



**Contra  
Costa  
County**

To: Board of Supervisors

From: John Kopchik, Director, Conservation & Development Department

Date: February 26, 2019

Subject: Verizon Wireless Access Permit #WA17-0013

**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 Creekdale Road right of way in unincorporated Walnut Creek (Permit No. WA17-0013), RECEIVE testimony, and CLOSE the public hearing.
2. DETERMINE that County File #WA17-0013 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 facility access permit for a Verizon Wireless cell site on a utility pole in the Creekdale Road public right of way in unincorporated Walnut Creek (Permit No. WA17-0013).
5. APPROVE the findings in support of Permit No. WA17-0013.
6. APPROVE the conditions of approval for Permit No. WA17-0013.
7. DENY the appeal of Jodi Nelson.

**FISCAL IMPACT:**

The applicant has paid the initial application deposit, and is obligated to pay supplemental

☒ 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: Adrian Veliz, (925)  
674-7798

cc:

fees to cover any and all additional staff time and materials costs associated with the processing of the application.

## **BACKGROUND:**

### **Project Description:**

The project is to establish a new Verizon cell site within the Creekdale Road public right-of-way. The proposal involves installing a seven-foot wooden pole extension atop the existing utility pole. A two-foot canister antenna would be mounted above the pole extension, resulting in an approximately nine-foot increase in overall pole height. A pole-mounted standoff bracket with disconnect switch and ground buss bar is proposed between eight to ten feet above ground level. Ancillary equipment associated with the operation of the pole-mounted antenna is proposed to be located within a 32 square-foot equipment area, located at ground level five feet east of the utility pole. A six-foot redwood fence surrounding the at-grade equipment area would provide visual screening for ancillary equipment. At-grade ancillary equipment includes:

- 6-foot tall redwood fence (screening enclosure);
- Two (2) RRU units;
- Two (2) diplexers;
- Two (2) Power supply units;
- Six (6) Hybrid Combiners;
- One (1) Power meter.

### **Appeal Of The County Planning Commission's Decision:**

The County received one appeal of the County Planning Commission's decision approving the establishment of the new Verizon Wireless telecommunications facility. In a letter dated received December 10, 2018 (attached), Ms. Jodi Nelson (appellant) provided many points of concern with the project. Staff has summarized the appeal points contained in the letter and has provided a discussion of each point below.

### **Review of Points Raised in Appellant's Appeal Letter:**

**Summary of Appeal Point #1 "Capacity":** The applicant contends that the Telecom act discusses a distinction between "essential services v. non-essential services". Verizon's stated goal to expand network capacity may simply allow the network to handle more data-intensive tasks that are not essential activity.

**Staff Response:** State law gives telephone corporations, including wireless telecommunications providers, a franchise to construct and maintain their facilities within public roads and highways rights of way "in such a manner and at such points as not to incommode the public use." (Pub. Util. Code, § 7901). Neither section 7901, nor the County Wireless Facilities Ordinance (Ordinance Code Chapter 88-24; the "Wireless Ordinance"), requires Verizon Wireless to demonstrate a technological necessity for capacity upgrades to their network.

**Summary of Appeal Point #2 California Constitution:** The California Constitution

calls for elected officials and paid employees to promote and preserve the health, welfare and economic viability of all residents, voters, and taxpayers.

**Staff Response:** Chapter 88-24 of the County Ordinance Code provides for the orderly development of wireless telecommunications facilities within unincorporated areas of Contra Costa County. The Wireless ordinance includes a requirement that all facilities demonstrate compliance with radio frequency exposure standards adopted by the Federal Communications Commission (FCC). Compliance with FCC standards ensures that the site will not result in excessive public exposure to radiofrequency 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.

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 #3 "FCC Bullying":** The FCC allows industry to make policy. They are streamlining rules for wireless providers that take away the rights of local governments to govern independently, rights that are guaranteed by the California

Constitution and United States Constitution.

**Staff response** The County is required to comply with all applicable federal, state, and local laws and regulations that govern permitting of wireless facilities in public rights of way.

**Summary of Appeal Point #4 “Aesthetics”:** The County has discretion to regulate cellular facilities on the basis of aesthetics as confirmed by California Appeals Courts in their decision on T-Mobile W., LLC v. City & County of San Francisco.

**Staff Response:** The County exercises discretion relating to the aesthetics of wireless telecommunications facilities, as codified under County Ordinance Code. Section 88-24.408 of the Wireless Ordinance provides design guidelines meant to improve aesthetics of wireless facilities. These guidelines require that the proposed equipment be painted to match their surroundings, limit the height of pole-top installations, and limits the number of antennae that may be placed on a utility pole. Verizon has agreed to paint all pole mounted equipment to match the existing pole. The project is conditioned (COA #15) to ensure that this occurs. The ordinance allows no more than four antenna enclosures on a single utility pole and no antenna may not extend more than 10 feet above the height of the existing pole. The project proposal would locate a single antenna approximately nine feet above the top of the existing pole. Thus, the project is consistent with these criteria. Wireless facility design guidelines also require that any facility within a residential zoning district must be a low-visibility facility. The ordinance defines low-visibility facilities to include those installed on an existing utility pole. Thus, the project is consistent with the applicable design criteria in the County's Wireless Ordinance.

The appellant contends that because elements of the facility will be visible, it will obstruct the public use of the right-of-way. The facility will not incommode the public use of the right-of-way.

**Summary of Appeal Point #5 “Section 6409(a)”** Carriers misrepresent equipment proposed for facilities. The County has no recourse to prevent them from adding equipment beyond what was approved because 47 C.F.R., § 1.400001 (codifying Section 6409 of the Spectrum Act) gives carriers the right to expand facilities an unlimited number of times.

**Staff Response:** The appeal point is incorrect. Condition of approval #8 requires that any future minor alteration to this facility will require a minor alteration permit issued under the County Wireless Ordinance. Condition of Approval #4 specifies that “non-compliance with the approved conditions and/or the ordinance code provisions, after written notice thereof, shall be cause for revocation proceedings”. Furthermore, the County routinely conditions the approval of cellular facilities to require ongoing compliance reviews for cell sites throughout the life of the permit. During compliance reviews, an inventory of all existing equipment can easily be compared to the original approval. Thus, the conditions of approval for this wireless access permit provide a

means for the ongoing monitoring of the Verizon facility and, if necessary, measures to bring a non-compliant site into conformance.

**Summary of Appeal Point #6 “County Ordinance”:** A commercial zoning district would be a more appropriate location for this equipment.

**Staff Response:** County Ordinance Code section 88-24.404 specifies that high-visibility facilities may not be located in, or within 300 feet, of any residential zoning district. However, this facility is not a high-visibility facility. This facility meets the definition of a low-visibility facility under County Ordinance Code Section 88-24.204 (p)(4) because the facility will be mounted on an existing utility pole. Therefore, the County has no basis to require Verizon to move this facility adjacent to or within a commercial zoning district. Under Public Utilities Code section 7901, Verizon may place this telecommunication facility in the public right of way.

The applicant has analyzed alternative locations for this facility in accordance with Ordinance Code Section 88-24.604(d)(3). The proposed location for this facility is preferred over those alternatives because nearby poles are relatively cluttered with existing equipment, transformers, and guy wires, that preclude the needed space for Verizon's equipment.

Finally, the facility qualifies as a low-visibility facility because it will be mounted on an existing utility pole. (Ord. Code, § 88-24.204(p)(4).) Ordinance Code section 88-24.404 cited by the appellant restricts the location of high-visibility facilities, which are any facilities that do not meet the definition of a “low visibility facility” under the County’s Wireless Ordinance. (See Ord. Code, §88-24.204(n) (defining high-visibility facility).) Therefore, Ordinance Code section 88-24.404 does not prohibit this low visibility facility from being located at the location designated in the permit.

**Summary of Appeal Point #7 “Fire Hazard”:** PG&E equipment is suspected to be the cause of recent fires. Extra precautions should be taken before adding equipment to these poles. Tree branches are currently near the power wires on this pole which can create a clearance problem under General Order 95.

**Staff Response:** The County routinely forwards applications for new wireless facilities to local Fire Protection agencies for comments. The County has not received any indication from the Contra Costa County Fire Protection District that the project represents an elevated risk of wildfire. As required by state law, PG&E engineers, in cooperation with Verizon Wireless, confirm the structural capacity of a proposed utility pole to determine if it is structurally sufficient.

Similar applications for Verizon deployments within the proposed small cell network (processed concurrently with this application) involved replacing utility poles where structural engineers determined that an existing pole could not handle the additional equipment. Thus, Verizon has demonstrated a willingness to replace poles where

necessary to accommodate new equipment. There is no evidence in the record to suggest that the subject utility pole is unable to accommodate additional equipment or that it poses a fire risk. If approved, construction plans will be subject to review by the Contra Costa County Fire Protection District and the County Building Inspection Division. Compliance with applicable Building and Electrical Codes, Fire Code, and Statewide regulations for utility poles in public rights-of-way, ensures that the project will not represent an elevated risk of wildfire.

The presence of tree branches growing near existing power lines can be addressed by routine pruning which can be undertaken, as needed, during the course of constructing the facility. Encroachment permit condition of approval #45 requires the applicant to notify the County of any unintended damage to mature trees. After assessing the damage, the condition requires either consulting with an arborist for advice on saving the affected tree, or the replacement of the tree. Over time, it is expected that the pruned tree branches would again grow back into the proximity of existing PG&E lines. To assist with this ongoing concern, PG&E offers a complimentary service to help homeowners safely prune trees near power lines or to report dead trees near power lines.

**Summary of Appeal Point #8 “Liability”:** Electromagnetic frequencies are uninsurable and have been deemed by insurance companies to be potentially harmful. Negative effects from radio frequency exposure can result in litigation and substantial legal fees. The County has assumed liability for the facility.

**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.) As long as the facility is designed and 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 applicant has submitted a RF report demonstrating that the proposed installation would not generate emissions exceeding FCC regulations for exposure to RF emissions. Additionally, the CPC approved condition of approval #26, requiring in-field verification of emission levels originating from the facility. These field measurements are required to be taken again in the event that equipment is added or replaced.

**Summary of Appeal Point #9 “CPUC 2902”:** Public Utilities Code section 2902 grants local governments the ability to regulate utilities in matters affecting the health, convenience, and safety of the general public.

**Staff Response:** California Public Utilities Code section 2902 is one statute that must be read together with other state and federal laws and regulations that govern wireless

telecommunications facilities. The County's Wireless Ordinance was adopted to regulate wireless telecommunication facilities in accordance with those state and federal laws and regulations, consistent with the County's authority under Public Utilities Code section 2902.

**Summary of Appeal Point #10 "Real Estate Values"**: The negative aesthetic impact will decrease the property value of homes in the area. Approving this facility will violate my constitutional rights because the facility will decrease my property's value.

**Staff Response**: Section 88-24.612(b)(4) of the County's Wireless Ordinance includes the findings that must be made before a wireless access permit will be issued. Those findings do not require analysis of the project's impact on property values in the surrounding area. Therefore, a wireless facility access permit cannot be denied based on an allegation of diminution of adjacent property values.

The appellant alleges that the facility will cause a diminution in her property's value, which would give rise to a cause of action against the County. The appellant does not identify what cause of action it would give rise to, but we presume the appellant is inferring the cause of action would be one for inverse condemnation. 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. Therefore, the County's approval of a permit for the facility will not give rise to a cause of action for inverse condemnation based on alleged diminution in property values.

Finally, the evidence in the record presented by the appellant does not establish that this facility at this location will negatively impact the appellant's property, or any specific property. The evidence submitted by the appellant is generalized and based in part on a study from New Zealand. The work of Dr. Sandy Bond, PhD, has been cited prominently as a basis for this appeal point. In an email to County staff, Dr. Bond characterized her findings on potential impacts of cell sites on property values in the U.S. as "not very significant", and further cautioned that such price impacts may be even smaller in "tight" markets where lower housing inventory leave buyers with fewer choices. According to Dr. Bond, buyers in low-inventory markets "may be prepared to live in closer proximity to a cell phone tower than otherwise may be the case in a slower market" where more properties are available for sale. Therefore, the oft-cited results of Dr. Bond's prior New Zealand study finding (characterized by Dr. Bond as "on average a 12% decrease") may not be indicative of potential price impacts in other markets. Staff is unaware of any conclusive studies demonstrating that the presence of a wireless facility would have a significant negative impact on the value of neighboring properties.

**Summary of Appeal Point #11 "Fiber Optics"**: The appellant would prefer hard-wired



fiber-optic data connections over wireless telecommunications facilities.

**Staff Response:** The appellant's preference for fiber optic technology is not a legally defensible basis for denying a wireless access permit under the County's Wireless Ordinance. 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).) Further, the County may not 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.)

**Summary of Appeal Point #12 "Required Recertification":** Burlington, Massachusetts formed a committee specifically for the review of small cell applications. I believe the County has the right to request similar yearly evaluations of these installations.

**Staff Response:** The County's approval of this application is consistent with the County's Wireless Ordinance, and state and federal laws and regulations that apply to wireless telecommunication facilities. The County's Wireless Ordinance does not currently require annual RF emission measurements to be performed.

Condition of Approval #26 requires in-field radio frequency measurements to be taken following facility construction to verify compliance with FCC standards. The condition also requires new RF field measurements in the event that equipment is added or replaced. These conditions of approval are consistent with what is required under the current Wireless Ordinance. These conditions are intended to ensure that the equipment installed at this location, and the resulting RF emissions, are consistent with the FCC-established RF limits.

### **Project History**

This application was submitted by On Air, LLC on October 19, 2017, requesting to establish a new Verizon Wireless Telecommunications Facility within the Creekdale Road right-of-way. On September 7, 2018, a "Notice of Intent to Render and Administrative Decision" was mailed to property owners within 300 feet of the project site. A timely request for a public hearing was received by the County on September 12, 2018.

On October 1, 2018, this application was considered by the County Zoning Administrator (ZA) at a public hearing. After taking testimony on the project, the ZA closed the public hearing and continued the item to October 15, 2018. The ZA approved the project with an added condition of approval (COA), and required annual measurements of electromagnetic emissions, to ensure that emissions generated by the site do not exceed public exposure limits, as set forth by the Federal Communications Commission (FCC). The ZA decision was appealed by Jodi Nelson, a neighboring property owner, on October 24, 2018. The County received one additional appeal from

Verizon Wireless on October 25, 2018.

The Nelson appeal cited several points of contention with the Verizon facility. The appeal of the Wireless Access Permit was heard by the County Planning Commission (CPC) meeting held on November 28, 2018. The CPC approved the project as recommended by staff by a vote of 5-1.

Conclusion:

The appeal points are similar to the appeal points presented to the CPC and do not provide support for overturning the ZA's approval or the CPC's 5-1 vote to uphold the ZA's approval. 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 project is also consistent with State and Federal laws and regulations governing wireless telecommunication facilities, and the location of facilities 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 #WA17-0013, 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 a Wireless Access Permit will be overturned. Verizon Wireless would be unable to construct the proposed new Wireless Facility within the Creekdale Road right-of-way.

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 #WA17-0013 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 facility access permit for a Verizon Wireless cell site on a utility pole in the Creekdale Road public right of way in unincorporated Walnut Creek (Permit No. WA17-0013); APPROVED the findings in support of Permit No. WA17-0013; APPROVED the conditions of approval for Permit No. WA17-0013 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 Jodi Nelson.***

#### **ATTACHMENTS**

Maps

Plans

Appeal

Findings and Conditions of Approval

Radio Frequency Report

Court Dec. T-Mobile vs. SF

PowerPoint Presentation