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MEMORANDUM OF LAW

DATE: March 6, 2006

TO: Kelly Broughton, Deputy Director, Development Services Department

FROM: City Attorney

SUBJECT: Wireless Antenna Placement within the Coastal Height Limit Overlay Zone

INTRODUCTION

On November 7, 1971, the voters approved Proposition D. This proposition limits the height of buildings within the Coastal Zone to no more than 30 feet, except in the downtown area. The Coastal Zone is essentially the area from the US-Mexico border to the northern border of the City of San Diego, and from the Pacific Ocean to Interstate 5. The Proposition became effective on December 7, 1972. The Proposition is codified at section 132.0505 of the San Diego Municipal Code, and has been amended three times by the voters to allow for the historic restoration of the chimney and rooftop of the Mission Brewery building, as well as development at Sea World and at the International Gateway of the Americas. The passage of the federal Telecommunications Act of 1996 [Act], which limits the City's ability to regulate placement of wireless antennas, and the development of wireless technology since the passage of Proposition D, has created the need to further define what height limits are applicable for wireless antennas within the Coastal Zone.

QUESTIONS PRESENTED

May wireless communication antennas be installed within the Coastal Zone to the façade of existing buildings above 30 feet and may equipment associated with the antennas be installed on the roof tops of those buildings when neither exceeds the height of the existing structure, without violating Proposition D?

SHORT ANSWERS

Yes. Wireless antennas that fit within the structural envelope of a pre-existing building may be installed without violating Proposition D. However, compliance with the federal Telecommunications Act of 1996 may require the placement of antenna or equipment that exceeds the 30-foot limit in some circumstances.

BACKGROUND

To provide coverage within the coastal area, providers of wireless communications desire to install antennas on existing buildings over 30 feet high in the Coastal Zone. Over the years, City approvals for antenna installation in the Coastal Zone have been given for both flush mounted antennas and recessed antennas. The antennas that were approved as flush mounted have, in some cases, not been installed flush with the building, and may extend as much as 18-24" from the building. The antennas transmit on a line of sight basis between the communication facilities and the mobile users. Antenna height becomes a critical issue in areas with hills or other physical obstructions.

ANALYSIS

The City must find a way to comply with the voters' directive as set forth in Proposition D, and still permit wireless antennas to the extent required by federal law. As recently characterized by one court that was attempting to reconcile the Act with local zoning, this type of conflict is indicative of "the ongoing struggle between federal regulatory power and local administrative prerogatives--the kind of political collision that our federal system seems to invite with inescapable regularity." *MetroPCS v. City and County of San Francisco*, 400 F.3d 715, 718 (9th Cir. 2005).

I

Local Regulation

Proposition D, with three excepted areas, prohibits the construction of a building or an addition to a building in excess of 30 feet within the Coastal Zone. The ballot argument in favor of Proposition D stated that the measure "preserves the unique and beautiful character of the coastal zone of San Diego." The proper method of measurement, per Proposition D, is in accordance with the Uniform Building Code of 1970. This office has previously opined that for the purposes of complying with Proposition D, measurements should be from the finished grade of a site, rather than the pre-existing grade. City Att'y MOL No. 2004-13 (August 12, 2004). The height of the building is then measured vertically to the uppermost point of the structure. SDMC § 113.0270(a)(3).

The Coastal Zone contains some structures that are over 30 feet in height and were built before the passage of Proposition D. These are "previously conforming" structures. "Previously conforming" is defined as meaning:

> the circumstances where a use, *structure*, or *premises* complied with all applicable state and local laws when it was first built or came into existence, but because of a subsequent change in zone or development regulations, is not in conformance with the current zone or all development regulations applicable to that zone.

SDMC § 113.0103. (Italics in original)

Any proposed development on a previously conforming structure is reviewed pursuant to regulations set forth at Chapter 12, Article 7, Division 1 of the San Diego Municipal Code states

Regulations regarding previously conforming structures do not allow the granting of any deviation from the height limit regulations in the Coastal Zone, meaning no new development can exceed the 30-foot limit. SDMC § 127.0102(f). Section 127.0103 and the corresponding tables, 127-01A through 127-01C, set forth what type of permit must be obtained for various development proposals. For example, maintenance, repair or alteration that is less than 50% of the market value of the entire structure or improvement, which does not expand the structural envelope, is permitted with the issuance of a construction permit and a Process 1 review. "Structural envelope" means the three-dimensional space enclosed by the exterior surfaces of a building or structure. SDMC § 113.0103.

In addition to the above regulations limiting structure height in the Coastal Zone, the City regulates communication antennas City-wide as a separately regulated use in Chapter 14, Article 1, Division 4 of the San Diego Municipal Code. The City of San Diego's stated purpose for separately regulating land uses is to provide "regulations for specific uses that may be desirable and appropriate in a particular zone if limitations or conditions are placed on the development of those uses to minimize detrimental effects to neighboring properties or incompatibility with the permitted uses of the base zone." SDMC § 141.0101.

A wireless antenna used for telephone, paging or similar services that complies with all development regulations and overlays, and that meets the criteria in section 141.0405(e)(1) or (2) is considered a minor communication facility. SDMC § 141.0405(a). Section 141.0405(e) allows minor communication facilities as a limited use or through the issuance of a Neighborhood Use Permit in certain zones, if the facility is concealed from public view or integrated into the architecture or environment through architectural enhancement, unique design solutions, or accessory use structures.

In an effort to encourage collocation and in recognition of the fact that some telecommunication facilities are minimally visible, the Municipal Code also recognizes as minor telecommunication facilities the following:

(A) Additions or modifications that do not increase the area occupied by the antennas or the antenna enclosure by more than 100% of the originally approved facility and do not increase the area occupied by an outdoor equipment unit more than 150 feet beyond the originally approved facility, if the additions and modifications are designed to minimize visibility;

(B) Panel-shaped antennas that are flush-mounted to an existing building façade on at least one edge, extend a maximum of 18 inches from the building façade at any edge, do not exceed the height of the building, and are designed to blend with the color and texture of the existing building; or

(C) Whip antennas if the number of antennas that are visible from the public right of way does not exceed six, if the antennas measure 4 inches or less in diameter, and if they have a mounting apparatus that is concealed from public view.

SDMC § 141.0405(e)(2)(A)-(C).

The City's regulations regarding height limits in the Coastal Zone, as well as those regulating the placement of wireless antenna are clearly designed to limit visual and aesthetic impacts. Zoning regulations to preserve aesthetics are valid, and in fact the preservation of

aesthetics is a traditional basis for zoning regulations. *MetroPCS*, 400 F.3d at 727.

II

Federal Regulation

The purpose of the Federal Telecommunication Act of 1996 is "to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.'" *City of Rancho Palos Verdes v. Abrams,* 544 US 113, ___, 125 S.Ct. 1453, 1455, 161 L.Ed. 2d 316 (2005) (quoting the Act). A general overview of the Act was previously provided by this office. 2001 City Att'y MOL 307. The Act reserves for the states and local governments the right to make decisions regarding the placement, construction, and modification of personal wireless service facilities. 47 USC § 332(c)(7)(A). However, the regulations may 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. 47 USC § 332(c)(7)(B).

The Ninth Circuit recently ruled for the first time on several of the standards set forth in the Act, most of which are the subject of split rulings by other circuit courts. In *MetroPCS*, the Board of Supervisors for the City and County of San Francisco denied an application by MetroPCS for a conditional use permit [CUP], allowing the installation of a wireless telecommunications antenna atop a public parking garage. The CUP was denied based on findings that: 1) the facility was not necessary to MetroPCS's ability to service that area; 2) the facility was not necessary for the community, because there was already adequate wireless service in the neighborhood; 3) the proposed facility would constitute a visual and industrial blight and would be detrimental to the character of the neighborhood; and 4) the proposed antenna facility was not in conformance with and would not further the policies of the City's General Plan. The Board stated that the CUP denial did not constitute unreasonable discrimination against MetroPCS, did not limit or prohibit access to wireless services, and did not limit or prohibit the filling of a significant gap in MetroPCS's coverage. The Board also stated that the proposed facility was not the least intrusive means to provide wireless coverage in the area.

A provider making a claim of unreasonable discrimination must show that they have been treated differently than other providers with facilities that are similarly situated in terms of the structure, placement or cumulative impact of the proposed facilities. *MetroPCS*, 400 F.3d at 727. In concluding that local zoning regulations may properly discriminate between facilities that have different effects on aesthetics, the court considered the House Conference Report on the Act, which stated that the Act would "provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services." HR Conf. Rep. No. 104-458, at 208 (1996). Ultimately, in *MetroPCS*, the court found that the record was insufficient to make a determination on this issue, because there was no systematic comparison of the proposed site with other approved facilities in that neighborhood.

Regulations that prohibit or have the effect of prohibiting the provision of personal wireless services are those that constitute either a complete prohibition against wireless service or those regulations that have the effect of preventing a provider from closing a significant gap in its own

service coverage, along with a showing that there are no feasible alternative facilities or sites. *MetroPCS*, 400 F.3d at 731. A significant gap in service coverage is extremely fact specific and an inquiry may include information such as the physical size of the gap and the number of users affected; however, the gap must be more than individual dead spots within a service area. Id.; *Second Generation Properties, LP v. Town of Pelham*, 313 F.3d 620 (1st Cir. 2002). In *MetroPCS*, the record contained numerous directly conflicting accounts as to whether the site was needed to prevent a significant gap in coverage, and so the court did not rule on the merits of that claim. The Act does not require 100% coverage, and federal regulations recognize the existence of "dead spots," defined as "small areas within a service area where the field strength is lower than the minimum level for reliable service." 47 CFR § 22.99; 360° *Communications Company of Charlottesville v. Board of Supervisors of Albemare County*, 211 F.3d 79 (4th Cir. 2000). Cellular geographic service areas licensed to providers of cellular service by the Federal Communications Commission include "dead spots." 47 CFR § 22.911(b).

Once the provider has demonstrated a significant gap in coverage, it must then show that the manner in which it proposes to fill the gap in service is the least intrusive on the values that the denial sought to serve. *MetroPCS*, 400 F.3d at 734. In *APT Pittsburgh Limited Partnership v. Penn Township Butler County of Pennsylvania*, 196 F.3d 469 (3rd Cir.1999), the court found that APT only submitted evidence that it had been unable to install the system it desired in the locations it desired at a price it desired. The evidence in the record demonstrated that ample other opportunities existed for the plaintiff to install the towers. Some alternatives that the court suggested were choosing a less sensitive site, reducing the tower height, using a preexisting structure or camouflaging the tower and/or antenna. Id. at 479, (citing *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2nd Cir. 1999)).

The Act requires that any decision 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 USC § 332(c)(7)(B)(iii). These standards were also addressed by the court in *MetroPCS.* The requirement that the decision be in writing means that the written denial, issued separately from the written record, must contain "'a sufficient explanation of the reasons for the . . . denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons.'" *MetroPCS ,* 400 F.3d at 722 (quoting *Southwestern Bell Mobile Systems, Inc. v. Todd,* 244 F.3d 51, 60 (1st Cir. 2001)).

In *MetroPCS*, the court found sufficient a five page decision by the Board of Supervisors which contained a summary of the facts and the proceedings, articulated the reasons for the denial, and included the evidence that supported the ruling. "Substantial evidence" in the context of the Act has been held to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *MetroPCS*, 400 F.3d at 725. It is a reasonable amount of evidence; more than a scintilla, but not necessarily a preponderance. *Id*. In finding that the Board's decision to deny the application by MetroPCS was supported by substantial evidence, the court first noted that San Francisco's zoning ordinances allowed for the consideration of whether the antenna was necessary or desirable for, and compatible with, the neighborhood or community. The court went on to hold that the record clearly established that the neighborhood was already served by at least five other providers, and therefore did not need the proposed facility. Although MetroPCS challenged the ability of the City and County of San Francisco to base a decision on need, arguing that the Act preempted the local regulations on this issue, the court noted that the Act was "agnostic" on the issue of the substantive content of local zoning

regulations and that a decision on aesthetics could prevent the addition of more antennas, which would have the same result of disadvantaging new entrants to the market. Id. at 730 n. 6. The City of San Diego regulations do not allow for an analysis of the needs of the community, only the aesthetics.

Therefore, a provider applying to install an antenna or equipment that violates the City's regulations must show that the installation is necessary to prevent a significant gap in service, of a nature greater than "dead spots" in coverage. Once the provider sufficiently demonstrates that the installation is needed, it must then show that its proposed installation is the least obtrusive method available, in light of the City's concerns regarding height and aesthetics. Any decision by the City to deny a permit must be accompanied by a written decision, supported by substantial evidence in the record.

CONCLUSION

The City of San Diego is prohibited by Proposition D from approving wireless antenna or equipment that exceeds 30 feet in the Coastal Zone, unless the placement of antenna or equipment is on previously conforming structures that exceed 30 feet, and the installation is within the structural envelope of that existing structure. However, compliance with the Federal Telecommunication Act of 1996 may require the placement of antenna or equipment that exceeds the 30 foot height limit. In that case, any placement of antenna or equipment that exceeds the structural envelope of a preexisting structure in excess of 30 feet in height should only be permitted when the applicant has demonstrated that the installation is necessary to prevent a significant gap in service and there is no less obtrusive alternative available. Any denial of an application to install wireless facilities must be accompanied by a written record of the decision, supported by substantial evidence in the record.

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