BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

Memorandum

To: Mayor Chuang and Honorable City Council
From: City Attorney's Office
Meeting Date: March 12, 2018
Re: Additional Issues Raised by the Applicant's Appeal Letter Dated March 7, 2018

This memo addresses legal arguments raised in the Applicant's second more lengthy appeal letter submitted on March 7, 2018.

1. The "Effective Prohibition" Test and Burden-Shifting on Least Intrusive Means

A recurring theme of the second appeal letter (Appeal Letter, pages 13-15, 18, 23) is that the Applicant met its initial obligation to make a *prima facie* showing that its proposed 16-node DAS Project is the least intrusive means, and therefore the burden now rests with the Town to show there are some potentially available and technologically feasible alternatives, a burden which the Applicant alleges, the City Manager failed to meet.

While the Applicant generally describes the test developed in case law interpreting the effective prohibition standard in 47 U.S.C. § 332(c)(7)(B)(i)(II) accurately, the City Manager's decision found the Applicant had not met its initial burden of submitting a comprehensive application, showing feasible alternatives. The City Manager's denial decision noted the lack of alternatives to the 16 node DAS Project, and (based on the CTC Reports) suggested some possibilities that had not been explored in the Applicant's Applications, such as addressing alleged gaps at least partially through adjustments to nearby macro sites.

The Applicant's Appeal Letter briefly discusses alternatives such as macro cell towers and placements on private property outside the public right-of-way in general terms in its argument that small cells and DAS networks represent the "least intrusive means technology, by design." We note that the least intrusive means standard requires an analysis in relation to the factors in the community's code, not generalized observations.[1]

In any event, the generalized discussion is for naught as the Applicant also claims that as a telephone company with the right to use the public rights-of-way under Pub. Util. Code Section 7901, it is not required by law to look outside the public right-of-way, and did not do so. The company offers no case law to support its narrow interpretation of its duty to consider alternatives under 47 U.S.C. § 332(c)(7)(B)(i)(II). The Applicant appears to rest its case that it has met its initial burden principally (if not entirely) on its consideration of a few different poles in close proximity to one another at each of the individual node sites for the 16-node DAS project. In other words, it appears that the Applicant believes presenting the Town with one

[1] *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-7 (9th Cir. 2014)("To prevail on this claim, therefore, ATC must show that its facilities were the "least intrusive means" in light of the aesthetic values that motivated the City's decision to deny the CUP applications.")

alternative – a 16-node DAS Project – and then allowing minor adjustments to the location or appearance of its selected nodes meets its burden to submit a "comprehensive application" which shows "a meaningful comparison of alternatives." This does not appear to accord with existing legal standards.[2]

The Applicant does, nonetheless, provide some additional evidence (Exhibit H- Crown Castle Review of CTC Report) critiquing alternatives proposed by CTC outside the public right-of-way. In addition, the CTC Supplemental Report on Alternatives (attached to City Manager's Report as Attachment 8) discusses alternatives *within* the public right-of-way that the Applicant never considered although they are deployed by the Applicant and the industry in other communities. These include both means of making the existing 16-node alternative less intrusive, and completely different alternatives such as different height placements, and placements on different infrastructure such as stop signs.

When deciding the Applications on appeal, the City Council will be deciding whether the Applicant has met its burden on least intrusive means and alternatives on appeal, taking into account all the evidence presented at the hearing, including information that was before the City Manager, the Applicant's additional evidence in response to CTC's initial report, feasible alternatives identified by CTC in its Supplemental Report but not explored by the Applicant in its Applications, the staff's node-by-node analysis, any additional information provided by Applicant, and information provided by the public.

2. Evidence Concerning Property Values

In the City Manager's discussion of the Bases for decision that the Applicant had failed to meet its burden on Factor #3 (compliance with design standards), the City Manager indicated the record included "multiple reports of area real estate agents regarding anticipated loss of property value due to aesthetic concerns," and cited several specific public comments as examples. In its March 7th Appeal Letter (page 22), the Applicant makes three incorrect assertions about this evidence and findings related to property values. These are addressed below.

First, the Applicant suggests the City Manager had cited anecdotal evidence from residents that could not be relied upon as substantial evidence, rather than market or other data that could be relied upon as substantial evidence on impacts to property values in the area. This is incorrect in two respects. First, as the decision noted (in the Bases document at page 5-6), the

[2] *Id.* ("ATC has not borne its burden. During the review process, ATC rejected relocation of the facilities or modifications that involved reduction in height or redesign of the towers. ATC essentially insisted that the City accept ATC's conclusion that the existing facilities were the "least intrusive means," without offering a feasibility analysis of alternative designs or sites for *the City* to reach its own conclusion. In effect, ATC would make the applicant—rather than the locality—the arbiter of feasibility and intrusiveness, gutting the "least intrusive means" standard with predictable, applicant-friendly results…..ATC did not adduce evidence allowing for a meaningful comparison of alternative designs or sites, and the City was not required to take ATC's word that these were the best options.").

cited comments expressing concerns about the negative effect on property values *were* from area real estate agents. Second, even if the evidence had been only from the public (and there was, in addition to the comments of area real estate agents, significant numbers of comments from property owners in the record expressing similar concerns), decisions denying wireless applications based on concerns about property values have been upheld both based on expert evidence and on public testimony. Some cases have held that when public testimony on property values *is contradicted* by expert evidence, the expert evidence tends to be favored where the public concerns are relatively generalized and limited.[3] Others have held that a denial based on significant public opposition may be upheld as having met the substantial evidence standard even in the face of a preponderance of expert testimony to the contrary.[4] Here the evidence, both expert and from the general public, expressed concerns about the impacts to property values within the Town of Hillsborough. The City Manager cited to the expert evidence.

Second, the Applicant provides an expert report of its own (Appeal Letter, Exhibit I) as support for the Applicant's position that studies reveal that wireless facilities have no impact on real estate values. It is noteworthy that the study dates from 2012 and examines property values for homes near wireless facilities in Palo Alto, Redwood City, Saratoga and San Jose over a 9 month period. The study does not include Hillsborough or communities with a similar low density and rural residential character to Hillsborough. Case law suggests expert evidence about impacts on property values *in other communities* is not adequate to respond to local concerns about local property values.[5] Even when faced with credible expert evidence on both sides, a reviewing court is likely to defer to the local jurisdiction's decision.[6]

---

[3] *Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490, 496 (2d Cir. 1999) ("the volume and specificity of the comments were not adequate to satisfy the requirement of the substantial evidence standard…. A few generalized concerns about potential decrease in property values, especially in light of AT&T's contradictory expert testimony, does not seem 'adequate to support a conclusion' that the permits should be denied." (citations omitted)); see also, *T-Mobile Northeast LLC v. City Council of Newport News*, 2012 U.S. App. LEXIS 6159, 15-16 (4th Cir. Va. Mar. 26, 2012) (Court upholds lower court holding, stating that "although citizens need not be 'armed with a slew of experts,' where 'the only cohesive thread' of opposition was found in 'four citizens' passing comments on property values,' such opposition was not substantial evidence.").

[4] *AT&T Wireless Pcs v. City Council of Va. Beach*, 155 F.3d 423, 430-431 (4th Cir. Va. 1998) ("[A]ppellees of course had numerous experts touting both the necessity and the minimal impact of towers at the Church. Such evidence surely would have justified a reasonable legislator in voting to approve the application, and may even amount to a preponderance of the evidence in favor of the application, but the repeated and widespread opposition of a majority of the citizens of Virginia Beach who voiced their views -- at the Planning Commission hearing, through petitions, through letters, and at the City Council meeting -- amounts to far more than a 'mere scintilla' of evidence to persuade a reasonable mind to oppose the application. Indeed, we should wonder at a legislator who ignored such opposition. In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens; that is, to thwart democracy. The district court dismissed citizen opposition as 'generalized concerns.'….Congress, in refusing to abolish local authority over zoning of personal wireless services, categorically rejected this scornful approach.")

[5] *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 762 (11th Cir. Fla. 2005) (Court upheld local decision based on public concerns stating: "Linet's expert testimony contradicting the adverse property value impact concerns was provided by a telecommunications executive who placed a tower in a different part of the community

Third, the Applicant points to cases that held that concerns about property values served as a proxy for impermissible concerns about RF emissions, the implication being that this may be what is happening here. That does not appear to be the case. The cited real estate agent comments expressed the bases for their opinions which largely related to aesthetics concerns of persons in the market for high value properties. Moreover, the City Manager's decision stated explicitly in Finding #6 that concerns raised by a few public commenters about health effects of radio frequency emissions may not be taken into account under federal law, and were not considered. A common combination of concerns expressed in opposition to wireless applications is concern about aesthetics and the negative impact on property values. These considerations are clearly permissible when based on substantial evidence.[7]

When deciding the Applications on appeal, the City Council will be deciding whether the Applicant has met its burden to meet all the Town's requirements based on all the evidence before it, including information that was before the City Manager and evidence presented at the hearing.

CHRISTOPHER J. DIAZ
GAIL A. KARISH

---

and a realtor who based his knowledge on condominium sales in a different county. This does not change our conclusion. The residents were worried about the impact of this tower on the golf course within their community, not a different tower, different location, or different community.")

[6] *Primeco Personal Communs., L.P. v. Village of Fox Lake*, 35 F. Supp. 2d 643, 649 (N.D. Ill. 1999) ("[S]ubstantial record evidence supports the Village's decision to deny PrimeCo's application. Pointer's testimony supports both of the Village's major reasons for denying the permit: negative economic impact based on diminished future residential and resort development and decreased enjoyment by current owners of their property. Pointer, an expert in urban planning…relied on his 37 years of experience and various photographs, primarily of the balloon test, which demonstrate the visual impact of the proposed 150-foot tower at the Hellios site. Although PrimeCo's expert, George Baker, disagreed with Pointer's assessment of the proposed tower's impact, the standard of review does not permit us to resolve this conflict anew. The Village chose to believe Pointer's assessment, as it was entitled to do. A reasonable mind could accept Pointer's testimony as sufficient to support the Village's conclusion that the proposed monopole could stunt development and injure residents' enjoyment of their property. We see no reason to disturb the Village's choice.").

[7] *Sprint PCS Assets LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 722-723 (9th Cir. 2009); *NextG Networks of Cal., Inc. v. City of Newport Beach*, 2011 U.S. Dist. LEXIS 17013, *18 (C.D. Cal. Feb. 18, 2011) ("In this case, the City was entitled to determine that degrading the aesthetic of the Pacific Coast Highway area decreases the public's ability to enjoy this area. This decreased enjoyment, in turn, quite obviously risks damage to property values and has other 'materially detrimental' effects to nearby owners, residents and businesses.").