



**Contra
Costa
County**

To: Board of Supervisors

From: John Kopchik, Director, Conservation & Development Department

Date: February 26, 2019

Subject: Verizon Wireless Access Permit #WA18-0004

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 1524 Alamo Way, in Alamo (Permit No. WA18-0004), RECEIVE testimony, and CLOSE the public hearing.
2. DETERMINE that County File #WA18-0004 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. WA18-0004).
5. APPROVE the findings in support of Permit No. WA18-0004.
6. APPROVE the conditions of approval for Permit No. WA18-0004.
7. DENY the appeal of Michael and Joan Parodi.

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 (to be replaced) in the public right-of-way near 1524 Alamo Way in the Alamo 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 (to be replaced) in the public right-of-way. This includes adding one 2-foot antenna (on top of a pole extension) located on top of the pole and ancillary equipment also attached to the pole. Ancillary equipment includes:

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

After installation of the antenna, the utility pole, which measures 38.6 feet tall, will measure 48.6 feet tall post construction. In addition, this request also includes the installation of two bollards adjacent to the utility pole within the public right-of-way. All pole equipment will be painted to match the utility pole. No ground mounted equipment is proposed.

Appeal of the County Planning Commission's Decision

On December 24, 2018, Michael and Joan Parodi 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:

Michael and Joan Parodi, 91 Gran Via, Alamo, CA

Summary of Appeal Point #1: Replacing the existing utility pole and adding Verizon Wireless cell site infrastructure would create a fire and falling apparatus hazard in the surrounding residential area.

Staff Response: This application was routed to the Contra Costa County Fire Protection District for comments during the initial 30-day noticing period for the project. The Contra

Costa County Fire Protection District did not indicate that the proposed cell site would result in an increased fire risk to people or property. In addition, the proposed wireless telecommunications facility would have to be compliant with all applicable building and fire codes relating to the installation of the facility's equipment to the utility pole, to ensure it would not result in an increased fire risk to people or property.

PG&E engineers, in cooperation with Verizon Wireless, assess the structural capacity of a utility pole to determine if it is structurally sufficient. Through that review it was determined, the existing utility pole needs to be replaced and the project includes installation of a new pole capable of supporting all equipment.

In addition, approval of an encroachment permit is required to ensure that the construction of the proposed 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 of the proposed cell site. The Public Works Departments 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 any risks to travelers within the right-of-way.

Summary of Appeal Point #2: The RF emissions from the proposed cell site would encroach and trespass through the air on adjacent properties, interfering with the "ordinary use and enjoyment" of the property.

Staff Response: An intangible intrusion on property only will constitute a trespass if it causes physical damage to the property. (*Elton v. Anheuser-Busch Beverage Group, Inc.* (1996) 50 Cal. App. 4th 1301, 1306-1307.) The appellant has not provided any evidence that RF emissions cause physical damage to property.

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: The FCC cannot be relied upon to set public health standards.

Staff Response: 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.) The County has no authority to regulate RF emissions under a permit. The FCC establishes emissions levels that apply to wireless facilities.

Summary of Appeal Point #4: No Environmental Impact Report has been conducted for the proposed project.

Staff Response: The proposed project is exempt under California Environmental Quality Act (CEQA) Guidelines Section 15303, which identifies existing facilities of both investor and publicly-owned utilities used to provide public utility services as being exempt from review.

Summary of Appeal Point #5: No public health study has been conducted for the proposed project.

Staff Response: As previously stated, 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.)

Summary of Appeal Point #6: The County Zoning Administrator failed to limit the permit scope, thus allowing for expansion to higher cellular frequencies with only minimal oversight. Other carriers may also choose to establish wireless telecommunications facilities on other utility poles.

Staff Response: As previously stated, 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.) Section 88-24.602 of the County's Wireless Ordinance provides that a minor alteration permit is required to make a minor alteration to the facility. If a change to an existing facility meets the definition of a "substantial change" under federal law (see 47 C.F.R., § 1.40001), a new wireless access permit would be required. Under the permit, the permittee would need to provide new RF emission information following a minor alteration. If a new wireless access permit is required, then new RF emissions readings would be required under the County's Wireless Ordinance.

Summary of Appeal Point #7: Neighborhood property values will be adversely affected due to the visual and aesthetic impacts of the proposed construction and the failure to

comply with the design guidelines, outlined in the County's Wireless Telecommunications, which mandate that a wireless facility be designed to minimize its visual and aesthetic impacts on the surrounding area. The applicant also failed to explore other viable options for the proposed wireless facility.

Staff Response: The applicant has satisfied the requirements in Section 88-24.612(b)(4)(A) through Section 88-24.612(b)(4)(I) of the Wireless Ordinance. 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.

With regard to the potential impact a new site would have on the aesthetic quality of its surroundings, although the subject utility pole is located within the right-of-way in a single-family residential neighborhood, small cell technology is less visually invasive than traditional cell towers (see attached photo simulations). The proposed canister antenna and ancillary equipment would be painted to match the existing utility pole, which would help the cell site blend in with its surroundings (this includes the existing utility pole and telephone wires). The proposed shrouds would also help conceal the pole-mounted equipment. The pole top equipment would result in 10-foot height increase for the pole, thus complying with the County Wireless ordinance, which limits such height increases to a maximum of 10 feet. Therefore, both the County Zoning Administrator and County Planning Commission concluded that the proposed wireless telecommunication facility would not substantially affect the aesthetic quality of its surroundings and complies with the design requirements of Section 88-24.408 for the facilities located in the public right-of-way.

With regard to the chosen location for the cell site, pursuant to a statement from Verizon Wireless, received on August 15, 2018, alternative sites are other poles within a short distance (neighboring) from the original choice. Verizon's radio frequency engineering group identifies areas in which capacity will be an issue to network performance (such as the chosen location). Subsequent to the engineering selection is the field identification and verification of whether or not any of the "chosen" poles will actually support a small cell facility as part of a system design. Two alternative sites considered for the proposed project included a utility pole located approximately 75 feet south from the subject utility pole and another utility pole located approximately 150 feet north from the subject pole. However, many of the poles are already loaded with vertical risers, conduits, equipment, and electrical and telephone lines that prevent a small cell facility from being able to "fit" at that site. Thus, the subject pole was chosen.

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 applicable requirements of the County’s Wireless Ordinance.

Project History

Verizon Wireless c/o On Air, LLC, submitted County File #WA18-0004 on April 17, 2018. At the September 4, 2018 Alamo MAC Meeting, the Alamo MAC recommended that a public hearing be held on County File #WA18-0002, becoming the impetus for the October 1, 2018 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 25, 2018, Michael and Joan Parodi, and Verizon Wireless c/o On Air, LLC, appealed the Zoning Administrator’s decision, prior to the appeal deadline, thus becoming the impetus of the November 28, 2018 County Planning Commission Meeting.

County File #WA18-0004 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 24, 2018, Michael and Joan Parodi 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 #WA18-0004, 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 (to be replaced) 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 #WA18-0004 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. WA18-0004); APPROVED the findings in

support of Permit No. WA18-0004; APPROVED the conditions of approval for Permit No. WA18-0004 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, and (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 DENIED the appeal of Michael and Joan Parodi.

ATTACHMENTS

Maps

Project Plans

WA18-0004 BOS Appeal

Findings and Conditions of Approval

Radio Frequency Report

PowerPoint Presentation