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August 5, 2019

VIA EMAIL

Mayor Lynette Lee Eng
Vice Mayor Jan Pepper
Councilmembers Jeannie Bruins,
Anita Enander and Neysa Fligor
City Council
City of Los Altos
1 North San Antonio Road
Los Altos, California 94022

Submitted @ Los Altos City Council Meeting
8/5/19
DATE

Re: Draft Ordinance and Design Guidelines for Wireless Facilities
Council Agenda Item 1, August 5, 2019

Dear Mayor Eng, Vice Mayor Pepper and Councilmembers:

We write again on behalf of Verizon Wireless regarding the revised draft ordinance regulating wireless facilities (the "Draft Ordinance") and revised draft design guidelines (the "Draft Guidelines"). Verizon Wireless urges the Council to defer action on these draft regulations, as proposed revisions only exacerbate the contradictions with federal and state law described in our prior letter of July 29, 2019. The Council should avoid inviting conflict with wireless carriers seeking to place new small cell facilities to meet the increasing service demands of Los Altos residents, workers and visitors. Verizon Wireless is willing to work collaboratively with the City to develop reasonable regulations that allow for needed service improvements.

In particular, the potential exclusion of small cells from residential zones described in your staff report would lead to a prohibition of service in broad areas. Draft Guidelines § 4(D). This would violate both the recent Federal Communications Commission ("FCC") order addressing appropriate small cell approval criteria (the "Small Cells Order")[1] and California Public Utilities Code Section 7901 that grants telephone corporations a statewide right to use any right-of-way. The potential granting of an exception does not excuse the residential zone prohibition because the exception process itself violates federal law. Draft Ordinance § 11.12.090. For small cells, the FCC requires the City to provide objective standards that are published in advance. Small Cells Order, ¶ 86. In contrast, the exception process is based on a vague finding

[1] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018).

that City standards infringe on an applicant's rights under federal and/or state law. Such quasi-judicial determinations are inappropriate for City decision-makers and would leave applicants guessing at the outcome of applications, which the FCC discouraged because small cell criteria must be clear at the outset. Small Cells Order, ¶ 88. By excluding small cells from some or all residential zones, or imposing problematic hurdles such as the exception process, the City would invite challenges by wireless carriers claiming a prohibition of service.

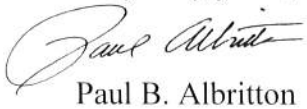
Other location restrictions in the revised Draft Guidelines are similarly prohibitive. The 500-foot setback from schools in PFC zones would eliminate numerous stretches of right-of-way from consideration. Draft Guidelines § 4(E)(5). Placing a small cell as little as 300 feet away from a target location could leave an intended coverage area underserved or unserved. The proposed 1,500 foot small cell separation distance would ban additional facilities within a 162-acre area, an unreasonable and prohibitive requirement. Draft Guidelines § 4(E)(6). There is no aesthetic reason to require that much separation, particularly where a new small cell is on a different street or otherwise out-of-view. Even on the same street, intervening trees, poles and utility lines lessen the impact of an additional small cell.

Other revisions pose issues with federal law, for example, the new requirement for annual testing of radio frequency emissions. Draft Ordinance § 11.12.060(A)(6). Once an installed wireless facility is shown to comply with FCC radio frequency exposure guidelines, the City cannot require repeat exposure tests, as that regulation of operational requirements is preempted by federal law. *See* 47 U.S.C. § 332(c)(7)(B)(iv); *see also Crown Castle USA Inc. v. City of Calabasas* (Los Angeles Superior Court BS140933, 2014) ("…the regulation of a facility's planned or ongoing operation constitutes an unlawful supplemental regulation into an area of federal preemption.")

The public notice distance has been expanded from 300 feet along the subject right-of-way to a 1,000-foot radius, inviting even more subjective public comment which we previously explained contradicts of the FCC's requirement for objective review of small cells. Draft Ordinance § 11.12.050(C). Appeal provisions have been revised to convert the appeal body from the City Manager to the City Council, also inappropriately introducing subjectivity to the process through Council notice and public hearing procedures. Draft Ordinance § 11.12.210.

The revised draft regulations are a further step in the wrong direction, imposing unreasonable and prohibitive requirements that contradict the FCC's Small Cells Order and state law. We urge the Council to defer action on the Draft Ordinance and Draft Guidelines, and direct staff to work with industry representatives to craft workable regulations.

Very truly yours,



Paul B. Albritton

cc: Christopher Diaz, Esq.
Gail Karish, Esq.

AT&T's Initial Comments on Los Altos's Newly-revised Wireless Ordinance 2019-460 and Resolution 2019-35

The ordinance and resolution are significantly revised from last week. The City needs to pause briefly to allow AT&T and others to review and submit comments.

Comments on Resolution

* Resolution Section 4(E)(6) requires 1,500-foot separation between small cells. This is unreasonable and discriminatory. Moreover, it will prohibit or effectively prohibit wireless services in the city. The city must eliminate this restriction.

Resolution Section 5(C) requires screening and camouflaging antennas. While AT&T will certainly strive to work with the city to provide aesthetic sites, mandatory concealment of antennas is discriminatory and unlawful.

Resolution Section 7(B)(1) limits pole-top extensions to 24 inches. Often greater extensions are required to comply with separation requirements and GO95. The city should build in flexibility here.

* Resolution Section 7(B)(2) allows antennas mounted up to 7 feet above the height of a street light in a commercial district, but only allows 3 feet above the height of street lights in other districts. The city needs to rethink this 3-foot restriction. This will actually result in bulkier facilities in residential neighborhoods. AT&T's typical top-mounted shroud extends up to six feet above a street light pole in order to incorporate other equipment and to provide the sleekest appearance possible.

* Resolution Section 7(B)(3) limits antenna shrouds to four feet tall. Again, this will result in bulkier facilities. And this conflicts with the 7-foot allowance for commercial zones in Section 7(B)(2).

Resolution Section 7(E)(4) requires all cables between poles and accessory equipment to be underground. This is unlawful to the extent it is discriminatory, which it is wherever other utilities are allowed to place aerial cables.

Resolution 7(E) requires equipment to be undergrounded as feasible. Radios will need to be above ground to be near enough to pole-mounted antennas to function.

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Comments on Ordinance

Unlawful Moratorium. Section 11.12.200(B) states that the City will not accept new applications for 60 days after a material change in applicable case law or regulations. The City cannot refuse to accept wireless siting applications. The FCC flatly prohibits any express or de facto moratoria on filing applications as an unlawful prohibition on wireless facilities.[1] The City must accept and process wireless siting applications pursuant to applicable laws and within the FCC shot clocks.

Independent Experts. Section 11.12.050(A)(10)&(B) of the proposed ordinance allows the City to select and retain an independent consultant in connection with application review and requires applicants to submit a deposit for the consultant's review. Use of consultants should be limited to review of information such as structural safety or compliance with FCC regulations on radio frequency emissions. Cost of a consultant may not pass through to an applicant as only objectively reasonable costs can be passed on through application fees.[2]

Compliance with FCC RF Standards. Section 11.12.060(A)(6)&(7) require on-site annual tests to demonstrate compliance with the FCC's RF standards. The FCC rules do not require annual assessments and the City cannot impose its own standards for compliance.

Technology Improvements. AT&T objects to Section 11.12.060(A)(2) and Section 11.12.070(A)(6), which requires providers to make changes to facilities if technology improves during the permit term. The City must delete this requirement as this would effectively limit the permit term to less than ten years in violation of state law.

Notice. AT&T objects to Section 11.12.050(C), which requires providers to give notice of installation to all residents and residential property managers within 1,000 feet of the proposed location. It does not make sense to require a 1,000-foot public notice for small cells given their minimal impact. And this notice requirement is preempted as discriminatory unless imposed with respect to all infrastructure deployments.

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[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-111 (August 3, 2018), at ¶¶ 147, 149 (local actions that "effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities . . . prohibit or have the effect of prohibiting deployment of telecommunications services" in violation of the Telecommunications Act of 1996).

[2] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018) ("*Infrastructure Order*") at ¶ 70 (FCC warned that "any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual 'cost' to the government").