PLANNING COMMISSION

ADDITIONAL ITEM ADDED AFTER DISTRIBUTION OF PACKET

Agenda # 2

- AT&T Letter emailed + dated 6/26/14

Date 6/26/14
Time 9:15 AM

From: Brindley, Karen
Sent: Thursday, June 26, 2014 8:59 AM
To: Kiss, Lisa
Subject: FW: AT&T comments re: telecom ordinance
Attachments: AT&T_comments_6-26-14.pdf

Please ensure this is included in the PC packet.

Karen

From: POWELL, KYLA C (Legal) [mailto:kc8424@att.com]
Sent: Thursday, June 26, 2014 8:48 AM
To: Brindley, Karen; Backoff, Jerry; Scollick, Phil; Helen Peak (Outside Mail)
Cc: OSBORNE, JOHN R; Kevin Sullivan (ksullivan@sanlawyers.com)
Subject: AT&T comments re: telecom ordinance

Hi Everyone,

Attached are AT&T's supplementary comments pertaining to the City of San Marcos Wireless Telecommunications Ordinance.

Thank you, Kyla

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June 26, 2014

Sent Via Email

Jerry Backoff, Director
Planning Division
City of San Marcos
1 Civic Center Drive
San Marcos, CA 92069

Subject: Proposed Revisions to City of San Marcos Wireless Telecommunications Facility Ordinance, Chapter 20.465 of the City's Zoning Code

Dear Mr. Backoff:

AT&T Mobility, LLC, as manager of New Cingular Wireless PCS, LLC ("AT&T"), hereby provides supplementary comments on the City of San Marcos' revised draft Wireless Telecommunications Facility ("new WTF") Ordinance revisions that were circulated to the public by City Staff on about May 21, 2014.

Overall, AT&T remains concerned the proposed revisions are overly restrictive and could give rise to a host of future issues and problems, including implementation difficulties and legal challenges. A few examples of major concerns about the latest version of the Ordinance include:

- The new WTF Ordinance requires "conclusive proof" throughout the regulations that a proposed wireless facility is the least intrusive means to close a specific gap, which exceeds the measure of proof that is required either by federal law under any applicable court decisions or the language of the Telecommunications Act ("TCA"). The excessive proof standard will be burdensome for applicants, and likely will have the effect of prohibiting the provision of personal wireless services in violation of TCA §332(c)(7)(B)(i)(II);

- Many revisions in the new WTF Ordinance impose wholesale requirements and discretionary review processes that disregard the mandate issued by Congress under Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 ("Section 6409") that local agencies "shall approve" eligible new co-location facilities and facility modifications. Those requirements also disregard the mandatory approval requirement for certain co-location facilities stated under California Government Code section 65850.6. Further, compliance with the new WTF regulations will not allow the City to meet its 90 and 150 day processing and approval deadlines established by the FCC's Shot Clock rules;

- The new WTF Ordinance generally disregards carriers' longstanding and express statutory rights under California law to construct needed facilities in the public rights-of-way (ROW). For example, the nearly-blanket prohibition under Section 20.465.040C against almost all non-camouflaged facilities could bar approvals to which applicants are entitled under California Pub.

Util. Code sections 7901 and 7901.1, and likely will have the effect of prohibiting the provision of personal wireless services in violation of the TCA;

Further, Sections 20.465.060 and 20.465.070 impose nine dense pages full of exhaustive design, permit application, undergrounding, camouflaging, and review requirements for cell facilities and equipment to be installed in the public ROW. (This is despite the fact that ROW areas are listed in the new Ordinance as preferred locations for wireless facilities). These overwhelming regulations greatly exceed the City's reasonable authority under Pub. Util. Code sections 7901 and 7901(a) over facilities installed in the public ROW;

The regulations for a process to obtain a discretionary permit that are found at Sections 20.465.060 and 20.465.070 discriminate against wireless carriers under Pub. Util. Code section 7901.1(b)(**reasonable control of the ROW "shall ... be applied to all entities in an equivalent manner."**) Nowhere near the same scope and type of regulations, however, are imposed on other public utilities that operate within the already visually and spatially cluttered public ROW. In fact, under the City's Code, the Director "shall approve" applications for other public utility facilities to be located within the ROW subject only to unidentified, but presumably reasonable, minor conditions. (SMMC section 14.04.140 relating to encroachment permits). No burdensome catalogue of specific design, permit application, undergrounding, camouflaging, and review requirements for other public utility facilities to be placed in the ROW is stated in that City Code. Further, the City's own municipal utility's ability to place its facilities in the ROW is governed by just 1 simple sentence. (*See* SMMC section 15.08.060(e));

- Sections 20.465.060, 20.465.070.A-D and 20.465.070.F impose five pages of exhaustive design, permit application, camouflaging and review requirements for cell facilities and equipment located in areas other than in the ROW. These unnecessarily burdensome and onerous requirements for applications, studies and reviews will make it much more difficult for carriers to fill (or timely fill) significant gaps in customer service coverage, and thus will have the effect of prohibiting the provision of personal wireless services in violation of the TCA; and

- The new WTF Ordinance generally disregards carriers' vested permit rights under California law regarding AT&T's ability to modify or alter its existing and operable facilities in a way that does not create any material new impacts.

Over the years, AT&T has worked cooperatively with the City under the existing WTF Ordinance regulations to propose facility locations and designs that are sensitive to sensible neighborhood concerns. This successful effort demonstrates that the existing WTF Ordinance provides all the necessary tools and standards for the City to review and approve compatible cell facilities. No change to that WTF Ordinance, especially the wholesale revisions that are proposed, is necessary to ensure the proper zoning regulation for cell facilities.

Further, AT&T's residential and business customers within the City require increasingly quick speeds for an expanding amount of data downloads and uploads for various files and applications. AT&T needs to install and modify long term evolution (LTE) cell facilities to ensure it has the network capacity and technology to meet these customer needs related to mobile and hand-held devices. Given this significantly increasing demand for cell services from City residents and businesses, the City should seek to make its WTF Ordinance more efficient, while still preserving reasonable zoning controls. Pursuing a

revisions to the WTF Ordinance, however, that contain onerous and difficult standards and time-consuming review processes, is counter productive. This will delay and inhibit AT&T's ability to meet customer needs within the City – especially when the existing WTF Ordinance has operated for years to strike a reasonable balance between the carriers' needs to meet customers' demands and the City's zoning concerns.

AT&T's concerns regarding specific provisions contained in the new WTF Ordinance are identified and explained in **Attachment A** to this letter.

AT&T welcomes the opportunity to work with the City Staff to discuss our legal and practical concerns and to develop mutually-amenable solutions. AT&T also requests that is letter be placed in the administrative record regarding the City's consideration of the draft WTF Ordinance.

Sincerely,

Kyla C. Powell

cc: Phil Scollick, City of San Marcos City Clerk (via email)
Karen Brindley, City of San Marcos Principal Planner (via email)
Helen H. Peak, City Attorney (via email)
John Osborne (via email)
Kevin P. Sullivan, Esq. (via email)

ATTACHMENT A

AT&T's Comments on Specific Provisions in the New WTF Ordinance

AT&T addresses below the many problematic provisions contained in the revised draft WTF Ordinance that was circulated by City Staff on about May 21, 2014. The comments in this **Attachment A** are supplementary and in addition to the comments and objections to the WTF Ordinance contained in AT&T's January 10, 2014 letter to the City on this matter.

AT&T respectfully requests that the City further revise its draft WTF Ordinance to delete or modify the provisions discussed below (and in its January 10 letter) to comport with reasonable standards and applicable laws:

1. Section 20.465.010A – AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Section 20.465.010A is also inconsistent with the City's intended (but impermissible) preference and promotion of Compact Cell technology as found at Sections 20.465.010C, 20.465.040D.1, 20.465.050B, 20.465.060A.1, and 20.465.180 (Definitions)(Compact Cell).

2. Section 20.465.010.B - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Further, requiring the undergrounding and camouflaging of cell facilities and equipment constitutes improper discrimination against wireless carriers under Pub. Util. Code section 7901.1(b) where similar undergrounding/camouflaging obligations for facilities and equipment are not imposed by the City on other utility service providers that operates within the already visually and spatially cluttered public ROW. In addition, the obligations impose unnecessary costs on wireless carriers that will prohibit, or have the effect of prohibiting, the provision of personal wireless services in violation of TCA section §332(c)(7)(B)(i)(II).

3. Section 20.465.010.C - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Further, the Section states an intent to encourage and promote the use of Compact Cell facilities over other types of wireless technologies, and to try to control AT&T's technological strategies to address customer needs. This City preference is improper and should be avoided in the revised City WTF Ordinance. In *New Cingular Wireless PCS, LLC et al v. Town of Clarkstown*, 2010 U.S. App. Lexis 13364, *18-21 (2nd Cir 2010), the Court struck down local land use regulations that sought to provide an improper preference in city application processing and permitting decisions for DAS and microcell systems. Such a preference for those "alternative technologies" was held to violate TCA sections 332(c)(7)(B)(I)-(II), which prohibit discrimination among providers of functionally equivalent services, as well as proscribe actions that prohibit or effectively prohibit the provision of personal wireless services.

4. Section 20.465.010.D, regarding the City seeking to reduce or eliminate the possible impacts of WTFs on City residents, and encouraging WTFs outside of residential and agricultural areas of the City, ignores the fact that network coverage needs and network coverage gaps exist in residential and agricultural areas of the City. Attempts to apply a "conclusive proof"

requirement of the necessity for facilities in these zones to close a significant gap in service is contrary to the law as discussed in AT&T's January 10 letter.

5. Sections 20.465.020.A and 20.465.020.B - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Also, in addition to the fact that this Section could impermissibly impair AT&T's rights under Section 6409[1], it also could violate AT&T's rights under Government Code section 65850.6.

6. Section 20.465.030.A-B - AT&T incorporates its comments and objections to this Section about violations of Section 6409 rights and State law vested rights as stated in its January 10 letter to the City. In addition, this Section could impermissibly impair AT&T's rights under Government Code section 65850.6.

7. Section 20.465.030 - AT&T incorporates its comments and objections to this Section about the need for the WTF Ordinance expressly to commit to processing an application within the 90 and 150 day timeframes following an application submittal that are required by the FCC in its 2009 Shot Clock Order.[2]

8. Section 20.465.030.B.1 - AT&T incorporates its comments and objections to this Section about improperly requiring an applicant to provide "technically sufficient and conclusive proof" that a proposed WTF location is the least intrusive means to close a significant gap in coverage as stated in its January 10 letter to the City.

9. Section 20.465.030.B.2 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. In addition, this Section violates AT&T's rights under Government Code section 65850.6.

10. Section 20.465.040.B - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. In addition, this Section violates AT&T's rights under Government Code section 65850.6.

11. Section 20.465.040.C.1 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. In addition, this Section violates AT&T's rights under Government Code section 65850.6. Further, this Section violates Pub. Util. Code section 7901.1(b), which states that a locality's reasonable control of the ROW "**shall ... be applied to all entities in an equivalent manner.**" Nowhere near the same volume and type of regulations, however, are imposed on other public utilities that operate within the already visually and spatially cluttered public ROW. In fact, under the City's Code, the Director "shall approve" applications for other public utility facilities to be located within the ROW subject only to unidentified, but presumably reasonable, minor conditions. (SMMC section 14.04.140 relating to encroachment permits). No burdensome catalogue of specific design, permit application, undergrounding, camouflaging, and review requirements for other public utility facilities in the

[1] Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, which was passed by Congress on February 22, 2012, is codified as 47 U.S.C. Section 1455(a). Congress specifically authorized the FCC to "implement and enforce" Section 6409. (2012 Job Creation Act section 6003, codified as 47 U.S.C. section 1403.)

[2] The FCC Shot Clock rules and time periods were upheld in *City of Arlington v. Federal Communications Commission*, 668 F.3d 229 (5th Cir. 2012).

ROW is stated in that City Code. Further, the City's own municipal utility's ability to place its facilities in the ROW is governed by just 1 simple sentence. (*See* SMMC section 15.08.060(e).

12. Section 20.465.040.D.1 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Also, this Section could impermissibly impair AT&T's rights Government Code section 65850.6.

13. Requirements in Section 20.465.040.D.1, requiring showings related to Compact Cell facilities, improperly attempts to regulate and prefer certain technologies over others under the pretext of reviewing aesthetics and other zoning-related matters. This City preference is improper as explained in item no. 3 above.

    In addition, the preference and promotion of Compact Cell facilities in this Section would impermissibly seek to control AT&T's business decisions about what technology is best-suited and appropriate to address its customers' service needs in an area. Also, the City may not permissibly force a carrier to incur likely increased costs associated with installing a DAS network instead of another appropriate type of facility. The *City of Anacortes* decision by the Ninth Circuit in 2009 specifically identified increased costs associated with project alternatives as one valid justification for the carrier to implement a single macro cell site solution to close a significant coverage gap.

14. Section 20.465.040.D.2 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Further, the increased setback regulations for a cell facility stated in this Section impermissibly seek to regulate RF emissions and therefore violate TCA section §332(c)(7)(B)(iv). There is no reason for any form of increased setback regulations for a cell facility beyond those that are generally applicable to any structure. A cell facility must necessarily already comply with the height limits in a zone, be reasonably stealthed, and meet all FCC, noise and building code standards to be approved. Therefore, the proposed increased minimum setback requirements just for cell facilities are arbitrary and unreasonable and appear to be based on the unfounded fears of RF emissions.

20. Section 20.465.050.A - The stated preference in this Section for cell facilities to be installed in the public ROW ignores the fact that most network coverage needs and network coverage gaps exist in areas of the City that can't be efficiently served by cell facilities located just in the ROW.

21. Section 20.465.050.B - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City.

22. Requirements in Section 20.465.050.B, regarding showings related to Compact Cell facilities, reveal that the City intends to regulate and prefer certain technologies, and to try to control AT&T's technological strategies to address customer needs, under the pretext of reviewing aesthetics and other zoning-related matters. This City preference for one form of wireless technology over another is improper as discussed in item no. 3 above.

23. The entirety of Section 20.465.060 contains an exhaustive, onerous, difficult, costly and time-consuming list of requirements to apply for any cell facility permits. These overly burdensome requirements will prohibit, or have the effect of prohibiting, the provision of personal wireless services in violation of the TCA. Also, compliance with the new regulations will not allow the

City to meet its 90 and 150 day processing and approval deadlines established by the FCC's Shot Clock rules.

24. Requirements in Section 20.465.060.A.1, regarding showings related to Compact Cell facilities, reveal that the City intends improperly to regulate and prefer certain wireless technologies over others, and to try to control AT&T's technological strategies to address customer needs, under the pretext of reviewing aesthetics and other zoning-related matters.

25. Section 20.465.060.A.2 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Further, this regulation is burdensome and is not reasonably related to zoning considerations about the physical nature of the WTF. Courts have held that localities cannot require carriers to submit "a description a telecommunications services to be provided" as that regulation violated the TCA. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 and 1178 (9th Cir. 2001); *see also Qwest Communications Corp. v. City of Berkeley,* 146 F.Supp.2d 1081, 1099 (N.D. Cal. 2001).

26. Section 20.465.060.A.4 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. In addition, requiring maps or data about AT&T's regional network would also be impractical and useless. Both cell facility technologies and customers' service needs are frequently changing. Consequently, the network maps for future cell sites would be of little practical value. Further, requiring the public disclosure of maps showing the location of all of the carrier's current and future cell facilities would jeopardize the security of the carriers' networks, which also support the E911 system within the City.

27. Section 20.465.060.A.5 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. In addition, there is no valid reason to require any "mock-up" materials or efforts for a cell facility that would be above and beyond reasonable photo simulation materials. Such a "mock up" requirement is not generally imposed for applications for any other types of structures. A cell facility must necessarily already comply with the height limits in a zone, be reasonably stealthed, and meet all FCC, noise and building code standards to be approved. Therefore, the proposed "mock-up" requirements are arbitrary, discriminatory and unreasonable and appear to relate to generalized aesthetic and community character concerns that are based on the unfounded fears of RF emissions or "radiation," which is not a valid basis for local regulation.

28. Section 20.465.060.A.7 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City.

29. Section 20.465.060.A.8 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Also, this Section could violate AT&T's rights under Government Code section 65850.6.

30. Section 20.465.060.A.15 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City.

31. Section 20.465.060.A.16, requiring an applicant to deposit mandatory consultant fees, is overly burdensome and unnecessary. Third party consultants may not be qualified to determine what constitutes a significant gap in service and/or the least intrusive means to fill a gap, both of

which require fact-based determinations that should be made by appointed or elected City officials. Further, the City does not have the discretion, as implied by Section 20.465.060.A.16, to charge a fee that exceeds the reasonable costs of providing the service for which the fee is charged. (CA Government Code section 50030). In addition, the vague fee deposit requirement violates the Mitigation Fee Act (Government Code section 66017).

32. Sections 20.465.070A-F - AT&T incorporates its comments and objections to these Sections as stated in its January 10 letter to the City. Also, compliance with the new regulations will not allow the City to meet its 90 and 150 day processing and approval deadlines established by the FCC's Shot Clock rules. Moreover, the regulations could violate AT&T's rights under Government Code section 65850.6.

33. Section 20.465.070.A.2, which includes design guidelines and standards for stealthed facilities that prohibits a faux tree from standing five (5) or more feet higher than other trees on the site, fails to recognize that (a) a greater height for a faux tree may be needed to avoid near field disruption of RF signals, (b) other trees on site may grow higher, and (c) the location/angle/view perspective for a faux tree on a particular site may still allow for a reasonable visual integration into the landscape even if the faux tree is more than 5' taller than other trees. This overly burdensome requirement could prohibit, or have the effect of prohibiting, the provision of personal wireless services in violation of the TCA.

34. Section 20.465.070.E, together with the content of Sections 20.465.060, 20.465.070.A-D, and 20.465.070.F that also regulate ROW facilities, impose exhaustive design, permit application, undergrounding, camouflaging and review requirements for cell facilities and equipment in the public ROW. (This is despite the fact that ROW areas are listed in the new Ordinance as preferred locations for wireless facilities.) These overwhelming and costly regulations greatly exceed the City's reasonable authority over facilities installed in public ROWs under Pub. Util. Code sections 7901 and 7901(a).

    The 9 pages of exhaustive and costly regulations for a process to obtain a discretionary permit that are found at Sections 20.465.060 and 20.465.070 discriminate against wireless carriers under Pub. Util. Code section 7901.1(b) as described in item no. 11 above.

35. Section 20.465.070.E.2 - AT&T incorporates its comments and objections to this Section regarding the requirement of "conclusive proof" as stated in its January 10 letter to the City.

36. Section 20.465.070.E.4 - AT&T incorporates here its comments and objections to Section 20.465.070.E.2 regarding a discretionary License Agreement as stated in its January 10 letter to the City.

37. Section 20.465.070.E.7, requiring an applicant to provide "technically sufficient and conclusive proof" to the City that a proposed WTF location is the least intrusive means to close a significant gap in coverage, is inconsistent with, and preempted by, federal law as discussed above and in AT&T's January 10 letter to the City.

38. Section 20.465.070.F, requiring an applicant to underground equipment where feasible and to comply with other design restrictions, is overly burdensome and unnecessary. Obligations

contained in this Section also discriminate against wireless carriers under Pub. Util. Code section 7901.1(b) to the extent the regulations are imposed on wireless facilities to be located in the ROW but not facilities of other utility providers operating in the ROW as described in item no. 11 above.

39. Section 20.465.080.I.1 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Moreover, the regulations could violate AT&T's rights under Government Code section 65850.6.

40. Section 20.465.080.I.2 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Moreover, the regulations could violate AT&T's rights under Government Code section 65850.6.

41. Section 20.465.080.J - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Moreover, the regulations could violate AT&T's rights under Government Code section 65850.6, and its rights under Pub. Util. Code sections 7901 and 7901.1. Further, the bonding requirement stated in this Section cannot be used to charge a fee that exceeds the reasonable costs of providing the service for which the fee is charged. (CA Government Code section 50030). In addition, the bonding requirement violates the Mitigation Fee Act (Government Code section 66017).

42. Sections 20.465.090.B-C - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Moreover, the regulations could violate AT&T's rights under Government Code section 65850.6.

43. Section 20.465.100 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Moreover, the regulations could violate AT&T's rights under Government Code section 65850.6.

44. Section 20.465.140 - AT&T incorporates its comments and objections to this Section as stated in its January 10 letter to the City. Moreover, the regulations could violate AT&T's rights under Government Code section 65850.6.

45. 20.465.180 (Definitions) re: Drive Test – "Drive Test" is defined as a test of actual over-the-air reception of RF signals performed within the area to be served by a proposed WTF within 3 months prior to the date a project application is submitted. The definition further states that "A computer-based projection of radio frequency signal strength is not a Drive Test." The apparent intent here is for the City to require a Drive Test as the means to show "technically sufficient proof" of a gap in coverage that would trigger the need for a proposed project. This will improperly require an expensive and time-consuming test relating to a gap in system coverage despite the long-standing and reasonable use of RF signal maps as the industry standard and substantial evidence on this issue. The regulation could result in an effective prohibition of AT&T's services under the TCA.