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July 2, 2012

VIA EMAIL ONLY

Mercy G. Cabral
Deputy City Clerk
City of Martinez
525 Henrietta Street
Martinez, CA 94553

Re: Appeal of Planning Commission's Determination Regarding Proposed Verizon Cell Phone Tower to be Located at 814 Carter Acres Lane

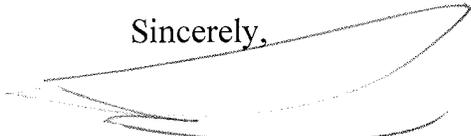
Dear Ms. Cabral:

This office is legal counsel for the parties appealing the Martinez Planning Commission determination referenced above. I will be appearing on their behalf at the hearing on this appeal set for July 11, 2012 at 7:00 p.m. in the Council Chambers at City Hall. Please include this office on any future communications regarding this matter.

The following is an outline of the reasons why the Planning Commission's determination should be reversed. I am submitting herewith under separate cover an Appendix with copies of the relevant statutes and cases cited. Please include the Outline and Appendix in the agenda packets distributed.

Thank you.

Sincerely,



Ari J. Lauer

OUTLINE

I. DUE PROCESS VIOLATION BY PLANNING COMMISSION

A. Due Process Equals Notice and Opportunity to be Heard

California Government Code section 54954 (part of the Brown Act) requires the Planning Commission to provide notice by posting an agenda at least 72 hours prior to the meeting. Neither the Notice of Public Hearing nor the Agenda (*Exhibits A and B*) mention the Telecommunications Act and possible preemption. Possible CEQA exemption is the description provided for the issue at the hearing.

B. The Planning Commission's 4/24/12 Agenda and Notice Were Insufficient Under Brown Act

Government Code section 54954.2(a) requires the local agency to post an agenda "containing a brief general description of each item of business to be transacted or discussed at the meeting." What constitutes a sufficient specification or description of the business was at issue in *Moreno v. City of King* (2005) 127 Cal.App.4th 17. In *Moreno*, the Court held the agenda description "Public Employee (employment contract)" was insufficient when it was the employee's termination that was at issue. The Court explained "The agenda's description provided no clue that the dismissal of a public employee would be discussed at the meeting." (117 Cal.App.4th @ 27.) Likewise, here the Planning Commission's agenda provided no clue that preemption by the Telecommunications Act would be at issue.

C. A New Meeting with Proper Notice and Agenda Are Necessary to Comply with the Brown Act.

The Planning Commission's decision should be set aside and another meeting noticed with a proper agenda in compliance with the Brown Act.

II. THE TELECOMMUNICATIONS ACT DOES NOT PREEMPT THE CITY FROM REVIEW

A. The Telecommunications Act Expressly Provides for the Regulation of Cell Site Locations By City Government

Section 332(c)(7)(A) of the Telecommunications Act preserves the City's authority over zoning decisions regarding placement and construction of wireless service facilities.¹

¹ There are enumerated exceptions in §332(c)(7)(B), none of which apply here.

B. The Courts Interpret the Telecommunications Act As Subject to Local Zoning

The courts have approved a wide variety of grounds upon which a local jurisdiction may regulate the siting of a cell phone tower notwithstanding the Telecommunications Act.

In *MetroPCS, Inc. v. City of San Francisco* (9th Cir. 2005) 400 F.3d 715 (*Exhibit C*), the San Francisco Board of Supervisors denied MetroPCS permission to construct a wireless communications antenna atop a parking garage. MetroPCS argued the decision of the Board of Supervisors violated the Telecommunications Act. Similar to the matter before the Council, MetroPCS' application for a use permit was approved by the local planning commission, and then appealed.

The San Francisco Board of Supervisors unanimously voted to overturn the Planning Commission's decision, finding (i) the antenna is not necessary since there is already adequate wireless service in the neighborhood; (ii) the proposed facility would constitute a "visual and industrial blight" and would be detrimental to the character of the neighborhood; and (iii) the proposed antenna facility is not in conformity with and would not further the policies of the City's General Plan.

The Martinez Planning Commission failed to consider any of the foregoing factors, instead erroneously concluding its decision was preempted by the TCA.

III. THE PLANNING COMMISSION FAILED TO FOLLOW THE MARTINEZ MUNICIPAL CODE AND ITS OWN POLICIES AND PROCEDURES

A. The Planning Commission Failed to Review The Permit Application Under Martinez Municipal Code Chapter 22.39

Martinez Municipal Code Chapter 22.39 ("Wireless Telecommunication Facilities") provides a framework for the Planning Commission to apply in reviewing permit applications for telecommunication facilities. The Planning Commission failed to apply Chapter 22.39 to the permit application.

B. The Planning Commission Failed to Follow Its Own Policies

Attached as Exhibit D is a Staff Report from the Martinez Planning Commission regarding a different permit application for wireless telecommunications facilities. This report includes the following comments from the Planning Commission:

- The Martinez Municipal Code Chapter 22.39 does not permit wireless facilities in a residentially zoned area without information and verification that no alternative, non-residentially zoned area is available to serve the same area.

- Residentially zoned areas are not preferred sites; therefore, evidence and documentation shall be provided by the applicant showing that other preferred sites were evaluated and dismissed.
- The applicant must sufficiently demonstrate that no other feasible alternative location exists.
- The Report mentions the Telecommunications Act in connection with radio frequency emissions but no mention is made of preemption.

The Planning Commission failed to follow its own precedent, analyze the permit under Municipal Code Chapter 22.39, or require Verizon to sufficiently demonstrate no alternative location exists. The parties appealing this decision believe an alternative location exists.

C. The Subject Permit Should Be Denied Under Chapter 22.39

Martinez Municipal Code Chapter 22.39 recognizes the City’s need to protect from the adverse effects of telecommunications facilities and ensure against the creation of visual blight. Attached collectively as Exhibit E hereto are two articles regarding the visual blight and damage to property values that result from cellphone towers in residential areas. The City Council is urged to deny the permit on these grounds, or at least send the matter back to the Planning Commission for proper evaluation in accordance with Chapter 22.39.

IV. CITY ZONING REQUIREMENTS MUST BE APPLIED

A. Environmental Conservation District - Section 22.24.030

The purpose of designating Environmental Conservation Districts, such as the area at issue here, is to protect environmental values. The Planning Commission’s decision does not take into account an environmental conservation district is involved.

B. EIR required for CUP in Environmental Conservation District - Section 22.24.040

Pursuant to Martinez Municipal Code Section 22.24.040, “conditional use permits in the environmental conservation districts shall be granted only after preparation of an environmental impact report ... and only after the City Planning Commission and/or the City Council make a finding that ‘no significant adverse impact’ will occur as a result of granting the conditional use permit.”

The Planning Commission’s determination did not comply with Section 22.24.040.

V. THE PERMIT IS NOT EXEMPT FROM CEQA

Although not part of the Planning Commission's decision, the CEQA exemptions cited by the Planning Commission in its Notice and Agenda are not applicable here. Section 15301 (existing facilities involving negligible or no expansion of use) and Section 15311 (minor accessory structure) are not applicable based upon the telecommunications facilities proposed by Verizon.

APPENDIX

<u>Exhibit</u>	<u>Description</u>
A	Notice of Public Hearing
B	Agenda for Public Hearing
C	Decision in <i>MetroPCS, Inc. v. City of San Francisco</i> (9 th Cir. 2005) 400 F.3d 715
D	Staff Report from A Different Planning Commission Hearing
E	Articles regarding visual blight and damage to property values from cell towers in residential neighborhoods

EXHIBIT A



NOTICE OF PUBLIC HEARING

The Martinez Planning Commission will hold a Public Hearing to discuss the following application:

- LOCATION:** PG&E Tower at 814 Carter Acres Lane (APN 365-150-053)
- APPLICANT:** Verizon Wireless/Ridge Communications, Inc. - Clarence Chavis
- OWNER:** Michael and Norma Hansen
- ZONING DESIGNATION:** Residential: R-80 (One-Family Residential: 80,000 sq. ft. minimum lot area) / ECD (Environmental Conservation District)
- DESCRIPTION:** Public hearing to consider a proposal for an installation of a new co-located wireless telecommunications facility on an existing PG&E tower located on a private residential lot. The proposed project consists of adding a 12' lattice structure, with 9 antennas, on top of the existing approximately 162' tall tower. Verizon will be leasing an approximately 473 sq. ft. area within the tower footprint for an equipment enclosure. The proposed project is located in a residential zoning district, which requires a Use Permit and Design Review.
- PROPOSED ENVIRONMENTAL DETERMINATION:** Staff proposes that the Planning Commission find that this permit be categorically exempt (Class I - Section 15301 - Existing Facilities and Class 11 - Section 15311 - Accessory Structures) from the requirements of CEQA. If the Planning Commission adopts this proposed finding, no further environmental review would be required by State law.

The Public Hearing will be held during the following meeting:

DATE:	Tuesday, April 24, 2012
TIME:	7:00 p.m.
PLACE:	City Hall Council Chambers 525 Henrietta Street Martinez, Ca 94553 [925] 372-3515

If you are interested in this application, you may come to the Public Hearing. Anyone may speak about the application at that time. If you cannot come to the hearing, you may send your comments in a letter addressed to the Planning Commission at the above address.

If you need further information, the application may be reviewed at the Planning Division at City Hall, which is open from 8:00 a.m. to 12 noon and from 1:00 p.m. to 5:00 p.m.

**PLEASE REVIEW IMPORTANT INFORMATION PRINTED
ON THE REVERSE OF THIS FORM.**

Date Notice Mailed: April 13, 2012

EXHIBIT B

City Hall, 525 Henrietta Street



Martinez, CA 94553-2394

**PLANNING COMMISSION
REGULAR MEETING
TUESDAY, APRIL 24, 2012
7:00 - 11:00 P.M. (Council Chambers)**

- Donna Allen**
- Harriett Burt**
- Rachael Ford (Chair)**
- Jeffrey Keller (Vice Chair)**
- Paul Kelly**
- Sigrid Waggener**
- Kimberley Glover**
- James Blair (Alternate)**

CALL TO ORDER

ROLL CALL

AGENDA CHANGES

PUBLIC COMMENT

CONSENT ITEMS

1. Minutes of March 13, 2012, meeting.

March 13, 2012 minutes

REGULAR ITEMS

2. Verizon Wireless 12PLN-0002 Public hearing to consider a proposal for an installation of a new co-located wireless telecommunication facility on an existing PG&E tower located on a private residential lot. The proposed project

consists of adding a 12' lattice structure, with 9 antennas, on top of the existing approximately 162' tall tower. Verizon will be leasing an approximately 473 sq. ft. area within the tower footprint for an equipment enclosure. The proposed project is located in a residential zoning district, which requires a Use Permit & Design Review. This project is located on a PG&E Tower at 814 Carter Acres Lane (APN 365-150-053)
Applicant: Verizon/Ridge Communications, Inc. - Clarence Chavis (AM)

Staff report

Plans

COMMISSION ITEMS

STAFF ITEMS

COMMUNICATIONS

Laura E. Austin, Administrative Aide



STAFF REPORT

TO: PLANNING COMMISSION

PREPARED BY: Anjana Mepani, Associate Planner

GENERAL INFORMATION

APPLICANT: Verizon Wireless/Ridge Communications, Inc. – Clarence Chavis

PROPERTY OWNER: Michael and Norma Hansen

LOCATION: PG&E Tower at 814 Carter Acres Lane (APN 365-150-053)

GENERAL PLAN: CUL: Open Space/Conservation Use Land

ZONING: Residential: R-80 (One-Family Residential: 80,000 sq. ft. minimum lot area) / ECD (Environmental Conservation District)

ENVIRONMENTAL REVIEW: Staff proposes that the Planning Commission find that this permit be categorically exempt (Class 1 - Section 15301 - Existing Facilities and Class 11 - Section 15311 - Accessory Structures) from the requirements of CEQA. If the Planning Commission adopts this proposed finding, no further environmental review would be required by State law.

PROPOSAL: Public hearing to consider approval of a proposal for the installation of a new co-located wireless telecommunications facility on an existing PG&E tower located on a private residential lot. The proposed project consists of adding a 12' lattice structure, with 9 antennas, on top of the existing approximately 162' tall tower. Verizon Wireless will be leasing an approximately 473 sq. ft. area within the tower footprint for an equipment enclosure. The proposed project is located in a residential zoning district, which requires a Use Permit and Design Review.

RECOMMENDATION

Approve Use Permit and Design Review application, Permit #12PLN-0002, subject to the attached conditions of approval.

BACKGROUND

On December 13, 2011, a study session with the Planning Commission was held to discuss the proposed project and receive public comments (Attachment E - Planning

Commission Study Session Minutes). The Planning Commission provided comments to the applicant on the project and requested that the access issue be resolved. Verizon's legal counsel determined that Verizon Wireless can lawfully enter into an agreement with the Hansen's to have the right to access the proposed project site for utility purposes via Carter Acres Lane for construction, operation, and maintenance of a communications facility (Attachment F - Verizon Legal Counsel Letter). The letter from Verizon's legal counsel states that Verizon Wireless has agreed to pay \$30,000 into the Carter Acres Community Road Fund for future improvements to be made to Carter Acres Lane. The letter from Verizon's legal counsel was sent by the applicant to the residents of Carter Acres Lane, however two of the residents continue to disagree (Attachment G - Applicant's Letter to Residents of Carter Acres Lane regarding access and Attachment H - Ms. St. Clare and Mr. & Ms. Scharmer's Letter). Should these residents wish to pursue their claims, it would be a private dispute to be resolved in a forum separate from the City's use permit review. Such a legal conflict between the private property owners and Verizon Wireless would be similar to the access/rights litigation that took place between the residents (DeVito, Buell, Brooke) of Carter Acres Lane and Cingular (now T-Mobile) in 2001/2002. Further, the applicant has provided a detailed letter addressing the comments from the study session (Attachment I - Applicant's Letter dated March 5, 2012, addressing Study Session comments, etc.). Also, since the study session the applicant has revised the equipment enclosure layout for better visibility around the tower.

On March 28, 2012, the project was reviewed by the Design Review Committee (DRC). The DRC reviewed the top hat design, antennas, and equipment materials and colors, and no changes were suggested for the items to be placed at the top of the tower. However, the DRC did recommend that the fence for the equipment enclosure be treated with a stain preservative or natural stain. The DRC's recommendation for staining the fence has been added as a condition of approval.

SITE, CONTEXT, PROJECT DESCRIPTION

The existing Pacific Gas and Electric Company (PG&E) utility tower and easement are located on a private residential lot at 814 Carter Acres Lane. The subject property has a lot size of 2.27 acres (99,055 sq. ft.) and contains one single-family residence, which is located over 100 feet away from the tower. The PG&E 100-foot right-of-way easement traverses along a portion of Carter Acres Lane and the PG&E tower is located at the western edge of the subject property. Further, T-Mobile currently operates a wireless telecommunications facility at the PG&E tower, which consists of antennas on the tower and an equipment area at the base of the tower.

The subject property is located in a residential zoning district, where pursuant to Martinez Municipal Code Chapter 22.39, "Wireless Telecommunications Facilities," a Use Permit and Design Review approval is required for any wireless facility installation. The subject property is located in a residential neighborhood, where many of the surrounding single-family residences are also located on large lots. According to the applicant, the nearest residence besides the Hansen residence is more than 200 feet away. To the north of the subject property is the Briones Horse Center and Briones Regional Park is located nearby. On July 6, 2011, the applicant held a neighborhood meeting at the Hansen residence with the property owners that reside on Carter Acres

Lane to describe the project and to answer questions.

The applicant is proposing to install a new wireless telecommunications facility by adding a 12-foot lattice top hat extension structure and 9 antennas to the top of an existing approximately 162 foot tall PG&E tower. The applicant is also proposing to place an equipment enclosure at the base of the tower. Verizon Wireless will be leasing an approximately 473 sq. ft. area within the towers footprint. According to the applicant, the proposed facility is needed to provide cell and LTE (3G) coverage to Alhambra Valley and the surrounding area that currently receive no or inadequate Verizon wireless coverage. The improved network coverage would effectively meet the wireless service needs and expectations of Verizon's customer base, which consist of local area residents, commuters, and professionals in the area.

The wireless facility will operate unmanned and the equipment will be serviced twice monthly. Further, a noise study was conducted for the proposed equipment area along with the noise generated from the existing T-Mobile equipment area and the noise requirements set in the Martinez Municipal Code Chapter 8.34.020 will be met (Attachment O - Noise Study). In addition, the attached Radio Frequency Radiation Report demonstrates that the proposed wireless facility, along with the operation of the other wireless carrier, will be within the permissible public exposure standards set by the Federal Communications Commission (FCC) (Attachment N - Radio Frequency Radiation Report). It should be noted that the Telecommunications Act of 1996 states that no state or local governmental entity may regulate the placement, construction, or modification of wireless facilities on the basis of environmental effects of radio frequency emissions to the extent that the emissions comply with FCC regulations.

DISCUSSION

Use Permit

As mentioned above, a Use Permit is required to permit a wireless telecommunications facility of this type. The "Wireless Telecommunications Facilities" ordinance (MMC Chapter 22.39) promotes co-location of wireless facilities to reduce the amount of wireless facility sites, which applies to the proposed project. Co-location occurs when a single tower or building supports one or more antennas, dishes, or similar devices owned by more than one public or private entity, such as multiple wireless carriers. Also, in order for a wireless telecommunications facility to be located in a residential area the applicant must demonstrate that no other feasible alternative site exists. The applicant considered an alternate site on an existing PG&E tower in Briones Regional Park. However, Verizon Wireless was unable to gain access to the tower, which was the only other co-locatable site in the search ring to provide adequate service. According to the applicant, there were no other viable alternative sites without the need for a monopole (Attachment L - Alternative Site Analysis).

Design Review

The existing PG&E tower is approximately 162 feet high, with existing antennas that belong to T-Mobile located at 67.9 feet high. The applicant is proposing to add a 12-foot lattice extension/top hat structure to the existing tower, thus bringing the overall tower height to approximately 174.2 feet. A top hat is an industry term that refers to a

tower extension structure to separate cell antennas from power lines. It should be noted that utility poles and towers are not subject to height limits (Martinez Municipal Code Chapter 22.34.170B). Further, the nine antennas proposed to be placed on the top hat will be located on three sectors around the extension, with three antennas mounted per sector, with the top of the antennas at approximately 174.2 feet in height. To gain the required separation from the PG&E power lines and to get necessary coverage the top hat will accommodate the antennas. The antennas are proposed to be mounted on the top hat extension level to provide Verizon Wireless network coverage to the surrounding area that currently has no or poor Verizon cell service. Thus, the top hat will be designed to look like an extension of the PG&E tower. The lattice top hat extension and antennas will be painted to match the existing PG&E tower.

The proposed equipment enclosure will be located within the footprint of the tower, next to an existing equipment area belonging to T-Mobile. At grade, the equipment within the enclosure will not be visible above the 8-foot solid wooden fence line. DRC recommended that the fence have a stain preservative or natural stain. Further, the antennas on the top hat will be visible to the surrounding area in general. The applicant has provided photo simulations with various views of the lattice top hat extension, antennas, and equipment enclosure (Attachment D - Photo Simulations).

CONCLUSION

Staff recommends approval of the project, and the draft resolution attached contains the necessary findings for Planning Commission approval. The attached draft conditions of approval have been prepared, also for Planning Commission approval.

ATTACHMENTS

- A. Site Context Map
- B. Resolution [Draft]
- C. Conditions of Approval [Draft]
- D. Photo Simulations
- E. Planning Commission Study Session Minutes – December 13, 2011
- F. Verizon Legal Counsel Letter regarding access received December 21, 2011
- G. Applicant's Letter to Residents of Carter Acres Lane regarding access dated January 9, 2012
- H. Ms. St. Clare and Mr. & Ms. Scharmer's Letter responding to Applicant and Verizon Legal Counsel received January 23, 2012
- I. Applicant's Letter dated March 5, 2012 addressing Study Session comments, etc.
- J. Design Review Committee Comment Forms from March 28, 2012 meeting
- K. Letter of Authorization from PG&E
- L. Alternative Site Analysis
- M. Coverage Maps
- N. Radio Frequency Radiation Report
- O. Noise Study

EXHIBITS

Site Map, Tower Detail, Site Plan, Equipment Area Layout and Plan, Antenna Layout, Elevations, and Details

F:\Community Development\All Projects\Wireless Facilities\Carter Acres Lane, 814 - Verizon\Verizon Wireless - PCStaffRpt.doc



1" = 394'



CityGIS

DRAFT RESOLUTION NO. PC 12-01

**A RESOLUTION OF THE PLANNING COMMISSION
OF THE CITY OF MARTINEZ
MAKING FINDINGS FOR THE APPROVAL OF USE PERMIT AND DESIGN REVIEW
APPLICATION PERMIT #12PLN-0002, FOR A NEW VERIZON WIRELESS
TELECOMMUNICATION FACILITY ON A PG&E TOWER AND EQUIPMENT IN A LEASED
AREA WITHIN THE TOWER FOOTPRINT AT 814 CARTER ACRES LANE
(APN 365-150-053)**

WHEREAS, the City of Martinez received a request for a Use Permit and Design Review from Verizon Wireless to allow construction of a new co-located wireless telecommunication facility on an existing PG&E tower and equipment in a leased area within the tower footprint ("Project") at 814 Carter Acres Lane, identified as APN 365-150-053 ("Project Lot", "Project site" or "site"), within the City of Martinez; and

WHEREAS, the policies applicable to the project site are set forth in the General Plan with the land use designation of CUL: Open Space/Conservation Use Land; and

WHEREAS, the zoning applicable to the site is Residential: R-80 (One-Family Residential: 80,000 sq. ft. minimum lot area) / ECD (Environmental Conservation District) as set forth in the Martinez Municipal Code, at Title 22-Zoning, and Chapter 22.12-Residential Districts (Zoning Ordinance) which allows for wireless telecommunication facilities with a conditional use permit and design review permit; and

WHEREAS, Chapter 22.39 Wireless Telecommunications Facilities - Section 22.39.050(3) requires Use Permit and Design Review approval by the Planning Commission to permit a wireless telecommunication facility; and

WHEREAS, the Project is categorically exempt from the requirements of CEQA, under Section 15301-Existing Facilities and Section 15311-Accessory Structures, because the Project consists of construction that is appurtenant to the existing PG&E facility; and

WHEREAS, the Planning Commission of the City of Martinez held a duly noticed public hearing on April 24, 2012, and considered public testimony on the matter and all other substantial evidence in the record; and

WHEREAS, the Planning Commission as part of its public hearing imposed certain Conditions of Approval on the Project for the Use Permit and Design Review which are required for the Project and incorporated into this Resolution; and

NOW, THEREFORE, the Planning Commission of the City of Martinez resolves as follows:

1. That the above recitals are found to be true and constitute part of the findings upon which this resolution is based.

2. In order to approve the Use Permit application, the Planning Commission must make the following findings (in bold below), which it hereby does:

(a) **The proposed location of the conditional use is in accord with the objectives of this title, and the purposes of the district in which the site is located.** The proposed wireless telecommunication facility is appropriate for the residential project site because of the existing PG&E tower with the other wireless carrier that is already located there. Co-location of wireless telecommunication facilities is promoted to condense the number of sites with such facilities.

(b) **The proposed location of the conditional use and the proposed conditions under which it would be operated or maintained will not be detrimental to the public health, safety or welfare, or materially injurious to properties or improvements in the vicinity.** The Project will be a co-located facility, which is promoted by the "Wireless Telecommunications Facilities" ordinance (MMC Chapter 22.39), to reduce the amount of wireless facility sites in the City. Also, in order to be located in a residential area, Verizon Wireless has demonstrated that no other feasible alternative site exists. The equipment for the wireless telecommunication facility will be fenced and secured. The equipment will make minimal noise and will require maintenance twice monthly, not significantly increasing traffic activity at the site. Thus, the Project as proposed will not be detrimental to the public health, safety or welfare or materially injurious to properties or improvements in the vicinity.

(c) **The proposed conditional use will comply with each of the applicable provisions of this title.** The Project complies with each of the applicable provisions of Title 22-Zoning of the Martinez Municipal Code, including the standards and criteria for telecommunication facilities. In addition, the project meets the Federal Communications Commission (FCC) requirements for levels of Radio Frequency Radiation.

3. In order to approve the Design Review application, the Planning Commission must make the following findings (in bold below), which it hereby does.

a) **Complying with all other applicable provisions of the Martinez Municipal Code involving the physical development of buildings, structures and property, including use restrictions.** The proposed wireless telecommunication facility complies with all other applicable provisions of the Martinez Municipal Code and is also consistent with the design review criteria and standards.

(b) **Provides desirable surroundings for occupants as well as for neighbors. Emphasis is placed upon exterior design with regard to**

height, bulk, and area openings; breaks in the facade facing on a public or private street; line and pitch of the roof; and arrangement of structures on the parcel. The Project would be a co-located facility, which is promoted by the "Wireless Telecommunications Facilities" ordinance (MMC Chapter 22.39) to reduce the amount of wireless facility sites in the City. Also, in order to be located in a residential area, Verizon Wireless has demonstrated that no other feasible alternative site exists. Verizon Wireless has designed the top hat to look similar to the PG&E tower and will paint the top hat, antennas, and brackets the match the tower. The equipment will comply with all FCC regulations and will be serviced twice monthly, which will not have a significant impact on traffic and activity at the site. The telecommunication site will only create a negligible amount of noise and will give off no fumes or odors.

- (c) **Has a harmonious relationship with existing and proposed neighboring developments avoiding both excessive variety and monotonous repetition, but allowing similarity of style, if warranted.** The Project will fit in with the site since it is similar to the other wireless facility at the site and the top hat, antennas, and brackets will resemble the PG&E towers materials and colors, allowing similarity of style. In addition, the proposed wireless facility will not exceed noise levels as required by the City's Noise Ordinance and will be in compliance with all FCC radio frequency regulations.
- (d) **Uses a limited palette of exterior colors; those colors must be harmonious and architecturally compatible with their surrounding environment.** Verizon Wireless will paint the top hat, antennas, and brackets to match the existing PG&E tower. The wooden fence surrounding the equipment enclosure will have a stain to blend in with the base and footprint of the utility tower.
- (e) **Uses a limited number of materials on the exterior face of the building or structure. In addition, all interior surfaces normally visible from public property shall be finished.** A limited number of exterior materials will be used since Verizon Wireless will use materials that are similar to and resemble the PG&E tower for the 12' top hat lattice structure. The fence surrounding the equipment enclosure at the base of the tower will be made of wood.
- (f) **Has exterior lighting appropriately designed with respect to convenience, safety, and effect on occupants as well as neighbors.** This standard is not applicable to the Project since no exterior lighting is proposed.
- (g) **Effectively concealing work areas, both inside and outside of buildings, in the case of non-residential facilities.** The equipment cabinets will be concealed by the wooden fence at the towers base.

- (h) **Under grounding all utility boxes unless it can be shown that they can be effectively screened from the view of the general public.** The utility boxes in the equipment enclosure will be screened from view of the general public by the wooden fence.
- (i) **Designing the type and location of planting with respect to the preservation of specimen and landmark trees, water conservation as set forth in Chapter 22.35, and maintenance of all planting.** This standard is not applicable to the Project.
- (j) **Establishing a circulation pattern, parking layout and points of ingress and egress (both vehicular and pedestrian), designed to maximize pedestrian safety and convenience and to minimize traffic congestion resulting from the impediment of vehicular movement. When applicable, access for handicapped individuals should be considered.** This standard is not applicable to the Project.
- (k) **Ensuring that all signs be designed so that they are in scale with the subject development, and will not create a traffic hazard. Emphasis is placed upon the identification of the use or building rather than the advertising of same.** This standard is not applicable to the Project.
- (l) **Substantially preserves views from nearby properties where this can be done without severe or undue restrictions on the use of the site, balancing the property rights of the applicant and the affected property owner(s).** Given that the top hat will be designed to resemble the existing PG&E tower; the top hat, antennas, and brackets materials and paint will match the existing tower; the overall height of the tower will increase approximately twelve feet; and the equipment enclosure will be located at the base and within the footprint of the tower, the Project will not result in any significant view loss.

NOW, BE IT FURTHER RESOLVED that based on the information contained in the entire administrative record and the findings set forth above, the Planning Commission of the City of Martinez hereby approves Use Permit and Design Review application Permit #12PLN-0002, subject to the Conditions of Approval, incorporated herein by reference.

I HEREBY CERTIFY that the foregoing is a true and correct copy of a resolution duly adopted by the Planning Commission of the City of Martinez at a Regular Meeting of said Commission held on the 24th day of April, 2012, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAINED:

BY: _____
Rachael Ford
Planning Commission Chair

Anjana Mepani
Associate Planner

F:\Community Development\All Projects\Wireless Facilities\Carter Acres Lane, 814 - Verizon\Verizon Wireless - PCResolution.doc

EXHIBIT C

MetroPCS, Inc. v. City and County of San Francisco

United States Court of Appeals, Ninth Circuit. March 7, 2005 400 F.3d 715 05 Cal. Daily Op. Serv. 1988 (Approx. 24 pages)

400 F.3d 715
United States Court of Appeals,
Ninth Circuit.

METROPCS, INC., a Delaware Corporation, Plaintiff–Appellant–

v.

The CITY AND COUNTY OF SAN FRANCISCO and The Board of
Supervisors of the City of San Francisco, Defendants–Appellees–
Cross–Appellants.

Nos. 03–16759, 03–16760. Argued and Submitted Oct. 4, 2004. Filed March 7,
2005.

Synopsis

Background: Wireless telecommunications service provider challenged city planning commission's denial of conditional use permit (CUP) needed to mount antennas on roof of parking garage. The United States District Court for the Northern District of California, Phyllis J. Hamilton, United States Magistrate Judge, 259 F.Supp.2d 1004, granted partial summary judgment for city, and cross-appeals were taken.

Holdings: The Court of Appeals, Cudahy, Circuit Judge, held that:

- 1 denial satisfied requirement that it be "in writing";
- 2 denial was supported by substantial evidence;
- 3 fact issue existed as to whether denial was discriminatory;
- 4 fact issue existed as to whether denial had effect of denying coverage; and
- 5 denial was not improperly based on concerns over radio frequency (RF) emissions.

Affirmed in part, reversed in part, and remanded.

Graber, Circuit Judge, concurred in part, dissented in part, and filed opinion.

West Headnotes (12)

Change View

1 **Zoning and Planning**  Findings, reasons, conclusions, minutes or records
To satisfy Telecommunications Act requirement that local government's denial of request to construct wireless service facility be "in writing," local government must issue written denial separate from written record which contains sufficient explanation of reasons for denial to allow reviewing court to evaluate evidence in record supporting those reasons. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

12 Cases that cite this headnote

2 **Zoning and Planning**  Findings, reasons, conclusions, minutes or records
City planning commission's written denial of wireless telecommunications service provider's application for zoning permit to construct service facility met

RELATED TOPICS

Zoning and Planning

- Denial of Telecommunications Service Conditional Use Permit
- Judicial Review or Relief
 - Five Member Zoning Board of Appeals of City Grant Special Use Permit

Federal Civil Procedure

- Timely and Adequate Precluded Summary Judgment

Telecommunication Act's requirement that any such denial be "in writing"; denial, which was separate from written hearing record, summarized facts of dispute, recounted proceedings city had conducted, and explained evidentiary basis for its ruling. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

3 Cases that cite this headnote

- 3 **Zoning and Planning**  Telecommunications towers and facilities
Telecommunications Act requirement that local government's ruling on request to construct wireless service facility be supported by "substantial evidence," means that decision must be authorized by applicable local regulations and supported by reasonable amount of evidence. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

18 Cases that cite this headnote

- 4 **Zoning and Planning**  Telecommunications towers and facilities
City planning commission's denial of wireless telecommunications service provider's application for zoning permit to construct service facility, on ground that it was unnecessary, was supported by requisite "substantial evidence"; city planning code explicitly authorized consideration of community needs, and there was evidence that area was already well served by other service providers. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

3 Cases that cite this headnote

- 5 **Zoning and Planning**  Telecommunications towers and facilities
Telecommunications Act's prohibition against local zoning board's unreasonable discrimination among wireless service providers does not preclude discrimination based on traditional bases of zoning regulation, such as preserving character of neighborhood and avoiding aesthetic blight. Communications Act of 1934, § 332(c)(7)(B)(i)(I), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

3 Cases that cite this headnote

- 6 **Zoning and Planning**  Telecommunications towers and facilities
To establish unreasonable discrimination, in violation of Telecommunications Act, wireless service provider who has been denied permit to construct facility must show that it has been treated differently from other providers whose facilities are similarly situated in terms of structure, placement or cumulative impact. Communications Act of 1934, § 332(c)(7)(B)(i)(I), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

6 Cases that cite this headnote

- 7 **Federal Civil Procedure**  Land and land use, cases involving in general
Issue of material fact as to whether wireless service provider's proposed facility and its competitors' facilities, whose construction was approved by city planning commission, were similarly situated precluded summary judgment on provider's claim that denial of its zoning permit request was unreasonably discriminatory. Communications Act of 1934, § 332(c)(7)(B)(i)(I), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

3 Cases that cite this headnote

- 8 **Zoning and Planning**  Telecommunications towers and facilities
Telecommunications Act's prohibition against denials of wireless service

facility construction permits that have effect of prohibiting provision of wireless services is not limited to blanket bans of all service providers, but rather extends to denials that prevent individual service providers from closing significant gaps in their own coverage. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

15 Cases that cite this headnote

- 9 Federal Civil Procedure**  Land and land use, cases involving in general
Issue of material fact as to whether wireless telecommunications service provider had "significant" gap in its coverage of area in which it sought to construct antennas precluded summary judgment on provider's claim that city's denial of zoning permit violated Telecommunications Act. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

20 Cases that cite this headnote

- 10 Zoning and Planning**  Telecommunications towers and facilities
Wireless service provider, asserting that local zoning authority's denial of permit to construct wireless facility violates Telecommunications Act by preventing provider from closing significant gap in its service, must show that manner in which it proposes to fill gap is least intrusive on values that denial sought to serve. Communications Act of 1934, § 332(c)(7)(B)(i)(II), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

22 Cases that cite this headnote

- 11 Zoning and Planning**  Telecommunications uses
Federal Communications Commission's exclusive authority to issue licenses and regulate wireless services market does not completely preempt local necessity-based zoning decisions; rather, such decision are preempted only to extent they violate specific prohibitions of Telecommunications Act. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

1 Case that cites this headnote

- 12 Zoning and Planning**  Telecommunications towers and facilities
City planning commission did not improperly base its denial of zoning permit for construction of wireless service facility on concerns over radio frequency (RF) emissions; although commission stated that it had considered objectors' emissions concerns, it did not include emission fears in its list of reasons for denying permit. Communications Act of 1934, § 332(c)(7)(B)(iv), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iv).

2 Cases that cite this headnote

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Atlanta, GA, for the amici curiae.

Appeals from the United States District Court for the Northern District of California;
Phyllis J. Hamilton, District Judge, Presiding. D.C. No. CV-02-3442 PJH.

Before: CUDAHY, * GRABER and FISHER, Circuit Judges.

Opinion

Opinion by Judge CUDAHY; Partial Concurrence and Partial Dissent by Judge GRABER.

*718 OPINION

CUDAHY, Circuit Judge:

MetroPCS brought the instant action in the District Court for the Northern District of California, alleging that a decision by the San Francisco Board of Supervisors denying MetroPCS permission to construct a wireless telecommunications antenna atop a city parking garage violated several provisions of the Telecommunications Act of 1996(TCA). Specifically, MetroPCS alleged that the Board's decision (1) was not "in writing" as required by the TCA, (2) was not supported by substantial evidence, (3) constituted unreasonable discrimination among providers of functionally equivalent wireless services, (4) prohibited or had the effect of prohibiting the provision of wireless services and (5) was improperly based on environmental concerns about radio frequency (RF) emissions.

Both parties moved for summary judgment, and the district court granted the City's motion for summary judgment as to all claims except the prohibition claim, ruling that material questions of fact remained as to whether the Board's decision had the effect of prohibiting the provision of personal wireless services. Both parties now appeal the ruling below, and we affirm in part and reverse in part the district court's decision.

I. BACKGROUND

This case marks yet another episode in the ongoing struggle between federal regulatory power and local administrative prerogatives—the kind of political collision that our federal system seems to invite with inescapable regularity. And as most often happens in such cases, the courts are summoned to re-strike the balance of power between the national and the local. More specifically, we are called upon to interpret several provisions of the TCA, an exegetical effort having implications for Federal Communications Commission (FCC) licensing authority, wireless telecommunications companies and municipal zoning authorities alike. The stakes of the current dispute are especially high since this case involves several important questions of law that have not yet been authoritatively addressed by this Circuit.

The basic facts of this case are not in dispute. MetroPCS is a provider of wireless telecommunications services. It is licensed by the FCC to construct and operate radio transmitting and receiving facilities in San Francisco, Oakland and San Jose, California (the Bay Area). On January 15, 2002, MetroPCS submitted to the City of San Francisco's Planning Department an application for a Conditional Use Permit (CUP) to install six panel antennas on an existing light pole located on the roof of a parking garage at 5200 Geary Boulevard (the Geary site). The proposed facility was to consist of (1) six panel antennas mounted 53 feet above the sidewalk grade on an existing light pole on the roof of a 42-foot-high parking garage, and (2) equipment cabinets mounted on an existing wall on the garage roof. Each antenna was to be five feet long and painted to match the garage. The proposed installation was designed to improve MetroPCS's wireless service coverage in the Richmond District, where the Geary site is located. MetroPCS chose the Geary site after evaluating the technical feasibility of several sites in the area and considering community objections to alternative site locations.

Under the San Francisco Planning Code, the Geary site is located within an *719 "NC-3" or "Moderate Scale Neighborhood Commercial District." In an NC-3 zoning district, a wireless facility (such as a panel antenna) is considered a public use that requires a CUP from the City Planning Commission. Because the Geary site is located on top of a

commercial structure in an NC-3 zoning district, it is classified as a Location Preference 4 under the City's Wireless Telecommunications Facilities Siting Guidelines—it is neither a high-priority site nor a “disfavored” site. On April 18, 2002, the San Francisco Planning Commission held a public hearing to consider MetroPCS's application for a CUP at the Geary site. At the close of the hearing, the Planning Commission voted to grant MetroPCS's application. The Planning Commission later adopted written findings and drafted a written decision. These findings included a determination that the proposed MetroPCS antenna facility is necessary to MetroPCS's service coverage in the Richmond District and “both necessary and desirable” for the community.

On May 20, 2002, Richmond District resident Robert Blum filed an appeal of the Planning Commission's decision with the City Board of Supervisors (the Board). Mr. Blum was joined by some 80 local property owners, representing almost 60% of the land area within 300 feet of the Geary site, who signed petitions in support of the appeal. Hundreds of other San Francisco residents also signed a petition opposing construction of the MetroPCS facility at the Geary site. Consistent with applicable local zoning procedures, the Board of Supervisors held a public hearing to consider the appeal on June 17, 2002. At the hearing, a number of community members (including Mr. Blum and his son) voiced disapproval of MetroPCS's CUP application. Local residents asserted, *inter alia*, that the antenna facility was not necessary for MetroPCS or the community since the Richmond District already enjoys excellent wireless service, that the facility would create a visual blight detrimental to the neighborhood character and that the facility would produce harmful RF emissions hazardous to public health.

Representatives of MetroPCS—including company managers and technical staff—appeared before the Board to speak in favor of the proposed facility, claiming that the antenna installation is necessary for MetroPCS's service coverage of the Richmond District and that it is an unobtrusive facility that will not constitute a visual or industrial blight on the neighborhood. At the conclusion of the hearing, the Board of Supervisors unanimously voted to overturn the decision of the Planning Commission and to deny MetroPCS the CUP. The Board's findings were later formally adopted in a five-page written decision disseminated on June 24, 2002.

In articulating the bases for its decision, the Board's written opinion formally found that (1) the proposed facility is not necessary to MetroPCS's ability to service the Richmond District around the Geary site, (2) the facility is not necessary for the community, since there is already adequate wireless service in the neighborhood around the Geary site, (3) the proposed facility would constitute a “visual and industrial blight” and would be detrimental to the character of the neighborhood and (4) the proposed antenna facility is not in conformity with and would not further the policies of the City's General Plan. The Board's decision asserted that its denial of the CUP application did not reflect unreasonable discrimination against MetroPCS, did not limit or prohibit access to wireless services and did not limit or prohibit the filling of a significant gap in MetroPCS's service coverage. The Board also maintained that the proposed facility was not the least intrusive way to provide wireless services in the Richmond District.

*720 On July 17, 2002, MetroPCS filed a complaint in the District Court for the Northern District of California claiming that, in denying its application for a CUP, the City (via the Board) had violated several provisions of § 332(c)(7) of the TCA. Both MetroPCS and the City moved for summary judgment on all claims, and on April 25, 2003, the district court issued a decision granting in part and denying in part the City's motion for summary judgment, and denying in part MetroPCS's motion for summary judgment. *MetroPCS, Inc. v. City & County of San Francisco*, 259 F.Supp.2d 1004 (N.D.Cal.2003).

Specifically, the district court held that (1) the Board's written denial of MetroPCS's CUP application constituted a decision “in writing” as required by § 332(c)(7) of the TCA, (2) the Board's decision was supported by “substantial evidence,” (3) the Board did not unreasonably discriminate among providers of functionally equivalent services and (4) the Board's decision was not impermissibly based on concerns over RF emissions. The City was granted summary judgment with respect to its claims on each of these issues. *Id.* However, the district court also held that significant questions of material fact existed as to whether the Board's denial of MetroPCS's CUP application prohibited or had the

effect of prohibiting the provision of wireless services in violation of § 332(c)(7) of the TCA. *Id.* at 1012–15. Accordingly, the district court denied both parties' motions for summary judgment as to this issue. *Id.* at 1015. Both parties were granted leave to appeal the district court's ruling to this Court, and both parties now seek summary judgment on all claims.

II. JURISDICTION AND STANDARD OF REVIEW

Since the district court granted both parties' motions to certify its order for appeal, we now have jurisdiction pursuant to 28 U.S.C. § 1292(b). We review motions for summary judgment *de novo*. See *Suzuki Motor Corp. v. Consumers Union of United States, Inc.*, 330 F.3d 1110, 1131 (9th Cir.), *cert. denied*, 540 U.S. 983, 124 S.Ct. 468, 157 L.Ed.2d 373 (2003); *King Jewelry, Inc. v. Fed. Express Corp.*, 316 F.3d 961, 963 (9th Cir.2003). Summary judgment should be granted when “there is no genuine issue as to any material fact” such that “the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Suzuki Motor Corp.*, 330 F.3d at 1131.

To prevail on a summary judgment motion, the moving party carries the initial burden of demonstrating to the court that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has carried that burden, it then shifts to the nonmoving party, who must present evidence that there is indeed a genuine issue for trial. See *id.* at 323–24, 106 S.Ct. 2548. All disputed issues of fact are to be resolved in favor of the nonmoving party. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505.

III. DISCUSSION

MetroPCS advances claims under several sections of the TCA, none of which has been authoritatively construed by this circuit.¹ We address each of these claims in turn.

*721 A. Decision “In Writing”

Under the Telecommunications Act, “[a]ny decision by a State or local government ... to deny a request to place, construct, or modify personal wireless service facilities shall be in writing.” 47 U.S.C. § 332(c)(7)(B)(iii). In the proceedings below, the district court ruled that the Board's decision was adequately “in writing” under the TCA and granted the City's motion for summary judgment on this issue. 259 F.Supp.2d at 1009. MetroPCS now appeals this ruling and moves for summary judgment.

The TCA's simple directive that all local zoning decisions adverse to wireless service providers be “in writing” seems clear enough, and the City's five-page written decision overturning the grant of MetroPCS's CUP certainly qualifies as “in writing” under any colloquial or common-sense understanding of that term. (See Board Decision, ER 12, Exh. 5.) However, while the plain meaning of the TCA's text supports the district court's ruling, the circuits are split in their interpretations of the “in writing” requirement, and this Circuit has yet to take an authoritative position on the issue. See *New Par v. City of Saginaw*, 301 F.3d 390, 395 (6th Cir.2002) (noting the split and outlining the various interpretations); *S.W. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 59 (1st Cir.2001) (giving a summary of the different interpretations).

At one interpretive extreme, some courts have required that local governments explicate the reasons for their decision and link their conclusions to specific evidence in the written record. See, e.g., *Omnipoint Communications, Inc. v. Planning & Zoning Comm'n*, 83 F.Supp.2d 306, 309 (D.Conn.2000) (“A local zoning authority must issue a decision in writing setting forth the reasons for the decision and linking its conclusions to evidence in the record.”) (citations omitted); *Cellco P'ship v. Town Plan & Zoning Comm'n*, 3 F.Supp.2d 178, 184 (D.Conn.1998) (similar standard); *Ill. RSA No. 3, Inc. v. County of Peoria*, 963 F.Supp. 732, 743 (C.D.Ill.1997) (same). The rationale for this approach is that anything short of this standard “places the burden on [the] Court to wade through the record below” in order to determine the decision's reasoning and assess its evidentiary support. *Omnipoint*, 83 F.Supp.2d at 309 (quoting *Smart SMR of N.Y., Inc. v. Zoning Comm'n*, 995 F.Supp. 52, 57 (D.Conn.1998)).

At the other end of the spectrum lies the Fourth Circuit, which has applied a strict *722

textualist approach to hold that merely stamping the word "DENIED" on a zoning permit application is sufficient to meet the TCA's "in writing" requirement. *AT & T Wireless PCS, Inc. v. City Council*, 155 F.3d 423, 429 (4th Cir.1998); see also *AT & T Wireless PCS v. Winston-Salem Zoning Bd. Of Adjustment*, 172 F.3d 307, 312–13 (4th Cir.1999). According to the Fourth Circuit, the bare language of the TCA requires nothing more, and so adhering to a more stringent standard would involve "importing additional language into the statute." *AT & T Wireless*, 155 F.3d at 429.

The First and Sixth Circuits have charted a middle course, requiring local governments to "issue a written denial separate from the written record" which "contain[s] a sufficient explanation of the reasons for the ... denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." *Todd*, 244 F.3d at 60; *Saginaw*, 301 F.3d at 395–96 (adopting the *Todd* standard). This approach attempts a compromise between the demands of strict textualism and the requirements of more pragmatic policy values. The *Todd* court observed that while the statutory language of the TCA does not explicitly require detailed findings of fact or conclusions of law, and while local zoning boards are often staffed with laypersons ill-equipped to draft complex legal decisions, written decisions must be robust enough to facilitate meaningful judicial review. See *Todd*, 244 F.3d at 59–60.

In the proceeding below, the district court ultimately chose to apply the *Todd* standard and held that the Board's written denial of MetroPCS's CUP application was adequate as a decision "in writing" under this standard. 259 F.Supp.2d at 1009. The district court asserted that the *Todd* standard best "reconciles both the statutory language and Congressional intent of the 'in writing' requirement" and held that, in accordance with *Todd*, the City "has issued a written denial separate from the written record ... which summarizes the proceedings, articulates the reasons it rejected MetroPCS'[s] application, and provides sufficient information for judicial review in conjunction with the written record." *Id.*

1 We agree with the district court that the *Todd* standard ultimately strikes the most reasonable balance between the text of the Act and the practical demands of meaningful judicial review. While the bare language of the Act may not require more than the briefest written disposition, it also does not compel a strictly minimalist construction, and the purposes of the "in writing" requirement would be ill-served by allowing local zoning authorities to issue the kind of opaque, unelaborated ruling approved by the Fourth Circuit in *AT & T Wireless v. City Council*. Indeed such a minimalist approach is in direct tension with the Act's requirement—discussed more fully in the next section—that all local zoning decisions be supported by substantial evidence contained in a written record. 47 U.S.C. § 332(c)(7)(B)(iii). If such an evidentiary review is to be undertaken at all, courts must at least be able to ascertain the basis of the zoning decision at issue; only then can they accurately assess the evidentiary support it finds in the written record. Therefore, the zoning decision must be sufficiently elaborated to permit this assessment.

Similarly, the text of the TCA does not compel the more demanding standard outlined in *Omnipoint*, 83 F.Supp.2d at 309, and we find persuasive the *Todd* court's observation that such a standard might place an unduly heavy burden on lay zoning boards. As a general matter, we see no reason to insist upon a standard more exacting than is required to facilitate *723 meaningful judicial review. We therefore adopt the *Todd* standard and hold that the TCA requires local zoning authorities to issue a written decision separate from the written record which contains sufficient explanation of the reasons for the decision to allow a reviewing court to evaluate the evidence in the record supporting those reasons.

2 As to the merits of the case at bar, we are persuaded that the district court did not err in granting the City's motion for summary judgment as to this claim under the *Todd* standard. As the district court correctly noted, the Board of Supervisors issued a five-page written decision, separate from the record, which summarized the facts of the dispute, recounted the proceedings it conducted, articulated its reasons for overturning the Commission's grant of the CUP and explained the evidentiary basis for its ruling. Whatever else might be said about the decision or its reasoning, it does contain sufficient explanation to enable judicial evaluation of the evidentiary support for its rationale. In fact

MetroPCS itself devotes many pages of its brief to discussing and critiquing the decision's reasoning and evidentiary support.²

In light of all these considerations, we affirm the district court's ruling that the Board's decision was properly "in writing" under § 332(c)(7)(B)(iii) of the TCA.

B. Substantial Evidence

³ In addition to requiring that all local zoning decisions be "in writing," the TCA also mandates that these decisions be "supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). In the proceedings below, the district court granted the City's motion for summary judgment on this issue, ruling that the Board's determination that the proposed facility is not necessary for the community was supported by substantial evidence. 259 F.Supp.2d at 1011.

In stark contrast to virtually every other aspect of this case, there appears to be universal agreement among the circuits as to the substantive content of this requirement. While the term "substantial evidence" is not statutorily defined in the Act, the legislative history of the TCA explicitly states, and courts have accordingly held, that this language is meant to trigger "the traditional standard used for judicial review of agency decisions." H.R. Conf. Rep. No. 104-458, at 208 (1996); *see also Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir.1999) (holding that "substantial evidence" implies this traditional standard); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1218 (11th Cir.2002) (same).

However, the substantial evidence inquiry does not require incorporation of the substantive federal standards imposed by the TCA, but instead requires a determination whether the zoning decision at issue ⁷²⁴ is supported by substantial evidence in the context of applicable *state and local law*. As our sister circuits have recognized, the TCA "does not affect or encroach upon the *substantive* standards to be applied under established principles of state and local law." *Oyster Bay*, 166 F.3d at 494 (internal quotation marks omitted) (emphasis added). " 'Substantial evidence' review under the TCA does not create a substantive federal limitation upon local land use regulatory power...." *Todd*, 244 F.3d at 58 (citations omitted); *see also VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 830 (7th Cir.2003) (same rule) (citing *Todd*). In other words, we must take applicable state and local regulations as we find them and evaluate the City decision's evidentiary support (or lack thereof) relative to those regulations. If the decision fails that test it, of course, is invalid even before the application of the TCA's federal standards.

This approach serves several purposes. First, it enables us to avoid unnecessarily reaching the federal questions of whether a zoning decision violates the substantive provisions of the TCA. If a zoning board's decision, reached under its own rules, is not supported by substantial evidence, then we need not consider the application of the anti-prohibition or anti-discrimination prongs of the statute. Second, local regulations standing alone may offer little insight into whether they violate the substantive requirements of the TCA. Zoning rules—such as those that allow local authorities to reject an application based on "necessity"—may not suggest on their face that they will lead to discrimination between providers or have the effect of prohibiting wireless services. Thus, in most cases, only when a locality applies the regulation to a particular permit application and reaches a decision—which it supports with substantial evidence—can a court determine whether the TCA has been violated.

The dissent disagrees with this approach, arguing that any zoning regulation—or application of such a regulation—based on considerations of community "necessity" by its terms discriminates against new providers, cannot be squared with the TCA's anti-discrimination provision, 47 U.S.C. § 332(c)(7)(B)(i)(II), and is therefore, *ipso facto*, not supported by substantial evidence. Yet such an interpretation may thwart congressional intent concerning the independence accorded local zoning authorities under the TCA. As the dissent recognizes, the only direct *substantive* restriction the Act places on local zoning authorities is the proscription of decisions based on concerns over radio frequency emissions contained in § 332(c)(7)(B)(iv). (See discussion of this provision, *infra* in Section III-F.) Had Congress desired to proscribe zoning decisions based on

community necessity—or, for that matter, any other disfavored rationale—we are confident that it could have done so. Yet as the foregoing legal precedents and legislative history demonstrate, Congress instead intended that the traditional substantive prerogatives of local zoning authorities not be disturbed.

Perhaps more fundamentally, the dissent's conflation of the TCA's substantive anti-discrimination provision, 47 U.S.C. § 332(c)(7)(B)(i)(II), with its procedural "substantial evidence" requirement threatens to render the "substantial evidence" provision superfluous. Rather than review a zoning decision for basic evidentiary support, the dissent would require, as a threshold matter, that we review the decision for discriminatory *rationale*. But regardless of the rationale employed, zoning decisions must still satisfy the TCA's anti-discrimination provision, *id.*, which prohibits *actual* discrimination. If similarly situated *725 providers are not treated differently *in fact*, there is little reason to obviate a zoning decision based purely on an impermissible "necessity" rationale.

Having thus delimited the scope of our substantial evidence inquiry, we may now turn to the merits of the question before us. The most authoritative and oft-cited elaboration of the TCA's substantial evidence standard comes from the Second Circuit in *Oyster Bay*, where the court explained that "substantial evidence" implies "less than a preponderance, but more than a scintilla of evidence. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" 166 F.3d at 494 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). This formulation has been adopted by every circuit that has had occasion to consider the issue. See, e.g., *St. Croix County*, 342 F.3d at 830 (7th Cir.2003); *United States Cellular Tel. of Greater Tulsa, L.L.C. v. City of Broken Arrow*, 340 F.3d 1122, 1133 (10th Cir.2003); *Troup County*, 296 F.3d at 1218 (11th Cir.); *Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 627–28 (1st Cir.2002); *360° Communications Co. of Charlottesville v. Bd. of Supervisors*, 211 F.3d 79, 83 (4th Cir.2000).

Review under this standard is essentially "deferential," such that courts may "neither engage in [their] own fact-finding nor supplant the Town Board's reasonable determinations." *Oyster Bay*, 166 F.3d at 494. In applying this standard to the facts of a given case, the written record must be viewed in its entirety, including all evidence supporting both parties, and "local and state zoning laws govern the weight to be given the evidence." *Id.* As mentioned earlier, these baseline rules are solidly established, and the parties here do not dispute them.

4 The upshot is simple: this Court may not overturn the Board's decision on "substantial evidence" grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence (i.e., more than a "scintilla" but not necessarily a preponderance). In the proceeding below, the district court correctly identified the prevailing legal standard discussed above, 259 F.Supp.2d at 1009, and granted the City's motion for summary judgment on this issue, ruling that the City's determination that the Richmond District community did not need the MetroPCS antenna was (1) authorized by local zoning regulations and (2) supported by substantial evidence, *id.* at 1010–11. This ruling was legally correct.

First, the San Francisco Planning Code explicitly authorizes the consideration of community need in evaluating conditional use permit applications. San Francisco Planning Code § 303(c)(1) (directing the City Planning Commission to consider whether "the proposed use ... is necessary or desirable for, and compatible with, the neighborhood or the community") (emphasis added). Thus, the necessity-based portion of the Board's decision was clearly authorized by local zoning regulations. Even MetroPCS acknowledges this much. Accordingly, the only remaining issue concerns whether the Board's "necessity" conclusion was supported by substantial evidence.³ A perusal of the record demonstrates that it was.

*726 The Board's inquiry into this issue was not a model of thoroughness or rigor,⁴ but the record does clearly establish that the Richmond District is amply served by at least five other major wireless service providers and thus did not "need" the proposed Geary facility. One of MetroPCS's own representatives testified before the Board that "every

carrier in San Francisco has coverage along Geary [Boulevard],” and reiterated that “every carrier has an antenna in this neighborhood.” Another MetroPCS representative testified that “we’ve got Verizon, Sprint, AT & T, Singular [sic], Nextel, all in the very same vicinity [of the Geary site],” adding later that Sprint and Verizon “have great coverage. They have an excellent foot-hold in the [Geary] area.” Indeed MetroPCS argued before the Board that it needed a facility at the Geary site *precisely* because it had to compete with other providers who had coverage in the area.

These statements by MetroPCS were buttressed by testimony and numerous written petitions from local residents, including Robert Blum (the resident actually challenging the CUP grant), reporting that the Richmond District already enjoyed excellent wireless coverage. The record also contains a site map showing the locations of SprintPCS facilities in the Richmond District, including one antenna installation just 0.2 miles from the proposed Geary site. Taken in its totality, this evidence, including unequivocal statements by MetroPCS itself, constitutes at least a showing that “a reasonable mind might accept” as adequate. The “substantial evidence” provision of the TCA requires nothing more.

In briefing this issue, both parties spend considerable time discussing the evidence supporting the Board's findings on neighborhood character and the aesthetic impact of the proposed facility. MetroPCS in particular spends considerable time arguing that residents' aesthetic concerns are speculative or unsubstantiated. This may be true. Yet, since the Board's finding on community necessity was authorized by local regulations and supported by substantial evidence, it is unnecessary to consider the evidence supporting other potential grounds for the City's decision. *See e.g., Oyster Bay*, 166 F.3d at 495 (stating that the court must “determine whether the Board possessed substantial evidence on one or both of [its permissible] grounds” for a zoning permit denial). The district court was correct in taking this analytical approach as well, relegating these ancillary concerns to a footnote. 259 F.Supp.2d at 1011 n. 6.

As the district court below identified the correct prevailing legal standard and applied it properly, we affirm the district court's ruling that the Board's decision was supported by “substantial evidence” as required by the TCA.

C. Discrimination Claim

In addition to its more concrete procedural requirements, the TCA also mandates *727 that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(l) *shall not unreasonably discriminate among providers of functionally equivalent services.*” 47 U.S.C. § 332(c)(7)(B)(i)(I) (emphasis added). As the bulk of the cases on this issue have recognized, by using this language “the Act explicitly contemplates that some discrimination ‘among providers of functionally equivalent services’ is allowed. Any discrimination need only be reasonable.” *AT & T Wireless*, 155 F.3d at 427; *see also Omnipoint Communications Enters., L.P. v. Zoning Hearing Bd.*, 331 F.3d 386, 395 (3d Cir.2003) (citing *AT & T Wireless*, 155 F.3d at 427), *cert. denied*, 540 U.S. 1108, 124 S.Ct. 1070, 157 L.Ed.2d 894 (2004); *Nextel W. Corp. v. Unity Township*, 282 F.3d 257, 267 (3d Cir.2002) (same); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 638 (2d Cir.1999) (same).

5 More specifically, most courts have held that discrimination based on “traditional bases of zoning regulation” such as “preserving the character of the neighborhood and avoiding aesthetic blight” are reasonable and thus permissible. *AT & T Wireless*, 155 F.3d at 427; *see also Willoth*, 176 F.3d at 639 (same) (citing *AT & T Wireless*). Aside from reflecting the plain meaning of the TCA's text, this interpretation is also supported by the Act's legislative history. The House Conference Report on the TCA explained the Act's nondiscrimination clause as follows:

The conferees also intend that the phrase “unreasonably discriminate among providers of functionally equivalent services” will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that

if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

H.R. Conf. Rep. No. 104-458, at 208 (1996) (emphasis added).⁵

6 In keeping with these baseline principles, almost all federal courts considering such cases have ruled that providers alleging unreasonable discrimination must show that they have been treated differently from other providers whose facilities are "*similarly situated*" in terms of the "*structure, placement or cumulative impact*" as the facilities in question. *APT Pittsburgh Ltd. P'ship v. Penn Township Butler County*, 196 F.3d 469, 480 n. 8 (3d Cir.1999) (internal quotation marks omitted) (emphasis added); *Willoth*, 176 F.3d at 643 ("[I]t is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative impact."); see also *Omnipoint*, 331 F.3d at 395 ("Permitting the erection of a communications tower in a business district does not compel the [*728 zoning board] to permit a similar tower at a later date in a residential district."); *Unity Township*, 282 F.3d at 267 (discrimination claim "require [s] a showing that the other provider is similarly situated") (quoting *Penn Township*, 196 F.3d at 480 n. 8). In fact, the sole district court case from the Ninth Circuit on this issue holds that a mere increase in the number of wireless antennas in a given area over time can justify differential treatment of providers. *Airtouch Cellular v. City of El Cajon*, 83 F.Supp.2d 1158, 1166 (S.D.Cal.2000).

In ruling that the City's decision here did not unreasonably discriminate against MetroPCS, the district court employed a somewhat confusing and contradictory analysis. The court first stated that, in order to prevail, MetroPCS must demonstrate that the City treated it differently from one of its competitors for a "*functionally identical request*." 259 F.Supp.2d at 1012 (emphasis added). The district court cites *Sprint Spectrum L.P. v. Board of Zoning Appeals of Town of Brookhaven*, 244 F.Supp.2d 108, 117 (E.D.N.Y.2003), for this proposition, though the court's formulation appears to reflect a misreading of that case. The court in *Sprint Spectrum* actually applied the broader legal principle that "a local board may reasonably consider the location of the cell tower when deciding ... whether to approve the application for construction." *Id.*

Later in its opinion, the district court stated that MetroPCS must demonstrate that "other providers have been permitted to build *similar* structures on *similar* sites while it has been denied." 259 F.Supp.2d at 1012 (emphasis added). As discussed above, given that the wireless providers in question provide "functionally equivalent services" (which is undisputed in this case), "*similarly situated*" is the prevailing legal standard on the discrimination issue. The district court then proceeded to find that the facilities of other service providers in the Richmond District are "differently situated from MetroPCS because they have sought to place their antenna structures at different locations within the district." *Id.* Thus while it is not clear whether the decision below ultimately turned on the prevailing "*similarly situated*" analysis (similar structures on similar sites) or the district court's own "*functionally identical request*" standard, it appears that the court would have ruled for the City under either test. This ruling was error.

First, the district court frames the relevant legal inquiry too narrowly. For the policy reasons discussed above, the "*similarly situated*" standard seems to strike an appropriate balance between Congress's twin goals of promoting robust competition and preserving local zoning authority. The district court's formulation of the discrimination inquiry, under which localities may deny use permits any time the relevant antenna structures are at "different locations," *id.*, appears unduly narrow. Unless competing providers seek to place virtually identical antennas at the very same location or on the same specific structure, no wireless service provider could ever carry its burden to show discrimination under this test. Such a standard would give localities far too much leeway in rejecting functionally *similar* requests by competing providers and would thwart the competition that the TCA sought to facilitate.

7 As for the district court's final determination that the City did not, as a matter of law, unreasonably discriminate against MetroPCS, this too was error. The factual record is equivocal on the discrimination issue. While the Board's decision appears to have been

authorized by the City Planning Code, it is not entirely clear whether the proposed MetroPCS site is "similarly situated" to other approved facilities in the Richmond District. The *729 record shows that there is a competing SprintPCS wireless facility, also on Geary Boulevard, just two blocks (~ 0.2 miles) from the rejected MetroPCS site. MetroPCS also alleges that, shortly after it denied MetroPCS's application for a CUP at the Geary site, the Board approved the installation of a Cingular Wireless facility on a rooftop in the same neighborhood. These facts at least suggest a real possibility of discrimination between similar sites.

While the Board maintains that the other existing wireless facilities in the Richmond District were approved because they were placed at a more ideal location, see 259 F.Supp.2d at 1012, the record contains no systematic comparison of the sites in question. Similarly, while the record also contains photo simulations of the proposed MetroPCS site (ER 31 Exh. 1), there are no similar photographs of competing facilities in the area. In short, while it is undisputed that there are other wireless facilities in the same neighborhood, there appears to have been no detailed inquiry into the similarity of these existing facilities to the proposed MetroPCS facility in terms of "structure, placement or cumulative impact." See *again Penn Township*, 196 F.3d at 480 n. 8 (internal quotation marks omitted).

Given the foregoing, MetroPCS has presented sufficient evidence to create an issue of fact as to the discrimination claim. Since there is no conclusive evidence as to how MetroPCS's proposed facility compares to the existing sites of its competitors in terms of "structure, placement or cumulative impact," substantial questions of fact remain as to whether the Board of Supervisors unreasonably discriminated against MetroPCS, and thus neither party is entitled to judgment as a matter of law.⁶ *730 We accordingly reverse the district court's grant of summary judgment in favor of the City on this issue and remand the case for further proceedings to determine whether the proposed MetroPCS facility was similarly situated to competing facilities approved by the City and, if so, whether the City discriminated against MetroPCS with respect to the proposed and the competing facilities.

D. Prohibition Claim

Section 332 of the TCA provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or any instrumentality thereof—(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). MetroPCS alleges that, in denying its application for a CUP, the City has violated this provision by both imposing a "general ban" on new service providers in the Richmond District and effectively prohibiting the provision of wireless services by preventing MetroPCS from filling a "significant gap" in its coverage.

In the proceedings below, the district court held that the City's decision did not amount to a "general ban" on wireless services, but that material questions of fact remain as to whether the denial of MetroPCS's CUP application perpetuates a "significant gap" in MetroPCS's coverage. 259 F.Supp.2d at 1015. We find the district court's reasoning persuasive, and we affirm all aspects of its holding as to this claim.

1. General Ban

⁸ A city-wide general ban on wireless services would certainly constitute an impermissible prohibition of wireless services under the TCA. In fact, this is the only circumstance under which the Fourth Circuit will find an impermissible prohibition under the statute. See *AT & T Wireless*, 155 F.3d at 428 (holding that only "blanket prohibitions" and "general bans or policies" affecting *all* wireless providers count as effective prohibition of wireless services under the TCA). Under this rule, which is based on a strict plain meaning analysis, individual zoning decisions or persistent coverage gaps can never constitute a prohibition under the statute—courts must ask only whether local governments have (effectively) banned wireless services *altogether*. *Id.* The City asks us to adopt the Fourth Circuit's interpretation as well, noting that the House Conference Committee's Report on the TCA seems to anticipate a narrow, bare-bones approach: "It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-

case basis." H.R. Conf. Rep. No. 104-458, at 208 (1996).

However, for a variety of reasons, we decline to adopt the Fourth Circuit rule on this point. The language of the TCA, while sparse, does not dictate such a narrow interpretation even under a plain meaning approach. As the First Circuit has observed, given the current structure of the wireless services market, "[t]he fact that some carrier provides some service to some consumers does not in itself mean that the town has not effectively prohibited services to other consumers." *Second *731 Generation Props.*, 313 F.3d at 634. Additionally the Fourth Circuit's interpretation, by permitting all but the most restrictive local zoning policies, could actually thwart Congress's twin goals of encouraging competition in the wireless services industry and facilitating efficient use of bandwidth. The touchstone of our prohibition analysis is therefore not limited to blanket bans or general policies prohibiting wireless services. The TCA framework requires a more discriminating inquiry. (See our discussion of the "Significant Gap" analysis, *infra*.)

Turning briefly to the merits, the record offers no support for MetroPCS's assertion that the City has imposed a "general ban" on wireless services, against new providers or anyone else. Aside from the fact that it would be extremely dubious to infer a general ban from a single CUP denial, the record reveals that the City has been receptive to wireless providers in general and MetroPCS in particular. It is undisputed that the City has authorized the installation of some 2,000 antennas at about 450 sites around the city, including 30 MetroPCS sites. This undercuts any assertion that the City has placed a general ban on new market entrants. The district court made virtually identical observations in its own finding that no general ban exists, 259 F.Supp.2d at 1013, and we uphold this ruling as entirely correct.

2. Service Gap

Several circuits have held that, even in the absence of a "general ban" on wireless services, a locality can run afoul of the TCA's "effective prohibition" clause if it prevents a wireless provider from closing a "significant gap" in service coverage. This inquiry generally involves a two-pronged analysis requiring (1) the showing of a "significant gap" in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations. Currently there is a clear circuit split as to what constitutes a "significant gap" in coverage, and the Ninth Circuit has yet to rule on the issue.⁷

(a) Definition of "Significant Gap"

The test employed by the Second and Third Circuits holds that a "significant gap" in service exists only if *no provider* is able to serve the "gap" area in question. See *Omnipoint*, 331 F.3d at 398; *Unity Township*, 282 F.3d at 265; *Penn Township*, 196 F.3d at 478-80; *Willoth*, 176 F.3d at 643. One district court in the Ninth Circuit has also adopted this test. *El Cajon*, 83 F.Supp.2d at 1167. This test is sometimes referred to as the "one provider" rule since, if any single provider offers coverage in a given area, localities may preclude other providers from entering the area (as long as the preclusion is a valid, nondiscriminatory zoning decision that satisfies the other provisions of the TCA).

This rule has been touted as proceeding from the consumer's perspective rather than the individual service provider's perspective, which the Third Circuit argues is more in keeping with the regulatory goals of the TCA—as long as *some* provider offers service in the area, consumers will be adequately served and the TCA's goal of establishing nationwide wireless service will be achieved. See *Omnipoint*, 331 F.3d at 397-98; *Unity Township*, 282 F.3d at 265. Under this view, the TCA protects only the individual user's ability to receive service from one provider or another; it does not protect each service provider's ability to maintain full coverage within a *732 given market. *Omnipoint*, 331 F.3d at 397-98; *Unity Township*, 282 F.3d at 265; *cf. Willoth*, 176 F.3d at 641-43.

The First Circuit has recently rejected the "one provider" approach and held that a local regulation creates a "significant gap" in service (and thus effectively prohibits wireless services) if the *provider in question* is prevented from filling a significant gap *in its own* service network. See *Second Generation Props.*, 313 F.3d at 631-33. This approach formally takes the perspective of the individual service provider in assessing coverage gaps, but, as the *Second Generation Properties* court persuasively explains, this

approach actually better serves both individual consumers and the policy goals of the TCA.⁸ The *Second Generation Properties* court notes that the TCA “aims to secure lower prices and better service for consumers by opening all telecommunications markets to competition.” *Id.* at 631 (citing H.R. Conf. Rep. No. 104–458, at 113 (1996)). The court then warns against the dysfunctional implications of the Second and Third Circuits’ “one provider rule”:

A flat “any service equals no effective prohibition” rule would say that a town could refuse permits to build the towers necessary to solve any number of different coverage problems.... Such a rule would be highly problematic because it does not further the interests of the individual consumer. To use an example from this case, it is of little comfort to the customer who uses AT & T Wireless (or Voicestream, Verizon, Sprint, or Nextel) who cannot get service along the significant geographic gap which may exist along Route 128 that a Cingular Wireless customer does get some service in that gap.... *The result [of such a rule] would be a crazy patchwork quilt of intermittent coverage. That quilt might have the effect of driving the industry toward a single carrier.* When Congress enacted legislation to promote the construction of a nationwide cellular network, such a consequence was not, we think, the intended result. *Id.* at 633 (footnote omitted). In short, the First Circuit’s multiple provider rule better facilitates the robust competition which Congress sought to encourage with the TCA, and it better accommodates the current state of the wireless services market. The district court also found these arguments persuasive, since it formally adopted the First Circuit rule in its decision below. 259 F.Supp.2d at 1013–14.

For its part, MetroPCS does not object to the district court’s adoption of the First Circuit “multiple provider rule” (in fact MetroPCS and its Amici argue strenuously in favor of the First Circuit’s approach), though it argues that the City’s zoning “criteria,” which allow for CUP denials based on findings that a given facility is “not necessary” for the community, are “impossible for any non-incumbent carrier to meet” and thus constitute an effective prohibition of wireless services. Once again, the large number of permits already granted by the City—to providers new and old—belies this assertion.

Additionally, we emphasize that MetroPCS’s concerns regarding zoning decisions based on “necessity” can be accommodated by the First Circuit’s version of the significant gap test. Under this rule, *733 zoning decisions explicitly based on redundancy of service are not per se invalid, but they are subject to the crucial limitations that (1) they cannot discriminate between similarly situated facilities and (2) they cannot result in a significant gap in service for the *provider in question*. As will be discussed shortly, the First Circuit’s interpretation also fully meets the preemption and supremacy arguments advanced by MetroPCS.⁹

Having considered both the avowed policy goals of the TCA and the practical implications of the various constructional options, we elect to follow the district court’s lead and formally adopt the First Circuit’s rule that a significant gap in service (and thus an effective prohibition of service) exists whenever a provider is prevented from filling a significant gap in *its own* service coverage. With the correct legal standard thus clarified, we now turn to the merits of MetroPCS’s prohibition claim.

9 In applying the First Circuit’s provider-focused notion of “significant gap,” the district court denied both parties summary judgment, holding that significant questions of fact still exist as to whether the Board’s decision actually perpetuates a significant gap in MetroPCS’s coverage. This conclusion is amply supported by the existing record and, therefore, we affirm the district court’s ruling on this issue. Both parties confidently assert that the current record unequivocally supports their respective positions. But to the contrary, the record is replete with contradictory allegations as to MetroPCS’s need for the Geary site. *Compare* Statements of Suki McCoy, SER at 223–36 (stating that MetroPCS has adequate coverage in the Richmond District); Statements of Martin Signithaler, SER at 134–36 (stating that the Geary site would not improve MetroPCS’s effective coverage); MetroPCS Marketing Materials, SER 225, 234 (advertising that MetroPCS has full coverage around the Geary site), *with* Statements of MetroPCS Technological Expert, SER at 200–02 (stating that MetroPCS coverage is not adequate without the Geary site); Declaration of Lisa Nahmanson, ER 32 (stating that MetroPCS

coverage is insufficient without the Geary site); Testimony of Deborah Stein, SER 191–200(same); Declaration of John Schwartz, ER 49 (challenging basis of City's contention that existing MetroPCS service is adequate).

In urging us to grant it summary judgment on this issue, the City cites a bevy of cases that, collectively, are meant to demonstrate that “[t]he TCA does not assure every wireless carrier a right to seamless coverage in every area it serves,” and that the inability to cover a “a few blocks in a large city” is, as a matter of law, not a “significant gap.” While we recognize that the TCA does not guarantee wireless service providers coverage free of small “dead spots,”¹⁰ the existing case law amply demonstrates that “significant gap” determinations are extremely fact-specific inquiries that defy any bright-line legal rule. Moreover, the City's assertion as to the size of MetroPCS's alleged service gap merely assumes the very fact in issue here—the *734 existence and geographic proportions of a gap in MetroPCS's coverage.

Given the conflicting contents of the record, there is simply no basis for granting either party summary judgment on this issue. We affirm the district court's ruling to that effect.

(b) Least Intrusive Means

10 Under all existing versions of the “significant gap” test, once a wireless service provider has demonstrated that the requisite significant gap in coverage exists, it must then make some showing as to the intrusiveness or necessity of its proposed means of closing that gap. Here again, the circuits are split as to the required showing.

The Second and Third Circuits require the provider to show that “the manner in which it proposes to fill the significant gap in service is the *least intrusive on the values that the denial sought to serve.*” *Penn Township*, 196 F.3d at 480 (emphasis added); see also *Omnipoint*, 331 F.3d at 398; *Unity Township*, 282 F.3d at 266; *Willoth*, 176 F.3d at 643. The First and Seventh Circuits, by contrast, require a showing that there are “no alternative sites which would solve the problem.” *Second Generation Props.*, 313 F.3d at 635; see also *St. Croix County*, 342 F.3d at 834–35 (adopting the First Circuit test and requiring providers to demonstrate that there are no “viable alternatives”) (citing *Second Generation Properties*).¹¹

After concluding that material issues of fact remain as to the presence (or absence) of a significant gap in MetroPCS's coverage, the district court attempted to reconcile competing interpretations of the intrusiveness inquiry by creating its own “fact-based test that requires the provider to demonstrate that its proposed solution is the *most acceptable option* for the community in question.” 259 F.Supp.2d at 1015 (emphasis added).

Since there is no controlling legal authority on the issue, our choice of rule must ultimately come down to policy considerations. The district court's “most acceptable option” rubric seems a hopelessly subjective standard, and one wonders how a proposed site could ever be proven “the most acceptable” if a zoning proposal with respect to it had already been denied by local authorities. On the other hand, the First and Seventh Circuit requirement that a provider demonstrate that its proposed facility is the only viable option seems too exacting. As the case at bar demonstrates, there may be several viable means of closing a major service gap, (see MetroPCS Alternative Site Analysis, SER 26–35), and in such a situation, this “only viable option” rule would either preclude the construction of any facility (since no single site is the “only viable” alternative) or require providers to endure repeated denials by local authorities until only one feasible alternative remained. This seems a poor use of time and resources for both providers and local governments alike.

The Second and Third Circuit “least intrusive” standard, by contrast, allows for a *735 meaningful comparison of alternative sites before the siting application process is needlessly repeated. It also gives providers an incentive to choose the least intrusive site in their first siting applications, and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials.

For these reasons, we now adopt the “least intrusive means” standard and instruct the district court to apply this rule as necessary in its consideration of the prohibition issue on

remand.

E. Preemption Claim

11 One additional note is in order that bears, albeit indirectly, on MetroPCS's discrimination and prohibition claims. MetroPCS vigorously asserts, as separate claims independent of the specific provisions of the TCA, that the Board's denial of its CUP based on an appraisal of community "necessity" violates the FCC's exclusive licensing authority over wireless providers and is preempted by the TCA's statutory scheme.

In support of this claim MetroPCS points out that the FCC has identified "an immediate need for cellular service" and has established the goal of "providing for up to two cellular systems per market." *In the Matter of An Inquiry Into the Use of Bands 825–845 MHz and 870–890 MHz for Cellular Communications Systems*, Memorandum Opinion and Order on Reconsideration, 89 F.C.C.2d 58, at ¶¶ 82, 1982 WL 190439 (1982). The FCC further sought to preclude state regulation of the number of service providers in a given market: "[W]e have already determined 'need' on a nationwide basis and have preempted the states from denying state certification based on the number of existing carriers in the market or the capacity of existing carriers to handle the demand for mobile services." *Id.* Congress similarly has declared that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service," 47 U.S.C. § 332(c)(3)(A), and that the TCA is "not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities," H.R. Conf. Rep. No. 104–458, at 209 (1996). For its part, the City does little to address these arguments directly.

Yet while MetroPCS does convincingly demonstrate that the FCC has exclusive authority to issue licenses and regulate the wireless services market—a point which appears to be undisputed between the parties—the TCA itself fully accommodates these preemption concerns in its anti-discrimination and anti-prohibition provisions. The TCA's statutory scheme ensures that the bandwidth usage and competitive market dynamics sought by Congress and the FCC will be realized, while at the same time allowing cities to prevent certain areas from being overburdened by a proliferation of wireless facilities. MetroPCS's vigorous *per se* arguments against necessity-based zoning decisions misconstrue the delicate regulatory balance struck by the Act.

First of all, a zoning decision to prohibit construction of a wireless facility at a specific location—whether based on necessity or not—does not implicate the FCC's ability to regulate the number of wireless providers in a given market. Federal supremacy and the FCC's exclusive power to regulate wireless markets are fully vindicated in the TCA's anti-discrimination and anti-prohibition provisions, especially under the First Circuit's "multiple provider" interpretation of the "prohibition" clause. As discussed above, whatever a locality's *736 judgment as to the need for a facility at a given site, such a determination may not effectively prohibit service or reflect favoritism for one provider over another. This protects, at a macro-level, the competitive markets that the FCC has sought to construct. Put differently, if a single siting denial does not create significant gaps in provider coverage and reflects no unreasonable discrimination among providers, market dynamics and FCC authority are not threatened in the first place.

Essentially, the TCA represents a congressional judgment that local zoning decisions harmless to the FCC's greater regulatory scheme—and only those proven to be harmless—should be allowed to stand. As discussed earlier, the TCA "does not affect or encroach upon the *substantive* standards to be applied under established principles of state and local law," *Oyster Bay*, 166 F.3d at 494 (internal quotation marks omitted) (emphasis added), and it "does not create a substantive federal limitation upon local land use regulatory power," *Todd*, 244 F.3d at 58; *see also St. Croix County*, 342 F.3d at 830 (same rule) (quoting *Todd*). MetroPCS's preemption and supremacy claims are thus misdirected. *See, e.g., El Cajon*, 83 F.Supp.2d at 1168–69 (rejecting a federal preemption claim in a § 332(c)(7) case). The fate of MetroPCS's real concerns in this area—that localities may be able to reject all siting proposals that they feel are unnecessary—is determined by our construction of the TCA's prohibition provision. As discussed earlier, the First Circuit's multiple-provider approach best preserves market

competition and addresses these supremacy and preemption concerns as well.

F. Environmental Concerns

12 The last claim in this case is easily resolved. The TCA provides that localities may not base zoning decisions on concerns over radio frequency emissions if the proposed wireless facility complies with FCC emissions requirements:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC]'s regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv). There is no dispute that MetroPCS's proposed facility for the Geary site complies with the relevant FCC regulations. The only issue is whether the City's decision was impermissibly based on concerns over RF emissions.

MetroPCS argues that the Board did base its decision on environmental considerations. In support of this claim it notes that "opponents of MetroPCS's application made boisterous presentations before the Board regarding RF emissions, accompanied by argument, badges and t-shirts complaining about RF emissions." MetroPCS also claims that "the Board's denial motion expressly states that it was based on 'all of the public comments made in support of and opposed to the appeal.'" Finally, MetroPCS notes that the Board's decision stated the proposed facility would "not promote the health, safety and welfare of the city."

These observations are of little relevance to the issue here. As the district court correctly points out, the party actually challenging the MetroPCS CUP application before the Board (Mr. Blum) took pains to clarify that his appeal was *not* based on environmental concerns. Additionally, the Board's formal decision against MetroPCS did *not* state that it was "based on" all public comments made in support of and opposed to the appeal. *737 MetroPCS's quotation on this point is misleading. The Board merely stated that it "*reviewed and considered*" all such comments, which is exactly what a local zoning board is supposed to do at a public hearing. (Emphasis added.)

Most crucially, the Board's written decision does not once mention RF emissions as a motivation for denying MetroPCS's CUP application. Broadly stating (presumably as a recitation of the City's Policy Principles) that the proposed facility "will not promote" public health, safety and welfare is not remotely equivalent to basing a zoning decision on a fear of RF emissions. Given the foregoing, the one case cited by MetroPCS on this issue (*Telespectrum, Inc. v. Pub. Serv. Comm'n*, 227 F.3d 414 (6th Cir.2000)), which involved a straightforward application of the TCA's RF provision, is inapposite. The district court was correct in granting the City summary judgment as to this claim, and we affirm that ruling.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's ruling that the Board's decision was properly "in writing," supported by substantial evidence and not impermissibly based on concerns over radio frequency emissions under the TCA. We also AFFIRM the district court's ruling that material questions of fact remain as to whether the Board's decision effectively prohibited the provision of personal wireless services under the TCA. Finally, we REVERSE the district court's determination that the Board's decision did not, as a matter of law, unreasonably discriminate among providers of functionally equivalent services within the meaning of the TCA, and we REMAND this case for further proceedings consistent with this opinion.

GRABER, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that genuine issues of material fact remain with respect to whether the Board of Supervisors' (Board) denial of MetroPCS's application for a Conditional Use Permit (CUP) to construct wireless facilities violated the anti-discrimination and anti-prohibition provisions of the Telecommunications Act of 1996(TCA), 47 U.S.C. §§ 151–615. I write separately because the Board's determination that the proposed facilities are unnecessary, premised on the fact that at least one other

service provider serves the same area, is irreconcilable with the anti-discrimination provision of the TCA, 47 U.S.C. § 332(c)(7)(B)(i)(II). In view of that inconsistency, the Board's "necessity" finding cannot support its denial of MetroPCS's request even if substantial evidence supports that finding. I respectfully dissent from the majority's conclusion to the contrary.

According to the majority, a reviewing court's analysis of the reasons given by a zoning authority for denying a request to construct wireless facilities begins and ends with determining whether those reasons are authorized by local regulations and supported by evidence. Relying on the Second Circuit's decision in *Cellular Telephone Co. v. Town of Oyster Bay*, the majority concludes that "the TCA 'does not affect or encroach upon the substantive standards to be applied under established principles of state and local law.'" Maj. op. at 724 (emphasis in majority opinion) (quoting *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir.1999)). That is, the reasons stated by a zoning authority in denying a request for wireless facilities are irrelevant under the majority's analysis. Accordingly, the majority concludes that the Board was entitled to reject MetroPCS's application for a *738 CUP solely because "[n]othing in the record suggests that the area proximate to 5200 Geary Boulevard is not already served by at least one other wireless service provider." See Maj. op. at 729–30 n. 6 (finding no error in the Board's "necessity" rationale because "the TCA is agnostic as to the substantive content of local regulations").

The majority overstates the extent of the TCA's indifference to the substantive content of local regulations when those regulations are applied to zoning decisions regarding the "placement, construction, and modification of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(B)(i). *Oyster Bay* tempered its statement regarding the TCA's neutrality by observing that at least one provision of the TCA places a substantive limitation on the permissible bases to support a zoning authority's denial of a request for the construction of wireless facilities: "We note ... that [47 U.S.C.] § 332(c)(7)(B)(iv) [1] bars denials based on environmental effects of rfes [radio frequency emissions,] if the applicant facility would comply with FCC standards...." *Oyster Bay*, 166 F.3d at 494 n. 2. Although health and safety are undeniably a proper subject for local regulation, the TCA "prevents the denial of a permit on the sole basis that the facility would cause negative environmental effects." *Id.* at 495 (quoting *Iowa Wireless Servs., L.P. v. City of Moline*, 29 F.Supp.2d 915, 923 (C.D.Ill.1998)).

Similarly, "the anti-discrimination and anti-prohibition provisions of the TCA, [47 U.S.C. § 332(c)(7)(B)(i)(I), (II),] involve federal limitations on state authority." *S.W. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 58 (1st Cir.2001) (internal quotation marks omitted). Unlike the TCA's provision relating to radio frequency emissions, the anti-discrimination and anti-prohibition provisions do not expressly prohibit the consideration of specific grounds in zoning decisions regarding the construction of wireless facilities. Nonetheless, those provisions do limit the ways in which a state or local government may apply its zoning regulations to a request for the placement of wireless facilities. As *Todd* observed, a local zoning authority is "subject to several substantive and procedural limitations that 'subject[local governments] to an outer limit' upon their ability to regulate personal wireless services land use issues." *Id.* at 57 (alteration in original) (quoting *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 15 (1st Cir.1999)); see also *APT Pittsburgh Ltd. P'ship v. Penn Township Butler County of Pennsylvania*, 196 F.3d 469, 473 (3d Cir.1999) (noting that the TCA "places several substantive and procedural limits upon [local zoning] authority when it is exercised in relation to personal wireless service facilities").

For example, the Board could not deny MetroPCS's application solely on the ground that the availability of wireless services in the Geary neighborhood may lead to increased wireless telephone usage among automobile drivers in that neighborhood, with a commensurate increase in traffic accidents. Traffic safety is certainly a legitimate zoning concern, and the Board could easily produce substantial evidence to support a correlation between wireless telephone usage among drivers and traffic accidents. Nonetheless, the *739 Board's rationale for its decision would be entirely inconsistent with the TCA's anti-prohibition provision, as carefully and correctly interpreted by the

majority, because the Board would be seeking to preserve a significant coverage gap. Accordingly, a denial of permission to construct wireless facilities for that reason alone should not survive judicial scrutiny.

The Board's necessity rationale presents the same problem. Whatever its consistency with local zoning ordinances,² the denial of MetroPCS's request on the ground that the Geary neighborhood is already served by at least one other wireless service provider is irreconcilable with § 332(c)(7)(B)(i)(II)'s prohibition of zoning decisions that "unreasonably discriminate among providers of functionally equivalent services." As explained in the House Conference Report, the chief purpose of the TCA is to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996). The TCA's anti-discrimination provision furthers that purpose by ensuring "that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section *unreasonably favor* one competitor over another." *Id.* at 208 (emphasis added).

Here, the Board's necessity determination results in precisely the type of unreasonable discrimination that the TCA seeks to prevent. It protects existing service providers against potential competitors and effectively bars all new market entrants from the area in question. Because the Board's necessity determination is inherently and unreasonably discriminatory, it cannot serve as a valid, legally relevant basis for rejecting MetroPCS's application for a CUP.

The majority misunderstands my point when it claims that I argue "that any zoning regulation—or application of such a regulation—based on considerations of community 'necessity' by its terms discriminates against new providers." *Maj. op.* at 724. Instead, I argue much more simply, and much more narrowly, that a local agency's fact-finding about "necessity" must respect the statutorily required definition of what "necessity" is.

Neither the majority nor the district court looked further than the Board's "necessity" rationale in holding that substantial evidence supported the Board's decision as a whole. Because "[a] significant number of community members that opposed the installation indicated that they had adequate wireless services [from other providers] in their district," the district court concluded that it "need not reach the question of whether there is substantial evidence supporting the Board's determination that MetroPCS's installation would cause visual blight, or that MetroPCS did not need the antennas for its own service." *MetroPCS, Inc. v. City & County of San Francisco*, 259 F.Supp.2d 1004, 1010-11 & n. 6 (N.D.Cal.2003). For the reasons discussed above, I disagree with the majority that the Board's decision can rest on that ground alone, even if that ground is supported by substantial evidence. Accordingly, on remand, I would instruct the district court to consider whether substantial evidence supports the legally relevant and permissible reasons that the Board gave for denying MetroPCS's request to construct wireless facilities.

*740 In all other respects, I concur in the majority's opinion.

Parallel Citations

05 Cal. Daily Op. Serv. 1988, 2005 Daily Journal D.A.R. 2835, 35 Communications Reg. (P&F) 400

Footnotes

* The Honorable Richard D. Cudahy, United States Circuit Judge for the Seventh Circuit, sitting by designation.

1 The relevant provisions of the TCA read as follows:

(7) Preservation of local zoning authority

(A) General Authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or

instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services

....

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7).

- 2 Incidentally, we believe that the Board's decision would arguably pass muster under any of the aforementioned legal standards. It easily passes the Fourth Circuit's test, under which merely stamping the application "DENIED" is sufficient. *AT & T Wireless*, 155 F.3d at 429. And with regard to the more stringent test outlined in *Omnipoint* and its ilk, the Board's decision "[sets] forth the reasons for the decision" and does at least a passable job of "linking its conclusions to evidence in the record." *Omnipoint*, 83 F.Supp.2d at 309. While the Board's decision is phrased in somewhat general terms, it does make reference to "the record," recounts the testimony offered during its hearing on the issue, articulates its findings and discusses its objections to many of the specific findings of the Planning Commission. Thus although the decision does not offer formal findings of fact and conclusions of law as a full-blown judicial decision might, it is not clear that the *Omnipoint* standard demands such rigor.
- 3 MetroPCS cites *Nextel Communications of Mid-Atlantic, Inc. v. Town of Wayland*, 231 F.Supp.2d 396, 406–07 (D.Mass.2002), for the proposition that local zoning regulations are not protected to the extent that they violate the TCA. This assertion reflects a misreading of *Wayland*. The passage cited by MetroPCS actually speaks to the anti-prohibition prong of the TCA. While the TCA is apparently agnostic as to the substantive content of local zoning ordinances, zoning *decisions* may be invalidated if they unreasonably discriminate among providers or prohibit the provision of wireless services. See discussion of the prohibition and discrimination issues, *infra*.
- 4 Particularly alarming is the general lack of reference to the City Planning Commission's decision to *grant* MetroPCS the CUP initially. At the least, one certainly wonders why the Planning Commission concluded, contrary to the Board's decision, that the MetroPCS site was "necessary and desirable" for the community. Unfortunately the Board did not shed any light on this issue, and, since at least one of its findings is supported by substantial evidence, the TCA provides no basis for remedying such procedural

shortcomings. As discussed above, congressional intent to preserve local zoning authority—however constituted—is clear.

5 Indeed one of the primary purposes of section 332(c)(7) is to protect the legitimate traditional zoning prerogatives of local governments. This section of the Act is actually entitled “Preservation of local zoning authority” and states as its baseline principle that, “[e]xcept as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government ... over decisions regarding the placement, construction, and modification of personal wireless service facilities.” 47 U.S.C. § 332(c)(7) (A).

6 In its brief, MetroPCS asserts that the City’s community necessity rationale “constitutes unreasonable discrimination against new providers and is antithetical to the pro-competitive goals of Section 332(c)(7)(B).” In support of this argument, MetroPCS relies on *Western PCS II Corp. v. Extraterritorial Zoning Authority*, 957 F.Supp. 1230, 1237–38 (D.N.M.1997), and *Sprint Spectrum, L.P. v. Town of Easton*, 982 F.Supp. 47, 51 (D.Mass.1997), both of which ruled that local governments may not deny wireless providers permission to construct facilities merely because they believe that existing wireless service is adequate. However, as the district court notes in its opinion below, 259 F.Supp.2d at 1012 n. 8, both of these decisions turned on the local government’s disregard of relevant evidence and improper application of relevant zoning laws. And while the City does little to directly address MetroPCS’s broader argument that necessity-based zoning decisions are inherently discriminatory against new market entrants, such an argument is of limited persuasiveness.

As discussed above, the Act specifically preserves traditional local zoning authority over siting decisions, and it has been consistently held that the TCA does not intrude upon the substantive content of local zoning rules. *Oyster Bay*, 166 F.3d at 494. In other words, far from prohibiting zoning decisions based on redundancy or community “necessity,” the TCA itself appears to be totally agnostic on this issue. Moreover, a purely aesthetic determination that a certain neighborhood is blighted with too many wireless antennas—which is specifically permitted in the prevailing case law and anticipated in the legislative history of the TCA—may similarly disadvantage new market entrants who wish to add new facilities in the neighborhood.

As for the case at bar, the claim of discrimination against new providers also rings a bit hollow coming from MetroPCS, since the record shows that it has been allowed to construct some 30 sites in the city of San Francisco, including 18 facilities under discretionary CUPs. While this does not necessarily establish that MetroPCS has been allowed to realize seamless coverage in the city, it certainly does refute any claim of discrimination against new providers *as such*.

More to the point, Congress has already considered the competing interests of local zoning authorities and wireless providers (both new and old), and has constructed a statutory scheme to accommodate both. As will be discussed more fully below, while the TCA is agnostic as to the substantive *content* of local regulations, localities are nonetheless constrained by section 332(c)(7)(B)(i)(I) and (II) of the TCA, which preclude them from unreasonably discriminating against competing providers or (effectively) prohibiting the provision of wireless services. See discussion *infra* at Section III, Part E.

7 The high stakes involved for both wireless service providers and local governments are reflected in the fact that most of the Amicus briefs filed in this case focus on this issue.

8 It should be noted that there is a difference between the interests of local

residents—who may prefer fewer providers to limit the number of antennas in the area—and those of wireless service subscribers who may be frustrated that their particular provider cannot offer coverage in a given neighborhood. Both of these may be categorized as the “consumer perspective,” though they lead to different results. Our use of the term “consumer” in the discussion here refers to wireless service subscribers.

9 See discussion of MetroPCS’s supremacy and preemption arguments, *infra* at Section III, Part E.

10 The district court correctly notes that the relevant service gap must be truly “significant” and “not merely individual ‘dead spots’ within a greater service area.” 259 F.Supp.2d at 1014. Courts applying both versions of the “significant gap” test appear to agree on this proposition. See e.g., *Second Generation Props.*, 313 F.3d at 631; *360° Communications Co.*, 211 F.3d at 87; *Willoth*, 176 F.3d at 643–44.

11 The district court also notes that, in the Fourth Circuit, “[a] community could rationally reject the least intrusive proposal in favor of a more intrusive proposal that provides better service or that better promotes commercial goals of the community.” 259 F.Supp.2d at 1014 (quoting *360 Communications Co.*, 211 F.3d at 87). This rule is inapposite to the case at bar since the Fourth Circuit, as discussed above, does not recognize either version of the “significant gap” test. Instead, it holds that the TCA prohibits only general or “blanket” bans on wireless services. Under such a rule, denials of individual siting requests can never run afoul of the TCA, and so the relative intrusiveness of different siting proposals is irrelevant.

1 47 U.S.C. § 332(c)(7)(B)(iv) provides:

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.

2 Pursuant to San Francisco Planning Code § 303(c)(1), the Board may consider whether a proposed development “is necessary or desirable for, and compatible with, the neighborhood or community.”



STAFF REPORT

TO: PLANNING COMMISSION

PREPARED BY: Anjana Mevani, Associate Planner

REVIEWED BY: Terry Blount, AICP, Planning Manager

GENERAL INFORMATION

APPLICANT: T-Mobile/Landmark Wireless – Karen Lienert

PROPERTY OWNER: Martinez United Methodist Church

LOCATION: 100 Church Street (APN 162-180-050)

GENERAL PLAN: Residential 0-6: 0 to 6 Units/Gross Acre

ZONING: R-7.5 (One-Family Residential: 7,500 sq. ft. minimum lot area)

ENVIRONMENTAL: Staff has yet to determine the level of environmental review that will be required for this project. All environmental documentation will be presented to the Planning Commission for either adoption or denial at a subsequent public hearing. Copies of the Initial Study document, if one is to be required for this project, will be made available to the general public at a date to be determined, at City Hall.

PROPOSAL: Study session to discuss and receive public input on a proposal for an installation of a new wireless telecommunications facility at 100 Church Street. The proposed project consists of adding an 85' monopine tree tower with panel antennas on top of the tower. T-Mobile will be leasing a 30'x20' area at the base of the tower for an equipment enclosure. The proposed project is located in a residential zoning district, which requires a Use Permit and Design Review approval.

RECOMMENDATION

Review proposal, accept public comment, and provide feedback and direction to staff and the applicant on the proposal. The purpose of the study session is to allow for preliminary project review. No Planning Commission action is to be taken at this time.

SITE, CONTEXT, AND PROJECT DESCRIPTION

The Martinez United Methodist Church property has a lot size of 3.39 acres (147,668 square feet), which is larger than most of the surrounding lots. The subject lot currently contains two church related buildings, a playground, patio, and parking. To the north, east, and adjacent to the subject property is Nancy Boyd Memorial Park. On the west and south are single-family residences. According to the Contra Costa County records the Church was built in 1950, prior to the construction of many of the nearby residences which were constructed in the 1960's. The subject property is located in a residential zoning district, where pursuant to Martinez Municipal Code Chapter 22.39, "Wireless Telecommunications Facilities," a Use Permit and Design Review approval is required for any wireless facility installation.

The applicant, T-Mobile, is proposing to install a new wireless telecommunications facility by adding an 85-foot monopine tree tower and panel antennas to the top of the tower. The applicant is also proposing to place an equipment enclosure at the base of the tower. T-Mobile will be leasing a 30'x20' area for the equipment enclosure. The equipment enclosure will be fenced and surrounded by oleander trees for screening. As noted in the applicant's letter dated February 5, 2010 (Attachment B), T-Mobile is seeking to improve its wireless communication network to provide adequate coverage for its customers, specifically in the residential area near Tahoe Circle.

The wireless telecommunications facility will operate unmanned and the equipment will be serviced up to two times a month. Noise from the equipment must meet the noise requirements set in Martinez Municipal Code Chapter 8.34.020 and shall not exceed 60dBA for exterior noise level. In addition, the attached Radio Frequency Radiation Report (Attachment H) demonstrates that the proposed wireless facility will be within the permissible public exposure standards set by the Federal Communications Commission (FCC). It should be noted that the Telecommunications Act of 1996 states that no state or local governmental entity may regulate the placement, construction, or modification of wireless facilities on the basis of environmental effects of radio frequency emissions to the extent that the emissions comply with FCC regulations.

DISCUSSION

Use Permit

As mentioned above, a Use Permit is required to permit a wireless telecommunications facility of this type. The Martinez Municipal Code Section 22.39, Adopting Standards and Criteria for Telecommunication Facilities – Resolution No. 071-01 (III B), does not permit wireless facilities in a residentially zoned area without information and verification that no alternative, non-residentially zoned site is available to serve the same area. According to the Resolution, residentially zoned areas are not preferred sites; therefore, evidence and documentation shall be provided by the applicant showing that other preferred sites were evaluated and dismissed. Also, in accordance with Adopting Standards and Criteria for Telecommunication Facilities, the applicant must sufficiently demonstrate that no other feasible alternative location exists.

The applicant has provided in writing (Attachment B and C) and with graphics (Attachment G) a coverage needs analysis that identifies alternative sites within the search ring that could accommodate the proposed wireless telecommunications facility

and provide similar service to the proposed coverage area. According to T-Mobile, the search ring is very small, approximately 0.3 of a mile in diameter and alternative sites considered in the search ring were collocation sites, Nancy Boyd Memorial Park, and Fire Station #13 (251 Church Street). However, within the coverage area no existing wireless telecommunications sites were available for collocation, Nancy Boyd Memorial Park sits at low elevation which would affect coverage, and both the tennis courts at the park and Fire Station #13 have limited space. The Martinez United Methodist Church site was chosen due to its elevation allowing for more coverage, large lot that allows separation from nearby residences, screening by mature trees on the lot, and its non-residential use (church use) in a residential area.

Design Review

The applicant is proposing to construct an 85-foot monopine tree tower at the northern portion of the subject property. The tower will resemble a pine tree and the antennas will be set within the branches. For screening purposes the tower will be set near existing trees. The proposed antennas will be covered in green fabric with faux pine needles to disguise the antennas on the tower. Further, the antennas proposed to be placed on the top portion of the tower hat will be approximately 55.9" in height, 13.3" in width, and 3.15" in depth. It should be noted that utility poles and towers are not subject to height limits (Martinez Municipal Code Chapter 22.34.170.B).

The proposed equipment enclosure will be located at the base of the tower and will not be visible from Church Street or Tahoe Circle. Most of the equipment within the enclosure will not be visible above the 6-foot chain-link fence. Oleander trees will surround the enclosure and will provide screening for both the equipment and enclosure. Based on the feedback received from the neighborhood outreach meeting held on May 10, 2010, two redwood trees will be planted near the western property line to provide additional screening. The applicant has provided photo simulations with various views of the monopine tree tower, antennas, and equipment enclosure (Attachment E). Additionally, should the applicant decide to move forward, the project will be reviewed by the Design Review Committee, prior to returning to the Planning Commission.

ATTACHMENTS

- A. Site Context Map
- B. Applicant's Letter Dated February 5, 2010
- C. Applicant's Letter Dated October 31, 2010
- D. Letter of Authorization from Martinez United Methodist Church
- E. Photo Simulations
- F. Antenna Cutsheet
- G. Coverage Maps
- H. Radio Frequency Radiation Report
- I. Noise Information

EXHIBITS

Survey, Site Plan and Antenna Layout, Elevations, Landscape Plan

F:\Community Development\All Projects\Wireless Facilities\Church St, 100 - T-Mobile\T-Mobile Wireless - StudySessionRpt.doc

EXHIBIT E

Property Search For Sale For Rent Min. Price (\$) Max. Price (\$) Bedrooms Property Type

Enter a country, city, neighborhood or US ZIP Any Any Any Any

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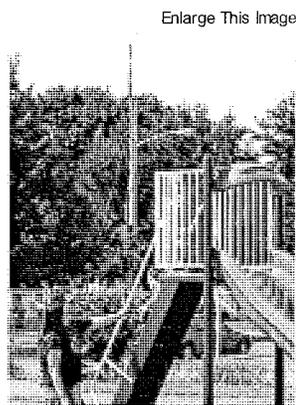
ONE HOLIDAY OCEAN BOCA RATON, FL Over 80% Sold Escape to South Florida, Residences Available for Immediate Occupancy.

IN THE REGION | LONG ISLAND

A Pushback Against Cell Towers

By MARCELLE S. FISCHLER Published: August 27, 2010

Wantagh



Phil Marino for The New York Times

Jodi Turk Goldberg and her husband, Michael, with their son Charlie, near a school in Merrick, are among those concerned about cell antennas (center rear).

TINA CANARIS, an associate broker and a co-owner of RE/MAX Hearthstone in Merrick, has a \$999,000 listing for a high ranch on the water in South Merrick, one of a handful of homes on the block on the market. But her listing has what some consider a disadvantage: a cell antenna poking from the top of a telephone pole at the front of the 65-by-100-foot lot.

"Even houses where there are transformers in front" make "people shy away," Ms. Canaris said. "If they have the opportunity to buy another home, they do."

She said cell antennas and towers near homes affected property values, adding, "You can see a buyer's dismay

over the sight of a cell tower near a home just by their expression, even if they don't want anything."

By blocking, or seeking to block, cell towers and antennas over the course of the last year, Island homeowners have given voice to concerns that proximity to a monopole or antenna may not be just aesthetically displeasing but also harmful to property values. Many also perceive health risks in proximity to radio frequency radiation emissions, despite industry assertions and other evidence disputing that such emissions pose a hazard.

Emotions are running so high in areas like Wantagh, where an application for six cell antennas on the Farmingdale Wantagh Jewish Center is pending, that the Town of Hempstead imposed a moratorium on applications until Sept. 21. That is the date for a public hearing on a new town ordinance stiffening requirements.

At a community meeting on Aug. 16 at Wantagh High School, Dave Denenberg, the Nassau county legislator for Bellmore, Wantagh and Merrick, told more than 200 residents that 160 cell antennas had been placed on telephone poles in the area in the last year by NextG, a wireless network provider.

"Everyone has a cellphone," Mr. Denenberg said, "but that doesn't mean you have to have cell installations right across the street from your house." Under the old town code, installations over 30 feet high required an exemption or a variance. But in New York,

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wireless providers have public utility status, like LIPA and Cablevision, and they can bypass zoning boards.

Earlier this month in South Huntington, T-Mobile was ordered to take down a new 100-foot monotower erected on property deemed environmentally sensitive (and thus requiring a variance). Andrew J. Campanelli, a civil rights lawyer in Garden City, said a group of residents had hired him to oppose the cellular company's application.

"They were worried about the property values," Mr. Campanelli said. "If your home is near a cell antenna, the value of your property is going down at least 4 percent. Depending on the size of the tower and the proximity, it is going down 10 percent."

In January, in an effort to dismantle 50 cell antennas on a water tower across from a school in the village of Bayville, Mr. Campanelli filed a federal lawsuit that cited health risks and private property rights.

In a statement, Dr. Anna F. Hunderfund, the Locust Valley superintendent, said that in February 2009 the district had engaged a firm to study the cellphone installations near the Bayville schools, finding that the tower "posed no significant health risks," and she noted that the emission levels fell well below amounts deemed unsafe by the Federal Communications Commission.

In June 2009, Sharon Curry, a psychologist in Merrick, woke up to find a cell antenna abutting her backyard, level to her 8-year-old son's bedroom window.

Puzzled by its presence, particularly because she lives next to an elementary school, she did research to see if there was cause for concern. What she learned about possible health impacts, she said, led her to seek help from civic associations and to form a group, Moms of Merrick Speak Out, to keep new cell towers out. She said she was seeking the "responsible" placement of cell antennas, away from homes and schools.

The Federal Communications Act of 1996 says health concerns are not a valid reason for a municipality to deny zoning for a cell tower or antenna. Property values and aesthetics, however, do qualify, according to the act.

Frank Schilero, an associate broker with RE/MAX Innovations in Wantagh, has a listing on a \$629,000 home down the street from the Farmingdale Wantagh Jewish Center, where the application is pending to put six cell antennas on the roof.

"People don't like living next to cell towers, for medical reasons or aesthetics," Mr. Schilero said. "Or they don't want that eyesore sticking up in their backyards." There is an offer on his listing, he added, but since the buyer heard about the possible cell antennas she has sought more information from the wireless companies about their size and impact.

Charles Kovit, the Hempstead deputy town attorney, said that under the proposed code change any new towers or antennas would have to be 1,500 feet from residences, schools, houses of worship and libraries.

The town recently hired a consultant, Richard A. Comi of the Center for Municipal Solutions in Glenmont, to review antenna applications.

Under the new ordinance, applications for wireless facilities would require technical evidence that they had a "gap" in coverage necessitating a new tower.

"If not, they will get denied," Mr. Kovit said. The wireless companies would also have to prove that the selected location had "the least negative impact on area character and property values." If another location farther away from homes can solve the gap problem, "they are going to have to move."

A version of this article appeared in print on August 29, 2010, on page RE9 of the New York edition.

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Note: This page is best viewed using [Mozilla Firefox](#) internet browser.

For residents in other communities opposing proposed wireless facilities in your neighborhood: in addition to the real estate studies you send and share with your local officials, talk to your local real estate professionals and inform and educate them about the negative effects on local property values that cell towers have, and ask them to submit letters of support to city officials, or have them sign a petition that will be forwarded onto your city officials. See examples below. It's very important to have your local real estate professionals back up what the experts report in their studies to make your arguments real and relative to your specific community. You can also educate your local homeowners associations and neighborhood councils about the negative property value effects and have them submit letters and sign petitions, too. Check out the other pages on this website (click links in right column) for other helpful information.

Residents are justifiably concerned about proposed cell towers reducing the value of their homes and properties. Who would want to live right next to one, or under one? And imagine what it's like for people who purchase or build their dream home or neighborhood, only to later have an unwanted cell tower installed just outside their window?

This negative effect can also contribute to urban blight, and a deterioration of neighborhoods and school districts when residents want to move out or pull their children out because they don't want to live or have their children attend schools next to a cell tower.

People don't want to live next to one not just because of health concerns, but also due to aesthetics and public safety reasons, i.e., cell towers become eyesores, obstructing or tarnishing cherished views, and also can attract crime, are potential noise nuisances, and fire and fall hazards.

These points underscore why wireless facilities are commercial facilities that don't belong in residential areas, parks and schools, and find out why they should be placed in alternative, less obtrusive locations. In addition, your city officials have the power to regulate the placement and appearance of cell towers, as long as such discrimination is not unreasonable, and especially if you show them that you already have coverage in your area.

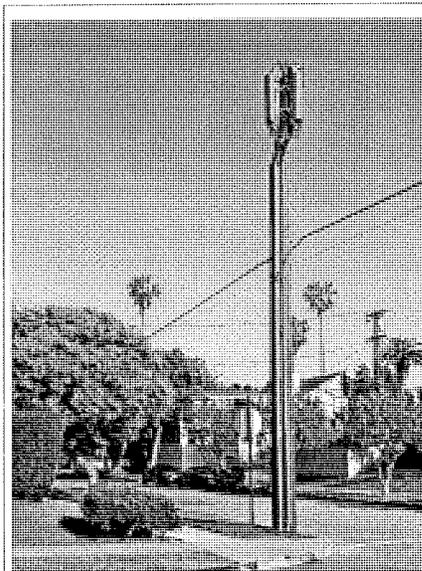
As mentioned on our Home Page, putting cell towers near residential properties is just bad business. For residential owners, it means decreased property values. For local businesses (realtors and brokers) representing and listing these properties, it will create decreased income. And for city governments, it results in decreased revenue (property taxes).

Read this New York Times news story, "A Pushback Against Cell Towers," published in the paper's Real Estate section, on August 27, 2010: http://www.nytimes.com/2010/08/29/realestate/29Lizo.html?_r=1&ref=realestate.

A number of organizations and studies have documented the detrimental effects of cell towers on property values.

1. The Appraisal Institute, the largest global professional membership organization for appraisers with 91 chapters throughout the world, spotlighted the issue of cell towers and the fair market value of a home and educated its members that a cell tower should, in fact, cause a decrease in home value.

The definitive work on this subject was done by Dr. Sandy Bond, who concluded that "media attention to the potential health hazards of [cellular phone towers and antennas] has spread concerns among the



How would you like one of these ugly monsters installed on the sidewalk next to your home? This one was installed in a public right of way (PROW, aka sidewalk) on Via De La Paz in beautiful Pacific Palisades, because the City of Los Angeles currently lacks rigorous regulations concerning proposed PROW wireless installations. Why isn't the Los Angeles City Council and Attorney updating the city's ordinance like residents are asking? Photo courtesy Pacific Palisades Residents Association, <http://pprainc.org/>

Menu

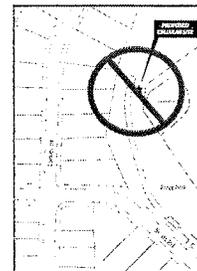
Burbank residents: Sign our Petition now, "Burbank Residents Oppose Smart Meters":
<http://burbankaction.wordpress.com>

Visit our Burbank ACTION blog:
<http://burbankaction.wordpress.com>

Calendar - upcoming events:
<http://burbankaction.wordpress.com>

Go to our "Smart Meter Concerns" Section:
<https://sites.google.com/site/smart-meter-concerns>

Join our facebook page- network, share and post info that's going on in your community, inform and help other communities



Click below for more info:

Burbank UPDATES:

- June 3-17, 2011: City of Burbank Planning & Transportation Division issues its draft updated wireless facility ordinance -- it fails to protect our residential areas -- go here to read how you can help: <https://sites.google.com/site/smart-meter-concerns/17-2011-resident-respons-comments-to-proposed-wf-ordinance-update>
- Read Burbank ACTION resident response to proposed Draft Update of our Wireless Telecommunications Facility Ordinance [here](#).
- Please go [here](#) for

public, resulting in increased resistance" to sites near those towers. Percentage decreases mentioned in the study range from 2 to 20% with the percentage moving toward the higher range the closer the property. These are a few of her studies:

a. "The effect of distance to cell phone towers on house prices" by Sandy Bond, Appraisal Journal, Fall 2007, see attached. Source, Appraisal Journal, found on the Entrepreneur website, <http://www.entrepreneur.com/tradejournals/article/171851340.html> or http://www.ppres.net/papers/Bond_Squires_Using_GIS_to_Measure.pdf

b. Sandy Bond, Ph.D., Ko-Kang Wang, "The Impact of Cell Phone Towers on House Prices in Residential Neighborhoods," The Appraisal Journal, Summer 2005; see attached. Source: Goliath business content website, http://goliath.ecnext.com/coms2/gi_0199-5011857/The-impact-of-cell-phone.html

c. Sandy Bond also co-authored, "Cellular Phone Towers: Perceived impact on residents and property values" University of Auckland, paper presented at the Ninth Pacific-Rim Real Estate Society Conference, Brisbane, Australia, January 19-22, 2003; see attached. Source: Pacific Rim Real Estate Society website, http://www.ppres.net/Papers/Bond_The_Impact_Of_Cellular_Phone_Base_Station_Towers_On_Property_Values.pdf

2. Industry Canada (Canadian government department promoting Canadian economy), "Report On the National Antenna Tower Policy Review, Section D – The Six Policy Questions, Question 6. What evidence exists that property values are impacted by the placement of antenna towers?"; see attached. Source: Industry Canada <http://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf08353.html> website,

3. New Zealand Ministry for the Environment, "Appendix 5: The Impact of Cellphone Towers on Property Values"; see attached. Source: New Zealand Ministry for the Environment website, <http://www.mfe.govt.nz/publications/rma/nes-telecommunications-section32-aug08/html/page12.html>

On a local level, residents and real estate professionals have also informed city officials about the detrimental effects of cell towers on home property values.

1. **Glendale, CA:** During the January 7, 2009 Glendale City Council public hearing about a proposed T-mobile cell tower in a residential neighborhood, local real estate professional Addora Beall described how a Spanish home in the Verdugo Woodlands, listed for 1 million dollars, sold \$25,000 less because of a power pole across the street. "Perception is everything," said Ms. Beall stated. "It the public perceives it to be a problem, then it is a problem. It really does affect property values." See Glendale City Council meeting, January 7, 2009, video of Addora Beall comments @ 2:35:24: http://glendale.granicus.com/MediaPlayer.php?view_id=12&clip_id=1227

2. **Windsor Hills/View Park, CA:** residents who were fighting off a T-Mobile antenna in their neighborhood received letters from real estate companies, homeowner associations and resident organizations in their community confirming that real estate values would decrease with a cell phone antenna in their neighborhood. To see copies of their letters to city officials, look at the . Report from Los Angeles County Regional Planning Commission regarding CUP Case No. 200700020-(2), from L.A. County Board of Supervisors September 16, 2009, Meeting documents, Los Angeles County website, here at: <http://file.lacounty.gov/bos/supdocs/48444.pdf>

a. See page 295, August 31, 2008 Letter from Donna Bohanna, President/Realtor of Solstice International Realty and resident of Baldwin Hills to Los Angeles Board of Supervisors explaining negative effect of cell tower on property values of surrounding properties. "As a realtor, I must disclose to potential buyers where there are any cell towers nearby. I have found in my own experience that there is a very real stigma and cellular facilities near homes are perceived as undesirable."

b. See page 296, March 26, 2008 Letter from real estate professional Beverly Clark, "Those who would otherwise purchase a home, now considered desirable, can be deterred by a facility like the one proposed and this significantly reduces sales prices and does so immediately...I believe a facility such as the one proposed will diminish the buyer pool, significantly reduce homes sales prices, alter the character of the surrounding area and impair the use of the residential properties for their primary uses."

c. See Page 298, The Appraiser Squad Comment Addendum, about the reduced value of a home of resident directly behind the proposed installation after the city had approved the CUP for a wireless facility there: "The property owner has listed the property...and has had a potential buyer back out of the deal once this particular information of the satellite communication center was announced....there has been a canceled potential sale therefore it is relevant and determined that this new planning decision can have some negative effect on the subject property."

our list of "Top 20" Resident Recommendations -- thanks to residents who have e-mailed these to our city officials. To read about the Dec. 1, 2010 Community Meeting, click the item under "Burbank UPDATES" in the column to your right.

- Dec. 1, 2010: [Community Meeting](#)
- August 31, 2010: [City Council Meeting - Interim Regulations Approved](#)
- July 26, 2010: [Planning Board Regulations Approved](#)
- June 14, 2010 [Study Session and Upcoming TBD Community Meeting](#)
- Dec. 8, 2009 [Study Session & City Hall Meetings](#)
- Nov. 16, 2009 [Planning Board and Nov. 17 City Hall Meetings](#)
- November 12, 2009 [Public Meeting](#)

City of Burbank website: Wireless ordinance updates

Burbank Leader Newspaper Stories and Editorials

Tools: Reasons To Deny A Proposed Cell Tower and/or push for stronger regulations:

- [Reasonable Discrimination Allowed](#)
- [Decrease In Property Value](#)
- [We Already Have Good Coverage: Significant Gap and 911](#)
- [Alternative Locations and Supplemental Application forms](#)
- [Aesthetics and](#)

d. See Page 301, PowerPower presentation by residents about real estate values: "The California Association of Realtors maintains that 'sellers and licensees must disclose material facts that affect the value or desirability of the property,' including 'known conditions outside of and surrounding' it. This includes 'nuisances' and zoning changes that allow for commercial uses."

e. See Pages 302-305 from the Baldwin Hills Estates Homeowners Association, the United Homeowners Association, and the Windsor Hills Block Club, opposing the proposed cell tower and addressing the effects on homes there: "Many residents are prepared to sell in an already depressed market or, in the case of one new resident with little to no equity, simply walk away if these antennas are installed."

f. See Pages 362-363, September 17, 2008, Letter from resident Sally Hampton, of the Windsor Hills Homeowner's Assoc., Item K, addressing effects of the proposed facility on real estate values.

3. **Santa Cruz, CA:** Also attached is a story about how a preschool closed up because of a cell tower installed on its grounds; "Santa Cruz Preschool Closes Citing Cell Tower Radiation," Santa Cruz Sentinel, May 17, 2006; Source, EMFacts website: <http://www.emfacts.com/weblog/?p=466>.

4. **Merrick, NY:** For a graphic illustration of what we don't want happening here in Burbank, just look at Merrick, NY, where NextG wireless facilities are being installed, resulting in declining home real estate values. Look at this Best Buyers Brokers Realty website ad from this area, "Residents of Merrick, Seaford and Wantaugh Complain Over Perceived Declining Property Values: <http://www.bestbuyerbroker.com/blog/?p=86>.

5. **Burbank, CA:** As for Burbank, at a City Council public hearing on December 8, 2009, hillside resident and a California licensed real estate professional Alex Safarian informed city officials that local real estate professionals he spoke with agree about the adverse effects the proposed cell tower would have on property values:

"I've done research on the subject and as well as spoken to many real estate professionals in the area, and they all agree that there's no doubt that cell towers negatively affect real estate values. Steve Hovakimian, a resident near Brace park, and a California real estate broker, and the publisher of "Home by Design" monthly real estate magazine, stated that he has seen properties near cell towers lose up to 10% of their value due to proximity of the cell tower...So even if they try to disguise them as tacky fake metal pine trees, as a real estate professional you're required by the California Association of Realtors: that sellers and licensees must disclose material facts that affect the value or desirability of a property including conditions that are known outside and surrounding areas."

(See City of Burbank Website, Video, Alex Safarian comments @ 6:24:28, http://burbank.granicus.com/MediaPlayer.php?view_id=6&clip_id=848)

Indeed, 27 Burbank real estate professionals in December 2009, signed a petition/statement offering their professional opinion that the proposed T-Mobile cell tower at Brace Canyon Park would negatively impact the surrounding homes, stating:

"It is our professional opinion that cell towers decrease the value of homes in the area tremendously. Peer reviewed research also concurs that cell sites do indeed cause a decrease in home value. We encourage you to respect the wishes of the residents and deny the proposed T-Mobile lease at this location. We also request that you strengthen your zoning ordinance regarding wireless facilities like the neighboring city of Glendale has done, to create preferred and non preferred zones that will protect the welfare of our residents and their properties as well as Burbank's real estate business professionals and the City of Burbank. Higher property values mean more tax revenue for the city, which helps improve our city." (Submitted to City Council, Planning Board, City Manager, City Clerk and other city officials via e-mail on June 18, 2010. To see a copy of this, scroll down to bottom of page and click "Subpages" or go here: <http://sites.google.com/site/nocelltowerinourneighborhood/home/decreased-real-estate-value/burbank-real-estate-professionals-statement>)

Here is a list of additional articles on how cell towers negatively affect the property values of homes near them:

- The Observer (U.K.), "Phone masts blight house sales: Health fears are alarming buyers as masts spread across Britain to meet rising demand for mobiles," Sunday May 25, 2003 or go here: <http://www.guardian.co.uk/money/2003/may/25/houseprices.uknews>
- "Cell Towers Are Sprouting in Unlikely Places," The New York Times, January 9, 2000 (fears that property values could drop between 5 and 40 percent because of neighboring cell towers)
- "Quarrel over Phone Tower Now Court's Call," Chicago Tribune, January 18, 2000 (fear of lowered property values due to cell tower)
- "The Future is Here, and It's Ugly: a Spreading of Techno-blight of Wires, Cables and Towers Sparks a

Public Safety

- Public Right of Way Developments
- Noise and Nuisance and notes about Clearwire
- Health Effects: Science & Research
- Watch these videos - Glendale and other residents protest cell towers and ask for new ordinances - great examples: read, watch and learn how these residents and other local groups organized their effective presentations before their elected reps. What they did will inspire and may help you.

DVDs and Books:
you can view and read

Take Action:

- Read and Sign the Petition
- Write and Call Our City Leaders

Other Links:

- Actions Taken
- Other Communities Saying "No"
- Important Organizations
- Burbank Neighborhoods & Districts

Search for Antennae in Your Area

Revolt," New York Times, September 7, 2000

- "Tower Opponents Ring Up a Victory," by Phil Brozynski, in the *Barrington [Illinois] Courier-Review*, February 15, 1999, 5, reporting how the Cuba Township assessor reduced the value of twelve homes following the construction of a cell tower in Lake County, IL. See attached story: <http://spot.colorado.edu/~maziara/appeal&attachments/Newton-43-LoweredPropertyValuation/>
- In another case, a Houston jury awarded 1.2 million to a couple because a 100-foot-tall cell tower was determined to have lessened the value of their property and caused them mental anguish: Nissimov, R., "GTE Wireless Loses Lawsuit over Cell-Phone Tower," *Houston Chronicle*, February 23, 1999, Section A, page 11. (Property values depreciate by about 10 percent because of the tower.)

Read about other "Tools" on our website that may help you and your fellow residents oppose a cell tower in your neighborhood in the column to the right. These include:

- [Reasonable Discrimination Allowed](#)
- [We Already Have Good Coverage: Significant Gap and 911](#)
- [Alternative Locations and Supplemental Application forms](#)
- [Aesthetics and Safety](#)
- [Noise and Nuisance and notes about Clearwire](#)
- [Health Effects: Science & Research](#)

Also print out this helpful article on court decisions from the communications law firm of Miller & Van Eaton (with offices in D.C. and San Francisco) that you can pull and read to realize what rights you may or may not have in opposing a wireless facility in your neighborhood:

http://www.millervaneaton.com/content_agent?

[page_name=HT%3A++IMLA+Article+Tower+Siting+Nov+2008](http://www.millervaneaton.com/content_agent?page_name=HT%3A++IMLA+Article+Tower+Siting+Nov+2008) (click the link once you get to this page).

Other important decisions and actions taken by courts and local governments can be found in our [Actions Taken](#) page.

Watch [how other resident groups](#) organized effective presentations at their public hearings so you can pick up their techniques and methods.

You can read and find additional organizations and resident groups that have organized opposition efforts against cell towers and wireless facilities, on our [Other Communities Saying "No"](#) and [Important Organizations](#) pages.

Subpages (1): [Burbank Real Estate Professionals Statement](#)

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MACKENZIE & ALBRITTON LLP

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SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE 415 / 288-4000
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July 2, 2012

VIA EMAIL

Mayor Rob Schroder
Vice Mayor Mark Ross
Councilmembers Lara DeLaney,
Janet Kennedy and Michael Menesini
City Council
City of Martinez
525 Henrietta Street
Martinez, California 94553

Re: Verizon Wireless Telecommunications Facility
814 Carter Acres Lane, Application 12PLN-0002P
City Council Agenda, July 11, 2012

Dear Mayor Schroder, Vice Mayor Ross and Councilmembers:

We write to you on behalf of our client Verizon Wireless to encourage you to uphold the well-reasoned approval by the Design Review Committee and Planning Commission of the proposed wireless facility on an existing PG&E tower located at 814 Carter Acres Lane (the "Approved Facility"). As recommended in the thorough report to the City Council prepared by Planning Division staff (the "Staff Report"), we urge you to reject the appeal of Simone St. Clare and Christine Scharmer ("Appellants"), which staff characterizes as procedural and which presents no evidence to counter the Planning Commission's approval. Verizon Wireless customers, including the Martinez Police Department and the Contra Costa County Fire Prevention District, require and deserve the reliable service that will be provided by the approved facility which we encourage you to approve on July 11th 2012 for the benefit of all Martinez residents.

Given the substantial body of evidence in support of the site and the thorough review of the appeal in the Staff Report, this letter will focus on the federal law justifications for approving the Approved Facility. In particular: 1) Appellants have failed to present any evidence, let alone the substantial evidence required for a local jurisdiction to deny approval of a wireless facility under 47 U.S.C. §332(c)(7)(B)(iii); 2) denial of the Approved Facility would constitute unreasonable discrimination against Verizon Wireless under 47 U.S.C. §332(c)(7)(B)(i)(I) given that a T-Mobile facility is already present on the PG&E transmission tower; and 3) denial of the Approved Facility

would constitute a prohibition of service under 47 U.S.C. §332(c)(7)(B)(i)(II) where Verizon Wireless has identified a significant gap in coverage and that the Approved Facility constitutes the least intrusive means to fill that gap,

I. The Approved Facility

The Approved Facility consists of a nine new panel antennas mounted on a 12-foot lattice extension to a 162-foot PG&E transmission tower located on the residential property at 814 Carter Acres Lane in southwest Martinez. As T-Mobile already has antennas placed on the same transmission tower, Verizon Wireless's antennas qualify as a collocation facility. Radio equipment will be located in a 473 square foot lease area within the legs of the transmission tower. The Approved Facility conforms with the location provisions of the City's Code of Ordinances (the "Code") and the Standards and Criteria for Telecommunications Facilities (the "Standards"). In particular, Standards §III.D specifically provides for placement of antennas on an existing tower in residentially-zoned conservation areas "where ground mounted equipment is located within the envelope created by the 'legs' of the existing tower".

A radio frequency emission report prepared by Hammett & Edison, Inc., Consulting Engineers dated June 16, 2011 (the "H&E RF Report") confirms that the Approved Facility will operate in full compliance with Federal Communications Commission ("FCC") emissions guidelines. An acoustic report prepared by Hammett & Edison, Inc., Consulting Engineers dated October 25, 2011 (the "H&E Acoustic Report") confirms that the Approved Facility, when operational, will fully comply with the noise control provisions of the Code. As confirmed by staff analysis under the California Environmental Quality Act ("CEQA"), the Approved Facility poses no significant environmental impacts and is exempt under CEQA Guidelines §§ 15301 and 15311. A photosimulation of the Approved Facility is attached as Exhibit A.

II. Federal Law

Verizon Wireless is licensed by the FCC to provide wireless telecommunications services throughout the United States, including the City of Martinez. The siting of wireless communications facilities ("WCFs") for licensees such as Verizon Wireless, including the one at issue here, is governed by both federal law and by local land use provisions. The federal Telecommunications Act attempts to reconcile any potential conflicts between the need for deployment of new WCFs and local land use authority "by placing certain limitations on localities' control over the construction and modification of WCFs." *See Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 721 (9th Cir. 2009). Specifically, the Telecommunications Act preserves local control over land use decisions, subject to the following explicit statutory restrictions:

- The local government must act on a permit application within a reasonable period of time (47 U.S.C. §332(c)(7)(B)(ii));
- The decision must be in writing and supported by substantial evidence contained in a written record (47 U.S.C. §332(c)(7)(B)(iii));
- The local government may *not* regulate the placement, construction, or modification of WCFs on the basis of the environmental effects of radio frequency emissions to the extent such facilities comply with the FCC's regulations concerning such emissions (47 U.S.C. §332(c)(7)(B)(iv));
- The local government may not unreasonably discriminate among providers of functionally equivalent services (47 U.S.C. §332(c)(7)(B)(i)(I)); and
- The local government's decision must not "prohibit or have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. §332(c)(7)(B)(i)(II)).

As interpreted under controlling federal court decisions, the "substantial evidence" requirement means that a local government's decision must be "authorized by applicable local regulations and supported by a reasonable amount of evidence (i.e., more than a 'scintilla' but not necessarily a preponderance)." *See Metro PCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 725 (9th Cir. 2005). In other words, a local government must have specific reasons that are both consistent with the local regulations and supported by substantial evidence in the record to deny a wireless facility permit.

A local jurisdiction may not unreasonably discriminate in the granting of WCF permits between functionally equivalent wireless providers. Federal courts considering such cases have ruled that such discrimination occurs where a provider has been "treated differently from other providers whose facilities are 'similarly situated' in terms of the 'structure, placement or cumulative impact' as the facilities in question." *MetroPCS v. San Francisco*, 400 F.3d at 727. Unreasonable discrimination occurs where a wireless provider shows that its denied facility has been treated differently from a similarly situated facility previously approved by that jurisdiction. *Id.* At 729.

A local government violates the "effective prohibition" clause of the Telecommunications Act if it prevents a wireless provider from closing a "significant gap" in service by the least intrusive means. This issue involves a two-pronged analysis: (1) whether the provider has demonstrated the existence of a "significant gap" in coverage; and (2) whether the proposed facility is the "least intrusive means," in relation to the land use values embodied in local regulations, to address the gap. *See T-Mobile*

USA, Inc. v. City of Anacortes, 572 F.3d 987 (9th Cir. 2009); *see also T-Mobile West Corp. v. City of Agoura Hills*, 2010 U.S. Dist. LEXIS 134329 (C.D. Cal. Dec. 20, 2010).

If a provider demonstrates both the existence of a significant gap in coverage, and that the proposed facility meets the “least intrusive means” standard, the local government is *required* to approve the facility, even if there would otherwise be substantial evidence to deny the permit under local land use provisions. This is because the requirements for federal preemption have been satisfied, i.e., denial of the permit would “have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. §332(c)(7)(B)(1)(ii); *City of Anacortes*, 572 F.3d at 999. For the local jurisdiction to avoid such preemption, it must show that another alternative is available, that it is technologically feasible, and that it is “less intrusive” than the proposed facility. *T-Mobile v. Anacortes*, 572 F.3d at 998-999.

With this legal framework in mind, we address below the specific issues before this City Council with respect to Verizon Wireless’s permit application. As we will explain, granting the appeal would violate federal law in the following respects:

III. Substantial Evidence for Approval, Lack of Substantial Evidence for Denial

As thoroughly described in the Staff Report and confirmed by the approvals of the Design Review Committee and the Planning Commission, Verizon Wireless has submitted substantial evidence to support the Approved Facility. The Approved Facility fully complies with specific permitting requirements under Code §22.49.060 as reflected in Standards §III.D that allows facilities to be located on a transmission tower with equipment located beneath the tower in a residentially-zoned conservation area and creates a specific preference where, as here, a facility is collocated with an existing wireless telecommunications facility. Standards §III. Further, as noted and confirmed by independent engineering analysis, the site fully complies with FCC emissions guidelines and noise control requirements under the Code.

In contrast, Appellants base their arguments entirely on procedural issues related to notice and federal law and fail to submit any evidence of any land use impacts from the Approved Facility that could constitute the substantial evidence required of the City Council under federal law to deny the Approved Facility. Absent any evidence supporting denial of the Approved Facility, such a denial would constitute a clear violation of 47 U.S.C. §332(c)(7)(B)(iii).

IV. Approval Avoids Unreasonable Discrimination

The City of Martinez granted approval to the existing T-Mobile facility in 2001. The impacts from the existing T-Mobile facility include antennas mounted to the PG&E transmission tower as well as ground-mounted equipment at the base of the tower. The Approved Facility will similarly add antennas mounted and architecturally integrated into the PG&E transmission tower and ground equipment at the base of the tower identical to the T-Mobile ground equipment area, all as recommended by the Design Review Committee. As properly determined by the Design Review Committee, the Planning Commission and Planning Division staff, the addition of the Approved Facility poses no significant impacts. Under the circumstances, where the Approved Facility is clearly “similarly situated” to the approved T-Mobile facility, approval of the Approved Facility avoids it from being “treated differently” than the T-Mobile facility and avoids violation of 47 U.S.C. §332(c)(7)(B)(i)(I).

V. Approval Avoids Prohibition of Verizon Wireless Service

Appellants do not challenge the significant gap in coverage identified by Verizon Wireless. As described in the Statement of Stefano Iachella, Verizon Wireless Radio Frequency Design Engineer (the “RF Statement”) attached as Exhibit B, there is a significant gap in Verizon Wireless coverage in the southernmost area of the City of Martinez. The gap area includes areas along and surrounding a one and one-half mile stretch of Reliez Valley Road between Hidden Pond Road and its northern terminus and an approximately one mile stretch of Alhambra Valley Road from Quail Lane to Millthwait Drive. In total, the Approved Facility will enhance Verizon Wireless service over an area of two and one-half square miles for approximately 10,000 residents. This significant gap in coverage is confirmed by coverage maps and drive test data attached to the RF Statement.

Similarly, Appellants fail to provide any evidence of a less intrusive alternative to the Approved Facility that would provide wireless service to the identified significant gap. As shown in the Alternatives Analysis attached as Exhibit C, collocation of the Approved Facility on an existing PG&E transmission tower that already hosts an operating T-Mobile facility is clearly the least intrusive means of providing service to the significant gap under the values expressed in the Code and Standards. Other available structures in the coverage objective area either lack the necessary height to provide adequate signal propagation or lack adequate access or collocation facilities and are therefore more intrusive under the Code and Standards.

Where Verizon Wireless has identified a significant gap in coverage and shown that the Approved Facility is the least intrusive means to provide service to that gap in

coverage under the values expressed in the Code and Standards, approval of the Approved Facility avoids violation of 47 U.S.C. §332(c)(7)(B)(i)(II).

VI. Grounds for Appeal are Without Merit

As set forth above, federal law compels denial of the appeal. In addition, as thoroughly reviewed in the Staff Report, the Appellants' procedural grounds for appeal lack merit and provide no basis for the City Council to reverse Design Review Committee and Planning Commission approval of the Approved Facility. To summarize, Appellants' five grounds of appeal must be dismissed as follows:

1. Notice of Planning Commission Hearing Fully Complies with Government Code §65094

As confirmed in the Staff Report and the notice of the Planning Commission hearing attached to the Staff Report, the City of Martinez fully complied with the Government Code requirements that the notice include:

...the date, time, and place of a public hearing, the identity of the hearing body or officer, a general explanation of the matter to be considered, and a general description, in text or by diagram, of the location of the real property, if any, that is the subject of the hearing.

Government Code §65094. Nothing in this Government Code section can be read to require identification of the federal law applicable to the Planning Commission's decision. Notably, Appellants fail to identify how any different notice would have modified the Planning Commission's unanimous approval. Appellants' claim that the Planning Commission hearing notice fails to comply with Government Code requirements is entirely without merit and must be rejected.

2. Planning Commission Action Confirms Lack of Alleged "Preemption" from City Considering Permit

It is clear from the Planning Commission resolution, which carefully reviews the findings and conditions of approval for the Approved Facility, including all Design Review Committee findings, that Verizon Wireless's application was approved based upon sound land-use determinations made within the Planning Commission's authority. There is no mention in the resolution of any "preemption" of the City's permitting authority under federal law. As shown by the Planning Commission resolution, Appellant's characterization of the Planning Commission's action is entirely in error and this ground for appeal must be rejected.

3. The Approved Facility Clearly Falls Within CEQA Guideline §§ 15301 and 15311

The Staff Report fully and thoroughly evaluates and confirms the applicability of CEQA Guidelines §15301 (existing facilities) and §15303 (accessory structures). Wireless communications facilities are routinely approved using these same CEQA exemptions.

The Approved Facility qualifies for the §15301 exemption of “the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features.” CEQA Guidelines §15301. The Guidelines list public utility facilities among the examples qualifying for this exemption. CEQA Guidelines §15301(b). Verizon Wireless is a telephone corporation, and thus a public utility under state law. *See* Pub. Util. Code Section 216(a) (defining “public utility” as including every for-profit telephone corporation). In contrast to the Approved Facility, the Guidelines create a safe harbor for much larger expansions of existing structures, including additions up to 10,000 square feet. CEQA Guidelines §15301(e)(2).

The Approved Facility also qualifies for the §15311 exemption of the “construction, or placement of minor structures accessory to (appurtenant to) existing commercial, industrial, or institutional facilities.” Courts have applied this exemption to the addition of much larger structures, even those with non-traditional or unique uses. For instance, in *Simons v. City of Los Angeles*, 72 Cal. App. 3d 924 (1977), the court upheld the exemption of a 1,500 square foot police firearms training simulator. Despite the size of the facility, the court held that it was “clearly within exempt class 11 . . . as a minor structure accessory to existing institutional facilities.” 72 Cal. App. 3d at 938-9. Here too, the 473 square foot ground equipment area of the Approved Facility clearly qualifies as a minor structure accessory to the existing facility.

Appellant provides no evidence to contradict staff’s well-reasoned CEQA exemption determination nor Planning Commission’s approval of that determination. This ground for Appellant’s appeal must be rejected.

4. Staff and Planning Commission Confirm that Approved Facility Complies with Martinez Regulations

The Staff Report fully confirms that the Approved Facility is in compliance with applicable provisions of the Code and Standards. As noted above, the Code and Standards specifically provide for the location of wireless facilities where antennas are attached to a transmission tower and equipment is located beneath the tower. Standards §III.D. Environmental evaluation for such a facility is fully accomplished through staff’s proposed exemptions under CEQA Guidelines §§ 15301 and 15311. Appellant provides

City Council
City of Martinez
July 2, 2012

Page 8 of 9

no evidence to counter staff's thorough analysis and the Planning Commission's approval, each of which confirm that the Approved Facility is in full compliance with the Code and Standards, and this ground for Appellant's appeal must be rejected.

5. Notice of Planning Commission Hearing Fully Complies with Government Code §65091(a)(4)

As noted in the Staff Report, the City of Martinez fully complied with the requirements of Government Code §65091(a)(4) that notice be mailed 10 days prior to the hearing to property owners within 300 feet of the property where the Approved Facility is to be located. The Staff Report indicates that additional notice was mailed to all property owners along Carter Acres Lane and was also published in the Martinez News-Gazette and posted at the subject property and City Hall. Appellant's claims of inadequate notice are clearly mistaken. Attendance at the Planning Commission hearing and the Appellants' own timely appeal of the Planning Commission's decision clearly demonstrate adequate actual notice. Further, Appellants fail to identify how any different notice would have altered or in any way modified the Planning Commission's approval.

Conclusion

The Design Review Committee, the Planning Commission and the Planning Division staff in its thorough Staff Report fully support approval of the Approved Facility and denial of Appellant's appeal. There is no basis for denial of the Approved Facility under federal law. Indeed, based on the substantial evidence for approval, the likelihood of unreasonable discrimination, the demonstrated significant gap and a complete review of alternatives presented by Verizon Wireless, federal law compels denial of the appeal and affirmation of the Planning Commission approval of the Approved Facility. Residents of Martinez, the City of Martinez Police Department and the Contra Costa County Fire Prevention District, who provide for the safety of Martinez residents, deserve the enhanced Verizon Wireless service to be provided by the Approved Facility. We urge you to affirm approval of this necessary infrastructure for your community.

Very truly yours,



Paul B. Albritton

cc: Jeff Walter, Esq., City Attorney
Anjana Mepani, Associate Planner

City Council
City of Martinez
July 2, 2012

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Schedule of Exhibits

Exhibit A: Photosimulation

Exhibit B: Statement of Stefano Iachella, Verizon Wireless Radio Frequency
Design Engineer

Exhibit C: Alternatives Analysis

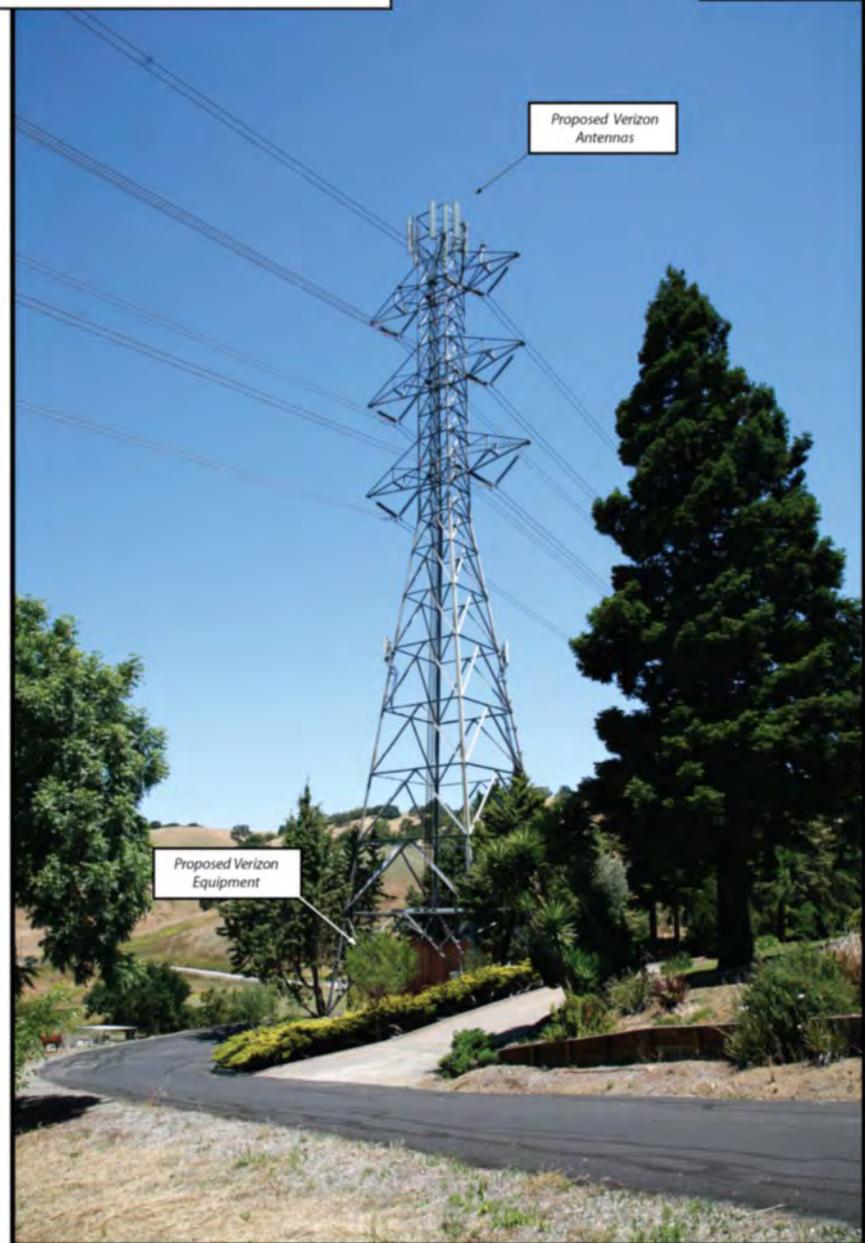
Existing

view from Carter Acres Road looking northeast at site



248124 Alhambra Reliez
814 Carter Acres Road, Martinez, CA

Proposed





June 29, 2012

To: City of Martinez

From: Stefano Iachella, Radio Frequency Design Engineer,
Verizon Wireless Network Engineering Department

Subject: Statement of Stefano Iachella in support of Verizon Wireless's
approved telecommunications facility at 814 Carter Acres Lane,
Martinez

SUMMARY

This statement clarifies coverage gaps and the coverage objectives for the Verizon Wireless telecommunications facility consisting of an addition to a PG&E transmission tower at 814 Carter Acres Lane in Martinez (the Approved Facility). Verizon Wireless Performance Engineers have identified a gap in coverage in the southernmost area of the city of Martinez. This gap consists of an area along and surrounding a 1.5 mile stretch of Reliez Valley Road between Hidden Pond Road and its northern terminus and an approximately 1 mile long stretch of Alhambra Valley Road from Quail Lane to Millthwait Drive (the Coverage Gap). This Coverage Gap area is shown on the attached Coverage Map (Exhibit A). Lack of coverage in this area is preventing the Verizon Wireless network from being accessible to the many residents and visitors in this area and is causing dropped calls for mobile users along Reliez Valley road. Exhibit B is a graphical depiction of the number of call failures actually occurring near the Gap Area measured over a one week period. This gap is significant to Verizon Wireless because it affects important stretches of roadway, in-building coverage for thousands of residents within the Coverage Gap, and E911 locator service. The Approved Facility will address these significant gaps in service and provide new wireless access to this area of Martinez.

Coverage Gap

Currently, our customers are experiencing inaccessibility (no signal) and impaired network reliability (dropped calls) within this Coverage Gap. The gap area includes all residences in Martinez south of Golden Hills Park along with

Reliez Valley road, which, in this area, serves approximately 150 cars per hour in each direction during the day.¹ This road also hosts a well-used Class 1 bike path. In addition to these significant portions of Martinez, the gap also includes the Meadowbrook Golf Club and the northern portion of Briones Regional Park, including the Park Office, where cellular is the only emergency means of communication.

Topographic Obstructions

The physical layout of the area to be served by the approved site is a narrow valley at the bottom of which lies Reliez Valley Road and Alhambra Valley Road. Wireless communication uses technology which generally requires line-of-sight visibility between the mobile device and site antennas. As a consequence, the hills which rise several hundred feet on either side of the valley create an isolated area that cannot be served by existing cell sites. One Verizon Wireless site exists near the gap area. It is called "Northwest Pleasant Hill" and is located on Wildcroft Drive along Alhambra Avenue. Though this site is only one mile east from the Approved Facility, a line of hills over 300' in elevation prevent any signal from this facility from reaching the Coverage Gap area. An additional site, "Palos Verdes" has been approved at a location along Pleasant Hill road in Walnut Creek over three miles southeast of the Approved Facility. Even when this site is built, signal from it will not reach into the gap area due to distance and topography. The only solution to provide signal into the Coverage Gap area is to locate a site within the gap area in a location that is able to provide signal throughout the gap area. Since the Coverage Gap area is not receiving adequate signal from existing sites, Verizon Wireless customers in this area frequently experience an inability to make, hold or receive calls ("Call Failures"). In fact, network data shows that excessive Call Failures are already occurring in the Gap Area. The Approved Facility is designed to address the Call Failures occurring in the Gap Area.

Vehicular Gap

Currently, the gap area suffers from unreliable in-vehicle coverage. A drive test was conducted (See Drive Test Map, Exhibit C) using industry standard methodology to measure the level of signal that currently exists along Reliez Valley Road and Alhambra Valley Road. Typically, as a wireless user travels between the discrete coverage areas of two or more sites, signal level is adequate to allow for a handoff of the call to occur from one site to the next. If the handoff is successful, it is transparent to the user and results in seamless coverage. However, as is evident in the Drive Test Map, signal is poor to nonexistent along Reliez Valley Road and Alhambra Valley Road. This lack of signal prevents successful handoffs, causes dropped calls and precludes reliable wireless coverage. Without the Approved Facility, drivers and cyclists, and even City of Martinez Police Officers (who rely on Verizon Wireless phones) will be without potentially lifesaving wireless coverage within the Coverage Gap Area.

¹ 2003 Traffic Study. <http://www.co.contra-costa.ca.us/depart/cd/current/AlhambraValley/05Ch3-12%20Transportation.pdf>

E911 Service Gap.

As a telecommunications carrier licensed by the Federal Communications Commission and as one of the two largest carriers serving California, Verizon Wireless is committed to providing reliable emergency services to the public. The existing coverage gap affects not only the ability to place emergency calls within the Coverage Gap area, but also the ability of the network to determine the geographic location of the calling device ("E911 Service") to assist public safety professionals in locating callers in distress. The approved facility will provide more reliable E911 locating capabilities for 911 calls which occur within the coverage objective area.

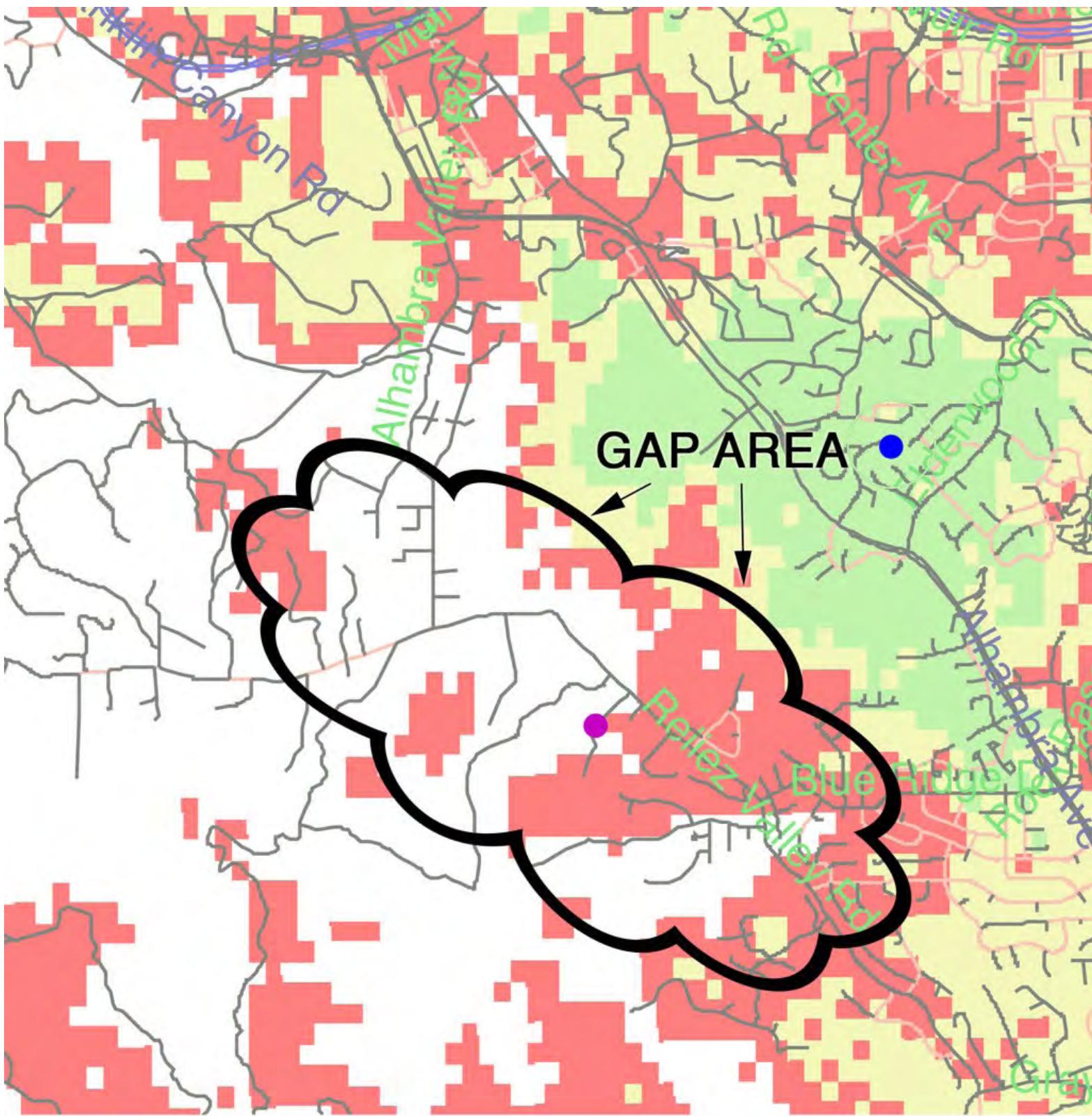
Conclusion

The Approved Facility is the most effective way Verizon Wireless can address the existing Coverage Gap. The approved site will provide new in-building service to the residences on either side of Reliez Valley Road and Alhambra Valley Road. (See approved coverage map, Exhibit C). New in-transit service will be added along over 2.5 miles of roadway within the Coverage Gap area. Also new on-street signal will be provided to recreational areas including Briones Regional Park. In sum, the Approved Facility will enhance Verizon Wireless service over 3.6 square miles of Martinez, Contra Costa County and Concord, and provide improved signal to a thousands of homes and vehicles each day.

Respectfully submitted,

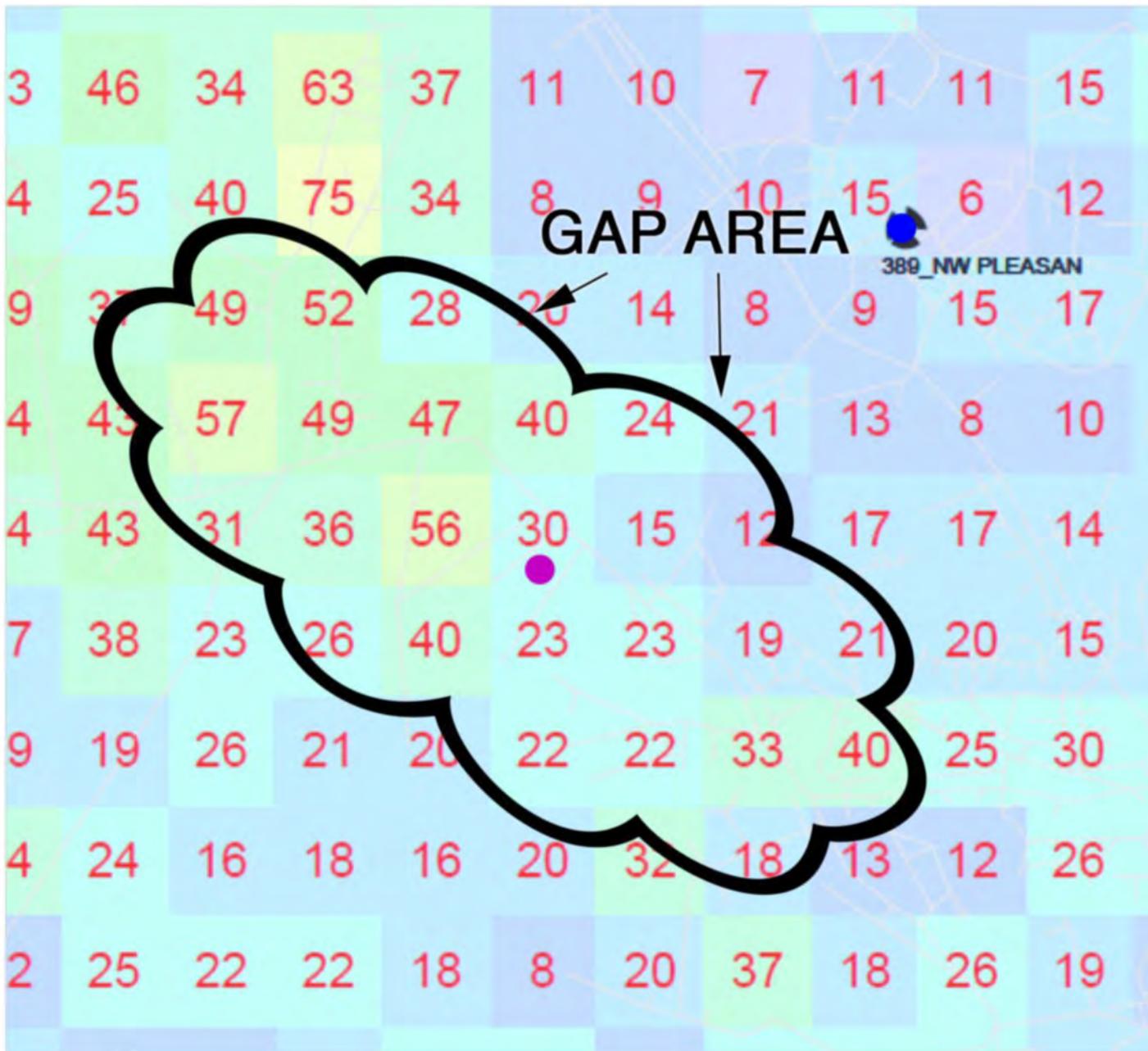


Stefano Iachella
RF Design Engineer
Network Engineering Department
Verizon Wireless



- Existing Site
- Proposed Site
- = in-building
- = in vehicle
- = on street

Exhibit B

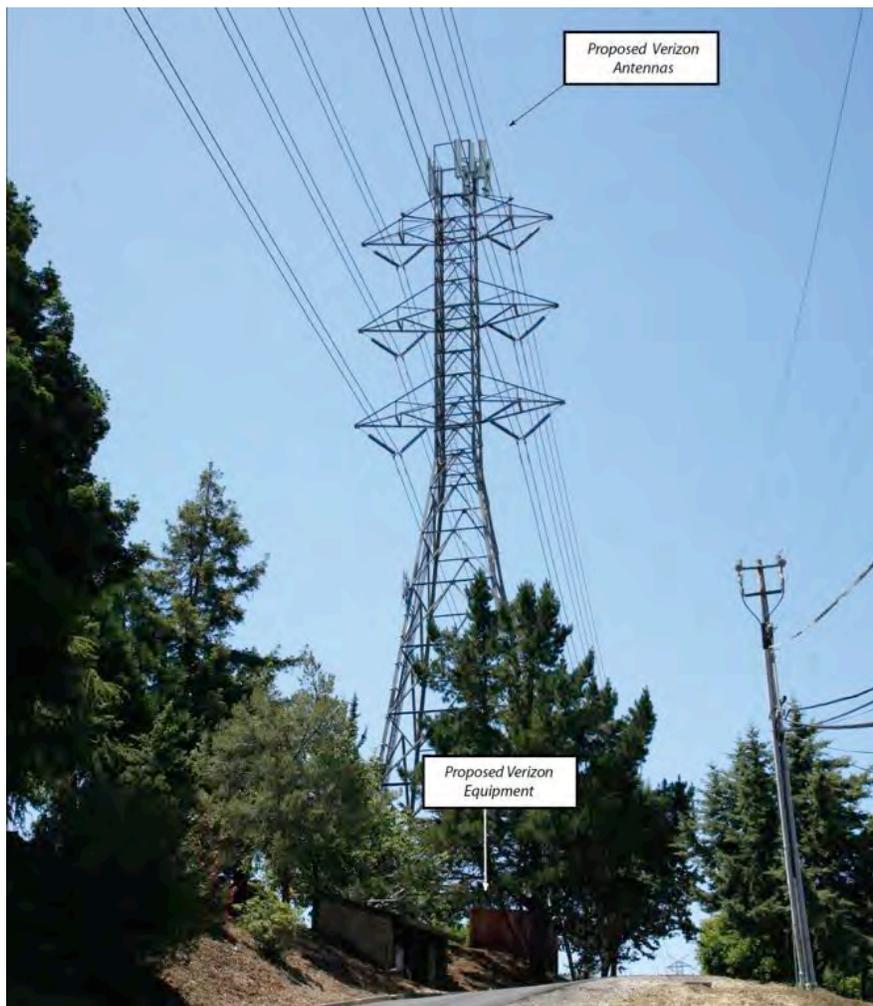


- Existing Site
- Proposed Site

Call Failure Map (over a 1 week period)

Alternatives Analysis

**Verizon Wireless
Alhambra Reliez
814 Carter Acres Lane, Martinez
APN 365-150-053**



June 29, 2012

**Summary of Site Evaluations
Conducted by Ridge Communications, Inc.**

Compiled by Mackenzie & Albritton LLP

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I. Executive Summary

Verizon Wireless has identified a gap in coverage in the southwest portion of Martinez in the vicinity of the intersection of Alhambra Valley Road and Reliez Valley Road and areas south. The gap includes a one mile stretch of Alhambra Valley Road and a one and one-half mile stretch of Reliez Valley Road, as well as the residential, open space and recreational areas surrounding these important roadways. Based on an extensive review of available sites as set forth in the following analysis, Verizon Wireless believes the proposed collocation of antennas on an existing PG&E transmission tower (the “Approved Facility”) constitutes the least intrusive alternative for providing Verizon Wireless service to the identified coverage gap based on the values expressed in the Martinez Code of Ordinances (the “Code”) and Standards and Criteria for Telecommunications Facilities (the “Standards”).

II. Coverage Gap

Verizon Wireless Performance Engineers have identified a gap in coverage in the southernmost area of the city of Martinez. The gap area includes all residences in Martinez south of Golden Hills Park along with Reliez Valley road, which, in this area, serves approximately 150 cars per hour in each direction during the day.¹ This road also hosts a well-used Class 1 bike path. In addition to these significant portions of Martinez, the gap also includes the Meadowbrook Golf Club and the northern portion of Briones Regional Park, including the Park Office, where cellular is the only emergency means of communication. (Collectively, the “Coverage Gap”) The Approved Facility will address these significant gaps in service and provide new wireless access to this area of Martinez. The Coverage Gap is more fully described in the Statement of Verizon Wireless Radio Frequency Design Engineer Stefano Iachella dated June 29, 2012.

III. Methodology

Once a coverage gap has been determined, Verizon Wireless seeks to identify a proposal that will provide coverage through the “least intrusive means” based upon the values expressed by local regulation. In addition to seeking the “least intrusive” alternative, sites proposed by Verizon Wireless must be feasible. In this regard, Verizon Wireless reviews the topography, radio frequency propagation, elevation, height, available electrical and telephone utilities, access, and other critical factors such as a willing landlord in completing its site analysis. Wherever feasible, Verizon Wireless seeks to identify collocation opportunities that allow placement of wireless facilities with minimal impacts.

While the Code provides for administrative and zoning administrator review of applications for wireless telecommunications facilities (“WTFs”) in commercial, industrial, professional or governmental facilities zoning districts, it also provides for the placement of WTFs in residential zones with a use permit and design review approved by

¹ 2003 Traffic Study. <http://www.co.contra-costa.ca.us/depart/cd/current/AlhambraValley/05Ch3-12%20Transportation.pdf>

the Planning Commission where the site complies with the Standards. (Code § 223.39.050(3)) Consistent with the Code, the Standards establish a preference for facilities in commercial and industrial zones. In addition, the Standards establish a location preference for facilities that are located on publicly-used structures, collocation and shared location sites. For facilities located in residential, agricultural, visually significant or designated open space and conservation areas, the Standards require WTFs to be “attached to existing power poles/towers and other existing public utility structures and where ground mounted equipment is located within the envelope created by the ‘legs’ of the existing tower”. (Standards § III.D)

In order to locate its facility in the least intrusive means based on the values expressed in the Code and Standards, Verizon Wireless reviewed the Coverage Gap area and confirmed that there are no industrial, commercial, professional or governmentally zoned parcels for the placement of its facility.² Verizon Wireless’s analysis further confirmed that the Coverage Gap is entirely comprised of residential, open space and recreational facility zoned parcels. Given the requirements for residential and open space parcels under the Code and Standards, Verizon Wireless then looked to available structures, power poles, towers and public utility structures. In so doing, Verizon Wireless investigated collocation opportunities on existing public utility structures. Verizon Wireless did not investigate the placement of monopoles for a new cell tower in the open space and residential parcels of the Coverage Gap as this would be contrary to the Code and Standards.

IV. Analysis

As noted, Verizon Wireless did not locate any commercial, industrial, professional or governmental facilities zoned parcels in the Coverage Gap. Two collocation opportunities were identified where public facilities support existing antennas. Two additional public utility structures were identified which do not host existing communications facilities. No locations were identified for the placement of a new freestanding monopole or tower as this would be contrary to the Code and Standards.

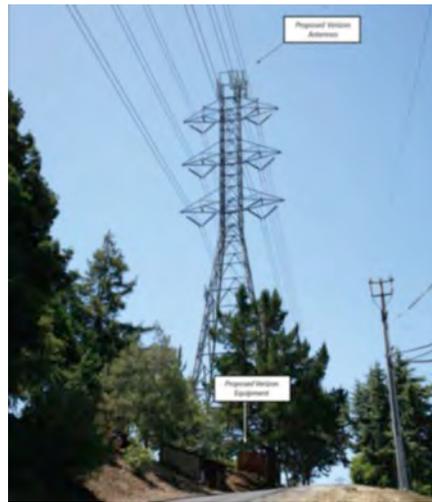
² The nearest government facility zoned parcels identified by Verizon Wireless are far outside the Coverage Gap area and include the City of Martinez water tank on Alhambra Avenue (one mile to the northeast of the Approved Facility and behind a topographic ridge) and the John Swett Elementary School (one and one-quarter miles north of the Approved Facility, lower in elevation and below a topographic ridge).

Collocation Opportunities on Public Facilities

The clear preference of the City of Martinez Code and Standards is the collocation of facilities on publicly-used structures. Verizon Wireless identified two opportunities in this preferred category, as follows.

1. PG&E Tower (Approved Facility)

814 Carter Acres Lane
APN: 365-150-053
Elevation: 371.5 feet
Zoning: R-80



Located west of Reliez Valley Road on a developed residential parcel, the Approved Facility consists of a 12 foot lattice extension to an existing 162 foot PG&E transmission tower which already hosts an existing T-Mobile wireless telecommunications facility. Verizon Wireless's lattice extension, designed to match the PG&E structure, will support nine new panel antennas, and radio equipment is located in a 473 square foot lease area within the footprint at the base of the transmission tower. Such attachment of antennas on an existing public utility structure (as well as location of equipment within the tower footprint) specifically complies with requirements for permitted wireless telecommunications facilities in residentially-zoned conservation areas. (Standards § III.D) The height achieved by the lattice extension to this transmission tower as well as the facility's location in the center of the Coverage Gap ensure that the Approved Facility meets Verizon Wireless's coverage objectives, including stretches of Alhambra Valley Road to the north and Reliez Valley Road to the east and south. Additionally, placement of the Approved Facility on this transmission tower that already supports another carrier's antennas qualifies as collocation, which is the top locational preference according to the Standards, and avoids placement on other nearby public structures in undeveloped and recreational areas. (Standards § III.B) By complying with the City's location standards and minimizing the need to utilize additional public utility structures or construct new towers, this location is the preferred and least intrusive option for Verizon Wireless's facility.

2. Golden Hills Park

Bernice Lane

APN: 164-150-024

Elevation: 226 feet

Zoning: RF



Located near the center of the Coverage Gap, this seven acre City park contains a one-story City park building with City public safety antennas mounted on the roof. As a recreational facility zoned parcel, any new antennas at this City park would be ineligible for administrative approval. The park facility is situated at an elevation 145 feet lower than the Approved Facility parcel, and lacks any tall structures of the necessary height for Verizon Wireless antennas to achieve radio frequency propagation to the Coverage Gap. In fact, the building supporting the City's antennas is just 13 feet tall, a total of over 300 feet lower in elevation than the antennas of the Approved Facility. Lacking adequate height for sufficient radio frequency propagation to the Coverage Gap, absent an extremely tall tower (e.g. over 300 feet tall), this location is not suitable for Verizon Wireless's facility.

Public Facilities without Collocation

Verizon Wireless continued the investigation for a suitable location by identifying public utility structures within the Coverage Gap where collocation is not available. Of two such public utility structures identified, neither provides adequate access for a Verizon Wireless facility.

3. PG&E Tower, Briones Regional Park

East Bay Regional Parks District, Unincorporated Contra Costa County

APN: N/A

Elevation: 475 feet

Zoning: N/A



This PG&E transmission tower is located next to a hiking trail in Briones Regional Park on East Bay Regional Park District land. This tower does not currently support any communications antennas. The current East Bay Regional Parks District Communications Site Policy requires new facilities to “meet District criteria for reduction of visual impacts to park visitors”. (Communications Site Policy § IV(C)(1)) The policy also encourages consolidation of communications sites. (*Id.* § IV(C)(7)(i)) Verizon Wireless rejected use of this alternative PG&E tower due to a lack of adequate access. To locate a wireless facility at this tower will require upgrading of the current dirt access to a one-quarter mile all-weather roadway that could support Verizon Wireless construction and maintenance equipment. In addition, there is presently no available electrical or telephone access to the tower, which would require installation of an approximately one-quarter mile underground trench for power and telephone utilities to be provided to a wireless facility. The lack of construction, maintenance or utility access to this tower make it an unsuitable alternative due to adverse impacts to the site to provide this adequate access that would be contrary to East Bay Regional Parks District policy.

- 4. PG&E Tower, East of Reliez Valley Road**
Reliez Valley Road and Carter Acres Lane
APN: 164-150-022
Elevation: 535 feet
Zoning: R-10



This PG&E transmission tower is located on a privately-owned pristine hilltop zoned R-10, slightly more than one-quarter mile east of the Approved Facility. This tower does not currently support any communications antennas. Like the PG&E tower to the west of the Approved Facility, a wireless facility at this tower will require upgrading of the current dirt access to a one-half mile all-weather roadway that could support Verizon Wireless construction and maintenance equipment. In addition, there is presently no available electrical or telephone access to the tower, which would require installation of an approximately one-quarter mile underground trench for power and telephone utilities to be provided to a wireless facility. The lack of adequate construction, maintenance or utility access to this tower make it an unsuitable alternative due to adverse impacts to the site to provide this access that would be contrary to the City of Martinez Code and Standards.

Conclusion

Verizon Wireless evaluated all existing public facility structures within the Coverage Gap. Based on the foregoing analysis, Verizon Wireless concludes that the Approved Facility, which provides for collocation of antennas on an existing public utility tower which already hosts another carrier's antennas, fully complies with the Code and Standards, and is the least intrusive means to fill the identified gap in Verizon Wireless's service.

**Verizon Wireless
Alhambra Reliez
Locations of Sites
Proposed and Alternatives**

**1. PG&E Tower (Approved Facility)
814 Carter Acres Lane**

**4. PG&E Tower
East of Reliez Valley Road**

**2. Golden Hills Park
Bernice Lane**

**3. PG&E Tower
Briones Regional Park**

