



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: **Additional Information and
Responses to Potential Issues
Related to the Appeal of CUP CP06-
030 by T-Mobile**

DATE: January 9, 2007

SUPPLEMENTAL

RECOMMENDATION

That the City Council accept this additional memorandum in connection with the subject matter above in response to certain issues raised or that may be raised during this administrative hearing.

OUTCOME

That the City Council conduct this appeal hearing and consider all testimony, including this memorandum, received in its decision-making process in this appeal matter.

BACKGROUND

An appeal of the Planning Commission's decision to approve this CUP with certain conditions has been filed by T-Mobile. T-Mobile is the entity that desires to place additional wireless communications equipment upon an existing 75' pole owned by Cingular Wireless on certain real property owned by another private entity.

The City Attorney's Office received a letter from an attorney representing T-Mobile, which letter asserts several reasons why T-Mobile believes that the City may not deny this CUP application. Following is a response and analysis in connection with these contentions, as well as other related issues.

ANALYSIS

- A. Assertion of Impossibility: T-Mobile contends that it is impossible for T-Mobile to flush-mount certain "wagon-wheel" antenna already existing on the pole as the Planning Commission conditioned because the owner of that antenna (Cingular Wireless) has indicated that they are not willing to make those changes. T-Mobile claims it is unlawful to condition T-Mobile's application upon actions of third parties over which T-Mobile has no control.

Response: While T-Mobile, who desires to be a new occupant on the existing pole, may not have control over the existing structures on the site, the actual applicant under the CUP (the real property owner, Judith Froom) **does** have control over the existing structures on her site and can choose to use those structures "as is" under her existing development approvals without expanding the current uses on her property or can endeavor to add new uses and make on-site

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modifications to address the cumulative aesthetic impacts being created by all of the uses collocating on her property.

Therefore, all of the conditions are within the applicant's control and relate to **on-site** conditions. The cases cited by T-Mobile regarding **off-site** requirements and conditions not within a property owner's control do not govern this situation.

- B. Gap In Service: T-Mobile alleges that the City Attorney to the Planning Commission was incorrect in advising that a denial of this permit request by T-Mobile cannot be construed as prohibiting or having the effect of prohibiting wireless service under federal law because other providers are in the area. If T-Mobile has a gap in its own service, T-Mobile argues, that alone can be an effective prohibition.

Response: T-Mobile's summary of the City Attorney's statements is incomplete. The City Attorney advised that the City cannot implement a blanket prohibition of wireless services (or take actions that, in effect, would blanketly prohibit wireless services) under federal law, but that the very fact that the City has issued numerous permits for wireless services all over the City – including on the subject site – was evidence that the City has no such blanket ban in actuality or in practice. The City Attorney noted that the City staff was not asking for this particular pole to be removed, nor was City staff recommending denial of the actual permit request, but rather that alternative locations may be more appropriate if the cumulative aesthetic impacts of co-locating several antenna on this pole cannot be addressed (and that the City staff conditions appear to be focused on addressing that element).

The City Attorney would agree that the Ninth Circuit, in *MetroPCS, Inc. v. City and County of San Francisco, et. al* (9th Cir. 2005) 400 F.3d 715 ("*MetroPCS*"), held that a "significant gap in service" for a particular provider can qualify as effective prohibition of service under Section 332(c)(7) of the Telecommunications Act of 1996. However, the City Attorney would note that this Court also reasoned as follows in reaching that determination:

- First, a provider has a burden to and must show that a government's decision in denying a particular permit will actually perpetrate a significant gap in a particular provider's service. In this instance, the Planning Division advises that T-Mobile has submitted no documentation -- only conclusory statements -- that any such gap in service now exists.
- Secondly, once a provider has demonstrated the requisite gap in service coverage, the Court found that the provider must then also make a showing that its proposal is the "least intrusive" means in comparison with alternative sites for filling that gap (*MetroPCS*, at 2742). The City's Planning Division asserts that simply adding more antennae to the existing, nonconforming 75-foot pole without any concomitant reduction in resulting visual impacts would not be the least intrusive means of effecting this collocation. Thus, Planning has recommended a reduction in the overall resulting visual impacts created by this proposal by eliminating the existing wagon wheel antenna or reducing its diameter on this pole. If this cannot be effectuated, then the Planning Division asserts that either an additional slimline pole with flush mounted antenna or building mounted antenna nearby both would be less intrusive alternatives, visually, to T-Mobile's proposal.

T-Mobile has not disagreed with this assessment, but claims that if City fails to approve **any** application of T-Mobile's in this area, then this could qualify as an effective prohibition of their service. While this claim may be true if T-Mobile can show a gap in service in this

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area, it also is true that this claim is premature at this point and does not mandate that the City approve this particular permit application.

- C. Substantial Evidence: T-Mobile also contends that the City Attorney is mistaken in claiming that the Planning Commission's decision must be supported by substantial evidence. However, the Ninth Circuit in *MetroPCS* specifically held that the substantial evidence standard applies in this context (400 F.3d 2722-2725).
- D. SB 1627: To date, neither T-Mobile nor the Applicant has raised the application of recently enacted SB 1627 (regarding collocation of wireless telecommunications facilities), effective on January 1, 2007, to this pending CUP application. However, an analysis of this application under that new legislation is provided in case this recently enacted legislation is raised at a later date.

SB 1627 requires that certain collocation facilities be approved as a permitted use and not subject to a discretionary permit if the original facility upon which the collocation facility would be placed was subject to a discretionary permit, its resulting impacts would be covered under existing CEQA clearance, and the collocation facility meets city requirements for those facilities (such as height, bulk, size, and aesthetic or design requirements, and any other general plan or zoning code requirements).

Under SB 1627, T-Mobile's proposal would not qualify as a permitted use. The proposal does not fall within the parameters of what was analyzed under the existing CUP issued for the existing pole, since none of these additional antennae were allowed nor analyzed as a part of the original CUP permitting the pole. Thus, none of the proposed collocated facilities proposed by T-Mobile were evaluated under the CEQA clearance prepared for the original pole. Additionally, it is unclear if the current proposal could be found to be consistent with existing City requirements, since the existing pole exceeds both the height and diameter of what City staff would currently support and that could be allowed without a CUP.

For these reasons, the passage of SB 1627 would not now mandate that the City allow as a permitted use T-Mobile's current request.

POLICY ALTERNATIVES

Not Applicable, as this is not a discussion of policy.

PUBLIC OUTREACH/INTEREST

Not applicable.

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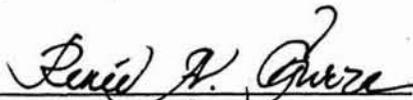
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COORDINATION

The factual information contained in this memorandum has been coordinated with the Department of Planning, Building and Code Enforcement.

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