

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

Filed: 10/20/2008
Denied: 2/4/2009

**W19a**

Staff: Charles Posner - LB
Staff Report: 3/19/2009
Hearing Date: April 8, 2009
Commission Action:

STAFF REPORT: REVISED FINDINGS

APPLICATION NUMBER: 5-07-375

APPLICANT: T-Mobile, USA

AGENT: Scott Longhurst, Trillium Companies

PROJECT LOCATION: Eastern edge of Pacific Avenue (4100 block – at Jib Avenue), Venice, City of Los Angeles, Los Angeles County.

PROJECT DESCRIPTION: Installation of a 47.5-foot tall wood utility pole to support cell phone equipment and antennas. This is an after-the-fact application.

COMMISSIONERS ON PREVAILING SIDE: Commissioners Achadjian, Blank, Burke, Clark, Gonzalez, Kram, Krueger, Potter, Reilly, Shallenberger, Wan and Chair Neely.

SUMMARY OF STAFF RECOMMENDATION

Staff is recommending that the Commission adopt the following revised findings in support of the Commission's February 4, 2009 denial of Coastal Development Permit Application 5-07-375 for an after-the-fact permit. In 2007, the applicant removed a 38-foot tall wooden guy pole from the City right-of-way at the 4100 block of Pacific Avenue in Venice, and erected a taller 47.5-foot high wooden utility pole in the same location within the existing concrete sidewalk. New cell phone equipment and an array of antennae are attached to the new utility pole.

The Commission, after a public hearing on February 4, 2009, determined that the proposed development obstructs a public view and degrades visual resources on the west bank of Ballona Lagoon, and that an alternative location would lessen the project's visual impacts. The proposed development degrades visual resources because it is taller and the antennae array on top of the new pole is more massive than the single pole that was replaced, and the placement of additional antennae on the pole would further increase the tower's mass and increase the development's visual impact. The Commission denied the permit because it found that there are alternative locations (i.e., on an existing power pole or on the top of an existing building) that would accomplish the need for telephone coverage in the project area without adversely impacting visual resources. The project's location is a bad spot because it is next to the Ballona Lagoon ecological reserve and the development obstructs the public's view of the west bank of Ballona Lagoon from Pacific Avenue, a public highway.

A vote by the majority of the Commissioners on the prevailing side is necessary to adopt the revised findings. **See Page Three for the motion to adopt the revised findings.**

SUBSTANTIVE FILE DOCUMENTS:

1. City of Los Angeles certified Land Use Plan for Venice, 6/12/2001.
2. Coastal Development Permit 5-01-257/A5-VEN-01-279 (City of LA - Ballona Lagoon).
3. Coastal Development Permit 5-95-152 & amendments (City of LA - Ballona Lagoon).

STAFF NOTE:

Although the City of Los Angeles has assumed coastal development permitting authority in the Venice coastal zone pursuant to Coastal Act Section 30600(b), the City will not require the applicant to obtain a local coastal development permit (or a public works utility permit) for the proposed project (Exhibit #5). The proposed development requires a coastal development permit from the Commission because it falls within the definition of development contained in Section 30106 of the Coastal Act and, pursuant to Coastal Act Section 30601, because it is located within 300 feet of the mean high tide line of the sea (Ballona Lagoon).

Section 30600(b) of the Coastal Act provides that prior to certification of its Local Coastal Program (LCP), a local jurisdiction may, with respect to development within its area of jurisdiction in the coastal zone and consistent with the provisions of Sections 30604, 30620 and 30620.5, establish procedures for the filing, processing, review, modification, approval or denial of a coastal development permit. Pursuant to this provision, the City of Los Angeles developed a permit program in 1978 to exercise its option to issue local coastal development permits. Pursuant to Coastal Act Section 30601, certain categories of development, including development located within 300 feet of the mean high tide line, also require a coastal development permit from the Commission.

In this case, however, the City of Los Angeles will not require the applicant to obtain a local coastal development permit (or a public works utility permit) for the proposed project (Exhibit #5). Therefore, since the proposed project constitutes "development" as defined by the Coastal Act, and it is located within 300 feet of the mean high tide line (of Ballona Lagoon), it requires a coastal development permit from the Commission pursuant to Section 30601 of the Coastal Act. The proposed project constitutes new development, rather than repair and maintenance or modification of an existing structure, because it involves the erection of a new pole and the installation of new cell phone equipment and antennae (the wooden pole that previously occupied the site was a guy pole without any attached equipment, power or antennae). The proposed project also does not fall within the scope of the exemption established in Section 30610(f) for the installation of utility connections between existing service facilities and development approved under the Coastal Act. The project would erect a new service facility to serve the neighborhood rather than simply connect an existing service facility (such as existing telephone or power lines) to new development.

The Commission's standard of review for the proposed development is the Chapter 3 policies of the Coastal Act. The City of Los Angeles certified Land Use Plan (LUP) for Venice is advisory in nature and may provide guidance.

STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolution to **adopt the revised findings** in support of the Commission's February 4, 2009 action to deny Coastal Development Permit Application 5-07-375.

Staff recommends a **YES** vote on the following motion:

MOTION: *"I move that the Commission adopt the revised findings proposed by staff in support of the Commission's action on February 4, 2009 denying Coastal Development Permit Application 5-07-375."*

Passage of this motion will result in the adoption of revised findings as set forth in this staff report or as modified by staff prior to the hearing. The motion requires a majority vote of the members from the prevailing side present at the April 8, 2009 hearing, with at least three of the prevailing members voting. The twelve Commissioners on the prevailing side are:

Commissioners Achadjian, Blank, Burke, Clark, Gonzalez, Kram, Kruer, Potter, Reilly, Shallenberger, Wan and Chair Neely.

Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings.

I. Resolution to Adopt Revised Findings

The Commission hereby adopts the findings set forth below for the denial of Coastal Development Permit Application 5-07-375 on the ground that the findings support the Commission's decision made on February 4, 2009 and accurately reflect the reasons for it.

II. Revised Findings and Declarations

Staff Note: The following revised findings include all of the staff's recommended findings that were set forth in the January 15, 2009 staff report for the Commission's February 4, 2009 hearing. The portions of those findings that are being deleted are crossed-out in the following *revised findings: ~~deleted findings~~*. The supplemental findings being added in support of the Commission's February 4, 2009 action are identified with underlined text.

The Commission hereby finds and declares:

A. Project Description

The proposed project is the installation of a 47.5-foot tall wood stand-alone utility pole to support cell phone equipment and antennae (Exhibit #4). This is an after-the-fact application. The project does not include any underground vault or above ground pedestal or cabinet as all of the cell phone equipment is attached to the pole. The new pole, which is set in the existing concrete sidewalk within the Jib Avenue right-of-way, is situated six feet east of the eastern curb of Pacific Avenue, and about forty-five feet west of the high tide line of Ballona Lagoon (Exhibit #3). The new pole is in the same location as a 38-foot high wooden guy pole that was removed in 2007 prior to installation of the cell phone antenna project.

The applicant asserts that the proposed facility is necessary to rectify a significant gap in the company's wireless coverage area, and has determined that the subject site is the only viable location after considering several alternative sites for the proposed facility (Exhibit #10, p.5). The alternative locations considered by the applicant include the buildings at 330 Washington Boulevard and 3401 Via Dolce. These two sites have been deemed "not leasable" by the applicant (Exhibit #10, p.6). A The applicant asserts that a City pump station located on the west bank of Grand Canal was also considered, but it does not have sufficient space for the facility. All The applicant asserts that the other structures in the area are residential buildings which also lack adequate space. The applicant identified a potential site within the City right-of-way across from 30 Reef Street, but the location was rejected by the applicant because of the adverse visual impact to adjacent residential uses. The applicant asserts that the existing line of utility poles on the western side of Pacific Avenue could not be used because there is no capacity on the poles for new antennae. Therefore According to the applicant, since the proposed facility cannot be co-located with another existing site nearby or located elsewhere, the subject site is the only viable location. The applicant also asserts that the proposed project is the "least intrusive means" of fulfilling its need to provide telephone service in the project area.

According to project opponents, three relatively tall buildings in the vicinity of the project currently have antennas for other cellphone service providers and would be less visually intrusive locations for the proposed project.

The City of Los Angeles has not required or processed any permit for the proposed project, but is aware of the facility's installation (Exhibit #5). The applicant has applied to the Coastal Commission for the necessary coastal development permit, although the applicant continues to assert that a coastal development permit is not required for this development. Several persons are objecting to the issuance of a coastal development permit for the proposed project because of its visibility and its location next to Ballona Lagoon.

B. Sensitive Habitat Areas and Marine Resources

The proposed project is located next to Ballona Lagoon, which the certified Venice Land Use Plan (LUP) designates as an Environmentally Sensitive Habitat Area (ESHAs - Exhibit #2). The new pole, which is within the Jib Avenue right-of-way, is situated about forty-five feet west of the high tide line of Ballona Lagoon. The proposed pole is not situated within the ESHA.

Section 30240 of the Coastal Act states:

- (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.
- (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

In addition, to the ESHA policy of the Coastal Act, Section 30230 requires the protection of the marine resources and biological productivity in wetland areas like Ballona Lagoon.

Section 30230 of the Coastal Act states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

The certified Venice LUP identifies Ballona Lagoon as an ESHA. The certified Venice LUP sets forth the following policies that require the protection of the habitat values in Ballona Lagoon and in the lagoon buffer strip, and require that uses adjacent to the lagoon (e.g., within the lagoon buffer strip) shall be compatible with preservation of the habitat.

Venice LUP Policy IV. B. 1. Ballona Lagoon.

a. Ballona Lagoon Enhancement Plan. The Ballona Lagoon shall be restored, protected and maintained for shallow tidal and intertidal marine habitat, fisheries and public access as provided in the Ballona Lagoon Enhancement Plan (See Coastal Commission Coastal Development Permit 5-95-152 and amendments). The plan is intended to improve water quality and tidal flushing; reduce the amount of garbage, sediment and other pollutants in the lagoon; maintain and expand habitat values for the endangered least tern, shorebirds and fisheries; restore native vegetation; protect banks from erosion; maintain and if possible increase the existing 50-year flood protection; and enhance public trails and interpretative overlooks without invading the privacy of adjoining residents. The goals and policies of the Enhancement Plan shall be carried out in a manner consistent with the policies of this LUP. The Ballona

Lagoon tidal gates located beneath Via Marina shall be operated in a manner that sustains and enhances biological productivity in the lagoon by ensuring maximum water circulation.

b. Permitted Uses. Only uses compatible with preservation of this habitat shall be permitted in and adjacent to the lagoon. Uses permitted in or adjacent to the lagoon shall be carried out in a manner to protect the biological productivity of marine resources and maintain healthy populations of marine organisms. Such uses as open space, habitat management, controlled nature study and interpretation, and passive public recreation such as birdwatching, photography, and strolling shall be encouraged and promoted. No fill shall occur in Ballona Lagoon unless it is consistent with Coastal Act Section 30233 and is the least environmentally damaging alternative. No untreated runoff shall be directed into the lagoon.

Venice LUP Policy IV. B. 2. Ballona Lagoon Buffer Strip.

The City shall implement methods of permanent protection of the lagoon, including acceptance of all outstanding and future offers to dedicate open space and public access buffer strips along the east and west banks.

c. West Bank Properties South of Ironsides Street to Topsail Street. These properties, commonly known as the Alphabet Lots, consist of the vacant lots located on the west bank of Ballona Lagoon between Ironsides Street and Topsail Street. The use of these parcels shall be permanent Open Space with restoration of the native vegetation. Non-intrusive public access may be permitted in a manner that protects the environmentally sensitive habitat areas (See also Policy I.A.4.d).

The proposed project is not situated within the ESHA. The proposed pole is located in the City right-of-way (Jib Street) and is set in the existing concrete sidewalk on the outer edge of the lagoon buffer where the lagoon buffer abuts Pacific Avenue (Exhibit #3). The certified Venice LUP designates Pacific Avenue as a Modified Secondary Highway. The Ballona Lagoon Enhancement Plan identifies the project site (the Jib Avenue right-of-way on the east side of Pacific Avenue) as the site of a future public interpretive sign and entrance to the west bank public access trail. The proposed project will not interfere with the future public interpretive sign or the entrance to the public trail.

The proposed project does not conflict with the ESHA protection and marine resource policies of the Coastal Act or the policies of the certified Venice LUP as the proposed project involves no filling of wetlands or displacement of any habitat. ~~The proposed pole, which is in the same place as a pole that has been removed, is compatible with preservation of the habitat. Therefore, the proposed project, as conditioned by the permit, is compatible with the habitat and has been sited to prevent impacts that would significantly degrade the ESHA.~~

C. Visual Resources

Section 30251 of the Coastal Act requires that the scenic and visual qualities of this coastal area shall be protected.

Section 30251 of the Coastal Act states, in part:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas...

In this case the proposed project's impact on visual resources will be significant as it would obstruct the public's view of the west bank of Ballona Lagoon from Pacific Avenue, a public highway. The project's location is in an especially scenic and visually prominent location because it is on the east side of the highway next to the Ballona Lagoon ecological reserve. Other utility poles in the vicinity are located on the other side of the street adjacent to existing development and therefore do not detract from the visual character of the ecological reserve as much as the proposed project. The proposed development also degrades visual resources because it is taller than the single pole that it replaced and includes a visually prominent antenna array on top. In addition, the neighborhood is engaged in efforts to place existing utility lines underground in order to improve the visual character of the community. Placement of new poles such as this for cellphone antennas runs counter to that effort. An alternative location, such as on the top of an existing building or of an existing power pole, would lessen the project's visual impacts while accomplishing the need for telephone coverage in the project area without adversely impacting visual resources.

The Commission is also concerned that cumulatively, installation of additional similar projects in the area could have adverse impacts on visual resources. As demand for wireless communication facilities increases, it is likely that other service providers will be interested in placing additional structures, antennas and equipment in the project area, and the Commission is concerned that cumulatively, installation of additional similar projects in the area could have adverse impacts on visual resources. Also, as noted previously, the neighborhood is engaged in efforts to reduce visual clutter by placing existing utility infrastructure underground. The proposed project exacerbates the problem of visual clutter.

The Commission finds that an alternative location (i.e., on an existing power pole or building) would significantly reduce the visual impacts that result from the currently proposed development. The applicant has failed to establish that alternative locations are not available or viable. For example, the County of Los Angeles has allowed other cellphone providers to place antennas on a nearby building that it owns. The applicant stated that liability concerns ruled out that site, but did not explain why those liability concerns would make the site infeasible for some cellphone service providers but not others. Because of these alternatives, denial of the proposed project neither discriminates against T-Mobile nor precludes T-Mobile from providing service in the area in violation of the federal Telecommunications Act. The denial of the proposed project is consistent with prior precedents relating to the protection of visual resources as the Commission has required that such facilities shall be the smallest in size and shortest in height that they can be, and that they can be permitted only if they cannot

be co-located with another existing site nearby or located elsewhere, in order to reduce any potential adverse impacts on visual resources and public views associated with such facilities. Therefore, the Commission finds the project is not consistent with Chapter 3 policies of the Coastal Act with respect to protecting and enhancing visual resources.

~~The proposed project's impact on visual resources will be minimal due to the project's proximity to existing development such as the nearby three-story residential structures and the utility poles and power lines that run along the opposite (west) side of Pacific Avenue. The proposed project does not block physical or visual access to Ballona Lagoon or the beach. No new ground level development (e.g., vaults or pedestals), except for the pole itself, is proposed. Therefore, the proposed project does not: a) obstruct a significant view to or along the coast; b) adversely impact public access to and use of the water; c) adversely impact public recreational use of a public park or beach; or d) otherwise adversely affect recreation, access or the visual resources of the coast. While the proposed facility will not have significant adverse impacts on the visual quality of the area, the Commission is concerned that cumulatively, installation of additional similar projects in the area could have adverse impacts on visual resources. When reviewing cellular antenna facility sites, the Commission must assure that the facility is the smallest in size and shortest in height that it can be, that it cannot be co-located with another existing site nearby or located elsewhere, in order to reduce any potential adverse impacts on visual resources and public views to the ocean associated with such facilities. As demand for wireless communication facilities increases, it is likely that other service providers will be interested in placing additional structures, antennas and equipment in the project area, and the Commission is concerned that cumulatively, installation of additional similar projects in the area could have adverse impacts on visual resources. Co-location is the preferred way to provide future telecommunication services. If co-location is not possible, then the visual impacts of such structures must be mitigated either through project design or siting so as not to result in adverse cumulative visual impacts. As such, Special Conditions One and Two are imposed on this permit. Special Condition One requires that the applicant submit a written statement agreeing to cooperate with other communication facilities in co-locating additional antenna on the proposed development, unless the applicant can demonstrate a substantial technical conflict to doing so. Special Condition Two requires the applicant to submit a written statement agreeing to remove the structure and restore this site in the future should technological advances make this facility obsolete. In this way, it can be assured that the proliferation of these types of facilities can be limited to appropriate locations, and that the area will not be littered with outdated and obsolete facilities in the future. Therefore, as conditioned, the Commission finds the project is consistent with Chapter 3 policies of the Coastal Act with respect to protecting visual resources.~~

D. Public Access and Recreation

One of the basic goals stated in the Coastal Act is to maximize public access and recreation along the coast. The public access and recreation policies of the Coastal Act require that maximum access and recreational opportunities be provided and that development shall not interfere with public access. The proposed project does not interfere with public access or recreation. ~~The proposed project does not block physical or visual access to Ballona Lagoon or the beach. Therefore, as conditioned, the proposed development will not have any new adverse impact on public access to the coast or to nearby recreational facilities. Thus, as conditioned, the proposed development conforms with Sections 30210 through 30214, Sections 30220 through 30224, and 30252 of the Coastal Act.~~

E. Unpermitted Development

Prior to applying for this coastal development permit, the development on the site occurred without the required coastal development permit. The unpermitted development includes the removal of an existing guy pole and the installation of a new 47.5-foot tall wood utility pole to support cell phone equipment and antennas. Although unpermitted development has occurred, consideration of the application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act. Approval (or denial) of the coastal development permit does not constitute a waiver of any legal action with regard to any alleged violations nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal development permit.

F. Local Coastal Program

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal development permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program (LCP) that conforms with Chapter 3 policies of the Coastal Act:

(a) Prior to certification of the Local Coastal Program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200). A denial of a coastal development permit on grounds it would prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for such conclusion.

The City of Los Angeles does not have a certified Local Coastal Program for the Venice area. The City of Los Angeles Land Use Plan (LUP) for Venice was effectively certified on June 14, 2001. ~~The proposed project, as conditioned, conforms to the policies of the certified Venice LUP. Therefore, approval of the project, as conditioned, will not prejudice the ability of the local government to prepare an LCP that is in conformity with the provisions of Chapter 3 of the Coastal Act.~~

The standard of review for the proposed development is the Coastal Act. The City is working towards certification of the Venice LCP. Although the City currently does not have a certified LCP, this decision could nevertheless have a precedential impact on future decisions, as the LCP would include provisions to address the visual impacts of cellphone facilities. The proposal is the first instance of a new antenna tower project in Venice. Therefore, this case represents an important precedent because of the proposed project's adverse affect on visual resources and because approval of this project could make it more difficult for the Commission to deny future similar projects by other cellphone providers.

As discussed above, the proposed project violates the visual resource policies of the Coastal Act. The Commission finds that an alternative location (i.e., on an existing power pole or building) would significantly reduce the visual impacts that result from the currently proposed development. Therefore, Commission approval of the proposed project would be a bad precedent that would prejudice the ability of the City to prepare an LCP that is in conformity with Chapter 3 of the Coastal Act, and is therefore not consistent with Section 30604(a) of the Coastal Act.

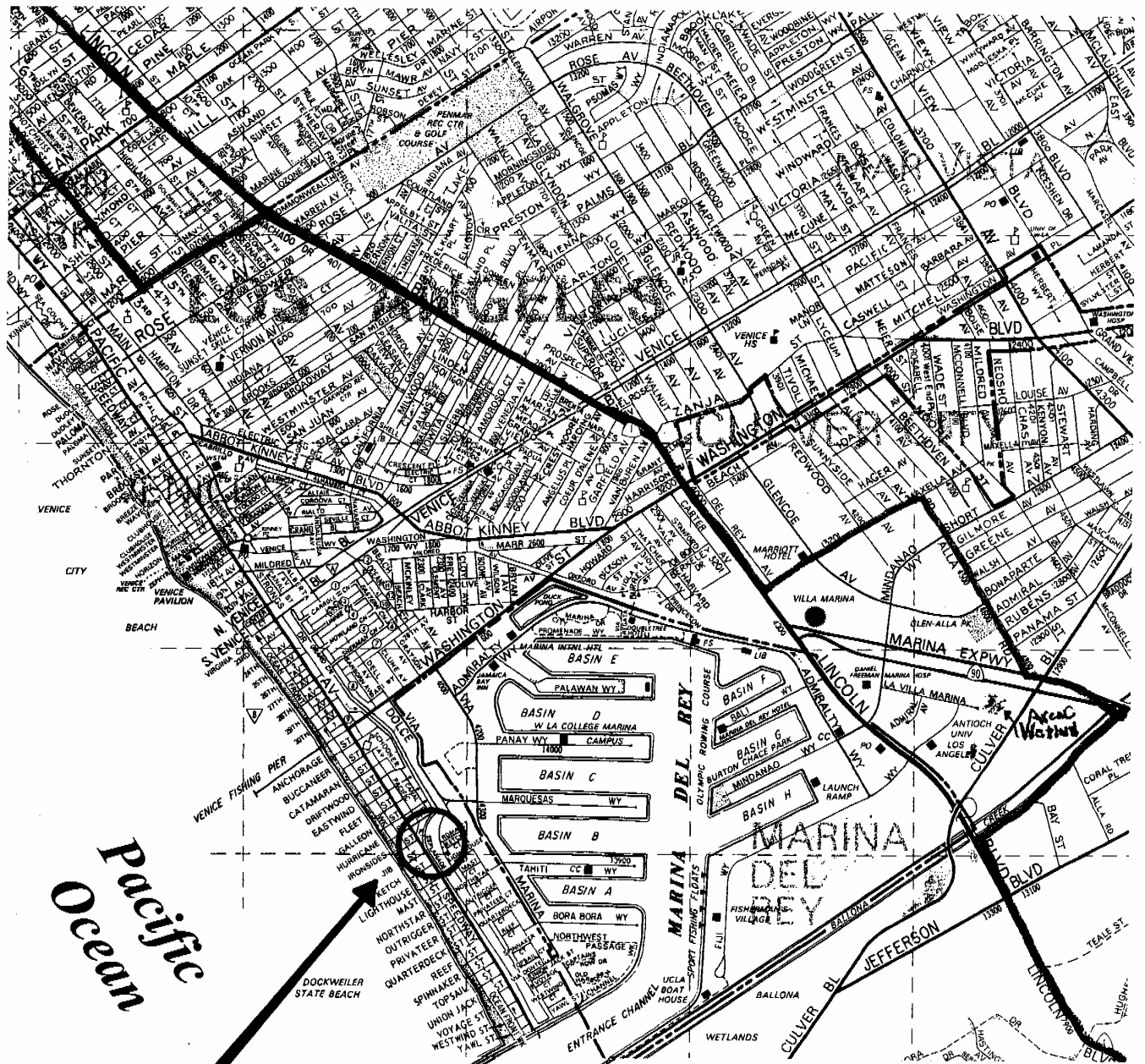
G. California Environmental Quality Act (CEQA)

Section 13096 Title 14 of the California Code of Regulations requires Commission approval of a coastal development permit application to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

~~The proposed project, as conditioned, has been found consistent with the Chapter 3 policies of the Coastal Act. All adverse impacts have been minimized by the recommended conditions of approval and there are no feasible alternatives or additional feasible mitigation measures available which would substantially lessen any significant adverse impact that the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned, can be found consistent with the requirements of the Coastal Act to conform to CEQA.~~

In this case, the Commission finds that an alternative location (i.e., on an existing power pole or building) would significantly reduce the visual impacts that result from the currently proposed development. An alternative location would substantially lessen the significant adverse effect of the proposed project. Thus, denial of the proposed project does not deny the applicant the opportunity to install antennas that are necessary for communications, but only requires that the proposed project be located in another location where it would not adversely affect visual resources of the coastal zone. Therefore, there are feasible alternatives or mitigation measures available which will lessen the significant adverse impacts that the development would have on the environment. Therefore, the Commission finds that the proposed project is not consistent with CEQA and the policies of the Coastal Act.

VENICE, CA



Pacific Ocean

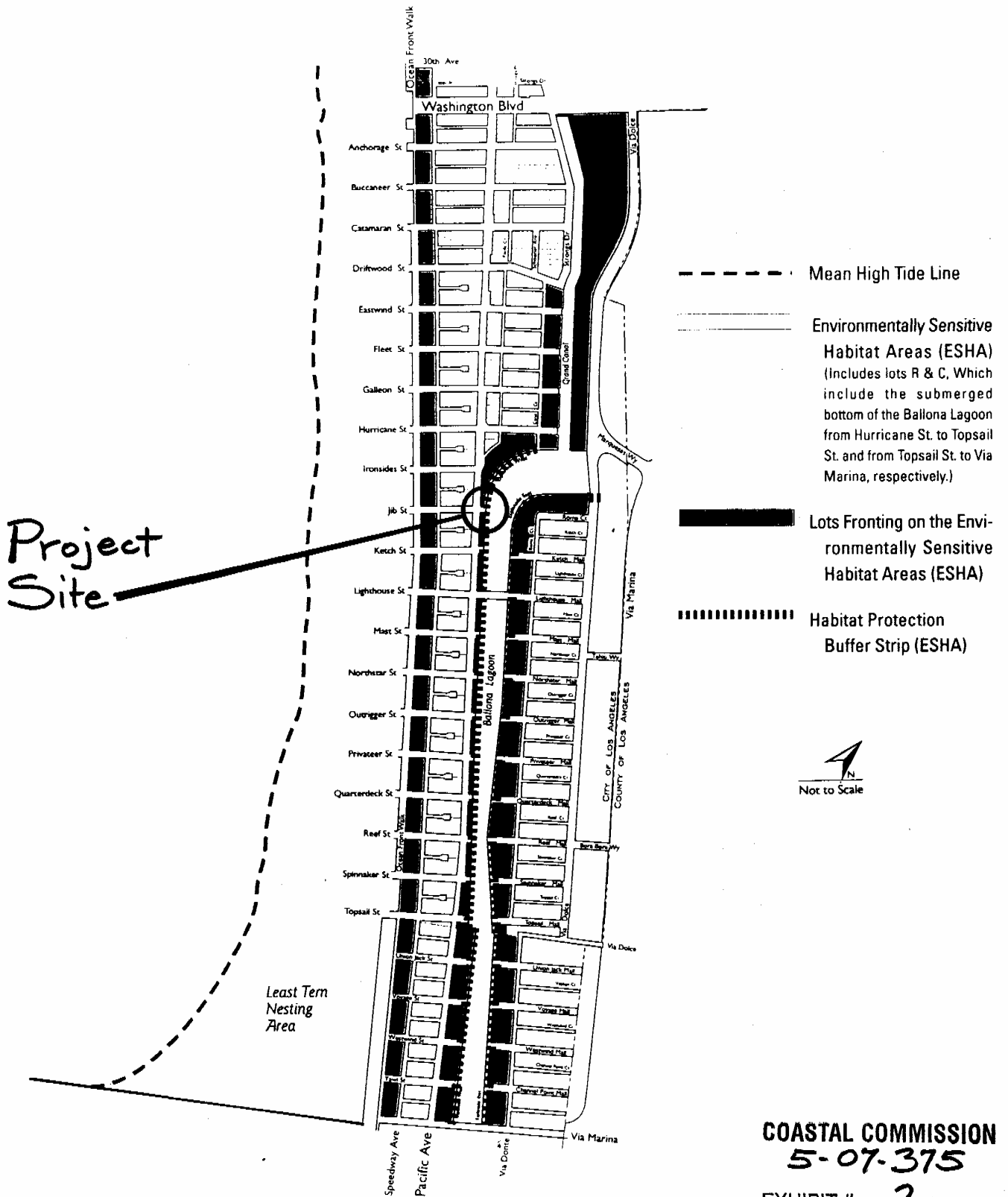
Project Site



COASTAL COMMISSION
5-07-375

EXHIBIT # 1

PAGE 1 OF 1

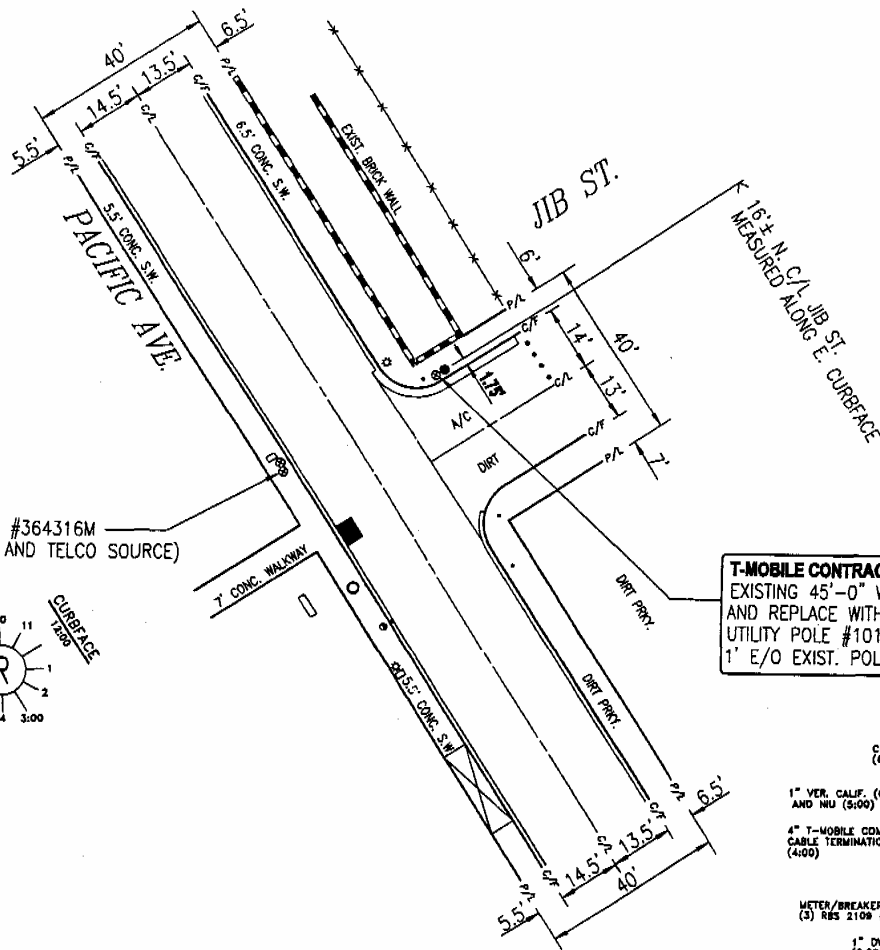


LUP
Exhibit 22c

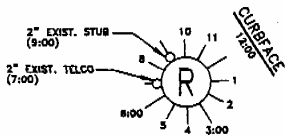
Environmentally Sensitive Habitat Areas

COASTAL COMMISSION
5-07-375

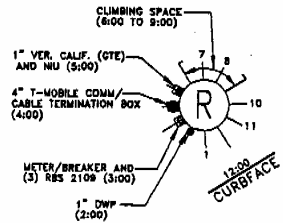
EXHIBIT # 2
PAGE 1 OF 1



EXIST. WOOD POLE #364316M
(T-MOBILE POWER AND TELCO SOURCE)



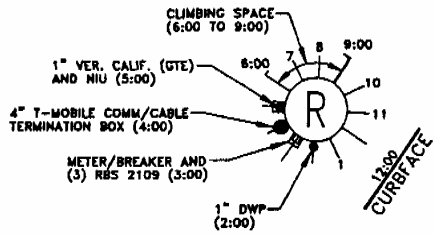
T-MOBILE CONTRACTOR TO REMOVE
EXISTING 45'-0" WOOD UTILITY POLE #371578M
AND REPLACE WITH A NEW 55'-0" WOOD
UTILITY POLE #10121PBM. NOTE: SET NEW POLE
1' E/O EXIST. POLE.



COASTAL COMMISSION
5-07-375

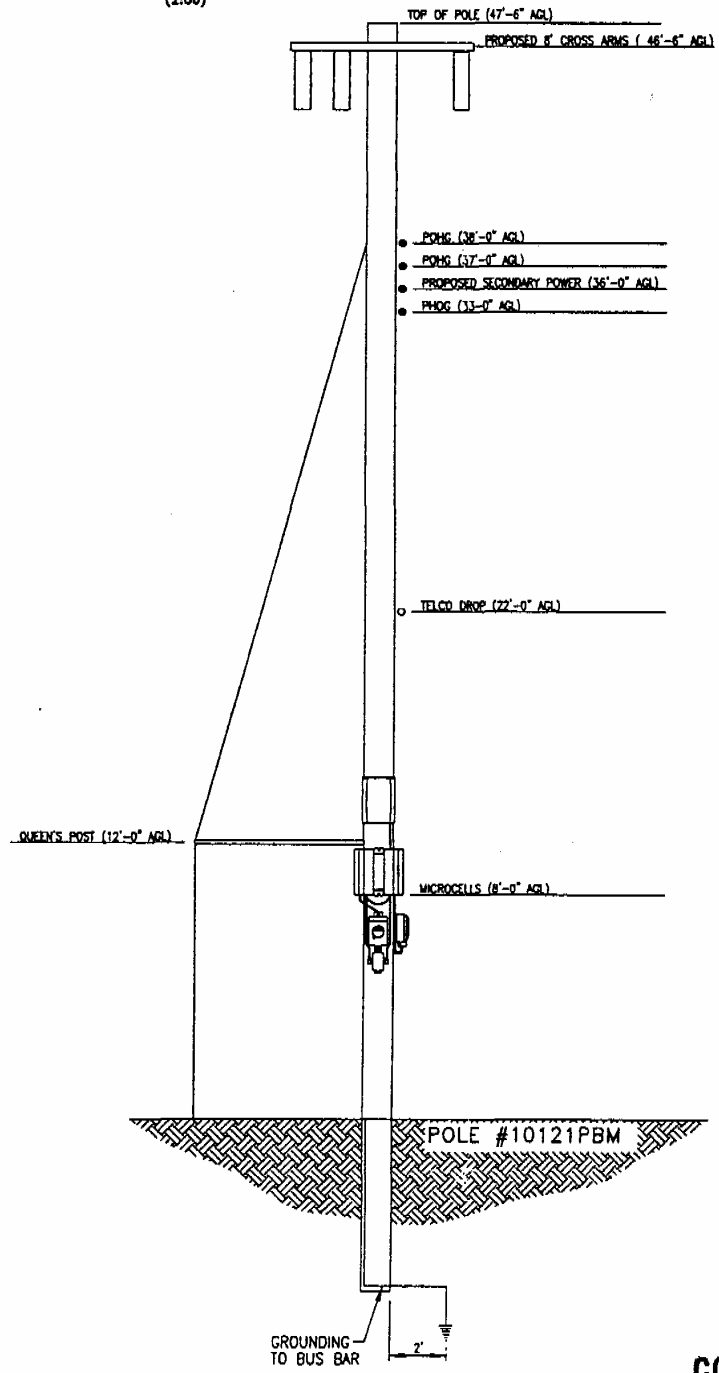
EXHIBIT # 3

PAGE 1 OF 1



NOTE TO CONTRACTOR:
 REVIEW SITE POLE MAKEREADY INFORMATION PRIOR
 TO POLE CONSTRUCTION.

47.5'



COASTAL COMMISSION

POLE SCHEMATIC 5-07-375

EXHIBIT # 4
 PAGE 1 OF 1

~~BOARD~~ OF PUBLIC WORKS
MEMBERS

CYNTHIA M. RUIZ
PRESIDENT

VALERIE LYNNE SHAW
VICE PRESIDENT

PAULA A. DANIELS
PRESIDENT PRO TEMPORE

ERNESTO CÁRDENAS
COMMISSIONER

JULIE GUTMAN
COMMISSIONER

JAMES A. GIBSON
EXECUTIVE OFFICER

CITY OF LOS ANGELES
CALIFORNIA



ANTONIO R. VILLARAIGOSA
MAYOR

DEPARTMENT OF
PUBLIC WORKS

BUREAU OF
ENGINEERING

GARY LEE MOORE, P.E.
CITY ENGINEER

1149 S. BROADWAY, SUITE 700
LOS ANGELES, CA 90015-2213

<http://eng.lacity.org>

Date: OCT 16 2008

RECEIVED
South Coast Region
OCT 21 2008

CALIFORNIA
COASTAL COMMISSION

California Coastal Commission
South Coast District Office
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

ATTN: Charles Posner, Coastal Program Analyst


**Re: T- MOBILE CELL PHONE TOWER PROJECT AT JIB / PACIFIC
COASTAL DEVELOPMENT PERMIT APPLICATION 5-07-375**

Dear Mr. Posner:

The Bureau of Engineering received a request from the California Coastal Commission to determine if a local coastal development permit was required for the installation of a cell phone antenna mast at the corner of Jib and Pacific in Venice. The City Engineer has determined that a local coastal development permit is not required from the City Engineer, since the installation is exempt from the City Engineer's Coastal Development permitting requirements pursuant to Section 30600(b)(2) of the *Coastal Act*. The *Act* expressly excludes "any development by a public agency for which a local government permit is not otherwise required.

Please contact Jim Doty (485-5759), or William Jones (485-5760) in the Environmental Management Group, if you need any further information in this regard.

Sincerely,


Ara Kasparian, Ph.D.
Manager

Environmental Management Group

AJK/JED: wj-m604

Cc: 1) Anthony Munoz, Bureau of Engineering, W.L.A. District
2) Tuan Vo, Bureau of Street Lighting
3) Dirk Broersma, Department of Water and Power.
4) Scott Longhurst, Trillium Communications

COASTAL COMMISSION
5-07-375

EXHIBIT # 5

PAGE 1 OF 2

CITY OF LOS ANGELES
INTERDEPARTMENTAL CORRESPONDENCE

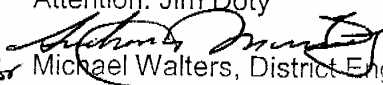
5-07-375
RECEIVED
South Coast Region

SEP 2 - 2008

Date: August 26, 2008
To: Ara J. Kasparian, Ph.D., Manager
Environmental Management Group
M.S. 939

CALIFORNIA
COASTAL COMMISSION

Attention: Jim Doty

From:  Michael Walters, District Engineer
West Los Angeles District

Subject: **Jib E/O Pacific T-Mobile Cell Phone Mast**

Upon a review of available resources and information, the following was found:

1. The subject pole is outside of the reserved right-of-way for the Bureau of Street Services.
2. The subject pole receives power from an overhead power line running to it from across the street. The pole receives its power from the Department of Water and Power, not through the Bureau of Street Lighting electrical system.
3. There are no power lines or conduit running from the pole into the ground.
4. The pole is considered a 'common utility pole' for which a Public Works utility permit would not have been required.

For the above noted items, it is this office's determination that a Public Works permit for the subject pole is not required.

Should you need additional information or clarification, please contact Anthony Muñoz at (310) 575-8530

ABM/abm/JibE/OPacific

Cc: Jeffrey La Dou, Bureau of Engineering, 201 N Figueroa St., 7th Floor, M.S. 503

William Jones, Bureau of Engineering, PWB, 6th Floor, M.S. 939

Chuck Posner
California Coastal Commission South Coast Area
200 Oceangate, 10th Floor
Long Beach, CA 90802-4325

COASTAL COMMISSION
5-07-375

EXHIBIT # 5
PAGE 2 OF 2



BILL ROSENDAHL

City of Los Angeles
Councilmember, Eleventh District

Committees
Chair, *Public Works*
Vice-Chair, *Trade, Commerce & Tourism*
Member, *Budget & Finance*
Member, *Transportation*
Member, *Ad Hoc Homelessness*

January 6, 2009

Commissioner Bonnie Neely
Chair
825 Fifth Street, Room 111
Eureka, CA 95501

NOISSIWOD COASTAL
CALIFORNIA
COMMISSION
JAN 6 - 2009
Region Coast Region
RECEIVED

Re: T-Mobile Cell pole at Pacific and Jib

Dear Commissioner Neely,

I am writing to voice my strong objection to the proposed Coastal Development Permit for the T-Mobile cell phone pole at Pacific and Jib in the Marina Peninsula area of Venice, and to respectfully ask that you postpone consideration of the matter until a commission meeting takes place in the Los Angeles area.

While all cell phone poles generate interest in the community, this particular one has sparked genuine outrage, due to the circumstances of its installation and to the environmentally sensitive location. On behalf of my constituents, I request that this matter be considered at a time and a venue when local residents can more easily attend.

If you choose to proceed with this matter, I urge you most strongly to deny the CDP. I share the concerns of my constituents:

- This cell phone pole was installed in an Environmentally Sensitive Habitat Area (ESHA) where the environmental community has been striving to eliminate or reduce overhead poles and wires to reduce impacts on local species, and in particular the Least Tern which is endangered. A cell phone pole should neither interfere with the view corridor to the Ballona Lagoon Marina Preserve ESHA nor be on land immediately adjacent to an ESHA. Both of these interferences are violations of the California Coastal Act.

Westchester Office
7166 W. Manchester Boulevard
Westchester, CA 90045
(310) 568-8772
(310) 410-3946 Fax

City Hall
200 N. Spring Street, Room 415
Los Angeles, CA 90012
(213) 473-7011
(213) 473-6926 Fax

COASTAL COMMISSION
5-07-375

EXHIBIT # 6

PAGE 1 OF 2



- This cell phone pole falls within the Venice Special Plan area. This means that T-Mobile must submit its plans to the Venice Neighborhood Council and the City of Los Angeles for review and approval before advancing to the California Coastal Commission for a hearing.
- Granting retroactive approval to installation of a cell phone pole in an environmentally sensitive area sets a bad precedent and sends the wrong message. It undermines the purpose an authority of local coastal protection measures and of your commission.

Thank you for your time and consideration. I look forward to a favorable reply. If you have any questions, or would like additional information, please contact Whitney Blumenfeld at my office at (213) 473-7011.

Regards,



BILL ROSENDAHL
Councilmember, 11th District

BR: wb

COASTAL COMMISSION

EXHIBIT # 6
PAGE 2 OF 2



Venice Neighborhood Council

PO Box 550, Venice, CA 90294 / www.VeniceNC.org
Email: info@VeniceNC.org / Phone or Fax: 310.606.2015



January 6, 2009

California Coastal Commission
South Coast District Office
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

RECEIVED
South Coast Region

JAN 6 - 2009

CALIFORNIA
COASTAL COMMISSION

Subject: T-Mobile Installation at Pacific and Jib in Venice, CA

Dear Commissioners:

The Venice Neighborhood Council ("VNC"), following a vote at its January 5, 2009 special meeting, wishes to express its strong opposition to the retroactive approval of a telephone pole installations by T-Mobile at Pacific Ave. and Jib in the Marina Peninsula area of Venice, within the Venice Coastal Zone Specific Plan area. This means that T-Mobile was required to, but did not, submit its plans to the Venice Neighborhood Council for approval before any construction began.

Unfortunately, this is not the first time that T-Mobile and its contractors have violated standard permit approval processes in our community, and foregone public input in the siting process. The VNC successfully opposed T-Mobile's attempt to site a similar installation on Venice Blvd. in early 2008, and has also gone on record in opposition to its current attempts to complete such an installation on 7th Ave. and Broadway.

With regard to the current application before the Commission at Pacific and Jib, T-Mobile proceeded to install a new pole with no permits whatsoever. When it was informed that permits were required, T-Mobile dragged its feet for over 14 months before local community pressure from the Marina Peninsula Neighborhood Association forced them to file for a retroactive permit. In our opinion, approving this permit will undermine the credibility of this agency, and sends the wrong signals about the importance of complying with the Coastal Act and local codes.

The Commission should also be aware that this pole was installed in an ESHA area where the environmental community has been striving to eliminate or reduce overhead poles and wires to reduce impacts on local species, and in particular the Least Tern which is endangered.

\\H:\VNC 07-09\1.5.09 Special Board Meeting\TMobile Jib.Pacific Ltr. 1.6.09.doc

It's YOUR Venice - get involved!

COASTAL COMMISSION

5-07-375

EXHIBIT # 7

PAGE 1 OF 2



Venice Neighborhood Council

PO Box 550, Venice, CA 90294 / www.VeniceNC.org
Email: info@VeniceNC.org / Phone or Fax: 310.606.2015



As such, we respectfully request that the Commission deny T-Mobile's application and order it to remove these illegally installed poles. Alternatively, at a minimum, we ask that the Commission postpone consideration of this item until your February meeting, which we understand will be in, or closer to, Los Angeles, so that our community can give public comment in greater numbers. It is crucial that the Commission and the community are respected, and that no precedents are set that give private interests the impression that they retroactively seek approval for projects, as opposed to proactively coming to the community and attempting to build support for their proposed projects.

Very truly yours,

Mike Newhouse, President
Venice Neighborhood Council

Cc: Secretary@VeniceNC.org,
cposner@coastal.ca.gov

COASTAL COMMISSION

[JH:\VNC 07-09\1.5.09 Special Board Meeting\TMobile Jib.Pacific Ltr. 1.6.09.doc

It's YOUR Venice - get involved!

EXHIBIT # 7
PAGE 2 OF 2

DIANA SPIELBERGER

ATTORNEY AT LAW

2115 MAIN STREET
SANTA MONICA, CALIFORNIA 90405
TELEPHONE (310) 399-3259
FACSIMILE (310) 914-1879
EMAIL diana@janddlaw.com

December 30, 2008

Via Facsimile (562)590-5084
California Coastal Commission
Jack Ainsworth, Deputy Director
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

RECEIVED
South Coast Region

DEC 30 2008

Re: Hearing on January 7, 2009 re T-Mobile
Permit Application No. 5-07-375

CALIFORNIA
COASTAL COMMISSION

DEAR COMMISSIONERS:

This letter is to register my strenuous objection to the retroactive grant of a permit to T-Mobile to place its utility pole adjacent to the Ballona Creek ESHA. I am a resident of the Marina del Rey Peninsula as well as a director of MPNA.

T-Mobile, a privately-owned utility company which knows better, should not be granted approval for their project after-the-fact, without even a slap on the wrist for failing to have obtained a permit to begin with. This sets a bad precedent, and is particularly egregious in this case because the development is adjacent to an ESHA.

Moreover, while Section 30240(b) of the Coastal Act provides that development in areas adjacent to ESHAs are "to be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas." staff apparently found that "the proposed project, as conditioned by the permit, is compatible with the habitat and has been sited to prevent impacts that would significantly degrade the ESHA." How a 5-story pole studded with antennas and equipment is in any compatible with the continuance of the habitat area is beyond my comprehension.

Further, although Section 30251 of the Coastal Act provides that "the scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance, and that permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas . . . and be visually compatible with the character of the surrounding areas," staff found that the "proposed project's impact on visual resources will be minimal." In fact, the moment T-Mobile erected this pole, many Marina Peninsula residents, including myself, not only noticed it immediately, but find it intrusive, unattractive, degrading and adversely and significantly affecting the visual resources of the surrounding area.

COASTAL COMMISSION

5-07-375

EXHIBIT # 8

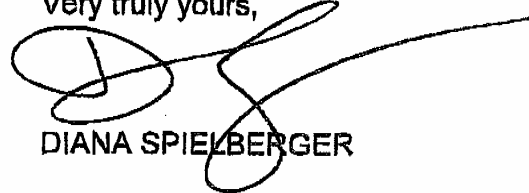
PAGE 1 OF 2

Jack Ainsworth, Deputy Director
December 30, 2008
Page Two

Finally, it is difficult to imagine that there is no other location where T-Mobile's cell phone facilities could be located; perhaps in an area that is not adjacent to an ESHA? The staff report indicates that T-Mobile "asserts that the proposed facility cannot be co-located with another existing site nearby or located elsewhere, and that the new cell phone antenna could not be placed on a building because all the structures in the area are residential buildings." What did T-Mobile do before placing its equipment on this new pole? Why can't their equipment be mounted on top of one of their existing poles, or on top of one of the hotels - or atop a tall residential building in the Marina or adjacent thereto, of which there are plenty? Likely T-Mobile has not approached any building owner or manager (or the County, which, I believe, owns one of the tall apartment buildings for seniors along the Grand Canal) to discuss this, and no one appears to have given its assertion that there is no place else to locate their equipment much thought. T-Mobile took the least expensive course of action: to erect its pole on public property, without obtaining a permit or any fees of which I am aware, knowing that if it does in fact get "caught" it will be given permits, and with no repercussions. Indeed, the staff report indicates that "the applicant has applied to the Coastal Commission for the necessary coastal development permit, although the applicant continues to assert that a coastal development permit is not required for this development." Clearly, the next time T-Mobile wants to erect a pole in the Coastal Zone, it will simply do so again, without obtaining a permit, since it contends that no permit is even required!

For all the foregoing reasons I urge the Commissioners to deny T-Mobile's application for the retroactive permit, and to teach T-Mobile and other would-be scofflaws a lesson - that the Coastal Commission will not tolerate the placement of poles on public land in the Coastal Zone without first obtaining a permit.

Very truly yours,



DIANA SPIELBERGER

cc: MPNA, CLEAN

COASTAL COMMISSION

EXHIBIT # 3
PAGE 2 OF 2

EX PARTE COMMUNICATIONS

Name of project: T-Mobile, USA Application: 5-07-375
Date and time: December 10, 2008; 1:15pm.
Location: Yang Sing, San Francisco
Type of communication: Lunch
Persons initiating communication: Marcia Hanscom, CLEAN

Detailed substantive description of content of communication:

Ms. Hanscom described her objection to T-Mobile's after-the-fact permit for a cell phone utility pole in near the Ballona Lagoon Marine Preserve in Venice.

Ms. Hanscom stated that the City of Los Angeles has long had plans to restore the land where this cellular installation has been illegally located. It makes no sense to us how this section of the Coastal Act can be upheld on an after-the-fact permit being granted.

She believed that staff should:

1. move the hearing to February when it would be heard closer to the subject area.
2. deny the permit under Section 30240b (development next to ESHA) and Section 30251 (scenic and visual qualities.)

Thursday, December 16, 2008

Date



Commissioner Steve Blank

COASTAL COMMISSION

5-07-375

EXHIBIT # 9

PAGE 1 OF 1

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
515 South Figueroa, 9th Floor | Los Angeles, CA 90071-3309
Telephone: 213.622.5555 | Facsimile: 213.620.8816
www.allenmatkins.com

Michael W. Shonafelt
E-mail: mshonafelt@allenmatkins.com
Direct Dial: 213.955.5520 File Number: T9860-012/LA812730.02

Via Facsimile and
First Class Mail

January 14, 2009

Mr. Charles Posner
California Coastal Commission
South Coast Area Office
200 OceanGate, Suite 1000
Long Beach, CA 90802-4302

RECEIVED
South Coast Region

JAN 14 2009

CALIFORNIA
COASTAL COMMISSION

Re: **Application No. 5-07-375 - T-Mobile Wireless Facility**

Dear Mr. Posner:

We represent T-Mobile USA, Inc. ("T-Mobile") with respect to all matters pertaining to Application Number 5-07-375, which seeks a coastal development permit ("CDP") for the wireless telecommunications facility located at the corner of Jib Street and Pacific Avenue in the Venice neighborhood of the City of Los Angeles, California ("Facility"). This letter presents T-Mobile's legal position with respect to that application. As demonstrated below, T-Mobile believes that the Facility is subject to an exemption from the CDP process pursuant to section 30610 subdivision (f) of the Coastal Act. Accordingly, *T-Mobile hereby requests that the Application be deemed submitted under protest.*

1. Introduction.

The Facility consists of six panel antennas, three microcells and a meter box mounted to a utility pole located approximately 47.5 feet above grade in the public right-of-way at the northeast intersection of Jib Street and Pacific Avenue in the Venice neighborhood of Los Angeles. T-Mobile installed the Facility in June 2007. Because the Facility merely involved replacing an existing utility pole and did not feature any ground-mounted equipment, the City of Los Angeles ("City"), which has authority to issue CDPs in its jurisdictional boundaries pursuant to section 30600 subdivision (b) of the Coastal Act, did not require discretionary or ministerial permits for its installation. On September 17, 2007, the California Coastal Commission ("Commission") commenced an administrative enforcement action to require T-Mobile to obtain a CDP for the Facility. In response to the Commission's request, T-Mobile submitted an application for a CDP on

Los Angeles | Orange County | San Diego | Century City | San Francisco | Del Mar Heights | Walnut Creek

COASTAL COMMISSION

5-07-375
EXHIBIT # 10
PAGE 1 OF 10

Mr. Charles Posner
January 14, 2009
Page 2

or around October 24, 2007 ("Application"). T-Mobile has been working closely with the Commission and the City to facilitate the resolution of the enforcement action.

2. The Commission Should Deem the Facility Exempt From the Coastal Act Pursuant to Section 30610 Subdivision (f) of the Coastal Act.

The Legislature's overriding objective in enacting the Coastal Act was the preservation of California's coastal resources and ensuring that future development has minimal impact on the public's ability to enjoy those resources. (See Pub. Resources Code, §§ 30001, 30001.5.) The primary tool for implementing the Coastal Act's policies is the requirement that all development within the coastal zone obtain a CDP. Despite the overriding legislative policy behind the CDP process, however, the Legislature recognized that certain types of development should be exempted from the CDP requirements because the administrative burden of issuing a CDP outweighs the impacts of such development on the State's coastal resources.

Specifically, section 30610 sets forth certain categories of development that are exempt from the CDP requirements. Among those is the "necessary utility" exemption, which states that "no coastal development permit shall be required pursuant to this chapter for ... [t]he installation, testing, and placement in service or the replacement of any necessary utility connection between an existing service facility and any development approved pursuant to this division." (*Id.* at § 30610.)

A. Wireless Telecommunications Services Constitute a "Utility" in the State of California.

It is well established in the State of California that a wireless telecommunications provider constitutes a "utility." Public Utilities Code section 216 defines a "public utility" to include "every ... telephone corporation ... where the service is performed for, or the commodity is delivered to, the public or any portion thereof." (Pub. Util. Code, § 216.) The Public Utilities Code defines "telephone corporation" to include "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within the state." (*Id.* at § 234.) "Telephone line," as used in the definition of "telephone corporation," includes

all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telegraph, *whether such communication is had with or without the use of transmission wires.*

(*Id.* at § 235, emphasis added.) Finally, the California Constitution makes clear that:

COASTAL COMMISSION

EXHIBIT # 10
PAGE 2 OF 10

Mr. Charles Posner
January 14, 2009
Page 3

Private corporations that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages ... are public utilities subject to control by the Legislature.

(Cal. Const., art. XII, § 3.)

B. *The Facility Is Necessary to Provide Wireless Telecommunications to Users in the Area.*

In this case, the Facility is intended to provide wireless telecommunications services to the neighborhoods in the vicinity of the intersection of Jib Street and Pacific Avenue and for mobile cell phone users in the Venice area. The provision of wireless telecommunications services from the Facility constitutes a "utility" for customers in that area. Moreover, the wireless telecommunications services provided by the Facility are necessary to provide adequate wireless coverage to the residents in the vicinity of the site. Conditions in the vicinity of the site prior to the installation and operation of the Facility reveal a significant gap in wireless telecommunications coverage at the site. The radio frequency propagation map attached as Exhibit A reveals that coverage without the Facility ranges from non-existent (the areas depicted in white) to marginal (areas depicted in gray). (See Predicted Coverage without LA03386D Jib St. JPA, attached as Exhibit A.) Indeed, in the areas shaded in gray, adequate wireless telephone service exists only outdoors; no reliable service exists in vehicles or buildings. By contrast, Exhibit B reveals significant improvement in in-building and in-vehicle coverage with the Facility up and running. (See Predicted Coverage with LA03386D Jib St. JPA, attached as Exhibit B.) Adequate wireless telecommunications coverage becomes more critical as more and more households abandon traditional land lines in favor of wireless telecommunications coverage.

The Commission's own guidelines interpreting the scope of section 30610 subdivision (f) further confirm that such services fall into the scope of the necessary utility exception. The Commission issued the guidelines interpreting section 30601 subdivision (f) in 1978. While the guidance predates widespread use of wireless telecommunications, the document reveals that the Commission intended to exempt expansion of telephone services to existing developments in the Coastal Zone. (See Cal. Coastal Com., *Guidelines on Repair, Maintenance and Utility Hook-Up Exclusions From Permit Requirements*, Sept. 5, 1978 ("Guidelines").) In particular, the Guidelines state that "[n]o permit or conditions are required for the activities of a telephone company" that constitute "[p]lacement of additional aerial facilities on existing poles" and "work in connection with or placement of facilities to expand service to existing customers or to serve new customers, including placement of underground service connections or aerial service connections from existing poles with any necessary clearance poles." (*Id.* at pp. 4-5.)

COASTAL COMMISSION

EXHIBIT # 10
PAGE 3 OF 10

Mr. Charles Posner

January 14, 2009

Page 4

Because they predate the widespread use of wireless telecommunications, the Guidelines do not expressly address wireless antennas. The Commission nevertheless made clear that the Guidelines are not meant to be exhaustive and that "the exclusions also apply to activities comparable to those listed." (*Id.* at p. 1.) Moreover, as demonstrated above, the Legislature itself has made clear that the use of hard-line wires is not essential to the definition of "utility" in the context of telecommunications. In short, the Facility serves the same purpose as aerial wires -- it provides telecommunications service to the nearby residences. Indeed, in this case, an argument may be made that the method that T-Mobile has chosen to accomplish that goal better serves the Coastal Act's policies for protecting public access and visual resources by minimizing the number of both aerial wires and support poles required to serve a comparable number of people.

The language of section 30610 subdivision (f) and the Guidelines therefore reveal a legislative intent to exempt services -- such as those provided by the Facility -- from the CDP requirements. In short:

- (1) T-Mobile's wireless telecommunications services qualify as a public utility;
- (2) The Facility provides a necessary wireless connection between T-Mobile's existing service facilities and the surrounding development, all of which was approved under the Coastal Act; and
- (3) Due to a growth in capacity demands, the Facility is necessary to expand services to existing customers and to allow T-Mobile to serve new customers -- a goal that the Guidelines expressly envision as exempt from the CDP requirements of the Coastal Act.

3. The Federal Telecommunications Act Circumscribes the Coastal Commission's Ability to Regulate the Facility.

Because this case addresses the permitting of a wireless telecommunications facility, it falls within the purview of the federal Telecommunications Act of 1996 ("Telecom Act"). Congress enacted the Telecom Act to "promote competition and reduce regulation" and to "encourage the rapid deployment of new telecommunications technologies." (Telecom Act, Pub. L. No. 104-104, 110 Stat. 56, 56 [preamble].) In furtherance of that congressional goal, section 332 of the Telecom Act circumscribes the scope of state and local regulatory authority with respect to the siting and permitting of wireless facilities.

A. State and Local Governments Cannot Prohibit the Provision of Wireless Telecommunications Services.

Among other restrictions found at section 332, the Telecom Act prohibits any regulation by a state or local government of the siting of wireless telecommunications sites where such regulation

COASTAL COMMISSION

EXHIBIT # 10
PAGE 4 OF 10

Mr. Charles Posner

January 14, 2009

Page 5

results in a prohibition of the provision of personal wireless services. (47 U.S.C. § 332(c)(7)(B)(i)(II).) Along those lines, the courts are in agreement that state decisions or regulations that have the effect of preventing carriers from filling coverage gaps are prohibited. (See *APT Pittsburgh L.P. v. Penn. Township Butler County* (3rd Cir. 1999) 196 F.3d 469, 480; *T-Mobile Spectrum, L.P. v. Willoth* (2nd Cir. 1999) 176 F.3d 630, 643.) The Ninth Circuit has determined that a prohibition in service under section 332(c)(7)(B)(i)(II) exists where (a) a provider has a "significant gap" in coverage and (b) the provider has proposed the "least intrusive" means to fill the significant gap. (*MetroPCS, Inc. v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d 715, 731-734.) In the case, T-Mobile has identified a significant gap in coverage and has proposed the "least intrusive means" of filling that significant gap.

(1) The Facility Is Necessary to Fill a Significant Gap in Service.

Selection of sites for the installation of wireless facilities is "locationally dependent," meaning that the location of sites is driven not by local planning concerns, but by the location of existing sites in the network chain. That is because the distance over which the low-power signals emitted by such facilities extend is limited to a geographically small area or "cell." An overlapping patchwork of such cells is needed to provide seamless coverage over a larger geographical area. As the caller moves through cells, one cell relays its signal to the next. Where there is a "gap" in this pattern, a call is either "dropped" (disconnected) or "blocked" (never connected), resulting in a failure of the network. (See *T-Mobile Spectrum L.P. v. Jefferson County* (N.D. Ala. 1997) 968 F.Supp. 1457 [describing wireless telecommunications coverage in the context of the Telecom Act].) Consequently, the lack of one site can lead to significant gaps in service. Along the same lines, relocation of a proposed site can upset the configuration of the entire network. This locational dependence significantly limits the scope of viable alternative sites for a proposed facility. Specifically, the location of a cell site is limited to the "service ring" determined by the existing facilities in the network.

As noted, conditions in the vicinity of the site prior to the installation and operation of the Facility reveal a significant gap in wireless telecommunications coverage at the site. The radio frequency propagation map attached as Exhibit A reveals that coverage without the Facility ranges from non-existent (the areas depicted in white) to marginal (areas depicted in gray). (See Predicted Coverage without LA03386D Jib St. JPA, attached as Exhibit A.) In the areas shaded in gray, adequate wireless telephone service exists only outdoors; no reliable service exists in vehicles or buildings. By contrast, Exhibit B reveals significant improvement in in-building and in-vehicle coverage with the Facility up and running. (See Predicted Coverage with LA03386D Jib St. JPA, attached as Exhibit B.) Adequate wireless telecommunications coverage becomes more critical as more and more households abandon traditional land lines in favor of wireless telecommunications coverage.

COASTAL COMMISSION

EXHIBIT # 10
PAGE 5 OF 10

Mr. Charles Posner

January 14, 2009

Page 6

Given the evidence of a substantial gap in coverage in the area served by the Facility, a denial of a CDP to T-Mobile for the Facility could result in an effective prohibition on T-Mobile's provision of wireless services within the immediate neighborhood, in violation of the Telecom Act. This is particularly true where, as here, the carrier has ruled out viable alternatives for the facility and, as a consequence, has proposed the "least intrusive means" of filling that coverage gap. In this case, T-Mobile has exhausted all viable alternative locations for the Facility.

(2) T-Mobile Has Exhausted Viable Alternative Locations.

The Ninth Circuit has interpreted "least intrusive means" to require service providers to undertake a "meaningful comparison of alternative sites before the siting application process is needlessly repeated." (*MetroPCS, Inc. v. City and County of San Francisco, supra*, 400 F.3d at p. 735.) T-Mobile has undertaken that meaningful comparison of alternative sites and determined that the subject site is the only viable location for the Facility.

T-Mobile identified a coverage gap in its network centered north of the channel opening into Marina Del Rey on the Venice peninsula at the intersection of Pacific Avenue and Top Sail Court. T-Mobile released a search ring in April 2005 to identify suitable properties on which to locate a wireless telecommunications facility that would provide coverage to the immediate area and provide improved coverage to their customers. An analysis of the existing properties in the vicinity indicated predominantly single and multi-family buildings, which lacked the necessary space to construct this type of facility. Two multi-story buildings were identified that were potentially suitable for the proposed use: 330 Washington Boulevard and 3401 Via Dolce.

330 Washington Blvd: A Letter of Interest was sent to the ownership of this property in May 2005. The ownership said that they were not interested in entering into a lease agreement with T-Mobile at that time as they were in the process of redeveloping the property and did not want to encumber the property with a leasehold interest.

3401 Via Dolce: A Letter of Interest was sent to the ownership of this property in May 2005. The ownership informed T-Mobile that they were interested in entering into a lease agreement with T-Mobile. Negotiations then ensued with the ownership and T-Mobile engaged its architect to produce the necessary drawings for submittal to the proper authorities for review. After several months of negotiations, however, the property owner determined that they were no longer interested in pursuing a lease with T-Mobile and terminated the negotiations.

After these two properties were deemed "not leasable," T-Mobile began to search for other suitable locations for the proposed facility. A City of Los Angeles Department of Water and Power pump station located on Hurricane Avenue was identified as a possible location but, after

COASTAL COMMISSION

EXHIBIT # 10
PAGE 6 OF 10

Mr. Charles Posner

January 14, 2009

Page 7

discussions with DWP representatives, it was determined that there was not sufficient space on the property for the proposed facility.

It was subsequently determined by T-Mobile that the only suitable location for the proposed facility would be within the public right-of-way. Where possible, T-Mobile tries to utilize existing buildings and/or private property on which to locate its facilities, since existing buildings and private property generally provide more flexibility with respect to the design of the facility and placement of equipment and antennas.

A third search of the area was then undertaken in late 2006 and two potential locations in the public right-of-way were identified. The first location consisted of an approximately 34-foot wood utility pole located within the public right-of-way across from 30 Reef Street. Upon investigation, it was determined that, due to the dimensions of the right-of-way at this location and the fact that the facility could create a visual impact on the residents, it would be best to move to the second location. The second location within the public right-of-way is the site of the Facility. It is located at the northeast corner of Pacific Avenue and Jib Street. T-Mobile's engineers selected that site for several reasons, including: (a) the dimensions of the right-of-way at that location allowed for the proposed use; and (b) the existing pole was not located in front of, or adjacent to, any structures; no visual impacts therefore would result and construction could be done without impacting the local residents. Discussions with the City of Los Angeles Bureau of Engineering indicated that the proposed location would meet all relevant city code and ordinance requirements and that the Facility could be constructed in a timely manner. The Facility was subsequently constructed in the summer of 2007.

B. State and Local Governments Must Base Permit Denials on Substantial Evidence.

The Telecom Act also requires that State and local governments base denials of wireless telecommunications permit applications be based on substantial evidence. Section 332(c)(7)(B)(3) of the Telecom Act provides that

Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, 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)(2).) To determine whether a decision properly is based on substantial evidence, one looks to applicable state and/or local law. (*Preferred Sites, LLC v. Troup County*, 296 F.3d 121, 1219 (11th Cir. 2002) (stating that the substantial evidence standard "does not affect or encroach upon the substantive standards to be applied under established principles of state and local law"); *Cellular Tel. Co. v. Zoning Bd. of Adjustment*, 197 F.3d 64, 72 (3d Cir. 1999) ("In the context of § 332(c)(7)(B)(iii), the decision process itself is governed by applicable state and local zoning laws."); *Omnipoint Corp. v. Zoning Hearing Bd. of Pinegrove Township*, 181 F.3d 403,

COASTAL COMMISSION

EXHIBIT # 10
PAGE 7 OF 10

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law

Mr. Charles Posner

January 14, 2009

Page 8

409 (3d Cir. 1999); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999) (“[L]ocal and state zoning laws govern the weight to be given the evidence.”).

Accordingly, if a stated ground of denial is entitled to no weight under state law, it cannot constitute “substantial evidence” under the Telecom Act. See *Town of Oyster Bay*, 166 F.3d at 494 (“[L]ocal and state zoning laws govern the weight to be given the evidence.”). The denial is then deemed “invalid even before the application of the [Telecom Act’s] federal standards.” (*MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 724.)

4. Public Utilities Code Section 7901 Also Restricts Regulation of Wireless Telecommunications Facilities in the Public Rights-of-Way.

California state law governs the weight of substantial evidence review under section 332(c)(7)(B)(iii) of the Telecom Act. California Public Utilities Code section 7901 and its precursor statute, Civil Code section 536; have constituted the controlling state law governing the placement of telecommunications facilities in the public rights-of-way since 1905, when telephone networks were first being deployed in the state. Since 1905, both statutes have been judicially construed by “many decisions” of the California courts. (*Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642, 648. Section 7901 states, in relevant part:

Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across; any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

(Pub. Util. Code, § 7901.)

When it enacted California Civil Code section 536, the predecessor statute to section 7901, the California Legislature determined that telephone service is a matter of statewide -- not local -- concern and is not subject to the normal scope of regulatory control:

[I]t is apparent that because of the interest of the people throughout the state in the existence of telephone lines in the streets in the city, the right and obligation to construct and maintain telephone lines has become a matter of state concern. For this reason the city cannot today exclude telephone lines from the streets upon the theory that “it is a municipal affair.”

COASTAL COMMISSION

EXHIBIT # 10
PAGE 8 OF 10

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law

Mr. Charles Posner

January 14, 2009

Page 9

(*Pac. Tel. & Tel. Co. v. City & County of S.F.*, 51 Cal. 2d. 766, 774 (1959).) Section 7901 vests a statewide franchise in telephone corporations to construct their facilities in the public rights-of-way of the State, without undue interference. As the California Court of Appeal recently affirmed:

[Former Civil Code section 536 [now section 7901] has been judicially construed by many decisions of this court, and it has been uniformly held that the statute is a continuing offer extended to telephone and telegraph companies to use the highways, which offer when accepted by the construction and maintenance of lines constitutes a binding contract based on adequate consideration, and that the vested right established thereby cannot be impaired by subsequent acts of the Legislature. [Citations.]

(*Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642, 648.)

The franchise rights afforded by section 7901 allow telephone corporations, including wireless telecommunications providers such as T-Mobile, to construct their facilities in the public rights-of-way, subject *only* to the requirement that construction activities do not “incommode” (i.e., “unreasonably obstruct and interfere with ordinary travel” in) the public rights-of-way. (*Pac. Tel. & Tel. Co. v. City & County of S.F.* (1961) 197 Cal.App.2d 133, 146; see Pub. Util. Code, § 7901.1.) The Legislature specifically targeted the public rights-of-way for facilitating the deployment of telecommunications networks. The public rights-of-way therefore have a special status -- unlike that of private property -- and that status applies in the Coastal Zone. The special status of the public rights-of-way limits regulation of telecommunications facilities to only to prevent the incommoding of the public rights-of-way and precludes regulation of public rights-of-way facilities, such as that at issue here, on the basis of aesthetic impacts. On that same basis, such impacts cannot constitute substantial evidence under section 332(c)(7)(B)(iii) of the Telecom Act.

5. In Any Event, the Facility Meets the Requirements for Issuance of a CDP.

As demonstrated above, the Facility is exempt from the Coastal Act’s CDP requirements, pursuant to section 30610 subdivision (f) of the Coastal Act and is otherwise not subject to aesthetic regulation pursuant to state law. Subject to the foregoing, T-Mobile nevertheless generally agrees with the findings and conclusions of the Staff Report concerning the Facility’s compliance with the Coastal Act.

Section 30604 of the Coastal Act states that “ a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with Chapter 3 (commencing with Section 30200) and that the permitted development will not prejudice the ability of the local government to prepare a local coastal program that is in conformity with Chapter 3.” Chapter 3 of the Coastal Act establishes policies protecting and promoting public access to the coastal zone, recreational opportunities, the coastal zone’s marine

COASTAL COMMISSION

EXHIBIT # 10
PAGE 9 OF 10

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law

Mr. Charles Posner
January 14, 2009
Page 10


environment, the coastal zone's land resources, and also establishes standards for development and industrial development within the coastal zone.

As noted above, the proposed Facility requires replacing an existing 38-foot high utility pole ("Original Pole") with a new 47.5-foot high utility pole and mounting six panel antennas, four equipment cabinets and one electric power meter onto the new pole at heights that do not obstruct the public right of way. The Facility's footprint is identical to that of the Original Pole. Accordingly, the Facility introduces no new impacts on public access, recreational opportunities, the marine environment and/or land resources. Additionally, the Facility conforms to the Coastal Act's development standards and arguably furthers the statute's goal of protecting visual resources by providing additional telephone service to the surrounding residents without constructing additional aerial wires and guide poles. (See Pub. Resources Code, § 30251.) As noted above, the Facility is a less intrusive means of providing the same telephone service that the Guidelines explicitly allow. Finally, the Facility will not prejudice the local government's ability to prepare a local coastal program that is in conformance with Chapter Three because the Facility will result in no new impacts.

6. Conclusion.

For the foregoing reasons, T-Mobile requests that the Commission consider and invoke the "necessary utility" exemption of Section 30610 subdivision (f) of the Coastal Act and/or otherwise determine that the Facility is exempt from the CDP requirement of the Coastal Act.

Very truly yours,



Michael W. Shonafelt

MWS:pmt

cc: Scott Longhurst
Tania Dao, Esq.
Joe Thompson

COASTAL COMMISSION

EXHIBIT # 10
PAGE 10 OF 10