



March 19, 2009

VIA FEDERAL EXPRESS OVERNIGHT DELIVERY

Mr. Richard Krapf
James City County 2008 Comprehensive Plan Steering Committee
2404 Forge Road
Toano, Virginia 23168

New Wireless Communication Technology

Dear Mr. Krapf:

We write to you on behalf of Verizon Wireless. We understand that at public hearings scheduled for March 23, 2009, and March 26, 2009, the Steering Committee will consider revising the James City County Comprehensive Plan's Community Character section which addresses wireless communication facilities policy, and that the Steering Committee may incorporate a revision providing a preference for new wireless communication technology. As a long-time communications provider in the County, we recommend refraining from implementing such a change.

As it is currently written, we believe the County's wireless policy adequately serves the community's interests. The policy protects the general welfare and preserves the community's aesthetic and historic quality, while contemporaneously allowing wireless companies flexibility to design and construct the wireless facilities necessary to provide community members with reliable service. Indeed, the Comprehensive Plan itself states that the County's efforts "to effectively hide new wireless communication facilities . . . to reduce their incompatibility with and impact on adjacent development" have been "quite successful to date," with "[m]ost new towers hav[ing] been either constructed below the tree line or built as a camouflaged structure to blend in with the surrounding natural and man-made environment."¹ As it is currently drafted, the Comprehensive Plan allows carriers to deploy new technologies where doing so would provide the best overall coverage and aesthetic solutions.

Implementing a preference for any specific technologies would thus be an unnecessary and potentially counterproductive amendment to the Comprehensive Plan. By way of example, the James City County service area is not the type of area that would be well-served by a Distributed Antenna System ("DAS"), which is identified as a new technology in Section 9a. of the Community Character Technical Report. Installation of DAS in a non-urban area such as

¹ James City County Comprehensive Plan at 94.

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James City County likely would require the construction of many new antenna poles and bulky facilities, which would be antithetical to the County's aesthetic goals. Other new technologies may be similarly inappropriate for use in the County.

As you may know, a DAS uses a number of smaller antennas, or nodes, linked by fiber optic lines in place of a single, larger cell site. DAS was initially developed as a way to provide coverage to relatively small, discrete areas such as airports or underground tunnels, where ordinary cell sites either could not be constructed or could not provide reliable coverage as a result of obstructions. DAS is ill-suited for providing reliable wireless coverage to large, open, non-urban areas such as the County, because to make the DAS function properly would require a large number of nodes. Each of these nodes would need to be located on an appropriate pole or building; since the majority of the County does not have the kind of infrastructure typical of a large, densely populated city, it is quite likely that new poles would need to be added for many, if not all, of the nodes. Indeed, because the County has adopted a strong preference that utility lines be constructed underground, the introduction of a DAS network would be at odds with this preference by requiring installation of a large number of unsightly poles for mounting DAS antennas. And, the backup power available at a typical DAS node is far less than that available at the typical cell site, decreasing the providers' ability to preserve service during emergencies. Verizon Wireless, for example, has a policy of using emergency generators to provide extended backup power at its cell sites wherever possible. To equip DAS facilities with similar and sufficient backup power for emergency situations, nodes would have to be supplemented with multiple cabinets of batteries or a generator, rendering those facilities similar in appearance to the "base stations" at standard cell sites. For these reasons, a DAS preference may actually be antithetical to the County's aesthetic goals, as it may end up replacing a small number of discreetly camouflaged wireless facilities with a much larger number of visually obtrusive installations.

A technology preference would also raise significant legal concerns.² The decision to use a DAS instead of a traditional cellular site is not simply one regarding placement of facilities. Rather, utilizing DAS to provide wireless service is a technology choice that carries with it significant engineering trade-offs. As a result, a DAS preference, or any preference for new or particular technologies, steps outside the bounds of traditional local zoning authority and into the area of the technical specifications and standards for wireless service. This relatively narrow but critically important field is wholly occupied by the federal government. Wireless phone service is a radio communication service, and as such has always been subject to pervasive and exclusive

² For convenience, we will discuss the legal concerns with mandating implementation of DAS as a concrete example. To the extent that other types of transmission technologies fall within the scope of the proposed preference, many or all of the same arguments would apply.

federal regulation. Indeed, in its first order relating to commercial cellular service, the Federal Communications Commission (“FCC”) made clear that uniform, national regulation was essential to the creation of a nationwide wireless infrastructure.³ To that end, the FCC has “assert[ed] federal primacy over the areas of technical standards and competitive market structure for cellular service,”⁴ and has stated without equivocation that state and local government entities cannot play any role in the adoption of technical standards for cellular service: “We affirm our preemption over the technical standards for cellular systems. We continue to regard this as being essential to the assurance of compatible operation of equipment on both local and national levels.”⁵ The FCC’s assertion of exclusive jurisdiction over the technical aspects of cellular service is consistent with the Supreme Court’s long-standing recognition that the Commission’s jurisdiction over the “technical matters” related to radio transmissions is “clearly exhaustive.”⁶ And the FCC has recently made clear that the regulatory powers of the FCC are at their zenith with respect to the technical standards for RF communications.⁷ A preference for DAS technology would thus exceed the bounds of permissible regulation of aesthetics and community character under the County’s traditional local zoning authority and intrude into the fully occupied field of technical standards for wireless communications.

Moreover, a County policy establishing a preference for DAS, or for any new or particular technology, would directly contradict the FCC’s judgment that carriers should be “provide[d] the maximum flexibility in technical standards so as to allow [personal wireless services] to develop in the most rapid, economically feasible, diverse manner.”⁸ Rather than permitting any flexibility in technical standards—much less “maximum” flexibility—a preference for new technologies would insert the County into the nuts and bolts of wireless system design and implementation. The FCC has expressly declined to pick technological winners and losers in the realm of telecommunications and has instead left that job to the

³ See, e.g., *Future Use of Frequency Band 806-960 MHz*, Second Report and Order, 46 F.C.C.2d 752, 766-67, ¶ 44 (1974); *Use of Bands 825-845 MHz and 870-890 MHz*, Report and Order, 86 F.C.C.2d 469, 503, ¶ 79 (1981).

⁴ 86 F.C.C.2d at 504-05, ¶ 82.

⁵ *Use of Bands 825-845 MHz and 870-890 MHz*, Memorandum Opinion and Order, 89 F.C.C. 2d 58, 95, ¶ 81 (1982).

⁶ *Head v. New Mexico Bd. of Exam'ers in Optometry*, 374 U.S. 424, 430 n.6 (1963)

⁷ FCC Br. at 2, 5, 9-10, *Murray v. Motorola*, No. 07-cv-1074 et al. (D.C. App. March 31, 2008).

⁸ *In re Amendment of the Comm'n's Rules to Establish New Pers. Commc'ns Servs.*, 8 F.C.C.R. 7700, 7755 ¶ 136 (1993).

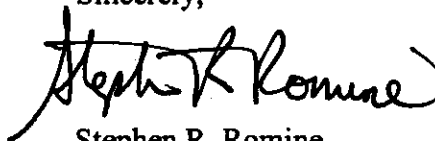
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competitive marketplace. A preference for new technologies would interfere with this overriding federal objective.⁹

In the end, there is simply no need for the Committee to adopt a potentially unlawful preference for new communications technologies that could be subject to the types of preemption challenges raised in on-going litigation in other jurisdictions.¹⁰ The ability of DAS or any similar technology to provide reliable wireless coverage with minimal aesthetic impact in James City County is questionable, and the County's current wireless facilities policy has been effective in meeting the County's needs. In short, the County's current policy works, and there is no need to change it, especially in a way that exceeds the County's authority under federal law.

Verizon Wireless would appreciate the opportunity to discuss these matters with you in further detail. We hope that Verizon Wireless and James City County will continue the strong cooperation we have had in the past, and we look forward to hearing from you. Thank you for your close attention to this matter.

Sincerely,



Stephen R. Romine

cc: ✓ Allen J. Murphy, Jr., Planning Director / Assistant Development Manager
Karin Riecker, Esquire
Marshall Pearsall
Catherine M. Faulkner

⁹ The Communications Act's prohibition of "entry" regulation is also of relevance here. See 47 U.S.C. § 332(c)(3)(A). A DAS preference would require Verizon Wireless and other wireless carriers to consider technological issues that they would not otherwise have to make and likewise impose procedural requirements based on the technology chosen that otherwise would not otherwise exist. Such requirements would clearly regulate the conditions under which wireless carriers may begin providing service and would likely be expressly preempted.

¹⁰ See, e.g., Compl., *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, No. 07-cv-7637 (S.D.N.Y. Aug. 28, 2007).

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