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Marisa Blackshire

May 17, 2010

VIA E-MAIL AND OVERNIGHT MAIL

Long Beach City Council
c/o Long Beach City Clerk
Lobby Level, 333 W. Ocean Boulevard
Long Beach, California 90802

Re: Proposed Moratorium and Planning Permit Application #PSPR12682

Honorable Mayor and City Council:

On March 16, 2010, TowerCo Assets LLC ("TowerCo") submitted a Site Plan Review application for the 10-year review of CUP 9907-18, which permits operation of an existing wireless telecommunications facility at 333 E. 29th Street (the "Facility") in the City of Long Beach ("City"). No construction or modification was proposed as part of the application. The application was simply provided to facilitate the 10-year review required under Municipal Code section 21.52.210, a ministerial review intended to determine "whether or not the originally approved monopole height and accessory equipment are still necessary to provide adequate communication service."

On or around April 12, 2010, TowerCo was informally notified that its 10-year review was complete and of staff's determination that the Facility was "still necessary to provide adequate communication service." Staff also indicated that a letter formalizing this conclusion was forthcoming. Before the letter was ultimately sent, however, on April 20, 2010, the City Council adopted a minute order that initiated a moratorium on the approval of applications to construct, modify or place wireless communication facilities. Additionally, the City Council directed the City Attorney and City staff to prepare an interim ordinance formalizing the moratorium. The proposed interim ordinance (the "Ordinance") will be considered at your May 18, 2010 meeting.

Shortly after institution of the moratorium, staff informed TowerCo that the letter concluding the Facility's ten-year review process could not be mailed until the moratorium was lifted or it was determined that the moratorium did not apply. TowerCo does not believe that the letter in question falls within purview of the Ordinance because: (1) the Facility is excepted under the Ordinance; (2) the Facility's Site Plan Review application does not propose to construct, modify or place a wireless communication facility; and (3) delaying completion of the 10-year review process for the Facility would

be inconsistent with applicable state law. Accordingly, TowerCo is requesting that if and when the City Council approves the Ordinance, that it also direct staff to continue issuing letters completing the 10-year review for existing cellular facilities, so long as, no construction, modification or installation is proposed as part of the 10-year review process. Following is a more detailed discussion of each relevant point described above.

I. Section 6.F. of the Ordinance Excepts TowerCo's Facility

Section 6 of the Ordinance provides as follows:

> "The provisions of this ordinance shall not apply to: ... F. All facilities that have previously received a final entitlement permit or approval from the City such as a Conditional Use Permit or Site Plan Review Permit, provided such entitlement or approval is not currently under appeal to either the Planning Commission or City Council."

On October 21, 1999, TowerCo was issued CUP 9907-18 for the Facility. The approval documents are silent as to its term, and there is nothing in the Long Beach Municipal Code that indicates a relevant CUP expiration term, or that requires an application for renewal. Additionally, California law is clear that even a CUP with a term of length does not automatically expire upon conclusion of the term. (*See Community Dev. Comm'n v. City of Fort Bragg*, 204 Cal.App. 3 1124 (1988), notice and hearing are required prior to expiration or revocation.) Accordingly, CUP 9907-18 remains active.

TowerCo recognizes that Long Beach Municipal Code § 21.52.210 (c) subjects all cellular facilities to "a ten (10) year review." However, § 21.52.210 limits the scope of that review to a ministerial determination about "whether or not the originally approved monopole height and accessory equipment are still necessary to provide adequate communication service."

TowerCo submitted the necessary 10-year review application. Staff has communicated that the 10-year review is complete and that no construction, modification or installation will be required as part of the 10-year review process. TowerCo is simply awaiting the letter communicating staff's determination and completing the ministerial review process. Transmittal of the letter should not fall within the purview of the moratorium because the Facility has previously received a final entitlement permit or approval from the City, even if that permit is subject to periodic review.

II. No Construction, Modification of Placement is Proposed by TowerCo

In addition to the reasons discussed above, the 10-year review application should not fall within the purview of the Ordinance because TowerCo does not propose construction, modification or placement of any facility – the Facility already exists. The Ordinance provides that it is necessary because:

> "There is a current and immediate threat to public health, safety and welfare because, without this urgency ordinance, Wireless Facilities could be installed, constructed or modified in the City without conforming to the City's full intention to protect residential neighborhoods and the City's urban design and minimize disruption to residential neighborhoods and other land uses caused by the proliferation of Wireless Facilities..." (Ordinance, Section 1.G (emphasis added).)

A letter communicating completion of the 10-year review process for the Facility will not result in any installation, construction or modification at the Facility. On the contrary, it will maintain the status quo. As such, issuing the letter would not conflict with the public health, safety, and welfare purposes espoused for enacting the Ordinance. Finally, while irrelevant to a determination about the Ordinance's applicability, the Facility is located in an area zoned for industrial use, is in close proximity to the freeway, and is compatible with surrounding uses. These facts further support the proposition that allowing issuance of the letter, at least in this instance, would not conflict with the purpose of the Ordinance. Because TowerCo is not proposing installation, construction or modification, the Ordinance should not apply to 10-year review of the Facility.

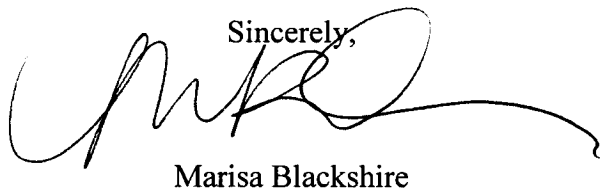
III. Delaying Completion of the 10-Year Review Process for the Facility is Inconsistent with Applicable State Law

Finally, refusing to allow completion of the 10-year review process during the Ordinance would conflict with applicable state law. California law establishes that interim ordinances are intended to protect and promote the planning process by prohibiting the introduction of potentially nonconforming land uses that could defeat a later adopted general plan or zoning ordinance. (*Sutter Bay Associates v. County of Sutter*, 58 Cal.App.4th 860.) Completing the 10-year review process for the Facility, an established use, does not conflict with this purpose. Conversely, not completing the 10-year review process for the Facility and other existing facilities where no installation, construction or modification is proposed is in conflict with this established purpose of an interim ordinance insofar as no introduction of a potentially nonconforming land use is proposed. Again, the Facility already exists.

Furthermore, as you know "[interference] with the right to continue an established business is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance." (*See Goat Hill Tavern v. Costa Mesa*, 6 Cal.App.4th 1519, 1530 (1992).) Absent a finding that the Facility is not necessary to provide adequate communications service in the area (a finding staff has already indicated will not be made) and/or a finding that the Facility is a nuisance, the Facility's CUP is a vested property right, the protection of which TowerCo is entitled. (*Id.*) Accordingly, while there may be something to gain by holding up the permitting process for new or modified facilities during the term of the Ordinance, we do not see how the same holds true for the Facility.

Each of the points discussed above support a determination that the Ordinance does not apply to the 10-year review process for the Facility. Taken together they provide overwhelming support for such a determination. For this reason, we urge the City Council to determine that staff may issue the letter completing the 10-year review process for the Facility, and any other facility where no installation, construction or modification is proposed or to otherwise determine that the moratorium is not applicable to TowerCo's existing facility. Thank you for your consideration of this matter.

Sincerely,



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cc: David Hockey, National Zoning Manager, TowerCo
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