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April 13, 2015

VIA EMAIL

City Council
c/o Clay Glasgow, City Planner
City of Gladstone
City Hall
525 Portland Avenue
Gladstone, Oregon 97027

Re: Verizon Wireless – Co-locate Wireless Communication Facility
Planning File No. Z0435-14-PDR
Response to Appeal

Dear Mayor and Councilors:

This firm represents Verizon Wireless (the “Applicant”) with regard to the above-referenced application to co-locate wireless communication antennas on a PGE utility pole located in the right-of-way for Portland Avenue with associated ground mounted equipment on the adjacent private property (the “Application”). The Planning Commission adopted the City staff’s recommendation and approved the Application at its February 17, 2015 public hearing (the “Planning Commission’s Decision”). David Catto appealed the Planning Commission’s Decision on March 11, 2015 (the “Appeal”). This letter is the Applicant’s written response to the Appeal. The Applicant requests that you deny the Appeal and affirm the Planning Commission’s Decision.

Background

A. Description of the proposed collocation and surrounding area.

The Applicant is proposing to co-locate six (6) panel antennas onto an existing PGE utility pole and install ground mounted equipment on the adjacent private property located at 725 Portland Avenue. The existing PGE pole is 60 feet. The Applicant proposes to extend or replace the existing pole with an 80-foot pole in order to provide the required separation between the Applicant’s antennas and PGE’s equipment to allow for normal operation of the facility. Ground mounted equipment cabinets will be located in the back of the adjacent property and will be screened with a sight-obscuring six (6) foot high fence and at least three-foot wide landscape buffer consisting of small and medium trees and shrubs.

The subject site and surrounding area are zoned Community Commercial (C-2). The surrounding area includes a mix of commercial and residential uses. The property where the ground mounted equipment will be located has a house but is currently used for commercial purposes. PGE utility poles line the length of Portland Avenue.

B. The City's approval criteria for collocated facilities.

Wireless communication facilities are outright allowed uses in the C-2 zone. Gladstone Municipal Code ("GMC") 17.18.020(9). All wireless communication facilities are subject to GMC Chapter 17.61, Wireless Telecommunication Facility. The Application must be reviewed based on the applicable standards set forth in GMC 16.71. ORS 227.173(1).

To minimize the number of new transmission towers, GMC Chapter 17.61 encourages collocation of antennas on existing structures and requires carriers to "exhaust all practicable collocation options" before proposing a new transmission tower. GMC Chapter 17.61 recognizes utility poles as suitable structures for collocation and expressly allows for existing structures to be replaced or enhanced in order to accommodate the antennas. GMC 17.61.070(1) & (2). GMC 17.61.080 specifically allows carriers to increase the height of existing structures an additional 20 feet in commercial and industrial zones. Collocated facilities are subject to the approval criteria set forth in GMC 17.61.060 through 17.61.100, and 17.61.190.

C. The Planning Commission's unanimous approval of the Application.

The City planning staff reviewed the Application, concluded that it complied with the applicable criteria and recommended approval. The Planning Commission held two public hearings, January 20 and February 17, 2015, and heard extensive public testimony.

The Planning Commission unanimously concluded that the Application complied with all of the approval criteria, and imposed additional conditions of approval to address some of the concerns raised at the public hearings. The Planning Commission imposed new conditions requiring additional vegetative screening for the equipment cabinet and replacing the diesel generator with an electric battery back-up power to minimize the impact of the equipment cabinet on the adjacent property. The Planning Commission unanimously approved the Application subject to six (6) conditions of approval.

Response to Appeal

A. Scope of the appeal.

The scope of the appeal is limited to the grounds stated in the Appeal. If a local code requires the appellant to specify the grounds for appeal in the notice of appeal, the appeal issues are limited to those listed in the notice of appeal. *Johns v. City of Lincoln City*, 146 Or App 594 (1997). GMC Chapter 17.92 requires the notice of appeal to provide detailed and specific grounds for appeal. GMC 17.92.020(3) provides: "The notice of appeal should state in detail the nature of the decision, determination or requirement and the grounds upon which the applicant deems herself/himself aggrieved." (Emphasis added). GMC 17.92.050(1)(f) requires the notice of appeal to include: "The specific grounds for the appeal." (Emphasis added). Therefore, the

City Council should limit its review of the Planning Commission's decision to the grounds listed in the Appeal.

B. Response to the Appeal.

The Appeal is based almost entirely on GMC 17.61.020, which sets forth the purpose for Chapter 17.61. GMC 17.61.020 provides:

"The purpose of this section is to establish design and siting standards for telecommunication facilities that:

- (1) Minimize adverse visual effects of towers and ancillary facilities through careful design, siting and screening standards;
- (2) Avoid potential damage to adjacent properties from tower failure and falling ice through structural standards and setback requirements;
- (3) Provide mechanisms for the mitigation of tower proliferation through tower sharing requirements for all new tower applicants and those existing towers that are physically capable of sharing." (Emphasis added).

The City achieved this purpose by adopting specific design and siting standards in GMC 17.61.060 through 17.61.120 that implement these goals.

There are two underlying problems with the Appeal's assertion that the Application does not comply with GMC 17.61.020. First, GMC 17.61.020 does not contain approval standards and therefore it cannot be used to deny the Application. Purpose statements that set out general expressions of goals and objectives to be achieved through the adoption of specific approval standards do not play a role in reviewing permit applications. *Bennett v. City of Dallas*, 96 Or App 645, 649, 773 P2d 1340 (1989); *Jones v. City of Grants Pass*, 64 Or LUBA 103, 110-11 (2011); *Bridge Street Partners v. City of Lafayette*, 56 Or LUBA 387, 392 (2008). GMC 17.61.020 merely sets forth the purpose behind the specific design and siting standards provided in GMC 17.61.060 through 17.61.120. Since GMC 17.61.020 merely contains purpose statements and does not contain actual approval standards, the Application cannot be denied under GMC 17.61.020.

Second, the Application is presumed to be consistent with the purpose statements because it complies with the specific design and siting standards applicable to this proposed facility. The goals in GMC 17.61.020 are implemented by requiring the Applicant to satisfy specific design and siting standards applicable to the particular type of proposal. Since the Application proposes a collocated facility, a design/siting approach encouraged and preferred under GMC Chapter 17.61, it is subject to the collocation approval criteria set forth in GMC 17.61.060 through 17.61.100, and 17.61.190. The Appeal does not challenge, nor is there a basis for challenging, the Planning Commission's determination that the Application complies with these specific design and siting standards. Since the Application complies with the specific design and siting standards applicable to a collocation facility, it is presumed to be consistent with the purpose statements set forth in GMC 17.61.020.

To the extent the City Council considers the specific issues raised in the Appeal notwithstanding the fact that they do not relate to approval standards, the Application clearly complies with GMC 17.61.020. The Appeal's claim that the proposed facility does not comply with GMC 17.61.020(1) because it will be 20 feet taller than the existing utility pole and surrounding structures ignores the fact that GMC 17.61.080, which specifically controls the height limit for collocated facilities, expressly allows the existing structure to be increased 20 feet in height in commercial and industrial zones. The proposed facility cannot be inconsistent with GMC 17.61.020(1) since it strictly complies with the height limits set forth in GMC 17.61.080. Additionally, neither GMC 17.61.020(1) nor GMC 17.61.080 limit collocated facilities to those no taller than the surrounding structures or trees.¹

The Appeal's claim that the utility pole and antennas do not comply with GMC 17.61.090 because they cannot blend in with the "ever changing" sky color is inconsistent with GMC 17.61.090. GMC 17.61.090 does not apply to the utility pole itself – it only applies to ancillary facilities and antennas. The ancillary facility in this case, the equipment cabinet, will be screened and hidden by the sight-obscuring six (6) foot high fence and landscape buffer. GMC 17.61.090(2) provides that antennas can be "painted or colored to blend into the structure or surroundings," which is what the Applicant is proposing in this case. The Appeal's assertion that it is effectively impossible to satisfy this requirement because the sky changes colors depending on the weather misinterprets this standard. GMC 17.61.090(2) does not require the antennas to be painted to match sky changing colors nor is it intended to impose standards that would literally be impossible to satisfy. See *Waker Associates, Inc. v. Clackamas County*, 22 Or LUBA 232, 246 (1991), *aff'd* 111 Or App 189 (1992) (General code provisions should not be interpreted to preclude an expressly allowed use).

The Appeal's claim that the proposed facility does not satisfy GMC 17.61.020(2) because it could damage the adjacent structures misinterprets this provision and is contrary to the evidence in the record. GMC 17.61.020(2) provides that the objective of avoiding potential damage to adjacent properties is satisfied "through structural standards and setback requirements." There is undisputable evidence that the proposed facility satisfies the structural standards and setbacks, and therefore it satisfies GMC 17.61.020(2).

The Appeal's claim that the proposed facility does not satisfy GMC 17.61.020(3) because it only allows for Verizon's antennas has several problems. This provision only applies to towers – "all new tower applicants or existing towers." Towers are defined as transmission towers, not existing utility poles. GMC 17.61.050(11)-(14). Even if it did apply to utility poles, the requirement for existing towers is limited to those "that are physically capable of sharing." The existing utility pole is not physically capable of accommodating additional carriers due to the need to provide separation between the antennas and utility facilities, couple with the height limit. It is ironic that the Appeal is advocating more room to accommodate other carriers when

¹ There is an important reason why GMC Chapter 17.61 and other city zoning codes do not limit wireless communication facilities to the height of the surrounding structures and trees. Since wireless communication antennas operate via line-of-sight communication with surrounding antennas in the network, the antennas must be placed on a structure that is taller than the surrounding structures and trees to maintain that line-of-sight.

such an outcome would only increase the height of the pole, number of antennas and visual impacts.

Finally, the Appeal's claim that approving the Application will open up the City "to single use cell towers for all 82 registered cell carrier providers" demonstrates a fundamental misunderstanding of both the proposal and GMC Chapter 16.71. This Application does not involve a single use cell tower. It involves collocation on an existing structure, a design/siting approach that is strongly encouraged under GMC Chapter 16.71 because it avoids the need for new transmission towers that have much greater impacts on surrounding properties. Nor does the City's approval of the Application mean that it must approve every future collocation proposal. All future proposals must satisfy the applicable criteria in GMC 16.71. Since GMC 16.71 has been in effect since 1998, the concern that approving this collocation facility under the standards set forth in GMC 16.71 will lead to the blanketing of these facilities throughout the City has been proven wrong by the absence of such a problem over the last 17 years.

C. Response to other issues raised at the Planning Commission.

Although the scope of the appeal is limited to the grounds stated in the Appeal, it is important for the City Council to understand that the Planning Commission correctly resolved those issues.

Some parties expressed concern about the visual and noise impact of the equipment cabinet. The proposed equipment cabinet complies with the setback, fencing and landscaping requirements. The equipment cabinet will be screened with a sight-obscuring six (6) foot high fence and substantial landscape buffer. The Planning Commission imposed additional conditions of approval requiring more vegetative screening and replacing the diesel generator with an electric battery back-up power to minimize the noise impacts. The equipment cabinet will comply with the applicable noise regulations.

Some parties raised health and safety concerns due to RF emissions. There are several problems with this assertion. The Applicant provided a Non-Ionizing Electromagnetic Exposure Analysis that demonstrates the proposed facility complies with all RF emissions requirements. While some parties speculated about potential health risks, none provided evidence to support their claims. Chapter 17.61 does not contain RF emission standards or allow the consideration of alleged safety or health effects. The reason it does not contain such standards is that the Federal Telecommunications Act ("TCA") prohibits local governments from regulating wireless service facilities based on concerns about the environmental or safety effects of RF emissions since those standards have been mandated at the federal level. 47 U.S.C. § 332(c)(7)(B)(iv).

Some parties argued that the Application should be denied because some surrounding properties might be eligible for historic designation. The fact that some properties could be eligible for historic designation does not mean that they are designated as historic properties or that they prohibit wireless communication facilities in the surrounding areas. Neither Chapter 17.61 nor any other provision in the GMC prohibits or restricts wireless communication facilities based on surrounding properties that might be eligible for historic designation. To the extent impacts on historic properties are considered, those impacts are considered as part of the SHPO and NEPA process. The Applicant is proposing a collocation with significant mitigation measures that will minimize any impacts on historical properties. Since Portland Avenue is already lined with

utility poles, any additional visual impacts from this proposed facility will be negligible in comparison to the existing visual impacts from the numerous utility poles.

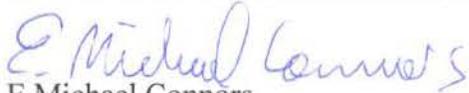
Some parties raised concerns about possible interference with police or fire public frequencies. Verizon facilities are on dedicated frequencies established by the FCC and will strictly comply with those frequencies. There is no evidence of Verizon frequencies interfering with public safety frequencies and Verizon facilities are regularly located on or near police/fire stations in order to provide better service for these emergency responders.

Conclusion

The Applicant understands that these types of facilities are not the most desirable type of development for the surrounding neighbors, but they provide a necessary and critical wireless communication need for residents in the City. The proposed facility complies with the City's desire to encourage collocation to avoid new transmission towers and strictly complies with all of the applicable approval standards. The Planning staff supports approval of the Application and the Planning Commission unanimously approved it. Therefore, the Applicant requests that the City Council deny the Appeal and affirm the Planning Commission's Decision.

Very truly yours,

HATHAWAY KOBACK CONNORS LLP


E Michael Connors

EMC/pl

cc: Verizon Wireless
Jacob Hamilton, Virtual Site Walk