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BY ELECTRONIC MAIL

Kristen Wilson, Esq.
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Re: Crown Castle's Application
Interpretation/Amendment to February 2011 City Right-of-Way Use Agreement
City Council Initiated Permit Proceeding
Forthcoming City Council Determinations

Dear Ms. Wilson:

We are writing to you on behalf of our client Crown Castle NG East LLC ("Crown") with respect to the above referenced matter. Crown's requests have been pending for over a year now and as the City Council's decision is forthcoming, we believe it is helpful to provide a narrative of the three specific actions on which the City Council will be making its determination and the legal standards that must guide its decision.

**1. Interpretation on Larger Equipment Cabinets
as "Permitted Equipment" under the RUA.**

In December of 2015, Crown proposed the installation of 85 nodes including new pole sets and larger equipment cabinets on utility poles within public right of ways.

Section 3.2 of the RUA permits node installations on any third party utility poles in the City in a manner that substantially conforms to the various configurations pre-approved and included in Exhibit A of the City RUA. It is Crown's position that the dimensions of the larger cabinets, while larger in volume, are substantially similar to the existing cabinets for purposes of the RUA and definition of Equipment.

In making the determination of whether the equipment is substantially similar, the City Council must interpret the controlling 2011 RUA.



2. Amend the RUA to Allow a Larger Equipment Cabinet.

In the event that the City determines that the larger cabinet is beyond the equipment contemplated in the RUA, Crown requests a minor amendment of the RUA. This minor amendment to Exhibit A was proposed in April of 2016 and incorporated the larger equipment cabinet to permit shared use and collocation by wireless carriers of equipment node locations and potentially avoid the need for new pole sets by Crown in public rights of way in the future.

The determination of whether to amend the RUA is a municipal decision that must be consistent with federal law, including Section 6409 of the federal Middle Class Tax Relief and Job Creation Act of 2012 (“Section 6409”), which mandates non-discretionary approvals for modifications to eligible facilities that are not substantial, as such terms are defined by FCC regulations.

3. Permit Approval of 64 DAS Node Installations.

Regardless of the City Council’s decision on requests 1 and 2 previously discussed, the City must consider and act on Crown’s proposed DAS expansion plans in accordance with the RUA between the parties. The three different options presented for DAS expansion by Crown are described below.

a. Proposed DAS Expansion (April 2016)

This proposal was a modification of the preliminary December 2015 plan to add 85 new node locations. It involved a reduction to 73 new node locations within public rights of way, 70 of which were proposed on existing utility poles, 2 of which included new telephone poles, and 1 replacement of a county-owned light pole. These plans involved the larger equipment cabinet, which was approved by the City’s Board of Architectural Review in May of 2016. Note that the RUA addresses new poles in Section 3.2, which provides that: “[W]here third-party property is not available for attachment of Equipment, [Crown] may install its own utility poles in the Public Way, consistent with the requirements that the City imposes on similar installations made by other utilities that use and occupy the Public Way.”

b. First Alternative/ Plan B (October 2016)

In response to public comments, the City Council asked Crown to refine its plans further to reduce the overall node count. The first alternative proposal was submitted without prejudice to Crown’s initial plans and proposed an overall reduction to 64 node locations. Crown sought the City Engineer’s review and approval of this alternative “by-right” plan which was filed in accordance with the RUA and proposed pre-approved equipment for installation as depicted in Exhibit A of the RUA. This alternative eliminated the two new proposed telephone poles and the county owned



light pole in order to avoid any at-grade disturbance and presented a plan that would involve equipment installations on existing utility poles only.

c. Second Alternative/ Plan C (February 2017)

In response to requests from the City Council consultants that Crown re-engineer the plan to incorporate City owned municipal street lights in the public right of ways, Crown submitted its Second Alternative. This plan keeps the number of nodes at 64 but incorporates 6 municipal street lights and 2 municipal-owned wood pole locations. The plan also shifts 4 other utility pole attachments to avoid public ways that are not owned by the City. This Second Alternative increases the use of pole top antennas to 36 and lessens the communications zone antennas to 20, and incorporates the RUA approved cabinet size and design.

There is no legal basis for the City Council to deny the installation of the 64 DAS nodes requested, as they clearly are permitted under Exhibit A of the operative RUA. Section 3.2 of the RUA provides that: “A denial of an application for the attachment of Equipment to third-party-owned poles or structures in the Public Way shall not be based upon the size, quantity, shape, color, weight, configuration, or other physical properties of [Crown’s] Equipment if the Equipment proposed for such application substantially conforms to one of the approved configurations and the Equipment specifications set forth in Exhibit A.” Further, sections 3 and 5 in the RUA confirm that right of way deployments by Crown are not subject to zoning or other land use discretionary permitting requirements that the City might have.

The RUA, authorized by the City Council in 2011, is fully enforceable and provides the legal framework for City action on Crown’s request. This agreement governs the terms and conditions for Crown’s access to and installations of equipment in public rights of way in accordance with federal, state and local laws and consents previously issued by the City.



State Environmental Review

In accordance with the State Environmental Quality Review (“SEQR”) regulations 6 NYCRR 617.5(c)(11)¹, (19), (7), (26) and/or (31), Department of Environmental Conservation (“DEC”) interpretations in the SEQRA Handbook,² Section 11.1 of the RUA,³ and the City’s past practice,⁴ standard wireless pole attachments under the RUA are a Type II exempt action for SEQR purposes. Furthermore, 2017 DEC proposed SEQR amendments demonstrate the State agency responsible for SEQR is in complete support of ensuring these types of installations are treated as Type II by municipalities.

A generic environmental impact statement (“DGEIS”) for the proposed amendments discusses DEC’s proposal to clarify and expressly add the attachment of cellular antennas to any existing structure or installation of fiber –optic or broadband cable technology in an existing right of way and the co-location of cellular equipment to the Type II action list. See 6 NYCRR 617.5[c][7] (proposed 2017).

The objectives, rationale, and benefits of siting cellular antennas and repeaters on existing structures is described in the DGEIS as follows:

The current Type II item [617.5(c)(7)] that precludes the installation of radio communication and microwave transmission facilities as a Type II action has generated a substantial number of questions on the SEQR classification for installation of antennas and repeaters on existing structures. These antenna and repeaters can, in many locations, be installed on existing buildings and preclude the construction of a new tower. The placement of antennas and repeaters are meant to extend range and capacity for a system, so to a certain extent location is pre-

¹ The DEC has declared as Type II (and thus exempt from SEQRA) any action that involves the “extension of utility distribution facilities, including gas, electric, telephone, cable, water and sewer connections to render service in approved subdivisions or in connection with any action on this list.” 6 NYCRR part 617.5(c)(11).

² The NYS DEC Handbook specifically notes that “radio and microwave transmission towers or other stand-alone facilities constructed specifically for radio or microwave transmission are specifically **not** included in the exemption for construction of small non-residential structures. **However, if a small dish antenna or repeater box is mounted on an existing structure such as a building, radio tower, or tall silo, the action would be Type II.**” DEC, SEQRA Handbook 33 (3d ed. 2010) (emphasis added).

³ Section 11.1 of the RUA incorporates this specific SEQRA Type II exemption for Crown’s routine installations of poles and related equipment in the right of way and notes other actions not contemplated by the RUA could be “unlisted” actions.

⁴ A review of minutes from past actions by the City Council approving cable franchise agreements did not reveal any specific SEQRA reviews or references (being treated generally as Type II exempt as set forth in New York State SEQRA regulations, see 6 NYCRR 617.5(c)(11) and (7)).



determined. Existing structures that might serve as locations for antennas and repeaters include substations, residential and commercial buildings, light poles, and power/ energy/ information distribution poles. It is fairly common practice in many communication projects to look for these types of facilities and appurtenances for co-location. This proposed change would create a better alignment of SEQR with Federal law on co-location. Congress, as part of the Middle Class Tax Relief and Job Creation Act of 2012, provided that a state or local government “may not deny, and shall approve” any request for collocation, removal, or replacement of transmission equipment on an existing wireless tower or base station, provided the action does not substantially change the physical dimensions of the tower or base station. Such co-locations, therefore, would not be subject to discretionary review under SEQR though local governments retain their authority under the municipal enabling acts as curtailed by Federal law.

N.Y. Dept. of Evtl. Conserv., DRAFT GENERIC ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED AMENDMENTS TO THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQR) REGULATIONS [hereinafter “DGEIS”], at 16-17 (Jan. 20, 2017).

In discussing the potential environmental impacts associated with co-location, the DGEIS affirms the following:

The Department believes that the addition of an antenna on an existing tower or pole or other type of structure would not have a significant adverse impact on the environment given the relatively small size of antennas and repeaters. Where they are being co-located, the addition of an antenna or repeater would not be visually significant. Co-location of antennas and repeaters on existing facilities may even limit adverse impacts on the landscape by reducing the need for additional cell towers. Co-location minimizes most new visual impacts and new ground disturbances by utilizing previously disturbed areas containing existing structures. The presence of existing access roads to sites intended for antennas and repeaters further reduces the likelihood of adverse impacts from occurring as no new ground disturbance is needed for roads. Installation of antennas and repeaters on existing buildings nearby to historic resources, whether individual properties or districts, is not considered an adverse impact to these resources because, while perhaps introducing a new element to the general area, it is not a visually intrusive element, and unlikely to change the historic importance of nearby buildings and is considered reversible.

DGEIS, at 17 (Jan. 20, 2017).



The objectives, rationale, and benefits of installation of fiber-optic or broadband technologies in existing rights of way are described in the DGEIS as follows:

High speed broadband service is increasingly seen as an essential component of a competitive business environment. Better broadband means greater opportunities for New Yorkers. Better broadband will provide individuals with the opportunity to connect to educational and workforce development training resources; communities can foster more economic development; businesses can access new markets and create more jobs, and our schools, colleges and universities can conduct high-tech research and development and build an innovative and talented high-tech workforce. But, residents and businesses cannot fully participate in the digital economy without access to broadband. There are still many areas in New York that are underserved and unserved. This Type II item would clarify that the installation of fiber-optic cable in existing highway or utility rights of way will not require environmental review under SEQR.

DGEIS, at 15-17 (Jan. 20, 2017) (emphasis added).

In discussing the potential environmental impacts associated with installing broadband equipment in the public right of ways, the DGEIS affirms the following:

The Department has determined that the installation of fiber-optic cable would not have a significant adverse impact on the environment given the relatively limited nature of the disturbance that will occur in existing rights of way. . . . The installation of aerial cables on existing poles will not involve any significant ground disturbance. Potential impacts common to this type of activity include: noise, fugitive dust, soil disturbance, erosion and stormwater runoff. Since this activity will occur in an existing highway or utility right of way, the area has already been disturbed and is being maintained in an artificial, static habitat. These impacts are all temporary in nature, limited in scope, predictable, common to other types of maintenance and repair of existing utility systems within an existing right of way and easily managed by standard best management practices.

DGEIS, at 15-17 (Jan. 20, 2017). To the extent that the City argues Kaplan v. Village of Pelham, Index No. 13/3827 (Sup. Ct. West. Co., June 20, 2014) (Zambelli, J.) is controlling in some way, the DEC's DGEIS makes clear that results like the court's interpretation are a misapplication of existing SEQR regulations.⁵

⁵ Aside from being neither appellate nor binding case law, the decision in Kaplan was appealed and ultimately settled as moot upon municipal SEQRA review and approvals. Furthermore, the defendants in Kaplan were proposing to construct a new utility pole in the village right of way. Distinguishably, Crown is not proposing the construction of any new structures as part of Plan B or C. Rather, they are proposing new node attachments to existing poles in public rights of way. Additionally, Kaplan explicitly did not address whether a municipality's



In light of these statements from the DEC, when the City Council reviews Part II and Part III of the Full EAF, and as applied to Crown's proposed right of way installations on existing utility poles, we submit that the City could not rationally find based on the facts before it that Crown's plans will involve large impacts on natural resources such as the land, surface water, groundwater, and air. Moreover, nothing the public has provided to the Council, other than generalized objections, indicates a factually severe, sizeable and large impact from any or a slightly larger equipment cabinet on a pole or putting Crown installations on any of the 64 existing structures as planned. Indeed, there is no credible evidence whatsoever that Crown's proposed installations would have a large impact on scenic or community character resources, produce noise above local limits, impact scenic views or historic sites, or otherwise interfere with the use and enjoyment of public streets and designated public resources. There simply is no substantial evidence to support a finding of a large impact, which is why utility installations in existing streets are Type II for SEQR purposes under regulations adopted by NYS DEC. As such, a determination of no significance should be issued pursuant to SEQR.

Conditions of Permit Approval Crown would Accept

Crown may consent to the following two conditions of any resolutions of approval issued by the City Council.

1. Crown does not agree with counsel for the City's claim of a breach of the RUA by permitting customer owned equipment within Crown-owned cabinets. Crown would propose amending Sections 1.3 and 1.10 of the RUA to explicitly state that customer owned equipment may be used in the network subject to final language approved by counsel to the parties.
2. Crown will not waive any federal rights under Section 6409 and accompanying FCC regulations and we submit such a request would be void for public policy reasons. Crown would agree to a condition incorporating in the RUA or permit approval a preference the City may have that adjacent poles in a public right of way be used for deployment of currently approved RUA equipment prior to any 6409 expansion to a larger cabinet or setting a new pole.

wireless siting law would survive scrutiny under 47 U.S.C. § 253(a) and NY Transportation Corporations Law § 27. See Kaplan v. Village of Pelham, Index No. 13/3827 at *18.



Conclusion

We do not believe there is a basis for a denial of Crown's request for approval of one of the three DAS expansion plans based on the voluminous evidence in the record and respectfully request that the City Council issue a negative declaration on these pending requests and approve Crown's permit application. We look forward to City Council action on Crown's pending request/application.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'C. Fisher', is written over the typed name.

Christopher B. Fisher

cc: Marcus Serrano, City Clerk
Mayor Joe Sack and Members of the City Council
Joseph Van Eaton, Esq.
Leslie Snyder, Esq., Counsel to Verizon Wireless
Crown Castle