



**LEDOUX
ESQUIRE**
INC.

December 21, 2006

Via U.S. Mail
And Facsimile: (408)292-6207

San Jose City Council
200 E. Santa Clara Street
San Jose, CA 95113

Richard Doyle, City Attorney
Office of the City Attorney
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113-1905

Re: Planning Commission's Approval of Conditional Use Permit Application of
T-Mobile CP06-030 but with Impossible Conditions

Honorable Councilmembers and City Attorney:

In November, 2005, T-Mobile applied to the City of San Jose ("City") to install wireless communication antennas on an existing 75 foot tall monopole located on the north side of Lano Street near the Almaden Expressway in an area zoned HI - Heavy Industrial, where collocated antennas are a permitted use.¹ The existing monopole is owned by Cingular Wireless and is situate on land leased by Cingular from Trustee Judith Froom. The monopole presently has two existing antenna arrays, one owned by Cingular and the other by Sprint Telephony PCS. T-Mobile seeks to flush mount its antennas at a height of about 50 feet, well below the top of the 75 foot tower and underneath the current antenna arrays.

On January 30, 2006, the City granted a Development Permit Adjustment for the collocation. As conditions, however, the City requested T-Mobile (a) flush mount the existing antenna arrays owned by the other two wireless carriers and T-Mobile competitors, (b) conceal all existing and proposed cabling, (c) remove existing pegs and ladder from the pole, and (d) plant 9 to 12 trees on adjacent properties. The fifth and last condition requires that the Conditional Use Permit expire in five years, at which point the entire pole and antenna configurations would be subject to review.

Our client T-Mobile exerted its best efforts to comply, but in a letter dated January 30, 2006, Cingular informed T-Mobile that it could not comply with (a) the flush mount condition because to do so would reduce the antenna count and negatively impact coverage, and (b) the removal of existing pegs and ladder, as these are used to climb the monopole to maintain and service the equipment. Staff took no credence from Cingular's

¹ Zoning Code Section 20.50.100 shows a permitted use as designated by "P" on the table 20.110

City Council and City Attorney
December 21, 2006
Page 2 of 5

representations, and refused to relax the conditions, instead instructing the applicant to apply to the Planning Commission to seek relief.

On October 11, 2006, the Planning Commission voted to approve T-Mobile's application but imposed the conditions described above. The Planning Commission acknowledged that it was treating T-Mobile unfairly by "effectively denying [its] application . . . without [T-Mobile] having any control over the issue because the competitor has the final say as to [whether the conditions are met]."²

After the Planning Commission hearing, T-Mobile again exerted its best efforts to meet the City's conditions, and again requested Cingular to comply with the City's permit conditions. In a letter dated December 1, 2006, Cingular informed the City that it will agree to sheath the wiring on its pole and remove the pegs and ladder but explained that it cannot flush mount its antennae without seriously compromising its coverage. Cingular's letter, a copy of which is enclosed for your review, explains the various technical reasons it cannot comply with the City's condition that it flush-mount its antenna array.

T-Mobile also sought and obtained the consent of the landlord to allow the use of a "cherry picker" hoist on the premises, needed to access the antennas if the pegs and ladder are to be removed. Due to a limited number of parking spaces at the site and to avoid interruption to retail tenants' activities that would result if the hoist were used during normal business hours, both T-Mobile and Cingular have agreed to limit access to their antennas to after normal business hours.

T-Mobile now appeals the Planning Commission's decision to the City Council. We first note that Joint Venture: Silicon Valley has submitted the enclosed informative letter in support of T-Mobile's current application. Describing deficient cell phone coverage as a serious problem in Silicon Valley, Joint Venture cites the rapid increase in cell phone use among business and residential users, as well as the stress placed on cellular networks by increased ubiquity of wireless laptop computers. To improve coverage and hence public safety and economic development, Joint Venture encourages the City and wireless providers to collaborate on increasing the number of cell sites while minimizing any adverse visual impacts – something that T-Mobile fully endorses and the reason why it selected this collocation opportunity *in accordance with the City's code*.

In this letter we address the legal opinions expressed by the Senior Deputy City Attorney at the hearing before the Planning Commission, and articulate the reasons we believe this application should be approved.

² A copy of the transcript of the Planning Commission hearing ordered by our firm is available for your review, should you desire it. T-Mobile has not received a separate written decision from the Planning Commission regarding its application.

City Council and City Attorney
December 21, 2006
Page 3 of 5

A. The Senior Deputy City Attorney Misstated the Law on Effective Prohibition under the Telecommunications Act.

The Senior Deputy City Attorney first advised the Commission that the City's actions in T-Mobile's case cannot be construed as prohibiting or having the effect of prohibiting the provision of service because antennae of *other* wireless providers are located at this site. This is simply incorrect. In *MetroPCS v. City and County of San Francisco*, 400 F.3d 715, 733 (9th Cir. 2005), the Ninth Circuit Court of Appeals held that a locality can run afoul of the "effective prohibition" clause of the Telecommunications Act of 1996 ("TCA"), 47 U.S.C. § 332(c)(7), if it prevents a wireless provider from closing a "significant gap in *its own* service coverage." (emphasis in the original). *MetroPCS* specifically rejecting the City's analysis. *Id.* at 731-33.

1. The City of San Jose has Effectively Prohibited T-Mobile from Providing Service.

In fact, we believe the City's recent actions on T-Mobile's wireless applications, if upheld by this Council, would amount to an "effective prohibition of service". Prior to the Planning Commission hearing on T-Mobile's current application, the City approved and then revoked another T-Mobile application to collocate on a monopole owned by Crown. Moreover, the staff of the Planning Department has informed T-Mobile that the alternative site for the instant application, calling for a new monopole located approximately 200 yards from the Cingular pole, likely will be denied.

The record shows that the City's failure to approve *any* of these three applications will result in a significant gap in T-Mobile's service coverage.

B. The Senior Deputy City Attorney was Mistaken in Claiming that the Planning Commission's Decision Need Only be Supported by Substantial Evidence.

The Senior Deputy City Attorney also represented that the Planning Commission's denial of T-Mobile's application would be lawful as long as it is based on substantial evidence. Contrary to this assertion, the City's decision on T-Mobile's application must meet several criteria set forth in the Telecommunications Act to be lawful. Whether or not the Planning Commission's decision was based on substantial evidence is only one of those criteria. Even if the decision is supported by substantial evidence, it runs afoul of the Telecommunications Act if it has the effect of preventing T-Mobile from closing a significant gap in its service coverage as discussed above.

C. The Reason Given for Imposing Impossible Conditions on T-Mobile is Illogical.

In responding to T-Mobile's position that imposing impossible conditions on its permit application is not only unjust but unlawful, the Senior Deputy City Attorney asserted that the City "also at this juncture does not have any means of compelling

City Council and City Attorney
December 21, 2006
Page 4 of 5

Cingular to do or not do something. . . .” The fact that the City is powerless to force Cingular to act makes our point and is not a logical or just basis for denying T-Mobile’s application because T-Mobile also cannot compel Cingular to conform to the City’s wishes.

D. Not Only is T-Mobile Powerless to Meet The Conditions Imposed by the City, the Conditions Actually Encourage Cingular to Refuse to Comply.

As described above, Cingular has explained to the City why it cannot flush mount its antennas and T-Mobile has no means to compel Cingular to comply with the City’s wishes. Also, condition five states that the Conditional Use Permit sought by T-Mobile will expire in five years, at which point the entire pole and antenna configurations would be subject to review. Cingular has informed us that this is unacceptable and that it will not sacrifice its vested rights to provide for its competitor’s collocation.

E. The City’s Imposition of Conditions which are Impossible to Meet is Unlawful.

Denying T-Mobile’s application due to the refusal of third parties to change their antennas would be legally untenable under state and federal law. Under state law, a local agency may not impose a condition which requires concerted action by others not a party to the transaction and over which the permit applicant has no control. The agency is limited to imposing conditions which may be performed by the applicant. *Munns v. Stenman*, (1957) 152 Cal.App.2d 543, 552 (Cal.App. 2 Dist.).

In *Munns*, the city of Monrovia refused to approve petitioner’s application for a permit to build a single family home until other property owners in the same area dedicate, without compensation, portions of their property to the city for street use and revamp their lots and facilities to comply with the city’s various requirements for a legal subdivision. *Id.* at 551-52. The court reasoned that it was “manifestly unreasonable” to expect the other property owners who had already built homes and made other improvements to “consent to any such exaction.” *Id.* at 552.

Similarly, requiring applicants for a building permit to join with other purchasers of lots in an illegal subdivision and obtain approval by the county of a subdivision map is “untenable” as the applicant has no means to compel the other purchasers to act. *Keizer v. Adams*, 2 Cal.3d 979, 980, 88 Cal. Rptr. 183, 471 P.2d 983 (1970).

As in *Munn* and *Keizer*, it would be manifestly unreasonable, untenable and a violation of state law to deny T-Mobile’s application because other wireless providers refused to change their antennas despite T-Mobile’s best efforts to obtain their consent.

Such a denial based on an applicant’s inability to meet an impossible condition would also violate federal law. “Setting out criteria under the zoning law that no one

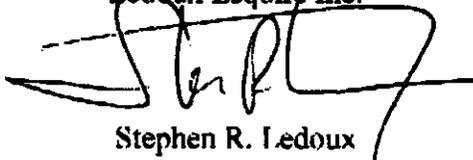
City Council and City Attorney
December 21, 2006
Page 5 of 5

could ever meet is an example of an effective prohibition.” (emphasis added) Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals, 297 F.3d 14, 23 (1st Cir.2002) citing Town of Amherst, N.H. v. Omnipoint Communications Enters., 173 F.3d 9, 14 (1st Cir.1999). Thus, denying T-Mobile's application because we are unable to compel Cingular to change its antenna array amounts to an “effective prohibition” in violation of the Telecommunications Act.

We ask this Council to make a common sense decision in light of the circumstances, particularly considering that there has been no public opposition to this application at any level. The Planning Commission rightfully acknowledged that the imposition of the offending conditions will result in an effective denial with two results: (a) the existing monopole and antennae arrays will remain unchanged, and (b) T-Mobile will need to look for an alternative site likely to result in a new monopole due to the lack of existing tall structures in the area with concomitant greater visual greater impact. A Council approval, however, would result in: (1) a collocated facility in furtherance of City policy, (2) minimal visual impacts, especially in this Heavy Industrial Zone, (3) rapid deployment of wireless communication services essential to the local business community, and (4) initiation of new federally mandated services, including E-911 and caller location technologies.

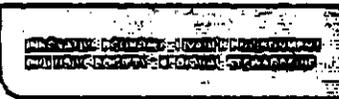
We enjoy our many collaborations with the City in the past and hope that we are able to reach a reasonable compromise. We thank you for every professional courtesy extended.

Very truly yours
Ledoux Esquire Inc.



Stephen R. Ledoux

Enclosures: Joint Venture letter and Cingular letter
Cc: Marian Vetro, Corporate Counsel

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December 8, 2006

Office of the City Clerk
City of San Jose
200 East Santa Clara St.
San Jose, CA 95113

Dear Mayor Gonzales:

I understand the San Jose City Council will soon consider an application for wireless installation in District 7. Joint Venture: Silicon Valley Network would like to go on record as strongly encouraging efforts to improve cell phone coverage in your community.

Last year a joint committee of business and city leaders identified cell phone coverage as a serious problem in Silicon Valley. They felt that our cell phone coverage is not up to world class standards. The committee determined that the availability and reliability of cell service is an issue of public safety and economic development.

With the help of business and community leaders, and with inputs from city planners and cell phone service providers, Joint Venture analyzed the problem. We concluded that the primary reason for poor coverage in Silicon Valley is the rapid growth in the use of cell phones as they become cheaper and offer more features. In addition, the network is being burdened by laptop computers using the cellular network to connect to the Internet. The cell phone network was not designed for this load; it was designed to serve business users in downtowns, industrial parks and on major thoroughfares. But more and more, people are trying to use their cell phones in their homes, in stores, and in rural areas, where coverage is poor. And more and more, people are depending on their cell phones in an emergency. More that one-third of 911 calls are being made from cell phones today.

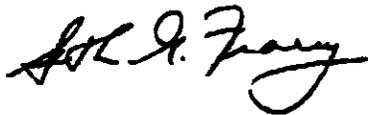
The solution is to increase the number of cell sites. Because service is now needed in residential areas, cell sites need to be compatible with community tastes. This often means that the antennas need to be mounted at a lower height so the signal can not travel as far as with the older towers. The smaller radius means more cell sites are needed. In our meetings with the carriers they have indicated a willingness to work with communities to fill in coverage gaps with cell sites that are attractively designed.

We now need the support of the cities as they consider permit applications.

Joint Venture is committed to supporting a collaborative process. We are developing a primer on cell phone coverage for cities, and a website that will highlight deadzones. I am also attaching a best practices guide that is intended to help inform decision-makers about possible issues and options when considering cell site applications.

Cell phone use is only going to increase. Joint Venture: Silicon Valley Network respectfully requests that you bear in mind the need to improve the quality of cell phone service within Silicon Valley as you review and consider the cell site application being presented to you this evening.

Sincerely,

A handwritten signature in black ink, appearing to read "Seth G. Fearey". The signature is fluid and cursive, with a large, stylized "S" at the beginning and a long, sweeping underline.

Seth G. Fearey
Vice President and Chief Operating Officer



F. Kevin Flaherty • Director, Net.Design • ph. 925.227.4497 • fax 925.227.4529

December 1, 2006

City of San Jose
Department of Building, Planning & Code Enforcement
200 East Santa Clara Street
San Jose, CA 95113
Attn: Mr. Joseph Horwedel, Deputy Director

Re: Appeal of Planning Commission Conditions In Resolution No. CP 06-030
T-Mobile Colocation Application on Cingular Wireless Monopole
417 Lano Lane, San Jose, CA

Dear Mr. Horwedel,

Introduction

We write on behalf of Cingular Wireless ("Cingular") to express concern about three (3) conditions imposed by the Planning Commission in its recent CUP approval of T-Mobile's application to collocate its antennas on Cingular's communications tower at 417 Lano Street ("CUP Approval").

For the reasons mentioned below, Cingular supports T-Mobile's request to modify the CUP Approval by eliminating Conditions 2(a), 2(c) and 2(d).

Cingular's Relationship With the City

San Jose represents Cingular's largest metropolitan customer base in Northern California. These important customers utilize not only voice, but also the new 3G data capacity of Cingular's network.

The high calling capacity requirements mandate that each site must cover a more concentrated area, so the area served by each site is smaller. We also provide an essential emergency service to the San Jose community.

Cingular wishes to promote its cooperative relationship with the City, and is sensitive to the concerns of the Planning Commission in attempting to address aesthetic considerations of existing communications facilities. We hope that San Jose will be cognizant of certain technical considerations that may limit our physical flexibility on the tower.

Cingular is prepared for this specific T-Mobile site, to allow T-Mobile to take the steps necessary to comply with Conditions 2(c) (sheathing of wiring on the monopole) and 2(d) (removal of existing ladder and access pegs).

Mr. Joseph Horwedel
Deputy Director
December 1, 2006
Page 2 of 2

With respect to Condition 2(a), however, Cingular is not in a position to accommodate this condition due to foreseeable technical impairment of Cingular's network operations. Cingular believes that compliance with Condition 2(a) would materially and adversely impair Cingular's ability to maintain proper service to its customers. Accordingly, this one Condition cannot be implemented.

Practical Adverse Effects of Condition 2(a) Restrictions on Cingular's Operations

Condition 2(a) of the CUP Approval requires the reconfiguring of Cingular's existing antenna arrays on the monopole, so that Cingular's antennas would be mounted not more than two feet (2') from the monopole ("Flush Mounting").

Cingular currently has [3] antenna sets mounted on a five-foot [5'] extended triangular array on the monopole. Cingular's antennas include Cellular Band Antennas (850 MHz), PCS Band Antennas (1900MHz), and the new 3G data service antennas (1950 MHz).

These 9 antennas cannot physically fit in a proposed "flush mount" configuration. Furthermore, Cingular must maintain the proper ability to "down tilt" its antennas to avoid "overshooting" the coverage area.

In addition, Cingular has launched its 3G data network in "data rich" Silicon Valley. This exiting new technology requires separate antennas with different antenna orientation than the Cellular Band and PCS Band antennas.

Cingular is confident that the Planning Commission does not intend to impose conditions on T-Mobile's project approval which would have the effect of degrading the quality of service which Cingular currently enjoys at the site.

Very truly yours,

Respectfully submitted


F. Kevin Flaherty
Network Operations
Cingular Wireless



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FACSIMILE TRANSMITTAL SHEET

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