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December 5, 2018

**VIA EMAIL**

Planning Commission  
City of Fresno  
c/o Jennifer K. Clark, AICP  
Director  
Development & Resource Management Department  
2600 Fresno Street, Third Floor  
Fresno, California 93721-3604

Re: *Verizon Wireless Application for Conditional Use Permit (P18-02352) for  
a new wireless facility at 309 W. Nielsen Avenue (the "Project")*

Dear Commissioners:

We are writing on behalf of our client Verizon Wireless to object to several conditions of approval that the Development and Resource Management Director imposed in approving the Project referenced above. Specifically, Verizon Wireless objects to being required to redesign its tower, and provide landscaping in any location other than the perimeter of its equipment area (Part A of the Conditions, second bullet point at top of page 2); provide water and sewer connections for a project that will not use water or generate sewage (Part B, Conditions 2 and 3, and Part E, Conditions 42 through 46, 57 and 58); and underground existing utilities, dedicate property for a public street, and install costly parking, lighting, sidewalk and street improvements (Part B, Condition 10 and Part E, Conditions 17 through 22, 24 and 25). None of these conditions are related to any impact of the Project, and the City may not lawfully impose them. In addition, we object to several conditions that appear to have been included by mistake, as they regulate matters that are not part of the Project, such as commercial signage (Part E, Conditions 26 through 31) and limits on roof-top facilities and mechanical equipment (Part E, Condition 38). As discussed in more detail below, we request that all of these conditions be omitted, or in some cases revised.

**I. Verizon Wireless Cannot Meet the City's Restrictive Requirements for a Slimline Monopole and Replacing it with a Monopalm will Preclude Collocation.**

The Project as proposed involves a traditional monopole with nine, six-foot panel antennas. Verizon Wireless did not propose to conceal them inside a radome because

their size and number would require a radome much larger in diameter than the City's 36-inch standard. The second bullet point on page two of the Conditions would require Verizon Wireless to either reduce the size and number of its antennas to fit inside a 36-inch radome, or redesign the tower completely as a faux palm tree or "monopalm."

The first option is not technically feasible, as the smaller antennas would sacrifice the signal coverage and capacity of the Project, while the second would conflict with another condition that requires the tower to be suitable for collocation (*see* Part A, second bullet point on page one of the Conditions). Although it may be technically feasible for a second carrier to mount its antennas on a monopalm, it would eliminate the stealth aspect of the monopalm because natural palm trees have their branches clustered at the top. This means it would be impossible to add a future array of antennas at a different height without robbing the monopalm of its natural appearance.

We request that the City eliminate this condition. Given the industrial zoning and the existing industrial uses (including an auto wrecking yard), a monopole with visible antennas will not be visually obtrusive or appear out of place. Alternatively, if the City is not willing to eliminate the condition, we request that it be modified to replace the monopalm with a monopine. That will not only look better from the outset, it will allow for future collocation without sacrificing the stealth aspect of the design.

## **II. The City Should not Require Landscaping Beyond the Verizon Wireless Lease Area.**

We object to the condition that requires a landscaped buffer "along the perimeter of the facility that fronts a major or local street" (page two of the conditions, second bullet point, item 3). We raise this objection in an abundance of caution because the condition is ambiguous. If the required buffer is confined to the Verizon Wireless lease area (the area immediately around its equipment shelter), then we have no objection. Such a requirement would be consistent with the City's policy regulating wireless facilities. *See* City of Fresno Planning and Development Department Policies and Procedures Issue No. 33 titled, "Wireless Telecommunications Facilities" (the "Wireless Policy"), Item I-D-1. If the condition requires a buffer beyond the lease area, then it would be excessive and inconsistent with the Wireless Policy. To eliminate any ambiguity, we request that the condition be revised to limit the buffer to "the perimeter of the facility equipment compound . . . ."

## **III. Water and Sewer Requirements are Unlawful as the Unoccupied Project will not Use Water or Generate Sewage.**

We object to conditions that require Verizon Wireless to install or upgrade water and sewer connections and/or meters and pay related fees. These include Part B, Conditions 2 and 3, and Part E, Conditions 42 through 46, 57 and 58. The Project will be unoccupied and will not use any water or generate any sewage. Consequently, these

conditions are unrelated to any impact of the Project, and are thus unlawful. California Government Code Section 65909 requires that conditions on land use permits be “reasonably related” to the impact of the planned project. Similarly, the U.S. Constitution requires that local governments establish both: (a) an “essential nexus” between a permit condition and the impact of the project (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825); and (b) “rough proportionality” between the magnitude of the exaction and the effects of the proposed development (*Dolan v. City of Tigard* (1994) 512 U.S. 374). We request that all of the conditions in question be deleted.

#### **IV. Parking, Underground Utilities, and Street and Sidewalk Requirements are Excessive and Unlawful.**

Part B, Condition 10 and Part E, Conditions 17 through 22, 24, and 25 would require Verizon Wireless to dedicate property for a public street, underground existing utilities, and install costly parking, lighting, sidewalk and street improvements. None of these requirements are related to any impact of the Project, and they are consequently unlawful under the authorities cited above. While some or all of these conditions may be appropriate in the event of a more intensive industrial or commercial development of the property, they cannot be justified in the case of the unoccupied utility project at issue here.

##### **A. Street Dedication**

The conditions would require that the landowners dedicate a 36-foot strip of their property to the City for public street purposes, and possibly additional property of an undetermined size (see Part B, Condition 10, items 2 and 9). The proposed dedication of property has *nothing whatsoever to do with the Verizon Wireless Project*, which consists of unoccupied communications facility that will generate essentially no traffic. Following a short period of construction, the facility will require an average of no more than one visit per month for maintenance. Since the dedication requirements are not proportional to any impact of the Project, they are unlawful under the authorities cited in Section III above.

One of those authorities, *Dolan v. City of Tigard* (1994) 512 U.S. 374, is particularly relevant here because it involved a similar permit condition, requiring a property owner to dedicate a strip of her property for a bike lane. In *Dolan*, the rationale for the disputed condition was at least debatable, since the permit in question involved a large expansion of an existing commercial use that was expected to generate over 400 additional vehicle trips per day. (See *Dolan*, 512 U.S. at 395.) The Supreme Court found that this met the nexus requirement under *Nollan*, but still overturned the condition as unconstitutional. It did so because the city failed to show that the traffic impact of the development was proportional to the impact of requiring the owner to dedicate a portion of her property. (*Id.* at 395-96.) Here, a court would not even get to this second question, because there is simply no relationship between the Verizon Wireless Project and the disputed conditions.

In short, requiring the owners to dedicate a portion of their property to public use would violate both Government Code Section 65909 and the U.S. Constitution. Constitutional violations are particularly significant, as they would subject the City to liability for a taking without just compensation, costs, and attorneys' fees. We sincerely hope it will not be necessary for Verizon Wireless or the property owners to pursue such remedies.

## **B. Parking**

Part E, Conditions 17-22 and 24-25 include extensive requirements for parking, including both automobile and bicycle parking. These requirements are inappropriate as the Project consists of an unoccupied communications facility that will require only infrequent visits by a single vehicle for maintenance. Consequently, it will not require any parking-related improvements, and Verizon Wireless does not propose to install any parking. Given that the parking requirements are not related to any impact of the Project, they are unlawful and we ask that the City delete them.

We have not objected to Condition 23 because it appears to require nothing more than revising the plans to show any lighting proposed. We note, however, that this condition may lead to confusion due to the reference to "parking, sales or display areas," none of which are included in the Project. The City may wish to revise this condition to simply state that the referenced code section applies to any lighting included in the Project.

## **C. The Project is Exempt from ADA Requirements.**

Some of the parking requirements appear to be tied to accessibility requirements under the Americans with Disabilities Act ("ADA"). *See, e.g.*, Part E, Conditions 20 and 21. The ADA cannot justify these requirements because the Project is exempt from the ADA.

While the goal of eliminating access barriers is laudable, the installation of an unmanned wireless facility is not subject to ADA requirements. The 2016 California Building Code ("CBC") contains the following exemption:

**11B-203.5 Machinery Spaces.** Spaces frequented only by service personnel for maintenance, repair, or occasional monitoring of equipment shall not be required to comply with these requirements or to be on an accessible route. Machinery spaces include, but are not limited to, elevator pits or elevator penthouses; mechanical, electrical or communications equipment rooms; piping or equipment catwalks; water or sewage treatment pump rooms and stations; electric substations and transformer vaults; and highway and tunnel utility facilities.

The Project qualifies for this exemption. The Verizon Wireless equipment and antennas will be installed entirely within a fenced enclosure, accessible only to Verizon Wireless, and visited only by service personnel to maintain and repair the equipment.

#### **D. Underground Utilities**

The conditions would require Verizon Wireless to “underground all existing *off-site* overhead utilities within the limits of this site/map as per FMC Section 15-2017.” (Part B, Condition 10, item 1 [emphasis added].) This appears to be based on a misreading of the Code, which does not impose any requirements regarding existing off-site utilities (i.e., those beyond the property line). The cited section provides that “All electrical, telephone, cable television, and similar distribution lines *providing direct service to a development* site shall be installed underground *within the site*.” (FMC § 15-2017 [emphasis added].)

As the emphasized language confirms, the undergrounding requirement applies only to the new utility runs that will connect its Project to the existing off-site utilities, and only to those portions “within the site.” Verizon Wireless has no objection to placing all new utility runs underground, but the Code does not require it to underground existing, off-site overhead lines. If the City were to construe the Code to impose such a requirement, it would be both cost-prohibitive and unlawful under the authorities cited above. This condition should either be deleted, or revised to state that any new utility runs between the existing overhead utilities and the Project shall be placed underground.

Verizon Wireless also objects to a requirement that it install an “underground street lighting system.” (Part B, Condition 10, item 8.) It is not clear what this condition requires, but what is clear is that the Project will not have any impact on the need for street lighting. Consequently, it is unlawful under the authorities cited above.

#### **E. Sidewalk and Street Improvements**

The conditions would also require Verizon Wireless to provide extensive street and sidewalk improvements. These include Part B, Condition 10, items 3, 5, 7, and 9. These requirements are very costly, and none of them have any connection with any impact of the Project, which as noted above will generate essentially no traffic, vehicular or pedestrian. Consequently, they are unlawful under the authorities cited above.

#### **V. Inapplicable Conditions Should Be Deleted to Avoid Confusion**

Finally, we object to a number of conditions that appear to have been included by mistake, as they do not apply to this Project. These include requirements applicable to advertising or other commercial signage (Part E, Conditions 26 through 31), roof-top equipment, and mechanical equipment (Part E, Condition 38). Verizon Wireless does not

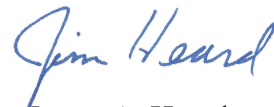
intend to install any advertising or other commercial signage, nor will it install any roof-top or mechanical equipment, and including conditions that regulate such uses is at best unnecessary and at worst may lead to confusion.

Of the listed conditions, we would not object to Condition 27, if modified to include the following: "Provided, however, that a small sign providing emergency contact information for the Verizon Wireless Network Operations Center may be installed on the fence surrounding the equipment area, subject to approval of the Building Department." We request that the other conditions in question be deleted.

## **VI. Conclusion**

For the foregoing reasons, we request that the Commission grant this appeal and either eliminate or revise the conditions we have identified above. As written, these conditions are overly burdensome and unlawful, and failure to eliminate or modify them as we have requested would violate our client's rights under California Government Code Section 65909 and the U.S. Constitution.

Sincerely,

A handwritten signature in blue ink that reads "Jim Heard". The signature is fluid and cursive, with the first and last names clearly legible.

James A. Heard

cc (via email only):

Douglas T. Sloan, Esq. (City Attorney)  
Jarred Olsen  
Paul B. Albritton, Esq.