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CITY OF FORT BRAGG
COMMUNITY DEVELOPMENT DEPT.

Date: November 17, 2009

TO: City of Fort Bragg Planning Dept/Staff
City of Fort Bragg Planning Commission

FR: Allen Potter/T Mobile Agent

RE: Agenda Item of November 18, 2009

Coastal Development Permit (CDP 3-09); Use Permit (USP
2-09); Design Review Permit (DR 3-09)

Pacific Gas and Electric

T-Mobile West Corporation

Eagle Consulting

Dear Planning Commission /Staff:

On behalf of the applicant, T Mobile West Corporation and owner, Pacific Gas and Electric, this memo is to request relief from three proposed Special Conditions of approval as noted in the Staff Report prepared for the hearing of November 18, 2009.

SPECIAL CONDITIONS

1. Applicant shall install sidewalks along the entire Walnut Street frontage of the parcel or provide the City with a bond for the completion of the sidewalks prior to finalizing the building permit.

Request: Please delete this Special Condition.

Argument:

The applicant, TMO and owner PGE do not find that the requirement of installation of sidewalks along the Walnut Street frontage are in anyway related to the proposed new use on the subject parcel. The subject parcel is a maintenance yard and already is the site of an existing and permitted tower site (USCC and Edge Wireless).

It appears that the existing cell site was not required to include sidewalks along the Walnut Street Frontage; therefore, we believe this Condition should be deleted entirely.

ITEM SUBMITTED AFTER
DISTRIBUTION OF 11/18/2009
FORT BRAGG PLANNING
COMMISSION PACKET

The Staff Report only makes the following reference in regards to this Condition:

The sidewalk along the Walnut Street parcel frontage is currently undeveloped. Undeveloped sidewalks increase the frequency of traffic and pedestrian conflicts and are not in keeping with the character of the surrounding development. It is the policy of the City of Fort Bragg to require that sidewalk improvements be completed as part of any development project that requires discretionary review. Therefore **Special Condition #1** has been added to require that the project proponent install sidewalks along the length of the property along the Walnut Street frontage.

(Page 6 of Staff Report)

The Staff Report makes no specific findings creating a nexus for the need for sidewalks to the proposed development (cell site). The Staff Report furthermore makes no reference if a dedication will be needed for said sidewalk installation.

It is also noted that the Initial Study under the Transportation / Traffic section states:

The project would not increase traffic in the vicinity of the site. It is reasonable to assume that during normal operating periods, the site would be visited by a service technician no more than once a day to ensure the systems are operating normally. Given the scope of activities occurring within the PG&E maintenance yard, any traffic associated with the proposed project would be unnoticed on local streets. The project is therefore considered to have no impact on traffic and transportation.

The Initial Study has been prepared to reflect no impact on traffic issues in the area that may be related to the proposed new cell site.

The applicant would point out that *per Dolan v. City of Tigard (93-518), 512 U.S. 687 (1994)*, a case regarding the practice of zoning and property rights, and a case that served to establish limits on the ability of cities and other government agencies, to use zoning and land-use regulations to compel property owners to make unrelated public improvements.

The Court held that under the doctrine of unconstitutional conditions a government agency may not require a person to surrender constitutional rights in exchange for discretionary benefits, where the property sought has little or no relationship to the benefit conferred. A two-prong test was applied: Whether or not there is an "essential nexus" between the permit conditions and legitimate state interest, and whether or not the degree of the exactions required by the permit condition bears the required relationship to the projected impact of the proposed development.

The applicant does not believe that the City has shown or demonstrated through appropriate findings that this condition can meet the above noted test. The necessary connection required by the Fifth Amendment is "rough proportionality." No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the

proposed development's impact. This is essentially the "reasonable relationship" test adopted by the majority of the state courts.

We find no such determination and/or finding has been made or can be made by the City to support this Special Condition.

Therefore, the applicant asks that this condition be deleted.

Special Condition No. 3

3. Prior to issuance of a building permit the applicant shall submit a new site plan that clearly shows that the tower and associated equipment are located a minimum of 90 feet from all property boundaries.

Request: Please delete this special Condition.

Argument:

The applicant and owner has determined that due to the underlying use of the host parcel, PGE Yard, that the proposed location as noted in our plans and survey is the most appropriate and safe location for this new site/tower and will be the least intrusive to other uses on the property. The requirement to move the site by our calculations another 15 ft. from the easterly property line is unnecessary.

Please note that:

Per Section 17.44.060 (A) in the CLUDC, communication facilities are required to comply with the following standards:

- 1(b) *A ground-mounted communication facility (including towers and antennas) shall be located as far as possible from all property boundaries, and set back from the property line at a ratio of 1.5 horizontal feet for every one foot of height, where feasible unless a location closer to property boundaries reduces visual impacts as viewed from public vantage points.*

The key word here is "where feasible", and in this instance, it is not "feasible" to meet this standard in its entirety since the underlying use consists of the need to move large vehicles safely in and out of the PGE Yard. Please see attached letter from PGE regarding this specific issue.

Special Condition No. 6:

6. Applicant shall submit a landscaping plan for approval by the Community Development Director that includes the planting of native trees and shrubs along the entire Walnut Street frontage of the property and along the eastern side of the property to screen the tower from nearby public right-of-ways up to a height of six feet. The landscaping plan shall be installed prior to the final on the building permit.

Request: Modify or delete this Condition.

Argument:

The applicant and owner believe that this condition is excessive and does not focus on the proposed new use on the parcel, a cell site, and therefore requests that this condition be deleted or modified. As a modification, the applicant and owner will install a wood fence round the perimeter of the cell site area within the PGE Yard, (not the entire yard) to help conceal the base of the tower and related ground based equipment. PGE has also noted that it is strongly objects to this condition as it creates safety issued for the yard and equipment and personnel working in and around the yard.

In conclusion, it would be good to restate the applicability of the 1996 Telecommunications Act, as noted below:

Applicability of the 1996 Telecommunications Act, Section 704:

Response:

Pursuant to the 1996 Telecommunications Act of 1996, "The Act", preserves local authority on the placement, construction, and modification of personal wireless service facilities (i.e. zoning decisions on antenna towers, etc.) with the following exceptions:

- 1. Local authorities can't discriminate among providers of "functionally equivalent" services. For example, if cellular providers already have facilities in the area, additional or new providers of similar services - such as PCS - can't be prohibited, but should be allowed under the same rules that govern existing services. Similarly, if three PCS providers are operating in an area, a fourth can't be excluded by the local authority simply because they feel that three providers are sufficient.*
- 2. Local authorities can't reject all wireless communications services (i.e. facilities) completely, nor "have the effect of prohibiting" wireless services, for example by enacting excessively restrictive zoning ordinances.*
- 3. When an appropriate request for authorization of wireless facilities is filed, local authorities must act "within a reasonable period of time".*
- 4. Any rejection of a request for wireless facilities must be in writing and supported by "substantial" evidence in a written record (e.g. proceedings).*
- 5. Local authorities can't reject a request for wireless facilities based on health concerns if the facilities meet the FCC's regulations concerning radio frequency (RF) emissions. In other words, local rules can't be more stringent than Federal ones. Local authorities can require that providers demonstrate compliance.*

The law also provides for review in the courts or by the FCC of any decision by a zoning authority that is inconsistent with Section 704.

Argument:

The Act prohibits discrimination between providers of equivalent services. In this case, US Cellular and Edge Wireless already operate in the area and therefore T Mobile must be allowed to operate as well. The applicant should be permitted under the same rules as the existing service providers have been permitted.

The applicant believes that with the deletion/ modification of these three Special Conditions, that the applicant can comply with other conditions.

Respectfully submitted,



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Electric Company®**

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November 17, 2009

Dear Mr Potter,

I am writing this letter in regards to your question with the T-Mobile site that is being proposed in our Ft. Bragg materials yard, site SF-40864. Your question is can we move the site to the West from where it is currently at. I am going to say no due to Safety. This is a heavily traveled yard with big trucks that come in daily picking up and dropping off material. Also when storms hit in the area we have crews that will be deployed from all over and will use this yard as their headquarters, they also have big trucks. My thoughts or what I'm trying to avoid is if we move the site to the West we are putting it closer to the entrance road that these trucks will be driving by to access the yard which will create a driving hazard that I'd like to eliminate by leaving the site were we agreed it would go. I hope you can understand my concerns and respect them.

If you or anyone else has any questions please feel free to call me at (925) 786-3375.

Thanks,
Sean Kennedy
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