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## Via Electronic Mail

City of Portland  
Zoning Board of Appeals  
Portland City Hall, Room 315  
389 Congress Street  
Portland, Maine 04101

### **Re: Conditional Use Application, Verizon Wireless 1877 Congress Street**

Dear Chair Avery and Members of the Zoning Board of Appeals:

I am writing on behalf of Verizon Wireless, the current applicant seeking a conditional use approval to construct an equipment shelter, external generator and HVAC units on a parcel of land located at 1877 Congress Street in Portland, Maine (the "Property"). By way of procedural background, the application was submitted on October 21, 2015 and first heard by the Zoning Board of Appeals ("Board") during its December 3, 2015 meeting. Supplemental information requested by the Board was submitted on January 4, 2016. On January 14, 2016, Attorney Silk submitted a challenge to the conditional use determination of utility substation as applied to Verizon Wireless. The objection was submitted on behalf of two non-abutting residents of the River's Edge neighborhood in Portland.

The City has determined that Verizon Wireless' proposed facility is a "utility substation." The Portland Land Use Code (the "Land Use Code" or the "Code") lists Utility Substations as a conditional use within the R-2 Zone. Based on the plain language of the City's Code, and reading this term in a manner consistent with the overall statutory scheme, this interpretation is correct. Further, this interpretation is not new, and has been applied to other permitted facilities. Finally, Attorney Silk's proposed interpretation leads to absurd results, and would likely render the Code in violation of federal law.

#### **I. THE CITY HAS PROPERLY DETERMINED THAT VERIZON WIRELESS' FACILITY IS A "UTILITY SUBSTATION."**

The starting point for the interpretation of any statute or ordinance is the language of the statute itself. *Hutchinson v. Cary Plantation*, 2000 ME 129, ¶10, 755 A.2d 494, 497; *Murphy v. Bd. of Envtl. Prot.*, 615 A.2d 255, 258 (Me. 1992). Unless defined, words used in an ordinance must be given their plain, common and ordinary meaning. *Hutchinson*, 2000 ME 129, ¶10, 755 A.2d at 497; *Town of Orono v. LaPointe*, 1997 ME 185, ¶11, 698 A.2d 1059, 1062; *Apex Custom*

*Lease Corp. v. State Tax Assessor*, 677 A.2d 530, 533 (Me. 1996). Further, terms must be interpreted in a manner that is harmonious with the overall statutory scheme and does not lead to absurd results. *See Town of Arundel v. Swain*, 374 A.2d 317, 321 (Me. 1977).

The term “utility substation” is defined in the R-2 Zone to include,

...sewage and water pumping stations and standpipes, electric power substations, transformer stations, telephone electronic equipment enclosures, and other similar structures, provided that such uses are suitably screened and landscaped so as to ensure compatibility with the surrounding neighborhood.

Code Sec. 14-78(c)(1).

Verizon has proposed a structure that will house and enclose telephone electronic equipment associated with its wireless communications network.<sup>1</sup> Thus, based on the plain language of the Code, Verizon Wireless has proposed a “telephone electronic equipment enclosure,” which is a “utility substation.”

Attorney Silk does not dispute that Verizon Wireless has proposed a “telephone electronic equipment enclosure.” Instead, he claims that this facility is not a “utility substation” because in another section of the Code the term “utility substation” is defined as those structures operated by a “public utility” and Attorney Silk argues that Verizon Wireless is not a “public utility” regulated by the Maine Public Utility Commission. Although Attorney Silk is correct that Verizon Wireless is not regulated by the Maine PUC, this fact is irrelevant to the City’s interpretation of its Land Use Code for several reasons.<sup>2</sup>

First, although the term “public utility” is defined in Title 35-A of Maine’s Revised statutes, it is not defined in the Land Use Code. As such, the term must be given its plain, common and ordinary meaning. *Apex Custom Lease Corp.*, 677 A.2d at 533. The commonly accepted meaning of “public utility” is a business providing necessary services to the general public. *See* Utility, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “public utility”) (“A company that provides necessary services to the public, such as telephone lines and service, electricity, and water.”) Services provided by public utilities are necessary for the safety, economic vitality, and general functioning of society, such as water, electricity, telephone communication, natural gas, sewage, transportation, and other everyday necessities. Where “telephone communication” once implied hard-wired cables, the commonly accepted meaning now includes wireless telephones. Indeed, many residents rely on wireless phones as the

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<sup>1</sup> Verizon’s structure will have no antennae and it neither emits nor receives any wireless signals.

<sup>2</sup> Attorney Silk ignores the fact that the term “utility substation” in Division 3 (R-2) does not include the phrase “public utility.” Thus, based on the plain language of the Code, utility substations in the R-2 Zone are not limited to those owned by a public utility. More importantly, however, and as discussed below, even if the phrase “public utility” is read in to the text in Division 3, Attorney Silk’s interpretation is incorrect.

exclusive source of “telephone communication” within their homes. A wireless signal, just like electricity, sewage, and transportation, has become indispensable to the general functioning of today’s society, and has thus come to be understood as a “public utility” in the ordinary or commonly accepted meaning of the term.<sup>3</sup>

Second, this interpretation of “utility substation” is appropriate because such services are necessary everywhere in the City of Portland, and so they must be allowed in a broad area of the City. Attorney Silk argues that Verizon Wireless’ building should be characterized as a “telecommunication facility,” which facilities are only allowed in the B6 and B7 Zones. These zoning districts, however, only encompass about 10% of the area of the City of Portland.<sup>4</sup> This figure is significant because Attorney Silk’s interpretation of the Land Use Code would, in effect, exclude wireless telecommunications equipment from over 90 percent of the City of Portland. This interpretation would lead to absurd results, with wireless telecommunications companies being banned from providing adequate wireless service within the City.<sup>5</sup>

Third, the Land Use Code’s interpretation of “public utility” is not unique. Verizon Wireless recently permitted a similar structure in the Town of Wells, as a “Public Utility Facility.” Such facilities are defined in the Wells ordinance as “[a] building or structure necessary for the furnishing of publicly regulated utility services primarily within the Town of Wells...such as, but not limited to switching stations, relay stations, treatment facilities and pumping stations.” Arguably Wells’ definition, with the language “regulated utility services,” is narrower than the City’s term “utility substations.” Regardless, as wireless facilities must be permitted in broad areas of any municipality, the Town of Wells has interpreted its ordinance to include facilities such as the one proposed by Verizon Wireless.

In summary, given the clear legal standard provided by the Law Court, “public utility” must be given its commonly accepted meaning under the Land Use Code. Prudent policy design

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<sup>3</sup> The term “public utility” has been defined in Title 35-A to determine when the PUC may or may not exercise jurisdiction over a particular entity and how that entity will be regulated if jurisdiction is found. 35-A M.R.S.A. § 101. This provision has nothing to do with zoning or land use and a determination regarding the scope of the Maine PUC’s jurisdiction is not relevant to the discussion of whether a particular land use is permitted in the City’s R-2 Zone. Further, Attorney Silk is selective in his citation to other statutory provisions, ignoring zoning and land use laws and regulations that define “public utility” more broadly, to include entities that are not regulated by the Maine PUC. *See, e.g.*, 06-96 CMR Ch. 1000, § 16(5)(G) (Shoreland Zoning Regulations in reference to the installation of a public utility service: “A public utility, water district, sanitary district or any utility company of any kind...”); 30-A M.R.S.A. § 4406(3) (defining utility installation as “[a] public utility, water district, sanitary district or any utility company of any kind...”).

<sup>4</sup> Zone B-6 is a narrow strip of land, less than a half of a mile long and no more than a tenth of a mile wide, tucked into the northeastern corner of the Portland peninsula. *See* Portland Zoning Map. B-7 is an area roughly a half a mile square with Marginal Way running through its center. *Id.*

<sup>5</sup> Nor does the term “telecommunications facility” fit Verizon’s proposed development, as this term clearly contemplates a facility that receives and emits wireless signals. As noted above, this structure will do neither.

and precedent from other jurisdictions also supports this conclusion. Verizon satisfies the commonly accepted meaning of public utility and thus satisfies the definition of “utility substation” within the R-2 Zone. Verizon’s structure is precisely an enclosure of telephone electronic equipment and is, therefore, a lawfully permitted conditional use within the R-2 Zone.

II. IF THE CITY ADOPTED ATTORNEY SILK’S INTERPRETATION OF THE LAND USE CODE, THE CITY’S CODE WOULD BE IN VIOLATION OF FEDERAL LAW.

The Federal Telecommunications Act of 1996 states in relevant part, that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof -- shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C.A. § 332(a)(7)(B)(i) and (II).

As noted above, Attorney Silk argues that Verizon has proposed a “telecommunication facility,” not a utility substation and, therefore, this facility is not permitted except in the B-6 and B-7 Zones. Such an interpretation would prohibit wireless companies from installing equipment in nearly every area of the City, except those small zones. The effect of such an interpretation would be that the City’s Code would “prohibit or have the effect of prohibiting the provision of personal wireless services” within the City and would, therefore, violate the Telecommunications Act. *See Davis v. SBA Towers II, LLC*, 2009 ME 82, ¶3, 979 A.2d 86, 90 (“no ordinance may prohibit, or effectively prohibit” telecommunications facilities or the providing of telecommunication services). Local ordinances should not be interpreted in a manner that would render them unlawful or unconstitutional.

Nor is it necessary to do so. It is clear that the City of Portland has issued permits for numerous wireless facilities outside the B-6 and B-7 Zones. Just recently, in October of last year, the Board of Appeals issued a conditional use permit for a Verizon Wireless facility consisting of a 100 foot tall flagpole tower and related equipment located at the Grace Baptist Church on 476 Summit Street, Portland, Maine. The Grace Baptist Church is located in the R-2 Zone and the facility was permitted as a “utility substation.” Not only would Attorney Silk’s interpretation violate federal law, but it contradicts the City’s practice of regulating and permitting these important facilities.

In conclusion, for the foregoing reasons, we contend that the City’s characterization of the proposed Verizon Wireless facility as a “utility substation,” as that term is defined and used in the City’s Land Use Code is proper—and the only proper—interpretation.

Thank you and we look forward to continuing our discussion of this project with the Board.

Very truly yours,

  
Kelly B. Boden

cc: David Silk, Esq.