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May 8, 2019

VIA EMAIL

Chair Michael LePage
Commissioners Christopher Bolton,
Gail Lehman, Stephanie Locke
and Julie Wendt
Planning Commission
City of Carmel-by-the-Sea
PO Box CC
Carmel-by-the-Sea, California 93921

Re: Verizon Wireless Applications for Small Cells in the Right-of-Way
Commission Agenda Item 3, May 8, 2019
Request for Continuance to June 12, 2019

Dear Chair LePage and Commissioners:

We write on behalf of Verizon Wireless to urge you to continue the hearing for its applications for five small cell wireless facilities on existing or replacement utility poles in the right-of-way. Staff's recommended findings of denial of use permits and design review pose several conflicts with federal and state law. In particular, we explain how the City's prohibition of siting in all R-1 residential zones violates the federal Telecommunications Act and a recent Federal Communications Commission ("FCC") order addressing small cells. Placed on existing utility infrastructure in the right-of-way, the proposed small cells pose minimal visual impact while providing expanded Verizon Wireless service to benefit Carmel residents and visitors. Verizon Wireless is willing to continue working with the City to discuss appropriate small cell approval criteria that are consistent with new FCC regulations. Staff has advised Verizon Wireless that this item may be continued to the June 12, 2019 hearing, in which case Verizon Wireless will agree to extend the applicable federal "Shot Clock" period for the City to review the application.

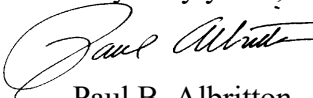
Among the problematic findings of denial, Finding 2 recites the Code's prohibition on wireless facilities within the R-1 residential zone and the discouragement of facilities in the right-of-way, both of which are preempted. Code §§ 17.46.020(A), 17.46.040(C). Nearly two-thirds of the City is zoned R-1, including the entire target service area in south Carmel. Prohibiting small cells in broad areas constitutes a prohibition of service in violation of the Telecommunications Act. *See* 47 U.S.C. §§

253(a), 332(c)(7)(B)(i)(II); *see also In Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018) (the “Small Cells Order”). The FCC has ruled that local regulation of small cells prohibits or has the effect of prohibiting service if it materially inhibits “densifying a wireless network, introducing new services, or otherwise improving service capabilities.” Small Cells Order, ¶ 37. These are exactly Verizon Wireless’s objectives for its five small cells in the south Carmel area. Denial would defeat these objectives, leaving the area underserved, compromising network access for customers. Code Section 17.46.020(A) is preempted by federal law and cannot be the basis for a denial.

Discouraging wireless facilities in the right-of-way contradicts California Public Utilities Code Section 7901, which grants telephone corporations such as Verizon Wireless a statewide right to place their equipment along any right-of-way. The City cannot favor relocation of wireless facilities out of the right-of-way based on a preference for private property, nor can the City place numerous rights-of-way (e.g., in R-1 zones) off-limits. Code Section 17.46.040(C) discouraging right-of-way facilities is preempted by state law, and it cannot be the basis for denial.

While the encroachment permits are not before the Planning Commission for approval, we note that the City cannot require data justifying the need for small cells as a prerequisite. Code § 12.08.060(A) requiring a “justifiable need” for an encroachment permit is preempted. As noted above, the FCC found that small cells are necessary to expand wireless networks for enhanced service. At the same time, the FCC disfavored narrow, dated standards for prohibition of service such as “significant gap” determinations. The FCC disagreed that the Telecommunications Act limits the federal prohibition of service standard to “protecting only against coverage gaps or the like” as determined through a “‘coverage gap’-based approach,” and the FCC disregarded federal circuit court interpretations relying only on a significant gap in coverage. Small Cells Order, ¶¶ 38, 40.

Staff has based proposed findings of denial on Code provisions that are preempted by federal and state law. If the Commission denies the small cell applications, Verizon Wireless will pursue its legal rights to secure approval. Verizon Wireless worked closely with Planning Division staff to determine optimal locations for its small cells to serve the south Carmel area, and is confident that the Commission can make findings of approval based on regulations that comply with federal and state law. As noted, if the Commission continues this matter to the June 12, 2019 hearing, Verizon Wireless will agree to extend the applicable timeframe for the City to review the application under federal law.

Very truly yours,

Paul B. Albritton

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