



Contra  
Costa  
County

To: Board of Supervisors

From: John Kopchik, Director, Conservation & Development Department

Date: February 26, 2019

Subject: Verizon Wireless Access Permit #WA18-0003

### **RECOMMENDATION(S):**

1. OPEN the public hearing on an appeal of a Planning Commission decision to approve a wireless facilities access permit for a Verizon Wireless cell site on a utility pole in the right of way near 1955 Meadow Road, in the Walnut Creek area (Permit No. WA18-0003), RECEIVE testimony, and CLOSE the public hearing.
2. DETERMINE that County File #WA18-0003 is exempt from the California Environmental Quality Act (CEQA) under CEQA Guidelines Section 15303.
3. DIRECT the Department of Conservation and Development to file a CEQA Notice of Exemption with the County Clerk.
4. APPROVE a wireless facilities access permit for a Verizon Wireless cell site on a utility pole in the Danville Boulevard public right of way in Alamo (Permit No. WA18-0003).
5. APPROVE the findings in support of Permit No. WA18-0003.
6. APPROVE the conditions of approval for Permit No. WA18-0003.
7. DENY the appeal of Donald and Anne Goldman.

### **FISCAL IMPACT:**

The applicant has paid the initial deposit and is responsible for all of the time and material costs associated with processing the application.

☒ APPROVE

☐ OTHER

☒ RECOMMENDATION OF CNTY ADMINISTRATOR

☐ RECOMMENDATION OF BOARD COMMITTEE

Action of Board On: **02/26/2019** ☐ APPROVED AS RECOMMENDED ☒ OTHER

Clerks Notes:

See Addendum

#### **VOTE OF SUPERVISORS**

AYE: John Gioia, District I  
Supervisor  
Candace Andersen, District II  
Supervisor  
Karen Mitchoff, District IV  
Supervisor  
Federal D. Glover, District V  
Supervisor

ABSENT: Diane Burgis, District III  
Supervisor

I hereby certify that this is a true and correct copy of an action taken and entered on the minutes of the Board of Supervisors on the date shown.

ATTESTED: February 26, 2019

David Twa, County Administrator and Clerk of the Board of Supervisors

By: June McHuen, Deputy

Contact: Susan Johnson,  
925-674-7868

cc:



## BACKGROUND:

This is a hearing for an appeal of the County Planning Commission's decision to deny an appeal and uphold the decision of the County Zoning Administrator to approve a Wireless Facilities Access Permit to establish a new Verizon Wireless cell site attached to an existing utility pole in the public right-of-way near 1955 Meadow Road in the Walnut Creek area of unincorporated Contra Costa County.

## Project Description

This project is to establish a new Verizon Wireless cell site attached to an existing utility pole in the public right-of-way. This includes adding one 4-foot canister antenna (on top of a 6-foot-tall pole extension) located on top of the pole and ancillary equipment also attached to the pole. Ancillary equipment includes:

- two (2) RRUS32
- two (2) diplexers inside two (2) RRU shrouds
- one (1) disconnect switch
- two (2) power supply units
- one (1) fiber demarc box
- one (1) power meter

After installation of the antenna, the existing pole, which measures 49.6 feet tall, will measure 59.6 feet tall post construction. All pole equipment will be painted to match the existing utility pole. No ground mounted equipment is proposed.

## Appeal of the County Planning Commission's Decision

On December 21, 2018, Donald and Anne Goldman filed an appeal with the Department of Conservation and Development, Community Development Division, over the decision of the County Planning Commission to deny the appeal and uphold the decision of the County Zoning Administrator to approve the Wireless Facilities Access Permit. The appeal points have been summarized and addressed below:

### **Donald and Anne Goldman, 1972 Meadow Road, Walnut Creek**

**Summary of Appeal Point #1:** The proposed Verizon Wireless cell site is intrusive and unaesthetic. The least intrusive design is based on fiber optic cable, not cellular wireless technology. In addition, pole mounted equipment would make the utility pole unstable and possibly block the drainage ditch in which the pole is located.

**Staff Response:** The County is not authorized to regulate the type of technology that a wireless carrier uses; the FCC regulates technology. (*New York SMSA, L.P. v. Town of Clarkstown* (SDNY 2009) 603 F.Supp. 715, 725; see also 47 C.F.R., § 24.50.) The County's Wireless Ordinance requires an evaluation of alternative locations for a wireless facility in the public road right of way, but it does not require an evaluation of

alternative technology. (See Ord. Code, § 88-24.604(d)(3).)

Small cell technology, such as the technology being used here, is less visually intrusive than traditional cell towers (see attached photo simulations). The facility canister antenna and ancillary equipment will be painted to match the existing utility pole, which will help the facility to blend in with its surroundings (this includes the existing utility pole and telephone wires). Equipment shrouds will conceal the pole-mounted equipment. The pole top equipment will result in a 10-foot height increase for the pole, thus complying with Ordinance Code Section 88-24.408(f)(2)(C). Therefore, by placing equipment on an existing utility pole, matching the equipment color to the color of the pole, and providing shrouds to create visual continuity, the proposed wireless telecommunications facility will not substantially change the existing visual character of the area and it will comply with the design requirements of Ordinance Code section 88-24.408 for facilities located in the public right-of-way. The facility is a low-visibility facility because it is located on an existing utility pole. (Ord. Code, § 88-24.204(p)(4).) Therefore, under the County's Wireless Telecommunication Facilities Ordinance, Ordinance Code chapter 88-24, ("Wireless Ordinance"), and Public Utilities Code section 7901, the facility may be located in the public right of way within a residential zoning district. (See Ord. Code, §§ 88-24.204(n) (defining "high visibility facility"), 88-24.404 (restricting the location of high-visibility facilities)).

With regard to the allegations related to utility pole safety, PG&E engineers, in cooperation with Verizon Wireless, determined that the structural capacity of the existing utility pole is sufficient. Therefore, the chosen utility pole does not need to be replaced and can safely withstand the load of the proposed cell site equipment. Compliance with all applicable building and fire codes relating to the installation of the facility's equipment to the existing utility pole will also ensure the safety of the proposed construction.

With regard to the allegations related to potential blockage of the drainage ditch, all proposed equipment will be attached to the existing utility pole. No ground-mounted equipment was proposed in this application. In addition, Condition of Approval #76, requires that, "All drainage shall be kept open and the existing drainage pattern maintained."

**Summary of Appeal Point #2:** The proposed wireless telecommunications facility would cause financial loss to homeowners on and adjacent to Meadow Road.

**Staff Response:** Section 88-24.612(b)(4) of the County Wireless Telecommunications Facilities ordinance, Ordinance Code chapter 88-24, ("Wireless Ordinance") clearly states that a wireless access permit will be issued if all of the requirements in Ordinance Code Section 88-24.612(b)(4)(A) through Section 88-24.612(b)(4)(I) are satisfied. None of these requirements or approval findings require the analysis of the project's impact on property values in the surrounding area. Therefore, irrespective of the project's potential impacts on property values in the surrounding area, the County Zoning Administrator and

the County Planning Commission approved the proposed Verizon Wireless cell site because all of the requirements in Section 88-24.612(b)(4)(A) through Section 88-24.612(b)(4)(I) were met. Staff is unaware of any conclusive studies that have determined that wireless telecommunications facilities negatively affect property values. Denying an application for reasons outside of the stated requirements would be inconsistent with the current County Wireless Telecommunications Facilities ordinance.

The appeal does not include substantial evidence in support of the allegation that the facility will cause a negative impact on the appellant's property's value, or on any property's value. According to the Court of Appeal in *Oliver v. AT&T Wireless*, "the mere displeasing appearance in size and shape of a neighboring structure [a wireless tower] that is otherwise permitted by law, the only admitted effect of which is an alleged diminution in value of the adjacent property, cannot constitute a nuisance or give rise to an inverse condemnation claim." ( *Oliver v. AT&T Wireless* (1999) 76 Cal.App.4th 521, 524.) Here, the facility is permitted by law and the applicant has satisfied all requirements of the County's Wireless Ordinance.

**Summary of Appeal Point #3:** There is a lack of need for a new Verizon Wireless facility on or near the Meadow Road/Tice Valley area.

**Staff Response:** Ordinance Code section 88-24.612 provides that a wireless access permit will be issued if the zoning administrator makes the following findings:

- ( i) The facility or substantial change will be designed in a manner that complies with the applicable requirements of section 88-24.408.
- ( ii) The facility or substantial change will not interfere with the use of the County right-of-way, or existing improvements or utilities located on, in, under, or above the right-of-way.
- (iii)The facility or substantial change will not interfere with any vehicular, bicycle, or pedestrian use of the County right-of-way.
- (iv)The facility or substantial change will not cause any violation of the accessibility requirements of the Americans with Disabilities Act.

The zoning administrator made those findings based on evidence in the record.

Appellants argue that Verizon has not established a need for the facility. Verizon is not required to make that showing to obtain a wireless access permit for this facility. Here, Verizon meets all of the requirements under Chapter 88-24 of the Ordinance Code to obtain a wireless access permit to place its wireless facility on an existing PG&E pole within the public right of way. Because Verizon meets the Ordinance Code's requirements for obtaining a wireless access permit, it is not required to show that the wireless facility is required at this particular location to close a significant gap in coverage or to densify its network. Verizon would only need to make that showing if the County were to deny a permit because Verizon didn't satisfy the requirements of Chapter

88-24 of the Ordinance Code. (See *T-Mobil USA, Inc. v. City of Anacortes* (2009) 572 F.3d 987.)

**Summary of Appeal Point #4:** The proposed project is a violation of the Wireless Ordinance because the goal of this ordinance is to establish criteria for the location and design of wireless facilities, consistent with state and federal requirements that “protect and enhance the public health, safety, and welfare of County residents”.

**Staff Response:** The County adopted the Wireless Ordinance to allow for the orderly development of wireless telecommunications facilities within unincorporated areas of Contra Costa County. Although not expressly stated in this appeal, it appears that the “public health and safety concerns” referenced in the appeal relate to radio-frequency (RF) emissions, because that was one of the appellants’ bases for their appeal before the Planning Commission. Federal law completely preempts the County’s ability to regulate the placement, construction, or modification of personal wireless service facilities based on the effects of radio frequency (RF) emissions on health or the environment. (47 U.S.C., § 332(c)(7)(B)(iv); *Telespectrum, Inc. v. Public Services Comm. of Kentucky* (6th Cir. 2000) 227 F.3d 414, 424); see also *AT&T Wireless Services of Southern California, LLC v. City of Carlsbad* (C.D. Cal. 2003) 308 F.Supp.2d 1148, 1159.) As long as the facility operates within the RF ranges established by the Federal Communications Commission, the County may not condition or prohibit the establishment or operation of the facility on any basis related to its RF emissions.

The Wireless Ordinance includes numerous design requirements specifically for telecommunications facilities located within a public right-of-way. Design guidelines for such facilities ensure that they do not impede vehicular circulation, pedestrian circulation, or parking within the right-of-way. This section of the Wireless Ordinance also specifies that all improvements within the right-of-way must be designed and located in a manner that does not violate accessibility requirements of the Americans with Disabilities Act (ADA). Finally, provisions specific to facilities within the right-of-way prohibit advertising, illumination, or the blockage of illumination from streetlight poles. The proposed Verizon wireless facility is consistent with all of the aforementioned design guidelines.

Additional safety and security standards applicable to all wireless telecommunications facilities require equipment enclosures to be locked at all times, limit lighting on any antenna or antenna support structure, and include physical measures designed to prevent climbing by unauthorized persons. The project is consistent with these safety and security measures.

Furthermore, approval of an encroachment permit is required to ensure that the construction of the approved facility proceeds in a safe manner. The Contra Costa County Public Works Department has reviewed the project, including a traffic control plan that would safely guide pedestrian, bicycle, and vehicular traffic in, around, and by

construction and installation work. The Public Works Department has also provided comments and conditions of approval specific to the Encroachment Permit portion of this project. Compliance with all Encroachment Permit conditions ensures that the construction of the project does not pose a significant risk to travelers within the right-of-way.

No evidence in the record demonstrates that the County Zoning Administrator's approval or the County Planning Commission's approval fails to protect the health, safety or welfare of County residents. Improvements to the reliability of wireless telecommunications infrastructure in the County is generally beneficial to residents, first responders and commuters in the vicinity. The project's conformance to design criteria within the Wireless Ordinance, and compliance with all conditions of approval, ensure the facility is consistent with the stated goal to protect the health, safety, and welfare of County residents.

**Summary of Appeal Point #5:** Approval of the proposed project would be a violation of the California Constitution and deprive the appellants of "life, liberty, or property without due process of law or denied equal protection of the laws" because such approval will result in "significant losses to homeowners."

**Staff Response:** According to the Court of Appeal in *Oliver v. AT&T Wireless*, "the mere displeasing appearance in size and shape of a neighboring structure [a wireless tower] that is otherwise permitted by law, the only admitted effect of which is an alleged diminution in value of the adjacent property, cannot constitute a nuisance or give rise to an inverse condemnation claim." (*Oliver v. AT&T Wireless* (1999) 76 Cal.App.4th 521, 524.) Here, the facility is permitted by law and the applicant has satisfied all requirements of the County's Wireless Ordinance.

### Project History

Verizon Wireless c/o On Air, LLC, submitted County File #WA18-0003 on April 17, 2018. During the noticing period for this application, eight (8) requests for a public hearing were received, becoming the impetus for the October 1, 2018 Contra Costa County Zoning Administrator Meeting.

After taking testimony on the project at the October 1, 2018 County Zoning Administrator Meeting, the Zoning Administrator closed the public hearing and continued it to October 15, 2018, in order to consider all of the testimony presented prior to making a decision. The Zoning Administrator approved the Wireless Access Permit at the public hearing held on October 15, 2018 with the following added Condition of Approval, "Within 15 days of the antenna being installed, Verizon shall take RF power density measurements with the antenna operating to verify the level reported in the Hammett and Edison report and to ensure that the FCC public exposure level is not exceeded in any publicly accessible area. This measurement shall be taken again on an

annual basis or if any equipment is replaced. Verification of these measurements shall be submitted to CDD for review and approval”.

On October 24, 2018, Donald and Anne Goldman, and Eric and Kimberly Crowe, appealed the County Zoning Administrator’s decision, prior to the appeal deadline, thus becoming the impetus of the November 28, 2018 County Planning Commission Meeting. On October 25, 2018, Verizon Wireless c/o On Air, LLC also appealed the County Zoning Administrator’s decision prior to the appeal deadline.

County File #WA18-0003 was not heard at the November 28, 2018 County Planning Commission Meeting due to time constraints. Therefore, the project was continued to the next available meeting date. At the December 12, 2018 County Planning Commission Meeting, the Commission made a motion to uphold the County Zoning Administrator’s decision and deny the appeal. The motion was passed by the Commission with a 5-1 vote. This approval included a modification to the Condition of Approval added by the Zoning Administrator at the October 15, 2018 Zoning Administrator meeting: “Within 15 days of the antenna being installed, Verizon shall take RF power density measurements with the antenna operating to verify the level reported in the Hammett and Edison report and to ensure that the FCC public exposure level is not exceeded in any publicly accessible area. This measurement shall be taken again if any equipment is replaced or added. Verification of these measurements shall be submitted to CDD for review and to confirm that the requirements of the Ordinance Code have been met.”

On December 21, 2018, Donald and Anne Goldman appealed the County Planning Commission’s decision, prior to the appeal deadline.

### Conclusion

The appeal is similar to the testimony offered to the County Zoning Administrator and County Planning Commission and does not provide support for overturning the County Planning Commission’s decision. The proposed Verizon cell site complies with the County Wireless Telecommunications Facilities Ordinance and would not conflict with the Single-Family Residential, Low-Density (SL) General Plan land use designation or the Single-Family Residential R-20 Zoning District. The proposed project is also consistent with State and Federal regulations governing cellular telecommunications, and installation, within a public right-of-way. Additionally, staff has determined that the project, as conditioned, is the least obtrusive design. Therefore, staff recommends that the Board of Supervisors deny the appeal and sustain the County Planning Commission’s approval of County File #WA18-0003, based on the attached findings and subject to the attached conditions of approval.

### CONSEQUENCE OF NEGATIVE ACTION:



If the Board of Supervisors grants the appeal, the County Planning Commission's decision to uphold the County Zoning Administrator's approval of the proposed Verizon Wireless cell site, attached to an existing utility pole in the public right-of-way, will be overturned. The applicant, Verizon Wireless, would be unable to move forward with the project as proposed.

#### CLERK'S ADDENDUM

*Speakers; Matt Lewis; Cathy Wojan; Joia Boos; Cathy Wojan; Gina; Art Scimia, Meadow Lane Improvement Association; David Baer; Lisa Snortum-Phelps; Ruth Strong; Kraj Khararjan; Linda Uhrenholt; Roger Smith; Anne Goldman; Alex Krueger; Megan Maddern; Melanie Volk; Kimberly Crowe; Shannon Erickson; Nadine Whisnant; Jill Sanchez.*

*Written commentary was received from (attached): Jami Tucker, Christine Scimia, Rob Harrison, Scott Maddern, Erin Lewis, Blessings Robertson-Winn, Elaine Gast, Judy DeYoe, Kirsten Muzinich, Rachel Day, Melanie Volk, no name, Irene Amido, Penelope Kojina, Tanya Krueger, Hayuta Jain, Susanne Frey, Jodee Brydges, Alex & Tanya Krueger, Kate Rudick, Christina Heil, Mandula Rewal, Kimiko Nguyen, Mitch Tunick, Karrie Haneman, Barry Winters, Tarplaijo, Eunice Chan, Christine Brashear, Miriam Winters, Bradley Hillbrandt, Laura Hillebrandt, Elizabeth Yuan, Devon Mitzel, Brett Pels, Woodie Dixon, Edward Volk, Hanh T. Estep, Joe & Paula Buenavistas, Mary Dietler, Lianna Gatto, Melanie Volk, Wendy Ko, Caroline Sherborne & Charles Bouch.*

*CLOSED the public hearing; DETERMINED that County File #WA18-0003 is exempt from the California Environmental Quality Act (CEQA) under CEQA Guidelines Section 15303; DIRECTED the Department of Conservation and Development to file a CEQA Notice of Exemption with the County Clerk; APPROVED a wireless facilities access permit for a Verizon Wireless cell site on a utility pole in the Danville Boulevard public right of way in Alamo (Permit No. WA18-0003); APPROVED the findings in support of Permit No. WA18-0003; APPROVED the conditions of approval for Permit No. WA18-0003 with amendments: (1) within 15 days after facility installation, Verizon must complete radio frequency (RF) testing at the facility, and, at the same time, Verizon must perform RF testing for interested property owners at their properties within a 300 foot radius of the facility, (2) one year after facility installation, Verizon must re-perform RF testing at the facility, and, at the same time, perform RF testing for interested property owners at their properties within a 300 foot radius of the facility, and (3) require that, before a building permit for the proposed facility is issued, Verizon provide the County verification by a California-licensed structural engineer that the existing utility pole will support the facility ; and DENIED the appeal of Donald and Anne Goldman.*

#### ATTACHMENTS

Maps

Project Plans

WA18-0003 BOS Appeal

Findings and Conditions of Approval

Radio Frequency Report

PowerPoint Presentation