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Via Electronic Mail

Craig Labadie, Esquire
(clabadie@albanyca.org)
City Attorney
City of Albany
1000 San Pablo Avenue
Albany, CA 94706

Re: AT&T Mobility's Application For A Cell Site on 1035 San Pablo Ave.

Dear Mr. Labadie:

I write to concerning the Mary 22, 2008 application of New Cingular Wireless, PCS, LLP d/b/a AT&T Mobility's ("AT&T") for a conditional use permit to collocate a rooftop wireless communication facility upon the building located at 1035 San Pablo. As the city Planning Department staff has explained in multiple reports to the Planning Commission, this is an application to collocate wireless communications facilities on a commercial building in the city's San Pablo Commercial District. The process to consider this application has taken far longer than any such application should take. The application finally came before the Planning Commission on February 28, 2012, and it should have been approved at that time. But rather than approving the application, the Planning Commission continued the hearing again based on two issues that we think should not have side-tracked the application.

I wanted to share AT&T's thinking on these two issues directly with you before the next Planning Commission hearing on this matter, which understand may be held on April 24, 2012. We are anxious to have the application approved as soon as possible, but we also want to make sure these issues do not distract us any longer, given the importance of the issue to AT&T.

The two issues that are (1) whether AT&T's proposed facilities need to comply with the height limits for rooftop equipment under Section 20.24.080, and (2) whether AT&T's proposed facility would comply with setback requirements under Section 20.20.100(d)(4). While these issues ostensibly arose out of concern that the application conform to the Municipal Code, it is clear that AT&T's application does indeed comply with the Municipal Code and there was never any need to delay this process even further. I will address each of these issues in turn below.

1. AT&T's application complies with the relevant height limitation.

Section 20.24.080 of the Municipal Code is titled "Height Limits and Exceptions." Subsection 20.24.080(B) provides general exceptions to height limits. But the specific height standard for wireless communication facilities in the City is defined by Section 20.20.100(E)(2)(h), which provides that such

facilities "shall not exceed ten (10) feet above the basic maximum building height prescribed by the regulations for the district in which the site is located...." AT&T's proposed wireless communication facility is in the San Pablo Commercial District, which has a maximum height limit of thirty-eight (38) feet. AT&T's proposed wireless communication facility will be lower than forty-eight (48) feet, and, therefore, it will meet the applicable specific height standard under the Municipal Code.

The issue that we believe side-tracked the discussion last time was whether the general height regulation rather than the specific regulation for wireless communication facilities should be applied, and whether that kicked in the accompanying rooftop space restriction. While the more specific regulation clearly should govern, AT&T's facility would even comply with the general regulation without any need to consider the rooftop space restriction. Subsection 20.24.080(B), which is referenced by 20.20.100(E)(2)(h), provides that if certain types of structures (e.g., spires, chimneys, monuments) exceed the applicable height limit by more than ten feet, then no more than 10% of such structures may be more than ten feet higher than the applicable height limitation. Again, AT&T's proposed wireless communications facility will be less than ten feet above the applicable height limitation. Therefore, even if 20.24.080(B) applies, AT&T's proposed facility is not subject to the 10% rooftop space restriction for structures that exceed the height limit by more than ten feet.

In its report of February 28, 2012, the Planning Department staff also performed a calculation showing that if AT&T's wireless communication facility was subject to yet another set of height and rooftop space limitations, then AT&T's facility still would be in compliance with the Municipal Code. The staff's calculation appears to have been based on Subsection 20.24.080(C), which provides that "mechanical appurtenances" that exceed the applicable height limit by more than six feet must comprise less than 20% of the rooftop area. AT&T's proposed facility is clearly not a mechanical appurtenance under the Municipal Code. It is a wireless communication facility, which is defined under Section 20.08.020, and which is treated specifically under 20.20.100(E)(2)(h). In any event, as staff concluded, even if Subsection 20.24.080(C) applied, AT&T's proposed facility would comply with the Municipal Code. In that case, AT&T's proposed facility would exceed six feet above the applicable height limit, so the Subsection's 20% rooftop space limit would apply. But even if everything else on the roof of the proposed site could be considered "mechanical appurtenances" (which they clearly cannot – neither the penthouse nor Sprint's facility is a mechanical appurtenance), then after AT&T's facility is constructed all of the structures on the rooftop together would comprise 19.5% of the rooftop. Thus, even if the city undertook such a strained reading of its Municipal Code, AT&T's proposal would comply.

2. AT&T's application complies with the setback requirement.

Given that AT&T's proposed facility as designed will comply with the Municipal Code, there is no code-based reason to deny or further delay AT&T's application on the basis of the percentage of the rooftop that it will occupy. Accordingly, it is unnecessary for AT&T to modify its application as staff had previously suggested such that its proposed facilities be constructed within the existing penthouse in order to satisfy the rooftop space requirements. Indeed, if AT&T had modified its application as suggested, there was a chance that staff and/or the Commission would have determined that the facility no longer met the applicable setback. Fortunately, this issue is not relevant to AT&T's proposal because, as our plans clearly show, we have not proposed to construct within the applicable setback, nor are we going to modify our plans to do so.

Unfortunately, the setback issue also distracted the Planning Commission from the task at hand. As you know, AT&T's proposed facility will be constructed within the San Pablo Commercial District. Thus, Section 20.20.100(D)(4) requires a 50-foot setback from a wireless communications facility to any contiguous residential district. As the staff previously noted in its February 28, 2012 report, AT&T's application proposes that the wireless communication facilities will be constructed more than 50 feet from the nearest boundary of the nearest residential zone. Accordingly, our proposed facility complies with the applicable setback.

These two issues – the height limitation and the setback requirement – should never have delayed AT&T's application. They were not relevant to AT&T's application, but concern over these issues now has caused yet more unnecessary delay. The fact is that AT&T's application fully complies with the Municipal Code. This was no small feat, because as written the Municipal Code makes it nearly impossible to site wireless communication facilities. As applied, the Municipal Code has prevented the construction of any wireless communication facilities in the city for the last seven years. The process that is applied to wireless providers seeking to construct wireless communication facilities is set up to prevent wireless providers from being able to serve their customers. AT&T has had a significant service coverage gap in the city for several years. In May 2008, after evaluating its coverage problems and options, AT&T applied for the proposed facilities.

AT&T has complied with the city's complex and burdensome Municipal Code, which forbids wireless providers to build in most districts. AT&T has worked with the city staff to find the most appropriate solution to its significant service coverage gap in the city. As the staff has explained multiple times, and under the Municipal Code, AT&T's application concerns a proposed collocation of wireless communication facilities. Indeed, AT&T managed to identify one of the very few collocation opportunities in the city. Moreover, AT&T proposes to camouflage this wireless communication facility behind stealth screening even though existing Sprint facilities on the same rooftop are not stealth. AT&T nevertheless conducted an exhaustive search for alternative sites to close its significant service coverage gap. Ultimately, AT&T confirmed that the proposed site is the least intrusive means to do so. The city engaged a consultant to review AT&T's application, and the city's consultant confirmed AT&T's analysis.

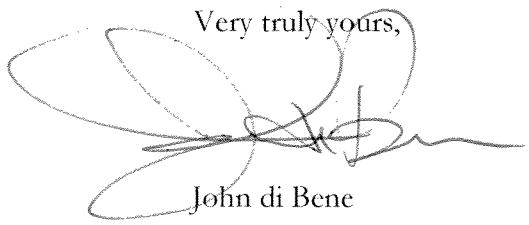
The Telecommunications Act of 1996, 47 U.S.C. § 332 (the "Act"), requires a local government to take final action on a permit to construct wireless communication facilities "within a reasonable period of time." 47 U.S.C. § 332(c)(7)(B)(ii). This application to collocate and camouflage wireless communication facilities should have been fully processed by the staff, the Planning Commission, and if necessary, the city council, all within 90 days. Under any circumstances, the application should have been approved at the Commission's meeting on February 28, 2012. On April 24, 2012, when the Commission hears this application, it will have been pending for 1,433 days. If the Commission fails to act on April 24, 2012, there will be little question that the reasonable period of time would have lapsed.

The Act also forbids local governments from prohibiting or having the effect of prohibiting the provision of personal wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(II). If the Commission fails to act on AT&T's application at the hearing on April 24, 2012, it will prevent AT&T from providing personal wireless services in the city. If the Commission denies AT&T's application, it likewise will be preventing AT&T from providing personal wireless services. In either event, the city would violate federal law, and AT&T would be forced to consider available avenues to seek redress.

The Act also precludes local governments from taking any action that unreasonably discriminates among providers of functionally equivalent wireless services. 47 U.S.C. § 332(c)(7)(B)(i)(I). If the city fails to act on AT&T's application on April 24, 2012 or denies AT&T's application, the city will have discriminated against AT&T vis-à-vis Sprint, which was permitted to construct non-stealth wireless communication facilities on the very same rooftop.

I hope this helps explain AT&T's concern regarding these two issues and its need for approval of the site in question. I look forward to working with you to resolve these issues satisfactorily and allowing AT&T to fill its significant gap in mobile service in this area of the City of Albany.

Very truly yours,



John di Bene