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November 15, 2010

VIA REGULAR MAIL AND ELECTRONIC MAIL

Gregory W. Stepanicich, Esq.
Richards, Watson & Gershon
44 Montgomery Street, Suite 3800
San Francisco, California 94104-4811

Re: *Crown Castle Existing Wireless Facility at 423 San Pablo*

Dear Mr. Stepanicich:

We represent Crown Castle, the owner/operator of the wireless facility located at 423 San Pablo Avenue in the City of Albany.

As you know, on October 26, 2010, Crown Castle received unanimous approval from the Planning and Zoning Commission (the "Commission") to proceed with necessary maintenance work on behalf of its subtenant, Verizon Wireless. Since obtaining that approval, the matter has now been called for review by the City Council which will be heard on December 13, 2010. We urge you to advise the City Council to affirm the Commission's decision as we continue to believe our current request is consistent with the original approval, and is fully authorized by state and federal law.

To reiterate, the proposed work simply consists of replacing the existing antennas with new ones. This is an extremely common practice in the industry and one that is consistently viewed as periodic and necessary maintenance. This occurs daily at thousands of sites across the country. There is no physical change to what has been approved, and therefore, we maintain there should be no issue with the fact that the site is legal, non-conforming. Consequently, we do not believe a zoning permit is warranted.

Under California law, rights concerning the construction and deployment of telecommunications services are generally understood to incorporate the "natural evolution of communications technology." *Salvaty v. Falcon Cable Television*, 165 Cal. App. 3d 798, 803 (1985); *see also Williams Communications, LLC v. City of Riverside*,

114 Cal. App. 4th 642, 653 (2004). Thus, the existing approval must be read to encompass and authorize such routine replacement of panels. This is particularly true where the proposed replacement panels are substantially smaller than the 6.5' panels originally approved for installation.

The federal Telecommunications Act ("TCA") also imposes significant restrictions on local regulation of wireless facilities. In addition to its well-known preemption of local regulation based on the environmental effects of radio-frequency ("RF") emissions, federal courts interpreting the TCA prohibit local zoning authorities from regulating the type of technology deployed within its jurisdiction. In June 2010, the United States Court of Appeals for the Second Circuit affirmed this principle, finding that a local zoning ordinance cannot dictate the type of antenna model and design that should be utilized or the technology deployed within its jurisdiction. *See New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 106 (2d Cir. 2010).

In *Clarkstown*, the Second Circuit reiterated its holding in *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000), that "Congress intended the FCC to possess exclusive authority over technical matters related to radio broadcasting" and that "Congress's grant of authority to the FCC was intended to be exclusive and to preempt local regulation." *Clarkstown*, 612 F.3d at 105. Moreover, the Second Circuit Court of Appeals rebuffed the Town's claim that it was simply regulating the aesthetic impacts of wireless communications facilities by establishing a preference for smaller, less visually obtrusive, wireless facilities. The Court stated that "*[the Ordinance] crosses the line between zoning and land use regulation and the regulation of technical and operational standards. Even assuming that Chapter 251 is entitled to the presumption against preemption because zoning and land use are matters within a local government's traditional police powers, the presumption is overcome because Chapter 251 goes beyond those areas into the areas of technological and operational standards.*" *Id.* at 106-07.

The Second Circuit Court of Appeals' decision in *Clarkstown* affirms and clarifies the limits and distinction between Federal regulation and local zoning authority. Congress has imbued the Federal Communications Commission with plenary authority over the technical aspects of the nation's wireless communications facilities development. While aesthetic impact of wireless communication facilities development remains within the police powers of local municipalities, such regulation cannot be achieved through means that effectively regulate wireless communications technology.

Section 20.20.100(F) of Albany Municipal Code ("AMC") purports to regulate "*any change in the specifications or conditions stipulated in the approved use permit, including but not limited to...antenna type or model, number of channels per antenna...*" This provision is clearly at odds with federal law, and in particular, the *Clarkstown* decision, which affirms the breadth and scope of federal preemption in this area.

Notwithstanding the foregoing provision, we believe the proposed work is consistent with AMC Section 20.20.100 (I)(3) which authorizes maintenance "*on existing, operational equipment and facilities*", and only requires that "*new construction, other than routine maintenance on existing towers, antennas, buildings, or other facilities shall comply with the requirements of this Chapter.*" This provision also conforms with AMC Section 20-44 which allows maintenance of a non-conforming use, but not "*enlargement*" of a non-residential use. As noted, the proposed work does not constitute new construction, and will not have any other impacts of any kind, as the proposed work merely consists of changing the existing panels with those of a similar shape and size.

We also note that AMC Section 20.44.030(B) authorizes modification of a non-conforming use as long as it does not "*occupy any part of the structure or site, or another structure or site which it did not occupy at the time of adoption of this Chapter.*" Here, as already discussed before the Commission, the antennas can be installed so that they are closer to the existing tower and hence occupy a smaller volume of space than they currently do. In addition, they will be in the same vertical plane, and the new mounting brackets will "occupy" no more space on the tower than the existing mounting brackets do. In short, under any reasonable interpretation of the non-conforming use provisions, the proposed work is not only authorized by federal law, but complies with the spirit and intent of the AMC relating to maintenance of this facility.

The issue before you is of significant concern and interest to Crown Castle and its wireless customers, such as Verizon Wireless, who must regularly conduct maintenance of equipment in the ordinary course of business. We recognize that the City's wireless regulations purport to require a use permit for <u>any</u> modification of a non-conforming wireless facility that involves adding new equipment. However, that provision is preempted by federal law, and for the reasons discussed above, we believe that other provisions of the AMC plainly authorize replacement of the existing panels.

We respectfully request that you advise the Council of our legal position and thank you for your anticipated cooperation in this regard.

Very truly yours,
SHUSTAK FROST & PARTNERS, P.C.

Joseph M. Parker, Esq.

cc: Jeff Bond (Principal Planner)
Jon Dohm, Crown Castle (Zoning Manager)
Cynthia Qualtire (District Manager)