PLANNING COMMISSION

ADDITIONAL ITEM ADDED AFTER DISTRIBUTION OF PACKET

Letter from Sarah L. Burbidge with MacKenzie + Albritton LLP

Agenda # 2

Date 6/27/14
Time 2:56 PM

From: Sarah Burbidge [mailto:sburbidge@mallp.com]
Sent: Friday, June 27, 2014 14:50 PM
To: Planning Commission; Helen Peak (Outside Mail); Backoff, Jerry; Brindley, Karen
Subject: 6/30 Planning Commission Agenda Item 2: Draft Wireless Ordinance (San Marcos)

Dear Commisioners, Mr. Backoff, Ms. Brindley, and Ms. Peak,

On behalf of Verizon Wireless, I am attaching our comments regarding the Revised Draft Wireless Ordinance, scheduled for review by the Planning Commission on Monday.

Please feel free to contact me with any questions.

Thank you.

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June 27, 2014

VIA EMAIL

Commissioners Eric Flodine, Rod Jones
Carl Maas, Bruce Minnery, Steve Kildoo
Kevin Norris and Jim Pennock
Planning Commission
City of San Marcos
1 Civic Center Drive
San Marcos, California 92069

Re: Ordinance No. 2014-1388, Amendment to Municipal Code
Wireless Telecommunications Facilities
Planning Commission Agenda Item 2, June 30, 2014

Dear Commissioners:

We write to you on behalf of our client Verizon Wireless with further comments on the revised draft ordinance that would govern the installation of wireless facilities within San Marcos. We remain concerned that Ordinance No. 2014-1388, Amendment to Municipal Code regarding Wireless Telecommunications Facilities (the "Draft Ordinance") still fails to comply with applicable state and federal law.

The Draft Ordinance must accommodate Verizon Wireless's state-mandated right to place facilities in the public right-of-way under California Public Utilities Code §7901 subject only to limited "time, place and manner" restrictions under CPUC §7901.1. Location criteria under Draft Ordinance § 20.465.050 must not group facilities in the public right-of-way (which Verizon Wireless has a state-mandated right to occupy) with locations on public and private land that may be subject to local use restrictions. The City does not have the authority to require Verizon Wireless to select between these two alternatives. The failure to acknowledge rights under CPUC §7901 is compounded by the many pages of exhaustive design review requirements for facilities and equipment to be installed in the public right-of-way, which go far beyond reasonable time, place and manner criteria permissible under CPUC §7901.1.

The Draft Ordinance fails to take into account the federally mandated right of carriers to co-locate on, or modify certain existing facilities. Section 6409 of the Middle Class Tax Relief Act, codified as 47 USC §1455, contains the following provision:

> Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

Under 47 USC §1455, an "eligible facilities request" includes virtually any proposed change to an existing tower or base station. *See* 47 USC §1455(a)(2). The only lawful question before the City in such circumstances would be whether co-location additions or modifications would "substantially change the physical dimensions" of the existing facility. If they would not, then federal law *mandates* approval. Under the Draft Ordinance, the discretionary standards applied to such requests will not survive judicial review.

The Draft Ordinance continues to contain evidentiary standards of "conclusive proof" under § 20.465.030(B)(1) and "clear and convincing evidence" under § 20.465.060(A)(15). Evidentiary standards for issues that arise under federal law are the province of Congress or the federal courts, not local zoning codes.

Issues of "proof" stem from the attempt in the Draft Ordinance to create a new hurdle out of the federal protection afforded wireless carriers under 47 U.S.C. § 332(c)(7)(B)(i)(II).[1] Federal courts have interpreted this federal protection to allow wireless carriers to install wireless facilities where a "significant gap" has been identified and the facility represents the "least intrusive means" to fill that gap, even where the local jurisdiction has identified substantial evidence that would warrant denial of the facility under local codes. *See MetroPCS v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005). These cases have repeatedly affirmed that findings of "significant gap" and "least intrusive means" are judicial determinations that defy any "bright-line" definition. *See, e.g., Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009) (citing half a dozen cases that make different factual findings of a significant gap).

Despite binding federal court precedent, the City purports under § 20.465.180 of the Draft Ordinance to establish its own definitions of "significant gap" and "least intrusive means" and the means of establishing both. By asking the City itself to find a significant gap "consistently with the use of that term in the Telecommunications Act of 1996 and case law construing that statute," the Draft Ordinance is at odds with both federalism and the separation of powers. The City's province is to establish land use

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[1] 47 U.S.C. § 332(c)(7)(B)(i)(II) provides, in relevant part, that the City's regulation of wireless facilities "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

criteria, not to create its own definitions and "proof" criteria out of protective standards contained in federal law.

The Draft Ordinance must clarify that the Administrative Wireless Telecommunications Facility Permit under Draft Ordinance § 20.465.030(A) is processed in the same manner as under current Zoning Ordinance § 20.465.040 – *Permit Procedures for Telecommunications Facilities*. Otherwise, procedures for an Administrative Wireless Telecommunications Facility Permit are unclear.

The Draft Ordinance should only require submittal information that is relevant to the City's land use authority and that is necessary for an Administrative Wireless Telecommunications Facility Permit, or necessary to make required conditional use permit findings. Draft Ordinance submittal requirements not necessary for an administrative permit or that second-guess Verizon Wireless's radio frequency engineering are preempted by federal law and cannot be required.

If moved forward in its present form, the Draft Ordinance appears destined to encourage conflict and litigation. As stated previously, Verizon Wireless stands ready to work cooperatively with the City to revise the Draft Ordinance to avoid violation of federal and state law, and to provide the improved wireless service demanded by those who live and work in San Marcos.

Sincerely yours,

Sarah L. Burbidge

Sarah L. Burbidge

cc: Jerry Backoff, Planning Division Director
Karen Brindley, Principal Planner
Helen Holmes Peak, Esq., City Attorney