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CITY OF  
**PORTLAND, OREGON**  
HEARINGS OFFICE

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**DECISION OF THE HEARINGS OFFICER  
ON APPEAL OF ADMINISTRATIVE DECISION**

**I. GENERAL INFORMATION**

**File No.:** LU 08-102387 CU (HO 4080017)

**Applicant:** School District No 1, property owner  
P O Box 3107  
Portland, OR 97208-3107

**Applicant's Representative:** Cheryl Croft Bennett, main contact  
Clearwire US LLC  
4400 Carillon Point  
Kirkland, Wa 98033

**Appellant:** Richard Bernat  
4004 NE Failing St.  
Portland, OR 97212

**Hearings Officer:** Gregory J. Frank

**Bureau of Development Services (BDS) Staff Representative:** Sylvia Cate

**Site Address:** Beaumont Middle School: 4043 NE Fremont Avenue

**Legal Description:** EXC PT IN STS-INC VAC ST BLOCK 1&2, WHITEROSE ADD

**Tax Account No.:** R906200010

**State ID No.:** 1N1E24DD 18900

**Quarter Section:** 2634

**Neighborhood:** Beaumont-Wilshire

**Business District:** Beaumont Business Association

**District Coalition:** Central Northeast Neighbors

**Plan District:** None

**Zoning:** R5h, Single Dwelling Residential 5,000 with Aircraft Landing overlay zone

**Land Use Review:** Type II, CU (Conditional Use)

**BDS Administrative Decision:** Approval with conditions

**Public Hearing:** The hearing was opened at 1:33 p.m. on May 6, 2008, in the 3<sup>rd</sup> floor hearing room, 1900 SW 4<sup>th</sup> Avenue, Portland OR, and was closed at 3:32 p.m. The record was held open until 4:30 p.m. on May 13, 2008 for new written evidence, until 4:30 p.m. on May 20, 2008 for rebuttal, and until 4:30 p.m. on May 27, 2008 for the Applicant's final response. The record was closed at that time.

**Testified at the Hearing:**

Sylvia Cate, BDS Staff Representative

Richard Bernat, 4004 NE Failing St., Portland, OR 97212

David Whitaker, 4325 NE Failing St., Portland, OR 97213

Mike Connors, Davis, Wright, Tremaine, 1300 SW 5th Ave. Suite 2300, Portland, OR 97201

**Proposal:**

The Applicant, Clearwire US, LLC, requests a Conditional Use to mount a wireless telecommunications (radio frequency transmission) facility on the existing chimney on the rooftop of Beaumont Elementary School. The facility will consist of six four-foot panel style antennas and four 24-inch microwave dishes, which are proposed to be flush mounted to the chimney and painted to match. An associated equipment cabinet will be placed on the rooftop of the same building and placed behind the parapet wall to screen its visibility from view to passersby at grade on the school grounds and from surrounding properties.

This case was processed by the Bureau of Development Services as a Type II Conditional Use review. BDS issued a Type II decision on March 13, 2008 (attached to Exhibit H.2). Richard Bernat, Appellant, filed a Type II Decision Appeal Form on April 25, 2008 (Exhibit H.2).

**Summary of Appeal:**

Appellant's letter (dated March 27, 2008), submitted with the Appeal Form (Exhibit H.2), argued that BDS staff, in making its Type II decision, erred in a number of ways. The Hearings Officer summarizes what the Hearings Officer believes are the primary points of disagreement made by Appellant:

- BDS should have included Portland Zoning Code section 33.110.010 as a relevant approval criteria;
- BDS erred in its findings regarding 33.274.040 C1 (tower sharing);
- BDS misconstrued TCA Section 332(c)(7) in the context of "functionally equivalent services;"
- BDS should have considered the historic nature of the Beaumont School;

At the public hearing, Appellant directed the Hearings Officer's attention to two issues:

- The application proposal is not appropriate;
- The application raises public safety issues.

The Appellant, at the public hearing, also raised the issue of:

- Approval of the application will have a negative impact on property values of nearby residences.

In an open-record submission (Exhibit H.14, page 1) Appellant “noted an additional error” in the BDS decision:

- BDS misconstrued an issue raised by neighbors.

The Hearings Officer will address each of Appellant’s issues either in this section of the decision or, if appropriate, in the findings for specific relevant approval criteria.

### **Hearings Officer General Comments Regarding Appeal:**

**Relationship of Portland Zoning Code (“Portland Code”) Approval Criteria to the Federal Telecommunications Act (“TCA”)** It appeared, to the Hearings Officer, that an underlying theme in one or more of Appellant’s arguments was that the Hearings Officer could deny the application on the basis that in some way or another the TCA was not satisfied or met.

The Hearings Officer’s decision in a quasi-judicial case, such as this appeal, is subject to the provisions of Oregon law. In particular, the Hearings Officer notes that ORS 227.173 (1) mandates approval or denial of a land use application be based on approval criteria set forth in the City of Portland’s Zoning Code/ordinance (which incorporates the City of Portland Comprehensive Plan). The Hearings Officer should not, under Oregon land use law, consider factors, rules or regulations unless they are identified as relevant approval criteria in the City of Portland Code. In this case, the relevant approval criteria include 33.815.225 (conditional use) and various sections of 33.274 (radio frequency tower regulations). The Hearings Officer finds that only if the relevant Portland Code requires compliance with specific sections of the TCA will the Hearings Officer find those sections of the TCA relevant approval criteria for this case.

33.815.225, the conditional use approval criteria for Radio Frequency Transmission Facilities in the City of Portland, does not include language to permit the Hearings Officer to consider sections of the TCA as independent approval criteria in this case. Section 33.274.040 C.5 (development standards – radio frequency emission levels) does reference Title 47 of the CFR, Section 1.1310, Radio Frequency Radiation Exposure Limits. The Hearings Officer finds that unless the limits set forth in Table 274-1 (33.274.040 C.5) are superseded by Title 47 of CFR Section 1.1310, the Hearings Officer may only consider Table 274-1. The Hearings Officer reviewed the comments made by Appellant (Exhibit H.14, pages 1 and 2) and did not find any reference by Appellant to the radio frequency emission standards in Table 274-1 being superseded by Title 47 of CFR Section 1.1310. Therefore, the Hearings Officer finds utilizing documents referenced in Title 47 of CRR Section 1.1310, as suggested by Appellant, as a basis of denial (conferring the status of relevant approval criteria) to be inappropriate.

The Hearings Officer views the Portland City Zoning Code sections referenced above as the sole approval criteria in this case. The Hearings Officer is, however, aware that the TCA can impact

decisions in radio transmission facility cases. The Hearings Officer notes that the TCA prohibits local jurisdictions from denying an application for a radio transmission facility on the basis of health concerns and local jurisdictions may not unreasonably discriminate among service providers. However, it is the Appellant who, if his appeal is successful, would create a situation where the City could be denying an application on the basis of health and/or safety concerns. As stated by the Applicant's attorney, at the hearing, the Hearings Officer in this case should not consider or apply the TCA unless the Hearings Officer first finds that the relevant Portland Zoning Code approval criteria indicate that the application should be denied. The Hearings Officer agrees with the attorney's sentiment and will not utilize provisions of the TCA as independent approval criteria for the purposes of justifying a denial of the application. The Hearings Officer finds it not necessary to consider whether or not BDS misconstrued TCA Section 332(c)(7) in the context of "functionally equivalent services."

**Portland Zoning Code section 33.110.010 as a relevant approval criteria:**

Appellant, in his attachment to his appeal form (Exhibit H.2), stated, "Key Zoning Code Section Overlooked." Appellant argued that 33.100.010 should be considered a relevant approval criteria. Appellant's explanation was that the real property subject to this application (the Beaumont School) is located in an area zoned R5h (single dwelling residential zone) and therefore is subject to 33.110.010.

BDS staff, at the hearing, stated that radio transmission facilities are either allowed *by right* or may be allowed as a *conditional use*. BDS staff suggested that where such facilities are allowed *by right* the purpose section (33.110.010) has been determined by City Council to be satisfied. Further, BDS staff suggested, in cases where such facilities require *conditional use* review, the purpose section (33.110.010) is satisfied if the conditional use approval criteria (33.815.225 and 33.274) are satisfied.

Applicant's attorney discussed the applicability of 33.110.010 in his "Response to Appellant's Arguments" (Exhibit H.3d). In summary, Applicant's attorney argued that "the general purpose section set forth in PCC 33.110.010 is not an approval criteria and therefore cannot be used as a basis for denying the Application" (attachment to Exhibit H.3). Applicant's attorney provided an alternative argument that considered the facts related to the application in this case and 33.110.010.

The Hearings Officer agrees with Applicant's attorney and BDS staff; 33.110.010 is not an approval criteria in this case. The Hearings Officer finds that City Council, when including radio transmission facilities as either *by right* or *conditional uses* in the R5 zone, found the purpose section satisfied (in the case of a conditional use radio transmission facility – so long as the conditional use approval criteria were satisfied). In the event this decision is appealed the Hearings Officer finds, in the alternative to 33.110.010 not being an approval criteria, that given the location and appearance of the proposed antenna and the location of the equipment cabinet, the character of residential area surrounding Beaumont School will not negatively impacted. The antennae are flush mounted and painted to match the chimney and the equipment cabinet is located in a location that cannot be seen from the public street/sidewalk.

**Consideration of Historic Nature of the Beaumont School:**

Appellant stated, in his appeal statement (Exhibit H.2) that he disagreed with the BDS statement in its Type II decision that, “because the Beaumont Middle School building ‘is not a designated Historic Landmark building...depicted by a dot on the zoning maps,’ no special consideration need be given to aesthetic concerns about the clutter created by the ten proposed antennae.” Appellant stated that the Beaumont Middle School is a “Rank II Historic Building” in the Historic Resource Inventory of the City of Portland” (Exhibit H.2). Appellant asserts that the Beaumont Middle School “is the architectural centerpiece to the entire Beaumont-Wilshire neighborhood”, and that the addition of ten high-tech antennae “will be strikingly incongruous on top of an 82-year-old, architecturally striking, Rank II historic building such as the Beaumont Middle School building, regardless of attempts to lessen the visual damage with flush-mounting and colored paint” (Exhibit H.2).

BDS staff responded to Appellant’s historic argument by stating, at the hearing, that since the Beaumont Middle School is not designated as a Historic Building, no additional requirements specific to historic buildings were required in considering this application.

Applicant’s attorney responded to Appellant’s historic argument by stating the following:  
“A Rank II historical building is not subject to special development restrictions. A Rank II historical building is a building that has been listed in the City’s Historic Resources Inventory. PCC 33.445.030(E). Being listed on the City’s Historic Resources Inventory merely means that a building is *eligible* for historic landmark or historic district designation. PCC 33.445.030(E). The only restrictions that apply to buildings listed in the City’s Historic Resources Inventory relate to demolishing the building. PCC 33.445.500-33.445.520. Therefore, there is no basis for denying the Application based on its Rank II historic building status” (letter attached to Exhibit H.3).

Appellant provided no additional explanation, beyond that referenced above, to support his historic building argument. The Hearings Officer finds that the preceding statement by Applicant’s attorney is persuasive. The Hearings Officer finds Appellant’s historic building argument not to be persuasive and will not apply any historic approval criteria in this case.

### **Approval Will Have Negative Impact on Property Values of Nearby Residences**

At the public hearing, Appellant argued that the presence of the proposed radio-frequency transmitters will create a perception of a health hazard at the Beaumont School, and reduce property value for “homes within a certain radius of the school” (See also, Exhibit H.11, page 2). Appellant submitted four documents in support of his claim that radio transmitter facilities have a negative impact upon nearby property values (Exhibits H.7, H.8, H.9 and H.10).

Applicant’s initial response to Appellant’s property value impact argument was “alleged impacts on the marketability and value of surrounding properties are not relevant under the City’s approval criteria” (Exhibit H.2, page 5). The Hearings Officer, at the public hearing, requested that Appellant provide a citation to the relevant City Code approval criteria imposing a value reduction requirement. Appellant provided no citation. The Hearings Officer finds that there is no relevant approval criteria related to property values surrounding residences.

In the alternative, Applicant noted that “an unsubstantiated claim that a wireless communications facility could affect property values or marketability is not sufficient to deny an Application under TCA” (Exhibit H.20, page 5, citing *Ogden Fire Company v. Upper Chichester Township*, 504 F3d 370, 390 (3<sup>rd</sup> Cir. 2007); *Omnipoint Corp. v. Zoning Hearing Board*, 181 F3d 403, 409 (3<sup>rd</sup> Cir. 1999). The Hearings Officer agrees with Applicant’s position and finds that evidence provided by Appellant does not constitute substantial and reliable evidence of property values, before and after the installation of the proposed antennae and equipment, in and around the Beaumont School.

**Point to Point Microwave Dishes.** Section 33.274.030 D. exempts the point to point microwave dishes from meeting development standards set forth in 33.274.040. The application must address, for the microwave dishes, relevant sections of 33.815.225 (including visual impacts under 33.815.225 A 1-3). The Hearings Officer found that the visual impacts of the microwave dishes were minimized (A.1), and that the accessory equipment was adequately screened (A.2). Further, the Hearings Officer found that the relevant and applicable regulations under Chapter 33.274 were satisfied with respects to the microwave dishes (see general discussion under the 33.274 approval criteria findings).

**Relevant Approval Criteria:**

In order to be approved, this proposal must comply with the approval criteria of Title 33. The relevant criteria are:

- 33.815.225 A 1-3, Conditional Use approval criteria
- 33.274.040 C, Development Standards

**II. ANALYSIS**

**Site and Vicinity:** The site is a 5.72 acre parcel developed with the Beaumont Middle School and associated parking lots and playing field. Residential uses and development are predominant to the north, west, south and east. To the southeast of the site along Fremont and near NE 42<sup>nd</sup> are commercial uses and development.

**Land Use History:** City records indicate three prior land use reviews on this site: A conditional use approval, case file No. CU 57-80, approved the construction of an 18 space off street parking lot with a curb cut from NE Bryce Street providing access. A 20,000 square foot addition to the school and a second parking lot, was approved and upheld on appeal to City Council via case file No. CU 80-88. In 1979, case file CU 87-79, approved a bus turnout for on-site loading and unloading. The approval was upheld on appeal to City Council. Case file LU 01-00324 CU approved a wireless facility to be mounted on the smoke stack of the school building.

**Zoning:** The site is zoned R5, Single Dwelling Residential 5,000. The single-dwelling zones are intended to preserve land for housing and to provide housing opportunities for individual households. The use regulations are intended to create, maintain and promote single-dwelling neighborhoods. They allow for some non-household living uses, but not to such an extent as to sacrifice the overall image and character of the single-dwelling neighborhood. The zones implement the Comprehensive Plan policies and designations for single-dwelling housing.

**Agency Review:** A “Notice of Proposal in Your Neighborhood” was mailed February 1, 2008. The following Bureaus have responded with no issues or concerns:

- Bureau of Environmental Services
- Bureau of Transportation Engineering
- Water Bureau
- Fire Bureau
- Site Development Section of BDS
- Bureau of Parks-Forestry Division
- Bureau of Development Services: Life Safety Section

**Neighborhood Review:** A Notice of Proposal in Your Neighborhood was mailed on February 1, 2008. A total of four letters and one petition in opposition, signed by 20 citizens were received during the public comment period. One letter was from the Beaumont–Wilshire Neighborhood Association Land Use Committee. All of the letters expressed opposition to the proposal. A summary of the reasons stated for the opposition and BDS comments were included in the BDS staff decision (Exhibit H.2), and are incorporated by this reference into this decision. The Hearings Officer addressed a number of Appellant’s issues earlier in this decision (those that were not directly related to a specific relevant approval criteria), and will address the balance of Appellant’s issues in the findings below.

## **ZONING CODE APPROVAL CRITERIA**

### **33.815.010 Purpose of Conditional Use**

Certain uses are conditional uses instead of being allowed outright, although they may have beneficial effects and serve important public interests. They are subject to the conditional use regulations because they may, but do not necessarily, have significant adverse effects on the environment, overburden public services, change the desired character of an area, or create major nuisances. A review of these uses is necessary due to the potential individual or cumulative impacts they may have on the surrounding area or neighborhood. The conditional use review provides an opportunity to allow the use when there are minimal impacts, to allow the use but impose mitigation measures to address identified concerns, or to deny the use if the concerns cannot be resolved.

### **33.815.225 Radio Frequency Transmission Facilities**

These approval criteria allow Radio Frequency Transmission Facilities in locations where there are few impacts on nearby properties. The approval criteria are:

- A. Approval criteria for facilities operating at 1,000 watts ERP or less, proposing to locate on an existing building or other non-broadcast structure in an OS or R zone, or in a C, E, or I zone within 50 feet of an R zone:
  1. The visual impact of an antenna must be minimized. For instance, it can be hidden behind a compatible building feature such as a dormer, mounted flush to the facade of the building and painted to match, mounted on a structure designed with minimal bulk and painted to fade into the background, or mounted by other technique that equally minimizes the visual impact of the antenna;

**Findings:** This approval criteria does not require that there be no negative visual impacts resulting from the placement of the antennae; the approval criteria requires a finding that the visual impacts have been minimized. The approval criteria suggests methods of “minimizing” visual impacts such as mounting antennae flush and painting the antennae to match the background. The Applicant proposes to flush mount all of the antennas on the sides of the existing chimney and paint to match. The antennae will not extend above the top of the chimney, so the overall shape and form of the chimney is relatively unblemished.

Appellant suggests that the proposed antennae will constitute a “high-tech eyesore” regardless of “attempts to lessen the visual damage with flush-mounting and colored paint. Surely no passer-by will look at the chimney and be fooled by the colored paint into not seeing the large array of radio-frequency transmission equipment at the top of it” (Exhibit H.2).

The Hearings Officer need not agree or disagree with the Appellant with respect to what passersby will see when looking at the chimney. This approval criteria only mandates that an Applicant minimize the visual impacts and the methods selected by Applicant in this case, are directly responsive to the suggestions contained in the approval criteria. The Hearings Officer finds the visual impacts of the antennae have been minimized and for these reasons, this criterion is met.

2. Accessory equipment associated with the facility must be adequately screened. If a new structure will be built to store the accessory equipment, the new structure must be designed to be compatible with the desired character of the surrounding area and be adequately screened; and

**Findings:** The accessory equipment that provides transmission signals to the antennas is proposed to be mounted on the roof of the building, behind an existing parapet, and located in such a way that it will be screened from views from both within the school campus and from surrounding properties in close proximity to the school campus. For these reasons, the Hearings Officer finds the accessory equipment will be adequately screened and, therefore, this criterion is met.

3. The regulations of Chapter 33.274, Radio Frequency Transmission Facilities are met.

**Findings:** The relevant regulations and standards for this proposal, as discussed below, are the development standards of Chapter 33.274 - Radio Frequency Transmission Facilities. As discussed in detail under the Hearings Officer’s findings for 33.274.040, all applicable regulations are met; therefore, this criterion is met.

## **DEVELOPMENT STANDARDS**

Unless specifically required in the approval criteria listed above, this proposal does not have to meet the development standards in order to be approved during this review process. The plans submitted for a building or zoning permit must demonstrate that all development standards of Title 33 can be met, or have received an Adjustment or Modification via a land use review prior to the approval of a building or zoning permit.

**33.274.040 Development Standards Radio Frequency Transmission Facilities**  
Amended by Ord. No. 165376, effective 5/29/92.)

**A. Purpose.** The development standards:

- Ensure that Radio Frequency Transmission Facilities will be compatible with adjacent uses;
- Reduce the visual impact of towers in residential and open space zones whenever possible;
- Protect adjacent populated areas from excessive radio frequency emission levels;
- Protect adjacent property from tower failure, falling ice, and other safety hazards

**B. When standards apply.** Unless exempted by 33.274.030, above, the development standards of this section apply to all Radio Frequency Transmission Facilities. Applications to modify existing facilities regulated by this chapter are only required to meet the standards of Paragraphs C.3, C.4, C.5, C.6, and C.9 in addition to any previous conditions of approval. Increasing the height of a tower is not considered modification of an existing facility.

**C. General requirements**

1. Tower sharing. Where technically feasible, new facilities must co-locate on existing towers or other structures to avoid construction of new towers. Requests for a new tower must be accompanied by evidence that application was made to locate on existing towers or other structures, with no success; or that location on an existing tower or other structure is infeasible.

**Findings:** Appellant stated, in his appeal statement (Exhibit H.2) the following:

“The Staff Planner has determined that because the proposal is to locate a new facility on an existing building and no new tower is proposed, this section is not applicable. The language in this section however, indicates the City’s intention, consistent with the requirements for R5h zones discussed above, that a wireless provider like Clearwire provide evidence that it has attempted without success to place a wireless facility at alternative locations (existing towers or other structures) when it applies for a CUP at a location such as Beaumont School.”

Appellant added comments in Exhibit H.14 related to why an alternative analysis is required to be undertaken in this case. The Appellant suggests that the TCA “requires Clearwire to provide a discussion of alternative sites for its facility” (citing 47 USC Section 332(c)(7)(B)(II)).

Applicant's attorney responded, in Exhibit 3d, that "Appellant's interpretation of PCC 33.274.040(C)(1) is inconsistent with the plain language and purpose of this code provision" ORS 197.829(1)(a)-(c). The Hearings Officer agrees with Applicant's attorney. The language in this approval criteria is clear in that it only applies to "requests for new towers" and not for applications for antennae on existing buildings.

The Hearings Officer finds Appellant's attempt to incorporate 47 USC Section 332 (c)(7)(B)(II) to justify a requirement of an alternatives analysis lacks merit. As discussed in the Hearings Officer General Comments Regarding Appeal, Relationship of Portland Zoning Code ("Portland Code") Approval Criteria to the Federal Telecommunications Act ("TCA"), the relevant approval criteria in the Portland Code are controlling and it is not necessary or appropriate to look outside the Portland Code. Because this application does not involve a new tower and the Portland Code (33.274.040 (C)(1)) language is clear/unequivocal, it is not appropriate to consider outside factors or regulations such as 47 USC Section 332(c)(7)(B)(II).

The Hearings Officer finds that this criterion is not applicable.

2. Grouping of towers. The grouping of towers that support facilities operating at 1,000 watts ERP or more on a site is encouraged where technically feasible. However, tower grouping may not result in radio frequency emission levels exceeding the standards of this chapter.

**Findings:** The proposal is to mount the facility on an existing building. No new tower is proposed. Therefore, this criterion is not applicable.

3. Tower finish. For towers not regulated by the Oregon Aeronautics Division or Federal Aviation Administration, a finish (paint/surface) must be provided that reduces the visibility of the structure.
4. Tower illumination. Towers must not be illuminated except as required for the Oregon State Aeronautics Division or the Federal Aviation Administration.

**Findings:** The proposal is to mount the facility on an existing building. No new tower is proposed. Therefore, these criteria are not applicable.

5. Radio frequency emission levels. All existing and proposed Radio Frequency Transmission Facilities are prohibited from exceeding or causing other facilities to exceed the radio frequency emission standards specified in Table 274-1, except as superseded by Part 1, Practice and Procedure, Title 47 of the Code of Federal Regulations, Section 1.1310, Radio Frequency Radiation Exposure Limits.

<b>Table 274-1 Radio Frequency Emission Standards [1]</b>			
Frequency Range (mW/cm <sup>2</sup> ) [4]	Mean Squared Electric (E <sup>2</sup> ) Field Strength	Mean Squared Magnetic (H <sup>2</sup> ) Field Strength (V <sup>2</sup> /m <sup>2</sup> ) [2]·	Equivalent Plane-Wave Power Density (A <sup>2</sup> /m <sup>2</sup> ) [3]·
100 KHz – 3 MHz	80,000	0.5	20
3 MHz – 30 MHz	4,000 (180/f <sup>2</sup> ) [5]	0.025 (180/f <sup>2</sup> )	180/f <sup>2</sup>
30 MHz – 300 MHz	800	0.005	0.2
300 MHz – 1500 MHz	4,000 (f/1500)	0.025 (f/1500)	f/1500
1500 MHz – 300 GHz	4,000	0.025	1.0

Notes:

- [1] All standards refer to root mean square (rms) measurements gathered by an approved method.
- [2] V<sup>2</sup>/m<sup>2</sup> = Volts squared per meter squared.
- [3] A<sup>2</sup>/m<sup>2</sup> = Amperes squared per meter squared.
- [4] mW/cm<sup>2</sup> = Milliwatts per centimeter squared.
- [5] f = Frequency in megahertz (MHz).

**Findings:** This section was the source of considerable discussion by the Appellant (Exhibits H.2 and H.14). Appellant appeared, to the Hearings Officer, to be attempting to have various TCA sections and court interpretations of TCA to be considered as mandatory approval criteria in this case. As stated above in the Hearings Officer General Comments Regarding Appeal, Relationship of Portland Zoning Code (“Portland Code”) Approval Criteria to the Federal Telecommunications Act (“TCA”), the Appellant did not provide any evidence to demonstrate that Table 274-1 had been superseded by Part 1, Practice and Procedure, Title 47 of the Code of Federal Regulations, Section 1.1310, Radio Frequency Radiation Limits. As such the Hearings Officer finds that the approval criteria of 33.274.040 C.5 are controlling.

The Hearings Officer finds no need to consider as mandatory approval criteria any provisions of the TCA, because the language of 33.274.050 C.5 does not incorporate additional sections of the TCA (only if Table 274-1 is superseded).

In the alternative, the Hearings Officer considered separately the Appellant’s argument regarding cumulative emissions (Exhibit H.14). Appellant stated, that “Clearwire has not presented evidence that it has engaged in a “collection of pertinent technical information’ regarding this multi-transmitter site. It has not conducted actual field test measurements of existing cumulative RF radiation levels at this location” (Exhibit H.14, page 3).

Applicant's attorney responded with a two-pronged argument. First, the Applicant argued that the Appellant's claim is unfounded in that the RF emission standards set forth in PCC 33.274.040 C.5 are not sufficient to address the exposure standards required by the FCC. Applicant asserts that the FCC, not the City of Portland, bears the exclusive responsibility under federal law for evaluating and addressing safety-related issues raised by RF emissions from FCC licensed transmitters (Exhibit H.20, page 3). Applicant continued by stating that the TCA "specifically prohibits state and local governments from regulating wireless service facilities based on concerns about environmental or safety effects of RF emissions" (Exhibit H.20, page 3). Applicant's second response to Appellant's claim regarding lack of sufficient information about cumulative emission impacts, is that the Applicant provided "undisputed evidence that the Facility complies" with relevant emission standards (Exhibit H.20, page 4). Applicant provided letters from two RF engineers (December 6, 2007 and May 20, 2008) confirming that the cumulative emissions from the existing T-Mobile facility and the proposed Applicant facility, "will be approximately .67% of the FCC's acceptable exposure limits." Applicant also argued that the Appellant "has not provided *any* evidence to the contrary" (Exhibit H.20, page 4).

The Hearings Officer finds the Applicant's arguments, as set forth in Exhibit H.20, to be persuasive. The Hearings Officer finds that the relevant emission standards *are* set forth in 33.274.040 C.5, and that Applicant has provided evidence sufficient to demonstrate that the proposal (including the existing T-Mobile facility) meets the requirements of 33.274.040 C.5.

Further, the Hearings Officer incorporates the following BDS findings (per Exhibit H.2, page 6) as additional findings in this case:

'The proposed facility will operate within the frequency range of 1500 Mhz to 300 GHz. The Effective Radiated Power for the facility is less than 100 watts, and the maximum allowed power density level is 1.0 mW/cm<sup>2</sup> [Milliwatts per centimeter squared]. Calculations submitted by the Applicant indicate that the greatest levels of power density, based on a 'worst case' scenario, will be 0.00468 mW/cm<sup>2</sup>. This is significantly below the maximum allowed, being 0.47% of the maximum allowed. This criterion is met.

Staff note: The Federal Telecommunications Act of 1996 prohibits a local government from denying a request to construct such facilities based on "harmful radio frequency emissions" as long as the wireless telecommunications facility meets the standards set by the FCC. Furthermore, the Act required the FCC to adopt standards for radio frequency emissions from wireless telecommunications by August, 1996. In a rule making procedure, the FCC adopted standards effective August 1, 1996, which are virtually the same as those reflected in Table 274-1. Because this land use review was submitted after those standards took effect,

“this conditional use review cannot be denied solely on the issue of harmful radio frequency emission levels.”

The Hearings Officer finds Applicant has provided adequate evidence to satisfy this approval criteria.

6. Antenna requirements. The antenna on any tower or support structure must meet the minimum siting distances to habitable areas of structures shown in Table 274-2. Measurements are made from points A and B on the antenna to the nearest habitable area of a structure normally occupied, on a regular basis, by someone other than the immediate family or employees of the owner/operator of the antenna. Point A is measured from the highest point of the antenna (not the tower) to the structure, and Point B is measured from the closest point of the antenna to the structure.

<b>Table 274-2</b>			
<b>Distance Between Antenna and Habitable Area of Structure</b>			
(Where f is frequency in megahertz.)			
Effective Radiated Power	Frequency (MHz)	Point A:	Point B:
		Minimum Distance From Highest Point of Antenna To Habitable Area of Structure (feet)	Minimum Distance From Closest Portion Of Antenna To Habitable Area of Structure (feet)
< 100 watts		10	3
100 watts to 999 watts		15	6
1,000 watts to 9.999 Kw	< 7	11	5
	7 - 30	$f/0.67$	$f/1.5$
	30 - 300	45	20
	300 - 1500	$780/vf$	$364/vf$
	> 1500	20	10
10 Kw plus	< 7	17.5	8
	7 - 30	$f/0.4$	$f/0.91$
	30 - 300	75	33
	300 - 1500	$1300/vf$	$572/vf$
	1500	34	15

**Findings:** The antennas will operate below 100 watts ERP, and thus are required to be 10 feet for Point A, and 3 feet for Point B, per Table 274-2. The proposed antennas will be approximately 50 feet above grade on the chimney of the existing building. Plans submitted with this application show that both Points A and B will

be 22 and 25 feet above habitable space within the school building below. These distances exceed the required 10 and 3 feet of separation. This criterion is met.

7. Setbacks. All towers must be set back at least a distance equal to 20 percent of the height of the tower or 15 feet, whichever is greater, from all abutting R and OS zoned property and public streets. Accessory equipment or structures must meet the base zone setback standards.

**Findings:** The proposal is to mount the facility on an existing building. No new tower is proposed. Therefore, this criterion is not applicable.

8. Guy anchor setback. Tower guy anchors must meet the main building setback requirements of the base zone.

**Findings:** The proposal is to mount the facility on an existing building. No new tower is proposed. Therefore, this criterion is not applicable.

9. Landscaping and screening. The base of a tower and all accessory equipment or structures located at grade must be fully screened from the street and any abutting sites as follows:

- a. In C, E or I zones more than 50 feet from an R zone. A tower and all accessory equipment or structures located in the C, E, or I zones more than 50 feet from an R zone must meet the following landscape standard:

**Findings:** The proposal is to mount the facility on an existing building. No new tower is proposed. Therefore, this criterion is not applicable.

- b. In OS or R zones or within 50 feet of an R zone. A tower and all accessory equipment or structures located in an OS or R zone or within 50 feet of an R zoned site must meet the following landscape standards:

- (1) Tower landscaping. A landscaped area that is at least 15 feet deep and meets the L3 standard must be provided around the base of the tower.

**Findings:** The proposal is to mount the facility on an existing building. No new tower is proposed. Therefore, this criterion is not applicable.

- (2) Accessory equipment and structures. A landscaped area that is at least 10 feet deep and meets the L3 standard must be provided around the base of all accessory equipment or structures located at grade.

**Findings:** No landscaping is required because the accessory equipment cabinet will be located on the roof of the building, and thus will not be located at grade.

10. Tower design.

- a. For a tower accommodating a Radio Frequency Transmission Facility of 100,000 watts or more, the tower must be designed to support at least two additional transmitter/antenna systems of equal or greater power to that proposed by the Applicant, and one microwave facility, and at least three two-way antennas for every 40 feet of tower over 200 feet of height above ground.
- b. For any other tower, the design must accommodate at least three two-way antennas for every 40 feet of tower, or at least one two-way antenna for every 20 feet of tower, and one microwave facility.
- c. The requirements of Subparagraphs a. and b. above may be modified by the City to provide the maximum number of compatible users within the radio frequency emission levels.

**Findings:** The proposal is to mount the facility on an existing building. No new tower is proposed. Therefore, this criterion is not applicable.

11. Mounting device. The device or structure used to mount facilities operating at 1,000 watts ERP or less to an existing building or other non-broadcast structure, may not project more than 10 feet above the roof of the building or other non-broadcast structure.

**Findings:** The proposed antennas will be flush mounted onto the sides of an existing chimney, and painted to match. No part of the antennas will extend above the top of the chimney. This criterion is met.

12. Abandoned facilities. A tower erected to support one or more Federal Communication Commission licensed Radio Frequency Transmission Facilities must be removed from a site, if no facility on the tower has been in use for more than six months.

**Findings:** The proposal is to mount the facility on an existing building. No new tower is proposed. Therefore, this criterion is not applicable.

**D. Additional requirements in OS, R, C, and EX zones and EG and I zones within 50 feet of an R zone.**

1. Purpose. These additional regulations are intended to ensure that facilities operating at 1,000 watts ERP or less have few visual impacts. The requirements encourage facilities that look clean and uncluttered.
2. Standards. In addition to the regulations in Subsection C., above, facilities operating at 1,000 watts ERP or less located in OS, R, C, or EX zones, or EG or I zones within 50 feet of an R zone must meet all of the following standards:

- a. Antennas mounted on towers. Triangular “top hat” style antenna mounts are prohibited. Antennas must be mounted to a tower either on davit arms that are no longer than 5 feet, flush with the tower, within a unicell style top cylinder, or other similar mounting technique that minimizes visual impact.

**Findings:** The proposal is to flush mount the antennas on the sides of a chimney atop an existing building. No new tower is proposed. Therefore, this criterion is not applicable.

- b. Antennas mounted on existing buildings or other non-broadcast structures. This standard only applies to facilities located in OS or R zones or within 50 feet of an R zone. The visual impact of antennas that are mounted to existing buildings or other non-broadcast structures must be minimized. For instance, on a pitched roof, an antenna may be hidden behind a false dormer, mounted flush to the facade of the building and painted to match; mounted on a structure designed with minimal bulk and painted to fade into the background; or mounted by other technique that equally minimizes the visual impact of the antenna. The specific technique will be determined by the conditional use review.

**Findings:** As previously discussed under criterion 33.815.225 A.1, the visual impact of the antennas has been minimized by mounting the antennas in a relatively flush fashion against the sides of a chimney, and will be painted to match. With this combination of techniques, the visual impact has been significantly reduced. This criterion is met.

- c. Lattice. Lattice towers are not allowed.

**Findings:** The proposal is to mount the facility on an existing building. No new tower is proposed. Therefore, this criterion is not applicable.

- E. Additional requirements in R zones.** The minimum site area required for a tower in an R zone is 40,000 square feet. This regulation must be met in addition to the regulations in Subsections C. and D., above.

**Findings:** The site is within an R zone, and comprises approximately 5.72 acres. However, this requirement is only when a monopole is proposed for a site in the R zones. This proposal is for a building mount. This criterion is not applicable.

### III. CONCLUSIONS

The Applicant, Clearwire USA, requests conditional use approval to mount a wireless facility on the existing chimney atop a building on the Beaumont Middle School campus. Appellant challenged the Bureau of Development Services Type II approval of the application.

Appellant raised a number of issues in his appeal. Central to Appellant's appeal are safety and appearance. The Hearings Officer found that, pursuant to the Federal Telecommunications Act of 1996 ("TCA"), safety concerns resulting from RF emissions generally cannot be the basis of a denial of an application for a radio transmission facility. The Hearings Officer also found, consistent with the relevant approval criteria, that appearance issues had been adequately addressed by the Applicant. The Hearings Officer found that the proposal meets all approval criteria and the Bureau of Development Services Type II approval should be upheld.

#### **IV. DECISION**

The Appellant did not prevail.

Approval of:

A conditional use for a wireless telecommunications facility, per the approved site plans, Exhibits C-1 through C-4, signed and dated March 10, 2008, subject to the following conditions:

- A. As part of the building permit application submittal, each of the 4 required site plans and any additional drawings must reflect the information and design approved by this land use review as indicated in Exhibits C.1-C.4. The sheets on which this information appears must be labeled, "Proposal and design as approved in Case File # LU 08-102387 CU."

- B. The antennas and all mounting hardware and cables will be painted to match the color of the chimney they are mounted upon.

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Gregory J. Frank, Hearings Officer

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Date

<b>Application Determined Complete:</b>	January 30, 2008
<b>Report to the Hearings Officer:</b>	April 25, 2008
<b>Decision Mailed:</b>	June 11, 2008
<b>Last Date to Appeal:</b>	July 2, 2008

**About this Decision.** This land use decision is **not a permit** for development. Permits may be required prior to any work. Contact the Development Services Center at 503-823-7310 for information about permits.

**Conditions of Approval.** This project may be subject to a number of specific conditions, listed above. Compliance with the applicable conditions of approval must be documented in all related permit applications. Plans and drawings submitted during the permitting process must illustrate how applicable conditions of approval are met. Any project elements that are specifically required by conditions of approval must be shown on the plans, and labeled as such.

These conditions of approval run with the land, unless modified by future land use reviews. As used in the conditions, the term "Applicant" includes the Applicant for this land use review, any person undertaking development pursuant to this land use review, the proprietor of the use or development approved by this land use review, and the current owner and future owners of the property subject to this land use review.

**Appealing this decision.** The Hearings Officer's decision is final and takes effect on the day the notice of decision is mailed. The decision may not be appealed to City Council, but may be appealed to the Oregon Land Use Board of Appeals (LUBA), as specified in the Oregon Revised Statute (ORS) 197.830. Among other things, ORS 197.830 requires that:

- an Appellant before LUBA must have presented testimony (orally or in writing) as part of the local hearing before the Hearings Officer; and
- a notice of intent to appeal be filed with LUBA within 21 days after the Hearings Officer's decision becomes final.

Please contact LUBA at 1-503-373-1265 for further information on filing an appeal.

**Recording the final decision.**

If this land use review is approved, the final decision must be recorded with the Multnomah County Recorder. A building or zoning permit will be issued only after the final decision is recorded.

The Applicant, builder, or a representative may record the final decision as follows:

- **By Mail:** Send the two recording sheets (sent in separate mailing) and the final Land Use Review decision with a check made payable to the Multnomah County Recorder to: Multnomah County Recorder, P.O. Box 5007, Portland OR 97208. The recording fee is identified on the recording sheet. Please include a self-addressed, stamped envelope.
- **In Person:** Bring the two recording sheets (sent in separate mailing) and the final Land Use Review decision with a check made payable to the Multnomah County Recorder to the County Recorder's office located at 501 SE Hawthorne Boulevard, #158, Portland OR 97214. The recording fee is identified on the recording sheet.

For further information on recording, please call the County Recorder at 503-988-3034  
For further information on your recording documents please call the Bureau of Development Services Land Use Services Division at 503-823-0625.

**Expiration of this approval.** An approval expires three years from the date the final decision is rendered unless a building permit has been issued, or the approved activity has begun.

Where a site has received approval for multiple developments, and a building permit is not issued for all of the approved development within three years of the date of the final decision, a new land use review will be required before a permit will be issued for the remaining development, subject to the Zoning Code in effect at that time.

Zone Change and Comprehensive Plan Map Amendment approvals do not expire.

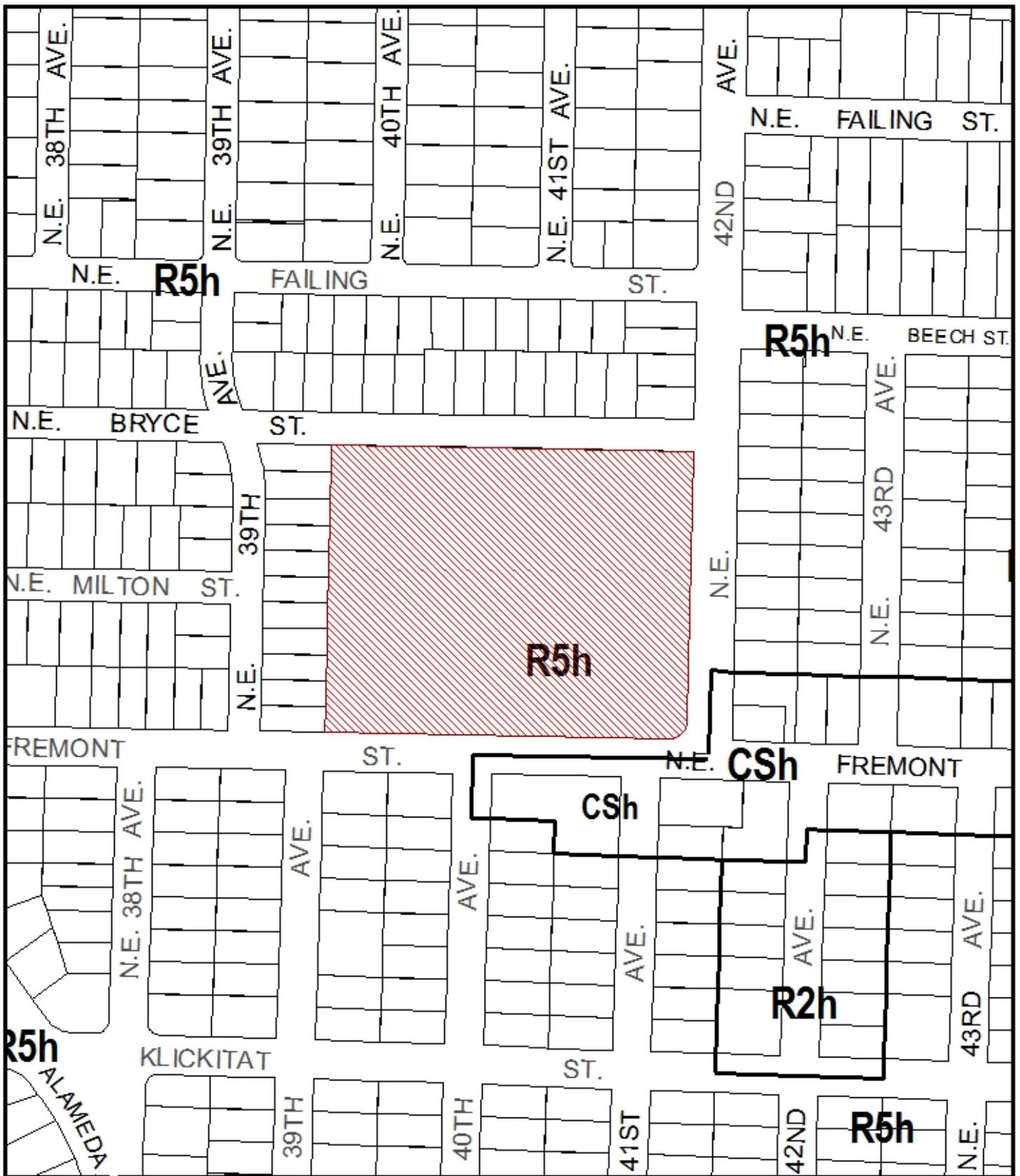
**Applying for your permits.** A building permit, occupancy permit, or development permit may be required before carrying out an approved project. At the time they apply for a permit, permittees must demonstrate compliance with:

- All conditions imposed herein;
- All applicable development standards, unless specifically exempted as part of this land use review;
- All requirements of the building code; and
- All provisions of the Municipal Code of the City of Portland, and all other applicable ordinances, provisions and regulations of the City.

**EXHIBITS**  
NOT ATTACHED UNLESS INDICATED

- A. Applicant's Statement
  - 1. project narrative
  - 2. 120-day extension email
- B. Zoning Map (**attached**)
- C. Plans/Drawings
  - 1. Site Plan (**attached, 8 ½ x 11"**)
  - 2. Architectural site plan
  - 3. Enlarged site plan
  - 4. Elevations (**attached**)
- D. Notification information
  - 1. Mailing list
  - 2. Mailed notice
- E. Agency Responses
  - 1. Bureau of Environmental Services
  - 2. Bureau of Transportation Engineering and Development Review
  - 3. Water Bureau
  - 4. Fire Bureau
  - 5. Site Development Review Section of BDS
  - 6. Bureau of Parks, Forestry Division
  - 7. Life Safety Section of BDS
- F. Correspondence
  - 1. V. Marks, February 22, 2008, in opposition
  - 2. M. Rounds, Beaumont-Wilshire Neighborhood Assn Land Use Committee, February 21, 2008, in opposition
  - 3. Ric Bernat, February 21, 2008, in opposition
  - 4. Cheryl Bristah, February 21, 2008, in opposition
  - 5. Petition letter signed by 20 citizens, February 21, 2008, in opposition
- G. Other
  - 1. Original LU Application
  - 2. Site History Research
- H. Received in the Hearings Office:
  - 1. Hearing notice, Cate, Sylvia
  - 2. Type II Appeal form with Staff decision, Cate, Sylvia
  - 3. 5/5/08 Memo with attachments, Cate, Sylvia
    - a. 4/7/08 Letter Bernat to Bennett, Cate, Sylvia
    - b. 4/21/08 Letter Kevin Maki to Bernat with 4/23/08 e-mail from Kevin Martin, Cate, Sylvia
    - c. 4/25/08 Fax Bernat to Cate with 4/25/08 letter Bernat to Maki, Cate, Sylvia
    - d. 5/2/08 letter from E. Michael Connors, Cate, Sylvia
    - e. 5/2/08 Fax cover sheets (2) from Bernat, Cate, Sylvia
  - 4. 5/5/08 Letter from Connors with attached e-mail, Cate, Sylvia
  - 5. 5/4/08 letter from Chris Jones, Bernat, Ric
  - 6. 5/5/08 letter from James K. Patterson, Bernat, Ric

7. Article - "The Impact of Cell Phone Towers on House Prices in Residential Neighborhoods", Bernat, Ric
8. Article - "The Effect of Distance to Cell Phone Towers on House Prices in Florida", Bernat, Ric
9. Article - "Electromagnetic Field Litigation: A Growing Issue for Real Estate and Building Concerns", Bernat, Ric
10. Illinois Real Estate Letter, Bernat, Ric
11. Written testimony, Bernat, Ric
12. What is WiMAX? Printout, Bernat, Ric
13. Hammet and Edison Statement for Sprint PCS Proposed Base Station, Bernat, Ric
14. 5/12/08 Letter, Bernat, Ric
15. OET Bulletin 65, August 1997, Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields, Bernat, Ric
16. Letter dated 5/13/08 with 3 large attachments, Connors, E. Michael
  - a. Market study report from Palmer, Groth and Pietka, Connors, E. Michael
  - b. Market study report from Lamb Hanson Lamb, Connors, E. Michael
  - c. Market study report from Macaulay and Associates, Connors, E. Michael
17. Not used
18. Not used
19. Letter dated 5/20/08 with attachments, Connors, E. Michael
  - a. Letter from VoiceStream dated 2/5/01, Connors, E. Michael
  - b. Copy of Type I Decision from Sylvia Cate dated 7/19/01, Connors, E. Michael
  - c. Letter on Clearwire letterhead dated 5/20/08, Connors, E. Michael
  - d. FCC Guide dated 6/2/00, Connors, E. Michael
20. Letter of rebuttal, Connors, E. Michael



# ZONING

 Site

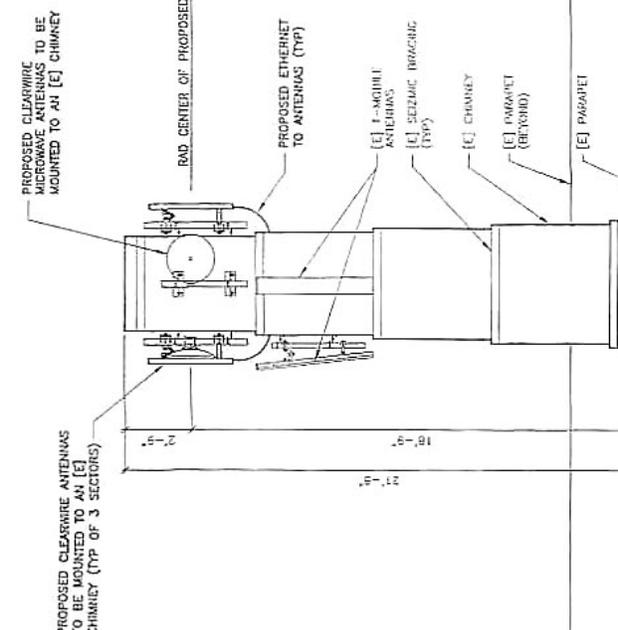


File No.	LU 08-102387 CU
1/4 Section	2634
Scale	1 inch = 200 feet
State_Id	1N1E24DD 18900
Exhibit	B (Jan 16,2008)



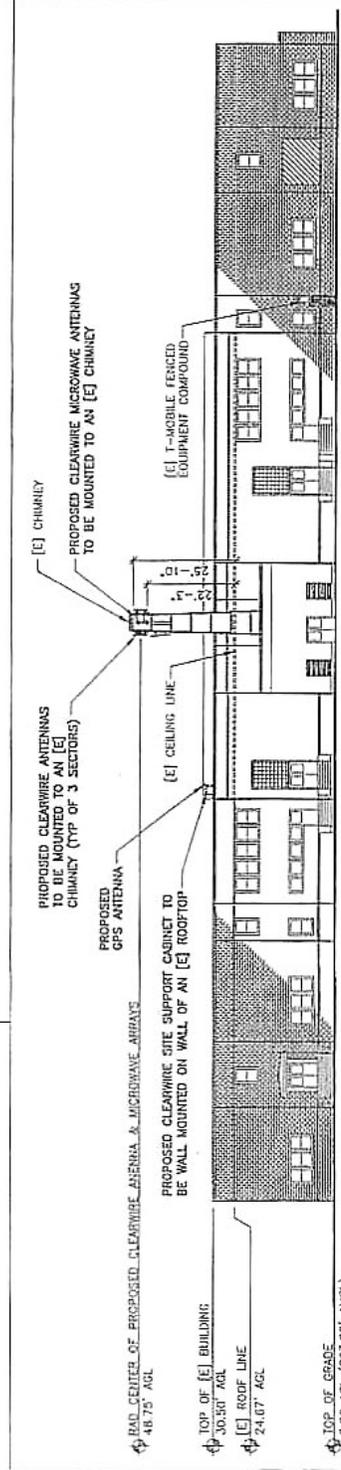
**NOTE:**  
SEE STRUCTURAL SHEETS  
FOR ANTENNA ATTACHMENTS

**NOTE:**  
ALL ANTENNAS & MOUNTING  
HARDWARE TO BE PAINTED  
TO MATCH [E] CHIMNEY



Approved  
 Bureau of Development Services  
 City of Portland  
 Planner: [Signature]  
 Date: [Date]  
 This structural approval is only to be used for the project to which it applies.

EXHIBIT C.4



GRAPHIC SCALE

WEST ELEVATION  
 SCALE 2/16"=1'-0"  
 SCALE 1/32"=1'-0"

 <b>PACIFIC TELECOM SERVICES, LLC</b> <small>1000 NE STREET, SUITE 400        PORTLAND, OREGON 97232        PHONE: (503) 251-1111</small>	 <b>POWDER RIVER</b> <small>Development Services, LLC</small>	<b>clear wire®</b> <small>4400 CARLTON POINT        KIRKLAND, WA 98033</small>	<b>BEAUMONT</b> <b>OR-POR167-C</b> <small>4843 NE FREIGHT AVE        PORTLAND, OR 97212</small>	NO. 2 DATE: 12-04-07 BY: PHD DESCRIPTION: FINAL ZONING DOCUMENTS	NO. 1 DATE: 10-31-07 BY: CBK DESCRIPTION: PRELIMINARY ZONING DOCUMENTS	NO. [ ] DATE: [ ] BY: [ ] DESCRIPTION: [ ]	NO. [ ] DATE: [ ] BY: [ ] DESCRIPTION: [ ]
				DESIGNED BY: CBK SCALE: AS SHOWN	DESIGNED BY: CBK SCALE: AS SHOWN	DESIGNED BY: CBK SCALE: AS SHOWN	DESIGNED BY: CBK SCALE: AS SHOWN