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File No.:
2464.112

January 3, 2018

VIA CERTIFIED MAIL AND EMAIL: MYOKOYAMA@HILLSBOROUGH.NET

City Council of the Town of Hillsborough
c/o City Clerk, Miyuki Yokoyama
Town of Hillsborough
1600 Floribunda Ave.
Hillsborough, CA 94010

Re: Crown Castle: APPEAL of City Manager Decision on 16 Pending Applications for Wireless Communications Facilities Permits pursuant to Town of Hillsborough Municipal Code Section 15.32.090.

Dear Ms. Yokoyama,

This office represents Crown Castle NG West LLC (“Crown Castle”) in the above-referenced matter (“Applications”).¹ This letter constitutes Crown Castle’s appeal of the City Manager’s December 20, 2017, denial of the Applications pursuant to Town of Hillsborough Municipal Code (“HMC”) section 15.32.090 (“Appeal”). A brief summary of the grounds for the Appeal follows. This Appeal is timely filed under HMC section 15.32.090.A.

Please note that Crown Castle reserves the right to supplement this letter and/or present additional evidence up to the date of the hearing on this Appeal.

1. The City Manager Has No Authority to Deny the Applications Based on Purported Non-Compliance with CEQA.

The major basis for the City Manager’s denial is a purported failure by Crown Castle to demonstrate that the Applications have proceeded through review pursuant to the California Environmental Quality Act (Pub. Resources Code, § 21000, et seq.) (“CEQA”). The City Manager’s contentions are misplaced. It is the permitting agency’s obligation to undertake CEQA review; it is *not* incumbent on the applicant to ensure that CEQA review occurs. (See Pub. Resources Code, § 21080 [public agency must conduct environmental review]; § 21006 [CEQA is an “integral part of any public agency’s decisionmaking process”].) Through the City Manager’s decision, the Town has attempted to evade its duties under CEQA by deferring to the Public Utilities Commission (“PUC”) as “lead agency” and washing its hands of CEQA compliance. While ordinarily it is true that the PUC takes a lead agency role in projects such as this, the PUC has not done so here since it has not yet issued a CEQA determination. In the absence of a CEQA determination, lead agency status falls to the Town, which has

¹ A list of the addresses of the node sites covered by the Applications is enclosed.

1333 N. CALIFORNIA BLVD
SUITE 600
WALNUT CREEK, CA 94596
T 925 988 3200
F 925 988 3290

895 DOVE STREET
5TH FLOOR
NEWPORT BEACH, CA 92660
T 949 854 7000
F 949 854 7099

3993 HOWARD HUGHES PKWY
SUITE 530
LAS VEGAS, NV 89169
T 702 777 7500
F 702 777 7599

comprehensive permitting authority over the whole of the project embraced by the Applications, thereby qualifying as lead agency in the absence of PUC action. (*Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 940 [under CEQA, when two or more public entities qualify as a lead agency, the entity that acts first is the lead agency].) By disclaiming any duty to undertake CEQA review, and instead simply issue a blanket denial, the Town not only has violated CEQA, but also the federal Telecommunications Act of 1996. To the extent the Town's code purports to allow the City Manager to deny the Applications based on purported lack of PUC CEQA documents, the Town's code is preempted by state law and therefore void of any legal effect.

2. The City Manager's Decision Does Not Rest on Substantial Evidence.

Aside from the City Manager's misplaced CEQA contentions, which make up the bulk of the reasons for the denial, the denial raises nine municipal code consistency "findings" as an "alternative" basis for the denial ("Findings"). The Findings consist only of perfunctory conclusions, none of which is supported by any evidence. The Findings feature no node-by-node factual analysis and otherwise contain no reasoning to which Crown Castle can adequately respond. (See Pub. Resources Code, § 21080, subd. (e)(2); "[s]ubstantial evidence is not argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous ..."; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [agency "must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."].)

Moreover, the Findings represent a striking "about-face" from the City Manager's October 31, 2017, public notices for the Applications, which informed the public that the Applications would be "approved," and which invoked the *same nine consistency criteria* with conclusions that the Applications *were consistent*. One may only conclude that the City Manager's remarkable, 180-degree, shift in position -- which occurred only after the Town asked Crown Castle to comply with an ad hoc, uncodified public hearing requirement before a gathering of project opponents -- rests more on political expedience than on substantial evidence. The failure to base the denial on substantial evidence violates 47 U.S.C. § 332 (c)(7)(B)(iii) and state law.

3. The Town of Hillsborough Has Not Acted on the Applications in a Reasonable Period of Time.

In a spirit of goodwill and collaboration with staff, Crown Castle agreed to extend the federal shot clock no less than *three times* pursuant to paragraph 49 of the Federal Communications Commission's "Shot Clock Rule" (Petition for Declaratory Ruling, 24 F.C.C. Rcd. 13994, ¶ 49 (2009)) ("Shot Clock"). The City Manager's surprising decision to issue a blanket denial came only one day before the third and final extension of the federal Shot Clock expired. As the State Legislature made very clear in its recent enactment of AB 57 (Gov. Code, § 65964.1 subdivision (a)), expiration of the Shot Clock means the project is *shovel ready*, not merely poised for another round of bureaucratic review.

In this case, the City Manager's decision was merely a preliminary decision in the administrative chain -- with the ultimate decision to be rendered by the City Council. (HMC § 15.32.090.) Having failed to issue a final action by the Shot Clock deadline, the Town has failed to act on the Applications in a "reasonable period of time," in violation of 47 U.S.C. § 332 (c)(7)(B)(ii) and Government Code section 65964.1, giving rise to Crown Castle's right to an approval of the Applications by operation of law.

4. The City Manager's Denials Are the Equivalent of a Blanket Prohibition.

The City Manager's decision, in an indiscriminate and summary fashion, denies *all sixteen applications*. It does so in the face of clear substantial evidence of a significant gap in coverage – evidence which the City Manager *confirmed* in her October 31, 2017, notice of decision. The Town otherwise presented no analysis of the nodes and identified no alternatives to the proposed node sites, leaving Crown Castle with no recourse aside from an appeal to the City Council. The City Manager's decision bears all the earmarks of a blanket prohibition in violation of 47 U.S.C. sections 253 and 332 (c)(7)(B)(i)(II).

5. The City Manager's Decision Violates Crown Castle's Statewide Franchise Rights under Public Utilities Code Section 7901.

Crown Castle's special regulatory status as a competitive local exchange carrier ("CLEC") gives rise to a vested right under Public Utilities Code section 7901 to use the public rights-of-way ("ROW") in the Town to "construct ... telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State" and to "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[.]" (Pub. Util. Code, § 7901; *Williams Communications v. City of Riverside, supra*, 114 Cal.App.4th at p. 648 quoting *County of L. A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 384 [196 P.2d 773].)² Given the vested nature of the section 7901 right, Crown Castle contends that a discretionary use permit -- like the conditional use permit required by the Town in this case -- constitutes an unlawful precondition for a CLEC's entry into the ROW. Moreover, the blanket denial constitutes a definitive prohibition on the use of the Town's ROW in direct collision with Section 7901.

For the foregoing reasons, among others, the City Council should grant this Appeal and approve the Applications.

² Notwithstanding the submittal of the Applications to this discretionary process, Crown Castle reserves its rights under Public Utilities Code sections 7901 and 7901.1, including the right to proceed with construction of its networks without having to obtain a local franchise and/or discretionary grant of entry in to the ROW.

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If you have any questions about this notice, please do not hesitate to call me.

Very truly yours,



Michael W. Shonafelt

MWS:mws

Enclosure

cc: Christopher Diaz, Esq.
Daniel Schweizer, Esq., Regional Director Government Relations, Crown Castle
Sharon James, Manager, Government Relations, Crown Castle
Greg Guerrazzi, G Squared Consulting
Joshua Trauner, Government Relations Counsel, Crown Castle

7308358.1

Crown Castle – Hillsborough Small Cell Project – 12/6/17

CC Project #	Permit #	Location	Pole Type & Height	Equipment Location
H01	ENC17-0013	Adjacent to 1455 Marlborough Road	Replace Wood Pole – 39’ 6” to 54’ 3”	Pole Mounted
H02m1	ENC17-0014	Adjacent to 1230 San Raymundo Road	Replace Wood Pole – 38’ 8” to 53’ 4”	Ground Mounted
H05m1	ENC17-0026	Adjacent to 720 Chateau Drive	New Steel Pole – 35’	Ground Mounted
H07m1	ENC17-0025	Across from 2812 Easton Drive	Use Existing Wood Pole - 38’ 6” to 45’ 3”	Pole Mounted
H08m2	ENC17-0021	Across from 2400 Skyfarm Drive	New Steel Pole – 35’	Ground Mounted
H12m3	ENC17-0027	Across from 510 Eucalyptus Avenue	New Steel Pole – 35’	Ground Mounted
H19m2	ENC17-0023	Adjacent to 1335 Hayne Road	New Steel Pole – 35’	Ground Mounted – up Mosely
H20m2	ENC17-0024	Adjacent to 1204 Kenilworth Road	Replace Wood Pole – 39’ 4” to 54’ 9”	Ground Mounted – Across St
H21m1	ENC17-0018	Adjacent to 620 El Cerrito Avenue	Use Existing Wood Pole - 32’ 3” to 39’	Pole Mounted
H22m1	ENC17-0019	Adjacent to 260 Woodridge Road	Replace Wood Pole – 38’ 9” to 54’ 5”	Pole Mounted
H27m2	ENC17-0020	Across from 1585 Black Mtn Road	New Wood Pole – 45’ 4”	Pole Mounted
H28m3	ENC17-0015	Between 1090 & 1100 Hayne Road	New Steel Pole – 35’	Ground Mounted
H29m2	ENC17-0016	Adjacent to 2795 Churchill Drive	New Steel Pole – 35’	Pole Mounted
H30m1	ENC17-0017	Adjacent to 105 Bella Vista Drive	Replace Wood Pole – 38’ 2” to 54’ 3”	Pole Mounted
H31m2	ENC17-0022	Adjacent to 3465 Ralston Avenue	New Steel Pole – 35’	Ground Mounted
H32	ENC17-0028	Adjacent to 920 Chiltern Road	Use Existing Wood Pole – 27’ 11” to 34’ 8”	Pole Mounted

- Notes:
- 1) Each new steel pole will be painted dark green to blend in with the surroundings and will have an overall height to top of antenna canister of 35’.
 - 2) Ground or pole mounted equipment will be painted dark brown or dark green to blend in with surroundings.
 - 3) Ground mounted equipment cabinets are 4’5” long X 2’ wide X 4’6” tall.
 - 4) Replacement poles height increases required to meet code for separation of lines