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PLANNING DEPARTMENT

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December 12, 2011

Mr. Steven Sung
Cascadia PM, LLC
1130 N. Nimitz Highway, Suite A-200
Honolulu, HI 96817

Dear Mr. Sung:

Use Permit Application (USE 11-000028)
Applicant: Verizon Wireless
Request: To Allow Construction of a 150' Telecommunication Monopole With Appurtenant Equipment and Related Improvements on 750 Square Feet of Land
Tax Map Key: 1-3-036:041

Enclosed for your information and files is the Windward Planning Commission's Findings of Fact, Conclusions of Law, and Decision regarding the above-referenced request for a 154-foot tall steel telecommunication monopole with 8-foot tall panel antennas and related facilities on an approximate 750 square foot portion of a 1-acre parcel situated in the State Land Use Agricultural district and the County's Agricultural 1-acre (A-1a) zoned district. The property is located at 13-3474 Kupono Street, which is on the west side of Kupono Street, approximately 400 feet north of the intersection of Kupono Street and Leilani Avenue in Leilani Estates Subdivision, Keahialaka, Puna, Hawai'i.

Should you have any questions regarding the above, please do not hesitate to contact Daryn Arai of this department at 961-8288.

Sincerely,

BJ LEITHEAD TODD
Planning Director

Lverizonwireless02syhf
Enclosure
cc/enc: Ivan Torigoe, Esq.
Amy Self, Esq.
Mr. Jay Fischer
Russell Kato, Esq./Randall C. Whattoff, Esq.
Verizon Wireless

SCANNED
DEC 15 2011
By:

DEC 13 2011

WINDWARD PLANNING COMMISSION

COUNTY OF HAWAI'I

STATE OF HAWAI'I

In the Matter of the Use Permit Application of CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, a Delaware Limited Liability Company, To Allow Construction of a 150' Telecommunication Monopole With Appurtenant Equipment and Related Improvements, Tax Map Key: (3) 1-3-036:041.	Use Permit Application No. 11-000028 **THE WINDWARD PLANNING COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION** Contested Case Hearing: Date: October 6, 2011 Presiding Officer: Chairman Zendo Kern

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

I. FINDINGS OF FACT

1. The Leilani Estates subdivision ("Leilani") comprises a 4.2 square mile area in East Hawai'i near Puna. There are approximately 1,500 residents and 800 households in Leilani.

2. There are substantial deficiencies in the wireless phone and internet service in Leilani. The majority of Leilani residents are without usable wireless services in their homes, and there are numerous large areas throughout the subdivision without any service. There is no reliable service in the subdivision. In particular, Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") does not provide service within Leilani.

3. In early 2008, Verizon Wireless contacted the Leilani Community Association (the "Association") to discuss the possibility of placing a new 154-foot

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telecommunications tower (the "Tower") on land owned by the Association. Verizon Wireless met with the Board of Directors of the Association numerous times over the next three years. Leilani residents were kept informed about the proposed Tower through resident meetings, newsletters, and board records.

4. The Association and Verizon Wireless decided that the best location for the Tower is a one-acre parcel owned by the Association at 13-3473 Kupono Street. This location is bordered by a five-acre parcel to the east, two one-acre parcels to the north, two one-acre parcels to the South, and Kupono Street to the west, all of which is owned by the Association. This Association-owned land creates a significant "buffer zone" around the Tower, ensuring that no residential lots are adjacent to the Tower.

5. Radio frequency engineers at Verizon Wireless studied the Kupono Street location to ensure it would provide adequate service to Leilani and the surrounding area. Among other things, Verizon Wireless conducted a "drive test" whereby Verizon Wireless established a temporary tower near the Kupono Street location and then analyzed signal strength by driving away from the location in all directions.

6. Prior to deciding on the Kupono Street location, Verizon Wireless considered several other locations for the Tower including Puna Geothermal Venture, property owned by Kamehameha Schools, and residential locations within Leilani. The Puna Geothermal Venture and Kamehameha Schools locations were rejected after radio frequency engineers determined that these locations could not provide adequate service to Leilani. The residential locations were rejected for numerous reasons including (a) concerns about inequitable distribution of rents from the Tower, (b) the lack of a

substantial "buffer zone" between the Tower and other residential lots, (c) concerns about increased opposition from residents, and (d) the fact that it would violate the Covenants, Conditions and Restrictions of the Association.

7. On June 6, 2011, Verizon Wireless filed a use permit application for the Tower (the "Application"). (Verizon Exhibit 4.)

8. On or about July 6, 2011, Jay Fischer ("Intervenor"), a non-resident owner of property at Leilani, filed a Petition for Standing in a Contested Case Hearing ("Petition"). Intervenor's Petition stated that (a) he had "aesthetic concerns" about the Tower (Intervenor's "Aesthetic Claims"); (b) he was "concerned about the high levels of radio frequency emissions that will be coming from this tower" (Intervenor's "RF Emission Claims"); and (c) he believed the Tower may be structurally unsafe in the event of a hurricane or earthquake (Intervenor's "Structural Safety Claims").

9. On or about July 15, 2011, the County of Hawai'i Planning Department (the "Department") issued its formal recommendation of the Application (the "Department's Recommendation"). (Verizon Wireless Exhibit 12; Department Exhibit B.) The Department found that the Tower met each of the requirements for a use permit.

10. The Windward Planning Commission (the "Commission") considered the Application at its meeting on August 4, 2011. During the meeting, Leilani residents Al Dettweiler, Rick Melzig, Donna Debaets, James Walsh, George Kelly, Wymond Wilds, and Greg Armstrong all testified in support of the Tower. They testified that the Tower would, among other things, provide for communications during emergencies and natural

disasters; assist the Community Emergency Response Team and Neighborhood Watch; assist with veterans' issues; and provide for business and employment communications.

11. At the conclusion of the August 4, 2011 meeting, the Commission granted Intervenor standing to object to the Application and set a contested case hearing for October 6, 2011. The Commission set August 31, 2011 as the deadline to serve witness lists and exhibit lists.

12. The Department and Verizon Wireless served their respective witness lists and exhibit lists prior to the August 31, 2011 deadline. Intervenor never served any witness list or exhibit list.

13. On September 22, 2011, Verizon Wireless filed a motion to dismiss and/or for summary judgment on each of Intervenor's claims. Verizon Wireless's motion was based on the following grounds:

a. Intervenor's claims were not supported by any evidence, let alone the "substantial evidence" required by the Federal Telecommunications Act of 1996 (the "TCA"), *see* 47 U.S.C. § 332(c)(7)(B)(iii);

b. Intervenor's Aesthetic Claims were directly contradicted by the evidence;

c. Intervenor's RF Emissions Claims were expressly prohibited by the TCA, *see* 47 U.S.C. § 332(c)(7)(B)(iv);

d. Intervenor's Structural Safety Claims were directly contradicted by the evidence;

e. The TCA requires approval of the Application because there is a "significant gap" in Verizon Wireless's service coverage in Leilani and (2) Verizon Wireless has made "some inquiry into the feasibility of alternative facilities or site locations," *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 730 (9th Cir. 2005);

f. The TCA requires approval of the Application because a denial would constitute "unreasonable discrimination" given that the Commission recently approved a nearly identical tower for T-Mobile in the Nanawale Estates subdivision immediately north of Leilani, *see* 47 U.S.C. § 332(c)(7)(B)(i)(I);

g. The Tower meets all of the requirements for a use permit; and

h. Approval of the Tower was in the public interest.

14. On September 27, 2011, Bobby Jean Leithead-Todd, Planning Director of the County of Hawai'i, filed a joinder in Verizon Wireless's motion to dismiss and/or for summary judgment.

15. The contested case hearing took place on October 6, 2011. Verizon Wireless was represented at the hearing by Randall Whattoff of Goodsill Anderson Quinn & Stifel LLP, the Department was represented by Bill Brilhante of the County of Hawai'i Corporation Counsel's Office, and Intervenor was represented by his personal representative.

16. The Commission began the hearing with public testimony. Al Dettweiler, George Kelly, and Greg Armstrong testified and reiterated their support for the Tower.

Janet Kama also testified on behalf of the Tower. Messrs. Dettweiler, Kelly, and Armstrong and Ms. Kama reiterated that there is currently no adequate wireless service in Leilani. A Puna-area resident who lives outside of Leilani testified and expressed health concerns related to radio frequency emissions.

17. The Commission then heard oral arguments on Verizon Wireless's motion to dismiss and/or for summary judgment. Following oral arguments the Commission went into executive session.

18. After the executive session, Intervenor stated he was withdrawing all of the objections contained in his Petition—*i.e.*, his Aesthetic Claims, RF Emission Claims, and Structural Safety Claims. Intervenor stated his only objections to the Tower were based on whether (1) the proposed Tower would provide adequate coverage to Leilani and (2) whether Verizon Wireless had considered alternative sites for the proposed Tower.

19. The contested case hearing then proceeded on the issues of adequate coverage and alternative sites.

20. All of the exhibits included on Verizon Wireless's and the Department's exhibit lists were admitted into evidence.

II. CONCLUSIONS OF LAW

21. If any of the following Conclusions of Law shall be deemed Findings of Fact, the Commission intends that every such Conclusion of Law shall be construed as a Finding of Fact.

22. The Intervenor has withdrawn his Aesthetic Claims, RF Emission Claims, and Structural Safety Claims. The Commission therefore dismisses each of these claims on that basis.

23. During the hearing, Verizon Wireless presented substantial evidence that the proposed Tower will provide wireless coverage to all of the Leilani area and to large portions of Pahoa Kalapana Road (Highway 130) and Kapoho Road (Highway 132). The evidence provided by Verizon Wireless included coverage maps attached to its Application (Verizon Wireless Exhibit 4) and the testimony of Verizon Wireless representative Steven Sung. The Commission finds this evidence persuasive.

24. Intervenor did not submit any evidence that the Tower will not provide adequate coverage to Leilani.

25. The Commission concludes that the proposed Tower will provide adequate coverage to Leilani and the surrounding area. The Tower will thus provide coverage to a large area that is currently without useable wireless services.

26. During the hearing, Verizon Wireless presented substantial evidence that it considered alternative sites for the Tower, including (1) a site located at Puna Geothermal Ventures, (2) sites located on land owned by Kamehameha Schools, and (3) a site located on residential property within Leilani.

27. Intervenor did not present any evidence that the alternative sites considered by Verizon Wireless were rejected for improper reasons. Intervenor did not propose any alternative sites that he contended Verizon Wireless should have considered but did not consider.

28. The Commission concludes that the alternative sites were appropriately rejected. The locations at Puna Geothermal Venture and on Kamehameha Schools land would not have provided adequate wireless coverage to Leilani. The residential site (a) would have created an inequitable distribution of the rent from the Tower; (b) lacked any buffer zone between the Tower and other nearby residential lots; (c) could have led to additional disputes among residents; and (d) would have violated the Covenants, Conditions and Restrictions of the Leilani Community Association.

29. The Commission concludes that Verizon Wireless thoroughly analyzed alternative sites for the Tower and that there are no viable alternative locations.

30. The Commission concludes that the Tower will provide a substantial benefit to the residents of Leilani. Among other things, it will provide for communications during emergencies and natural disasters; assist the Community Emergency Response Team and Neighborhood Watch; assist with veterans' issues; and provide for business and employment communications.

31. The Commission concludes that the Kupono Street location will minimize the aesthetic effects of the Tower. The Tower will be placed within a 10-acre area owned by the Association, ensuring the Tower is not adjacent to any residential lots. In addition, there is significant amount of vegetation that will create a screen between the Tower and the surrounding area.

32. The Commission finds that the Tower meets the requirements for a use permit contained in Rule 7-6 of the County of Hawai'i Planning Commission Rules of Practice and Procedure. The Commission's conclusion is based on the reasons stated in

the Department's Recommendation, which is incorporated by reference into these Findings of Fact and Conclusions of Law.

33. Verizon Wireless filed their Proposed Findings of Fact, Conclusions of Law, and Decision, dated October 10, 2011 ("Verizon's Proposed FOF/COL"). At the Commission's meeting on December 1, 2011, the parties, including Intervenor, were given opportunity to comment upon Verizon's Proposed FOF/COL, and none of the parties offered any comment. The Commission adopted each of Verizon Wireless's Proposed Findings of Fact and Conclusions of Law, and incorporates them into these Findings of Fact and Conclusions of Law.

III. DECISION

34. Based upon the foregoing Findings of Fact and Conclusions of Law, the Commission hereby rejects each of the objections raised by Intervenor. The Commission grants Verizon Wireless's Application, subject to the following conditions:

a. The applicant, its successors or assigns shall be responsible for complying with all stated conditions of approval.

b. Construction of the proposed development shall be completed within five (5) years from the effective date of this permit. Prior to construction, the applicant, successors or assigns shall secure Final Plan Approval for the proposed development from the Planning Director in accordance with Section 25-2-71(c)(3), 25-2-72, 25-2-74 and 25-4-12, Chapter 25 (Zoning-Code), Hawai'i County Code. Plans shall identify proposed structures, fire protection measures,

access easements and any fencing associated with the use. Landscaping shall also be indicated on the plans along the perimeter of the 750 square-foot project site for the purpose of mitigating any adverse noise or visual impacts to adjacent properties. The antenna plans shall be stamped by a structural engineer.

c. Co-location or any expansion of the tower and related facilities within the project site may be allowed within the parameters of the tower height and envelope as approved by the Planning Commission.

d. Within 120 days of the permanent abandonment of the tower, the applicant shall remove the tower and its antenna and accessory structures (including the equipment building and the fence), down to, but not including, the concrete foundation. The applicant shall immediately provide written notification to the Planning Director of the termination of the telecommunication tower and related improvements and the removal of all structures.

e. Should any unidentified sites or remains such as lava tubes, artifacts, shell, bone, or charcoal deposits, human burials, rock or coral alignments, pavings, or walls be encountered, work in the immediate area shall cease and the Department of Land and Natural Resources-Historic Preservation Division (DLNR-HPD) shall be immediately notified. Subsequent work shall proceed upon an archaeological

clearance from the DLNR-HPD when it finds that sufficient mitigative measures have been taken.

f. Comply with all applicable rules, regulations and requirements of the affected agencies for the proposed development, including the Federal Aviation Administration and Federal Communications Commission.

g. An initial extension of time for the performance of conditions of the permit may be granted by the Planning Director upon the following circumstances:

    i. Non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence.

    ii. Granting of the time extension would not be contrary to the General Plan or the Zoning Code.

    iii. Granting of the extension would not be contrary to the original reasons for the granting of the permit.

    iv. The time extension granted shall be for a period not to exceed the period originally granted for performance (*i.e.*, a condition to be performed within one year may be extended for up to one additional year).

35. Should any of the conditions not be met or substantially complied with in a timely fashion, the Director may initiate procedures to revoke the permit.

DATED: Hilo, Hawai'i, December 10, 2011.

ZENDO KERN
Chairman, Windward Planning Commission