SUPPLEMENTAL MATERIAL

W.8.C.

AGENDA COVER MEMO

ADDENDUM

DATE: February 14, 2005 (date of memo)
February 16, 2005 (date of meeting)

TO: Board of County Commissioners

DEPT.: Public Works Department/Land Management Division

PRESENTED BY: Steve Hopkins, AICP

AGENDA ITEM TITLE:

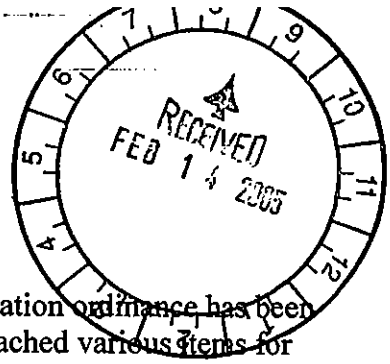
IN THE MATTER OF AMENDING CHAPTER 16 OF LANE CODE TO REVISE THE APPLICABLE STANDARDS FOR TELECOMMUNICATION FACILITIES (LC 16.264).

Today, I received a submittal from Mona Linstromberg. It is comprised of numerous documents, and I have identified each one in the list below. This submittal reiterates the concerns she has raised in previous submittals and does not raise any new issues. The documents are listed in the same order that they were submitted to me.

The submittal from Mona Linstromberg is comprised of the following documents:

1. Letter from Mona Linstromberg dated February 13, 2005.
2. Email from Jerry Kendall dated December 16, 2002.
3. Email from Jerry Kendall dated February 3, 2003.
4. Letter from RealCom Associates, LLC. dated January 29, 2003.
5. Letter from Mona Linstromberg dated January 6, 2003.
6. Letter from Mona Linstromberg dated November 24, 2003.
7. Email from Thom Lanfear dated November 26, 2003.
8. Email from Craig Harbison dated November 26, 2003.
9. Letter from Mona Linstromberg dated February 12, 2005.
10. Letter from Eugene City Attorney Jerome Lidz, dated July 9, 2004.
11. Letter from Mona Linstromberg dated July 20, 2004.
12. Letter from Eugene City Attorney Jerome Lidz, dated October 1, 2004.
13. Minutes from County Commissioners' meeting on September 25, 2002.
14. Letter dated December 6, 2004. Author unknown.
15. Letter from Ron Fowler dated November 3, 2004.

16. Letter dated November 3, 2004. Author unknown.
17. Email from Kent Howe dated August 16, 2004.
18. Letter from Mona Linstromberg dated August 9, 2004.
19. Email from Mona Linstromberg dated July 15, 2004.
20. Letter from Donald J. Borut, Executive Director, National League of Cities, dated May 8, 2003.
21. Undated submittal to Eugene City County from Citizens for Responsible Placement of Cell Phone Transmission Towers.
22. Voice Stream v. City of Hillsboro, February 2, 2004; U.S. District Court.



February 13, 2005
Lane County Board of Commissioners

Re: revision Lane County Telecommunication Ordinance

To further make the case that the revision of current Lane County Telecommunication ordinance has been and continues to be mismanaged, I have gone back into my archives and have attached various items for your review.

During the periods for comment and public testimony, our group often made the case that there was a lack of clarity in the ordinance. Shortly after the approval of the telecommunication ordinance, there were several applications for collocation. The provision for collocation facilities should have been straightforward. However, both applicants (service providers) and LMD staff were having a bit of difficulty interpreting this code section.

Since one of the applications was south of where I live, I reviewed the application and traced all the requirements made in the code to ascertain if the applicant had indeed provided all the submittals. I have attached my comments on that particular application. I have also attached staff's comments on this application (directed to Kent Howe) showing staff's questions concerning the collocation code section. Also included are comments from service providers regarding some of the difficulties they were having with the ordinance. I reviewed two other applications and have included e-mail with yet another LMD staff member. He states, "I thoroughly agree that the collocation provisions are confusing at best."

So, please explain to me why when review of the telecommunication ordinance was included in LMD's work plan, no one took the opportunity to review the ordinance in its entirety to figure out why the language was incomprehensible. In fact, in meeting with Steve Hopkins and Ron Fowler in December, Mr. Fowler made comment about a different section being confusing, the 1200 ft setback from homes and schools. Since day one I had pointed out to staff and the Board that the setback should have been an absolute setback (no more, no less than 1200 feet). However it was written so that it could have been a **MINIMUM** setback of 1200 feet. No one, absolutely no one would listen to us. Yet Mr. Fowler points it out and staff is all over him. So at least now that language has been cleared up. Our group has always been reasonable in our approach to the crafting of this telecommunication ordinance. Imagine if you had taken a bit more care and listened a little more closely, we would not be incessantly reviewing this ordinance, its revision, and its revised revision.

It would seem to me that the Planning Director should have gotten back to the Board to make them aware that there were more difficulties with this ordinance than the three items listed as directives from the Board. In his revision, Mr. Hopkins was to simplify but not change policy. Good grief! Why was he not directed to review the content and requirements to see if it was consistent with policy. Of course, Mr. Hopkins was not aware of policy, and I agree that reading the current ordinance would make one wonder what Lane County policy is and what is actually being required of an applicant.

Yes, this ordinance needs to be reviewed, but a patchwork quilt process will only do a disservice to the parts of this ordinance that are head and shoulders above other Oregon telecommunication ordinances. Lets make up for lost time and make sure it gets done right this time. Neither the Planning Director or Steve Hopkins are the staff that can do this.

Mona Linstromberg, member Citizens for the Responsible Placement of Cell Phone Transmission Towers
87140 Territorial Rd
Veneta, OR 97487

KENDALL Jerry

From: KENDALL Jerry
Sent: Monday, December 16, 2002 4:46 PM
To: HOWE Kent
Subject: Just checking

PA 02-6162 is the co-location of an antenna & equipment building PA I mentioned at staff meeting today. The tower exists (although the BP is expired, they will have to get a new one as a condition). No increase in height from that previously approved.

Per LC 16.264(4), they are to address sections (3)(b)(i)-(ix), (5) & (6). Can he simply respond "NA, already built", or should I require him to literally address each criterion, and deny the proposal, if, for ex., the already built tower is less than the setback required in (5)(e)?

Please respond asap, as my completeness check is due out in the Tuesday morning mail.

Jerry Kendall/Associate Planner
Dept. of Public Works
Land Management Division
125 E. 8th Ave.
Eugene, Or. 97401

Phone: 541-682-4057
FAX: 541-682-3947

Response: N/A sufficient.

Let him know to get owners signature.

Owner = Richard Boyles
P. O. Box 137
Looney Or. 97451

KENDALL Jerry

From: KENDALL Jerry
Sent: Tuesday, February 04, 2003 3:03 PM
To: HOWE Kent
Subject: complaint from RealCom (cell providers)

Attached to hard copy of this email is a letter dated 1-29-03 from RealCom, in behalf of AT&T.

It comments on various vaccilations, etc in our interpretations regarding colocations of cell panels.

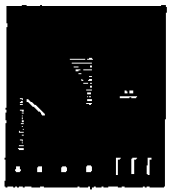
It was submitted in conjunction with 3 colocations I rec'd by FEDEX today. The letter does not ask for a reply....I'll leave that up to you. It does ask that the permits be expedited.

No PA# yet on the 3 submittals, but they are at 17-07-index #4400 (Badger Mtn.); 17-25-Index #600 (Goodpasture Rd.); & 19-01-12 #300 (near Lowell).

I will ask the clerk to give me the PA#s when she assigns them.

Jerry Kendall/Associate Planner
Dept. of Public Works
Land Management Division
125 E. 8th Ave.
Eugene, Or. 97401

Phone: 541-682-4057
FAX: 541-682-3947



RealCom Associates, LLC.

January 29, 2003

Jerry Kendall
Land Management Division
Lane County Courthouse
125 E. 8th Ave.
Eugene, OR. 97401

RE: Land Use Applications for AT&T Wireless Cell Site Modifications.

Dear Mr. Kendall,

RealCom Associates, acting on behalf of AT&T Wireless Services, LLC for the purposes of obtaining permits for antenna modifications, hereby submits, "under protest" and Use applications for the following sites:
Site Description: 45546 Goodpasture Road, Vida, OR. Parcel # 17 25 00600
Site Description: Top of Butte Disappointment Lowell, OR. Parcel # 19 01 12 00300
Site Description: Top of Badger Mtn. Noti, OR. Parcel # 17 07 00 4400
It is our contention that such applications are not required under the Lane County

Since July 2002 RealCom Associates has been attempting to get answers from Lane County regarding the specific process required for adding antennas to existing telecommunications towers. Initially, we were told that the Telecommunications Code had just been adopted and the Planning Department was unable to give specific direction since modifications of existing towers were not addressed in the new code. After several months of waiting and attempting to get a decision from the Planning Department, we met with the Building Department. We were told to research each property file and submit for the building permits, including in that submittal any pertinent information from your own files. The application would be reviewed by Planning prior to issuing the BP. After researching the files and compiling other required information we submitted BP applications for four sites on October 30, 2002 for Building Permit.

On or about December10, 2002 we received letters for two of the four sites that directed us to submit for a Special Use Permit under the new code through the Planning Department. No correspondence is yet to be received regarding the other two submittals from October 30. Following the direction of the Building Department we completed the application and compiled all documentation. When we attempted to submit in person the Special Use Applications on the above-mentioned properties in January 2003 we were told that Lane County had revisited their code and would no longer require a Land Use application for existing sites in the F-1 zone. Three days later we were notified that the County had reversed that decision and we would have to submit the Special Use applications.

In addition to the County's inability to give clear and timely direction regarding their own process, we maintain that the recently adopted Wireless Code is not applicable to the F-1 zone., Furthermore, there is sufficient ambiguous wording in the Wireless Code regarding the definition of antenna, facility and collocation to maintain the possible position that replacing or adding antennas may not, in fact, be considered a collocation and therefore the collocation process should not apply.

208 SW Stark St #602, Portland, Oregon 97204 503-229-1840 Off, 503-229-1878 Fax

The confusion on the part of Lane County has cost both RealCom and AT&T Wireless valuable time and considerable money. We are only trying to provide improved service to our customers that live, work, and travel in the communities over which Lane County has jurisdiction. Your own code interpretation and confusion has caused us severe hardship in these matters. If, in fact, a planning process is required, please expedite the attached applications as we have already suffered through an eight month period of inaction on our permits with the prospect of an additional four more months for approval.

Sincerely,

Sandra Walden
208 SW Stark St, #602
Portland, Or.
(503)709-0820

cc: Jim Garner/AT&T Wireless Services
Kevin Martin/RealCom Associates

January 6, 2003

Public Works
Land Management Division
125 East 8th Ave.
Eugene, OR 97401

Re: PA 02-6162

Dear Mr. Kendall,

As an interested party, I am responding to the Referral Notice and Opportunity to Comment on a Cell Phone Facility (co-location) Request.

While reviewing this application file, I noticed that the applicant includes site plans and tower drawings from the original application. These plans show the schematic diagrams for three alternative foundations, one of which states that "a qualified geotechnical engineer must verify this assumption at the time of installation." Intrigued, I looked for the schematic diagram of the foundation actually built, along with any accompanying reports. I was unable to confirm the existence of any finalized building permits or inspections. I did find, however, reference in current correspondence that the "BP" had expired and "they" will have to get a new one as a condition. I would like clarification as to any time frame for the expiration of PAs given that the structure(s) may not be legal. Is it possible that this application, technically, does not fall under the LC code provision for collocation?

If it does fall under this provision, LC16.264 (4) reads that collocation telecommunication facilities are not subject to the application and approval provisions of LC 16.264 (3). However, this provision then proceeds to indicate that the applicant **shall** provide information required under LC 16.264(3)(b)(i)-(ix) and (d). In the applicant's narrative addressing Land Use Code Criteria, the applicant, under LC16.264(3)(b) responds only to (i) and (ix). Applicant is to address (i) **through** (ix). Also, under "(d)" of that same provision, the applicant has failed to submit documentation demonstrating compliance with non-ionizing electromagnetic radiation emission standards as set forth by the Federal Communications Commission. New antennae are being installed. I do not see any specs provided on the new equipment. Assurances by the applicant without accompanying figures on ERP, antennae gain, power, number of channels would be purely 'conclusory" .not documentation of compliance with FCC standards.

Next under LC 16.264(4) "the application for collocation may be allowed **provided** the requirements" in LC 16.264(4)(b) are met. (4)(b) reads: "Factual information addressing compliance with requirements in LC 16.264(5) and (6), below:

(5) addresses siting standards for height, setbacks and access to telecommunication facilities. (6) addresses standards for construction, lighting, signage and fencing of

telecommunication facilities. Nowhere under LC 16.264(4) does it say that collocation telecommunication facilities are not subject to LC 16.264(5) or (6). LC 16.264(4) only refers to collocation telecommunication facilities not being subject to LC 16.264(3) excluding, apparently, LC 16.264(3)(b)(i)-(ix) and (d). Although the language of this section seems convoluted, LC 16.264(4) states that even the collocation of a new or replacement telecommunication facility would need to satisfy the siting standards for height, setbacks and access. It is very possible that the proposed request for collocation at 82100 Territorial Hwy might meet the standards set forth. However, most of these standards are not addressed in the application.

Given the above, I request that PA 02-6162 be denied until a complete application is submitted as specified in LC 16.264 Telecommunication Tower Standards.

Mona Linstromberg
87140 Territorial Rd.
Veneta, OR 97487

P.S. Could you please clarify the following? Under "Proposal", the Referral Notice lists a 12' by 20' radio equipment building. The application by Mericom refers to a 12' by 30' radio equipment building to replace an existing one. I am not sure if the current application is being made for a 12'x 20' or a 12'x 30' structure.

November 24, 2003

Re: PA03-5986
PA03-5984

As an interested party (though not specifically identified as such), I am responding to the Referral Notice and Opportunity to Comment on additional antennas (collocation) request. Having reviewed both applications, I consider the body of the narrative enough alike that I will address both at the same time.

Having reviewed a previous co-location request (PA02-6162) and finding no final building permit approval, it was of special interest that there was a note in PA03-5986 regarding the building permit on the existing facility. I would appreciate a response as to if there was final approval of the building permit, and, if not, that the appropriate fees and fines will be levied for non-compliance.

The following is my analysis of LC16.264 (4):

LC16.264(4) reads in part that collocation telecommunication facilities are not subject to the application and approval provisions of LC16.264(3). However, LC16.264(4) then goes on to state "the application for collocation may be allowed **provided** the requirements" in LC16.264(4)(b) are met. (4)(b) reads: "Factual information addressing compliance with requirements in LC 16.264(5) and (6), below:

(5) addresses siting standards for height, setbacks and access to telecommunication facilities. (6) addresses standards for construction, lighting, signage and fencing of telecommunication facilities.

"Collocation" is defined in this code section as "placement of an antenna on an existing structure....." Nowhere under LC16.264(4) does it say that collocation telecommunication facilities (antennas being part of the whole) are not subject to LC16.264(5) or (6). LC16.264(4) only refers to collocation telecommunication facilities not being subject to LC16.264(3) excluding, apparently, LC16.26493)(b)(i)-(ix) and (d). Although the language of this section seems convoluted, LC16.264(4) states that even the collocation of a new or replacement telecommunication facility would need to satisfy the siting standards for height, setbacks and access. It is very possible that the proposed request(s) for collocation might meet the standards set forth. However, these standards are not addressed in the application(s).

Although land use approval for the existing installation was obtained prior to the effective date of the LC16.264, the collocation of additional antennas on an existing tower would still fall under the collocation provision of this ordinance.

Given the above, I request that PA03-5986 and PA03-5984 be denied until a complete application addressing all applicable criteria as specified in LC16.264 Telecommunication Tower Standards.

Thank you for your attention in this matter.

Mona Linstromberg
87140 Territorial Rd.
Veneta, OR 97487
CHarb@presys.com

Craig Harbison

From: "LANFEAR Thom"
To: "'Craig Harbison'" <charb@presys.com>
Sent: Wednesday, November 26, 2003 8:28 AM
Subject: RE: Letter of November 24

Hi Mona:

Thanks for the follow-up. I thoroughly agree that the collocation provisions are confusing at best.

Thom

> -----Original Message-----
> From: Craig Harbison [SMTP:charb@presys.com]
> Sent: Tuesday, November 25, 2003 5:56 PM
> To: LANFEAR Thom
> Subject: Re: Letter of November 24
>
> Yikes! Maybe I am nuts. However, I do have a letter from RealCom dated
> January 29, 2003 (I think I found it in the file I referenced in my
> comments) that supports my contention that this provision (collocation) is
> so poorly written that it is amazing anyone can make heads or tails of it.
>
> What I tried to accomplish in my letter was to track the actual verbage of
> the collocation provision. My conclusion is that if one seeks approval
> for collocation then the existing facility must meet the criteria for
> setback (i.e. 1200 feet from homes and schools) as well as the other
> criteria listed in LC16.264(5)(a)-(h). Now, that may not have been the
> intention (or maybe it was) of the BCC, but I believe that is the way it
> reads.
>
> This actually accomplishes what other telecom ordinances in other
> jurisdictions accomplish when they have provision that pre-existing towers
> are non-conforming. To add additional facilities or antennas they must
> become conforming.
>
> I can well imagine that this will be taken with a grain of salt. However,
> at some point there will be an existing tower closer than 1200 feet to a
> house or school, and I just may pursue this. For your information, I did
> point out during testimony some of the confusing points in this ordinance.
> We all would have benefited from clearer language.
>
> So there you have it.
>
> Mona Linstromberg
>
>
> ---
> FIGHT BACK AGAINST SPAM!
> Download Spam Inspector, the Award Winning Anti-Spam Filter
> <http://mail.giantcompany.com>
>
>

Craig Harbison

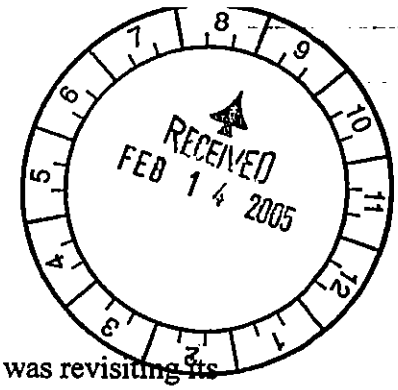
From: "Craig Harbison" <charb@presys.com>
To: "LANFEAR Thom"
Sent: Wednesday, November 26, 2003 11:29 AM
Subject: Re: Letter of November 24

Thank you for your acknowledgement of my response.

I would like to reiterate that I think these applications are incomplete because they have not addressed all appropriate criteria especially as to setback from homes and schools.

Saying the facility existed prior to the effective date of this regulation and therefore does not need to be addressed does not meet the criteria as it reads. And that is my point.

Thanks, Mona



February 12, 2005

Lane County Board of Commissioners

Re: revision of Lane County Telecommunication Ordinance

The following is a letter sent out by the City of Eugene's attorney when Eugene was revisiting its telecommunication ordinance. **WHAT A NOVEL CONCEPT TO INVITE KNOWN INTERESTED PARTIES TO JOIN IN THE PROCESS OF REVISING EUGENE'S CODE!** My response is also attached. And then the City writes us to bring us up to date!

This is where Lane County has miserably failed. Not long after the passage in 2002 of the existing ordinance, it was made clear by staff, applicants and myself that there were sections of the Lane County telecommunication ordinance that made no sense (most especially the collocation provision). At some point between than and now, the Planning Director should have made the Board aware that there was a problem that did not fall within his particular scope of review of this ordinance.

The time for a fix is not February 2005 but mid 2004 when the revision assignment was placed on Steve Hopkins' desk. I lay this at Kent Howe's door and Steve Hopkins'. Testimony has been made from the beginning that a revision was needed, but that it should go beyond language simplification and three specific items. When members of our group and Ron Fowler (Cingular/ATT) met with Steve Hopkins in December, we all tried to direct attention to the collocation provision and were told in no uncertain terms that that was outside the scope of our conversation. **AND NOW IN FEBRUARY 2005 THE BOARD FINALLY GETS A CLUE?** Who is going to be held accountable for this gross mismanagement?

Lane County should not lose sight of the fact that **THERE ARE IMPORTANT PROVISIONS IN THE CURRENT ORDINANCE!** Finally we got staff to listen to us on the setback provision being unrealistic in terms of having a possibly **GREATER THAN** 1200 ft setback from homes and schools. And we only got heard on that issue because Ron Fowler said HE thought it was unreasonable. Who does the County have providing oversight? This is gross mismanagement is costing taxpayers money and valuable time needed on other issues. However, given Steve Hopkins' performance, maybe it is just as well we got him away from other tasks. Also, contrary to the County's attitude and approach, my time is of value, too.

In addition, I am submitting testimony from throughout the process of getting a Lane County telecommunication ordinance approved. Also attached are the minutes from the Sept. 2002 public hearing so you can update yourselves on why peer review was recommended to be reviewed by staff. What a joke that has turned out to be! Apparently Mr. Hopkins has not had the opportunity to have background information from any source when revising this ordinance, and I imagine he didn't make the effort to find out if he was changing policy or not when he did his revision. I would also speculate that some on the Board might also find this to be new material, at least to their eyes.

Submitted by,

Mona Linstromberg
Member, Citizen for Responsible Placement of Cell Phone Transmission Towers
87140 Territorial Rd.
Veneta, OR 97487

City Attorney
Civil Department

City of Eugene
360 East 10th Avenue, Suite 300
Eugene, Oregon 97401
(541) 682-5080

July 9, 2004

Re: Amendments to Cell Tower Ordinance (Eugene Code Section 9.5750)

Dear Interested Parties:

Enclosed is a draft of a proposed ordinance to amend the siting requirements for telecommunications transmission towers in the City of Eugene. We are providing you a copy of this draft in advance of the public hearing so that we may have the benefit of your comments before staff presents the proposed ordinance to the Eugene Planning Commission. The proposed ordinance would amend Eugene Code section 9.5750. The full text of that section is available online at www.ci.eugene.or.us/cityreco/citycode.

The Eugene City Council directed staff and the city attorney's office to prepare amendments that would require telecommunications towers to be set back 1,000 feet from schools and 800 feet from residences, establish zero tolerance for interference with public safety communications, and require permit applicants to cover the cost of a consultant if one is needed to help the City review the application. We are particularly interested in your thoughts as to whether the amendments accomplish Council's goals and whether you foresee any technological or legal difficulties with them. Comments on the underlying policy should be saved for the City Council's consideration, after the Planning Commission's discussion.

Please give us your comments by the end of July.

We appreciate your review and thoughtful comments. Thank you.

Sincerely yours,

HARRANG LONG GARY RUDNICK P.C.
– City Attorneys

Jerome Lidz

JL:lke

July 20, 2004

City Attorney
City of Eugene
360 East 10th Ave., Suite 300

Re: Amendments to Cell Tower Ordinance (Eugene Code Section 9.5750)

1) When incorporating a meaningful setback provision (i.e. something other than the "height of the tower") into a telecommunication ordinance, it would appear prudent to lay the ground work for potential challenges. Taking this approach, my recommendation would be to add the following or something similar to 9.5750 (1) Purpose:

(f) Preserve property values
(g) Locate towers so that they do not have negative impacts, such as, but not limited to, attractive nuisance, noise and falling objects, on the general safety, welfare and quality of life of the community. Safety from excessive radio frequency radiation is also of concern in case the tower of personal communication service facility is found to exceed the FCC guidelines. (Note: the issue is not of environmental concern except when FCC standards are exceeded).

2) The first provision addressed in the proposed amendment is 7(d) Setback. I would certainly take exception with the exclusion of areas zoned GO and C1 in the new setback provisions of 1000 feet from a public school and 800 feet from homes (i.e. I would reconsider the stated "residentially zoned property").

From City Council work sessions and in testimony by the public, it appeared the intent was to situate transmission towers away from homes, not just those homes in residentially zone areas. There are several areas, mostly light commercial strips such as the River Road and Franklin Blvd areas, where there exist residentially occupied buildings. A similar situation may exist in areas zoned GO. From past experience, especially in the River Road area, it appears that these modest home owners now dwell in a sacrificial tower zone. Given the language as it stands now, they will continue to be a target area. I understand there are more constraints in siting towers in a city than in rural Lane County, but the County telecomm provisions apply equally in all zone designations. Although jurisdictions must not have requirements which have the effect of prohibiting service, there would certainly seem to be enough industrially zoned land to ensure adequate coverage.

3) The proposed revisions to the 9.5750(9) Variance provision would seem to, in reality, provide an easy opportunity to sidestep the new setback provisions altogether. I would like to think that the strengthening of the fee provision (9.5750 (11)) would be enough to ensure that there would be meaningful review of an applicant's ascertains in seeking a variance, but I am unconvinced. (c) 1. is especially troubling because the Federal Communications Act of 1996 is often interpreted by the telecommunication industry to

allow total and complete coverage without limit and without gaps. This provision does nothing to address the scope or intensity of coverage. I would refer you to the 2004 US District Court Case Voice Stream PCS I, LLC, Plaintiff, Golden Road Baptist Church, Involuntary Plaintiff, v City of Hillsboro (Oregon), Defendant. To simplify the Court's findings, jurisdictions may have cause to deny an application when there is no significant gap in coverage for a service provider. There are also findings as to visual impact and issues of aesthetics.

My second concern is with (9)(d). Preserving property values, listed in the purpose section, addresses a very real concern for the devaluation of property of neighboring property owners. Although property devaluation does have to do with negative visual impact, it also has something to do with, even if only perceived, concern for negative environmental impacts. Over time, even a stealth tower could have malfunctioning antennae arrays and channels. Who is monitoring the output of these facilities? This is one reason why there are setbacks from homes and schools.

Those of us who have been involved in this issue for quite sometime have had the opportunity to observe the implementation of the current ordinance. We knew it would not be a quick fix to give neighborhoods a greater measure of protection while still ensuring adequate coverage. However, if Eugene seriously wants to do this, an absolute setback will be the teeth of this ordinance. The granting of a variance must only be done in unusual circumstances. Otherwise, why have an ordinance at all?

Thank you so much for the opportunity to comment on the proposed revisions to Eugene's Telecommunication Ordinance.

Regards,

Mona Linstromberg
Member: Citizens for Responsible Placement of Cell Phone Transmission Towers
87140 Territorial Rd.
Veneta, OR 97487

City Attorney
Civil Department

City of Eugene
360 East 10th Avenue, Suite 300
Eugene, Oregon 97401
(541) 682-5080

October 1, 2004

Mona Lindstromberg
87140 Territorial Road
Veneta, OR 97487

Re: Proposed Amendments to Eugene Code Section 9.5750 (Telecommunications Devices - Siting Requirements and Procedures)

Dear Ms. Lindstromberg:

I am writing to bring you up to date on the latest developments regarding the proposed amendments to Eugene Code section 9.5750, about which you have previously provided comments.

I am enclosing a copy of the proposed ordinance in its most-recently revised form. The changes are to subsections (7)(d)2 and(9)(c)1. Please note that the proposed ordinance includes only those portions of section 9.9750 which we propose to amend. If you would like to place the proposed changes in context, the full text of section 9.5750 is available on the City's website at www.ci.eugene.or.us/cityreco/citycode. Please refer to chapter 9, Land Use Code.

The Eugene Planning Commission will begin its consideration of the proposed ordinance on October 11 and 12, 2004. On October 11, the Commission will hold a work session, at which it does not receive public testimony, in the Sloat Room, at the Atrium Building, at 10th and Olive Streets. You are welcome to attend as an observer. The Commission meeting begins at 11:30 a.m., and the proposed ordinance is the third item on the agenda. On October 12, the Planning Commission will hold a public hearing, at which it will receive testimony from interested persons. The hearing will begin at 6:00 p.m., in the City Council chambers at City Hall, 777 Pearl Street in Eugene. The Planning Commission also will hold a supplemental public hearing on the proposed ordinance on November 8, 2004, at 11:30 a.m., again in the Sloat Room in the Atrium Building.

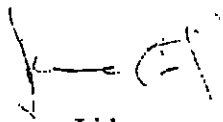
In addition, the Eugene City Council has scheduled a public hearing on the proposed ordinance on November 22, 2004; the public hearing is on the agenda for the 7:30 p.m. meeting, which takes place in the City Council chambers in City Hall. Finally, the City Council is scheduled to take action on the proposed ordinance on December 6, 2004, at its 7:30 p.m. meeting.

The Planning Division's staff report for the October 11 Planning Commission meeting will be available on October 5, 2004. Please contact the Planning Division via the City website for a copy; if you are unable to access the staff report that way, please call me or my assistant, Lynette Elgin, and we will fax you a copy.

The City of Eugene appreciates your interest in these issues.

Sincerely yours,

HARRANG LONG GARY RUDNICK P.C.
– City Attorneys



Jerome Lidz

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Approved 10/2/02

BOARD OF COMMISSIONERS'
REGULAR MEETING
September 25, 2002
1:30 p.m.
Commissioners' Conference Room

Commissioner Bill Dwyer presided with Commissioners Bobby Green, Sr., Anna Morrison, Peter Sorenson and Cindy Weeldreyer present. County Administrator Bill Van Vactor, Assistant County Counsel Stephen Vorhes and Recording Secretary Melissa Zimmer were also present.

14. **PUBLIC HEARINGS**

a. SECOND READING AND PUBLIC HEARING/Ordinance PA 1176/In the Matter of Naming an Unnamed Private Road, Northpole Lane (19-02-03). (NBA & PM 8/21/02)

Tom Drechsler, Land Management, reported this was the Second Reading and Public Hearing to consider naming a private road. He noted it was in the Pleasant Hill neighborhood off Enterprise Road. He added one of the properties served by the road is the Christmas Tree Farm and in connection with that business, the applicant wanted to name the road Northpole Lane.

Drechsler stated the name met the criteria in the manual for new road names. He said they provided a referral notice to the fire district, 911, and the Post Office. He added he had not heard any negative feedback. He noted that legal notice of the hearing had been provided and he recommended approval.

Commissioner Dwyer opened up the Public Hearing. There being no one signed up to speak, he closed the Public Hearing.

MOTION: to adopt Ordinance PA 1176.

Weeldreyer MOVED, Green SECONDED.

ROLL CALL VOTE: 4-0. (Morrison out of room.)

b. SECOND READING AND PUBLIC HEARING/Ordinance No. 11-02/In the Matter of Amending Chapters 10 and 16 of Lane Code to Revise the Telecommunication Tower Standards, and Declaring an Emergency. (NBA & PM 9/11/02)

Kent Howe, Land Management, recalled the Board conducted a Public Hearing on April 10 and issues were forwarded to the Planning Commission for work on the ordinance. He explained those issues were notice, setbacks, siting standards, the performance bond requirements and review standards. He said the Planning

Commission conducted an additional work session on May 7 and they came up with recommendations regarding three of the five areas.

Howe commented under notice, it was open-ended, requiring notice of not more than 30 days in advance of a meeting. He said the Planning Commission recommended putting in at least 14 days but not more than 30 days.

Howe said under setbacks, the Planning Commission recommended an increase to 1,200 feet from dwellings and they also added schools to the setback requirement in their recommendation. He noted they made no recommendation to changes to the sitting standards. He added under the performance standards, they recommended a performance bond review that would assure that upon abandonment of the facility that there would be adequate funds to cover the cost of removal and restoration of the site if it were abandoned. He added under review standards, they didn't recommend any changes.

Howe stated the Board conducted a work session on this on June 18 and recommended that the staff move this forward in ordinance form to prepare for the public hearing. He said they sent out the 45-day notice to LCDC on August 8 and because they are adding restrictions to the land use regulations, it required a Ballot Measure 56 notice. He said approximately 40,000 notices went out to property owners outside of the city limits of the small cities and outside of the urban growth boundaries of Eugene and Springfield at a cost of approximately $10,000. He stated those notices were sent out on August 23. He said The Register-Guard published a legal ad on September 4 for the Public Hearing and the Board conducted a First Reading on September 11.

Howe noted he received approximately 80 phone calls on how it would reduce people's property values. He added he received a letter that the Board received from Dan Stotter about the definition of tract and contiguous ownership. He said that staff thinks the ordinance specifically addresses the issue of setbacks as it deals with the definition of tract, that the application requires the owner of the property in granting authorization before an application can be made. He noted the definition of tract is the contiguous property under the same ownership. He stated that covered whether either the applicant who owns the subject property or the landowner (if the applicant is leasing the property). He said the contiguous ownership is what is being addressed when it comes to setback requirements.

Commissioner Dwyer opened up the Public Hearing.

Nina Lovinger, 40093 Little Fall Creek, Fall Creek, read a recommendation from Martin Conner of Torrington, CT. She said that Lane County should hire experts at the applicant's expense to review the applications. She said the City of Eugene's telecommunication ordinance has a provision for an independent expert review but because it is not integrated into the application process, the provision had been rendered useless. She noted under 16.2643 (IX) the director can request

in the application form, peer review by an independent engineering firm. She said it is discretionary by the director. She didn't know if Lane County would follow what the City of Eugene, whose similar provision had never been utilized. She asked if Lane County could ensure that the applicant's technical information is accurate, thorough and pertinent. She said this ordinance along with the proposed amendments could go a long way ensuring that cell phone transmission towers would be appropriately placed in Lane County. She encouraged the Board to approve the amendment recommended by the Planning Commission and the recommendations made by Dan Stotter.

Mona Lindstromberg, Veneta, stated this is a countywide issue and not about stopping the placement of all cell phone transmission towers. She said it had been about the appropriate placement away from homes and schools. She said it is about service providers and tower companies knowing that neighborhoods cannot be bullied. She said they had tried to show that in the long term it is fiscally prudent for tower company providers to work with people that they impact most. She said the Lane County telecommunication ordinance with the amendments recommended by the Lane County Planning Commission will go far in protecting Lane County residences from the intrusive nature of those facilities while in no way infringing on their ability to provide service. She asked the Board to include Stotter's definition of applicant's tract in the code in order to clarify the intent and purpose of the setback provision. She hopes Land Management will implement this ordinance with due diligence and make sure it stays in step with the changing technology. She asked the emergency clause to be included.

Heather Kent, 24214 Suttle Road, Veneta, echoed what Lindstromberg and Lovinger had recommended. She said it was important to keep what was in the ordinance about funds the applicant needs to put up in advance.

Martha Johnson, explained the federal government had issued a document through the FCC, mentioning that it wasn't uncommon for local governments to contract with an RF engineer. She added it was common across the United States that applications are reviewed by an independent engineer. She urged the Board to adopt the amendments that are proposed by the Planning Commission and making the language change that Stotter recommended about the applicant's tract.

Kathy Haworth, 25921 Crow Rd., Eugene, encouraged the Board to examine keeping the telecommunication towers away from neighborhoods and schools and areas where children play. She thought forestlands should be utilized.

Dan Stotter, 259 E. 5th, Portland, thought the Board was moving in the right direction. He said the amendments were necessary and he didn't think they were controversial but said they were important and the addition of schools and the 1,200 foot setback were important. He said the Board was ready to move on the matters except there is a legal requirement for notice and notice was set. With regard to the coverage of the applicant's tract issue, he agreed with staff about the

intent to cover all contiguous property. His concern is that by referencing only the applicant's tract, they could have an applicant and landowner who are different. He suggested stating in the ordinance: the applicant/landowner's tract. He said that way there is no confusion about the subject property. With regard to technical expertise, he didn't think that should delay the Board from moving forward with the already noticed amendment. He thought the issue of technical expertise is a broader question than in the cell tower context. He suggested having it go to the Planning Commission with direction to look at the idea of the applicant paying for expertise to enable Land Management to do its review functions in a variety of ways.

Vorhes noted there is currently a definition for application, but there is an indication that the owner of the property has to sign the application. He said the provisions of 16.264 and 10.400 talks about a tract and defines it as contiguous property under the same ownership. He said they had defined tract in a way that meets with the concerns that were raised. He said if there were interest from the Board to make additional clarification, it would require a change to come back to the Board for an additional two readings, and recommended additional readings.

Sorenson asked if it were possible under this proposed ordinance for someone other than a landowner to be an applicant.

Stotter said there could be an applicant who is not a landowner. He said although the landowner may be signing the application, it might not be clear that the setback requirement applies to the landowner's property, just because they signed the application. He said there is no harm in adding the language "or landowner." He disagreed with Vorhes in the need to notice. He said it was the intention to cover the landowner and application and this is not a substantive change, it is an administrative change that clarifies the Board's intention. He encouraged the Board to add the language but not to delay the process.

Howe explained the applications were property specific to the owner of the property who has to sign as part of the application. He noted the ordinance as written is property owner specific. He said an application has to reference the subject property to which the cell tower is proposed to be located. He added the property couldn't be part of the application without the owner's signature being part of the application.

Vorhes said the applicant's application includes the signature of the property owner. He said they were one and the same. He noted as a legal matter he didn't think the change was necessary, but it was up to the Board to include language in the code that clarifies the change, and should be done today for the next reading to shorten the timeframe for action on the change. He said the issue of notice and intent is not the only issue to be concerned about. He recommended including the changes with the two readings 13 days apart.

Mickey Scott, 30764 Koinoia Rd., Eugene, supported an independent review, the setbacks and cell phone towers not being located around schools or homes.

Cindy Driscoll, 11460 E. Mapleton Road, Mapleton, asked if there were any applicants in her area.

Jeannie Hunt, 3049 Hawkins Lane, represented Weyerhaeuser Company. She stated that Weyerhaeuser does lease sites for communication. She said they would consider themselves the applicant but it would be their obligation to sign as landowner and have the responsibilities for setbacks. She said the leaseholder would be the applicant. She was concerned about the permit applying to the contiguous property. She noted it should be to an area around the site.

Dwyer suggested that there be contiguous properties within a community of interest.

Howe explained that prior to an applicant making an application, they send notice meeting the Lane Code Chapter 14 requirement that are 750 feet in resource lands and 500 feet in exception areas to adjacent property owners and that distance is measured from the perimeter of the property line. He added in addition to the notice, the applicant is responsible for making an application to Lane County. He said once they make an application to Lane County, a public hearing is conducted and that notice is sent to people within one-half mile of the boundaries.

Vorhes noted under Chapter 14 they used the concept of contiguity on all land use applications. He said it was not a new concept they included in this set of regulations, it is something that is always used as a measure for notice in any land use application that goes out for any land use activity on any property that is processed through the code provision. He said if they were to refine the notice provisions of this ordinance, he recommended doing it in the context of these regulations and not necessarily with the whole system they currently have in place.

Sorenson suggested making the landowner part of the ordinance to conform to the intent. He said they should pass the ordinance and have all the matters referred to the Planning Commission.

Green requested a Third Reading and Deliberation and discussion to combine the two issues and then if there were outstanding matters that need the planning commission reviews, he would support that.

MOTION: to approve a Second Reading and Setting a Third Reading and Deliberation, including language in Lane Code 10.400-30(5), inserting property owner/applicant's tract in both places in the section where applicant's tract is used and in Lane Code 16.264(5 e), doing the same thing for Ordinance No. 11-02 on October 16, 2002.

Green MOVED, Morrison SECONDED.

Morrison stated that once a performance bond is paid for, it would not go away.

Dwyer recommended having the Planning Commission work on the definition of technical assistance and when it might be required.

Sorenson suggested sending to the Planning Commission the matter of the notice for land use matters and whether the notice is getting to the people.

Vorhes passed out copies of 10.400-30(5). He inserted property owner/applicant's tract in the two places that it appears. He recommended if the language was satisfactory, to move the second reading and set the third reading and deliberation for October 16.

MOTION: to approve a Second Reading and Setting a Third Reading and Deliberation for Ordinance No. 11-02 on October 16, 2002 with the proposed revisions.

Green MOVED, Morrison SECONDED.

Vorhes noted the sections will now read: "The proposed telecommunications tower is sited at least 1,200 feet from nearby residences and schools not on the property owner/applicant's tract or as far away from nearby residences and schools as it is sited from the closest dwelling on the property owner/applicant's tract, whichever is greater."

VOTE: 5-0.

15. COMMISSIONERS' ANNOUNCEMENTS

Weeldreyer said the Board needs to rank the needs and issues inventory and have it back to Mike Meyers by this Friday so it could go into next week's agenda packet as LCOG has to decide on this by October 3.

Dwyer stated he attended the POW/MIA event in Springfield.

Sorenson announced he attended the Labor Council meeting to discuss the Yes on Parks campaign. He said that tomorrow night he and Bonny Bettman were hosting a program called Jobs and Smart Growth.

16. CORRESPONDENCE TO THE BOARD

None.

17. **OTHER BUSINESS**

None.

There being no further business, Commissioner Dwyer adjourned the meeting at 3:30 p.m.

Melissa A. Zimmer

Melissa Zimmer
Recording Secretary

December 6, 2004
Lane Co. Planning
Lane Co. Telecommunication Ordinance
Tower Group: Draft 1

Issues to resolve:

1. **Peer review – subsections 4(c)(iv) & (viii); and 5 (b)(vii) & (viii) in no way address our concerns about independent, technical peer review as addressed during the public hearing in Sept. 2002 reflected in the directive given by the Board of Commissioners. These subsections do not even reflect the original ordinance's peer review by an independent engineering firm as expressed under subsection (3)(b)(ix).**

The following expressly states the essence of "peer review" and what information is necessary to perform such an evaluation: (from the Concord, MA bylaw, adapted) Upon submission of a complete application under this Section, the Planning Director shall engage the services of a qualified independent consultant and shall provide the independent consultant with the completed application and existing documentation for analysis and review:

Existing documentation will include submittals required under 4.c. and 5.b. of the proposed revision, including the following:
(a) The applicant shall provide written documentation of any facility sites within a radius of (?) miles including facilities located in jurisdictions within the confines of Lane County that fall within this range. Said documentation shall demonstrate the following: that these facility site(s) are not already providing , or do not have the potential, by adjusting the personal wireless communication facility on the site(s), to provide adequate coverage and/or adequate capacity; that there is a significant gap in coverage, and that the proposal reduces or eliminates the significant gap in coverage in a manner that is least intrusive upon the interests of the County as expressed in the purpose section of this Ordinance (purpose section should be restated). A "gap" in coverage exists when a communication facility cannot maintain a connection capable of supporting a reasonably uninterrupted communication. A "significant gap" depends upon the physical size of the gap and upon the number of customers affected by that gap. Documentation shall include, for each facility site listed, the exact location, ground elevation, height of tower or structure, type of antennas, antenna gain, height of antennas on tower or structure, output frequency, number of channels, power input and maximum output per channel. Potential adjustments to these existing facility sites, including changes, in antenna type, orientation, gain, height or power output shall be specified. Radial plots from each of these facility sites, as they exist and with adjustments as above, shall be provided as part of the application.

(b)The applicant shall provide written documentation that they have examined all personal wireless communication facility sites located in the

within the specified range (under (a)) to determine whether those existing facility sites can be used to provide adequate coverage and/or adequate capacity. Documentation shall include all information outlined above. Radial plots from each of these facility sites as proposed shall also be provided.

(c)The applicant shall provide written documentation (including radial plots) that they have analyzed the provision of adequate coverage and adequate capacity through the use of filler sites in conjunction with all personal wireless communication facility sites listed above.

(d)The applicant shall provide a map of all proposed facilities to be applied for over the next twenty (20) months (or a complete build-out analysis) by the personal wireless communication service provider. Such map shall also include any and all existing personal wireless communication facility(s) of the provider and known proposed facilities of other personal wireless communication service providers.

Additionally, other technical information deemed necessary to perform the evaluation by the independent consultant shall be provided by the applicant at the applicant's expense.

The above ensures that all information needed to assess an application is available. In my personal experience, claims are often made which need to be confirmed and can only be done by an independent qualified consultant.

Issue to resolve:

2. A new policy regarding "change outs":
   I will address those items listed by Mr. Fowler in his letter to the County dated November 3, 2004 to the extent of his arguments, as I imagine this is just a sample.
   1. Agreed, definitions need to be cleaned up. Purpose section also needs attention.
   2. Agreed, though I have not seen standards for quality requirement of carriers. Would the US District Court Case, Feb. 2, 04 Voice Stream, PCS vs City of Hillsboro, Oregon be relevant in assessing this particular "need"?
   3. I think this comment came out of misreading this subsection, at least regarding repair and maintenance. Upgrading a facility should be subject to some sort of review process.
   4. Throughout the process of writing this ordinance, I was under the impression that this subsection was to address speculation tower builders and that one provider needed to have signed a lease.
   5. Agreed

6. First sentence, please refer to US District Court case Voice Stream vs City of Hillsboro. Second sentence, 10 miles is excessive. See my comments under "issues to resolve: 1. peer review".
7. Nor do service providers adequately address the issues most important to neighbors impacted by PCS transmission towers. I can relate some stories that illustrate that providers sometimes try to ride rough shod over neighbors.
8. Addressed in "issues to resolve – 3. separation distance form homes and schools."
9. I have read numerous ordinances throughout the country and have seen provision for actual monitoring of these facilities. This was Lane County's effort at making sure a tower is in compliance, especially if service providers don't want upgrades reviewed. It does not seem an onerous provision. If a facility should fail to meet standards then there should be some recourse for the County.
10. The collocation section in the original ordinance is extremely confusing and poorly worded. I do believe staff wrote the revision from a literal reading. However, it was never the intent of those who wrote this ordinance to have such a convoluted procedure. There should be some review as to compliance with FCC standards and a way in which to record the additional antenna arrays.

Just some of my thoughts, and I am sure to have more.....

Issue to resolve:

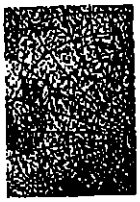
3. Separation distance from new towers and existing dwellings/schools - Our group sought and received Board support for an absolute setback of towers of 1200 feet from homes and schools. Given the rural character of Lane County, it seems a reasonable setback that would not effectively prohibit wireless services in the County and would not discriminate against any service provider.

   The confusing aspect of 4.e. in the proposed revision is subsection (ii). This makes no sense given the Boards directive of an absolute setback of 1200 ft. This subsection is a holdover from a Task Force recommendation which was made obsolete by the 1200 ft setback.

   In a letter from TerraQuest International to the County dated November 3, 2004, Mr. Fowler professes to be confused not only by the language but also concept of the setback provision from homes and schools. The language is confusing but the concept is simple. Often, the most significant investment people have are their homes. No matter that industry can provide studies maintaining that homes in the vicinity of transmission towers do not lose value, the industry is probably funding and conducting these studies. It

defies logic to think a 190 foot tower 400 ft from our home in rural Lane County would not lessen the value of our property – it defies logic. As to the setback from schools, this is based on attractive nuisance concerns and the potential for emissions from these facilities to exceed FCC standards. With no monitoring of these facilities, it is within the realm of possibility that FCC emission standards could be exceeded. See previously submitted testimony on emissions from the Berjac Building across from (the recently closed) Santa Clara Elementary School. Eugene 4J School District has a policy of not siting towers on school grounds, and Bethel School District also does not site on school grounds.

Mr. Fowler thinks that the County is catering to a vocal minority. I am not against the appropriate siting of PCS towers, and acknowledge the demand for cell phones. However, Mr. Fowler is naïve if he thinks when a tower is proposed for a neighborhood that he is not going to be challenged by those particular impacted homeowners. Unfortunately, most people are very uneducated as to the infrastructure it takes to provide coverage until they see the financial investment in their homes diminish and the view out their windows blighted.



TERRAQUEST INTERNATIONAL

A division of Quest Energy Systems, Inc. (Est. 1980)

Consultants to AT&T Wireless

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Beaverton, OR 97008

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November 3, 2004

Board of County Commissioners
Lane County
125 East 8th Street
Eugene, Oregon 97401

RE: Proposed amendments to Lane Code 16.264

Dear Chairman and members of the Commission:

TerraQuest International is a contracted consultant to AT&T Wireless Services of Oregon, Inc. ("AWS") and their affiliates and is representing them and acting on their behalf.

We have submitted letters to the Planning Commission on August 4, 2004 and September 29, 2004 setting out a number of questions and expressing our concerns about the proposed amendments to Lane County Code 16.264. To date, our concerns have not been addressed and our comments appear to have been largely ignored. We ask the Board to review these letters and the issues that they raise. Although we are concerned about many areas of the code, the following matters are among the most important:

In General

Wireless communications are at the forefront of the growth of all industry and wireless is rapidly becoming an essential part of our lives that is destined to be the service of choice for most citizens of Lane County for voice and data communications. Industry and the general public depend on wireless and the County should take reasonable steps to encourage responsible wireless development for the benefit of all. In particular, the Lane County code should do everything reasonably possible to embrace wireless technology and encourage its development to meet the needs of industry and the general population. Unfortunately, the proposed code amendments are confusing, excessive and make development problematic, if not impossible. Due to various controversial sections in the code, it may be difficult for County staff to administer the regulations, and, for industry to reasonably comply with the provisions. This will certainly lead to stagnated development, conflict and possibly litigation.

Regarding the proposed changes to 16.264

1. The code uses a number of very unusual definitions that are non-standard or contrary to the general industry interpretation of the terms. For example, the code definitions

of "provider" (indicates that a cell phone user is a provider), "collocation" and "replacement collocation" need to be clearly defined and consistent with industry usage of the term.

2. 16.264 3.c. - Coverage is not the only reason that new sites are needed. The language limits the ability to develop the networks to address capacity and quality requirements of the carriers.

OK

3. 16.264 3.h. - The term of collocation is misused in this section and apparently includes normal maintenance or equipment upgrades by the tower owner. This creates unnecessary process and delays when the carriers are making minor and imperceptible changes to their equipment. Antenna changeouts and compliance with federal mandates to install E911 equipment should be excluded from a review process if the impact is minimal. What is the actual purpose of this provision? Is there a legitimate regulatory need for this review? The County provisions are directly contrary to other more progressive codes that focus on more cogent issues rather than focusing on minor matters.

I THINK THIS WAS MIS-READ

4. 16.264 4.c.(ii)(C) - The provision requires a new applicant to have additional tenants under contract before they can apply for a new tower location. This is an unreasonable interference with private industry and the county has no legitimate right to make this a requirement. Does the County require any other private commercial developer to have additional tenants in place before they can apply for land use approval? This requirement is unique to Lane County and will certainly lead to litigation.

OK, ONE LEASE AGREEMENT IN THE CASE OF A SPEC. TOWER

5. 16.264 4.c.(iii) – Approval of the FAA and Oregon Department of Aeronautics should not be a requirement for collocations if the basic tower height or size is unchanged.

OK

6. 16.264 4.d(i) – The County appears to be requiring that the applicant prove a "need" for the new development although they do not have similar requirements for other types of uses. Also, it exacts an arbitrary area 10 miles in radius that they apparently feel will prove or disprove the applicant's need for the site. The County needs to explain the specific purpose and intent of this requirement.

SEE FEB 2, '04 U.S. DIST. CT VOICE STREAM PCS. VS CITY OF ISSAQUAH, OR

7. 16.264 4.d.(i) – Collocation is not a simplistic issue and the code provisions do not adequately address the concerns that may be raised when considering a collocation. For example, the provision fails to include reasons for unsuitable collocations due to: quality requirements of the carrier; ability to obtain ground space; excessive rents charged by the tower owner; unwilling tower or property owner; cost of modifying the structure or facility to accommodate the collocation; etc. The code is not comprehensive and encourages disagreement between the applicant and county staff as to compliance.

NOR DOES THE AUTHOR FACTOR IN THE GREED FACTOR

8. 16.264 4.e. – This provision pertaining to separation remains confusing and very difficult to interpret. What is the County trying to accomplish with this requirement? What is the purpose of the exclusionary zone around schools? Many jurisdictions seek out communications sites for their school properties, but the County appears to be specifically avoiding use of the school properties or the private property around them. Does the County have a specific concern, or are they arbitrarily setting exclusionary zones? The County needs to provide an explanation for this setback or the fair assumption may be that it violates the Telecommunications Act of 1996.

ADDRESSED

9. 16.264 4.f.(iii) – What is the reasoning behind requiring renewal of the special use permit every two years? Is there a valid concern, or is the County looking upon this as an opportunity to set new requirements that may force a telecommunications provider to dismantle or move the site location? Is there a valid reason for this requirement? Does the County require other commercial uses to renew their permits? Once a provider invests hundreds of thousands of dollars in a

THE COUNTY'S EFFORT AT MAKING SURE THE FACILITY IS IN COMPLIANCE WITH FCC STANDARDS.

OTHER JURISDICTIONS HAVE PROVISIONS FOR MONITORING

THIS IS NOT UNREASONABLE

November 3, 2004

communications facility, they are at a distinct disadvantage when the County elects to set new "... applicable conditions of approval...". This provision has no apparently valid purpose and the discriminatory nature of the requirement may violate the Telecommunications Act of 1996.

10. 16.264 5. – This section makes collocation on existing sites very complex and difficult. All other jurisdictions encourage collocation by offering an abbreviated approval process for using existing facilities. To the contrary, the Lane County code makes collocation as difficult as constructing a new tower location. The entire section should be modified to simplify the process and make collocations a preferred alternative for developers.

In summary, as we have previously stated, the proposed code needs more work in order to comply with existing laws and avoid unnecessary controversy or litigation. As it currently stands, the County is forcing the carriers to take a defensive posture and even reconsider the need to develop telecommunications in Lane County. The objective of code regulations should be to protect the public interest while setting reasonable requirements for development. This proposed code fails to do so in many aspects.

On behalf of AT&T Wireless, we are proposing that more work needs to be done on the proposed amendments. We would encourage the Board to postpone their decision and send the matter back to a joint task force comprised of County staff, industry and neighborhood representatives to review the proposed code and suggest possible changes or modifications. This has worked successfully in many areas and has resulted in improved codes while addressing the concerns of all parties.

It is important to all parties to come up with a solution that avoids catering to the vocal minority by implementing changes that override or impede the legitimate interests of industry and the majority of the public. Unless the Board has compelling evidence to the contrary, we don't feel that this code actually represents or addresses the concerns of most Lane County residents.

Please contact me if you have questions.

Sincerely,

Ron Fowler
Consultant to AT&T Wireless

THIS WAS THE ORIGINAL INTENT & HOW THE COUNTY HAS BEEN PROCESSING APPLICATIONS

ORIGINAL ORD. POORLY LOCATION STAFF AND WHO DID REVISION TOOK IT LITIGATION-

November 3, 2004

Lane County Board of Commissioners
In the mater of amending Lane Code 16.264

Name and address

In previous comment, it was mentioned that there are two specific areas of concern in the revision of the Lane County Telecommunication Ordinance. The second is one of three issues directed by the Board to be resolved. This issue is item number two listed in the Agenda Cover Memo to the Planning Commission dated June 25, 2004. In the memo, the directive simply states "(p)eer review of radiation limits and tower design."

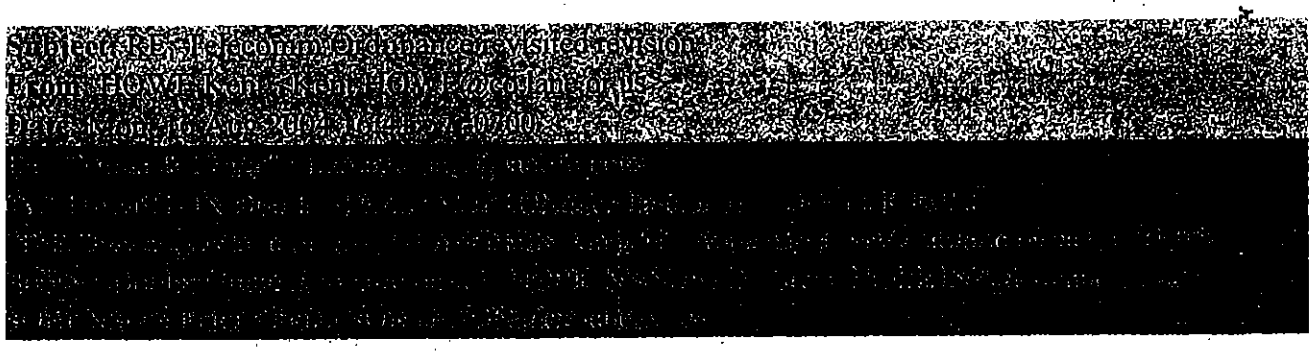
When addressing this, staff apparently had no context to what this directive was referring. I went back to the tape of the September 2002 public hearing before the Board. The directive from the Board would seem to encourage a more meaningful provision regarding peer review by an independent engineering firm as to the telecommunication facility design than now exists in the current ordinance (16.264 3(b)(ix)) – a decision left to the discretion of the planning director with no provisions for implementation.

What resulted were two sections (4. c. (iv) and (viii)) in the revised ordinance that essentially have very little to do with assessing the telecommunication facility design. Independent peer review at the expense of the applicant of the technical information being submitted would need to address and verify, e.g., the cumulative levels of radio frequency radiation, area of coverage, and adequacy of coverage. Staff does not have the qualification to evaluate the very technical data presented in a telecommunication application. The suggested response to the Board's directive by staff makes a mockery of the concept of independent peer review of technical information.

I request staff's response to this Board directive be re-evaluated and a provision crafted which establishes a fee schedule for such an independent review and the circumstances in which a review would be warranted.

Sincerely,

Situation in which independent review might be required: If, for whatever reason, a telecommunication facility (even an additional collocation on an existing facility) were to seek a site closer than 1200 feet from a home or school, then there would have to be mandatory independent review of technical information. This is a precautionary measure.



Hi Mona,

I understand you are concerned, however the record for the Planning Commission is closed.

To make the record clear, staff understand the Board direction regarding peer review. Peer review always has been and is still in the draft revisions. Sections 4(c)(iv) and (viii) of the current draft proposal provide the peer review requirements for transmission towers. Sections 5(b)(vii) and (viii) provide the peer review for colocation facilities. In fact, the Section 3(b)(ix) you reference in the existing ordinance is an option and the draft language make peer review a requirement in Sections 4 and 5 referenced, above.

If this language does not address your concerns you will have another opportunity when the draft ordinance is being considered by the Board of Commissioners.

Thanks, Kent

-----Original Message-----
From: Mona & Craig [mailto:monancraig@pacinfo.com]
Sent: Monday, August 16, 2004 11:54 AM
To: kent.howe@co.lane.or.us
Cc: don.hampton@co.lane.or.us; bill.dwyer@co.lane.or.us; anna.morrison@co.lane.or.us; bobby.green@co.lane.or.us; Steve.hopkins@co.lane.or.us; peter.sorenson@co.lane.or.us
Subject: Telecomm Ordiinance revisited revision

Kent, thank you for your detailed response. I apologize for not making clear the nature of my concern. I had already gone back and re-listened to tapes of work sessions and hearings and re-read the minutes of others. My concern is the vagueness of the wording of Board directive number two concerning "peer" review especially since Mr. Hopkins apparently has no context in which to interpret that directive - which is obvious from his first revision of the current ordinance.

After comments from interested parties including myself and representatives from the telcomm. industry, Mr. Hopkins in his second revision has not only NOT addressed "peer" review but has eliminated the one reference to it in the current ordinance (3)(b)(ix), unless I am missing something. No doubt Mr. Hopkins eliminated all reference to "peer review by an independent engineering firm of the proposed telecommunications facility SYSTEM DESIGN" in his quest for simplicity, but I should think that would run contrary to Board directive. The concern expressed about the current ordinance and peer or independent review of technical aspects of a telecom application has to do with the existing discretionary nature of this review. In order for independent technical review to actually be meaningful, it needs to be incorporated into a fee schedule and utilized - fee to be refunded if review not necessary. As is, this Board directive has been dismissed at staff level of review.

August 9, 2004

Staff: Steve Hopkins

Comments on Revised Revision of Lane County Telecommunication Ordinance:

One of the so-called directives from the Board concerns peer review. Given the opportunity for written comment and oral comment made during previous work sessions and public hearings, independent peer review was at the top of our list of concerns. Application after application makes assertions "supported" by very technical data provided by their experts. Mr. Hopkins seems to think (please refer to Attachment 1 page 4 (ix)) that peer review by an independent engineering firm has only to do with FCC radiation requirements. Mr. Hopkins, independent peer review has to do with the ENTIRE SYSTEMS DESIGN. Just because an applicant says something is true does not necessarily make it so. Even if what is said may be "true", often what is not said could be a deciding factor in confirming the information being provided by the applicant is accurate. In the current ordinance this often crucial aspect is left to the discretion of the Planning Director. With Mr. Hopkins' pen, any provision for independent technical has been wiped out. And, please, do not say that it could be addressed in the proposed amendment (Attachment 6) page 4 of 7, (c) (xi). Peer review was deliberately deleted from this very provision. Again, instead of addressing the Board's directive, independent peer review has been misconstrued (as evidenced by the first revision) and now deleted!!!!!!!!!!!!!!!!! Of course, independent technical review would need to be incorporated into the County's fee schedule, expert to be selected by the County but paid for by the applicant – i.e. an arm's length transaction..

In a more orderly fashion, I will address the new revision as proposed:

16.264 3. Standards applicable to all telecommunication facilities.

j. Notice. I am unclear as to the intent of "(i)f the property does not contain a leased area, this subsection shall not apply." Since this has to do with notice, what notice provision would apply if there is no leased area? Any homeowner could have a tower built on their property without going through a leasing process (eg Silke Communications has a tower on its property so the site is not leased property). Again, I am not sure what the implications would be of this exception.

16.264 4. Standards for a new or replacement transmission tower:

c. Required submittals:

(v) A signed statement from the property owner indicating awareness of the removal responsibilities of LC 16.264(4)(f)(iii).

Staff in Attachment 1, page 7 argues that whoever posts the performance bond it the one ultimately responsible for removal of a tower. However, if the applicant posts the bond which at a later date is determined insufficient, the excess cost of removal should be acknowledged by the landowner to be his responsibility. The one does not preclude the other.

d. Performance standards.

(iii) The cumulative radio frequency emissions from the collocations on a single structure shall not exceed the maximum exposure limits of the FCC.

I do not see any required submittals that would in fact establish the cumulative effect of either a new facility with multiple arrays or on a collocation facility. Of course, we are most concerned with the fact that no one is monitoring the cumulative effect and are sensitive to the County's liability in regard

to the absence of this information. Actually, this provision would also be well placed under 16.264 5. Collocation, b. Required submittals

e. Setbacks.
Again, my concern with part (ii) is that this part of the setback provision might be open to challenge as it would seem on the surface to be an unreasonable requirement. This provision in an extreme case could create a setback of e.g. two miles from homes and schools. Section (ii) should be eliminated in its entirety with an absolute setback of 1200 feet from homes and schools. If it were a question of a parcel which could not accommodate a 1200 ft setback, then that would be an entirely different question and this setback provision does not address that situation.

f. Expiration and renewal of the special use permit:
(iv) This section was discussed at the July 6, 2004 work session/public hearing. Staff's position was that by deleting the 6 month time frame from this removal provision the tower would be required to be removed even sooner than the six months in the current ordinance. In the current revision, Attachment 1 page 7 staff examines this section and seems to find some contradiction with the stipulation that after one year of non-use the applicant has 6 months to remove the tower. That is how I read that current ordinance and would re-iterate that the six months is needed. I agree with staff that this provision can be better written, but I do not think staff has managed to do it. The way staff states it removal is open-ended.

Attachment 1, (5) Siting Standards, (c) Directional /parabolic antennae.....
Staff deletes this. To accommodate upcoming technology, the "directional /parabolic antennae" could be eliminated but the remainder of this section should be retained and re-phrased.....
"any antennae utilized should be selected to optimize performance and minimize visual impact."

Under Collocation, Required Submittals I would add proof of final building permit approval for existing facility. In several applications I have reviewed, the existing tower never received final permit approval. Though one would think that at some point in the process this deficiency would surface, it might be possible for it to slip through the cracks. It would seem logical to require this proof during this permit application process.

In conclusion, if one had the perseverance, I am sure every aspect of the new revision could be tracked through Mr. Hopkins exhaustive and exhausting approach. Although I may not agree with some of his editing, I do agree that the current ordinance is confusing and poorly formatted. However, I would also like to point out this process managed to divert the focus from substance to form. I am still waiting for my answer as to how the specifics of this Board Directive were ascertained.

Sincerely,

Mona Linstromberg
Member: Citizens for Responsible Placement of Cell Phone Transmission Towers
87140 Territorial Rd.
Veneta, OR 97487

Subject: Update on Telecomm. Ord. revision
From: Mona & Craig <monacraig@pacinfo.com>
Date: Thu, 15 Jul 2004 09:24:07 -0700

The attached document was my response to the recent efforts of the LMD to revise the Lane County Telecomm Ordinance originally passed in April 2002 and amended in September 2002. The Lane County Planning Commission received the revision for consideration July 6, 2004 with directive from the Board. I reveiwed the revision and submitted detailed comment for the public hearing held that night. The record remained open for 7 days (hence the attachment). Staff has two weeks to revise his revision and then the public has a week to respond. The Planning Commission will then reconsider the proposed revision.

If this is going to be a meaningful review (which it hasn't been to date), I think it would be prudent to have someone providing the oversight to make sure the Board and the Planning Commission and staff are on the same page. Lack of communication amongst all parties last go around necessitated noticing the County twice to the tune of over $10,000 the second time. I am not aiming for substantial change to the Telecomm Ordinance. What I would like to see is clarity of language and the fine tuning of some procedural problems. I would like to see more explicit direction for independent peer review - a concept staff seems to be having great difficulty understanding.

Other than the week of the Democratic Convention (July 26-30), I would be more than happy to meet with any of you and with Kent Howe to make sure this is a productive review. Also, LeAndra Bell Matson in her comment suggested that Vincent Maretello of the Planning Commission might provide review of the progress of this revised revision to make sure it is on track prior to the Planning Commission formally getting it for consideration. There was a serious lack of communication at the work session and hearing between staff and the Planning Commission (thank you Planning Commission!)..

Respectfully,

Mona Linstromberg

Telecommunications - additional comment for July 13.doc	**Content-Type:** application/msword **Content-Encoding:** base64

Attachment I.
Letter from National League of Cities

LANE COUNTY SHOULD JOIN THIS EFFORT !

National League of Cities

May 8, 2003

The Honorable Patrick Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

On behalf of the membership of the National League of Cities, we are writing to express our strong support for the Local Control of Broadcast Towers Act (S.3102) and Local Control of Cellular Towers Act (S.3103). We believe the 1996 Telecommunication Act fundamentally interferes with and preempts traditional state and local zoning and land use authority with regard to tower placement. These measures would restore the ability of local governments to effectively balance the needs of telecommunications providers and the zoning needs of their citizens.

As you know, the Telecommunications Act of 1996 legislation codified the federal government's confidence of increased competition and decreased government regulation in the telephony industry. For local governments cross the nation, there has been immense local conflict over tower siting that stems from the vagueness of the language Congress wrote into The Act.

While the Act added Section 704, codified at Section 332(c)(7)(A), which generally preserves state and local government authority over decisions concerning wireless tower siting, it did specifically limit the authority of state or local governments to prevent unreasonable discrimination among "providers of functionally equivalent services." The Act further prevented state and local governments from prohibiting "the provision of personal wireless services." This section also requires state and local governments to respond within a reasonable time to requests to site wireless towers and facilities. In addition, this section also expressly forbids local governments from prohibiting tower sitings based on the health effects of RF emissions, providing that these sites comply with the FCC's regulations concerning such emissions.

This measure would amend the Telecommunications Act of 1996 and reaffirm state and local authority to regulate the placement, construction, and modification of broadcast transmission facilities. Moreover, it would prohibit the Federal Communications Commission from adopting a final rule or otherwise implementing any portion of a proposed rule regarding the preemption of State and local zoning and land use restrictions concerning the siting, placement, and construction of broadcast station transmission facilities.

We believe that Congress must move to examine the needs of the cities as well as the overall demand for new technologies if we are to have a sensible, balanced approach to land use across the nation. While local zoning control over cell towers may seem burdensome to telecommunications providers, it is no greater a hurdle than that faced by all other businesses who are applying to build in any given city or town. Permitting control of cellular communications is best left in the hands of local officials.

If you have any questions or concerns, please contact Juan Otero, Senior Legislative Counsel at (202) 626-3022.

Sincerely,

Donald J. Borut
Executive Director

TO ILLUSTRATE OUR DEPTH & BREADTH OF KNOWLEDGE ON ISSUES

1

To: the Eugene City Council and Mayor Torrey; Pam Berrian; Jerry Jacobson; Jan Childs
From: Citizens for Responsible Placement of Cell Phone Transmission Towers
Regarding: Revisions needed to the Current Eugene City Code on Siting and construction of Telecommunications Devices

A list of revisions we propose to Eugene City Code 9.5750 follows. The list follows the same order in which the current code is written, with sections and subsections numbered as you will find them in the current code. For your convenience, EC 9.5750 is included in your packet as **Attachment H.**

EC 9.5750(1). Purpose.
The Purpose section is commendable, but could be strengthened with references to preservation of property values; avoidance of public safety hazards; avoidance of attractive nuisance; protection of scenic and natural resources, and other values. See Purpose section of **Attachment A** (p195 of article by T. Blair) for more details. Moreover, principles from the current Purpose section are not applied as approval criteria. This results in a watered down ordinance that fails to protect property values for owners of homes and businesses near proposed cell tower sites.

EC 9.5750(3) Collocation of Additional Antennas on an Existing Tower.
We propose that no additional antennas may be added to an existing tower unless the tower is brought into compliance with the updated code. For example, if an existing tower is closer to a residence or school than updated setbacks allow, no new antennas may be added. At the time this revision comes into effect, there will be pre-existing telecommunications facilities as well as permit applications still in process. These will of course fall under the regulations in effect at the time of application. Nonconforming facilities may continue in use but shall not be expanded, altered, or modified other than as necessary for routine maintenance and repair, unless brought into compliance with the revised provisions of this ordinance.

EC 9.5750(4) Collocation of Antennas on Existing Buildings, Light or Utility Poles, and Water Towers.
Current code allows collocation as an outright permitted use in certain zones. We propose revising this so that collocation is subject to site review process in zones C-3, C-4, I-1, I-2, and I-3. In all other zones, collocation should require a conditional use permit. This would necessitate rewriting most of subsection (4). The rationale for stricter limits on collocation is preservation of residential and business property values. Although collocation is much preferable to construction of new towers, collocated antennas still have the potential to create a stigma that will lower property values. See article from Real Estate Finance Review, Winter 1999, on Telecommunications Leases in **Attachment B.** This is information which documents that installation of rooftop antenna arrays can have an adverse effect on value and marketability of property.

EC 9.5750(5) Construction of Transmission Tower.
The current system is a tiered approach, based on zoning of the proposed site. Current code allows construction of new towers as an outright permitted use in the C-4, I-1, I-2, and I-3 zones. We propose that even in the C-4, I-1, I-2, and I-3 zones, construction of new towers should be subject to a site review approval process. This will ensure compliance with all provisions of this code, particularly an independent technical review of RF aspects of the application. Zones in which towers are currently prohibited are AG, R-2, R-3, R-4, H, NR, and PRO. We propose that R-1 and RA should be added to this list, since the vast majority of residential neighborhoods in the Eugene area are either R-1 or RA. RA must be added because the Lane County Board of Commissioners recently adopted EC 9.5750 to apply on county lands within the Urban Growth Boundary, and most of the residential neighborhoods outside city limits and inside the UGB are zoned RA. Applications for towers in C-2 zoning should be subject to a Conditional Use Permit, rather than the current Site Site Review process; because there are a significant number of neighborhoods in which C-2 zoning is adjacent to residential zoning and/or use. Conditional use permits should be required in PL, C-2, C-3, S, and GO.

EC 9.5750(6) Application Requirements.
(a) Collocation of antennas.
EC 9.5750(6)(a)1. Current code requires the applicant to give "A description of proposed antennas' location, design, and height." The application requirements should also include engineering specifics such as effective radiated power (ERP), mounting angle of proposed antennas, and if antennas are to be placed on a rooftop, documentation by an <u>independent</u> RF engineer that the ERP will not be in excess of FCC standards for rooftop installations.

For example, in February of 2002, we contacted the City of Eugene about an antenna array placed on the Berjac Building (EUG 0243) across from the then operational Santa Clara Elementary School. There are 16 antennas on the rooftop, and the newest six have an ERP of 1805 watts each. This newest installation puts the cumulative ERP at the Berjac Building in excess of the total 2000 watts FCC allows for rooftop installations. In response to our concern, Mr. McKerrow stated:

"According to the City's telecommunication ordinance an applicant wishing to install telecommunication devices must meet all of the application requirements. One of the requirements is documentation that shows the proposed equipment will meet FCC standards for electromagnetic radiation. The application for this permit included a report from a radio frequency engineer indicating FCC-approved equipment will be used and FCC guidelines met. The requirements of Eugene Code Section 9.5750(6) were satisfied and the permit was approved."

From A LOCAL GOVERNMENT OFFICIAL'S GUIDE TO TRANSMITTING ANTENNA RF EMISSION SAFETY: RULES, PROCEDURES, AND PRACTICAL GUIDANCE (FCC):
"Moreover, the limits (on RF exposure) themselves are many times below levels that are generally accepted as having the potential to cause adverse health effects. Nonetheless, it is recognized that any instance of noncompliance with the guidelines is potentially very serious, and the FCC has therefore implemented procedures to enforce compliance with its rules. At the same time, state and local governments may wish to verify compliance with the FCC's exposure limits IN ORDER TO PROTECT THEIR OWN CITIZENS."

The City seems to be very accepting of the industry's affirmation of compliance, but is the City considering the cumulative effect of multiple antenna array? Is the City aware that the FCC has inadequate capability to monitor or enforce compliance? Has the City considered its exposure to litigation from its own citizens? Appendix A of the above-referenced FCC publication, under Evaluation Required If, states: "Personal Communications Services, building-mounted antennas: total power of all channels > 2000 W ERP." The situation just described sends out serious signals that the City has been remiss in the area of compliance. See Attachment C, Berjac Bldg.

EC 9.5750(6)(a) 2. "Documentation demonstrating compliance with non-ionizing electromagnetic radiation (NIER) standards as set forth by the FCC..." The FCC's standards do not address NIER specifically. The relevant FCC standards are based upon Maximium Permissible Exposure (MPE) to radio frequency radiation at specific power densities. The Code's reference to NIER in this context suggests a flawed understanding of RF principles. Code language should use proper terminology.

EC 9.5750(6)(a) 8. "Signature of property owner(s) on the application form or a statement from the property owner(s) granting authorization to proceed with the development and land use processes." Current code lacks any provision that would require the telecommunications tenant to make their landlord aware of his/her potential future liabilities, including costs for removal if it becomes defunct. Having reviewed a number of telecommunications leases, we have found it is fairly common practice for the wireless tenant to make his landlord potentially responsible for costs of future removal of the facility should it become defunct. We propose that the landlord should be informed of this potential liability at the time he or she signs the application or authorization to proceed.

EC 9.5750(6)(a) 9. With respect to ancillary facilities, whether located on the ground or on a rooftop, site plans should address the need for adequate ventilation of the battery cabinet, and plans to prevent and/or contain leakage of hazardous chemicals. The rationale for this is prevention of chemical hazards, fires and explosions. Regarding chemical hazards, sulfuric acid is present in a typical telecommunications array of 16 one hundred pound batteries in sufficient quantity

to warrant notification of the presence of hazardous material to local fire and safety authorities, per EPA regulations.

Regarding the need for proper ventilation, battery rooms and cabinets are notorious for explosions when hydrogen created by electrolysis and mixed with oxygen is ignited by a spark. The proliferation of backup batteries at communications sites has spread the hazard from the private concern of the battery users to the public at large. Battery cabinets, vaults, and rooms are now scattered like time bombs all around the world, many where an explosion could injure or kill unaware bystanders. Many vaults have exploded and recently a communications shelter in Yuma, Arizona blew up, shattering the windows of a neighboring house.

Regarding structure fires at electronic equipment rooms, more than 1000 structure fires are reported each year to US fire departments in electronic equipment rooms. See Attachment D, Battery Hazards.

EC 9.5750(6)(b) Construction of Transmission Tower.
EC 9.5750(6)(b) 2. Current code requires the applicant to state "The general capacity of the tower in terms of the number and type of antennas it is designed to accomodate." We propose that this provision require the applicant to provide the following information: exact location in longitude and latitude; ground elevation; height of tower; type of antennas; antenna gain; height of antennas on tower; output frequency; number of channels; power output and maximum power output per channel.

EC9.5750(6)(b) 3. Regarding NIER standards, we have the same comment as above in section (6)(a)2.

EC9.5750(6)(c) Site Review and Conditional Use Permit Applications.
EC 9.5750(6)(c) 1.If there is residential property near the proposed site, we propose that the required visual study should include views from residential areas, and that the visual study include a balloon test, as follows:

Within 35 days of submitting an application, Applicant shall arrange to fly, or raise upon a temporary mast, a three foot (minimum) diameter brightly colored balloon at the maximum height and at the location of the proposed tower. The dates (including a second date, in case of poor visibility on the initial date), times, and location of this balloon test shall be advertised, by the Applicant, at 7 and 14 days in advance of the first test date in the newspaper with a general circulation in Eugene. The Applicant shall inform the Eugene Planning Department, in writing, of the dates and times of the test, at least 14 days in advance. The balloon shall be flown for at least four consecutive hours between 8:00 AM and 5:00 PM of the dates chosen. For model of enacted ordinance which requires a balloon test, see Attachment A, p 210.

Prior to submitting application, applicant shall hold a public meeting which area property owners and residents will receive notice of. Lane County's recently adopted code on construction and placement of telecommunications facilities requires this type of neighborhood meeting. For further details, see Attachment G,

Lane Code 16.264(3). Application shall include evidence of compliance with this requirement.

EC 9.5750(6)(c) 2. Alternate Sites.
The current code allows applicant to consider alternate sites only in more intensively used commercial and industrial zones. In many areas, this results in a dearth of potential alternative sites. Applicants should be required to submit documentation of having considered any feasible sites within the required radius, both in more intensively zoned properties, and in the same zone as the subject property. This provides a larger pool of potential alternative sites, and could make it possible to meet both community and telecommunication provider needs more easily. The required radius should be increased from 2000 to 2600 feet. This is because the coverage footprint for PCS antennas has a diameter of approximately 4 miles, and the antennas can be placed anywhere within a 25% radius of the center and still provide adequate service (radius of a 4mile circle = 2 miles, 25% of 2 miles = one half mile, or 2640 feet). Again, Planning staff lacks the technical expertise to determine verity of an applicant's statements regarding RF coverage areas. This points to the need for <u>independent</u> review of ALL applications by a qualified RF engineer, whose fee shall be paid by the applicant.

EC 9.5750(6)(c) 3. Collocation on existing structures. Current code language (regarding the applicant's attempt to collocate on existing structures rather than build a new tower) is so broadly written as to allow the applicant to forego collocation at the wave of a hand. Under current code, an applicant can get out of collocation merely by stating that it is "impractical". In general, there are two types of telecommunications applicants: wireless service providers, and tower contractors. Wireless service providers generally are amenable to collocation, because it saves the expense of putting up new towers, and gets them on the air faster. Tower contractors are more likely to avoid collocation if possible, since they make their money by building new towers and leasing space on them to wireless service providers. In order to preserve property values for homeowners, collocation on existing structures should be required unless the applicant can document with an independent RF engineering report that it is impossible. Wherever possible, mini-cell technology on light and power poles should be required. This is another provision that cannot be administered effectively without independent review of ALL applications by an RF engineer.

EC 9.5750(6)(c) 5. Current code requires the applicant to submit "A statement providing the reasons for the location, design, and height of the proposed tower or antennas." To ensure that the applicant's claims are accurate, a provision needs to be added, either in the telecommunications code itself, or better, in site review and conditional use permit criteria, which specifies that applications found to contain false or misleading statements or information will be suspended, and if already approved, will be denied. We have found numerous examples from both Lane County and the City of Eugene in which telecommunications providers have stated

that their proposed location, height, or design were the only ones which would would allow their network to function. In the face of community opposition, the providers' staunchly held assertions for the above needs have been revised. Lane Code contains a similar provision regarding denial of applications which contain false of misleading information. See Attachment E, Lane Code 14.700(3)(iii).

EC 9.5750(7)
Standards for Transmission Towers and Antennas.
EC 9.5750(7)(a) Separation between transmission towers.
Based on the data cited above regarding RF footprint size for PCS sysytems, the required minimum separation between towers should be at least 2600 feet.

EC 9.5750(7)(c) Collocation. Current code language allows applicants to meet standard by merely stating in the application that their tower is DESIGNED to accomodate collocation. Code should be revised to require that the proposed design be independently reviewed and approved by a qualified RF engineer as having the capacity to accomodate collocation by most telecommunications providers. SR 01-33, Master Towers, a stealth tower which the applicant claims is designed for three providers, was approved by the City. Not long after its approval, Mericom submitted a preapplication for a tower only 400 feet from Master Towers site, stating that Mericom needed an additional new tower because Master Towers' design would not accomodate their needs, specifically, that "the proposed flagpole tower would not have sufficient diameter and circumference to place Verizon's antennas inside the flagpole."

EC 9.5750(7)(d) Setback.
In terms of preserving property values and protecting the City from lawsuits, this is the MOST IMPORTANT provision of the entire code on telecommunications facility siting. Howard Richter & Associates, a 26 year-old Chicago real estate appraisal firm, found as much as 15% devaluation in homes within 270 feet of a cell tower. To illustrate from a recent local example, within 270 feet of a proposed site on River Road, there are approximately 30 homes. The average sale price for a home in the Eugene area is currently $153,860 (*Eugene RG,* 2/3/02). A 15% devaluation is equal to a loss of value of $23,079 for each home, or a neighborhood total of $692,370.

A quote from the Chicago Tribune 2/1/99: "the bigger issue that has municipal leaders closely watching the case is potential liability of villages that have allowed such towers to be built." In North Barrington, IL, 21 residents sued the Village of North Barrington and Ameritech Mobile Communications for property devaluation in January of 1999. The final outcome of that case was not available at the time of this writing. In Harris County, Texas, a jury ordered GTE Wireless to pay $1.2 million to a Houston couple who sued for nuisance, mental anguish, and property devaluation after a 100 foot cell tower was constructed 20 feet from their property line. The City was also named in the lawsuit, but settled out of court for an undisclosed amount. It would seem in the best interest of the City of Eugene to

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increase setbacks from residences in order to reduce its exposure to potential litigation by aggrieved homeowners. See Attachment B for full text articles and citations regarding property devaluation.

In the interest of consistency with recently adopted Lane County Code 16.264, we propose a 1200 foot minimum setback from the nearest residence. (Although Lane Code 16.264 now calls for a 1000 foot setback from homes, work is underway to amend the setback to 1200 feet, from homes and schools.) See Attachment G, Lane County Code 16.264.

A 1200 foot setback from schools is needed because cell towers have been identified as an "attractive nuisance." Children and teenagers are attracted to climb towers, and have fallen to their deaths in other communities. A 1200 foot setback from schools is among the soon-to-be adopted revisions to Lane County's new telecommunications ordinance.

With regard to mechanical safety in case of tower failure, we propose that in addition to the setbacks from homes and schools as proposed above, towers in all zones should be set back from the property boundary a distance that is equal to at least the height of the tower. Current code language requires little or no setback from property boundaries in some zones, which could result in property damage, injury, or death in case of tower failure.

EC 9.5750(10) Removal of facilities.

Again, the landlord should be made aware of his potential liability up front. Current code states that the city "may require the posting of an open-ended bond before development issuance to ensure removal..." This language should be strengthened so that a bond is required as part of the application process. Recent economic downturns in the telecommunications industry highlight the need for this provision. If a service provider goes bankrupt but posted a bond with their application fee, the cost of removal is already covered.

EC 9.5750(11) Fees.

Existing code has a provision for independent technical review of telecom applications; however, it is weakly worded and cumbersome to implement, due to the need for the City Manager's involvement. It is telling that this provision has never yet been utilized. To illustrate, EC 9.5750 (11) Fees, states:

"notwithstanding any other provision of this code, the city manager may require, as part of application fees for building or land use permits for telecommunication facilities, an amount sufficient to recover all of the city's costs in retaining consultants to verify statements made in conjunction with the permit application, to the extent that verification requires telecommunications expertise." See Attachment H (full text of EC 9.5750).

During public comment on the Villard proposal (SR-01-32), the Fairmount Neighborhood requested that there be independent technical review of the

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200 word limit,same letter to no other papers
1 every 60 days

application. We were informed that the City could not seek independent review because no mechanism was in place to hire expert review at that point in the process. We also learned that the City had NEVER used the existing provision for independent technical review. It is well established in Oregon land use case law that when there is question as to whether a proposal will meet application criteria, the burden of proof rests solely upon the applicant. Nonetheless, it was up to the Fairmount Neighborhood to seek out an acoustics analyst to refute Sprint's noise analysis. This study, paid for by the Fairmount Neighborhood, figured in the hearings officer's denial of Sprint's appeal.

EC 9.5750 (11) as currently written provides only lip service. A method is needed to ensure it can be implemented and used. The following is from correspondence with Martin Connor, AICP, City Planner, Torrington, CT:

"Your ordinance or fee schedule should be written to allow you to hire experts at the applicant's expense to review the application. We hire an RF Engineer to review the application and be available during the public hearing process. That was key in a denial which went to litigation when I worked for the Town of Litchfield, CT. Our denial held up in Federal Court as the technical information was woefully inadequate. We would not have known that without our own RF Engineer."

Independent technical review of ALL applications for construction of new transmission towers by a qualified RF engineer is of critical importance to the effectiveness of Eugene's telecommunications code. Planning staff lacks the technical expertise to verify statements in applications regarding RF coverage footprints; height needed to achieve adequate coverage; potential for collocation on existing structures in the area, etc. The FCC's publication A Local Government Official's Guide to Transmitting Antenna Radio Frequency Emission Safety: Rules, Procedures, and Practical Guidance, p. 11, states, "Many larger cities and counties, and most states, have radio engineers on staff or under contract." This indicates that independent review is common practice in many jurisdictions. As regards the expense of such review, current code correctly requires that the applicant shall pay the cost of the review.

In conclusion, we propose the addition of some provisions which existing code does not address at all. First, telecommunications applicants will insist that they need blanket RF coverage for their networks to function. This is not true, nor does the FCC require towns and cities to guarantee blanket coverage for service providers. See Attachment F, excerpt from FCC Fact Sheet. City code should modified to specify that there may be gaps in service coverage areas. Second, the applicant should be the service provider, or in cases where the applicant is a tower contractor building a transmission tower for lease, he should have a signed lease agreement with at least one service provider. This ensures that new towers will not be built on speculation, but to meet an existing need.

Why and How of Letters to the Editor for Pete

Those of us who know Pete Sorenson or who have seen him in action do not have to feign being jazzed about his entering the 2006 Governor's race. A quick tour of this website will reveal his background, years in public service, and stances on a variety of issues. Pete has a vision for our state and the leadership skills and dedication to see the vision become a reality. Our current governor does not.

This will be very much a grassroots effort. We need to get Pete's name out to the far reaches of the state in addition to the urban areas. One way for him to get greater name familiarity is to have a letter to the editor writing campaign. We must make a concerted effort to keep Pete's name in the media. These letters can be of a personal experience with Pete in his capacity as county commissioner or state senator or just a testament to his character and integrity. Letters can also be issue oriented. You should reach out to friends and encourage them to write letters.

So write of those personal stories on how you know Pete. Write of those times Pete took a stand on an issue that was of importance to you or the larger community. There is a third type of letter to the editor that should also be considered. When our current governor makes a misstep, as he often does, ask probing questions and draw an obvious conclusion, Oregon needs Pete Sorenson as our next Governor. We can extend this third type of letter to the most probable candidate from the Republican Party, Kevin Mannix.

The following is a list of newspapers and contact information. This will eventually be expanded. One can go to any search engine on the internet and get additional information by just typing in the name of the newspaper (or just "newspaper") and the name of the city and state. Usually there is contact information and details on submitting letters to the editor. Address your comments to "Letter to the editor." Most have a word limitation of either 200 or 250 words. If you have a lot to say, e-mail them for specifics. Some discourage submitting letters to multiple newspapers. Weekly papers usually have a deadline for submittals. Include name, address and phone number. The larger papers may limit the frequency of publishing a letter from any one person

And remember to mention Pete's website in every letter you write, www.PeteSorenson.com , and that Pete Sorenson is a Democratic running for Governor. Also, you can help out by contacting us if any of the following information is incorrect and needs updating. Thank you.

Albany Democrat-Herald
Hasso.hering@lee.net
PO Box 130
Albany, OR 97321-0041

Ashland Daily Tidings
Tidingsopinion@DailyTidings.com
PO Box 7
Ashland, OR 97520-2498

The Daily Astorian
sforrester@dailyastorian.com
PO Box 210
Astoria, OR 97103-0210

Baker City Harold
mfurman@bakercityherald.com
PO Box 807
Baker City, OR 97814-0807

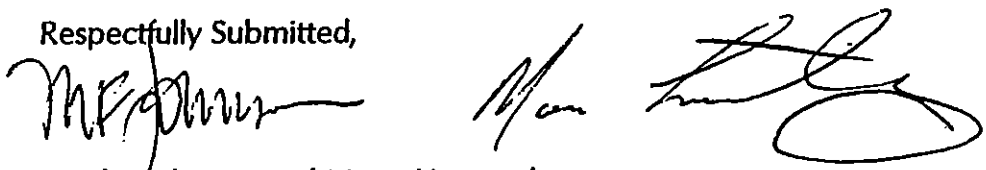
Finally, we are not certain whether the City makes use of a savings and severability clause such as that applied by Lane County:

"If any section, subsection, sentence, clause, phrase, or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity to the remaining portions hereof."

We strongly recommend that such a clause be added to this ordinance, to preserve the remainder of the ordinance, if any particular provision should be deleted in the future.

Many thanks for your time in consideration of our thinking on this issue.

Respectfully Submitted,



Martha Johnson and Mona Linstromberg
Citizens for Responsible Placement of Cell Phone Transmission Towers

List of Attachments

A. Tony Blair. Planning and Zoning Regulations: Some Local Solutions
NB: this attachment should be reviewed in full, as it details the crafting of a telecommunications ordinance, using as its basis an ordinance enacted in Great Barrington, MA. We have anumber of other enacted ordinances in our files.

B. Citations and full text articles on property devaluation

C. Berjac Building information

D. Battery Hazards

E. Lane Code 14.700(3)(iii)

F. Excerpt from 1998 FCC fact sheet

G. Lane County Code 16.264 (new telecommunications ordinance, adopted 04/02)

H. Eugene Code 9.5750

VERY EXCITING DECISION FOR THOSE OF US WHO WANT A CLEARLY WRITTEN ORDINANCE.

Westlaw.
301 F.Supp.2d 1251
(Cite as: 301 F.Supp.2d 1251)

United States District Court,
D. Oregon.

VOICE STREAM PCS I, LLC, d/b/a T-Mobile,
Plaintiff,
Golden Road Baptist Church, Involuntary Plaintiff,
v.
CITY OF HILLSBORO, Defendant.

Civil No. 03-365-MO.

Feb. 2, 2004.

Background: Wireless telecommunications service provider brought action under Telecommunications Act (TCA) seeking to overturn city's decision to deny its conditional use application to erect wireless telecommunications tower in residentially zoned area.

Holdings: The District Court, **Mosman**, J., held that:
(1) substantial evidence supported city's decision to deny application on aesthetic grounds;
(2) city's decision did not effectively prohibit wireless services in city; and
(3) city did not unreasonably discriminate against provider.

Judgment for city.

West Headnotes

[1] Zoning and Planning ⇐708
414k708 Most Cited Cases

Court reviewing local zoning decision affecting wireless telecommunications towers pursuant to Telecommunications Act (TCA) must examine entire record, including evidence contradictory to local government's decision, in determining whether substantial evidence supports decision. Communications Act of 1934, § 332(c)(7)(B), 47 U.S.C.A. § 332(c)(7)(B).

[2] Zoning and Planning ⇐36
414k36 Most Cited Cases

Under Oregon law, city can prohibit proposed use of property on sole ground that use is offensive to aesthetic sensibilities.

[3] Zoning and Planning ⇐384.1
414k384.1 Most Cited Cases

Under Telecommunications Act (TCA), local zoning board is entitled to make aesthetic judgment in ruling on conditional use application for wireless telecommunications tower, as long as judgment is grounded in specifics of case, and does not evince merely aesthetic opposition to cell-phone towers in general. Communications Act of 1934, § 332(c)(7)(B), 47 U.S.C.A. § 332(c)(7)(B).

[4] Zoning and Planning ⇐384.1
414k384.1 Most Cited Cases

Substantial evidence supported city's decision to deny, on aesthetic grounds, conditional use application for wireless telecommunications tower in residentially zoned area, despite applicant's contention that decision was based solely on general, unsubstantiated aesthetics concerns, in light of evidence that city considered specific scene in which proposed tower would appear, city gave consideration to proposed tower's distance from surrounding homes, and proposed tower would not have filled complete void in coverage but instead would only have improved indoor coverage. Communications Act of 1934, § 332(c)(7)(B), 47 U.S.C.A. § 332(c)(7)(B).

[5] Zoning and Planning ⇐685
414k685 Most Cited Cases

In seeking to overturn city's decision to deny conditional use application for wireless telecommunications tower in residentially zoned area, burden is on applicant. Communications Act of 1934, § 332(c)(7)(B), 47 U.S.C.A. § 332(c)(7)(B)

[6] Zoning and Planning ⇐642
414k642 Most Cited Cases

District court reviews record de novo to determine whether it supports applicant's claim that city's rejection of application for wireless communications tower effectively prohibits such towers in city. Communications Act of 1934, § 332(c)(7)(B)(i), 47 U.S.C.A. § 332(c)(7)(B)(i).

[7] Zoning and Planning ⇐384.1
414k384.1 Most Cited Cases

Single zoning decision can give rise to effective prohibition of wireless services in violation of Telecommunications Act (TCA). Communications Act of 1934, § 332(c)(7)(B)(i), 47 U.S.C.A. § 332(c)(7)(B)(i).

[8] Zoning and Planning ⇐384.1
414k384.1 Most Cited Cases

City's decision to deny conditional use application for wireless telecommunications tower in residentially zoned area did not effectively prohibit wireless services in city, in violation of Telecommunications Act (TCA), where proposed tower would have simply improved existing indoor coverage, not filled complete void in coverage, applicant could have achieved its objectives by installing two towers at other locations, and city's decision was based on specific circumstances presented, not on unsubstantiated general observations. Communications Act of 1934, § 332(c)(7)(B)(i), 47 U.S.C.A. § 332(c)(7)(B)(i).

[9] Zoning and Planning ⇐384.1
414k384.1 Most Cited Cases

City's decision to deny conditional use application for wireless telecommunications tower in residentially zoned area did not unreasonably discriminate against applicant, in violation of Telecommunications Act (TCA), even though city had previously granted conditional use permits for two other wireless communication facilities in residential areas, where there was no evidence of any relevant similarity other than common zoning designation. Communications Act of 1934, § 332(c)(7)(B)(i)(I), 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

[10] Zoning and Planning ⇐685
414k685 Most Cited Cases

Unsuccessful applicant for conditional use application for wireless telecommunications tower bears burden of establishing that city engaged in unreasonable discrimination in violation of Telecommunications Act (TCA). Communications Act of 1934, § 332(c)(7)(B)(i)(I), 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

*1253 Christopher P. Koback, Davis Wright Tremaine, LLP, Portland, OR, for Plaintiff.

Pamela J. Beery, Paul C. Elsner, Beery & Elsner, LLP, Portland, OR, for Defendant.

OPINION AND ORDER

MOSMAN, District Judge.

Plaintiff Voice Stream PCS I, LLC ("plaintiff") brings this lawsuit under the Telecommunications Act of 1996 ("TCA"), seeking to overturn the City of Hillsboro's decision to deny plaintiff's conditional-use application to erect a wireless-telecommunications (or, as commonly called, a "cell-phone") tower in a residentially zoned area. The issues in this case pit the TCA's intention to deregulate the wireless telephone industry against the traditional control over local land use maintained by municipalities. For the reasons discussed below, municipal control prevails in this case.

I. Background

Personal wireless services are dependent upon low power, high frequency radio signals that are transmitted from antennae placed on preexisting structures, such as water towers, or on newly constructed towers. See generally *Southwestern Bell Mobile Sys. v. Todd,* 244 F.3d 51, 56-57 (1st Cir.2001); *Sprint Spectrum, L.P. v. Willoth,* 176 F.3d 630, 634-35 (2d Cir.1999). As a subscriber travels within a cellular provider's service area, the cellular call in progress is transferred from one cell site to another without noticeable interruption. To increase quality of service and therefore attract subscribers, providers usually have an incentive to increase the number of cells and correspondingly decrease the geographic coverage of each cell. In furtherance of this plan to improve service, coverage within an area is maintained by arranging antennae in a honeycomb-shaped grid. When the grid is placed over a city map, desired tower locations of course often fall in residential areas. And because wireless technology is relatively

low-powered and requires line-of-sight to a tower, the necessary antennae generally must be placed on towers which loom over the landscape, commonly giving rise to opposition especially in residential areas.

Plaintiff submitted an application for a conditional-use permit to construct and maintain a 120-foot tower on residentially zoned property owned by the Golden Road Baptist Church in the City of Hillsboro. The church site is surrounded on all sides by residentially zoned property. Many of the surrounding homes are between 100 and 200 feet from the proposed site. As revealed by the record, the proposed site is in an area commonly described as scenic, as it is surrounded by fir trees and is near wetlands and a greenway. Neighbors, therefore, banded together to oppose plaintiff's permit application.

The City's Zoning Hearings Board held public hearings and accepted neighbors' opposition letters. The board also accepted a petition of over 50 residents expressing opposition. In addition, the board had before it maps, simulated photographs, and a chart depicting the location of the city's wireless- telecommunications facilities. The board applied Hillsboro Zoning Ordinance ("HZO") No.1945, Section 83(9). This ordinance provides as follows:

> The Commission or Hearings Board shall grant approval only if the proposal, *1254 as conditioned, is determined to conform to the following criteria:
> (a) The granting of the application would meet some public need or convenience.
> (b) The granting of the application is in the public interest.
> (c) The property in question is reasonably suited for the use required.
> (d) The use requested would not have a substantial adverse effect on the rights of the owners of surrounding properties.
> (e) The use requested would conform to the maps and the goals and policies of the Hillsboro Comprehensive Plan.

The board ultimately issued a written decision denying plaintiff's application. Plaintiff appealed the board's denial to the city council. The city council issued a written decision, adopting in part the board's written decision and affirming the board's denial. The council found granting the application would meet a public need or convenience, because the tower would improve indoor cellular telephone coverage (although the council found the plaintiff did not prove its assertion the tower would improve communications for public-safety personnel). The council further found the property was suited for the proposed use, since the church's lot is large enough to accommodate the tower and no other infrastructure would be necessary to service the site. As for requirement (e) the council found this was met.

The council denied the permit because it determined the proposal would not be in the public interest and would have a substantial adverse effect on surrounding property owners' rights. Both of these findings were based on generally the same evidence: There was no showing denying the application would harm the public interest since the tower would only improve what plaintiff calls "urban" coverage, meaning coverage indoors. In addition, both plaintiff and opponents testified plaintiff alternatively could have erected two towers at other sites, although plaintiff suggested this alternative would not have served its needs. The council further found the proposed tower would negatively affect the aesthetic character of the neighborhood, relying primarily on residents' concerns about the tower's effect on the neighborhood's natural surroundings, which include an undeveloped greenway. The council further relied on simulated pictures showing what the tower would look like. In addition, the council adopted the board's findings distinguishing two prior permits that had been granted to wireless providers for residential-area facilities: One of the facilities, the board found, was placed on an existing light pole at an athletic field. The board also observed that the other facility is located near a busy street and across from a commercial district.

While the council found there would be a negative aesthetic impact, it found the evidence inconclusive as to whether the tower would cause property values to decline. Plaintiff had submitted an expert report which studied the effects of towers in other neighborhoods and which concluded there would be no adverse effect. In response, residents submitted three letters from local realtors who concluded the tower would negatively affect property values. Based on this conflicting evidence, the council did not base its decision on property devaluation and determined property devaluation was not necessary for it to deny the application.

II. Discussion

The TCA permits parties to bring cases like this in federal court:

> Any person adversely affected by any final action or failure to act [regarding siting a cell-phone tower] by a State or *1255 local government or any instrumentality thereof ... may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction.

47 U.S.C. § 332(c)(7)(B)(v). Congress therefore expressly intended for local zoning decisions which affect cell-phone towers to be reviewed by federal courts. A driving force behind this decision was Congress's conclusion that " 'siting and zoning decisions by non-federal units of government[ ] have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit' " the development and growth of wireless services. *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township,* 181 F.3d 403, 407 (3d Cir.1999) (quoting H.R. Rep. 104-204, at 94 (1995) , *reprinted in* 1996 U.S.C.C.A.N. 10, 61). Thus, generally speaking, the TCA reflects Congress's intent to expand wireless services and increase competition among providers. *Todd,* 244 F.3d at 57; see also H.R.Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (stating TCA intended "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications ... and services to all Americans by opening all telecommunications markets to competition").

But despite Congress's intention to advance competition among wireless providers, Congress also acknowledged "there are legitimate state and local concerns involved in regulating the siting of such facilities ... such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way." H.R. Rep. 104-204, at 94-95 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. Consequently, the TCA expressly preserves local zoning authority regarding the placement of equipment such as cell-phone towers:

> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

47 U.S.C. § 332(c)(7)(A). [FN1] However, the TCA restricts zoning boards' authority to base their denials on perceived adverse environmental effects, since that issue is heavily regulated by the federal government. *Id.* § 332(c)(7)(B)(iv). Congress also delineated three situations at issue in this case in which federal courts can reverse a local zoning board's denial of a permit for a cell-phone tower: (1) when the board's denial is not "supported by substantial evidence contained in a written record," (2) when the board's decision "prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services," and (3) when the board's decision "unreasonably discriminate[s] among providers of functionally equivalent services." *Id.* § 332(c)(7)(B). Plaintiff contends that the city's denial violates each of these three provisions. [FN2]

FN1. Notably, the House version of the bill would have given the FCC (rather than local zoning entities) authority to regulate tower siting. See generally *Sprint Spectrum L.P. v. Parish of Plaquemines,* No. 01- 0520, 2003 WL 193456, at *5 (E.D.La. Jan. 28, 2003) (discussing TCA's legislative history). But, as Section 332(c)(7)(A) shows, Congress made a conscious decision to reject any scheme revoking local control over zoning decisions, even at the cost of inhibiting the growth of wireless services.

FN2. Although no formal motions have been filed with the court, the parties agreed at oral argument the case is ready to be decided.

A. Substantial Evidence

Plaintiff argues that the city's denial of plaintiff's conditional-use application was not supported by "substantial evidence." *1256 Plaintiff essentially argues that the city's decision was improperly based on nothing more than general, speculative aesthetics concerns.

[1] While the Ninth Circuit has not yet decided a case under the TCA provisions at issue in this case, other federal courts agree "substantial evidence," as used in the TCA, was meant generally to track the standard of the same name set forth in the

Administrative Procedures Act. See, e.g., *Preferred Sites, LLC v. Troup County,* 296 F.3d 1210, 1218 (11th Cir.2002); *Todd,* 244 F.3d at 58; *Omnipoint Corp.,* 181 F.3d at 407-08; *Cellular Tel. Co. v. Town of Oyster Bay,* 166 F.3d 490, 494 (2d Cir.1999); *MetroPCS, Inc. v. City & County of San Francisco,* 259 F.Supp.2d 1004, 1009 (N.D.Cal.2003). Although the TCA does not itself define "substantial evidence," legislative history supports the decision to follow the Administrative Procedures Act standard. See H.R. Conf. Rep. 104-458, at 208, *reprinted in* 1996 U.S.C.C.A.N. 124, at 223 (stating TCA standard is intended as "the traditional standard used for judicial review of agency actions"). Substantial evidence, therefore, means " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Pierce v. Underwood,* 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). Substantial evidence is not "a large or considerable amount of evidence," and the fact two different conclusions could have been reached does not mean there is not substantial evidence. *Id.;* see also *Todd,* 244 F.3d at 58-59. As measured by degree, substantial evidence is usually considered to be "more than a mere scintilla" and less than a preponderance. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951). In short, the governing standard is "highly deferential" to the local government's decision but does not amount to a mere rubber stamp. *Second Generation Props., L.P. v. Town of Pelham,* 313 F.3d 620, 627 (1st Cir.2002). The court must examine the entire record, including evidence contradictory to the local government's decision, in determining whether substantial evidence supports the decision. See *Todd,* 244 F.3d at 58; *MetroPCS,* 259 F.Supp.2d at 1010.

In searching for substantial evidence, the government's decision is analyzed under the applicable zoning ordinance; " '[t]he TCA's substantial evidence test is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable zoning requirements.' " *VoiceStream Minneapolis, Inc. v. St. Croix County,* 342 F.3d 818, 830 (7th Cir.2003) (quoting *ATC Realty, LLC v. Town of Kingston,* 303 F.3d 91, 94 (1st Cir.2002)). The party seeking to overturn the local government's decision carries the burden of showing the decision was not supported by substantial evidence. See *id.* at 830.

At the outset, the terms of the applicable zoning ordinance must be evaluated. The ordinance at issue here directs the city to reject a proposed conditional use when it concludes permitting the use would not be in the "public interest" or would have "a substantial adverse effect on the rights of the owners of surrounding properties." HZO § 83(9). In this case, the city made both of these findings, which plaintiff challenges.

The city council interpreted "public interest," as used in the ordinance, to contemplate a consideration of the public health, safety, and welfare of the community. R.38. The council further concluded the ordinance's "substantial adverse effect" language does not require any property-value devaluation but instead contemplates a consideration of whether an ***1257** owner's property use and enjoyment will be affected by the proposed use. R.40.

[2] As with most such zoning ordinances, the open-ended nature of the ordinance's conditional-use criteria evinces an intent to grant wide discretion to the zoning board when making conditional-use decisions. Cf. *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 68, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life...."); *Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27 (1954) ("The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy ...." (citation omitted)). And under well-established Oregon law, a city can prohibit a proposed use of property "on the sole ground that the use is offensive to aesthetic sensibilities." *Oregon City v. Hartke,* 240 Or. 35, 46, 49, 400 P.2d 255 (1965). Accordingly, in light of the applicable ordinance's broad language, the city had the power to deny plaintiff's permit on grounds of "aesthetic considerations." *Oregon City,* 240 Or. at 49, 400 P.2d 255. The TCA, however, requires this court to evaluate the evidence to ensure the city's decision was not "irrational or substanceless." See *Todd,* 244 F.3d at 57.

As plaintiff recognizes, even under a substantial evidence review, zoning decisions based on aesthetic concerns can be valid. See *St. Croix County,* 342 F.3d at 831; *Troup County,* 296 F.3d at 1219; *Todd,* 244 F.3d at 61; *Pine Grove Township,* 181 F.3d at 408; *AT & T Wireless PCS, Inc. v. City Council of the City of Virginia Beach,* 155 F.3d 423, 430-31 & n. 6 (4th Cir.1998); see also H.R. Conf. Rep. 104-458, at 208, *reprinted in* 1996 U.S.C.C.A.N. 124, at 222 (contemplating that localities properly can base decision on aesthetic impact). Plaintiff does not cite, and the court could not find, any authority holding that the TCA renders aesthetic concerns an invalid basis upon which to base a permit denial. As summarized by the Seventh Circuit, "[n]othing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes, and ... aesthetic harmony is a prominent goal underlying almost every such code." *Aegerter v. City of Delafield,* 174 F.3d 886, 891 (7th Cir.1999). Moreover, consistent with traditional zoning standards, local government is "entitled to make an aesthetic judgment" about the proposal "without justifying that judgment by reference to an economic or other quantifiable impact" such as property value. *Todd,* 244 F.3d at 61.

Plaintiff, however, correctly observes that cases have found general, unsubstantiated aesthetics concerns to have marginal evidentiary value. See, e.g., *PrimeCo Personal Communications, LP v. City of Mequon,* 352 F.3d 1147, 1150-51 (7th Cir.2003) ("The only 'evidence' bearing on aesthetic considerations was the testimony of three or four residents that they don't like poles in general; they didn't say they would object to a flagpole in the church's [the proposed site's] backyard.... [T]here is no evidence that Verizon's proposed flagpole would if erected in the churchyard be considered unsightly by the neighbors...."); *Troup County,* 296 F.3d at 1219 (finding insufficient petitions which gave "no articulated reasons for the opposition" and a single affidavit reciting "generalized concerns" about the tower's negative aesthetic impact when there was no other evidence in the record); *Oyster Bay,* 166 F.3d at 492, 495-96 (finding insufficient evidence of visual blight because *1258 "[v]ery few residents expressed aesthetic concerns at the hearings," comments suggested that the "residents who expressed aesthetic concerns did not understand what the proposed cell sites would actually look like," and health concerns, a basis generally improper under the TCA, "dominated the speakers' statements").

[3] But even under the TCA, the board is entitled to make an aesthetic judgment as long as the judgment is "grounded in the specifics of the case," and does not evince merely an aesthetic opposition to cell-phone towers in general. *Todd,* 244 F.3d at 61; see also *Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway County,* 205 F.3d 688, 695 (4th Cir.2000) ("[If a zoning board] denies a permit based on the *reasonably-founded* concerns of the community then undoubtedly there is 'substantial evidence' " (emphasis in original)). Accordingly, when the evidence specifically focuses on the adverse visual impact of the tower at the *particular location at issue* more than a mere scintilla of evidence generally will exist.

Plaintiff nevertheless insists the evidence before the city in this case amounted to no more than unsupported and vague objections. See Plaintiff's Pre-Hearing Memorandum at 9. But a proper review of the record shows there was more than a scintilla of evidence "grounded in the specifics of the case." *Todd,* 244 F.3d at 61.

For example, neighboring residents submitted letters objecting to the tower's proposed location because the tower would infringe upon the neighborhood's prized natural setting, comprised of fir and evergreen trees as well as a greenway. See, e.g., R. 191, R.195, R.197, R.205, R.207, R.220, R.222, R.407, R.420. At the site, there is no significant commercial development; nor are there existing commercial towers or above-ground power lines. R.26, R.205, R.407, R.420. In addition, on each side of the tower is a single-family residential zone; the record shows the tower would be surrounded by existing residences. See, e.g., R.247-58, R.769, R.816. Residents stated they relied on the natural, residential character of the neighborhood in purchasing their homes, which they would not have purchased had plaintiff's proposed tower been standing. R.191, R.199, R.205. The city properly relied on the evidence showing the tower would be incompatible with the character of this particular neighborhood. See, e.g., *Todd,* 244 F.3d at 61 ("The five limitations upon local authority in the TCA do not state or imply that the TCA prevents municipalities from exercising their traditional prerogatives to restrict and control

development based upon aesthetic considerations...."); *Aegerter,* 174 F.3d at 890-91 (upholding zoning board's denial of cell-phone tower because the tower would be "unsightly" and "inconsistent" with the neighborhood, in which residents bought their homes in reliance on the neighborhood's existing residential character). In sum, although opponents made general assertions about the nature of cell-phone towers, they also considered the specific scene in which the proposed tower would appear.

Moreover, the city also gave consideration to the proposed tower's distance from surrounding homes. The city council cited an appraiser's testimony that no other cell-phone facility in the city sits as close to residences as would plaintiff's proposed tower. R.39. In the board's words, "the cell tower in this case would be in the heart of an R-7 single family residential neighborhood and would be the functional equivalent of placing a cell tower in the center of a subdivision." R.27. In addition, the board specifically distinguished the two other previously approved cell-phone facilities which sit in single-family residential zones. R.27. The board observed that one of the existing facilities was placed on an existing light pole at an athletic field and *1259 that the other sits in a busy section of the city across from a commercial district. R.27. At the proposed site, the record indicates that many of the neighboring houses are between 100 and 200 feet from the proposed tower. As one witness observed, "[t]he proposed cell tower site regardless of where placed on the property would be within 100 feet of a single-family site." R.769.

In fact, in an attempt to compare the proposed site to other sites where homes are near cell-phone facilities, plaintiff's own expert witness picked four "subject" homes which are no less than 350 feet from the nearest cell-phone facility. R.265, R.269-70, R.279, R.289. Each of the expert's four subject homes is in Washington County (which includes the City of Hillsboro) and one of the homes is in the city. Notably, Washington County records indicate three of the expert's chosen homes actually are over 450 feet from the nearest cell-phone facility, with one of these three homes being 900 feet away. R.138-39. Thus the city had before it plaintiff's own evidence indicating the proposed site is significantly different from the area's most comparable sites. [FN3]

FN3. The court recognizes another appraiser mentioned three other homes which are within 100 feet of a cell-phone tower. R.137. However, these sites are not in Washington County. Moreover, as indicated above, the court finds it significant that plaintiff's own expert--"[a]fter filtering the number of sites for research," R.269--chose four homes which are at least 350 feet from cell-phone towers as the sites most appropriate for purposes of drawing a comparison to plaintiff's proposed site.

Coupled with the city's aesthetic judgment is the fact the proposed tower would not fill a complete void in coverage but instead would only improve indoor or, in plaintiff's term, "urban" coverage. R.16; see Plaintiff's Reply Memorandum at 3. In determining whether the tower would be in the "public interest," the city was within its authority to weigh the benefit of merely improving the existing coverage against the negative aesthetic impact the tower would cause. See, e.g., *City of Mequon,* 352 F.3d at 1149 ("A reasonable decision whether to approve the construction of an antenna for cellphone communications requires balancing two considerations. The first is the contribution that the antenna will make to the availability of cellphone services. The second is the aesthetic or other harm that the antenna will cause."). Such a policy-based decision is precisely the type of decision Congress left to local zoning boards.

[4] Keeping in mind the standard is merely "more than a scintilla," and less than a preponderance, the city based its denial on sufficient evidence. Certainly, as plaintiff contends, it is possible to conclude the proposed tower would not be a visual blight, judging by the simulated photographs in the record. This court's role, however, is not to interject its own judgment, but rather to apply the deferential standard of substantial evidence to the city's judgment. See *Todd,* 244 F.3d at 58 ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."); *Aegerter,* 174 F.3d at 888 ("While the conclusions the City reached may not be the only possible ones, they find support in the written record and therefore must be respected."). While the court is obligated to review

the evidence, given the TCA's express reservation of local control, the court also must be sensitive to the difficulties involved in applying inherently policy-based standards such as "in the public interest" to tower-siting decisions. See, e.g., *1260 *Sprint Spectrum, L.P. v. Parish of Plaquemines,* No. 01-0520, 2003 WL 193456, at *19- 20 (E.D.La. Jan. 28, 2003) (finding substantial evidence to satisfy the ordinance's "public interest" standard where many residents expressed aesthetic concerns, keeping in mind that even under the TCA " '[l]and use decisions are basically the business of state and local governments' ") (quoting *Am. Tower, L.P. v. City of Huntsville,* 295 F.3d 1203, 1206 (11th Cir.2002)).

[5] In sum, plaintiff does not carry its burden to show the City of Hillsboro's decision was not supported by substantial evidence. The city grounded its decision to deny plaintiff's application in "the specifics of the case," *Todd,* 244 F.3d at 61, not on merely unsupported and vague objections about cell-phone towers in general, as plaintiff contends. [FN4]

FN4. Plaintiff argues "[i]f the City had concerns other than aesthetics, those concerns could have been addressed by a conditional approval." See Plaintiff's Pre-Hearing Memorandum at 14-15. Specifically, plaintiff argues, "had the City had lingering concerns over either the lighting requirements or maintaining the large trees bordering the Golden Road location" the city should have conditioned approval on plaintiff's taking measures to alleviate those concerns. *Id.* But because the city's decision was not based on the issue of lighting or trees, the court need not consider this issue. Moreover, plaintiff does not point to evidence in the record showing what, if any, "reasonable conditions" were feasible and that would have effectively alleviated the city's concerns. See ORS § 197.522 (providing that local government can deny a permit application when it "cannot be made consistent through the imposition of reasonable conditions of approval"). In seeking to overturn the city's decision, the burden is on plaintiff. See *St. Croix,* 342 F.3d at 830; cf. *United States Cellular Tel. of Greater Tulsa, LLC v. City of Broken Arrow,* 340 F.3d 1122, 1137-38 (10th Cir.2003) (" 'We doubt that Congress intended local zoning boards to pay for experts to prove that there are alternative sites for a proposed tower.' ") (quoting *Petersburg Cellular P'ship,* 205 F.3d at 695). In any event, as discussed above, the city's decision is supported by sufficient evidence.

B. Effective Prohibition

Plaintiff further argues the city's denial effectively prohibits wireless services. Plaintiff specifically argues that because the city's denial was based on general aesthetic concerns, no tower could pass the city's review, since no one would praise the aesthetic virtue of a cell-phone tower. See Plaintiff's Pre-Hearing Memorandum at 17.

[6] The TCA permits a federal court to overturn a local government's zoning decision when the decision has the "effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i). Unlike the substantial evidence inquiry, a district court reviews the record *de novo* to determine whether it supports an effective prohibition claim. *St. Croix,* 342 F.3d at 833; *Nat'l Tower, LLC v. Plainville Zoning Bd. of Appeals,* 297 F.3d 14, 22 (1st Cir.2002).

[7] Most cases have held that a single zoning decision can give rise to an effective prohibition of wireless services. See, e.g., *Second Generation Props., LP v. Town of Pelham,* 313 F.3d 620, 629 (1st Cir.2002) (citing *Town of Amherst v. Omnipoint Communications Enters., Inc.,* 173 F.3d 9, 14 (1st Cir.1999)); *APT Pittsburgh LP v. Penn Township Butler County of Pa.,* 196 F.3d 469, 479-80 (3d Cir.1999); *MetroPCS, Inc.,* 259 F.Supp.2d at 1013; *Airtouch Cellular v. City of El Cajon,* 83 F.Supp.2d 1158, 1167 (S.D.Cal.2000). The Fourth Circuit, however, has held that *only* blanket bans of wireless services implicate the TCA's effective prohibition provision. See *City Council of Va. Beach,* 155 F.3d at 428. The weight of authority, and the more persuasive reasoning, concludes that an effective prohibition can be shown either with a blanket ban or a single decision. As courts have recognized, construing the effective prohibition clause " 'to apply only *1261 to general

bans would lead to the conclusion that, in the absence of an explicit anti-tower policy, a court would have to wait for a series of denied applications before it could step in and force a local government to end its illegal boycott of personal wireless services.' " *St. Croix,* 342 F.3d at 833 (quoting *Sprint Spectrum, LP v. Willoth,* 176 F.3d 630, 640-41 (2d Cir.1999)). Thus the court should consider whether, as plaintiff contends, the city's denial in this case amounts to an effective prohibition.

In invoking the effective prohibition clause, " 'the burden for the carrier ... is a heavy one.' " *Second Generation,* 313 F.3d at 629 (quoting *Town of Amherst,* 173 F.3d at 14); see also *MetroPCS,* 259 F.Supp.2d at 1013 (stating a provider challenging a permit denial on effective prohibition grounds "bears a 'heavy' burden of proof").

[8] As an initial matter, in determining whether a denial is an effective prohibition, courts have looked to whether the proposed tower would close a "significant gap" in coverage. *St. Croix,* 342 F.3d at 835 n. 7; *Omnipoint Communications Enters., L.P. v. Zoning Hearing Bd. of Easttown Township,* 331 F.3d 386, 397-98 (3d Cir.2003); *Second Generation,* 313 F.3d at 631. In addition, the provider must show, not just that this permit application was denied, but that further " 'reasonable efforts are so likely to be fruitless that it is a waste of time even to try.' " *Second Generation,* 313 F.3d at 629 (quoting *Town of Amherst,* 173 F.3d at 14); accord *St. Croix,* 342 F.3d at 834. Under this standard, the provider must show its " 'existing application is the only feasible plan' and ... 'there are no other potential solutions to the purported problem.' " *St. Croix,* 342 F.3d at 834 (quoting *Town of Pelham,* 313 F.3d at 630, 635). Plaintiff cannot meet the applicable standard.

First, plaintiff does not establish its proposed tower would close a "significant gap" in coverage. A significant gap does not exist simply because an area with coverage also has "dead spots" (*i.e.,* " '[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service' "). *Second Generation,* 313 F.3d at 631 (quoting 47 C.F.R. § 22.99). It is undisputed plaintiff's tower would simply improve existing indoor coverage, not fill a complete void in coverage. See, e.g., Plaintiff's Reply Memorandum at 3. This at most appears to be a dead spot. More important, plaintiff does not show "further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." *Second Generation,* 313 F.3d at 629. For instance, the record indicates plaintiff could have achieved its objectives by installing two towers at other locations. R.117, R.513-15. Although the record suggests one of the two alternative towers would be three feet above FAA regulatory limits, R.425, R.517-19, plaintiff does not point to any evidence showing the effect reducing the one tower by three feet would have on service provided by the two-tower alternative. Instead, in response to the FAA regulatory limits, it appears plaintiff submitted a proposal taking into account only *one* proposed tower. R.425, R.575. Such an attempt does not suffice to carry plaintiff's burden to show any further reasonable efforts would be fruitless. Similarly plaintiff does not attempt to show that the proposed tower was the "only feasible plan" or that "there are no other potential solutions to the purported problem." *St. Croix,* 342 F.3d at 834. [FN5]

FN5. That the possible alternative would have required two towers does not make the Golden Road proposal the only feasible option. Although plaintiff might believe its one-tower alternative is the more attractive option, the city could have reasonably believed two towers in other locations is better than one tower in the proposed location. See, e.g., *Parish of Plaquemines,* 2003 WL 193456 at *19-20 (noting, even though the alternative site would require "two towers at other locations," the city could reasonably prefer "two or more towers" at other locations instead of one tower at the location Sprint chose); see also *Town of Amherst,* 173 F.3d at 15 ("Ultimately, we are in the realm of trade-offs: on one side [is] the opportunity for the carrier to save costs, pay more to the town, and reduce the number of towers; on the other are more costs, more towers, but possible less offensive sites and somewhat shorter towers.").

*1262 And contrary to plaintiff's contention that the city rejected the tower simply because the tower would have been visible to the neighbors, the city

based its decision on the specific circumstances presented in the case, not on unsubstantiated general observations equally applicable to any cell-phone tower. In short, plaintiff does not carry its burden to show the city's denial has the effect of prohibiting wireless services.

C. Discrimination

[9] Plaintiff generally contends the city's denial results in unlawful discrimination, because the city previously has granted conditional- use permits for two other wireless-communication facilities in residential areas. Plaintiff speculates that the city denied the Golden Road permit simply because the neighborhood at issue is affluent. Plaintiff contends a municipality should not be permitted to deny a conditional-use application on the sole ground the proposed location is in a neighborhood more affluent than others. While plaintiff's position may be laudable, it points to no evidence showing the city based its decision on the alleged wealth of the residents. As discussed below, plaintiff does not otherwise offer sufficient evidence supporting its argument the city engaged in unreasonable discrimination. [FN6]

> FN6. It is worth noting that plaintiff's argument regarding discrimination, i.e., that other, similar permits have been granted, is at least partially inconsistent with its argument regarding effective prohibition, i.e., that the city is effectively prohibiting wireless services.

The TCA prohibits zoning boards from unreasonably discriminating "among providers of functionally equivalent services." 47 U.S.C. § 332(c)(7)(B)(i)(I). As with claims under the effective prohibition clause, there is no deference to the local government's findings. *Airtouch,* 83 F.Supp.2d at 1164 (citing *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus,* 197 F.3d 64, 71 (3d Cir.1999)).

[10] The TCA allows discrimination among providers as long as the discrimination is reasonable. See *Willoth,* 176 F.3d at 638. Plaintiff bears the burden of establishing the city engaged in unreasonable discrimination. See *MetroPCS,* 259 F.Supp.2d at 1011-12. Plaintiff must show "other providers have been permitted to build similar structures on similar sites while it has been denied." *Id.* at 1012 (citing cases). That is, plaintiff must show the city treated a competitor more favorably "for a functionally identical request." *Id.* In determining whether unlawful discrimination occurred, a court must remain mindful that cities retain " 'flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements, even if those facilities provide functionally equivalent services.' " *Id.* at 1011 (quoting H.R. Conf. Rep. No. 104-458, at 208, *reprinted in* 1996 U.S.C.A.A.N. at 222). Thus a zoning board can treat one provider's application differently from another provider's application based on "traditional bases of zoning regulation." *City of Va. Beach,* 155 F.3d at 427.

Plaintiff does not carry its burden to establish unreasonable discrimination. Plaintiff cites a map showing the city has *1263 approved two other permits for wireless facilities in residential zones. R. 779-81. However, neither this map nor plaintiff establishes any relevant similarity (other than the common zoning designation) between those other two locations and the Golden Road location at issue here. The record shows the other facilities are "at different locations within the [city]." *MetroPCS,* 259 F.Supp.2d . at 1012 (holding that a mere showing facilities were permitted in different locations within a district was not "unreasonable discrimination under the Telecommunications Act, as a matter of law"). In fact, the board specifically distinguished the other two sites. See *infra* at 1259-60. Nor does plaintiff show that the two other residential area permits were approved, as in this case, to improve indoor coverage rather than to fill a complete void in coverage. In sum,

> There is no evidence that the City Council had any intent to favor one company or form of service over another. [Instead] the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. If such behavior is unreasonable then nearly every denial of an application such as this will violate the Act, an obviously absurd result.

City of Va. Beach, 155 F.3d at 427.

III. Conclusion

For the reasons discussed above the court affirms the city's denial of plaintiff's application for a conditional use. The city's decision was based on more than a scintilla of evidence, does not effectively prohibit wireless services, and does not discriminate among providers.

IT IS SO ORDERED.

301 F.Supp.2d 1251

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