

File No. 110591

Committee Item No. 9
Board Item No. 32

COMMITTEE/BOARD OF SUPERVISORS
AGENDA PACKET CONTENTS LIST

Committee: Rules

Date 7/21/11

Board of Supervisors Meeting

Date 7/26/11

Cmte Board

- Motion
- Resolution
- Ordinance
- Legislative Digest
- Budget Analyst Report
- Legislative Analyst Report
- Youth Commission Report
- Introduction Form (for hearings)
- Department/Agency Cover Letter and/or Report
- MOU
- Grant Information Form
- Grant Budget
- Subcontract Budget
- Contract/Agreement
- Award Letter
- Application
- Public Correspondence

OTHER (Use back side if additional space is needed)

- Conditions of Approval
- Stipulated Judgement
- CEQA Report
- _____
- _____

Completed by: Linda Wong

Date 7/18/11

Completed by: L.W.

Date 7/26/11

An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

1 [Settlement of Lawsuit - T-Mobile West Corporation]

2
3 **Ordinance authorizing settlement of the lawsuit filed by T-Mobile West Corporation**
4 **against the City and County of San Francisco on July 8, 2010, in the United States**
5 **District Court for the Northern District of California, Case No. C-10-03011-CW; entitled**
6 ***T-Mobile West Corporation v. City and County of San Francisco*, according to the terms**
7 **set forth in the Settlement Agreement and subject to court approval of the parties'**
8 **Stipulated Judgment; approving as part of the settlement a conditional use**
9 **authorization enabling T-Mobile West Corporation to construct a wireless facility at 725**
10 **Taraval Street containing substantially fewer antennas than originally proposed and**
11 **subject to all City required conditions; and making environmental findings.**

12
13 Be it ordained by the People of the City and County of San Francisco:

14 Section 1. The City Attorney is hereby authorized to settle the action entitled *T-Mobile*
15 *West Corporation v. City and County of San Francisco*, United States District Court for the
16 Northern District of California, Case No. C-10-03011-CW, on the terms set forth in the
17 Settlement Agreement on file with the Clerk of the Board of Supervisors in File No. 110591
18 which is hereby declared to be a part of this ordinance as if set forth fully herein. The
19 Settlement Agreement specifies that the parties will enter a Stipulated Judgment requiring the
20 City and County of San Francisco ("City") to approve a conditional use authorization enabling
21 T-Mobile West Corporation ("T-Mobile") to construct a wireless facility at 725 Taraval Street
22 that contains fewer antennas than the wireless facility that T-Mobile originally proposed and
23 that the Board of Supervisors previously disapproved. A copy of the Stipulated Judgment is
24 on file with the Clerk of the Board of Supervisors in File No. 110591, which is hereby declared
25 to be a part of this ordinance as if set forth fully herein.

1 Section 2. The above-named action was filed in the United States District Court for the
2 Northern District of California on July 8, 2010, and the following parties are named in the
3 lawsuit: plaintiff T-Mobile West Corporation and defendant City and County of San Francisco.

4 Section 3. As required by the Stipulated Judgment, the Board of Supervisors, acting
5 pursuant to San Francisco Planning Code Sections 303, 711.83 and 790.80, approves a
6 conditional use authorization enabling T-Mobile to install a wireless telecommunications
7 facility at 725 Taraval Street, San Francisco, California consisting of four panel antennas
8 mounted on the elevator penthouse structures of an existing mixed-use building, a maximum
9 of 55'-0" above grade, with four related equipment cabinets installed within the underground
10 garage. This authorization includes certain Conditions of Approval, which are on file with the
11 Clerk of the Board of Supervisors in File No. 110591 and hereby declared to be a part of this
12 ordinance as if set forth fully herein. This approval will become effective upon the Court's
13 approval and entry of the Stipulated Judgment.

14 Section 4. The Board of Supervisors finds that the proposed settlement is in the best
15 interests of the City for four reasons. First, the City will eliminate the risk and expense of
16 further litigation (including a potential appeal). Second, by settling the case as proposed the
17 City will be certain that T-Mobile's wireless facility at 725 Taraval Street will contain
18 substantially fewer antennas than the facility disapproved by the Board. Third, T-Mobile's
19 customers and others in the vicinity of 725 Taraval Street will be able to make better use of
20 their wireless phones. Fourth, T-Mobile will agree as part of the settlement to abide by the
21 standard Conditions of Approval used by the Planning Commission with conditional use
22 permits for wireless facilities.

23 Section 5. The Planning Department has determined that the actions contemplated in
24 this ordinance comply with the California Environmental Quality Act (Public Resources Code
25 Section 21000 *et seq.*). Said determination is on file with the Clerk of the Board of

1 Supervisors in File No. 110591, which determination is incorporated herein by this
2 reference.

3

4 APPROVED AS TO FORM AND
5 RECOMMENDED:

6 DENNIS J. HERRERA
7 City Attorney

8 See File for Signature
9 WILLIAM K. SANDERS
Deputy City Attorney

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BOARD of SUPERVISORS



City Hall
Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. 554-5184
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July 15, 2011

File No. 110591

Bill Wycko
Environmental Review Officer
Planning Department
1650 Mission Street, 4th Floor
San Francisco, CA 94103

Dear Mr. Wycko:

On June 14, 2011, Supervisor Elsbernd introduced the following proposed legislation:

File No. 110591

Ordinance authorizing settlement of the lawsuit filed by T-Mobile West Corporation against the City and County of San Francisco on July 8, 2010, in the United States District Court for the Northern District of California, Case No. C-10-03011-CW; entitled *T-Mobile West Corporation v. City and County of San Francisco*, according to the terms set forth in the Settlement Agreement and subject to court approval of the parties' Stipulated Judgment; approving as part of the settlement a conditional use authorization enabling T-Mobile West Corporation to construct a wireless facility at 725 Taraval Street containing substantially fewer antennas than originally proposed and subject to all City required conditions; and making environmental findings.

The legislation is being transmitted to you for environmental review, pursuant to Planning Code Section 306.7(c).

Angela Calvillo, Clerk of the Board

By: Linda Wong, Committee Clerk
Rules Committee

Attachment

- c: Nannie Turrell, Major Environmental Analysis
Brett Bollinger, Major Environmental Analysis
AnMarie Rodgers, Manager, Legislative Affairs

Nannie Turrell
July 19, 2011

*Determined by the San Francisco
Public Utilities Commission's Bureau
of Environmental and Regulatory
Management to be categorically
exempt from the environmental
review process pursuant to
Class 3 exemption (Sec. 15303)
of Title 14 of the California
Administrative Code.*

1 [Settlement of Lawsuit - T-Mobile West Corporation]

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20 City and County of San Francisco ("City") to approve a conditional use authorization enabling
21 T-Mobile West Corporation ("T-Mobile") to construct a wireless facility at 725 Taraval Street
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7 facility at 725 Taraval Street, San Francisco, California consisting of four panel antennas
8 mounted on the elevator penthouse structures of an existing mixed-use building, a maximum
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10 garage. This authorization includes certain Conditions of Approval, which are on file with the
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18 substantially fewer antennas than the facility disapproved by the Board. Third, T-Mobile's
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20 their wireless phones. Fourth, T-Mobile will agree as part of the settlement to abide by the
21 standard Conditions of Approval used by the Planning Commission with conditional use
22 permits for wireless facilities.

23 Section 5. The Planning Department has determined that the actions contemplated in
24 this ordinance comply with the California Environmental Quality Act (Public Resources Code
25 Section 21000 *et seq.*). Said determination is on file with the Clerk of the Board of

1 Supervisors in File No. _____, which determination is incorporated herein by this
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3

4 APPROVED AS TO FORM AND
5 RECOMMENDED:

6

7 DENNIS J. HERRERA
8 City Attorney

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10 See File for Signature
11 WILLIAM K. SANDERS
12 Deputy City Attorney

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Conditions of Approval

General Conditions

1. Authorized Equipment. This approval is for Conditional Use authorization under Planning Code Sections 303, 711.83 and 790.80 to install a wireless telecommunications facility consisting of four panel antennas mounted on the existing elevator penthouse structures on the roof of a mixed-use building, a maximum of 55'-0" above grade, with four related equipment cabinets within the underground garage, as part of T-Mobile's wireless telecommunications network within a NC-2 (Neighborhood Commercial, Small-Scale) Zoning District and a 40-X Height and Bulk District.

Design

2. Final Plans. The final plans shall meet the standards of the Planning Code and be in general conformity with the plans attached to the Stipulated Judgment entered into in the matter entitled *T-Mobile West Corporation v. City and County of San Francisco* (Case No. C-10-03011-CW).
3. Plan Drawings. Prior to the issuance of any building or electrical permits for the installation of the facilities, T-Mobile shall submit final scaled drawings for review and approval by the Planning Department ("Plan Drawings"). The Plan Drawings shall:
 - a. Identify all facility related support and protection measures to be installed. This includes, but is not limited to, the location(s) and method(s) of placement, support, protection, screening, paint and/or other treatments of the antennas and other appurtenances to insure public safety, insure compatibility with urban design, architectural and historic preservation principles, and harmony with neighborhood character.
 - b. Identify the location of all existing antennas and facilities; and identify the location of all approved (but not installed) antennas and facilities.
 - c. Provide a report, subject to approval of the Zoning Administrator, that operation of the facilities in addition to ambient RF emission levels will not exceed adopted FCC standards with regard to human exposure in uncontrolled areas.

Performance

4. Project Implementation Report. T-Mobile shall prepare and submit to the Zoning Administrator a Project Implementation Report. The Project Implementation Report shall:
 - a. Identify the three-dimensional perimeter closest to the facility at which adopted FCC standards for human exposure to RF emissions in uncontrolled areas are satisfied.
 - b. Document testing that demonstrates that the facility will not cause any potential exposure to RF emissions that exceed adopted FCC emission standards for human exposure in uncontrolled areas.
 - c. Compare test results for each test point with applicable FCC standards. Testing shall be conducted in compliance with FCC regulations governing the measurement of RF

emissions and shall be conducted during normal business hours on a non-holiday week day with the subject equipment measured while operating at maximum power.

- d. The Project Implementation Report shall be prepared by a certified professional engineer or other technical expert approved by the Department. At the sole option of the Planning Department, the Planning Department (or its agents) may monitor the performance of testing required for preparation of the Project Implementation Report. The cost of such monitoring shall be borne by T-Mobile pursuant to the condition related to the payment of the City's reasonable costs.
5. Notification and Testing. The Project Implementation Report shall set forth the testing and measurements undertaken pursuant to Conditions 3 and 12.
6. Approval. The Zoning Administrator shall request that the Certification of Final Completion for operation of the facility not be issued by the Department of Building Inspection until such time that the Project Implementation Report is approved by the Planning Department for compliance with these conditions.
7. Notification Prior to Project Implementation Report. T-Mobile shall undertake to inform and perform appropriate tests for residents of any dwelling units located within 25 feet of the transmitting antennae at the time of testing for the Project Implementation Report.
 - a. At least twenty calendar days prior to conducting the testing required for preparation of the Project Implementation Report, T-Mobile shall mail notice to the Planning Department, as well as to the resident of any legal dwelling unit within 25 feet of a transmitting antenna, of the date on which testing will be conducted. T-Mobile will submit a written affidavit attesting to this mail notice along with the mailing list.
 - b. When requested in advance by a resident notified of testing pursuant to subsection (a), T-Mobile shall conduct testing of total power density of RF emissions within the residence of that resident on the date on which the testing is conducted for the Project Implementation Report.
8. Community Liaison. T-Mobile shall appoint a community liaison officer to resolve issues of concern to neighbors and residents relating to the construction and operation of the facilities. Upon appointment, the Project Sponsor shall report in writing the name, address and telephone number of this officer to the Zoning Administrator. The Community Liaison Officer shall report to the Zoning Administrator what issues, if any, are of concern to the community and what issues have not been resolved by the Project Sponsor.
9. Installation. Within 10 days of the installation and operation of the facilities, T-Mobile shall confirm in writing to the Zoning Administrator that the facilities are being maintained and operated in compliance with applicable Building, Electrical and other Code requirements, as well as applicable FCC emissions standards.

10. Screening.

- a. To the extent necessary to ensure compliance with adopted FCC regulations regarding human exposure to RF emissions, and upon the recommendation of the Zoning Administrator, T-Mobile shall:
 - i. Modify the placement of the facilities;
 - ii. Install fencing, barriers or other appropriate structures or devices to restrict access to the facilities;
 - iii. Install multi-lingual signage, including the RF radiation hazard warning symbol identified in ANSI C95.2-1982, to notify persons that the facility could cause exposure to RF emissions; or
 - iv. Implement any other practice reasonably necessary to ensure that the facility is operated in compliance with adopted FCC RF emission standards.
- b. To the extent necessary to minimize visual obtrusion and clutter, installations shall conform to the following standards:
 - i. Antennas and back-up equipment shall be painted, fenced, landscaped or otherwise treated architecturally so as to minimize visual impacts;
 - ii. Rooftop installations shall be set-back such that back-up facilities are not viewed from the street;
 - iii. Antennae attached to building facades shall be so placed, screened or otherwise treated to minimize any negative visual impact; and

11. Removal of Equipment. The T-Mobile or the property owner shall remove antennae and equipment that has been out of service for a continuous period of six months.

12. Periodic Safety Monitoring. T-Mobile shall submit to the Zoning Administrator 10 days after installation of the facilities, and every two years thereafter, a certification attested to by a licensed engineer expert in the field of EMR/RF emissions, that the facilities are and have been operated within the then current applicable FCC standards for RF/EMF emissions.

13. Emissions Conditions. It is a continuing condition of this authorization that the facilities be operated in such a manner so as not to contribute to ambient RF/EMF emissions in excess of then current FCC adopted RF/EMF emission standards; violation of this condition shall be grounds for revocation.

14. Noise and Heat. The facility, including power source and cooling facility, shall be operated at all times within the limits of the San Francisco Noise Ordinance. The facility, including power source and cooling facility, shall not be operated so as to cause the generation of heat that adversely affects a building occupant.

15. Implementation and Monitoring Costs.

- a. T-Mobile, on an equitable basis with other wireless providers, shall pay the cost of preparing and adopting appropriate General Plan policies related to the placement of wireless facilities. Should future legislation be enacted to provide for cost recovery for planning, T-Mobile shall be bound by such legislation.
- b. T-Mobile or its successors shall be responsible for the payment of all reasonable costs associated with the monitoring of the conditions of approval contained in this authorization, including costs incurred by the Planning Department, the Department of Public Health, the Department of Technology, Office of the City Attorney, or any other appropriate City Department or agency pursuant to Planning Code Section 351(f) (2). The Planning Department shall collect such costs on behalf of the City.
- c. T-Mobile shall be responsible for the payment of all fees associated with the installation of the subject facility, which are assessed by the City pursuant to all applicable law.

16. All Conditions Basis for Revocation.

- a. T-Mobile or its successors shall comply fully with all conditions specified herein. Failure to comply with any condition shall constitute grounds for revocation under the provisions of Planning Code Sections 174, 176 and 303(d). The Zoning Administrator shall schedule a public hearing before the Planning Commission to receive testimony and other evidence to demonstrate a finding of a violation of a condition of the authorization of the use of the facility and, finding that violation, the Commission shall revoke the Conditional Use authorization. Such revocation by the Planning Commission is appealable to the Board of Supervisors.
- b. In the event that the project implementation report includes a finding that RF emissions for the site exceed FCC Standards in any uncontrolled location, the Zoning Administrator may require the Applicant to immediately cease and desist operation of the facility until such time that the violation is corrected to the satisfaction of the Zoning Administrator.

17. Complaints and Proceedings. Should any party complain to T-Mobile about the installation or operation of the facilities, which complaints are not resolved by T-Mobile, T-Mobile (or its appointed agent) shall advise the Zoning Administrator of the complaint and the failure to satisfactorily resolve such complaint. If the Zoning Administrator thereafter finds a violation of any provision of the Planning Code and/or any condition of approval herein, the Zoning Administrator shall attempt to resolve such violation on an expedited basis with the Project Sponsor. If such efforts fail, the Zoning Administrator shall refer such complaints to the Commission for consideration at the next regularly scheduled public meeting.

18. Severability. If any clause, sentence, section or any part of these conditions of approval is for any reason held to be invalid, such invalidity shall not affect or impair other of the remaining provisions, clauses, sentences, or sections of these conditions. It is hereby declared to be the intent of the Commission that these conditions of approval would have been adopted had such invalid sentence, clause, or section or part thereof not been included herein.

19. Transfer of Operation. T-Mobile may assign the operation of the facility to another carrier licensed by the FCC for that radio frequency provided that such transfer is made known to the Zoning Administrator in advance of such operation, and all conditions of approval for the subject installation are carried out by the new carrier/provider.
20. Compatibility with City Emergency Services. The facility shall not be operated, nor caused to transmit on or adjacent to any radio frequencies licensed to the City for emergency telecommunication services such that the City's emergency telecommunications system experiences interference, unless prior approval for such has been granted in writing by the City.
21. Recordation of conditions of approval. Prior to the issuance of the building permit or commencement of use the facilities the Zoning Administrator shall approve and order the recordation of a Notice in the Official Records of the Recorder of the City and County of San Francisco for the subject property. This Notice shall state that the project is subject to the conditions of approval contained herein.

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2
3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
5 OAKLAND DIVISION

6 T-MOBILE WEST CORPORATION, a
7 Delaware corporation,

8 Plaintiff,

9 vs.

10 CITY AND COUNTY OF SAN
11 FRANCISCO,

12 Defendant.

Case No. C-10-03011-CW (BZ)

**[PROPOSED] STIPULATED
JUDGMENT**

13
14 1. Plaintiff T-Mobile West Corporation ("T-Mobile") has filed a complaint against
15 Defendant City and County of San Francisco ("City") alleging that the City violated Section 704 of
16 the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)) by denying T-Mobile's application for a
17 conditional use permit to construct a wireless facility at 725 Taraval Street, San Francisco, California.

18 2. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1337.

19 3. The Court finds that T-Mobile alleges that the City violated 42 U.S.C. §
20 332(c)(7)(B)(iii), because the decision of the City's Board of Supervisors to deny T-Mobile's
21 application for a conditional use permit was neither "in writing" nor "supported by substantial
22 evidence contained in a written record." Both parties filed motions for summary judgment on this
23 claim. In an order dated February 14, 2011, the Court denied T-Mobile's motion and granted the
24 City's motion.

25 4. The Court further finds that T-Mobile alleges that the City violated 47 U.S.C. §
26 332(c)(7)(B)(i)(II), because the decision of the City's Board of Supervisors to deny T-Mobile's
27 application for a conditional use permit prohibits or has the effect of prohibiting T-Mobile's provision
28 of personal wireless services. The Court finds that the City has denied this allegation.

1 5. In order to avoid the risk and expense of further litigation, the parties have entered into
2 a Settlement Agreement and Release, a copy of which is attached to as Exhibit A to this Stipulated
3 Judgment and incorporated herein by this reference, and have agreed to stipulate to the judgment
4 contained herein.

5 NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the City, acting
6 pursuant to San Francisco Planning Code Sections 303, 711.83 and 790.80, shall approve a
7 conditional use authorization enabling T-Mobile to install a wireless telecommunications facility at
8 725 Taraval Street, San Francisco, California, consisting of four panel antennas mounted on the
9 elevator penthouse structures of an existing mixed-use building, a maximum of 55'-0" above grade,
10 with four related equipment cabinets installed within the underground garage, as set forth in the plans
11 attached hereto as Exhibit B and incorporated herein by this reference.

12 NOW, THEREFORE, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
13 T-Mobile may not construct its wireless facility at 725 Taraval Street, San Francisco, California until
14 T-Mobile has obtained any other required permits from the City and County of San Francisco.

15 NOW, THEREFORE, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
16 T-Mobile may not seek to amend the conditional use authorization required herein by increasing the
17 number or size of the antennas to be installed at 725 Taraval Street, San Francisco, California.

18 NOW, THEREFORE, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the
19 Court shall retain jurisdiction over this action to implement and enforce this Stipulated Judgment.

20 NOW, THEREFORE, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
21 each party shall bear its own costs.

22
23 IT IS SO ORDERED.

24 Dated: _____, 2011

25 _____
26 HONORABLE CLAUDIA WILKEN
27 United States District Judge
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Dated: _____, 2011

DAVIS WRIGHT TREMAINE LLP
MARTIN L. FINEMAN

By: _____
MARTIN L. FINEMAN

Attorneys for Plaintiff
T-MOBILE WEST CORPORATION

Dated: _____, 2011

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney

By: _____
WILLIAM K. SANDERS

Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into on this 10th day of June, 2011, by and between T-Mobile West Corporation ("T-Mobile"), a Delaware corporation, and City and County of San Francisco ("City"), a municipal corporation.

RECITALS

WHEREAS, on June 18, 2009, T-Mobile submitted an application for a conditional use permit to install a wireless telecommunications facility at 725 Taraval Street, San Francisco, California (the "Property");

WHEREAS, T-Mobile's proposed wireless facility on the Property consists of eight panel antennas mounted to an existing elevator penthouse and four equipment cabinets located within a subterranean garage ("Proposed Facility");

WHEREAS, On February 25, 2010, the Planning Commission approved T-Mobile's application for a conditional use permit to install the Proposed Facility at the Property;

WHEREAS, On March 25, 2010, the Planning Commission's decision was appealed to the Board of Supervisors ("Board");

WHEREAS, On May 18, 2010, the Board voted to uphold the appeal and deny T-Mobile's application for a conditional use permit to install the Proposed Facility at the Property;

WHEREAS, on June 8, 2010, the Board approved a written motion to uphold the appeal and deny T-Mobile's application for a conditional use permit to install the Proposed Facility at the Property;

WHEREAS, On July 8, 2010, T-Mobile filed a lawsuit against City in the United States District Court for the Northern District of California in which T-Mobile alleged that the Board's

denial of its application for a conditional use permit to install the Proposed Facility at the Property was preempted by and/or violated federal law (47 U.S.C. § 332(c)(7));

WHEREAS, City disputes T-Mobile's claim and denies that the Board's actions were contrary to federal law;

WHEREAS, City and T-Mobile filed motions for summary judgment with respect to T-Mobile's claim that the decision of City's Board of Supervisors to deny T-Mobile's application for a conditional use permit to install the Proposed Facility at the Property was not based on substantial evidence;

WHEREAS, the Court granted City's motion and denied T-Mobile's motion;

WHEREAS, T-Mobile's claim that the decision of City's Board of Supervisors to deny T-Mobile's application for a conditional use permit to install the Proposed Facility at the Property prohibited or effectively prohibited T-Mobile from providing personal wireless services is still in dispute;

WHEREAS, City and T-Mobile participated in a settlement conference conducted by United States Magistrate Judge Bernard Zimmerman;

WHEREAS, City and T-Mobile, in order to avoid the expense and uncertainty of further litigation, desire to settle their dispute; and

WHEREAS, T-Mobile has agreed to reduce the size of the Proposed Facility so that T-Mobile will install only four antennas and four equipment cabinets on the Property ("Modified Facility"); and

WHEREAS, City has agreed to enter into a Stipulated Judgment requiring City to issue T-Mobile a conditional use permit for the Modified Facility;

NOW therefore, in consideration of the mutual covenants and agreements contained herein and for other good and valuable consideration the sufficiency of which are hereby acknowledged, the parties agree as follows:

TERMS

1. **City Approval.** City shall cause this Agreement to be submitted to the Board for approval. Notwithstanding anything herein to the contrary, T-Mobile understands and agrees that no officer or employee of City has authority to commit City to this Agreement unless and until City shall have duly enacted an ordinance approving this Agreement in accordance with City's Charter. City may choose not to enact such an ordinance in its sole discretion. Therefore, any obligations of City hereunder are contingent upon approval of such ordinance, and this Agreement shall not be effective unless and until such ordinance is enacted. In the event that the City does not enact an ordinance approving this Agreement, then this Agreement shall terminate and shall be of no force and effect whatsoever. In the event that the City does enact an ordinance approving this Agreement, the effective date of the approving ordinance shall be the effective date of this Agreement (the "Effective Date").

2. **Stipulated Judgment.** Promptly after the Effective Date, City and T-Mobile will enter into and file with the court a Stipulated Judgment in the form attached hereto as Exhibit A and incorporated herein by this reference. The Stipulated Judgment requires the City to issue T-Mobile a conditional use permit for the Modified Facility on the Property.

3. **Conditions of Approval.** T-Mobile agrees that its use of the Property to install, own, and maintain the Modified Facility is subject to the Conditions of Approval attached hereto as Exhibit B.

4. **T-Mobile's Waiver and Release of Claims.** In consideration of the foregoing promises, conditions and covenants, T-Mobile shall and hereby does forever waive, release, relinquish, and abandon all claims, causes of action, demands, liabilities, damages or costs, whether now known or unknown, that it has, had, or might have against City, its agents, employees, attorneys, elective and/or appointive boards, commissioners, consultants, officers and other representatives, which arise from or are based upon the facts alleged in the complaint.

5. **Waiver and Release of Unknown Claims.** In agreeing to this waiver of all existing or future claims or causes of action (whether known or unknown), T-Mobile acknowledges that it has read and is aware of California Civil Code section 1542 which states as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

T-Mobile expressly waives and releases any right to benefits that it may have under California Civil Code § 1542 to the fullest extent it may lawfully do so.

6. **Entire Agreement.** This Agreement, including all attachments hereto, contains the entire understanding and agreement between the parties, each of which has participated and cooperated in the drafting of this Agreement. This Agreement may not be modified, amended or waived, in whole or in part, except in a writing signed by both of the parties.

7. **Authorization to Execute Agreement.** Each party represents and warrants to the other that the person executing this Agreement on its behalf has the authority to sign and, by signing, to bind that party to the terms and conditions of this Agreement, subject to Paragraph 1 of this Agreement.

8. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original.

9. Successors and Assigns. Neither party may assign its rights under this Agreement without the consent of the other party hereto. All covenants and agreements herein shall bind and inure to the benefit of the respective heirs, executors, administrators, successors, and assigns.

10. Conflict of Interest. Through its execution of this Agreement, T-Mobile acknowledges that it is familiar with the provisions of Section 15.103 of City's Charter, Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts that constitute a violation of said provisions and agrees that it will immediately notify City if it becomes aware of any such fact during the term of this Agreement.

CITY AND COUNTY OF SAN FRANCISCO T-MOBILE WEST CORPORATION

By: _____

Title: _____

Date: _____

By: 

Title: Corporate Counsel

Date: 6/10/11

APPROVED AS TO FORM:

DENNIS J. HERRERA
City Attorney

WILLIAM K. SANDERS
Deputy City Attorney

File # 110591

Received
in Committee
7/21/11
JW

725 Taraval Resident Speech No. 1

Good afternoon, Supervisors. My name is Melvin Li. I have lived at [include your address if you live in the neighborhood] for the past 15 years, which is [state how close to 725 Taraval St.]

↑ 717 TARAVAL ST.

I am one of the neighbors who joined with Bob Carson to appeal this T-Mobile wireless facility to the Board of Supervisors in May 2010.

In a unanimous 11-0 vote, the Board granted Mr. Carson's appeal and denied T-Mobile a Conditional Use Permit for 725 Taraval Street.

~~Bob Carson is currently out of the country until mid-June, but he has previously sent an email to each of you requesting that you NOT SETTLE the lawsuit T-Mobile subsequently filed against the City.~~

~~As he explained in that email communication, the City has already WON THE FIRST ROUND of T-Mobile's lawsuit.~~

Federal Judge Claudia Wilken ruled that the City's denial of a permit for T-Mobile was based on 'SUBSTANTIAL EVIDENCE' presented at the May 2010 appeal hearing before the Board.

The remaining issue is whether T-Mobile can prove it in fact has a 'SIGNIFICANT GAP' in its coverage at 725 Taraval, and if it can prove the existence of a 'significant gap,' that it can also prove that the proposed facility at 725 Taraval is the 'LEAST INTRUSIVE MEANS' for filling that significant gap.

Under a 2005 United States Supreme Court decision *City of Rancho Palos Verdes Estates vs. Abrams*, in this type of lawsuit, should T-Mobile ultimately prevail at trial, it is NOT entitled to any monetary damages or attorneys' fees from the City.

And as Mr. Carson informed each of you, we have identified and are willing to pay for, at the neighborhood residents' expense, an expert with a Ph.D. in Electrical Engineering who is a practicing lawyer in this area and a licensed IEEE [say "I Triple-E" -- it stands for "Institute of Electrical and Electronics Engineers"] member willing to present evidence and testimony at trial upholding the proposition that T-Mobile does not have a significant gap in coverage in the neighborhood of 725 Taraval.

*Received in
Committee
7/21/11*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

File 110591

T-MOBILE WEST CORPORATION,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

No. C 10-03011 CW

ORDER DENYING
PLAINTIFF'S
MOTION FOR
PARTIAL SUMMARY
JUDGMENT AND
GRANTING
DEFENDANT'S
CROSS-MOTION FOR
PARTIAL SUMMARY
JUDGMENT
(Docket Nos. 29
and 31)

United States District Court
For the Northern District of California

This action arises from Defendant City and County of San Francisco's decision to deny Plaintiff T-Mobile West Corporation's application for a conditional use permit (CUP) for a proposed wireless telecommunications facility at 725 Taraval Street in San Francisco, California. Plaintiff moves for partial summary judgment on its claim that, in violation of the Telecommunications Act of 1996 (TCA), the City did not issue a decision in writing that is supported by substantial evidence. The City opposes Plaintiff's motion and cross-moves for partial summary judgment in its favor on the same issue. The motions were heard on February 10, 2011. Having considered the papers submitted by the parties, the Court DENIES T-Mobile's motion for partial summary judgment and GRANTS the City's cross-motion for partial summary judgment.

BACKGROUND

San Francisco's Planning Code divides the City into various "use districts." S.F. Planning Code § 201. In a Small-Scale Neighborhood Commercial District, or NC-2 District, wireless

1 transmission facilities are considered a "public use" and require a
2 conditional use permit. Id. §§ 709, 711.83 and 790.80. The City
3 Planning Commission is charged with making determinations regarding
4 applications for conditional use permits. Id. § 303(a). Under the
5 Planning Code, the Planning Commission is required to approve an
6 application and authorize a conditional use if, among other things,
7 the "proposed use or feature, at the size and intensity
8 contemplated and at the proposed location, will provide a
9 development that is necessary or desirable for, and compatible
10 with, the neighborhood or the community." Id. § 303(c)(1). A
11 Planning Commission decision regarding a conditional use
12 authorization may be appealed to the City's Board of Supervisors.
13 Id. § 308.1(a).

14 On June 18, 2009, T-Mobile, a telecommunications carrier,
15 applied for a CUP to install a wireless telecommunications facility
16 "consisting of eight panel antennas mounted to the existing
17 elevator penthouse structures" of a four-story, mixed-use building
18 located at 725 Taraval Street, which is located in an NC-2
19 District. AR42-43.¹ On February 25, 2010, following a hearing on
20 the matter, the Planning Commission approved T-Mobile's application
21 and authorized the installation of the facility. The Planning
22 Commission found, among other things, that the facility was
23 "necessary or desirable, and compatible with, the neighborhood or
24 the community." AR190.

25 On March 25, 2010, Robert Carson, a property owner, appealed

26
27 ¹ Citations to the Administrative Record are designated
"AR__."

1 the Planning Commission's decision to the Board, complaining that
2 the facility was not necessary, not desirable and not compatible
3 with the neighborhood.

4 On May 18, 2010, the Board held a public hearing on Carson's
5 appeal. Carson submitted data, collected on or before February 23,
6 2010 by another resident, on signal strength in the vicinity of 725
7 Taraval. This resident, who was a T-Mobile customer living near
8 the proposed facility site, measured signal strength using "the
9 'field test' mode" on a "T-Mobile Dash phone." AR8. The resident
10 noted that the "Receive Signal Strength Indication" (RSSI)
11 measurement, taken within the resident's home, showed values from
12 thirteen to twenty-two. Id. The resident stated, "A value between
13 12 and 20 is considered average. A value over 20 is exceptional."
14 Id. The resident also stated, "I've had good cellular coverage
15 through T-Mobile from the beginning regardless of the phone I have
16 used. . . . I don't have a problem with dropped calls." Id.
17 Carson also offered additional "RSSI Readings," apparently
18 collected on May 14, 2010 from thirty-seven outdoor locations in
19 the vicinity of 725 Taraval; the RSSI values ranged from ten to
20 thirty-one. Carson also asserted, and T-Mobile did not dispute,
21 that there were at least eight existing T-Mobile facilities within
22 a mile of 725 Taraval. Finally, Carson offered T-Mobile's coverage
23 maps from its website. Those maps, which approximated "anticipated
24 coverage outdoors," represented that T-Mobile had good voice and
25 data coverage in the vicinity of 725 Taraval. AR9-13. Carson
26 briefly testified about this evidence at the Board meeting, arguing
27 that it demonstrated that the facility was not necessary.

1 At the hearing, T-Mobile responded with data showing that its
2 coverage in the neighborhood "would be greatly improved with this
3 project." Tr. of May 18, 2010 Hrg. 51:9-10. A map showed that
4 coverage in the neighborhood ranged from good to poor.
5 Specifically, in the area south of the proposed site, a signal
6 could be obtained only by "walking on the street." Id. at 50:23.
7 T-Mobile asserted that the "only way to get the accurate picture of
8 the existing signals is to drive the neighborhood using the
9 appropriate software to gauge the signals" and that signal
10 measurement entails "a fairly sophisticated scientific testing
11 process," which requires analysis by engineers. AR50-51. T-Mobile
12 also offered data that, in the vicinity of the proposed site, there
13 were 1,200 dropped calls out of 470,903 total calls. Finally, T-
14 Mobile asserted that it received three complaints from its
15 customers using phones within the neighborhood. Notably, however,
16 the three complaints originated in an area that would not have
17 benefitted from the proposed facility. Compare AR25 with AR27.

18 Several other members of the public objected to the proposed
19 facility. Some raised concerns about the health effects of radio
20 frequency emissions. However, at the beginning of the hearing, a
21 deputy city attorney informed the Board that the TCA prohibits
22 local governments and agencies from disapproving a wireless
23 transmission facility based on such concerns. No member of the
24 public spoke in favor of T-Mobile.

25 In an 11-0 vote, the Board reversed the Planning Commission's
26 decision to approve T-Mobile's CUP application. In relevant part,
27 the written findings of the Board stated,

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1 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
2 1987).

3 DISCUSSION

4 The Telecommunications Act of 1996 is intended to "encourage
5 the rapid deployment of new telecommunications technologies" while
6 preserving "the authority of State and local governments over
7 zoning and land use matters." Sprint PCS Assets, L.L.C. v. City of
8 Palos Verdes Estates, 583 F.3d 716, 721 (9th Cir. 2009) (citations
9 and internal quotation marks omitted). To this end, the TCA
10 imposes restrictions on localities' control over the installation
11 of wireless telecommunications facilities. Id. One of these
12 limitations "is that '[a]ny decision . . . to deny a request to
13 place, construct, or modify personal wireless service facilities
14 shall be in writing and supported by substantial evidence contained
15 in a written record.'" Id. (quoting 47 U.S.C.
16 § 332(c)(7)(B)(iii)).

17 Although T-Mobile alleges that the City violated the TCA in a
18 number of ways, the parties' current motions pertain only to this
19 limitation. T-Mobile seeks partial summary judgment that the
20 City's written findings did not constitute a "decision in writing"
21 and that, even if they did, they were not supported by substantial
22 evidence. The City seeks partial summary judgment that its
23 determination satisfied the "decision in writing" and substantial
24 evidence requirements of § 332(c)(7)(B)(iii).

25 I. Decision In Writing

26 The "TCA requires local zoning authorities to issue a written
27 decision separate from the written record which contains sufficient
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1 explanation of the reasons for the decision to allow a reviewing
2 court to evaluate the evidence in the record supporting those
3 reasons." MetroPCS, Inc. v. City & Cnty. of S.F., 400 F.3d 715,
4 723 (9th Cir. 2005). Under this standard, it is not sufficient for
5 an authority to stamp the word "DENIED" on a party's application.
6 Id. at 722 (rejecting standard set forth in AT&T Wireless PCS, Inc.
7 v. City Council, 155 F.3d 423 (4th Cir. 1998)). However, this
8 standard does not require localities to "explicate the reasons for
9 their decision and link their conclusions to specific evidence in
10 the written record." MetroPCS, 400 F.3d at 721-22 (rejecting
11 standard set forth in Omnipoint Commc'ns, Inc. v. Planning & Zoning
12 Comm'n, 83 F. Supp. 2d 306 (D. Conn. 2000)).

13 Here, the Board's findings satisfy the "decision in writing"
14 requirement of § 332(c)(7)(B)(iii). The five-page document recites
15 the facts of T-Mobile's application, refers to the May 18, 2010
16 hearing, specifies Carson's and T-Mobile's arguments at the hearing
17 and identifies the evidence submitted by Carson to support his
18 position. The findings further state that the Board's decision was
19 based on the record, which contained the Planning Commission's
20 findings, testimony presented at the public hearing and Carson's
21 and T-Mobile's documentary evidence.

22 Despite this detail, T-Mobile argues that the findings are
23 insufficient because assertions are not paired with citations to
24 evidence and because the findings do not explain why the Board
25 rejected T-Mobile's evidence, even though the Planning Commission
26 accepted it. However, MetroPCS rejected the need to tie
27 conclusions to specific evidence. Further, MetroPCS does not
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1 require a detailed explication of the Board's decision. The
2 findings "contain sufficient explanation to enable judicial
3 evaluation of the evidentiary support for its rationale."

4 MetroPCS, 400 F.3d at 723. Accordingly, they are sufficient.

5 Thus, T-Mobile's motion for partial summary judgment, to the
6 extent that it is based on the "decision in writing" requirement,
7 is denied. The City's cross-motion for partial summary judgment,
8 to the extent that it is based on the same, is granted.

9 II. Substantial Evidence

10 Although the TCA does not define the term "substantial
11 evidence," courts have held "that this language is meant to trigger
12 the traditional standard used for judicial review of agency
13 decisions." MetroPCS, 400 F.3d at 723 (citation and internal
14 quotation marks omitted). Under this deferential standard, courts
15 may not overturn a locality's decision on "'substantial evidence'
16 grounds if that decision is authorized by applicable local
17 regulations and supported by a reasonable amount of evidence (i.e.,
18 more than a 'scintilla' but not necessarily a preponderance)." Id.
19 at 725. In other words, the evidence must constitute a showing
20 "that 'a reasonable mind might accept' as adequate." Id. at 726.
21 Courts must consider the entirety of the written record. Id. at
22 723.

23 As noted above, the San Francisco Planning Code authorizes
24 consideration of a neighborhood's need for a proposed use in
25 evaluating conditional use permit applications. S.F. Planning Code
26 § 303(c)(1); see also MetroPCS, 400 F.3d at 725 (discussing section
27 303(c)(1)). Here, the Board found that the facility was not

1 necessary because there was already "acceptable service" in the
2 relevant area. AR242. Specifically, the Board pointed to the
3 signal strength data submitted by Carson, T-Mobile's advertising
4 materials showing good coverage for voice and data services in the
5 neighborhood and T-Mobile's existing facilities in the vicinity of
6 725 Taraval. T-Mobile did not dispute the accuracy of Carson's
7 signal strength data or that it had several other facilities close
8 by. The written record also contained a letter from a T-Mobile
9 customer, who did not have a problem with dropped calls and stated
10 that indoor signal strength rated from average to exceptional.
11 Indeed, T-Mobile's own data showed that, in a given two week
12 period, out of 470,903 calls originating within the neighborhood,
13 only 1,198 were dropped, or one-fourth of one percent of the total.
14 The Board also noted that no member of the public supported T-
15 Mobile's application, which suggested a lack of a community need
16 for the facility. And, as noted above, to the extent that T-Mobile
17 received complaints, they originated in an area east of the
18 proposed facility, which would not have benefitted from the
19 installation. In sum, the written record contained evidence that
20 there was an adequate signal in the neighborhood, few calls were
21 dropped, a T-Mobile customer was satisfied and no members of the
22 public expressed support of T-Mobile's application. A reasonable
23 mind would accept this evidence as adequate to support a conclusion
24 that the neighborhood surrounding 725 Taraval did not need the
25 proposed facility.

26 T-Mobile contends that the Board could not reasonably rely on
27 the evidence submitted by Carson because determining the adequacy
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1 of coverage is a "complex engineering issue." T-Mobile Mot. 18.
2 T-Mobile challenges the data submitted by Carson as unscientific
3 and distances itself from its advertising materials. Although it
4 is true that a resident who took signal measurements stated that it
5 was not a scientific test, there was no evidence in the written
6 record directly challenging the accuracy of the data. Indeed, T-
7 Mobile's testimony at the May 18 hearing suggested that its data
8 were more accurate, not that Carson's data were inaccurate. Nor
9 was there evidence in the written record suggesting that T-Mobile's
10 advertising materials misrepresented the signal strength in the
11 neighborhood. While the documents stated that they only
12 approximated outdoor coverage, there was no evidence in the written
13 record suggesting that the Board should have discounted them.

14 T-Mobile also argues that substantial evidence did not support
15 the Board's rejection of the Planning Commission's finding that the
16 proposed facility was "necessary for T-Mobile to provide improved
17 communications and emergency resources." T-Mobile Mot. 20.
18 However, at the May 18 hearing, Carson responded to this argument,
19 noting that, under federal law, a wireless telecommunications
20 provider must transmit all wireless 911 calls, including those
21 handled by another carrier. Tr. of May 18, 2010 Hrg. 60:24-65:2;
22 see also 47 C.F.R. § 20.18(b). There is no evidence that the
23 proposed project was necessary to improve the handling of wireless
24 911 calls in the neighborhood.

25 T-Mobile cites several cases, all of which are
26 distinguishable, not controlling or both. Only a couple of cases
27 bear noting. In T-Mobile Central, LLC v. Unified Government of

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1 Wyandotte County, 546 F.3d 1299 (10th Cir. 2008), the Tenth Circuit
2 held that the locality's decision to deny a permit was not
3 supported by substantial evidence. In particular, the court held
4 that a drive test, which was "intended to measure the level of
5 existing network coverage," was not substantial evidence of the
6 lack of dropped calls in a given area. Id. at 1309. The court
7 also rejected the locality's reliance on an "uncorroborated
8 assertion . . . that T-Mobile's service in the targeted area was
9 'pretty good.'" Id. Here, the City did not make such errors. It
10 did not rely on a metric, intended to measure one characteristic,
11 to measure another parameter. Nor did it rely on uncorroborated
12 assertions.

13 T-Mobile's reliance on AT&T Wireless Services of California,
14 LLC v. City of Carlsbad, 308 F. Supp. 2d 1148 (S.D. Cal. 2003),
15 which predated the Ninth Circuit's decision MetroPCS, is also
16 unavailing. There, the court rejected the city's expert's
17 testimony because his conclusions did not result "from independent
18 research unconnected with" the case and because he failed to
19 provide "any objective criteria by which the court may evaluate his
20 opinion." Id. at 1157. The court also noted that it was not
21 required to "accept as substantial evidence impossible, incredible,
22 unfeasible, or implausible testimony." Id. at 1159 (citation and
23 internal quotation marks omitted). Here, T-Mobile insists that the
24 Court, like the City of Carlsbad court, must play its "gatekeeping"
25 role under Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S.
26 579 (1993); however, neither T-Mobile nor the City has offered
27 expert testimony to which Federal Rule of Evidence 702 applies.

1 Further, unlike the City of Carlsbad, the Board here did not rely
2 on impossible, incredible, infeasible or implausible testimony.

3 Finally, T-Mobile argues that the Board's decision must be
4 overturned because it failed to rebut the Planning Commission's
5 determination. MetroPCS, which also involved the Board's decision
6 to overrule the Planning Commission, does not require this.

7 The Board's decision that T-Mobile's proposed facility was not
8 necessary for the neighborhood is supported by substantial
9 evidence.

10 CONCLUSION

11 For the foregoing reasons, the Court DENIES T-Mobile's motion
12 for partial summary judgment (Docket No. 29) and GRANTS the City's
13 cross-motion for partial summary judgment (Docket No. 31). The
14 Court summarily adjudicates that, with respect to T-Mobile's CUP
15 application, the Board issued a decision in writing that was
16 supported by substantial evidence.

17 IT IS SO ORDERED.

18
19
20 Dated: 2/14/2011



CLAUDIA WILKEN
United States District Judge

United States District Court
For the Northern District of California