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Via Electronic Mail

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January 23, 2008

Chair Barry Schultz
and Members of the Planning Commission
CITY OF SAN DIEGO
1222 First Avenue, 4th Floor
San Diego, CA 92101

Re: American Tower Corporation Request for a Conditional Use Permit and Planned
Development Permit for an Existing Wireless Facility at 6770 Aviation Drive
(Project No. 92076) ("Aviation")

Dear Chair Schultz and Members:

The purpose of this letter is two-fold: First, ATC wants to provide the Planning Commission with a brief summary of the interactions between American Tower Corporation ("ATC") and the City of San Diego ("City") with regard to Aviation. In addition, ATC requests that the minutes from the September 20, 2007 meeting more accurately reflect the Commission's motion regarding Aviation.

Over the past two years, ATC and the City have had the following interactions regarding Aviation:

ATC made contact with City project manager Natalie De Freitas on February 17, 2006 to inquire about a meeting proposed by the City on February 28, 2006. Ms. De Freitas told ATC that the City's IT Department wanted to discuss a single tower solution for Aviation using a lattice tower.

On February 28, 2006, ATC and a representative from Verizon met with the City Departments and Nextel to discuss a lattice tower solution. ATC volunteered to do the structural analysis and drawings. Ms. De Freitas told ATC that the City would provide ATC with City's antenna requirements.

August 22, 2006: Natalie De Freitas conducts a meeting with ATC, carriers and the City to discuss ATC's proposed lattice tower. The City IT&C and carriers agree that the amount of equipment on the structure limited their ability to add screening. At no time during the meeting did the City reject the proposal. Regardless of these discussions, in an email to ATC on August 23rd, Ms. De Freitas tells ATC the structure is too tall and proposes a multiple monolith design.

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October 30, 2006: In a meeting with carriers on CUP renewal provisions, Senior Planner Karen Lynch Ashcraft tells ATC that the City was rejecting the lattice tower proposal and apologizes to ATC for being inconsistent about the proposed design.

January 19, 2007: Ms. Lynch Ashcraft calls a meeting to discuss "reasonable modifications" to ATC's facilities. The meeting is terminated because ATC is unwilling to discuss replacement of the existing facilities as part of "reasonable modifications."

June 28, 2007: The City Planning Commission continues its hearing in order to get input from the City's IT department about "how we are in this situation," encouraging City and ATC to work on a solution.

August 9, 2007: Mike O'Brien from the IT&C Department testifies that the City needs its 100-foot monopoles for "intensive engineering reasons," that stealthing these poles would be very expensive and could cost the City \$25 million and that collocation onto a single lattice tower does not work because of antenna separation requirements. The Planning Commission continues the item for an analysis by the City Attorney on City immunity from code requirements and indicates an expectation that ATC and staff will meet.

September 20, 2007: ATC notes that no meeting took place with staff and Planning Commission instructs staff to look at "a master plan solution" that would require the involvement of all parties and, in addition, to "structure a CUP" with "trigger points" requiring participation by ATC "at some point in time."

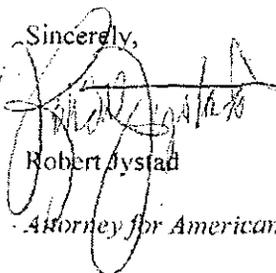
November 1, 2007: City calls a meeting with ATC to discuss Aviation. ATC outlines the Commission's instructions to staff and the City tells ATC that Code is clear on its face and ATC must replace its facility even if the City's facility remains the unchanged. Mayor's office concludes the meeting: "At least we know where we both stand."

In addition, ATC asks that the Planning Commission clarify the minutes drafted for the September 20, 2007 hearing. First, we ask that the Commission delete the phrase "structure a CUP to be minimal visible" – this language is not accurate. Please also delete the phrase "how the community contributes..." We believe the following more accurately reflects the Commission's motion:

"...direct staff (1) to structure a CUP using the City's decision to redesign its monopole as a trigger point for ATC to redesign its own monopole and look into granting a shorter CUP and (2) to develop a master plan to improve the aesthetic impact of the three facilities at Aviation."

ATC looks forward to further discussion with the Planning Commission on this matter. Questions can be directed to me at rjystad@channellawgroup.com or (310) 209-8515.

Sincerely,



Robert Jystad

Attorney for American Tower Corporation

c: William Anderson, Deputy Chief Operating Officer for Land Use and Economic Development
Christine Fitzgerald, Chief Deputy City Attorney, City of San Diego

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Letter to: Chair Barry Schultz and Members of the Planning Commission

Date: January 23, 2008

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Karen Lynch Ashcraft, Development Services Department
Elizabeth Hill, Esq., American Tower Corporation
Terri Beck, American Tower Corporation
Mr. James Kelly, American Tower Corporation
Suzanne Toller, Esq., Davis Wright Tremaine LLP
Leslie Vartanian, Verizon Wireless

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January 23, 2008

Via Hand Delivery and E-Mail

Chair Barry Schultz
and Members of the Planning Commission
CITY OF SAN DIEGO
1222 First Avenue, 4th Floor
San Diego, CA 92101

Re: **American Tower Corporation Request for a Conditional Use Permit
and Planned Development Permit for an Existing Wireless Facility at
6770 Aviation Drive (Project No. 92076) ("Aviation")**

Dear Chair Schultz and Members:

At the last hearing on the Aviation wireless facility cell site (September 20, 2007), the Planning Commission directed staff, with the participation of the applicant, American Tower Corporation ("ATC") to develop a master plan for the site that incorporated all three towers at the sites: the ATC tower, the City owned tower and the Sprint tower. ATC has written the Planning Commission two letters detailing its efforts to work with staff on this site. (See November 29, 2007 and January 23, 2008 letters from R. Jystad). The purpose of this letter is to describe Verizon Wireless's recent interaction with staff regarding the Aviation tower. As you know Verizon Wireless owns the Aviation site; ATC manages the site for Verizon Wireless.

I and several other representatives of Verizon Wireless had a meeting on Friday, January 18, 2008 with Bill Anderson, Karen Lynch Ashcroft and Beth Murray. Verizon Wireless had requested the meeting to see if there was a way that we could work cooperatively with staff to address their ongoing concerns about the visual impact of Verizon Wireless's legacy monopole sites, while still leaving the sites in place. Although the primary purpose of the meeting was to discuss broader policy issues and a possible renewal policy, the Aviation site was discussed at some length.

In the course of that discussion, we stated our desire, consistent with the Planning Commission's direction, to work on a master plan with staff for the Aviation site. We also

expressed our ongoing willingness to work with ATC to implement any of the reasonable visual mitigation measures that had been offered for this or other monopole sites including landscaping, painting the tower and/or the installation of a type of banner or other screening device for the antennas.

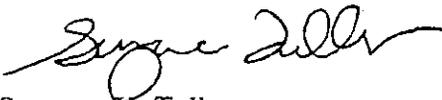
In response staff stated that it was not their obligation to present a master plan for the site; rather that if any master plan was to be proposed it would have to come from Verizon Wireless or ATC (even though the plan would need to address towers that are not owned by Verizon Wireless or ATC). Moreover, staff stated that regardless of what was in the master plan, that the City had no intention of modifying its tower. Finally staff stated that it was their opinion that there were no visual mitigation measures that Verizon Wireless could propose that would sufficiently mitigate the visual impacts from the site. Thus staff held firm to their position that the ATC tower had to be removed and be replaced with a shorter stealth tower.

From Verizon Wireless's standpoint it appears clear that we have reached an impasse with the staff on the Aviation site -- if not on all existing monopole sites. Accordingly VZW urges the Commission to follow through with the actions contemplated in the motion adopted at the end of the last Planning Commission meeting, i.e. to approve a conditional use permit for the existing ATC monopole at Aviation that will permit the monopole to remain in place unless and until the City approves a master plan that incorporates all three existing monopole facilities.

We thank you and the other Commissioners for all of the time and energy you have expended on this application and are hopeful that the hearing tomorrow will lead to a final resolution of this matter for the Commission.

Very truly yours,

Davis Wright Tremain LLP



Suzanne K. Toller

Attorney for Verizon Wireless

- c: William Anderson, Deputy Chief Operating Officer for Land Use and Economic Development
- Karen Lynch Ashcraft, Development Services Department
- Leslie Vartanian, Verizon Wireless
- Robert Jystad, Channel Law Group
- Elizabeth Hill, American Tower Corporation
- Mr. James Kelly, American Tower Corporation

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August 6, 2007

VIA OVERNIGHT DELIVERY

Chairperson Barry Schultz
and Members of the San Diego Planning Commission
City of San Diego
202 C Street, 12th Floor
San Diego, CA 92101

**RE: American Tower Corporation ("ATC") CUP/PTS No. 357727 (Mini Storage);
CUP No. 290030 (Kearny Villa); CUP/PDP No. 296156 (Aviation)**

Dear Chairman Schultz and Commissioners:

I am writing this letter on behalf of American Tower Corporation ("ATC") as a follow up to items continued by the Planning Commission ("Commission") to the August 9th meeting.

Prior to the June 28, 2007, Commission meeting, ATC submitted a letter supporting each of the findings required for a Conditional Use Permit ("CUP") and/or Planned Development Permit ("PDP") for each of the above referenced sites. I will not repeat all that was included in that letter, but have attached copies for your reference.

CUP/PTS No. 357727 (Mini Storage)

At the June 28th Commission meeting, Commissioner Garcia motioned that the item be continued so that ATC could look at landscaping options at this site. ATC submitted a landscape plan proposing that eight (8) 24" box eucalyptus trees, six (6) one gallon *acacia redolins* and four (4) five gallon *photinia fraseri* would be planted at the site. In addition, ATC proposes that the facility be painted an olive green color to blend in with the existing and proposed eucalyptus. As Mr. Kelly stated at the June 28th meeting, since the site is set back from the street, the addition of the proposed landscaping to that which currently exists should be sufficient to cover the public's view of this facility. In her memorandum to the Planning Commission dated August 2, 2007, Karen Lynch-Ashcraft acknowledges that the proposed landscaping will buffer the

public view of the pole from the "properties below and 29th and Ash Streets and Highway 94." Yet, Ms. Lynch-Ashcraft states that this is inadequate because it is her experience that trees used in this type of situation are eventually topped when they begin to interfere with the facility to a point that the trees are unable to remain viable. This statement ignores the fact that the existing eucalyptus has grown to a height that nearly reaches the top of the facility as indicated in the landscape plan submitted to the City (a copy of the landscape plan was attached to Ms. Lynch-Ashcraft's August 2nd memo). Mr. Alexander Hampton, of the City's Development Services Department, stated, prior to having had time to review the submitted landscape plans, a related concern that the trees would be planted too close to the tower which would result in the trees being topped or pruned improperly. As shown in the landscape plans, the proposed eucalyptus trees would not be planted directly adjacent to the tower, but rather are spread out from the fencing surrounding the tower to provide screening over a larger area. Additionally, ATC will work with the City's landscape architect to place the trees so that they provide maximum screening potential. However, ATC would be willing to agree to a condition in the CUP that requires ATC to maintain the landscaping in a manner so as not to risk the viability of the proposed and existing trees and shrubs. *

5th + El Capn
 Morano +
 R. Bernardo

CUP No. 290030 (Kearny Villa)

At the June 28th, Planning Commission meeting, Commissioner Naslund made a motion to continue the item to allow ATC and Staff time to explore the reduction in the overall height of the structure, and the use of a lattice superstructure around the existing pole. As the staff report indicates, ATC has proposed that the entire 120-foot monopole be surrounded by a structure that will envelope the facility. This design proposal is depicted in the plan accompanying the staff memorandum. It is important to note, that an engineering analysis is required to determine if this design plan is feasible. ATC is seeking the Commission's approval of the proposed design before it bears the costs of the analysis. As ATC has communicated to Ms. Lynch-Ashcraft, ATC will agree to design only on condition that the facility is allowed to remain at its existing height and only on condition that the CUP is granted in perpetuity. ATC offers this design voluntarily and in so doing does not concede that the City has the authority to impose a design requirement on the site. Accordingly, ATC does not waive any rights and reserves all rights accordingly.

CUP/PDP No. 296156 (Aviation)

At the June 28th Planning Commission hearing, the Commission voted to continue the hearing on the Aviation application so that a representative from the Mayor's Office or the City's IT&C Department could come before the Commission to explain how the City will surmount the perceived impediments to combining the three sites into a single structure as proposed last year. To that end, ATC reaffirmed its proposal for a single structure.

Rather than respond to the Commission's direction to recommence discussions on a single structure, the staff memorandum argues that the City is "immune from their own land use regulations" and does "not have to comply with their own building and zoning regulations when engaged in traditional government functions." ATC will address this argument in litigation. We

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note, however, that the City's position is compromised by its commercial use of these facilities. *Time on city*
For purposes of the Commission's review, it remains noteworthy that the City is willing to subject ATC and its carrier tenants to burdens allegedly in the public interest that it is unwilling *pete*
to accept itself on the grounds, among others, that its facilities are used for emergency
communications. It should be emphasized that ATC's facilities provide critical emergency public works
communications services as well. As noted in ATC's previous letter, both the state and federal
governments have espoused a policy to transition the nation's current emergency alert system to
a mobile-based alert system.

Significantly, the staff memorandum states that "[i]f funding were available for the City to replace their monopoly, they would more than likely replace it with a lattice tower due to the stringent design constraints placed on them." As previously mentioned, ATC proposed a lattice tower to staff early in the renewal process that would co-locate all antennas onto one structure, but staff rejected this approach because staff "couldn't make the findings to support that." Unfortunately, staff remains resistant to ATC's co-location solution despite the Planning Commission's directive to work with ATC on the matter. On the contrary, staff is recommending *no one is*
that the City maintain its existing monopolies throughout the City and that ATC "add several *making that*
trees to . . . buffer the visual impact of the City monopoly." This recommendation lacks a legal *reasonable*
basis and is devoid of fundamental fairness. *decision*
they're allowed
to do to cause

Conclusion

It is ATC's sincere desire to work with the City and ATC has considered reasonable *city's position*
requests made by the City, as evidenced by the proposed landscape plans and architectural *not as*
designs, in an effort to obtain a renewal/approval of the aforementioned applications. However, *and as*
it is important to note that ATC's decision to pursue a permit through this process, including but *communications*
not limited to making the above proposed changes to the site, is not a waiver of ATC's rights *for the city's*
under federal and state law and should not be construed as an admission. ATC reserves all *other jurisdiction*
rights accordingly. *as well as standard*
Security.

If you have any questions, I can be reached at 310-209-8515.

Sincerely,
Robert Jystad / 8/7/07
Robert Jystad
Attorney for American Tower

Enclosure

cc:

- Christine Fitzgerald, Esq., Chief Deputy City Attorney, City of San Diego
- Elizabeth Hill, Esq., American Tower Corporation
- Mr. Douglas Kearney, American Tower Corporation
- Mr. James Kelly, American Tower Corporation

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Mr. Barry Schultz
August 6, 2007
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Attachments

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June 25, 2007

VIA OVERNIGHT DELIVERY

Planning Commission
City of San Diego
202 C Street, 12th Floor
San Diego, CA 92101

**Re: Appeal of Hearing Officer's Decision; American Tower Corporation ("ATC")
CUP/PTS No. 357727 (Mini Storage)**

Dear Chairman Schultz and Commissioners:

I am writing this letter on behalf of American Tower Corporation ("ATC") which respectfully requests that the City of San Diego's Planning Commission ("Commission") overturn the Hearing Officer's denial of the above referenced Conditional Use Permit ("CUP") and that it grant the CUP. ATC is requesting a Planned Development Permit ("PDP") in the event that the Commission decides such a permit is necessary.

The City Attorney's Office undoubtedly has made the Commission aware that ATC filed suit against the City of San Diego ("City") in federal court on grounds, *inter alia*, that the City's permitting process is unlawful. ATC filed this request for a permit under protest and is pursuing this permit concurrently as it seeks the Court's review of the permitting process. ATC's decision to pursue a permit through this process should not be construed as a waiver of ATC's rights under federal and state law and ATC reserves all rights accordingly.

I. Background

ATC hereby requests that the City of San Diego ("City") permit the continued use of this wireless communications facility ("WCF"), which has been operational for over ten (10) years without creating any adverse impacts on the surrounding areas and that during this period has been continuously serving the City's vital public and private communications needs.

The WCF at 1529 38th Street ("Facility") consists of a 60 foot high monopole and 150 square-foot equipment room is located at 1529 38th Street. The property is zoned IL- 2-1 and is designated for industrial use in the Mid-Cities Community Plan. The Facility currently has one tenant, Sprint Nextel, with Nextel at the top of the pole with nine panel antennas and Sprint at about the 35 foot height with six panel antennas. There are multiple permits issued for various components and to different carriers for this site. The original CUP (94-0330-12) for the monopole was issued to Nextel and permitted up to three omni antennas and 12 panel antennas and a 150 square-foot equipment room and was approved February 1, 1996 by the Planning Commission. Sprint, later was approved for nine panel antennas at approximately the 48 foot height and a 94 square-foot area for the equipment cabinets. This approval was issued administratively to Sprint on February 1, 2000. The property is zoned IL-2-1 and is designated for industrial use in the Mid-Cities Community Plan. Surrounding uses are completely industrial and heavy commercial.

The original 10-year Coastal Development/Conditional Use Permit ("CDP/CUP") was issued on February 1, 1996 and the Facility has continued to exist without controversy since it was first approved. ATC has met with and has maintained contact with the City since May 2005 and expedited its own internal processes in order to be able to file and facilitate the processing of the application in a timely manner consistent with the requests of City Staff.

II. The Commission's Scope of Review is Limited

It should be noted that the Commission's ability to regulate WCFs is restricted by both state and federal law. Specifically, § 253(a) of the Telecommunications Act of 1996 ("Telecom Act") states the following:

"No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

47 U.S.C. 253(a) (2007). The federal courts, including the courts of the Ninth Circuit, have interpreted § 253(a) to strictly limit the authority of municipalities over the installation of WCFs. Specifically, federal courts within the Ninth Circuit have held that California municipalities are prohibited by § 253(a) from adopting and implementing wireless communications ordinances that allow for the exercise of unfettered discretion over decisions to approve, deny or condition permits for the placement of WCFs. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001) (holding that § 253 preemption of local authority is "virtually absolute"); *Sprint Telephony PCS, L.P. v. County of San Diego*, 2007 U.S. App. LEXIS 13811, *50-51 (9th Cir., June 13, 2007) (Denying en banc review and holding that County's ordinance was preempted because permitting structure and design requirements presented barriers to wireless telecommunications); *Quest Communications Inc. v. Berkeley*, 433 F.3d 1253, 1257-58 (9th Cir. 2006) (burdensome ordinance that gives municipality significant discretion to deny telecommunication companies the ability to provide services violates § 253).

A. Cities Do Not Have Authority to Regulate Visual Impact of WCFs

The Commission should be aware that the Ninth Circuit – the jurisdiction of which includes California - has stated that regulations requiring a facility to be appropriately “camouflaged” are **unlawful** pursuant to § 253(a) of the Telecom Act. *Sprint Telephony PCS, L.P. v. County of San Diego*, 2007 U.S. App. LEXIS 13811 (9th Cir., June 13, 2007). Significantly, the Ninth Circuit recently **denied** the County of San Diego’s petition for *en banc* review in this case. In *Sprint*, the court critiqued the County of San Diego’s ordinance as follows:

“The WTO itself explicitly allows the decision maker to determine whether a facility is appropriately “camouflaged,” “consistent with community character,” and designed to have minimum “visual impact.” ... We conclude that the WTO imposes a permitting structure and design requirements that present barriers to wireless telecommunications within the County, and is therefore preempted by § 253(a).” (emphasis added).

2007 U.S. App. LEXIS 13811, at *43-44. The City may not impose unreasonable permitting burdens on ATC. *Id.* City regulations that purport to regulate the “visual impact” of wireless facilities are unreasonable and run afoul of federal law.

B. The Hearing Officer’s Findings Are Not Supported By Substantial Evidence; the Facility is an Appropriate Use and Complies with Regulations to the Maximum Extent Feasible

Even if the City could require ATC to remove and replace the existing Facility, such a decision must be supported by substantial evidence. Section 332(c)(7)(B)(iii) of the Telecom Act states the following: “[A]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by **substantial evidence** contained in a written record” 47 U.S.C. § 332(c)(7)(B)(iii). For this reason, zoning boards cannot rely on conclusory or generalized concerns. *Ill. RSA No. 3 v. County of Peoria*, 963 F. Supp. 732, 745 (C.D. Ill. 1997) (“generalized concerns do not constitute substantial evidence [citation omitted]”). Dozens of cases have analyzed this restriction and there is no dispute that generalized concerns, speculation and conjecture do not constitute substantial evidence. *Prime Co Pers. Communs. v. City of Mequon*, 352 F.3d 1147, 1150 (7th Cir. 2003) (“It is not sufficient evidence, as the cases make clear by saying that “generalized” aesthetic concerns do not justify the denial of a permit”); *New Par v. City of Saginaw*, 301 F.3d 390, 399 (6th Cir. 2002) (“If, however, the concerns expressed by the community are objectively unreasonable, such as concerns based upon conjecture or speculation, then they lack probative value and will not amount to substantial evidence”). Furthermore, “in applying the substantial evidence standard, the court applies common sense and need not accept as substantial evidence impossible, incredible, unfeasible, or implausible testimony.” *AT&T Wireless Servs. of Cal., LLC, v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1159 (S.D. Cal. 2003) citing *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158, 1164 (S.D. Cal. 2000) (internal quotations omitted).

The record in this case clearly indicates that ATC’s Facility is an appropriate use and consistent with the surrounding environment. See Section III discussion below. This said, ATC

has proposed to add landscaping to the Facility as a demonstration of good faith to further enhance the Facility. Landscape Plans will be forthcoming. The evidence strongly supports the conclusion that the Facility meets all the requirements of the City's Land Development Code.

Further, Section 332 of the Telecom Act sets additional limits on local zoning authority over the placement, construction and modification of wireless communications facilities. Those limits are as follows: (1) "The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not unreasonably discriminate among providers of functionally equivalent services and shall not prohibit or have the effect of prohibiting the provision of personal wireless services" § 332(c)(7)(B)(i); (2) "A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request" § 332(c)(7)(B)(ii); (3) "Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record" § 332(c)(7)(B)(iii); and (4) "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions" § 332(c)(7)(B)(iv).

Thus, the City may not unreasonably discriminate in any decision to deny a permit for a WCF. It also may not deny a permit for a WCF if that denial would constitute actual or effective prohibition of services. Where there is a "significant gap" in a provider's service and "the manner in which it proposes to fill the significant gap in service is the *least intrusive on the values that the denial sought to serve* a local jurisdiction's denial would constitute effective prohibition. *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 734 (9th Cir. 2005) (internal citations omitted.).

C. California Has Adopted a Clear State Policy Promoting the Deployment of Wireless Technology and Co-Location Facilities

The State of California has adopted a policy promoting the wide and efficient deployment of wireless technology. For example, Public Utilities Code § 709(c),

The Legislature hereby finds and declares that the policies for telecommunications in California are as follows:

(a) To continue our universal service commitment by assuring the continued affordability and widespread availability of high-quality telecommunications services to all Californians.

(c) To encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services.

(d) To assist in bridging the "digital divide" by encouraging expanded access to

state-of-the-art technologies for rural, inner-city, low-income, and disabled Californians.

(e) To promote economic growth, job creation, and the substantial social benefits that will result from the rapid implementation of advanced information and communications technologies by adequate long-term investment in the necessary infrastructure.

(f) To promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct.

(g) To remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice.

...

In this case, the forced removal of the Facility would have a severe impact on the ability of customer-carriers to provide affordable and widely available wireless services in the affected areas. Costly visual mitigation measures will be born by the citizens of the City in the form of higher bills and consequently fewer individuals will be able to afford wireless services. This, in turn, will affect the state of emergency communications for the State of California. Both the federal and state governments are in the process of overhauling the broadcast-based Emergency Alert System ("EAS") to incorporate wireless devices. In October 2006, Congress passed the Warning, Alert, and Response Network Act. The Act calls for the development of a nationwide wireless alert platform that can be used to transmit geographically targeted emergency messages to the public. For its part, California has proposed to jump start the federal government's emergency initiative, announcing plans to develop and launch a statewide wireless alert system within 12 to 14 months.¹ For such services to function, the continued operation of wireless infrastructure (such as the Facility) is critical. The forced removal of the Facility will undermine these efforts and subject affected residents to substandard emergency services. Also see discussion below pertaining to finding number four for a PDP.

Further, California's newly adopted state co-location law, referred to as "SB 1627," establishes a clear state policy favoring wireless facilities that are potential co-location candidates. See Cal. Gov. Code § 65850.6(a) (stating a "collocation facility shall be a permitted use not subject to a city or county discretionary permit" provided the facility complies with are lawfully required conditions). The approval of the application currently before the Commission will conform to the spirit and purpose of SB 1627. Also see discussion below addressing finding number five for a PDP regarding co-location opportunities for the Facility.

III. The Facility Meets All the Requirements of the San Diego Land Development Code for Issuance of the Requested Permits

As demonstrated below, the Facility meets all of the City's requirements for approval of the requested permit as outlined in the City's Land Development Code. The Hearing Officer erred in not finding that the Facility complies with findings three and four for a CUP and/or the findings necessary for a PDP.

¹ Kapko, *California plans statewide wireless alert system*, RCR Wireless News (May 21, 2007) p. 14.

A. Findings Required for a Conditional Use Permit

Contrary to staff's assertions and the Hearing Officer's conclusions, the City can make the findings necessary to approve the requested permit for this Facility at its present height, location, and configuration.

Section 126.0305 of the Land Development Code sets forth four findings for issuance of a CUP, all of which can be made with respect to this project:

1. The proposed development will not adversely affect the applicable land use plan.

Staff and the Hearing Officer correctly acknowledged that the Facility would not adversely affect the applicable land use plan. The Facility has existed on this site for over ten (10) years without controversy and without creating any adverse impacts on the surrounding areas, land uses or residents. The location, size, design, and operating characteristics of this Facility are such that it does not create noise, traffic, emissions, fumes, smoke, odors, dust or other conditions that may be harmful, dangerous, objectionable, detrimental or incompatible with other-permitted uses in the vicinity. Indeed, in most respects it is among the least impactful of all land uses, and is certainly at or below the level of impacts created by other public utility facilities. The following supports ATC's position that the Facility does not adversely affect the applicable land use plan.

- Area zoned IL 2-1 Industrial-Light. Pursuant to Table 131-06B of the San Diego Municipal Code, telecommunication facilities are clearly not prohibited in this zone.
- Neither the City's General Plan nor the Mid-Cities Community Plan prohibits WCFs as a specific land use.
- The facility, as it exists, complies with the development regulations for an industrial.
- South of the property are industrial uses, to the west is industrial and single unit residential, to the north is an elementary school and single unit residential and to the east it is vacant with industrial uses.
- The equipment associated with the facility operates virtually noise-free.
- The equipment does not emit fumes, smoke, dust, or odors that could be considered objectionable.
- The communications facility is unmanned and requires only periodic maintenance.
- Utility facilities for electricity, natural gas and telecommunications are located in this zone.

2. The proposed development will not be detrimental to the public health, safety, and welfare.

As acknowledged by staff and the Hearing Officer, the Facility has not created conditions or circumstances contrary to the public health, safety, and general welfare in that:

- The Facility operates in full compliance with the regulations and licensing requirements of the FCC, FAA, CPUC and other applicable federal, state and local regulations designed to address health and safety concerns.

- The Facility was professionally designed and constructed, and continues to be inspected at regular intervals to insure its continuing safety.
- The Facility has operated, for many years without incident, controversy, or complaint.
- The Facility recently received the unanimous endorsement of the Community Planning Group for its locations.
- Given the benefits provided by the wireless systems served by the Facility as outlined below, the insignificant tradeoffs necessary to ensure the reliable availability of these benefits cannot be said to have created circumstances that are contrary to the public welfare.

3. *The proposed development will comply to the maximum extent feasible with the regulations of the Land Development Code;*

The Facility complies with the applicable regulations of the Land Development Code. The staff report prepared in connection this hearing states that each of ATC's projects require a CUP "due to the fact that it does not comply with the communication antenna regulations (Section 141.0405 of the LDC)." However, the Facility does, in fact, comply with § 141.0405. The staff and the Hearing Officer simply failed to properly apply that section as indicated below.

Subsection (a) of § 141.0405 is merely a definitional provision that delineates the scope of the section's coverage and spells out the difference between minor telecommunication facilities, major telecommunication facilities, and satellite antennas. It contains no requirements.

Subsection (b) contains the "General Rules for Telecommunication Facilities." Subsection (b)(1) requires facilities to comply with Federal standards for radio frequency radiation. ATC has previously submitted evidence establishing that the Facility meets this requirement. Subsection (b)(2) relates to routine maintenance and inspection located on residentially zoned premises and is thus irrelevant to this Facility as it is in an Industrial Zone. Subsections (b)(3) and (4) relate to antennas and associated equipment located in the public right of way and thus are inapplicable to the Facility.

Section 141.0405(c) relates to temporary facilities and is also inapplicable.

Subsection (d) relates to facilities that are required to obtain encroachment authorization to locate on city-owned dedicated or designated parkland or open space areas and is inapplicable to this Facility.

Subsection (e) sets forth the rules for minor telecommunication facilities. It is ATC's position that the Facility falls within the definition of a minor telecommunication facility set forth in § 141.0405(a)(1) because it is an antenna facility used for wireless telephone services that complies with all development regulations of the underlying zone (as acknowledged by staff) and meets the criteria in § 141.0405(e)(1). The Facility meets the requirements of § 141.0405(e)(1) because it is partly concealed from public view and integrated into the architecture and surrounding environment through enhancements that complement the scale, texture, color, and style of the surrounding architecture and environment. The area surrounding

the Facility is completely industrial and heavy commercial.

Subsection (e)(2) is an alternative to subsection (e)(1) that is inapplicable.

The Facility does not violate any of the prohibitions in subsection (e)(3) in that it is not (A) on premises that are developed with residential uses in residential zones, (B) on vacant premises zoned for residential development, (C) on premises that have been designated as historical resources, (D) on premises that have been designated or mapped as containing sensitive resources, (E) on premises within the MHPA, or (F) on premises that are leased for billboard use.

Even if the Facility is a major telecommunication facility, the Facility would still be in compliance with the provisions of § 141.0405. It would not violate any of the prohibitions in subsection (f)(1) since it would not be (A) on premises containing designated historical resources, (B) within viewsheds of designated and recommended State Scenic Highways and City Scenic Routes, (C) within ½ mile of another major telecommunication facility (and in any case it is partly concealed from public view and integrated into the architecture and surrounding environment through enhancements that complement the scale, texture, color and style of the surrounding architecture and environment as indicated above), or (D) within the Coastal Overlay Zone, on premises within a MHPA and/or containing steep hillsides with sensitive biological resources, or within public view corridors or view sheds identified in applicable land use plans.

The Facility also is in compliance with subsection (f)(2) in that it is designed to be minimally visible through the use of architecture, landscape architecture, and siting solutions. As discussed above, the City has no authority to base any part of its decision regarding this permit on the visual impact of the Facility. It has been sited in an industrial area where it is surrounded by industrial and heavy commercial buildings. The existing land uses must be considered when deciding whether or not the Facility has a "significant visual impact." The record demonstrates that the Facility is both a compatible use and minimally visible under the circumstances. The alternative suggested by staff, namely a new structure that would enclose the facility would, by definition, be larger and thus not "minimally visible."

Finally, the Facility does use the smallest and least visually intrusive antennas and components that meet the requirements of the Facility.

The only portion of §141.0405 that has not been addressed in the above discussion is subsection (g), which deals in its entirety with satellite antennas and is thus irrelevant.

Therefore, the Facility complies with the regulations in the Land Development Code to the maximum extent feasible. There is no basis for the staff's statements or the Hearing Officer's conclusion that he could not make this finding. The only evidence even referred to by the Hearing Officer in his decision was that "there's no additional screening, landscaping." It is not at all clear which site he was referring to, but there is nothing in the Land Development Code that requires "additional screening, landscaping" when the Facility already employs adequate screening, landscaping and other features that make it minimally visible and complement the scale, texture, color, and style of the surrounding architecture and environment. This is a

particularly egregious error tantamount to an abuse of discretion when coupled with a refusal to take into account the willingness, repeatedly emphasized by American Tower, to provide additional screening and landscaping where feasible. Landscape Plans will be forthcoming. To the extent the staff and the Hearing Officer treated the Facility as a major telecommunication facility, they simply failed to apply the proper standards at all.

Furthermore, the Facility was originally permitted with a CDP/CUP in its current location and at its current height. ATC is proposing no modifications to the Facility that would alter the findings that supported the original permits.

The Facility does not pose a "significant visual impact" to the surrounding community and complies with the City's Communication Antennas regulations. As discussed above, the City has no authority to base any part of its decision regarding this permit on the visual impact of the Facility. That said, the Facility is in compliance with subsection (f)(2) in that it is designed to be minimally visible through the use of architecture, landscape architecture, and siting solutions. The Facility is adjacent to a major transportation corridor. The alternative suggested by staff, namely a new structure that would enclose the facility would, by definition, be larger and thus not "minimally" visible. *Also see* discussion above.

Staff maintains that the expirations were inserted into the original CDP/CUP "to coincide with the anticipated changes in technology so that the facilities could be redesigned at that time." ATC does not concede that this assertion is true. Even if it were true, no evidence has been introduced of any changes in technology that obviate the need for the Facility, such as, the availability of smaller antennas that could meet the requirements of the sites.

This project involves no change to the familiar visual environment in this largely industrial and commercial area and nearby major highways. Given the complete absence of problems or complaints with the projects over the past ten (10) years, it represents a solution to the City's need to provide wireless communication service and has proven to be effective in avoiding any significant visual or other negative impacts. To abandon such a proven solution to be replaced with an unfamiliar and necessarily bulkier structure, which, given the setting, with which the existing structure currently integrates quite appropriately, would not be consistent with either the spirit or the letter of the City's Code. Staff's recommendation and the action of the Hearing Officer could actually have a much greater impact on the neighborhood, as evidenced by the fact that the approach recommended by the staff and required by the Hearing Officer would subject at the site to a coastal development regulation review process which is not implicated by the project for which the applicant has applied.

The Hearing Officer thus erred in failing to find that the Facility complies, to the maximum extent feasible, with the applicable regulations of the Land Development Code for the above-mentioned reasons.

4. *The proposed use is appropriate at the proposed location.*

As to the fourth finding, namely that the proposed use is appropriate at the proposed location, the Hearing Officer did not even attempt an analysis, but instead merely rendered a

summary conclusion without any support at all. First, the City has already determined that the Facility was appropriate at this location by granting the original CUP. Nothing has been entered into the record that suggests changes to the area now render the location inappropriate. In addition, the location is a location where wireless signal coverage is needed to provide service to the adjacent highways and thoroughfares and to the surrounding neighborhoods. Unlike other land uses, which can be spatially determined through the General Plan or other land use plans, the location of wireless telecommunications facilities is based on technical requirements which include service area, geographical elevations, alignment with neighboring sites, customer demand components, and other key criteria that include, but are not limited to: accessibility, utility connections, liability and risk assessment, site acquisition, maintenance, and construction costs. Placement within the urban geography is dependent on these requirements. WCFs have been located adjacent to and within all major land use categories including residential, commercial, industrial, open space, etc. proving to be not only appropriate but necessary in all such locations.

B. Findings Required for a Planned Development Permit

Even if the Facility does not comply, to the maximum extent feasible, with the applicable regulations of the Land Development Code, the project is still permitted under the Code with a Planned Development Permit. Further, the Facility meets the PDP requirements to deviate from the new setback requirement for this property. The purpose of such a permit, as stated in §126.0601 of the Land Development Code is to allow "applicants greater flexibility from the strict application of the regulations" and to "encourage imaginative and innovative planning." Under §126.0602(b)(1), a "[d]evelopment that does not comply with all base zone regulations or all development regulations ..." may be requested with a PDP. The intent of the PDP regulations, according to §143.0401, is "to accommodate, to the greatest extent possible, an equitable balance of development types, intensities, styles, site constraints, project amenities, public improvements, and community and City benefits." Thus, even if the findings for a CUP could not be made, the City must also consider the applicability, as requested by ATC, of a Planned Development Permit. Unfortunately, both staff and the Hearing Officer simply ignored the requests for PDPs in ATC's applications. The five findings for a PDP should also be made in the affirmative with respect to the Facility:

1. The proposed development will not adversely affect the applicable land use plan.

This is the identical finding as finding number one for a CUP, and ATC therefore incorporates by reference the discussion above with respect to such finding.

2. The proposed development will not be detrimental to the public health safety and welfare.

This is the identical finding as finding number two for a CUP, and ATC therefore incorporates by reference the discussion above with respect to such finding.

3. The proposed development will comply with the applicable regulations of the Land Development Code.

This is the identical finding as finding number three for a CUP, and ATC therefore incorporates by reference the discussion above with respect to such finding.

4. *The proposed development, when considered as a whole, will be beneficial to the community.*

The Facility has benefited, and will continue to benefit the community in numerous ways which include the following:

- It will continue to allow commuters, businesses, and residents within the coverage area wireless access to the rapidly expanding communication infrastructure and to voice and data transmission services not currently available.
- The existing Facility provides co-location possibilities, reducing the need for other wireless facilities in the area.
- Wireless communications systems supported by the Facility services a critical need in the event of public emergency, including traffic accidents and other freeway incidents. In a recent survey by the Pew Internet & American Life Project, of the 66% of American adults who have cell phones, nearly 74% of those cell phone owners say they have used their mobile phone in an emergency and gained valuable help.² The media has included many recent examples of the critical role wireless telephony has played in recovering kidnapping victims.
- Wireless systems are an economical alternative to wired networks. According to recent surveys, 11% of American adults rely solely on cell phones³ with an additional 23% who currently have a landline phone indicating they were very likely or somewhat likely to convert to being only cell phone users.⁴ Without the reliable wireless coverage provided by this Facility, in addition to the normal inconveniences incident to an absence of telephone service in any location, such residents would be unable to call for police, fire or ambulance services in the event of an emergency at home, nor would school officials be able to contact them in the event of emergencies affecting their children at school. Also, see discussion above in Section II C regarding the role of wireless in emergency services.

The Hearing Officer erred in not finding that the Facility, when considered as a whole, will be beneficial to the community. These startling statistics further demonstrate the benefit, if not the need, of the local residents and businesses having adequate and reliable cell phone service throughout the City.

5. *Any proposed deviations pursuant to § 126.0602(b)(1) are appropriate for this location and will result in a more desirable project than would be achieved if designed in strict conformance with the development regulations of the applicable zone.*

- The Facility, at its current height, reduces the need for other wireless facilities in the area by providing the opportunity for co-location in conformance with State policy as discussed above.

² Pew Internet & American Life Project, "Pew Internet Project Data Memo" (April 2006)

³ Hill, *Survey: 11% of callers use only cellphones*, RCR Wireless News (June 8, 2007)

⁴ Pew Internet & American Life Project, "Pew Internet Project Data Memo" (April 2006)

- Allowing the Facility to continue to serve the community in its current configuration avoids expensive construction, the costs of which would have to be ultimately passed on to wireless subscribers making service less affordable and in some cases unaffordable, for those most in need of the cost savings wireless service provides. As explained above, this is contrary to the express State policies in favor of "assuring the continued affordability and widespread availability of high-quality telecommunications services to all Californians," "encourage[ing] the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services," "bridging the "digital divide" by encouraging expanded access to state-of-the-art technologies for rural, inner-city, low-income, and disabled Californians," and many of the other State policies outlined in Section 709 of the Public Utilities Code.⁵
- Staff has consistently implied that a reduction in the Facility's height would be required to avoid a staff-level, subjective determination of "significant visual impact." However, the applicable code provisions do *not* mandate a reduction in the Facility's height. That said, a reduction in the height of the Facility would seriously impact the quality and scope of coverage provided by ATC's carrier customers from these sites. There is a necessary and logical interrelationship between each proposed site. Eliminating or relocating a single cell site can lead to gaps in the system and prohibit the carrier from providing service to customers in a defined coverage area. Further, the elimination or relocation of a cell site will most often have a "domino" effect on other cell site locations and necessitate significant design changes or modifications to the network. As acknowledged by staff and the Hearing Officer, ATC's facilities are a part of the "backbone" of the wireless network in San Diego. The project therefore is more desirable in its present configuration than it would be if the City strictly enforced the development regulations that would limit the height of the Facilities. Additionally, any reduction in height would severely limit, if not extinguish, any possibility of additional co-location facilities and therefore result in the need for additional poles or towers in the immediate vicinity.

C. New Coastal Development Permits Not Required

As acknowledged by staff and the Hearing Officer, new Coastal Development Permits pursuant to San Diego Mun. Code § 126.0704 are not required. The Facility is an existing structure, and ATC is proposing no modifications.

IV. Conclusion

Accordingly, there is no lawful basis for the Planning Commission to uphold the Hearing Officer's decision to deny the CUP for ATC's Facility. ATC respectfully requests that the Planning Commission approve the CUP and/or PDP.

ATC provides the information contained herein without waiving its rights under applicable federal and state laws. ATC does not concede that the City has the authority to deny or refuse to renew ATC's applications on the grounds that such findings cannot be made or do

⁵ Cal. Pub. Utils. Code § 709.

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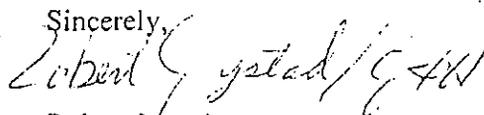
Letter to: City of San Diego Planning Commission re: Mini Storage
June 25, 2007
Page 13

not support a grant of approval by the City. ATC offers the above information to facilitate the City's review of these applications, but in doing so reserves all rights and does not waive any right to any claim or defense, including federal preemption.

Moreover, the failure to include additional findings or make additional legal or technical arguments in support of these facilities shall not be construed as an admission and shall not be construed as a waiver of any findings and arguments. ATC hereby reserves the right to supplement this letter with additional evidence to be presented at or prior to the hearing in this appeal.

I can be reached at 310-209-8515 should you have any questions.

Sincerely,



Robert Jystad
*Attorney for American Tower
Corporation*

cc: Christine, Fitzgerald, Chief Deputy City Attorney, City of San Diego
Elizabeth Hill, Esq., American Tower Corporation
Mr. James Kelly, American Tower Corporation
Mr. Douglas Kearney, American Tower Corporation

**American Tower Corporation • San Diego, California
Potential Impacts of Reduced Tower Height**

Statement of Hammett & Edison, Inc., Consulting Engineers

The firm of Hammett & Edison, Inc., Consulting Engineers, has been retained on behalf of American Tower Corporation to prepare an engineering analysis of the potential effects of reducing antenna structure heights from 60–140 feet to 35 feet.

Summary

Reductions in antenna structure height typically result in reductions in coverage and decreased opportunities for collocation of wireless base station facilities. The result of these factors is likely to be decreased service quality for subscribers in the short-term, and require construction of additional base station facilities in the longer term.

As an example, reduction of a 105-foot structure to 35 feet may result in reduction by half in coverage area and a significantly reduced ability to collocate wireless carriers. The number of additional sites required to offset these factors would vary, but could be significant.

Structure Height Directly Affects Coverage Area

Radio signals transmitted from a base station (*i.e.*, a cell site) are not only subject to the same significant propagation-path losses that are encountered in other types of atmospheric propagation (*i.e.*, inverse-distance losses) but are also subject to the path-loss effects of terrain. While terrain losses are greatly affected by the general topography of an area, the simplest case to analyze is one of smooth terrain. The low subscriber antenna height contributes to this additional propagation-path loss by reducing the "radio horizon" within which it can communicate. The small distance to the radio horizon associated with a portable or mobile subscriber must be compensated for by a larger horizon distance for the base station, in order to allow communication over the same distance.

The maximum range for a mobile-radio propagation path depends upon the heights of the base and mobile antennas. Transmissions at cellular and PCS frequencies (850 and 1,900 MHz) are "line of sight," meaning that they generally do not extend beyond the horizon. Since the height of the mobile station antenna, h_M , is usually fixed at 4–6 feet above ground, the maximum range is completely determined by the height of the base station antenna, h_B . In English units (miles and feet), the distance to the horizon for the base station antenna, d_H , is approximately:¹

$$d_H \approx \sqrt{2h_B} \quad (1)$$

¹ W.C.Y. Lee, Mobile Communications Engineering, (McGraw-Hill, 1997), p. 102.

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Potential Impacts of Reduced Tower Height

The diagram below illustrates the base-mobile propagation scenario, where d_B and d_M are the distances to the radio horizon for the base and mobile antennas, respectively.

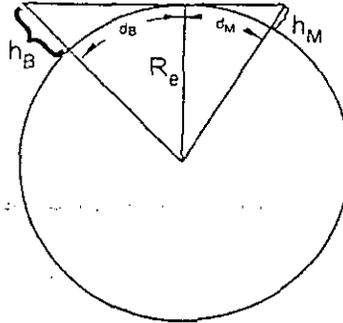


Figure 1. Geometry of propagation over curved, smooth Earth.

Thus, the maximum distance covered by a base station is proportional to the square root of the antenna height of the base station. Halving the antenna height reduces the coverage distance by 1.414 times. Since the coverage *area* is proportional to the square of this distance, halving the antenna height also halves the coverage area.

For example, if the height of a base station antenna is reduced from 105 feet to 35 feet, the maximum coverage area is reduced from 660 square miles to 220 square miles. Often, sites are designed to cover less than this maximum range, in order to provide useful signal level and achieve practical call volumes, but the reduction in coverage with antenna height remains similarly significant.

The Federal Communications Commission (FCC) offers an empirically-derived formula for determining the maximum distance served by a base station,² namely:

$$d = 2.531 \times h_B^{0.34} \times p^{0.17} \quad (2)$$

where d is the maximum coverage distance in kilometers, p is the effective radiated power of the base station in watts, and h_B is the effective height of the base station antenna in meters. Using this relation,³ the coverage distance resulting from antennas with heights of 105 and 35 feet (32.0 and 10.7 meters) would be 18 to 12.4 kilometers (11.2 to 7.7 miles), respectively. Assuming a circular coverage area about the base station, the coverage area would be reduced from 1,017 to 482 square kilometers (393 to 186 square miles), a reduction of slightly greater than one-half. Thus, the empirical FCC method provides results that are nearly identical to the theoretical.

² 47 CFR §22.911(a)(1)

³ The ERP is taken to be 100 watts per channel, a typical value for cell sites.

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Potential Impacts of Reduced Tower Height

Structure Height Directly Affects the Ability to Collocate

Collocation by several wireless carriers on a particular structure is encouraged by the City of San Diego⁴ and by many other jurisdictions, because that minimizes the number of individual sites that must be developed to cover a geographic area. Wireless carriers, especially those using different technologies and frequencies, generally cannot share antennas, so each carrier installs its own antenna array, with some vertical spacing required between the arrays. Some minimum inter-antenna spacing is required in order to mitigate the potential for inter-system interference. Most carriers recommend a "bottom to top" separation of 15 feet,⁵ although lesser separation can sometimes be accommodated, based upon the results of a detailed interference analysis.

For typical four-foot panel antennas, the 15-foot "bottom to top" separation requirement means that the effective (center) height of each carrier's antennas must be separated by 19 feet. Assuming a structure having an overall height of 105 feet, the uppermost antenna array would be at an effective height of 103 feet, the next antenna array would be at an effective height of 84 feet, and the third array would be at 65 feet. Of course, the maximum coverage areas of the lower antenna arrays would be less than the upper one. In contrast, for a 35-foot structure, the effective height of the uppermost antennas would be at 33 feet, the next array would be at 14 feet, and collocation of a third wireless carrier would not be possible with the standard antenna separation.

The impact of reduced structure height on lower-placed carrier antennas is also disproportionate. For example, if the structure height is decreased from 105 to 35 feet, corresponding to effective antenna heights of 84 and 14 feet for the second carrier (the middle set of antennas on the 105-foot structure), the coverage area would decrease by a factor of six times (rather than a reduction of two times for the upper antenna array).

Decreased Structure Height Increases Number of Sites Required

Because of the reduction in maximum coverage distance, a reduction in structure height will likely create coverage gaps in a mature wireless system. Because the system is mature, the locations of the neighboring sites are fixed, and many of the gaps can be filled only by the addition of new sites. It is generally not practical or even possible to relocate the existing sites to "fill in" the coverage gaps, because those existing sites are "locked-in" by long-term leases. While some reconfiguration of existing sites can be expected to fill in some of the coverage gaps resulting from a lower structure height, mature wireless systems often already operate near peak call capacity. This means that, during peak usage

⁴ See San Diego Municipal Code, Section 141.0405(e)(2).

⁵ Mawrey, Robert, "Radio Frequency Interference and Antenna Sites," (Unisite: 1998)

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Potential Impacts of Reduced Tower Height

periods (often, commuting hours), some subscribers will be unable to place or receive calls, because the capacity of the site has been reached.

Any increase in the coverage area of such a "capacity-limited" site would increase the number of so-called "blocked calls," resulting in lower quality of service to the public. Because the amount of frequency spectrum available to each wireless carrier is finite, it is generally not possible simply to add additional capacity to an existing site in a mature system. To achieve greater call-handling capacity in a particular area may require the decommissioning of one site, in favor of two or more sites, which together cover the same area as the original site – a process called "cell splitting."



Robert D. Weller

Robert D. Weller, P.E.

June 25, 2007

000329

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September 19, 2007

Chair Barry Schultz
and Members of the Planning Commission
CITY OF SAN DIEGO
1222 First Avenue, 4th Floor
San Diego, CA 92101

Re: American Tower – Aviation, Project Number 92076

Dear Chair Schultz and Members:

The purpose of this correspondence is to respond to the City of San Diego Memorandum from Karen Lynch-Ashcraft of the Department of Development Services (“DSD”) to the Planning Commission dated September 14, 2007 regarding the above-identified project known as Aviation (“Memorandum”). The letter is not exhaustive and ATC reserves the right to supplement its response.

I. City's Failure to Meet with American Tower

As you now know, in the interim between our last meeting on August 9 and this continued hearing, the City elected not to meet with ATC to discuss a collocation proposal for Aviation. The Commission's request to the City to hold such a meeting was unambiguous and for that reason we made several efforts to contact staff to set up the meeting. The City's failure to hold this meeting and, instead to discuss the matter internally, led to a number of unfortunate conclusions.

For example, the Memorandum seems to suggest that the City would bear the cost of a single support structure. To the contrary, the City was adamant at ATC's prior meetings that it would not bear any cost associated with consolidation and ATC nevertheless volunteered to take the lead. *See* Declaration of Terri Beck, attached as Exhibit 1; Declaration of James Kelly, attached as Exhibit 2. The Memorandum suggests that the staff “cautioned” ATC that the facility would need to meet the City's new Codes, but it does not report that the lattice design was discussed extensively among all parties before ATC submitted drawings and the City never objected to a lattice tower discussion let alone cautioned against it. The Memorandum suggests that ATC proposed a 180-foot tower out of whole cloth, but the design was in direct response to a site visit and communications with City representatives of the Information Technology and Communications Department (“ITCD”). The Memorandum also neglects to

report that the top 40 feet of the tower proposed by ATC was requested by the City for its own antennas. See American Tower Drawings attached as Exhibit 3. Finally, the Memorandum reports that ITCD has "separation" concerns but, in the absence of a meeting, ATC was not allowed to discuss those concerns and suggest alternatives that address those concerns and allow for consolidation.

II. The City's Legal Analysis Re: Immunity from Zoning

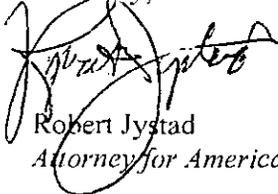
ATC has not seen the City's legal analysis, but it is not contending that the City is not exempt from its own zoning laws in the ordinary course of events. ATC is arguing that the City cannot use its zoning laws to impair a private competitor if the City has elected to compete directly with that private competitor. "The scope of the relevant inquiry is defined by the particular activities in question." See *Bame v. City of Del Mar* (2001) 86 Cal. App. 4th 1346, 1356 ("While the distinction between governmental and proprietary activity is no longer applicable to determine governmental tort liability, it remains viable in the context of encroachment of municipal regulations").

But even if the City has a degree of immunity from its own laws so as to support actions such as imposing unique and highly restrictive zoning requirements on competitors, it cannot transfer that immunity to its private partners acting in their own private capacity. "In short, although we still conclude that the state is immune from local building and zoning ordinances even when it acts in a proprietary capacity on its own land, we reject the conclusion that section 53090 exempts private parties with respect to their private pursuits merely because the state happens to be their landlord. The latter conclusion is not supported by any statutory or case law in California of which we are aware." 68 Op. Atty Gen. Cal. 114, at *14 (1985). The City may be immune from its own zoning laws when it constructs monopolies that arguably do not comply with the zoning code, but its lessees are not likewise immune.

However the legal arguments play out, the situation is patently unfair. The City claims an inability to address the visual impacts of its own facilities at Aviation because the City wants to retain the height of its antennas. How is it possible that the City would ignore the same concerns of ATC and its tenants?

ATC requests that the Planning Commission continue this item again and instruct the DSD to hold meetings with ATC and affected carriers to determine the true viability of a single structure or consolidated solution to the existing structures at Aviation. In the alternative, ATC request that the Commission grant ATC's appeal and find that the Hearing Officer's determination is not supported by the evidence and grant ATC's request for a CUP/PDP.

Sincerely,



Robert Jystad
Attorney for American Tower Corporation

- c: Members of the Planning Commission, City of San Diego
- Terri Beck, American Tower Corporation
- James Kelly, American Tower Corporation

attachments

000331

Exhibit 1

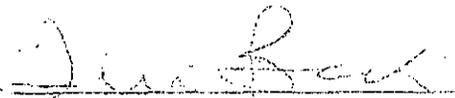
DECLARATION OF TERRI BECK

I, Terri Beck, hereby declare and attest as follows:

1. I am over the age of eighteen, suffer no legal disabilities, have personal knowledge of the facts set forth below, and am competent to testify.
2. I am Area Vice President – West for American Tower Corporation, a Delaware corporation (“ATC”), with offices located at 2201 Dupont Drive, Suite 340, Irvine, CA 92612.
3. ATC is a telecommunications company that owns and manages communications towers, in-building communication systems and roof-top communication sites.
4. ATC manages a 130-foot Verizon-owned monopole located on a hilltop in the City of San Diego (“City”) at 6770 Aviation Boulevard, San Diego, CA 92114 (“Aviation”).
5. Two other monopoles occupy the same hilltop location, one of which is 105 feet tall and owned by the City and another of which is 90 feet tall and owned by Sprint Nextel.
6. On or about February 28, 2006, I attended a meeting in the City with, among others, Natalie De Frietas and Karen Lynch-Ashcraft of the City’s Development Services Department, along with representatives of the City’s Real Estate Assets Department, the City’s Information Technology and Communications Department (“ITC”), the Water Department and several wireless carriers including Sprint Nextel and T-Mobile.
7. The purpose of the February 28 meeting was to discuss the possibility of removing the three existing monopoles and replacing those monopoles with a single antenna structure capable of holding all existing antennas, and some proposed antennas, at acceptable heights.
8. At that meeting, the ITC expressed a willingness to investigate the possibility of the collocation of its communication antennas on a single lattice tower. The ITC proposed a number of conditions to collocation including a need to increase the height of its antennas to 110 feet.
9. The ITC expressed no willingness to construct the new lattice tower or to pay for the new tower, and took the position that the City should not bear the cost of the new tower.
10. The ITC stated that Cricket had expressed an interest in collocating on the City’s tower and indicated that it would contact Cricket to confer with Cricket regarding Cricket’s ability to be collocated on a single tower.

11. Sprint Nextel agreed that it could collocate its antennas on a single lattice tower, so long as the tower met Sprint Nextel's minimum height requirements for transmitting antennas.
12. The City inquired as to which company would be willing to determine whether a single lattice tower could hold all radio and microwave antennas from the three monopoles and if so, calculate the engineering specifications for the new tower. ATC volunteered to conduct that analysis.
13. The City also asked whether or not ATC would be open to constructing a new lattice tower and ATC told the group that something could be worked out, pending completion of the engineering analysis.
14. Karen Lynch Ashcraft asked ATC whether or not it would be possible to develop a stealth site and ATC responded that it may be. However, at no point did the City, through Ms. Lynch-Ashcraft or anyone else representing the City, require that ATC analyze any other type of structure than a lattice tower.
15. Moreover, at no point did Ms. Lynch-Ashcraft caution the group that the solution would have to comply with the Communication antenna regulations requiring it to be designed to be minimally visible through the use of architecture, landscape architecture and siting solutions" as alleged in Ms. Lynch-Ashcraft's Memorandum to the Planning Commission dated September 14, 2007.
16. ATC produced to the City its engineering specifications along with a drawing of a proposed lattice tower as it had agreed. The City never responded to ATC's submission.
17. ATC remains interested in developing a single site solution for the Aviation location. Moreover, ATC remains interested in discussing with all interested parties a design for the location that allows for collocation of all antennas on a single structure.

I HEREBY ATTEST THIS 19TH DAY OF SEPTEMBER 2007 THAT, TO THE BEST OF MY KNOWLEDGE, UNDERSTANDING AND BELIEF, THE FOREGOING STATEMENTS ARE TRUE AND THAT I WOULD BE WILLING TO MAKE THESE STATEMENTS UNDER OATH IN A COURT OF LAW.



Terri Beck

000335

Exhibit 2

000337

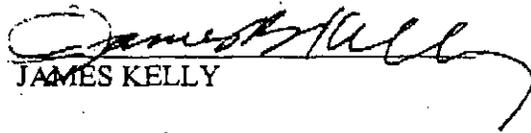
DECLARATION OF JAMES KELLY

I, James Kelly, hereby declare and attest as follows:

1. I am over the age of eighteen, suffer no legal disabilities, have personal knowledge of the facts set forth below, and am competent to testify.
2. I am a Regional Zoning Specialist – West for American Tower Corporation, a Delaware corporation (“ATC”), with offices located at 2201 Dupont Drive, Suite 340, Irvine, CA 92612.
3. ATC is a telecommunications company that owns and manages communications towers, in-building communication systems and roof-top communication sites.
4. ATC manages a 130-foot Verizon-owned monopole located on a hilltop in the City of San Diego (“City”) at 6770 Aviation Boulevard, San Diego, CA 92114 (“Aviation”).
5. Two other monopoles occupy the same hilltop location, one of which is 105 feet tall and owned by the City and another of which is 90 feet tall and owned by Sprint Nextel.
6. On or about Tuesday, August 22, 2006, I attended a meeting in the City with, among others, Natalie De Frietas of the City’s Development Services Department, along with representatives of the City’s Information Technology and Communications Department (“ITC”), and several wireless carriers including Verizon.
7. The purpose of the August 22 meeting was to discuss the initial draft engineering drawings of a taller, multi-carrier lattice-type tower which would replace the existing communication monopoles at the Aviation site. The single structure would be capable of holding all existing antennas, and some proposed antennas, at acceptable heights.
8. At that meeting, a representative of ATC presented the design and distributed copies of the proposed tower in elevation for review. Ms. De Frietas had little commentary or critique at this meeting of the proposed facility other than to inquire about the reasoning behind the height of the proposed facility. Ms. De Frietas then took copies of the concept drawing and stated that she wanted to review and obtain comments from others in Development Services. She requested that ATC allow Development Services a couple weeks to review the plans and to make some preliminary comments.
9. Ms. De Frietas solicited comments as to whether anything could be designed to provide additional screening of the tower, but the group, including the ITC, stated that the amount of equipment and the number of co-locaters limited any ability to add screening. Upon the meeting’s completion, Ms. De Frietas did not request that ATC analyze any other type of structure.

10. ATC remains interested in developing a single site solution for the Aviation location. Moreover, ATC remains interested in discussing with all interested parties a design for the location that allows for collocation of all antennas on a single structure.

I HEREBY ATTEST THIS 20TH DAY OF SEPTEMBER 2007 THAT, TO THE BEST OF MY KNOWLEDGE, UNDERSTANDING AND BELIEF, THE FOREGOING STATEMENTS ARE TRUE AND THAT I WOULD BE WILLING TO MAKE THESE STATEMENTS UNDER OATH IN A COURT OF LAW.


JAMES KELLY

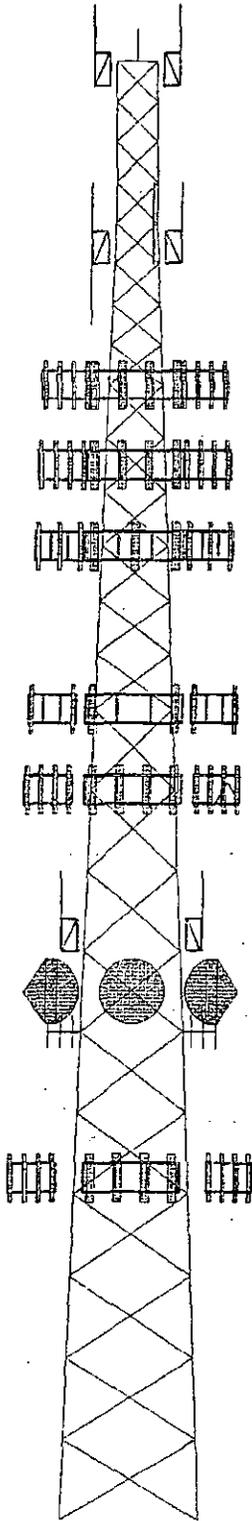
000339

Exhibit 3

000342

Section	17	16	15	14	13	12	11
Legs	P8x28	P8x28	P5x28	P3x216	P2.5x203	P2x154	P2x154
Leg Grade	L3x3x1/4	L3x3x1/6	L2 1/2x2 1/2x3/16	L2x2x1/6	L1 3/4x1 3/4x1/8	L1 1/2x1 1/2x1/8	L1 1/2x1 1/2x1/8
Diagonals							
Diagonal Grade							
Top Gus.							
Face Width (ft)	15.5	14	12.5	9.5	6	6.5	
# Panels @ (ft)		10 @ 10			6 @ 6.85687		
Weight (lb) 11001.6	3927	1823	1612	1187	823	484	473

180.0 ft
180.0 ft
140.0 ft
120.0 ft
100.0 ft
80.0 ft
80.0 ft
40.0 ft
20.0 ft
0.0 ft



APPURTENANCES

TYPE	ELEVATION	TYPE	ELEVATION
4' Lightning Rod	180	Cricket	110
City of San Diego	180	Modo	100
City of San Diego	180	T-Mobile	90
City of San Diego	155	City of San Diego	70
City of San Diego	155	City of San Diego	70
City of San Diego	155	City of San Diego	65
City of San Diego	155	City of San Diego	65
Verizon	140	City of San Diego	65
Verizon	130	City of San Diego	60
Cingular <i>T-Mobile</i>	120	City of San Diego	60
Cricket	110	Sprint/Nextel	42
Cricket	110		

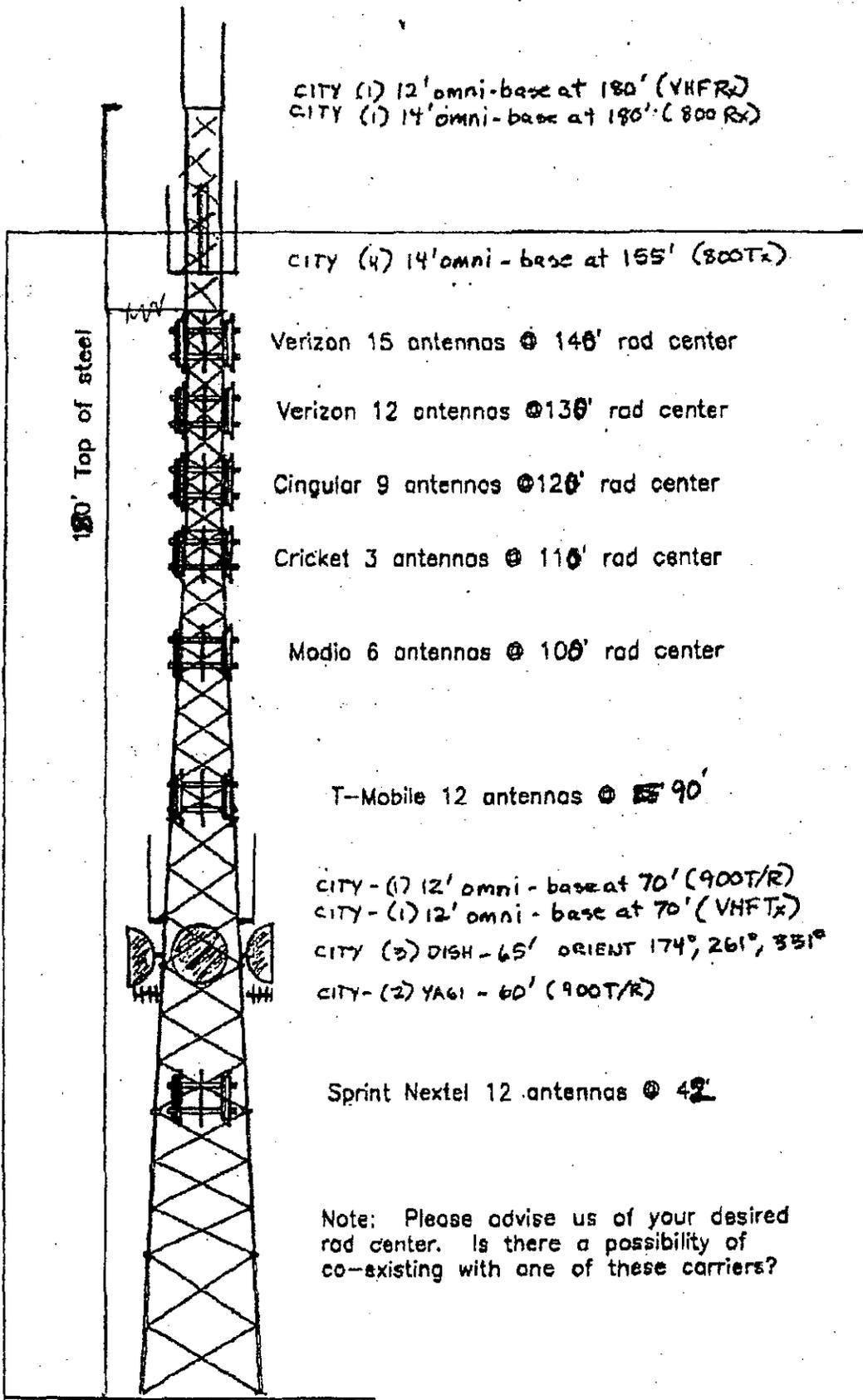
MATERIAL STRENGTH

GRADE	Fy	Fu	GRADE	Fy	Fu
A500-50	50 ksi	82 ksi	A36	36 ksi	58 ksi

TOWER DESIGN NOTES

1. Tower is located in San Diego County, California.
2. Tower designed for a 70 mph basic wind in accordance with the TIA/EIA-222-F Standard.
3. Deflections are based upon a 50 mph wind.

NELLO CORPORATION		Job: Request 189905	
1301 STAHLY DRIVE			
NAPPANEE, IN			
Phone: 800/806-3556			
FAX: 574/773-5840			
Project:	NSX 180' - San Diego, CA	Client:	American Tower
Code:	TIA/EIA-222-F	Drawn by:	Curt
Date:	07/07/08	App'd:	
Scale:	NTS	Path:	N:\3-1_Fredwin\2220005\2220005-1.dwg
			Dwg No: E-1



000345

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Via Electronic Mail

planningcommission@sandiego.gov

November 29, 2007

Chair Barry Schultz
and Members of the Planning Commission
CITY OF SAN DIEGO
1222 First Avenue, 4th Floor
San Diego, CA 92101

Re: American Tower Corporation Request for a Conditional Use Permit and Planned Development Permit for an Existing Wireless Facility at 6770 Aviation Drive (Project No. 92076)

Dear Chair Schultz and Members:

As you are aware, the City of San Diego ("City") and American Tower Corporation ("ATC") have been at loggerheads over what is required for the preservation of ATC's wireless telecommunications facility ("WTF") at 6770 Aviation Drive (the "Facility") since ATC and the City first met to discuss a single tower solution at the location in February 2006. At that meeting, ATC offered to propose a single tower solution incorporating all antennas from the three existing monopoles owned by Nextel, Verizon Wireless, T-Mobile and the City. ATC offered to include in that analysis preliminary structural calculations to verify the viability of the proposed structure. However, after ATC submitted its initial drawing and calculations, the City refused to discuss the matter further. Rather, the City reverted to its original position that ATC's 130-foot WTF must be replaced with a new 30-foot WTF that satisfies the design requirements of the new Wireless Communication Facility Guidelines.

Moreover, ATC has known that the City was marketing its monopoles as collocation facilities and, more specifically, that T-Mobile had leased space on the City's monopole at Aviation. Despite this direct competition with ATC, the City refused to include its own WTF in a plan for Aviation. ATC objected to the City's position as discriminatory and, at its August 9 hearing on the ATC WTF, the City Planning Commission ("Commission"), concerned about a one-sided perspective, instructed staff to meet with ATC to continue discussions on a single tower solution. As has been documented, the meeting never happened.

In fact, at the next hearing on the Facility on September 20, 2007, the following exchange took place regarding the City's failure to meet with ATC:

Commissioner Naslund:

In Mr. Jystad's comments, he suggested that American Tower wasn't included in the discussions about the collocation possibility. Why were they not? **I mean, when we left here, the idea was that you would discuss with them.**

Karen Lynch Ashcraft:

Staff had an internal meeting with the affected city departments. And it was determined at those meeting -- at that meeting that the City was not interested in a single structure solution, that they wanted to remain on the tower that they currently have. **And that at some point in the future, if resources and -- and the opportunity were available to do anything with that tower, they would do it at that point in time.** But they -- the Office of the CIO wanted to remain separate from the other commercial carriers.

After that exchange, the Commission discussed the problem of the City's position not to change its monopole until "some point in the future" and adopted a motion setting forth clear instructions to staff as follows:

Chair Schultz:

Okay. Then I guess my question is then if -- if the City's position is its tower is what it is and it's going to be what it is forever because we can't figure out to do anything better, I guess I need to hear you say that. Because that's a major -- that's a major factor in my approach to this decision.

... So I guess where I'm at is I would like -- I would prefer to see a continuance to see if we can't begin to think about how we -- how do we make this a -- you know, a cell tower site property that can work and minimize the visual blight that these things have on our community. That -- that would be what I would want to see.

The second piece -- the second alternative that maybe I would like to hear people talk about is, well, we can grant the CUP, but we can place some conditions on it that -- that at such time that there is alternatives to address the visual impact, that they will do that. Or that the CUP would expire at that point, and people would have to come together to -- to participate in making that place a better place. And that would include the Nextel tower as well....

Commissioner Naslund:

It sort of occurs to me that we could -- I'm wondering now, could we grant a shorter CUP for the existing tower, with the idea that we would be able to revisit this at some point with the hope that we find either a technical solution or that the city system is in a position where they feel they need to upgrade, and we could find a collocation opportunity? or -- you know what I'm saying? Is there a possibility there?

Karen Lynch Ashcraft:

Definitely.

Commissioner Naslund:

Okay. I think we ought to continue this item with the idea that we would try to find a way to structure their CUP language. I still feel quite strongly that to tell them to take down their pole, when we're not doing anything to improve the condition out there, we are not improving the visual situation by taking that one pole. We're only minimally doing so, that we really need to find a better solution here. And I guess Chairman Schultz's idea makes a lot of sense to me. And if you would like, I would make that a motion.

Chair Schultz:

Yeah. Why don't you make that a motion... [to] structure a CUP along the lines that you just said that would -- that might be in shorter terms and have some specific conditions that would require them to participate or do something at some point in time, some triggering points.

Commissioner Naslund:

Okay. I'm going to make a motion that we continue this item to some date certain. And we'll determine that. And that we direct staff to look at terms of a CUP that would allow somebody, presumably the City, but with the cooperation and the involvement of American Tower Corporation, to develop a master plan for the site. And so that we would -- and we would look at two things. We would look at a set of terms and a set of conditions that might oblige them to participate in the event that the City would -- would resolve their problem and fix their monopole. Or that we find a way at some future date, through technology or whatever considerations, to find a collocation opportunity that would solve this problem.

Chair Schultz:

I think between everything we've said that it should be clear.

The motion proposed by Commissioner Naslund was seconded by Commissioner Otsuji and passed unanimously and, as Chair Schultz indicated, it was clear. The staff was to put together a CUP that (1) authorized the tower to remain as is until the City changed its mind about concealing its own monopole and (2) included a condition that obligated ATC to conceal its tower in the event the City concealed its own monopole. In addition the Commission instructed staff to work with American Tower on a "master" design plan for the three towers.

So when DSD invited ATC to a meeting to discuss the site on November 1, 2007, there was no way for ATC to envision what actually happened there. ATC flew two engineers out from Atlanta, and brought two architects and three representatives from Los Angeles fully envisioning a detailed discussion on a "master plan" for Aviation. However, in the absence of any carriers and in the presence of representatives from several City departments including the Mayor's office, the City Attorney's Office, DSD, IT&C and READ, ATC was told the City Code is clear on its face and ATC must replace its WTC regardless of what happened to the City's monopole. When asked why the City was not willing to engage in that discussion, one representative stated: "We are discussing the master plan. The master plan is for Sprint Nextel to replace its tower with a tree, the City's monopole to remain as is, and American Tower to bring its facility into compliance with the Code." The Mayor's Office concluded the meeting by saying: "At least we know where we both stand."

000348

Letter to: Planning Commission
Date: November 29, 2007
Page 4

Thus, for a second consecutive time, the City staff ignored the Commission's motion and returned to its original position on Aviation.

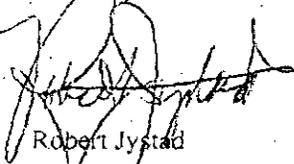
Under these circumstances, there is no point to ATC continuing its discussion with staff unless and until the City grants ATC a CUP/PDP for its existing facility. ATC remains open to the idea that, in the event the City decides to cooperate in a master plan solution for Aviation, ATC is committed to participating in good faith in those discussions, as it has to date.

Along those lines, ATC proposes the following conditional language for its CUP/PDP:

"The Facility is authorized to remain as is, subject to minor and reasonable modification under a substantial conformance approval, unless and until the City approves and implements a financially and technically feasible master plan for the location that incorporates all three existing monopole facilities. ATC agrees to cooperate in the development of the master plan, including providing design alternatives and engineering for its own facilities. This condition does not bind any party to bear the cost of the formation or implementation of the master plan on its own."

ATC looks forward to further discussion with the Planning Commission on this matter. Questions can be directed to me at rjystad@channellawgroup.com or (310) 209-8515.

Sincerely,



Robert Jystad

Attorney for American Tower Corporation

c: William Anderson, Deputy Chief Operating Officer for Land Use and Economic Development
Christine Fitzgerald, Chief Deputy City Attorney, City of San Diego
Karen Lynch Ashcraft, Development Services Department
Elizabeth Hill, Esq., American Tower Corporation
Terri Beck, American Tower Corporation
Mr. James Kelly, American Tower Corporation
Suzanne Toller, Esq., Davis Wright Tremaine LLP
Leslie Vartanian, Verizon Wireless