

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3
4 **VERIZON WIRELESS,**

5 **Appellant,**

6 **v.**

7 **CITY OF TACOMA, a Washington**
8 **municipal corporation, through its**

9 **LANDMARKS PRESERVATION**
10 **COMMISSION,**

11 **Respondent.**

HEX NO. 2017-022
(HDR19-0007)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

12 **THIS MATTER** came on for hearing before JEFF H. CAPELL, Hearing Examiner for
13 the City of Tacoma (the “City”), on October 31, 2019, in Tacoma. The hearing was held in the
14 City Council Chambers of the Tacoma Municipal Building, 747 Market Street, Tacoma,
15 Washington. The Examiner briefly visited the site that is the subject of this appeal—100 South
16 9th Street, Tacoma, Washington—the day before the hearing.

17 Appellant Verizon Wireless (“Appellant” or “Verizon”) appeared at the hearing through
18 Rick Cardoza, Project Manager, LDC, Inc., along with Matthew Painley (“Painley”), a Verizon
19 Wireless Radio Frequency Engineer. The City and its Landmarks Preservation Commission
20 (“LPC”) was represented by Deputy City Attorney Steve Victor, with the assistance of Laura
21 Hoogkamer, the City’s Assistant Historic Preservation Officer (herein “Hoogkamer”). Two

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1 additional City witnesses testified, Jeff Williams (“Williams”) and Lysa Schloesser
2 (“Schloesser”) who are present members of the LPC, both of whom participated in the LPC
3 decision being appealed.

4 During the hearing, both parties made reference to the “Spectrum Act,” which is a
5 commonly used name for certain sections (primarily section 6409) of the Middle Class Tax
6 Relief Act and Job Creation Act,¹ and the Telecommunications Act of 1996 (collectively herein
7 the “Federal Laws”).² As a result of these seemingly competing references, the Examiner
8 requested that the parties put in writing their respective positions regarding any application of
9 these Federal Laws to this appeal and submit them in memo or brief form by November 15,
10 2019. The record was held open for the parties’ submissions and initially closed upon receipt of
11 the parties submissions on the date just noted.

12 The Examiner re-opened the record, by his own request, on November 19, 2019, asking
13 that the parties submit any prior hearing examiner decisions dealing with the Subject Property
14 (defined below) regarding the rooftop telecommunications equipment that are in their
15 possession, as well as information regarding the LPC’s review of the expansion/modification of
16 the rooftop equipment in 2014 (as such was mentioned at the hearing). Verizon previously
17 submitted a 2011 LPC decision approving the “Installation of not more than six cell antennas
18 and its [sic] associated equipment onto the rooftop...” Verizon later confirmed that it was not
19 able to find any previous hearing examiner decisions on the Building (defined below) and the
20 Verizon equipment. The City did not provide any LPC information from the 2014
21 modifications to the Verizon equipment (nor did Verizon).

¹ Found at 42 U.S.C. § 1344(a).

² Found at Title 47 U.S.C.

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1 From the evidence and testimony presented, the Examiner enters the following:

2 **FINDINGS OF FACT:**

3 1. The Bowes Building (aka the “Tacoma Savings and Loan Building”), located at
4 100 South 9th Street in Tacoma, Washington (the “Subject Property” or the “Building”), is a
5 privately owned, commercial building in the north end of Tacoma’s downtown core built in
6 1909. Testimony described the Building as “low-profile,” “narrow,” and generally “small.” Its
7 location on South 9th Street puts it at or near the bottom of one of the many steep inclines that
8 constitute the Tacoma peninsula’s rise up from the waters of the Puget Sound. *Hoogkamer*
9 *Testimony, Williams Testimony, Schloesser Testimony; Ex. R-9.*

10 2. The Building appears to have been nominated locally for historic status on the
11 Tacoma Register of Historic Places in 1979. *Ex. R-9.* The recent LPC process leading to this
12 appeal refers to the Building as “an individual landmark on the Tacoma Register of Historic
13 Places.” *See e.g., Ex. R-3.*³ The Building is also referenced as being a significant example of
14 Beaux Arts Architecture, and as having been designed by prominent Tacoma architect Fredrick
15 Heath. *See e.g., Ex. R-9.*

16 3. Cardoza testified that Verizon first installed rooftop telecommunications
17 equipment (hereafter generically “RTE”) on the Building sometime after a 2007 to 2008
18 timeframe, and that such was installed only after the LPC denied a Certificate of Approval
19
20

21 ³ Hoogkamer testified that she thinks the Building is federally listed as well, but the City did not point to anything in the record that bears this out conclusively. Whether the Building is federally listed is not critical to this appeal. In its search for the prior Hearing Examiner decision that Verizon erroneously referenced during the hearing, the Hearing Examiner’s Office did find LPC Meeting Minutes from August 27, 2008 (the “8/27/2008 Minutes”), which make reference to the Subject Property being “on the Washington State and National Registers.”

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1 (“COA”), but the Hearing Examiner reversed that denial on appeal.⁴ Cardoza’s testimony was
2 unable to be corroborated by anything in City Records. While it is clear that at some point RTE
3 was approved for installation on the Building, it is not clear from the evidence presented in the
4 record of this appeal (or from available City records generally) when that approval first took
5 place, although it can be confirmed that it was no later than 2011.⁵

6 4. Cardoza further testified that Verizon last modified the RTE in 2014. His
7 understanding is that this modification never went to the LPC for its review and approval.
8 Schloesser testified that such was not the case, and that the LPC did review and approve the
9 2014 modification to the RTE, although no written record of this review and approval was
10 submitted by the LPC/City even after it was requested. While having the historical provenance
11 of the RTE fully sorted would be preferred, it is not essential to deciding the issue(s) presented
12 by this appeal.

13 5. In any event, the RTE has been functioning on the rooftop of the Building for
14 many years as part of Verizon’s communications network in the downtown Tacoma area. The
15 RTE is on the rooftop of the Building under the auspices of a lease that Verizon has with the
16 owner of the building. *Cardoza Testimony*. Cardoza testified that the lease has approximately
17 20 years remaining in its effective term.

18
19 ⁴ A Hearing Examiner decision in this time frame would have been made by a predecessor to the present
20 Examiner. The 8/27/2008 Minutes interestingly seem to reference an even earlier denial of a similar proposal on
the way also to denying the 2008 Verizon application by motion and vote of the LPC. The stated reason for the
2008 denial was due to visual impacts the equipment would have on the views of the Building.

21 ⁵ After the hearing, Hearing Examiner Office staff made a search of extant records along with a request to other
City departments. No 2007~2008 Hearing Examiner decision was found regarding the Building. Staff did come up
with the 8/27/2008 Minutes, as well as LPC Meeting Minutes from January 12, 2011 and February 9, 2011 (the
“2/9/2011 Minutes”). In the 2/9/2011 Minutes, the LPC approved the installation of RTE as set forth therein, and
this appears possibly to have been the first approval of RTE on the Building. This decision was finalized in a

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1 6. Dating back to 2008, Verizon has desired to have, and to update the RTE on the
2 Building based on Radio Frequency (“RF”) justification studies it has performed. *Painley*
3 *Testimony, Ex. A-7, Ex. A-8, See also 8/27/2008 Minutes.* Verizon refers to its location on the
4 Building as the “TAC Wheeler site.” *Painley Testimony, Ex. A-7, Ex. A-8.* Verizon’s RF
5 studies have shown the TAC Wheeler site to be vital to Verizon’s network coverage and
6 capacity in the area. *Id.* The requested COA under appeal here, and the revisions proposed to
7 the RTE thereunder, are designed to allow Verizon to increase its capacity (i.e., greater call
8 volume and data transmission) in the area served by its TAC Wheeler facilities (the RTE).
9 *Cardoza Testimony, Painley Testimony, Ex. A-7, Ex. A-8.* Verizon’s testimony regarding its
10 need for the expanded RTE to address current capacity deficiencies has not been challenged by
11 the City/LPC. *Id.*

12 7. The process leading to the current appeal began in earnest at the LPC’s April 24,
13 2019 meeting. *Cardoza Testimony, Williams Testimony, Schloesser Testimony; Ex. R-1,*
14 *Ex. R-2.* Verizon’s proposal was listed as “replacing six existing antennas and six remote radio
15 units (RRU) and adding three 5G panel antennas and three combined antenna/RRUs, two
16 overvoltage protectors (OVP) and two hybrid cables on the rooftop.” *Cardoza Testimony; Ex.*
17 *R-3.* At this meeting, LPC members expressed concerns about “[t]he placement [and height] of
18 the [proposed] antennas, asking if they could be placed lower and farther back from the edge.”
19 *Id.* Ultimately, the meeting ended with the LPC deferring a decision and asking that Verizon
20 “[r]eturn[] at a future date with more information about the feasibility of lowering and moving
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formal decision memo from the City’s Historic Preservation Officer on February 10, 2011. This decision memo was submitted by Verizon as part of its post hearing materials.

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1 panels for less visibility.” *Ex. R-1*. Among other things, Verizon gleaned from this meeting that
2 the LPC was concerned about too much “daylight” (i.e., open visibility) being present between
3 the panels proposed on the rooftop, and that the LPC did not want Verizon to make repeated
4 return trips to the LPC with RTE modification requests at short intervals.⁶ *Cardoza Testimony*.

5 8. Between this first meeting and Verizon’s return trip to the LPC on August 14,
6 2019, Verizon revised its design and proposal to incorporate *more* facilities in order potentially
7 to decrease the need for a sooner return in the future. *Cardoza Testimony*. The LPC’s meeting
8 minutes remark that “the updated proposal was made to include all new technologies to avoid
9 future addition of equipment to the building.” *Ex. R-6*. That notwithstanding, the listing of
10 equipment for Verizon’s proposal in all of the August 2019 documentation (the LP Packet [*Ex.*
11 *R-4*], the LPC Minutes [*Ex. R-6*], and the Decision being appealed [*Ex. R-8*]), all read the same
12 as what was considered the previous April. Cardoza testified, however, that Verizon had added
13 three more panel antennas for MIMO (multiple input, multiple output), three 5g antennas and
14 three 5g RRUs. The additions were intended to enable AWS-3 and CBRS frequency bands at
15 the TAC Wheeler site. *Cardoza Testimony*. Cardoza testified additionally that the positioning
16 of the various panel antennas had been revised to reduce daylight visibility between the panels
17 as much as possible, but he acknowledged that from a size, height, and numbers standpoint, the
18 overall proposal had increased.

19 9. At the August 14, 2019 LPC meeting, Verizon presented its expanded design with
20 only one of the antennas having been lowered in height from where it was positioned in the

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⁶ The parties’ testimony was in agreement that Verizon’s last modification took place in 2014. For historic preservation professionals, five years no doubt seems like a very short time in the grand scheme. Contrarily, to those in the technology fields, five years must seem like an aeon.

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1 April 2019 design. *Ex. R-5*. At least one commissioner commented, “If you can’t lower them
2 all, what’s the point.” *Id.* Another commissioner mused about whether the new proposal was
3 “all that much worse than what was there before,” while others characterized it as a significant
4 and obvious change saying that the RTE “is bad now, and this [proposal] only makes it worse.”
5 *Id.* There were also pointed comments made that Verizon should look to place its RTE
6 elsewhere (i.e., relocate it off the Building).⁷ *Id.* Discussion at both the August 2019 LPC
7 meeting and testimony at the hearing made it clear that the LPC’s concern about the RTE rests
8 squarely on the height of the RTE and its visibility from the rooftop of the Building.⁸
9 Ultimately, the August 2019 LPC meeting resulted in a unanimous vote by the commissioners
10 present to deny the COA. *Ex. R-5, Ex. R-6*. The LPC decision was based on application of the
11 federal Secretary of the Interior's Standards for the Rehabilitation of Historic Buildings (the
12 “Federal Rehab Standards”), paragraph 9, which provides as follows:

13 New additions, exterior alterations or related new construction shall not destroy
14 historic materials that characterize the property. The new work shall be
15 differentiated from the old and shall be compatible with the massing, size, scale,
and architectural features to protect the historic integrity of the property and its
environment.

16 Hoogkamer testified that the City/LPC considers any change that modernizes or even modifies
17 an historic building in any way to be a rehabilitation, and therefore, the City/LPC applies the
18 Federal Rehab Standards to all applications.⁹ The LPC’s specific decision language in this
19 instance stated:

20 _____
21 ⁷ Hoogkamer reinforced this sentiment in her testimony at the hearing.

⁸ Which concern seems to be consistent with all LPC reviews dating back to 2008.

⁹ On questioning from the Examiner, Hoogkamer was unsure if the TMC defined “rehabilitation” as it applies to this appeal. At the time, the Examiner was also unsure. As it turns out, TMC 13.07.030 defines “rehabilitation” thusly: “Rehabilitation” means the act or process of making possible a compatible use for a property through

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- 1 1. The proposal did not meet Standard 9 as it was not compatible with the
2 massing, size, scale, and architectural features to protect the historic integrity of
3 the property and its environment.
- 4 2. The Commission commented that as this was a smaller, three-story building,
5 the proposal was not compatible in massing and scale. *Ex. R-8.*

6 The decision was clarified at the hearing in the testimony of Williams and Schloesser, which
7 made it clear that the height of the RTE, and the resulting visibility of the RTE from the street
8 and surrounding neighborhood are the basis of the LPC's denial.

9 10. At the August 2019 presentation to the LPC, Verizon represented that its design
10 could go no lower and still achieve the increased capacity that Verizon is seeking. *Ex. R-5.* At
11 the hearing, in response to questioning, Painley testified similarly that the height of the
12 proposed RTE could not go lower and still achieve Verizon's capacity needs. That
13 notwithstanding, a few minutes later, Cardoza testified that after the LPC issued its denial,
14 Verizon had come up with an alternative design that would lower the height of the proposed
15 RTE, but that Verizon wanted a decision on the appeal as presented rather than go back to the
16 LPC with this new design proposal first. Cardoza further testified that Verizon has some
17 concerns about this alternative lower proposal due to LPC restrictions from 2011 regarding
18 attachment to the parapets of the Building. Finally, in its post-hearing submission regarding the
19 applicability of federal laws, Verizon stated "[t]here currently is not an alternative design that is
20 available to Verizon based on LPC actions to date." This was stated immediately following
21 Verizon's renewed mention of the 2011 LPC concerns regarding the Building's parapets, and

repair, alterations, and additions while preserving those portions or features which convey its historical, cultural, or architectural values."

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1 appears to be based on Verizon's presumed limitation regarding them drawn from the 2011
2 LPC decision.

3 11. At the Examiner's request, both parties submitted post-hearing memos regarding
4 the Federal Laws mentioned briefly at the hearing.¹⁰ Verizon's memo had sections purporting
5 to address all of the following:

- 6 1. Telecommunications Act of 1996
- 7 2. Spectrum Act - 6409
- 8 3. FCC 18-133 – Small Wireless Facilities. (*Listed here exactly as presented in
9 Verizon's memo*)

10 After its brief discussion of each of the above, Verizon included a "Comments" section
11 seemingly attempting to draw a conclusion on its preceding assertions. As will be discussed in
12 more detail in the Conclusions of Law section below, Verizon's conclusions were equivocal in
13 each instance.

14 12. For its part, the City's memo addressed "Section 6409(a) of the Spectrum Act,
15 "Section 332(c)(7) of the Communications Act,"¹¹ and a Federal Communications Commission
16 ("FCC") Order now codified at 47 C.F.R. § 1.6100. The City's memo concluded by contending
17 that "[f]ederal law does not affect the outcome of this appeal."

18 13. Any conclusion herein which may be more properly deemed or considered a
19 finding is hereby adopted as such.

20 CONCLUSIONS OF LAW

- 21 1. The Hearing Examiner has jurisdiction in this matter pursuant to Tacoma

¹⁰ These submissions are in the record, but are not considered exhibits and are not referenced as such.

¹¹ Also referred to as the "Telecommunications Act."

1 Municipal Code (“TMC”) 1.23.050 and TMC 13.05.047.

2 2. Under TMC 13.05.047.G.4, the Hearing Examiner is to “consider” the following
3 criteria in reviewing a decision of the LPC:

4 a. The purposes, guidelines, and standards for the treatment of historic properties
5 contained in this Title, and the goals and policies contained in the Historic
6 Preservation Element of the Comprehensive Plan;¹²

7 b. The purpose of the ordinance under which each Historic Special Review or
8 Conservation District is created;

9 c. For individual City landmarks, the extent to which the proposal contained in the
10 application for Certificate of Approval would adversely affect the specific features
11 or characteristics specified in the nomination to the Tacoma Register of Historic
12 Places;

13 d. The reasonableness, or lack thereof, of the proposal contained in the application
14 in light of other alternatives available to achieve the objectives of the owner and
15 the applicant; and

16 e. The extent to which the proposal contained in the application may be necessary
17 to meet the requirements of any other law, statute, regulation, code, or ordinance.

18 Each of these criteria will be discussed, as applicable, in turn below.

19 3. In addition to the foregoing review criteria, TMC 13.05.047.G.4 instructs the
20 Hearing Examiner to “[g]ive weight to the determination and testimony of the consensus of the
21 Landmarks Preservation Commission...”¹³ The foregoing notwithstanding, the Hearing
22 Examiner’s review is *de novo*. TMC 1.23.060.

4. Appellant Verizon has the burden of demonstrating that the LPC’s denial of

¹² Hereinafter referred to simply as the “Comp Plan.”

¹³ The LPC is composed of individuals having expertise in architecture (three positions), historic preservation (four positions), a Tacoma Arts Commission appointee, and three “At-Large” positions. TMC 1.42.040.