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Re: MOTION FOR RECONSIDERATION
CUP 15-01 (Prune Hill Wireless Communication Facility)

Dear Ms. Fox & Mr. Turner:

I represent Glenn Watson and the Friends of Prune Hill in matters pertaining to the above-referenced application. This letter constitutes our motion for reconsideration of the *Final Order* published August 5, 2015. Said decision is based, *inter alia*, upon the following determination:

> [F]ederal law allows the City to adopt additional standards regulating the location of wireless communication facilities, including requiring applicants to show a significant gap in existing coverage and that the proposed facility is the least intrusive means to fill that gap. . . . However, the City of Camas has not adopted such regulations. The CMC does not authorize the examiner to consider the need for the facility or the minimum level of coverage . . . The applicant largely determines what service is necessary, based upon proprietary information, market factors, characteristics of RF propagation and system design and engineering, among other things. [[1]]

The foregoing conclusion constitutes: (i) an erroneous interpretation of law, after allowing for deference due to the agency, (ii) a decision not supported by substantial evidence, and (iii) a clearly erroneous application of law to the facts.[2]

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[1] *Final Decision* rendered August 5, 2015, at 24, paragraph 15.

[2] RCW 36.70C.130(b), (c), and (d).

The purpose of the Camas *Telecommunication Ordinance* is provided in the Municipal Code:

> The purpose of this chapter is to minimize the exposure to potential adverse impacts of radio frequency radiation, to preserve the aesthetics of residential, commercial and light industrial areas, and to minimize interference by telecommunication transmissions and radio frequency signals with manufacturing and industrial processes, and with emergency and residential communication equipment. [3]

Specific goals to achieve the foregoing purposes include the following:

> D. Encourage the location of wireless communication support structures in nonresidential areas.
>
> E. Encourage the collocation and clustering of wireless communication support structures and antennas to help minimize the total number of such facilities throughout the community. [4]

It is beyond logical contradiction that impacts to aesthetics and transmission can be minimized only if overlap of service areas is minimized. Wherever service areas overlap, there is a greater number of facilities and transmissions. Likewise, location of support structures in nonresidential areas, and minimization of interference with transmissions, are possible only if service areas are closely monitored and additional facilities are limited to correcting significant gaps in service. Other provisions of the ordinance support this conclusion, including criteria for height variance:

> In addition to the criteria of Chapter 18.45, the application must demonstrate the variance is **necessary** for wireless coverage to exist in a specific identifiable area that could not feasibly be covered by locating at a different location in the vicinity. [5]

It is inexplicable that criteria for variance to height standards requires consideration of what is "*necessary* for wireless coverage to exist in a specific identifiable area," unless filling significant gaps in coverage is the determinative criteria for all wireless communication facilities. Only through consideration of coverage gaps can the City determine what is "necessary for wireless coverage to exist in . . . specific identifiable area[s]."

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[3] RCW 18.35.010.

[4] *Id.*

[5] CMC 18.35.080(D), emphasis added.

Moreover, the required collocation study requires "[c]ertification from a licensed radio engineer indicating whether the *necessary* service is technically feasible if provided by collocation at the identified site(s) by the other provider(s)." [6] The required determination is impossible without consideration of what service is *necessary*, and proposed facilities cannot be necessary unless they fill significant gaps in existing service. Even the "minimiz[ation] of adverse visual, aesthetic and safety impacts" is consistent only with the minimum number of facilities which, in turn, is logically possible only with minimum overlap of service areas.[7]

The Washington Supreme Court considers it "settled" that:

> [T]he plain meaning of a statute is determined by looking not only "to the text of the statutory provision in question," but also to "'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" [8]

Above-quoted provisions provide clear indication that the Camas *Telecommunications Ordinance* was intended to limit wireless communication facilities to the minimum number required to satisfy the federal *Telecommunications Act*.[9] In the alternative, the ordinance lags behind rapid changes in communication technologies in violation of periodic review requirements:

> The city recognizes that communication technologies are subject to rapid change. Future innovations may result in reducing the impacts of individual facilities and render specific portions of this chapter obsolete. Additionally, this chapter may not address new technologies as they develop. Therefore, **periodic review and revision of this chapter shall occur at least every two years**, or at the request of the planning commission or city council. [10]

The foregoing provision contains both mandatory and permissive verbs. "Where a provision contains both the words "shall" and "may," it is presumed that the lawmaker intended to distinguish between them, "shall" being construed as mandatory and "may" as permissive." [11]

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[6]CMC 18.35.140(B), emphasis added.

[7]CMC 18.35.010(A).

[8]*State v. Hurst*, 173 Wash.2d 597, 604, 269 P.3d 1023 (2012); citing *State v. Ervin,* 169 Wash.2d 815, 820, 239 P.3d 354 (2010); quoting *State v. Jacobs,* 154 Wash.2d 596, 600, 115 P.3d 281 (2005).

[9]47 U.S.C. §151, *et seq* (1996).

[10]CMC 18.35.170, emphasis added.

[11]*Scannell v. Seattle*, 97 Wash.2d 701, 704-05, 648 P.2d 435 (1982).

The *Telecommunications Ordinance* was last amended in 2008.[12] Other defects from failure of periodic review are exemplified in a statement of purpose to "minimize the exposure to potential adverse impacts of radio frequency radiation," [13] prohibited under the *Telecommunications Act*:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. [14]

If the examiner's view of the case predominates, a lack of review criteria constitutes failure to address new communication technologies that incentivise growth in communication facilities, evidenced by "25 registered towers . . . within a 4 mile radius of the proposed site." [15] The Washington Supreme Court held, recently, that claims alleging failure to conduct required periodic review are not subject to statutory appeal periods which are triggered by activity, not inactivity. "Failure to act claims may be brought any time after mandatory review deadlines." [16]

However, it is more consistent with the statutory scheme to hold that the *Telecommunications Ordinance* limits wireless communication facilities to significant gaps in service, than to hold that the approval has been rendered void by failure to comply with mandatory periodic review. Ninth Circuit decisions interpreting the *Telecommunications Act* have adopted the rule that "a significant gap in service . . . exists whenever a provider is prevented from filling a significant gap in *its own* service coverage." [17] After the provider has shown a significant gap in coverage, it must demonstrate that its proposal is the "least intrusive means" of filling the gap.[18] The provider also bears "the burden of showing the lack of available and technologically feasible alternatives." [19]

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[12]Ord. 2515 §1 (Exh. A (part)), 2008.

[13]RCW 18.35.010.

[14]47 U.S.C. §332(c)(7)(B)(iv).

[15]Exhibit 90 at 6.

[16]*Save Our Scenic Area v. Skamania County*, 183 Wash.2d 455, 470, 352 P.3d 177 (2015).

[17]*MetroPCS v. San Francisco*, 400 F.3d 715, 733 (9th Cir. 2005) abrogated on other grounds in *T-Mobile South v. Roswell*, 135 S. Ct. 808, 190 L. Ed. 2d 679 (2015). See also *T-Mobile USA v. Anacortes*, 572 F.3d 987, 995 (2009).

[18]*MetroPCS*, 400 F.3d at 735; *T-Mobile USA*, 572 F3d at 995.

[19]*T-Mobile*, 572 F.3d at 996.

The *Final Order* is inconsistent with the Ninth Circuit rule because allowing the "applicant to . . . determine[] what service is necessary, based upon proprietary information, market factors, characteristics of RF propagation and system design and engineering" [20] would "make the applicant – rather than the locality – the arbiter of feasibility and intrusiveness, gutting the 'least intrusive means' standard with predictable, applicant-friendly results," expressly prohibited in the Ninth Circuit.[21]

The document listed as "Freewire Coverage Analysis" contains no coverage analysis whatsoever, but relies upon mere prediction: "[a]t the 160' to 175' space on the tower at the new proposed site, this issue [line-of-sight interference] does not exist and we are able to provide 360 degree coverage to the surrounding businesses." [22] Likewise, the MW Path Analysis is merely a "line of site" evaluation.[23] Entirely lacking is any plotting of significant gaps in service which the proposal seeks to correct, let alone any discussion of the "least intrusive means" and "lack of available and technologically feasible alternatives." The Ninth Circuit held, recently, that failure of the proponent to carry its burden of proof mandates denial:

> ATC did not adduce evidence allowing for a meaningful comparison of alternative designs or sites, and the City was not required to take ATC's word that these were the best options. Consequently, ATC failed to show that its facilities were the least intrusive means of filling a significant gap in service coverage, and the City is entitled to judgment as a matter of law on the effective prohibition claim. [[24]]

The *Final Order* concludes as follows regarding categorization of the proposed facility:

> [T]he facility will provide wireless telecommunications services and is subject to the federal telecommunications act. Therefore, it is a "wireless communication facilities" [sic] as defined by CMC 18.25.030. [[25]]

The defining feature of "major telecommunication facility" in the *Telecommunication Ordinance* is "[t]hese facilities, because of their size, typically have impacts beyond their immediate site." [26]

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[20] *Final Decision* at 24, paragraph 15.

[21] *American Tower v. San Diego*, 763 F.3d 1035, 1056 (9th Cir. 2014).

[22] Exhibit H at 1.

[23] Exhibit C.

[24] *American Tower*, 763 F.3d at 1057.

[25] *Final Order* at 12, paragraph 5(b).

[26] CMC 18.35.030.

At a 175 feet in height, the proposed monopole will have impacts beyond the immediate site including impacts to views which would not result from a wireless communication facility of standard height. The Verizon Wireless monopole (CUP 13-01) which the applicant offers as a comparison is only 75 feet tall, 100 feet shorter than the present proposal. As acknowledged by the examiner, "the tower will be visually incongruous because of its relatively great height compared to most other structures in the vicinity." [27] Hence, the present proposal is a "major telecommunication facility," prohibited in single-family residential zones.[28]

The *Final Order* cites the District Court decision in *AT&T Wireless Services v. Carlsbad* for the proposition that diminution in property values cannot serve as a proxy for fears regarding RF emissions prohibited under the *Telecommunications Act*.[29] However, another District has held:

> Concerns about visual impact cannot be premised on health risks associated with RF emissions the way a decline in property values can be premised on such health concerns. . . . [T]here was substantial evidence in the record before the Board that the Bell Tower site would have a negative visual impact on the surrounding residential area. . . . Area residents expressed concerns about the negative visual impact of the proposed facility and its incompatibility with the surrounding area before the Planning Commission and the Board. . . . The evidence before the Board could support a reasonable conclusion that T-Mobile failed to mitigate the visual impact of the facility. [30]

The Fourth Circuit affirmed, noting that aesthetic concerns "constituted a legitimate basis for the Board's denial of the application." [31] District Court for the Ninth Circuit holds, "even under the [*Telecommunications Act*], 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." [32] While Oregon law allows zoning decisions based upon aesthetic concerns, so does the Camas *Telecommunication Ordinance*:

> The purpose of this chapter is to . . . preserve the **aesthetics** of residential, commercial, and light industrial areas, . . .

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[27] *Final Order* at 14, paragraph 9(a)(i).

[28] CMC 18.07.040.

[29] 47 U.S.C. §332(c)(7)(B)(iv).

[30] *T-Mobile NE v. Loudoun County*, 903 F.Supp.2d 385, 407 (E.D. Va. 2012), affirmed, 748 F.3d 185 (4th Cir. 2014).

[31] *T-Mobile NE*, 748 F.3d at 197. Accord *American Tower*, 763 F.3d at 1055-56.

[32] *Voice Stream PCS I v. Hillsboro*, 301 F.Supp.2d 1251, 1258 (D. Or. 2004).

The goals of this chapter are to:

A. Establish clear and objective standards for the placement, design, and maintenance of wireless communication facilities in order to minimize adverse **visual, aesthetic**, and safety impacts. . . .

C. Encourage the design of such facilities to be **aesthetically** and architecturally compatible with the surrounding built and natural environment.[33]

The record is replete with evidence of aesthetic impacts resulting from the proposed project:

The Photo Simulation shows a huge monopole and three arrays looming like the sword of Damocles over residential uses below.[34]

A petition containing 107 signatures is "concerned regarding visual pollution." [35]

"Jon Spikkeland argued that the proposed facility is out of character with the existing residential uses . . ." [36]

"Realtor Francine O'Shaughnessy testified that the proposed tower will block the existing view of Mt. Hood from her residence. . . ." [37]

"James Christensen testified that the tower will impact his existing view. . . .[38]

"Marc Dailey testified that the tower will impact his view . . ." [39]

"George Castillo . . . argued . . . aesthetic impacts will be materially detrimental . . ." [40]

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[33]CMC 18.35.010, emphasis added.

[34]Exhibit B.

[35]Exhibit L at 23-31.

[36]*Final Order* at 9, paragraph 4.

[37]*Final Order* at 9, paragraph 5.

[38]*Final Order* at 9, paragraph 11.

[39]*Final Order* at 10, paragraph 14.

[40]*Final Order* at 10, paragraph 16.

Contrary to conclusions in the *Final Order*, CMC 16.33.010(B)(1) *is* applicable because the protected views impacted by the proposed project include Mount Hood and the Columbia River. The next sentence of the ordinance indicates that protected views *include* public viewing places, not that they are *limited* thereby. Hence, the absence of "identified viewpoints, parks, scenic routes, or view corridors in the vicinity of the site" [41] is entirely irrelevant to the protection afforded by the ordinance. The ordinance manifests a blanket intention to protect the views of Mount Hood and the Columbia River, not limited to views from public viewing areas. Nor could there be any conceivable public interest in excluding private views from protection; the landmarks are equally a public resource whether viewed from public or private lands.

The *Final Order* concludes that "all of the [potential collocation] towers identified in Exhibit 90 are one mile or more away from the site, too far outside the applicant's search ring to provide the coverage this facility is intended to provide." [42] This determination is contrary to fact and law because the record fails entirely to delineate either a significant gap in coverage which the project endeavors to fill, or the search ring from which the tower must broadcast in order to fill that gap. Rather, "according to T-Mobile's own [on-line] coverage map, there is presently full "4G LTE" coverage in the area." [43]

The *Final Order* concludes as follows:

> The applicant did review the feasibility of locating its antennae on the existing water towers. However, the water towers are too short to provide the desired coverage. Tall trees on the properties to the south block the "line of sight" signal from this location. Exhibits C and H. [44]

This conclusion is contrary to fact and law because the record, including Exhibits C and H, fails to delineate the coverage gap which the project endeavors to fill. Line-of-sight analysis does not define a coverage gap, only an elevation and general broadcast direction. It is impossible to determine service gap or overlap from line-of-sight analysis.

The *Final Order* concludes that "[t]he applicant is only required to review existing towers that may provide opportunities for collocation . . . [,] not . . . alternative locations for the proposed tower." [45] This conclusion is contrary to fact and law. As discussed in the opening pages, the

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[41] *Final Order* at 15, paragraph 9(a)(vii).

[42] *Final Order* at 23, paragraph 14(l)(ii).

[43] Exhibit L at 13, citing "http://www.t-mobile.com/coverage-map.html."

[44] *Final Order* at 23, paragraph 14(l)(iv).

[45] *Final Order* at 25, paragraph 15(b).

Telecommunications Ordinance requires analysis of significant gaps in coverage in order to minimize adverse impacts to aesthetics and transmission, minimize the total number of wireless communication facilities, and determine the feasibility of necessary service.[46] Moreover, the ordinance seeks to "[e]ncourage the location of wireless communication support structures in nonresidential areas." [47] This provision alone requires the identification and comparison of alternate nonresidential locations. How the examiner proposes to conduct a blind comparison of alternate nonresidential locations is not apparent; however, there is no record of any such comparison in the present case.

The *Final Order* that "[t]he CMC does not authorize the examiner to consider the need for the facility or the minimum level of coverage" [48] constitutes an erroneous interpretation of law, unsupported by substantial evidence, and a clearly erroneous application of the law to the facts. The *Telecommunications Ordinance* requires analysis of significant gaps in coverage in order to minimize adverse impacts to aesthetics and transmission, minimize the total number of wireless communication facilities, and determine the feasibility of necessary service.[49] "A statute expressly granting general authority to achieve a lawful objective includes by implication the right to do such acts as may be reasonably necessary to achieve that objective." [50] The purpose and structure of the Camas *Telecommunications Ordinance* demand that the applicant prove a significant gap in service, define the search ring from which to serve the gap, and compare alternate nonresidential locations and technologies within the search ring. The record in the present case is devoid of the foregoing, and the approval must be reversed. In the alternative, the approval is void because Camas failed to conduct mandatory periodic review, rendering the *Telecommunications Ordinance* inconsistent with the current state of law regarding review of telecommunication facilities.

Sincerely,

Mark A. Erikson
Attorney at Law

MAE/ke
WATG0101.L01.wpd

cc: Client

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[46]CMC 18.35.010; CMC 18.35.080(D); and CMC 18.35.140(B).

[47]CMC 18.35.010(D).

[48]*Final Decision* rendered August 5, 2015, at 24, paragraph 15.

[49]CMC 18.35.010; CMC 18.35.080(D); and CMC 18.35.140(B).

[50]*Pacific County v. Sherwood Pacific*, 17 Wash.App. 790, 794-95, 567 P.2d 642 (1977), *review denied*, 89 Wash. 2d 1013 (1978); citing *State v. Melton*, 41 Wash.2d 298, 248 P.2d 892 (1952).

SIGNED AT CAMAS, Washington, this 19th day of August, 2016.

Petitioner

By: _____
Glenn Watson