OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

VERIZON WIRELESS,

Appellant,

v.

CITY OF TACOMA, a Washington municipal corporation, through its

LANDMARKS PRESERVATION COMMISSION,

Respondent.

HEX NO. 2017-022
(HDR19-0007)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

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

Appellant Verizon Wireless (“Appellant” or “Verizon”) appeared at the hearing through Rick Cardoza, Project Manager, LDC, Inc., along with Matthew Painley (“Painley”), a Verizon Wireless Radio Frequency Engineer. The City and its Landmarks Preservation Commission (“LPC”) was represented by Deputy City Attorney Steve Victor, with the assistance of Laura Hoogkamer, the City’s Assistant Historic Preservation Officer (herein “Hoogkamer”). Two
additional City witnesses testified, Jeff Williams ("Williams") and Lysa Schloesser
("Schloesser") who are present members of the LPC, both of whom participated in the LPC
decision being appealed.

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

The Examiner re-opened the record, by his own request, on November 19, 2019, asking
that the parties submit any prior hearing examiner decisions dealing with the Subject Property
(defined below) regarding the rooftop telecommunications equipment that are in their
possession, as well as information regarding the LPC’s review of the expansion/modified of
the rooftop equipment in 2014 (as such was mentioned at the hearing). Verizon previously
submitted a 2011 LPC decision approving the “Installation of not more than six cell antennas
and its [sic] associated equipment onto the rooftop…” Verizon later confirmed that it was not
able to find any previous hearing examiner decisions on the Building (defined below) and the
Verizon equipment. The City did not provide any LPC information from the 2014
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.
From the evidence and testimony presented, the Examiner enters the following:

FINDINGS OF FACT:

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

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

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

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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.”

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER - 3 -
(“COA”), but the Hearing Examiner reversed that denial on appeal. 4 Cardoza’s testimony was unable to be corroborated by anything in City Records. While it is clear that at some point RTE was approved for installation on the Building, it is not clear from the evidence presented in the record of this appeal (or from available City records generally) when that approval first took place, although it can be confirmed that it was no later than 2011. 5

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

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

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4 A Hearing Examiner decision in this time frame would have been made by a predecessor to the present 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.

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

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

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

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FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

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

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

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

\footnote{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 acon.}

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 6 -
April 2019 design. Ex. R-5. At least one commissioner commented, “If you can’t lower them all, what’s the point.” Id. Another commissioner mused about whether the new proposal was “all that much worse than what was there before,” while others characterized it as a significant and obvious change saying that the RTE “is bad now, and this [proposal] only makes it worse.”

Id. There were also pointed comments made that Verizon should look to place its RTE elsewhere (i.e., relocate it off the Building). Id. Discussion at both the August 2019 LPC meeting and testimony at the hearing made it clear that the LPC’s concern about the RTE rests squarely on the height of the RTE and its visibility from the rooftop of the Building.

Ultimately, the August 2019 LPC meeting resulted in a unanimous vote by the commissioners present to deny the COA. Ex. R-5, Ex. R-6. The LPC decision was based on application of the federal Secretary of the Interior’s Standards for the Rehabilitation of Historic Buildings (the “Federal Rehab Standards”), paragraph 9, which provides as follows:

New additions, exterior alterations or related new construction shall not destroy historic materials that characterize the property. The new work shall be 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.

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

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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
1. The proposal did not meet Standard 9 as it was not compatible with the
massing, size, scale, and architectural features to protect the historic integrity of
the property and its environment.

2. The Commission commented that as this was a smaller, three-story building,
the proposal was not compatible in massing and scale. Ex. R-8.

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

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

11. At the Examiner’s request, both parties submitted post-hearing memos regarding the Federal Laws mentioned briefly at the hearing.\textsuperscript{10} Verizon’s memo had sections purporting to address all of the following:

1. Telecommunications Act of 1996
2. Spectrum Act - 6409
3. FCC 18-133 – Small Wireless Facilities. (\textit{Listed here exactly as presented in Verizon's memo})

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

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

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

CONCLUSIONS OF LAW

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

\textsuperscript{10} These submissions are in the record, but are not considered exhibits and are not referenced as such.
\textsuperscript{11} Also referred to as the “Telecommunications Act.”
2. Under TMC 13.05.047.G.4, the Hearing Examiner is to “consider” the following criteria in reviewing a decision of the LPC:

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

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

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

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

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

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

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

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

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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.
Verizon’s request for a COA was in error or otherwise inconsistent with applicable standards and, therefore, should be reversed. TMC 1.23.070.C.

5. The LPC’s denial centered squarely on the identical language of Federal Rehab Standard 9 and TMC 13.07.095.A.1.i, which states:

New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be 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.14

Regardless of whether they were added in an attempt to lengthen any return period to the LPC,16 Verizon’s additions to the RTE are new additions under Federal Rehab Standard 9 and TMC 13.07.095.A.1.i. As such, the additions must “be compatible with the massing, size, scale, and architectural features” of the Building. As the LPC’s discussion (Exs. R-2 and R-5)

14 In other words, the LPC found no other provisions of the Federal Rehab Standards or the TMC that Verizon’s proposal violated.
15 For what it is worth, the Examiner finds the City’s universal application of the Federal Rehab Standards to any change to an historic building to be slightly awkward and perhaps not the intention of the TMC regardless of current practice. TMC 13.07.095.A.1 introduces the City codification of the Federal Rehab Standards indicating that they “[a]re to be applied to specific rehabilitation projects in a reasonable manner...” [Emphasis added] After codifying the Federal Rehab Standards, TMC 13.07.095.A.2 states that “For specific projects that involve Restoration, Preservation, or Reconstruction, the Secretary of the Interior’s Standards for Rehabilitation, Restoration, Preservation, and Reconstruction, may be applied as appropriate to the proposed project.” This provision seems to indicate that the other federal standards, i.e., those for Restoration, Preservation, and Reconstruction may have a better application for some projects and perhaps not every change to an historic building should necessarily be considered a rehabilitation. Admittedly, the definition of rehabilitation at TMC 13.07.030 appears to be very broad. That notwithstanding, in Verizon’s proposal to modify the RTE, no part of the Building itself is being rehabilitated in a lay definition sense. The RTE seem somewhat akin to Abraham Lincoln’s stovepipe hat. The hat goes on top. Wearing it changes nothing permanent about the historically significant person below, and the hat can be removed without damage to the wearer. The hat may be seen as an aesthetically undesirable affectation to the dignified historic wearer, but it ultimately does nothing to change the historic person underneath, much as the RTE do not affect the Building in any irreversible fashion.
16 It should be noted that the LPC cited no authority for requiring Verizon to not come back “repeatedly” to obtain further modifications to the RTE other than the LPC’s personal preferences. Technology changes, often rapidly. Other than complying with applicable laws, nothing should prevent Verizon from being heard regarding additional modifications. The LPC is governed by applicable laws the same as any applicant before it, personal predilections notwithstanding.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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and hearing testimony clearly indicate, the LPC’s denial was solely due to the proposal’s
increased visibility on the rooftop of the Building as a function of increased size and mass. All
testimony and evidence seemed to indicate that increased size and mass that would not impact
views would not matter to the LPC, although that hypothetical was not asked or otherwise
directly addressed. Giving all due deference to the LPC, three of the four views presented in
Exhibit A-5—Northeast View (Looking Southwest), Northwest View (Looking Southeast), and
the Fireman’s Park and A Street view17—do not present a significant enough visual change to
warrant denying the COA. The Southwest view (from Court A and 939 Court Parking),
however, is a different story. The visible change here is significant enough to support the
LPC’s denial.

6. Turning now to the considerations in TMC 13.05.047.G.4, the Examiner
concludes as follows:

6.a. TMC 13.05.047.G.4.a.—The purposes, guidelines, and standards for the
treatment of historic properties contained in this Title, and the goals and policies
contained in the Historic Preservation Element of the Comprehensive Plan.

The purposes, guidelines, and standards for the treatment of historic properties
contained in TMC Title 13 are many and varied. The primary purpose statements regarding
historic preservation found in Title 13 are set forth at TMC 13.05.045 and TMC 13.07.020.
Add to that mix the purposes, guidelines, and standards from the Historic Preservation Plan

17 Although the photos from Fireman’s Park and A Street are somewhat interesting because the RTE seem to
washout in the background buildings farther south producing a somewhat camouflaging effect.
element of the Comp Plan, and the field gets many times broader.\footnote{The Historic Preservation Plan element of the Comp Plan is essentially the City's all-encompassing policy statement on historic preservation and spans 158 pages.} As with many policy statements, the broader they get, the more there is that potentially conflicts. TMC 13.07.020 presents the most usable and concise summary statement of the many and varied purposes, guidelines and standards of the TMC and the Comp Plan and reads as follows:

The purpose of this chapter is to:

A. Preserve and protect historic resources, including both designated City landmarks and historic resources which are eligible for state, local, or national listing;

B. Establish and maintain an open and public process for the designation and maintenance of City landmarks and other historic resources which represent the history of architecture and culture of the City and the nation, and to apply historic preservation standards and guidelines to individual projects fairly and equitably;

C. Promote economic development in the City through the adaptive reuse of historic buildings, structures, and districts;

D. Conserve and enhance the physical and natural beauty of Tacoma through the development of policies that protect historically compatible settings for such buildings, places, and districts;

E. Comply with the state Environmental Policy Act by preserving important historic, cultural, and natural aspects of our national heritage; and [sic]

F. To promote preservation compatible practices related to cultural, economic and environmental sustainability, including: conservation of resources through retention and enhancement of existing building stock, reduction of impacts to the waste stream resulting from construction activities, promotion of energy conservation, stimulation of job growth in rehabilitation industries, and promotion of Heritage Tourism;

G. To contribute to a healthy population by encouraging human scale development and preservation activities, including walkable neighborhoods; and
H. Integrate the historic preservation goals of the state Growth Management Act and the goals and objectives set forth in the City’s Comprehensive Plan and regulatory language.

As discussed a bit at FN 15 above, the RTE on the building, and the LPC’s approach to approvals at this location are a somewhat interesting case because the RTE are an attached, and ultimately removable addition to the Building that does not alter the Building itself, except perhaps visually. The RTE, at present, and even as proposed, do nothing to cause actual, physical harm to the historic resource that is the Building/Subject Property (subsections A, D, E, F and H of TMC 13.07.020 above). In fact, the RTE does not alter any historic aspect of the building physically whatsoever. The presence of the RTE on the rooftop does change the Building’s overall appearance, however, because the RTE is/are visible.

Similarly, the ongoing preservation of the Building is neither harmed nor enhanced structurally by the presence of the RTE (Id). Alternatively, allowing the latest and best RTE to be installed on the Building can certainly be seen as “Promot[ing] economic development in the City through the adaptive reuse of historic buildings,...” and no doubt the income that the owner of the Building receives from Verizon’s leased presence on the rooftop contributes to the capital that enables the Building’s prolonged preservation (subsections C and F above). All that is to say that the presence of the RTE on the Building and allowing their expansion can be seen as in harmony with some purposes, guidelines, and standards for the treatment of historic properties, and not in harmony with others. If this criterion were the lynchpin of this decision, perhaps a more in depth weighing of the pros and cons of purposes, guidelines, and standards

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19 Subsections B (“Establish and maintain an open and public process...”) and G (“To contribute to a healthy population”) do not have much application here.
would be warranted. This criterion is not the core of the decision in this appeal, however. As it
stands this criterion can be considered a neutral wash.

6.b. TMC 13.05.047.G.4.b.—The purpose of the ordinance under which each
Historic Special Review or Conservation District is created.

This criterion is not applicable here. The LPC’s authority in this particular COA
application comes from the Building being individually listed on the Tacoma Register of
Historic Places, not from the Building being located in an Historic Special Review or
Conservation District.

6.c. TMC 13.05.047.G.4.c.—For individual City landmarks, the extent to which
the proposal contained in the application for Certificate of Approval would
adversely affect the specific features or characteristics specified in the nomination
to the Tacoma Register of Historic Places.

This criterion is the flipside to TMC 13.05.047.G.4.b. It is directly applicable to the
Building/Subject Property because it is an individually listed “City landmark[". As is likely
the case with most historic buildings, the specific features or characteristics specified in the
nomination to the Tacoma Register of Historic Places for this individual City landmark have
their greatest ties to actual architectural features of the building, FoF 1 and FoF 2. In the
Nomination Form for the Building/Subject Property, some mention is made regarding the
surrounding neighborhood and the Building’s relationship to that area historically as well.

As has already been discussed, the RTE do not alter, damage, or otherwise physically
affect any specific features or characteristics of the structure of the Building as specified in the
nomination to the Tacoma Register of Historic Places. The RTE do, however, affect the overall

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20 Ex. R-9.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER
visual appearance of the Building, and Verizon’s proposed new additions will appreciably add to that visual impact, at least from southerly vantage points (i.e., the view from Court A and 939 Court Parking referenced at CoL 5). To the extent that these visual impacts, even though not a permanent, unremovable part of the historic Building, can be further mitigated, they should be.\textsuperscript{21} This goes hand-in-hand with the next criterion.

\textbf{6.d. TMC 13.05.047.G.4.d.}—The reasonableness, or lack thereof, of the proposal contained in the application in light of other alternatives available to achieve the objectives of the owner and the applicant.

Throughout the course of the two LPC meetings (April and August 2019) and the hearing, much discussion and testimony focused on whether the visibility of the RTE could be reduced in Verizon’s proposal while still achieving Verizon’s objectives. At its April 2019 meeting, the LPC specifically called on Verizon to explore the availability of lower, and therefore less visible, configurations. Verizon only lowered the height of one of its proposed masts. Verizon’s August 2019 proposal, which is the one on appeal here, was loaded up, so to speak, in Verizon’s attempt to lengthen the period between this LPC request and any subsequent request to modify the RTE. This approach was not unreasonable given the LPC’s comments regarding its preference that Verizon not make repeat requests at what the LPC perceived to be short intervals. FoF 7. The reasonableness of the loaded up approach does not change the visual impacts arising from the new additions and the increase in size of the RTE that results, however.

\textsuperscript{21} Testimony at the hearing showed both that (a) Verizon is used to mitigating visual impacts through screening, and (b) that the LPC has an uncodified preference to avoid the use of screening because it is seen as adding mass, size, and scale.

\textbf{FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER}
Throughout this same period, the LPC has proposed relocation of the RTE to another location. While it may be the LPC’s preference essentially to backtrack and have no RTE on this Building, in light of (a) Verizon’s investment in the RTE as presently constituted on the Building, (b) the term remaining on Verizon’s lease, and (c) Verizon’s RF studies, outright relocation is not a reasonably available alternative based on the record presented.

At the hearing, Cardoza did indicate that Verizon had an alternative design that it came up with after the LPC’s August 2019 denial that would reduce the height of the RTE. If this alternative design can achieve Verizon’s objectives while decreasing the visual impacts on which the LPC based its denial, the alternative design needs to be considered under TMC 13.05.047.G.4.d, and the LPC should give that alternative design serious consideration in light of this decision. The Examiner understands Verizon’s concerns regarding “use of the parapets” stemming back to the 2011 LPC approval. Eight years have passed since that approval, and the LPC’s present denial rests squarely on added height and visibility. With the alternative lower design before the LPC, the LPC and Verizon may very well find an avenue for compromise.

In any event, in light of the south facing material change in visual impacts presented by the proposal under appeal, TMC 13.05.047.G.4.d dictates that Verizon’s lower alternative design needs to be considered as an alternative to the present proposal that the LPC denied. This criterion weighs against Verizon’s requested reversal without having first sufficiently considered the new, alternative design.

6.e. TMC 13.05.047.G.4.e.—The extent to which the proposal contained in the application may be necessary to meet the requirements of any other law, statute, regulation, code, or ordinance.
Application of the Federal Laws

Without the parties’ brief mention at the hearing of the Federal Laws, this criterion would have had no application here and been without any support in the record. The discussion that follows comes from the parties’ post hearing memos. Cardoza stated in closing at the hearing that he would make Verizon’s best case for the application of the Federal Laws to both replacement antennas and small cell facilities. Verizon’s memo is taken in that light.

As mentioned above, in its memo, Verizon supplied content from various sections of the Federal Laws followed by “Comments.” After referencing content from the “Telecommunications Act of 1996” that disallows local regulations from prohibiting or having the effect of prohibiting the provision of telecommunications services, Verizon posits that it has established “the need for the site” through its RF studies. Verizon’s need has not been questioned. Verizon’s level of need, however, does not equate to a prohibition of services even if the RTE are not updated based on present technological needs. Verizon is providing telecommunications services from the TAC Wheeler site and presumably can continue to do so, just not at its optimal capacity level if the LPC’s denial stays in place. If being frozen at current capacity constitutes a prohibition, Verizon did not prove that such is the case under applicable laws as applied to the facts here by a preponderance of the evidence as required by TMC 1.23.070.

In its memo’s second section, Verizon turns to the Spectrum Act and its concept of what is, and is not, a “Substantial Change.” While this is informative, Verizon does not supply any analysis of this content against its existing/proposed RTE. Verizon then concludes in its
“Comments” section that (a) “Verizon believes the site may qualify as a 6409 ‘Eligible Facility...” [emphasis added], and (b) “Verizon believes the proposal does not meet the criteria of the FCC’s definition of a ‘Substantial Change.’”\textsuperscript{22} Verizon’s beliefs aside, in order for the Examiner to reverse the LPC’s denial based on any other law, statute, regulation, code, or ordinance, there must be evidence and analysis that rises to a preponderance showing such a reversal to be warranted. That analysis—matching the facts present to applicable laws—is missing here. The Examiner evaluates the parties’ evidence and arguments, but he does not supply missing analysis not presented by the parties themselves.

In its last section addressing Small Wireless Facilities, Verizon begins by saying “There are 2 potentially applicable FCC Clarifications and Rules that might apply per reference to 5G or Small Wireless Facilities equipment in the record...” [emphasis added] Whether these “FCC Clarifications and Rules” apply is for Verizon to argue and support that argument convincingly, applying facts supported by a preponderance of the evidence to applicable laws. Verizon has not done so here. As a result, the Examiner concludes that the criterion set forth at TMC 13.05.047.G.4.d is not met and does not provide grounds for reversing the LPC’s decision.

7. Any finding herein which may be deemed a conclusion is hereby adopted as such.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner enters the following:

\textsuperscript{22} Verizon has an additional statement in this Comments section regarding existing concealment elements which is puzzling. At the hearing and previously at LPC meetings, Verizon brought up the subject of screening for the RTE and was shot down quickly, as already referenced above. There was no evidence offered regarding any existing screening with the RTE at present.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
ORDER

The Landmarks Preservation Commission’s decision denying a certificate of approval (COA) to Verizon’s proposed revisions and additions to its rooftop telecommunications equipment (the RTE) at the Bowes Building located at 100 South 9th Street in Tacoma, Washington (the Building) is upheld because the visual impacts from southern vantage points resulting from increases to the mass, size, and scale of the RTE are no longer compatible enough with the mass, size, scale and architectural features of the Building (TMC 13.07.095.A.1.i.) to be approved as presented, and because Verizon has not fully explored a potentially reasonable alternative that may be able to achieve its objectives (TMC 13.05.047.G.4.d.) while reducing mass, size and scale incompatibility present in the project as proposed.

Given the foregoing, Verizon’s application for a COA is remanded to the LPC in order for Verizon to present its alternative design for consideration. The remand shall be considered an extension and continuation of the process begun in April of 2019 and any waiting period, and reapplication filing or fees that might otherwise apply are waived. In the event that Verizon chooses not to present the alternative design to which it alluded at the hearing, the LPC’s denial of a COA shall stand and be considered the City’s final decision on this COA application.

DATED this 5th day of December, 2019.

JEFF H. CAPELL, Hearing Examiner

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
NOTICE

RECONSIDERATION/APPEAL OF EXAMINER’S DECISION

RECONSIDERATION:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Hearing Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Hearing Examiner. It shall be within the sole discretion of the Hearing Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Hearing Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (Tacoma Municipal Code 1.23.140).

NOTICE

APPEAL TO SUPERIOR COURT OF EXAMINER’S DECISION

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160 and RCW 36.70C.040, the Hearing Examiner's decision may be appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner likely must be commenced within 21 days of the entering of the decision by the Hearing Examiner, unless otherwise provided by statute.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER