City of Albany

PLANNING & ZONING APPEAL

GENERAL INFORMATION

Who: Any Applicant or party with standing may appeal an administrative decision by Planning staff or a Planning & Zoning Commission action

When: A written appeal must be filed within 14 calendar days of the administrative or Commission action

Where: Appeals of administrative decisions are filed with the Community Development Department. Appeals of Planning & Zoning Commission actions are filed with the City Clerk

Cost: $550.00 (non-refundable)

Process: Appeals of Planning Staff decisions will be considered by the Planning & Zoning Commission. Appeals of Planning & Zoning Commission decisions will be heard before the City Council. For appeals of Planning & Zoning Commission decisions on items not requiring a Public Hearing, the appeal will be set for formal City Council consideration within 30 days. For items which required a Public Hearing, the City Council will schedule a Public Hearing within 30 days to consider the appeal.

Date of decision being appealed: 05/08/2012

Type of decision: **Please check one**

Administrative	
Planning & Zoning Commission	X
Municipal Code or Zoning Ordinance Section	

If you have any questions regarding this procedure, please call the City Clerk at (510) 528-5720 or Planning Division at (510) 528-5760.

Description of Project: See Attached

Applicant Name: New Cingular Wireless PCS c/o John di Bene
Address: AT&T Services Inc. 2600 Camino Ramon, RM 2W901 San Ramon, CA 94583
Phone Number: 925-543-1548

Appellant Name: Same
Address:
Phone Number:

FILED
MAY 22 2012
ALBANY CITY CLERK

Basis of Appeal: (Please be precise) See Attached

Signature: [signature] Date: May 22, 2012

Date Filed:	Received by:	Fee: $	Receipt #:

Appeal Agenda Date: P & Z ☐ City Council ☐

JOHN DI BENE
General Attorney
Legal Department

AT&T Services, Inc.
2600 Camino Ramon
Room 2W901
San Ramon, CA 94583

925.543.1548 Phone
925.867.3869 Fax
jdb@att.com

May 22, 2012

By Hand

Mayor Farid Javandel
City Hall
1000 San Pablo Avenue
Albany, California 94706

Vice Mayor Marge Atkinson
City Hall
1000 San Pablo Avenue
Albany, California 94706

Councilmember Joanne Wile
City Hall
1000 San Pablo Avenue
Albany, California 94706

Councilmember Robert Lieber
City Hall
1000 San Pablo Avenue
Albany, California 94706

Councilmember Peggy Thomsen
City Hall
1000 San Pablo Avenue
Albany, California 94706

Re: Appeal Re: Planning Application #08-038 (1035 San Pablo Ave.)

Dear Councilmembers:

New Cingular Wireless PCS, LLC, d/b/a AT&T Wireless (AT&T) hereby appeals the May 8, 2012 decision by the Planning and Zoning Commission (Commission) denying the above-referenced Application. The Application sought a conditional use permit authorizing AT&T to collocate a fully-screened wireless communication facility on the rooftop of 1035 San Pablo Avenue. The Commission voted 3-1 to deny the Application even though two separate city consultants recommended in favor of the site because AT&T has a significant gap in personal wireless services coverage in the area and the site would be the least intrusive means by which AT&T could fill that gap.

AT&T has no wireless service facilities in the City of Albany. While certain portions of the city have limited "overflow" coverage from AT&T's facilities in neighboring communities, AT&T's wireless customers suffer a significant gap in

wireless service coverage throughout much of the city. This Application would allow AT&T to fill the significant gap in southeast Albany.

Four years ago today, AT&T filed this Application to collocate wireless communication facilities with existing Sprint facilities at 1035 San Pablo Avenue. Before and after filing, on its own initiative and at the suggestion of staff and residents, AT&T attempted to find all possible alternative locations where it could place a site to fill the service gap. But there is no less intrusive site available to fill the service coverage gap in southeast Albany.

As discussed in more detail below, the Commission's denial of AT&T's application was based on an overly-stringent interpretation of the city's planning and zoning code as it applies to a preexisting break room penthouse at 1035 San Pablo Avenue. AT&T believes the interpretation is erroneous and the Council is legally required to interpret the code in a more reasonable and appropriate manner. But regardless how the city interprets the code, this Application must be granted under the federal Telecommunications Act of 1996 because denial of this Application will effectively prohibit AT&T from providing personal wireless services in southeast Albany and will unlawfully discriminate against AT&T.

Because the Commission's denial of AT&T's Application is improper under the city's code and is inconsistent with the requirements of federal law, AT&T urges the City Council to reverse the decision of the Commission and approve the Application.

FACTUAL BACKGROUND

AT&T Identifies A Service Coverage Gap In Its Network

This Application began with AT&T identifying a significant gap in its personal wireless service network in and around southeast Albany. Exhibit A is a map previously submitted to the planning commission and staff that shows the coverage from AT&T's personal wireless service network as of that date.[1] While AT&T customers may have service in some outdoor areas of the city, the coverage is inadequate to meet the needs of Albany residents and visitors.

Specifically, AT&T's radio frequency engineers identified a significant service coverage gap in an area that is roughly bounded by Pomona Avenue to the east, Washington Avenue and Solano Avenue to the north, Polk Street, Taylor Street, Marin Avenue and 8th Street to the west, Harrison Street and Dartmouth Street to the south. This gap is significant because it impacts a wide swath of commercial, residential, and

[1] Exhibit B, attached hereto, contains updated maps showing the current coverage gap in AT&T's personal wireless services network.

governmental districts in the city, including City Hall, the City Police Department, the Albany Library, large residential areas, and major commercial areas along San Pablo Avenue. Exhibit C is the Statement of Michael Quinto, AT&T's Radio Frequency Engineer assigned to this site, which explains the extent of the gap and AT&T's need to provide in-building and in-transit service throughout southeast Albany.

AT&T Identifies 1035 San Pablo As The Best Location For A Site To Fill The Gap

AT&T designs network improvements to be the least intrusive means under the local code to fill its coverage gaps. The Albany Municipal Code has a number of policies and objectives for siting wireless communication facilities, as contained in Section 20.20.100(E) of the Planning and Zoning code, including two primary siting requirements. First, the city prefers collocations to brand new sites. Collocation is a stated preference in Section 20.20.100(E)(2)(a) of the Municipal Code, which provides:

> a. New wireless communication facilities shall be co-located with existing facilities and with other planned new facilities whenever feasible and aesthetically desirable to minimize overall visual impact. Service providers are encouraged to co-locate antennas with other facilities such as water tanks, light standards, and other utility structures where the co-location is found to minimize the overall visual impact;[2]

Collocation is also encouraged in Section 20.20.100(A)(5), which sets forth the purpose and intent of the city's wireless code:

> A. Purpose and intent. The purpose and intent of this section are to:
>
> * * *
>
> 5. Allow antennas to be located according to demonstrated need; encourage the use of existing facilities, including co-location by multiple companies; encourage the placement of antennas on existing structures and encourage use of smaller, less-obtrusive facilities such as repeaters and microcell facilities where they are feasible alternatives to base station facilities;

[2] See also Planning & Zoning Code sec. 20.20.100(E)(1)(h) ("[a]ll service providers shall cooperate in the locating of equipment and antennas to accommodate the maximum number of operators at a given site where feasible and aesthetically desirable. This will facilitate the co-location of wireless communication facilities....")

Further, in the event that a wireless service provider seeks to construct a wireless communication facility that is not a collocation, Section 20.20.100(F)(5)(b)(2) requires a specific and detailed showing why it could not collocate.[3]

Second, the Albany Municipal Code establishes a set of preferences for locating wireless communication facilities within certain zoning districts. Subject to certain exceptions not applicable here, the city prohibits the installation of wireless communication facilities "in any residential zone." The city allows wireless communication facilities in only three areas: (1) in the Commercial Mixed Use (CMX) District (top preference); (2) on public facilities (second preference); and (3) in the San Pablo or the Solano Commercial Districts. *See* Sections 20.20.100(D)(2).

AT&T identified possible sites pursuant to these preferences. There were no existing sites in the CMX District on which AT&T could collocate. As far as public property, AT&T investigated the possibility of collocating on the city's monopole at 1000 San Pablo Avenue, but the city did not approve of that proposal. No other collocation opportunities were identified on public facilities.[4] AT&T next looked to collocate in the San Pablo Commercial District or the Solano Commercial District. The only available collocation opportunity in those commercial districts is the proposed site at 1035 San Pablo Avenue.

AT&T also sought to identify non-collocation locations in these preferred zoning districts. AT&T determined that there was no feasible way to meet its coverage objective by building a new site in the CMX District. AT&T continued to pursue sites on public facilities, but it did not identify any other site where it could collocate its facilities and was both available and technologically feasible. AT&T also analyzed several other locations in the San Pablo and the Solano Commercial Districts. These sites were either unavailable, not feasible, or both. Exhibit D is a summary of AT&T's alternatives sites analysis. Over the four years that AT&T's application has been pending, AT&T has submitted documentation of the lack of alternative sites on several occasions, including AT&T's October 2010 Alternatives Analysis (Exhibit E), AT&T's February 2011

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[3] Section 20.20.100(F)(5)(b)(2) of the Albany Municipal Code provides:

> Findings for the establishment of a wireless communications facility that is not co-located with other existing or proposed facilities or a new freestanding pole or tower (at least one (1) finding required): (a) Co-location is not feasible; (b) Co-location would have more significant adverse effects on views or other environmental consideration; (c) Co-location is not permitted by the property owner; (d) Co-location would impair the quality of service to the existing facility; (e) Co-location would require existing facilities at the same location to go off-line for a significant period of time; or [sic]

[4] The city is currently evaluating a proposal to make space available for future wireless sites on city property. The city describes this plan as one that will generate revenue for that city and increase its control over the siting of wireless communication facilities. To that end, the Planning and Zoning Commission authorized the release of a Request for Qualifications to identify a radio frequency engineer to consult with the city.

Alternatives Analysis (Exhibit F), AT&T's Alternatives Matrix (Exhibit G), AT&T's presentation of propagation maps relative to its alternative sites analysis (Exhibit H), and AT&T's May 2012 analysis of 1760 Solano Avenue, Berkeley (Exhibit I). All told, AT&T investigated more than ten alternative sites in detail. None of them would be a less intrusive means to fill the gap in coverage.

May 2008: AT&T Files This Application

On May 22, 2008, AT&T filed Application PA08-038. Exhibit J is a copy of AT&T's Application and the accompanying materials submitted on May 22, 2008. In 2010, the city engaged RCC Consulting, Inc. (RCC) to conduct an independent review of AT&T's revised application. RCC reviewed the data showing a significant gap in personal wireless service coverage and confirmed that the data "demonstrates the existence of a coverage gap in AT&T's network." Exhibit K is RCC's October 19, 2010 report, which concludes:

- AT&T's need for a wireless site is justified, based on stated design objectives for the intended area of coverage and the demonstrated coverage gap depicted on the RF coverage prediction maps as verified by AT&T's drive test data.

- The proposed design is considered reasonable and consistent with industry best practices to fill coverage gaps in areas similar to the subject target area

* * *

Id., at 12. RCC also concluded that alternative sites and technologies will not meet AT&T's coverage objective, with particular focus on the lack of available locations in the CMX district. *Id.*

The Commission's October 26, 2010 Hearing

Based in part on RCC's findings, the city planning staff recommended approval of AT&T's application in their staff report for the Commission's October 26, 2010 hearing. At that hearing, AT&T put forth evidence of its service coverage gap by including relevant propagation maps. AT&T also provided an alternative site analysis that addressed nine possible alternative sites. Some members of the public commented about the health effects of radio frequency emissions, and other residents supported the Application. At the conclusion of the hearing, the Commission requested AT&T to prepare a more rigorous alternative sites analysis, and it voted to continue the matter.

On March 24, 2011, AT&T filed supplemental materials in support of its application. These materials included a revised alternatives sites analysis and propagation maps (Exhibit L). By letter dated April 15, 2011, the city requested

additional information so that staff could complete its analysis of the application (Exhibit M). AT&T responded in full on October 20, 2011, by further supplementing its application with several documents including the revised Alternatives Analysis (Exhibit F), an Alternatives Matrix (Exhibit G), revised drawings, coverage propagation maps (Exhibit H), and a radio frequency report by Hammett & Edison, Inc. At that time, AT&T revised its proposal by moving its eastward-facing antennas more than three feet to the west on the rooftop in order to maximize setbacks (to meet the noted 50-foot setback) and to reduce the visibility of the screening material to be placed over the wireless communication facilities.

The city then engaged another consultant, the Kramer Firm, to obtain an independent review of AT&T's application by a radio frequency engineer who would evaluate the basis and appropriateness of AT&T's proposed site. On January 4, 2012, the Kramer Firm issued its report and determined that (1) based on AT&T's alternative sites analysis, the proposed site at 1035 San Pablo Avenue "is a logical site," (2) AT&T's coverage maps and project documentation support AT&T's stated objective to improve "a lower grade of existing coverage in its Cellular band of service," and (3) AT&T needs to address certain issues with projected radio frequency emissions (Exhibit N). AT&T has agreed to conditions suggested by the Kramer Firm in regards to radio frequency emissions, and these issues were not the basis of the Commission's denial of AT&T's Application.

The Commission's January 10, 2012 Study Session

Based in part on the Kramer Firm's report, the planning staff presented findings of approval in its report to the Commission for its scheduled January 10, 2012 meeting. These findings included the Kramer Firm's conditions. At that meeting, the Commission focused on the applicable height and rooftop coverage limitation, which were enacted on October 5, 2009, after AT&T filed its application. The City Planner testified that AT&T's proposed wireless communication facilities would comply with the applicable height limits under the city's code, and offered her opinion that the break room penthouse should not be counted towards the ten percent rooftop coverage limitation. At the conclusion of the meeting, the Commission instructed city staff to visit the site, walk the roof, and view the break room penthouse.

On January 18, 2012, city staff (including the City Planner, the City Building Inspector, and the Community Development Director) visited the proposed site to examine the break room penthouse to determine whether it should be included in calculating the rooftop coverage limit under Section 20.24.080(B) of the city's code.

The Planning Commission's February 28, 2012 Hearing

Based in part on that site visit, the planning staff report for the Commission's February 28, 2012 hearing again recommended approval of AT&T's application. Staff prepared two sets of rooftop coverage calculations to include or exclude the break room penthouse in the rooftop coverage percentage calculation, and it again recommended that the Commission approve AT&T's application. At the hearing, staff discussed their site visit and described the break room penthouse to the Commissioners.

The Commission suggested that AT&T consider whether it would be possible to lower its equipment to six feet in height in order to meet the alternative twenty percent rooftop coverage limit under 20.24.080(C) for mechanical appurtenances. The Commission then developed two alternative options to AT&T's primary proposal to work within the city's rooftop coverage limits under Section 20.24.080. The first such alternative (option #1) involves moving AT&T's equipment from the rooftop into the break room penthouse, to avoid triggering the ten percent rooftop coverage limit under Section 20.24.080(B). Under this option, AT&T's equipment would be within the 50-foot setback, but the Commission easily could have made the necessary findings to reduce the setback to ten feet because the equipment would be inside the break room penthouse.[5] The second alternative (option #2) involves applying the twenty percent rooftop coverage limit under 20.24.080(C) for mechanical appurtenances to AT&T's proposed facilities if they can be lowered to a maximum of six feet in height. At the conclusion of the meeting, the Commission voted to continue consideration of the application so that AT&T could develop plans to meet these options.

The Commission Denies AT&T's Application At Its April 24, 2012 Hearing

On April 24, 2012, the Commission heard AT&T's application for a fourth time. AT&T presented alternative plans to meet the city's site options. The Commission considered whether the alternative options would comply with one of the two rooftop coverage limits under Section 20.24.080 of the city's code. At the conclusion of the hearing, the Commission determined that neither AT&T's proposal nor the two options would comply with Section 20.24.080 of the city's code, and it requested city staff to draft denial findings to be presented at the next Commission meeting.

[5] Under Section 20.20.100(D)(4) of the Municipal Code, the Commission is empowered to reduce the setback to "no less than ten (10) feet of separation between a property line that is contiguous to the residential district and the subject wireless communication facility" pursuant to a finding that "the lesser distance will not have perceptibly greater noise impact or greater visual impact with respect to the properties in the abutting residential district...."

The Commission Adopts Denial Findings At Its May 8, 2012 Hearing

On May 8, 2012, the Commission again heard AT&T's application, during which AT&T offered yet another proposal that would have removed all equipment from the rooftop and added to the roof only one small support for one set of antennas that would occupy less than one square foot of space on the roof. My May 4, 2012 letter to the Planning Commissioners (Exhibit O), explains and attaches plans for this third option (option #3) to AT&T's primary proposal. Like option #1, under option #3 AT&T's equipment would be within the 50-foot setback, but the Commission easily could have made the necessary findings to reduce the setback to ten feet because the equipment would be inside the penthouse. Here is a summary of the four site options that the Commission considered:

Site Options	Description
Primary Proposal	AT&T's proposal pursuant to revised plans submitted October 2011, as clarified by plans submitted April 9, 2012. Three sets of antennas would be fully screened and meet all applicable setback provisions, with two sets of antennas wall-mounted and one set of antennas roof-mounted in excess of 50 feet from the abutting residential district to the east. The equipment and antennas on rooftop would total 65.21 square feet.
Site Option #1	AT&T would move all equipment off of the rooftop and into the break room penthouse and onto the parapet wall. AT&T would erect a wall inside of the penthouse that would be greater than 10 feet from the abutting residential district, and mount the equipment on and to the west side of that wall. This would allow the Commission to make the finding under Section 20.20.100(D)(4). The antennas would remain in the same locations as under AT&T's primary proposal. The roof-mounted set of antennas could not be moved off of the roof because a signal could not be propagated from the only available east-facing wall that is more than 50 feet from the abutting residential district to the east.
Site Option #2	AT&T's equipment would be located the same as its primary proposal, but AT&T would lower all of its equipment and antennas to below six feet in height. The city would apply the 20% rooftop coverage and six foot excess height limitations for mechanical appurtenances under Section 20.24.080(C) of the city's code rather than the 10% rooftop coverage and ten foot excess height limitations under Section 20.24.080(B). Notably, when the building (including the break room penthouse) was constructed, the applicable height limit for the applicable zoning district was 45 feet. See former Section 20-2.12(c)(1). Thus, the break room penthouse, which is under 48 feet, is well less than six feet above

	the height limit that applied when it was constructed.
Site Option #3	AT&T would move all equipment off of the rooftop and into the break room penthouse and onto the parapet wall. AT&T would erect a wall inside of the penthouse that would be greater than 10 feet from the abutting residential district and mount the equipment on and to the west side of that wall. This would allow the Commission to make the finding under Section 20.20.100(D)(4). The antennas would remain in the same locations as under AT&T's primary proposal. The roof-mounted set of antennas would be mounted to a post with a three-inch diameter such that the base would occupy less than one square foot of the rooftop.

Each one of AT&T's options would be screened as required under the code and would meet all required setbacks and visual impact regulations. Not a single antenna would be visible from the street and no equipment would be visible (and under option #1 all of the equipment would have been moved off of the roof and into the break room penthouse). There also would be no noise impacts from the wireless communication facilities.

Citing Section 20.24.080(B), the Commission ultimately denied AT&T's application and issued denial findings. The primary basis for the denial was the conclusion that the existing structures on the rooftop occupy more than ten percent of the 4,786 square-foot roof. The break room penthouse, however, was part of the original building, constructed in 1985. Even though the penthouse was part of the original building (with a roof top of its own), the Commission applied the area of the penthouse to the calculation of roof top coverage. The break room penthouse alone occupies 432 square feet (about 9.0% of the roof), and the wireless service facilities operated by Sprint take up 265 square feet (about 5.5% of the roof). Together the penthouse and the Sprint facility occupy more than 14.5% of the rooftop, meaning that no other enumerated or "similar structure" can ever be collocated on the building under the city's interpretation of Section 20.24.080(B). Given that the Sprint facilities were constructed years before the rooftop coverage limits were enacted, that means that the enactment of those limits as they are now being interpreted by the Commission, prevented any other such structure to be collocated on that rooftop, in spite of the city's clear preference for collocations.

The Commissioners discussed that 1035 San Pablo Avenue is a legal non-conforming structure because it was built above the after-enacted height limitation. A split majority of the Commissioners determined that it could not be expanded by even a very small amount to accommodate AT&T's proposed wireless communication facilities. In the end, the difference between approval and denial was no more than the three-inch pipe that would have to attach to the roof under AT&T's option #3. Even if that three-inch pipe required a full square foot of space, it would have occupied only two hundredths of one percent (0.02%) of the rooftop. Accordingly, the Commission voted 3-

1 to deny AT&T's application and adopted denial findings. Exhibit P are the Commission's denial findings, from which AT&T brings this appeal.

The Council Should Approve AT&T's Application

1. The Commission Erred In Denying AT&T's Application

After four years of review and study, the Commission denied AT&T's application because it determined that AT&T cannot occupy even a single square foot of the roof at 1035 San Pablo Avenue. The Commission determined that the 432 square foot break room penthouse needed to be included within the 10% rooftop coverage percentage in Section 20.24.080(B). But, as noted above, the entire structure at 1035 San Pablo Avenue was built before the Council adopted the current height and rooftop coverage standards, and it does not easily conform to the current code requirements. In this situation, and in light of the applicable federal law discussed below, the Planning Commission should have approved AT&T's application, as proposed or by the site options presented over time. Approval would have been reasonable and would have conformed to the overall purpose of the Zoning Ordinance as specified in Section 20.04.030. Instead, the Commission tried to force-fit the height and rooftop coverage requirements into this fact pattern, and its decision is wrong for several reasons.

First, the Commission committed plain error by refusing to consider the actual use (as opposed to the approved use) of the break room penthouse . Section 20.24.080(B) specifically states that "no such structure *shall be used* for habitable space or advertising purposes." (emphasis added). The code does not state that the habitable use must be authorized or approved, conforming or not; it merely states that if a structure is "used" in such a manner, it cannot count toward the 10% height limitation. The uncontested evidence is that the penthouse is, and was at the time of the Commission decision, being used as a break room, and thus as habitable space. Thus, even if the break room penthouse is a "similar structure," under the plain language of the code it cannot be included in the 10% rooftop coverage requirements because of its current use.

Second, if the Council considers the approved use, rather than the actual use, the penthouse still should not be counted against the 10% rooftop coverage limit. The penthouse was approved to house mechanical equipment, and Section 20.24.080(C) allows mechanical equipment to cover 20% of the rooftop. While this section allows mechanical equipment to be up to 6' above the applicable height limitation, and the penthouse is higher than the 6' over the height limit for the District, the Commission could have reasonably concluded that the height is a preexisting nonconformity. When the penthouse was constructed, at the same time as the building, the applicable height limit was 45 feet under former Section 20-2.12(c)(1). The penthouse is a little less than 48 feet tall, and, therefore, is less than six feet above the height limit that applied when it

was built. Such a reading would better fit the intent of the code than counting the penthouse within the 10' and 10% rooftop coverage percentages.

Third, the Commission erred in finding that the very large, 10' high, break room penthouse was a "similar structure" to "towers, spires, cupolas, chimneys, elevator penthouses, water tanks, monuments, flagpoles, theatre scenery storage structures, [and] fire towers." The break room penthouse is nothing like most of these structures, and it is significantly larger than most of them. The enumerated structure most similar to the penthouse is an elevator penthouse, but the break room penthouse is much larger than a single-shaft elevator penthouse that one would find on a 40 foot building. In short, Section 20.24.080(B) was never intended to apply to a structure like the break room penthouse at issue here.

Finally, given that the structure was preexisting and that it did not easily fit within the code requirements, the Commission should not have applied the 10% limitation so strictly. AT&T's option #3 would have covered only a single square foot of the rooftop – less than 0.02% of the total rooftop area. In fact, as Commissioner Maass noted during the deliberations at the May 8, 2012 meeting, the code has conflicting goals between preferring, on the one hand, carriers collocate together on rooftops, but restricting wireless facilities, and many other structures, on the other hand, from covering more than 10% of any rooftop. Commissioner Maass urged the Commission to recognize that AT&T's single square foot proposal would have a *de minimus* effect on the rooftop, and he urged the Commission to approve the Application. The Council should find that the break room penthouse does not fall within the 10% limitation and reverse the Commission's decision.

2. Denial of AT&T's Application Is Preempted By Federal Law

Even if the Council concludes the Commission correctly interpreted and applied its code – which it should not – the federal Telecommunications Act of 1996 (Act) requires approval of AT&T's application. The Act provides rights to wireless service providers and establishes limitations upon state and local zoning authorities with respect to applications for permits to construct personal wireless service facilities. The United States Supreme Court has explained,

> Congress enacted the Telecommunications Act of 1996 (TCA), 110 Stat. 56, to promote competition and higher quality in American telecommunications services and to "encourage the rapid deployment of new telecommunications technologies." *Ibid.* One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers. To this end, the TCA amended the Communications Act of 1934, 48 Stat. 1064, to include §

> 332(c)(7), which imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities, 110 Stat. 151, codified at 47 U. S. C. § 332(c)(7).

City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 115-16 (2005).

Under the Act, a state or local government must, within a reasonable period of time, take final action on a permit application seeking to construct personal wireless service facilities by issuing its decision in writing and supported by substantial evidence. When considering such an application, a state or local government may not, by its action or inaction, effectively prohibit the applicant from providing personal wireless services. Nor may a state or local government unreasonably discriminate among providers of functionally equivalent services. Nor may a state or local government regulate the siting or construction of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions. The way this application has been handled raises significant legal issues regarding most of these standards, but this letter will focus specifically on the "effective prohibition" and unreasonable discrimination preemptions in federal law.[6]

a. Denial Would Effectively Prohibit AT&T From Providing Personal Wireless Services.

By denying the least intrusive means to fill its significant service coverage gap in the southeastern portion of the city, the Commission's decision prohibits AT&T from providing personal wireless service in this area. Doing so violates federal law. The Act provides:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--
>
> * * *
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

47 U.S.C. § 332(c)(7)(B)(i)(II).

[6] AT&T expressly reserves the right to raise all available claims under the Act, as well as under any other federal or state laws. Additional claims under the Act include, but are not limited to, the failure of the city to act within a reasonable period of time, lack of substantial evidence to support the city's denial of AT&T's application, lack of an adequate written decision, and improper consideration of the health effects of radio frequency emissions. From the record to date, all of these standards could give rise to legal claims.

When a local government acts to prohibit a wireless provider from providing personal wireless services, federal law takes over, focusing on two main issues – whether there is a "significant gap in coverage of personal wireless services" and whether the proposed site is the "least intrusive means" to fill gap.

As to the first issue, there is no legitimate question that AT&T has a significant gap in service coverage in southeast Albany. City staff has acknowledged that AT&T has no wireless communication facilities in the city – a fact also found in the communications from AT&T customers to the city. AT&T analyzed its coverage gap in detail, using predictive tools and drive test data. The result is that AT&T has no in-transit or in-building service in southeast Albany. This coverage gap continues to this day, as shown in the current coverage maps and statement of Michael Quinto contained in Exhibit C.

In addition to the extensive and unrebutted evidence AT&T has provided, the RCC and Kramer analyses also confirm the existence of the significant coverage gap. RCC was retained by city staff "to conduct an independent review, consistent with recognized industry standard practices, of the proposal from AT&T...." RCC's October report concluded that the data "substantially validates the coverage prediction maps provided originally and demonstrates the existence of a coverage gap in AT&T's network." The Kramer Firm's January 2012 report likewise confirmed that AT&T's "coverage maps and project documentation support the proposition that AT&T is attempting to improve its Cellular band to southeast Albany and indicates that AT&T has a lower grade of existing coverage in its Cellular band of service...."

At the several public hearings of AT&T's application, city residents described their inability to access AT&T's cellular service within the city. Many residents spoke out in favor of AT&T's Application. Even opponents of AT&T's application readily acknowledge this service coverage gap. This gap is significant because it impacts a wide swath of commercial, numerous residential neighborhoods, and governmental districts in the city, including a major commercial area along San Pablo Avenue. In sum, there is overwhelming, undisputed evidence of a "significant coverage gap" in AT&T's network in southeast Albany.

The second part of the "effective prohibition" test is whether the proposal is the least intrusive means to fill the coverage gap. *See, e.g., MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 734-35 (9th Cir. 2005) (adopting least intrusive means test and explaining that the test "gives providers an incentive to choose the least intrusive site in their first siting applications, and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials"); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995 (9th Cir. 2009). When a claim of effective prohibition is litigated, the wireless service provider first must make a prima facie showing of effective prohibition, including

evidence of its analysis of alternative sites. The burden then shifts to the state or local government to demonstrate the existence of a less intrusive, available, and technologically feasible alternative site. *City of Anacortes*, at 997-98. The provider then has the opportunity to dispute the availability and feasibility of the alternative favored by the state or local government. *Id.*

There is similarly overwhelming evidence that 1035 San Pablo Avenue is the "least intrusive means" to fill the coverage gap in southeast Albany. The area is largely residential, and the code generally prohibits placement of wireless sites in residential areas. As discussed above, the code prefers collocations. Sprint has a site on 1035 San Pablo Avenue, which makes this site a "preferred" location for AT&T's facility. The city does not dispute this key point. AT&T has shown repeatedly that there are no other, similarly preferred alternatives to cover the significant gap in the area.

As far as the design of the site, AT&T did everything it possibly could do to meet the multiplicity of requirements in the city code. AT&T sought out and analyzed several alternative sites and alternative designs. AT&T offered the Commission four separate designs, including one that required only *one square foot of coverage on the rooftop.* Indeed, AT&T worked closely with the planning staff, and twice the planning staff recommended approval of the Application. The city also engaged another outside consultant to review AT&T's alternative sites analysis, Jonathan Kramer, and Mr. Kramer, after reviewing AT&T's analysis, concluded that 1035 San Pablo Avenue was "a logical site." The city has not shown any other available and technologically feasible site that would be less intrusive.

The Act provides AT&T with a remedy in the form of injunctive relief. In a lawsuit over "effective prohibition," when the wireless provider prevails, a federal court generally instructs the local government to issue the permits necessary to install the wireless communication facilities without further discretionary processes or delay, and the decision of what will be built is decided by the federal court.

b. Denial Would Unreasonably Discriminate Against AT&T

The Act also forbids unreasonable discrimination among providers of functionally equivalent services, 47 U.S.C. § 332(c)(7)(B)(i)(I). Sprint owns and operates wireless communication facilities on this same roof, which facilities occupy 265 square feet of rooftop space. Sprint's facilities were permitted by the city even though they are not screened and even though they are visible from the neighboring properties. Moreover, if the break room penthouse is considered a "similar structure" under Section 20.24.080(B) of the code, as the Commission found with AT&T's proposal, Sprint's site also covers too much of the rooftop – Sprint's 265 square feet plus the 432 square feet of the break room penthouse total 697 square feet, or 14.56% of the rooftop.

AT&T and Sprint provide functionally equivalent services within the meaning of the Act. Considering all the circumstances surrounding this site and AT&T's application, including the length of time this application has been pending, the size and significance of the personal wireless service gap, the preferences in the code, and the various alternatives proposed by AT&T to try to satisfy the code, it is unreasonable for the city to allow one wireless provider to occupy 265 square feet on the rooftop with an unscreened, non-stealthy facility but to disallow AT&T to use a *single square foot* of the rooftop to collocate its screened and stealthy facility.

The remedy for unreasonable discrimination, as with the remedy for an "effective prohibition," would be injunctive relief. Affirming the Commission's denial of AT&T's Application will most likely result in AT&T gaining the right to build its proposal with no further city input.

In conclusion, AT&T respectfully requests that the Council grant AT&T's appeal, reverse the decision of the Planning Commission, and grant AT&T's Application.

Very truly yours,

John di Bene

cc: Mr. Craig Labadie, Esq., City Attorney (w/encl.)
Ms. Nicole Almaguer, City Clerk (w/encl.)
Ms. Anne Hersh, City Planner (w/encl.)