CITY OF OAKLAND

AGENDA REPORT

TO: John A. Flores
INTERIM CITY ADMINISTRATOR

FROM: Rachel Flynn

SUBJECT: 6239 Elderberry Drive Utility Pole Telecommunications Project Appeal

DATE: March 5, 2015

City Administrator Approval

Date 3/18/15

COUNCIL DISTRICT: 4

RECOMMENDATION

Staff recommends that the City Council conduct a Public Hearing and upon conclusion adopt:

A Resolution Denying Appeal #A13-233 And Upholding The Decision Of The City Planning Commission To Approve Regular Design Review To Attach A Telecommunications Facility To A New Replacement Utility Pole Located In The Public Right-Of-Way At The Intersection Of Elderberry Drive And Girvin Drive

Alternatively, should the Council wish to approve the Appeal and deny the Regular Design Review application, the City Council may, upon conclusion of a public hearing, adopt:

A Resolution Upholding The Appeal Of Manuel Perez And Dr. Christy Hiebert (Appeal #A13-233), Thereby Reversing The Decision of the City Planning Commission And Denying Regular Design Review To Attach A Telecommunications Facility To A New Replacement Utility Pole Located In The Public Right-Of-Way At The Intersection Of Elderberry Drive And Girvin Drive

OUTCOME

Denial of the appeal would result in upholding the Planning Commission's approval of the Regular Design Review to attach a telecommunications facility to a utility pole located in the public right-of-way at the intersection of Elderberry Drive and Girvin Drive. The zoning entitlements would be effectively approved, and the applicant would be free to go forward with other steps necessary to begin implementation.

Alternatively, approval of the appeal would overturn the Planning Commission's decision of July 31, 2013, and deny the Regular Design Review application for the proposed telecommunications facility. The zoning entitlements would effectively be denied.

Item: _____
City Council
March 31, 2015

EXECUTIVE SUMMARY

On July 31, 2013, the Planning Commission held a public hearing and approved an application submitted by Mr. Matthew Yergovich on behalf of New Cingular Wireless PCS, LLC, for AT&T Mobility ("AT&T") for Regular Design Review with additional telecommunications findings to install two panel antennae (two-feet long and ten inches wide) to a new 47 foot-6 inch replacement wooden Joint Pole Authority (JPA) utility pole owned by PG&E, and an associated equipment box, one battery backup and meter boxes, all of which will be located within a six foot tall by 18 inches wide singular equipment box. On August 12, 2013, the appellants Mr. Manuel Perez and Dr. Christy Hiebert filed a timely Appeal (#A13233) of the Planning Commission's decision to approve the project. Staff recommends the City Council deny the appeal and uphold the Planning Commission's decision to approve the application. However, staff has also attached an alternative resolution and findings for denial, which provides the City Council with the option of either approving or denying this appeal.

BACKGROUND

Local Government Zoning Authority

In 2009, a State Supreme Court decision provided Oakland with design review discretion over telecommunications projects when located in the public right-of-way. Prior to this decision, these types of projects were not subject to zoning permits. Telecommunications projects located in the public right-of-way are also distinct from those located on private property, which have always been subject to design review as well as a conditional use permit and possible variances in certain situations.

In addition, the Telecommunications Act of 1996 prohibits any local zoning regulations purporting to regulate the placement, construction and modification of personal wireless service facilities on the basis, either directly or indirectly, of the environmental effects of radio frequency emissions (RF) of such facilities, which otherwise comply with Federal Communications Commission (FCC) standards in this regard. This means that local authorities may not regulate the siting or construction of personal wireless facilities based on RF standards that are more stringent than those promulgated by the FCC.

Application

On February 6, 2013, AT&T submitted a Regular Design Review application to the Planning & Building Department to construct a telecommunications facility on an existing utility pole located in the public right-of-way. The proposal was to install a seven foot extension with two panel antennae (two feet long and ten inches wide) to an existing 43 foot – four inch wooden

Joint Pole Authority (JPA) utility pole (with a total pole height of 50 foot – four inches and an overall height of 53 feet- three inches to the top of the attached antennas) owned by PG&E and located in the City public right-of-way at the intersection of Elderberry Drive and Girvin Drive, and to mount an associated equipment box, one battery backup and meter boxes within a six foot tall by 18 inches wide singular equipment box attached to the pole at eight feet above ground.

On May 1, 2013, the Planning Commission conducted a duly noticed public hearing and after concerns were raised by the appellants, continued the matter to allow the applicant to revise the proposal. The applicant subsequently modified the project to install a new 47 foot- six inch high replacement wooden Joint Pole Authority (JPA) utility pole (five feet-nine inches shorter from the top of the antennas than the original proposal) with the two panel antennae (two feet long and ten inches wide) placed onto arms located 37 feet high on the pole (16 feet-three inches lower on the pole than the original proposal). On July 31, 2013, the Planning Commission again conducted a public hearing and approved the modified proposal by a six-zero vote.

Application Review and Decision

The site is a section of public right-of-way at the intersection of Elderberry Drive and Girvin Drive containing a 43foot-four inch wooden utility pole. This section of road contains no sidewalk. The surrounding area consists of a hillside residential neighborhood with single-family homes. The utility pole is surrounded by several mature tall trees and adjacent to a City of Oakland fire hydrant.

The modified proposal approved by the Planning Commission is to install a new 47 foot-six inch high replacement wooden Joint Pole Authority (JPA) utility pole with two panel antennae (two feet long and ten inches wide) mounted onto arms located 37 feet high and to mount an associated equipment box, one battery backup and meter boxes within a six foot tall by 18 inch wide singular equipment box attached to the pole at eight feet above ground to enhance wireless telecommunications services (i.e., cellular telephone and wireless data). The pole mounted equipment cabinet would be contained in a singular shroud. Both the equipment cabinet and antennas would be painted matte (non-reflective) brown to match the color and finish of the wooden pole.

As described in more detail in the July 31, 2013 staff report, staff considered the proposal and site surroundings, including its proposed right of way location, and recommended Planning Commission approval of the modified project application based on the following information: (1) the proposal meets all the required findings under Planning Code Section 17.136.050(B) (Non-Residential Design Review criteria); (2) the proposal meets all additional required findings under Planning Code Section 17.128.070(B) (telecommunication facilities (Macro) Design Review criteria); (3) the applicant submitted a Site Design Alternatives Analysis (see July 31, 2013 Staff Report, Attachment C); and, (4) the applicant submitted a satisfactory RF Emissions Report (see July 31, 2013 Staff Report, ***Attachment B***). Staff visited the site (the intersection of

Elderberry Drive and Girvin Drive) and utilized internet aerial images, and did not discern a view issue, given the elevation of homes uphill from the pole.

The City publicly noticed the project for 17 days for the Planning Commission hearing of July 31, 2013. On July 30, 2013, the City received a letter dated July 29, 2013 from appellant Mr. Perez and a separate letter dated July 29, 2013 from appellant Dr. Hiebert. Appellants Mr. Perez and Dr. Hiebert both reside at 6239 Elderberry Drive. The City also received correspondence opposing the proposed project before it was modified (i.e., a letter dated April 15, 2013 from Dr. Hiebert and an undated letter from Christopher Fuller, Ph.D. and Cara Counter-Fuller, who reside at 6240 Elderberry Drive, received April 29, 2013), which were part of the record before the Planning Commission at its May 1, 2013 hearing on this matter. All four letters opposed the project and requested that the Planning Commission deny the application. Staff distributed the letters from Mr. Perez and Dr. Hiebert to the Planning Commission at the July 31, 2013 Planning Commission meeting. After reviewing the entire administrative record, including receiving and considering all oral and written testimony, the Planning Commission approved (by a vote of six to zero) the requested planning permit for the Project.

On August 12, 2013, the appellants filed an appeal (***Attachment A***). The bases of the appeal were: (1) Oakland Municipal Code Section 12.36-Protected Tree Ordinance (Oak Tree); (2) Health related concerns from radiation and electromagnetic field, i.e. cancer end other neurodegenerative diseases; (3) Obstruction of views-visual impact negatively effected; (4) Property boundary dispute regarding claimed public right of way; (5) Aesthetic concerns; (6) Reduced property value; (7) Not exempt from environmental review-under CEQA; (8) Lack of notice as to proposed CEQA exemptions; (9) Public Nuisance-noise related concerns fans (cooling equipment); (10) Fire danger-close proximity to wooded environs; (11) Traffic safety concerns-dangerous location- near a blind sloped corner; (12) Alternative site analysis inaccurate; (13) OPC 17.128.070 (B) and OPC 17.136.050 (B); and, (14) OPC 17.136.090.

ANALYSIS

The Planning Code indicates that for an appeal of a Planning Commission decision on a Regular Design Review:

The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Commission or wherein its decision is not supported by the evidenee in the record. (OMC Sec. 17.132.070(A).)

> *In considering the appeal, the Council shall determine whether the proposal conforms to the applicable design review criteria, and may approve or disapprove the proposal or require such changes therein or impose such reasonable conditions of approval as are in its judgment neeessary to ensure conformity to said criteria.* (OMC Sec. 17.136.090.)

Below are the primary issues presented by the Appellants in their Appeal and staff's response to each issue (shown in italicized text).

Appellants' Issue #1

Oakland Municipal Code Section 12.36-Protected Tree Ordinance (Oak Tree)

The appellants state that the appeal is based on "Oakland Municipal Code Section 12.36-Protected Tree Ordinance (Oak Tree); but make no statements supporting this basis for appeal. The appellants attached the following documents in support of their claim: OMC Chapter 12.36, the City of Oakland Protected Trees Ordinance, a United States Department of Agriculture Natural Resources Conservation Service Plant Guide for Coast Live Oak and the letter dated July 29, 2013 from Mr. Perez, which was previously submitted to and considered by the City.

Mr. Perez' July 29, 2013 letter provides: "There are multiple Coastal Live Oak Trees in the immediate vicinity of the proposed location of the new pole, several of which are on the property of 6239 Elderberry Dive. Oakland Municipal Code Section 12.36 requires a permit if work 'might' damage or destroy a protected tree. Any person found violating Oakland's Protected Tree Ordinance shall be deemed guilty of an infraction, in addition to being held liable for damages. The Oak trees have helped prevent soil erosion of the hillside, thus stabilizing the foundation of our home. Additionally, these Oak trees have contributed to the habitat and food source for a diversity of animals. If any tree roots or any other parts of these protected trees are damaged as a result of the new infrastructure put in place (a new pole), we will seek full enforcement of the applicable laws."

Staff Response

Staff does not agree that replacement of an existing utility pole with a new pole in the same location might damage or destroy a protected tree. The proposal is to install a new shorter replacement pole in the exact same location only 10 inches deeper than the existing pole (the existing pole is six feet-eight inches deep and the new pole would be seven feet- six inches deep) for greater strength and to meet present-day building and engineering codes.

Even if the applicant were required to obtain a permit (i.e., replacement of an existing utility pole with a new pole might damage or destroy a protected tree), the Standard Conditions of Approval require the applicant to comply with "all other applicable Federal, State, regional and/or local codes, requirements, regulations and guidelines..." If this were the case; the applicant would be required to submit an application for a Tree Protection Permit prior to the approval of a building permit application. At that time, the City of Oakland Tree Division would review the application against the criteria and follow the procedures in OMC Chapter 12.36 (Protected Trees).

Appellants Issue #2

Health related concerns from radiation and electromagnetic field, i.e cancer and other neurodegenerative diseases.

The appellants state that the appeal is based on "Health related concerns from radiation and electromagnetic field, ie cancer and other neurodegenerative diseases," but make no statements supporting this basis for appeal. The appellants attached the following documents in support of their claim: an undated article from a Pinole, California newspaper, and the letter dated April 15, 2013 from Dr. Hiebert. An undated letter from Christopher Fuller, Ph.D. and Cara Counter-Fuller received on April 29, 2013, which were both previously submitted to and considered by the City. The two letters provided comments on the previous proposal, before it was modified.

Dr. Hiebert's April 15, 2013 letter provides: "Health Concerns: Radio frequency radiation emitted from these towers is potentially carcinogenic, especially to young children. My children, as well as others in this populated area may be placed at an elevated risk for the development of multiple heath conditions, including cancer as a result of this exposure." Dr. and Mrs. Fuller's undated letter states, "Radio wave transmission path – The proximity of the antenna and the low relative elevation guarantees that radio waves traveling to the tower will also be traveling through our home, bedrooms and ourselves...."

Staff Response

As stated in the July 31, 2013 staff report, this area of the law is preempted by Federal regulations, and local agencies cannot reject telecommunications applications on the basis of emissions concerns if a satisfactory radio frequency emissions (RF) report was filed pursuant to the Planning Code, as was the case here. The Federal Communications Commission (FCC) regulates radio frequency emissions; this is not an area local authorities have jurisdiction over.

Specifically, Section 704 of the Telecommunications Act of 1996 preempts any local zoning regulation purporting to regulate the placement, construction and modification of personal wireless service facilities on the basis, either directly or indirectly, on the environmental effects of radio frequency emissions (RF) of such facilities, which otherwise comply with FCC standards in this regard. See, 47 U.S.C. 332(c)(7)(B)(iv) (1996). This means that local authorities may not regulate the siting or construction of personal wireless facilities based on RF standards that are more stringent than those promulgated by the FCC.

OMC section 17.128.130 (Radio frequency emissions standards) require that the applicant submit the following verifications for all wireless facilities, including requests for modifications to existing facilities:

a. With the initial application, a RF emissions report, prepared by a licensed professional engineer or other expert, indicating that the proposed site will operate within the current acceptable thresholds as established by the Federal government or any such agency who may be subsequently authorized to establish such standards.
b. Prior to commencement of construction, a RF emissions report indicating the baseline RF emissions condition at the proposed site.
c. Prior to final building permit sign off, an RF emissions report indicating that the site is actually operating within the acceptable thresholds as established by the Federal government or any such agency who may be subsequently authorized to establish such standards.

AT&T submitted a satisfactory RF emissions report with his initial application concluding that the project "will comply with the FCC Guidelines limiting public exposure to RF energy." The RF emissions report is attached to this report as ***Attachment B***.

Appellants Issue #3

Obstruction of views-Visual Impact negatively effected.

The appellants state that the appeal is based on "Obstruction of views-Visual Impact negatively effected" but make no statements supporting this basis for appeal. The appellants attached the following documents in support of their claim: the letter dated July 29, 2013, from Dr. Hiebert (which includes 4 photographs), and the undated letter from Dr. and Mrs. Fuller (which includes 2 photographs). Both letters were previously submitted to and considered by the City.

Dr. Hiebert's July 29, 2013 letter states: "View from primary living space: Given my property has a steep grade, the pole and cell tower box would be directly parallel with my living room windows. The pole can also be visualized from all 3 of my decks/outdoor living spaces (picture #3). This tower would depreciate the beauty of my hillside view, which we consider to be 'our Yosemite'. The fact that there would be a telecommunications facility blocking part of our view will have a negative impact on the future value of our home. Additionally, after consultation with real estate professionals, at a minimum, we would be required to disclose the potential for health related effects, if we ever chose to sell this property. This disclosure could lead to the depreciation of my home value."

Dr. and Mrs. Fuller's undated letter provides: "This location significantly impacts our view of the beautiful valley from all of our windows that face to the south. We spend a lot of time on our deck relaxing, and the proposed antenna would now be the most prominent feature of our view. One of the reasons we bought our home last year was this view, and we are concerned that having telecommunications antennas blocking the view will impact the future value of our home."

Staff Response

Staff visited the site (the intersection of Elderberry Drive and Girvin Drive) and utilized internet aerial images, and did not discern a view issue, given the elevation of homes uphill from the pole. The new replacement pole in the same location has an approximate diameter of 12inches and would be four feet-two inches taller than the existing pole, thus creating a very minimal visual change. From the appellants submitted "picture #3" there appears only a minimal sky view blockage when looking upward eansed by the existing pole. The City of Oakland Design Review Manual for One and Two Unit Residences, Criterion 1 Views states: "A project shall make a reasonable effort to maintain the most significant views from primary living spaces of existing residences on lots in close proximity to the project site. View protection is oonsidered for views that are located within view corridors, subject to view protection limitations." Criterion one goes on to define significant views as "distant views of the following scenic sites in order of priority. (1) Golden Gate Bridge, Bay Bridge, other bridges, downtown Oakland or San Francisco Skyline; (2) A large portion of San Francisco Bay and/or San Pablo Bay; (3) A panoramic view of a major natural feature such as the Oakland/Piedmont/Berkeley hills, a large open hillside, Mount Tamalpais, Mount Diablo, Lake Merritt, etc.; (4)A prominent structural landmark such as UC Berkeley Campanile Mormon Temple etc." A sky view with an approximate three square foot difference from the existing pole is not considered a significant view impact.

From the submitted photos and letter by Dr. and Mrs. Fuller, the existing pole is located across Elderberry Drive and significantly downslope from their residence. The submitted documents show the pole located approximately (as they have estimated) at 130 feet away on Girvin Drive. Further the existing pole is never shown in their photos, and the proposed pole with antennas as they have represented it is inaccurate with a T-like top, whereas the actual design would place the antennas at 37 feet on the new replacement pole. Also, the photo from the Fuller's deck shows very little impact into their view of the hillside.

Appellants Issue #4

Property Boundary dispute regarding the public right of way.

The appellants state that the appeal is based on "Property Boundary dispute regarding claimed public right of way;" but make no statements supporting this basis for appeal. The appellants attached the following documents in support of their claim, with no further explanation: a Forestland Manor (Oakland, Alameda County, California) map dated August, 1927, and the letter dated July 29, 2013 from Mr. Perez, which was previously submitted to and considered by the City.

Mr. Perez' July 29, 2013 letter provides: "The AT&T proposal calling to install a wireless communications device onto a new pole located in a public right-of-way is in dispute. The residents at 6239 Elderberry Drive do not concede that this proposal is for a location in a public

right-of-way. After review of the grant deed and its corresponding assessor maps, the Forestland Manor-Lot 2359 maps from 1927-1928, and after consultation from representatives of Grubb Realty, we are informed and believed the location of the pole is on property owned by the residents of 6239 Elderberry Drive."

Staff Response

The appellants have not submitted any documentation from a licensed land surveyor or engineer stating that the pole is on their property. Instead, they simply refer to statements made by a real estate representative and provide a map from 1927 that in no way depicts the location of a telephone pole or even how to relate the map to the existing site conditions. To demonstrate that the pole is on their property and not in the public right-of-way (as most utility poles are), the appellants have several options, including obtaining a title report and disputing the property boundary line directly with the applicant. Even if the pole were on their property, it is possible that another legal instrument, such as a deed or an easement, has been executed subsequent to 1927, that permits the applicant to locate the pole on their property. Moreover, the plans submitted by the applicant to the City were prepared by licensed architects and engineers, and the plans all depict the existing pole and location of the new replacement pole to be located in the public right-of-way.

Appellants Issue #5

Aesthetic concerns.

The appellants state that the appeal is based on "Aesthetic concerns;" but make no statements supportlng this basis for appeal.

Staff Response

The project was found to comply with all of the required Regular Design Review Findings as approved by the Planning Commission (see July 31, 2013 staff report). Further, multiple very similar applications with the exact same design and conditions of approval by the same applicant (AT&T) have been approved by the Planning Commission within the last year to two years.

Appellants Issue #6

Reduced property value.

The appellants state that the appeal is based on "reduced property value," but make no statements supporting this basis for appeal. The appellants attached the following documents in support of their claim: the previously submitted letters from Dr. Hiebert (dated July 29, 2013 and April 15, 2013), and the undated letter from Dr. and Mrs. Fuller. All three letters were previously submitted to and considered by the City.

Dr. Hiebert's letter dated July 29, 2013 refers to depreciation of her home value due to disclosure of potential health related effects. In addition, Dr. Hiebert's letter dated April 15, 2013, provides: "Environmental beauty: our family, in addition to many of the local residents elects to live in the community because of its display of natural beauty. Given my property has a steep grade, the pole and cell tower box would be directly parallel with my living room windows. This tower would rise above the tree line and depreciate the beauty of my mountain view, and possibly lead to the depreciation of my home value." The Fullers' undated letter refers to their concern that "having telecommunications antennas blocking the view will impact the future value of our home."

Staff Response

Staff does not agree that approval of this project will result in depreciation of property value. The project will result in more efficient cell phone coverage and data will increase telecommunication coverage for the community (which can increase business communication for residents that work from home). In addition, approval of the project will enhance emergency responses and service capabilities by police, fire and public safety organizations, which will protect properties from disasters and result in better responsiveness in case of emergencies. Further, numerous real estate professionals have actually informed Planning staff that potential buyers are often checking for cellular service when searching for a new home, especially in areas that traditionally do not have good reception, thus a home with adequate telecommunication service may even increase property value.

Appellants Issue #7

Not exempt from Environmental Review-under CEQA

The appellants state that the appeal is based on "Not exempt from Environmental Review-under CEQA," but make no statements supporting this basis for appeal. The appellants attached the following documents in support of their claim: a printout of CEQA Article 19, Categorical Exemptions, and the letter dated July 29, 2013 from Mr. Perez, which was previously submitted to and considered by the City.

In the letter dated July 29, 2013, Mr. Perez states: "Environmental Concerns: (a) Proposal is not Exempt: AT&T claims that they are categorically exempt from having an Environmental Review

based on Section 15301 of the California Environmental Quality Act (CEQA), additions and alterations to existing facilities. However, the proposal from AT&T calls for new infrastructure, a 'NEW' pole to replace an 'EXISTING' pole. A new pole by definition is not an addition or alteration to existing facilities, and should not qualify under the above exemption for environmental review."

Staff Response

The project is categorically exempt from CEQA pursuant to several sections of the Public Resources Code and the CEQA Guidelines, including, but not limited to, CEQA Guidelines sections 15301, 15302, 15303, 15183, and Public Resources Code section 15061(b)(3), each as a separate and independent basis:

- Section 15301 of the CEQA Guidelines exempts projects involving "...the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use...";
- Section 15302 of the CEQA Guidelines exempts projects involving "replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced...." ;
- Section 15303 of the CEQA Guidelines exempts projects involving "...construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure...";
- Section 15183 of the CEQA Guidelines (projects consistent with a community plan, general plan or zoning); and
- Public Resources Code section 15061(b)(3) (general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment).

The proposed project to attaeh wireless telecommunications antennas and related equipment to a wooden utility pole is exempt from CEQA review as stated above. Although the site is receiving a new replacement utility pole in the exact same location, the site is part of an overall whole Joint Pole Authority (JPA) infrastructure with the interconnected wiring to remain and be reconnected to the new replacement pole. Therefore, the City Council's action to deny the appeal and uphold the Planning Commission's approval of this application, as recommended in this report, is exempt from CEQA.

Appellants Issue #8

Lack of Notice as to proposed CEQA exemptions

The appellants state that the appeal is based on "Lack of Notice as to proposed CEQA exemptions," but make no statements supporting this basis for appeal.

Staff Response

CEQA permits, but does not require, a public agency to file a Notice of Exemption, which is a brief notice filed after it approves a project and has determined that the project is exempt from CEQA as being categorically exempt. Public Resources Code section 15062, CEQA Guidelines section 15374. Although there are no legal requirements that the City provide advanced notice of its intention to rely on a particular CEQA exemption, staff did provide such notice along with its Planning Commission Public Notice, which was posted and mailed in compliance with all applicable laws and regulations. On April 12, 2013, the City posted and mailed public notice for the first Planning Commission meeting (more than 17 days prior to the May 1, 2013 Planning Commission meeting). The notice included identification of the CEQA exemptions in the "Environmental Determination" section of the notice. On July 12, 2013, the City posted and mailed public notice for the second Planning Commission meeting (more than 17 days prior to the July 31, 2013 Planning Commission meeting). That notice also included identification of the CEQA exemptions in the "Environmental Determination" section of the notice. The notices for both Planning Commission meetings were posted at seven locations and mailed to all property owners within a 300 foot radius, including appellants. Appellants had proper and legally sufficient notice of the public hearings, and although not required by law, also received notice of the CEQA exemptions that the City anticipated relying on.

As a Design Review application the project was publicly noticed per Planning Code Section 17.136.040.C.2: Notification Procedures. Copies of the public notices for both meetings (as well as the mailing lists) are attached to this report as **Attachment D**.

Appellants Issue #9

Public Nuisance-Noise related concerns fans (cooling equipment).

The appellants state that the appeal is based on "Public Nuisance-Noise related concerns fans (cooling equipment)" but make no statements supporting this basis for appeal. The appellants attached:the following documents in support of their claim: the letter dated July 29, 2013 from Dr. Hiebert, which was previously submitted to and considered by the City.

Dr. Hiebert's letter dated July 29, 2013 states: "Public nuisance/sound concerns, fire hazard: Even low decibel noise can be easily heard in our quiet, mountainous valley. The fans included in the plans would operate to cool the equipment when it became too hot. If the sound level this fan produce exceeded local sound ordinances, then the City and AT&T would be liable for this public nuisance."

Staff Response

This project, as well as all projects that receive City approval, must meet all Planning Code and Municipal Code requirements for maximum emitted sound levels. Further, Project Specific Conditions specifically address noise concerns. Conditional of Approval #14 from the approved staff report requires noise levels from the activity, property, or any mechanical equipment on site to comply with the performance standards of Section 17.120 of the Planning Code and Section 8.18 of the Oakland Municipal Code. The condition further provides, "If noise levels exceed these standards, the activity causing the noise shall be abated until appropriate noise reduction measures have been installed and compliance verified by the Planning and Zoning Division and Building Services."

Appellants Issue #10

Fire Danger-close proximity to wooded environs.

The appellants state that the appeal is based on "Fire Danger-close proximity to wooded environs," but make no statements supporting this basis for appeal. The appellants attached the following documents in support of their claim: the letter dated July 29, 2013 from Dr. Hiebert, which was previously submitted to and considered by the City.

Dr. Hiebert's letter dated July 29, 2013 states: "there is a significant amount of vegetation in close proximity to the proposed wireless telecommunications facility. The new proposal highlights the idea to 'hide' the box in the midst of our protected Coastal Oak trees (Picture #4) The Oakland hills would be especially susceptible to this increase fire hazard."

Staff Response

The level of flammability for any new telecommunication equipment would be out of the scope of knowledge of the Bureau of Planning. However, all newly proposed projects must receive Building Department review where the project will be reviewed by City plan check engineers. During that review the City engineers will be reviewing the project to comply with all City ordinances related to fire safety. Staff believes that new telecommunication equipment attached to a wood utility pole with other public utilities will not cause any greater fire danger than would be existent from the other utility equipment.

Appellants Issue #11

Traffic Safety Concerns-Dangerous location-near a blind sloped corner.

The appellants state that the appeal is based on "Traffic Safety Concerns-Dangerous location-near a blind sloped corner," but make no statements supporting this basis for appeal. The appellants attached the following documents in support of their claim: the letters dated April 15, 2013, and July 29, 2013 from Dr. Hiebert, which were previously submitted to and considered by the City.

Dr. Hiebert's letters dated April 15, 2013 and July 29, 2013 both state: "Traffic safety concerns: The intersection at Girvin and Elderberry is a sloped blind corner, and as it stands already a significant traffic risk (picture #1, #2). Any additional work, construction, or vehicle parking at this intersection would potentially increase traffic accidents at the site of the proposed tower."

Staff Response

A new replacement pole in the same location with a height of only four feet-two inches higher should not increase traffic safety issues at the intersection of Girvin Drive and Elderberry Drive. The equipment will be placed on the pole at eight feet high and will be surrounded by existing foliage. Limited routine maintenance will be required at the unmanned site, thus work vehicles will only be at the site primarily during the initial construction of the project. Further, during construction, the applicant will be required to obtain a City excavation and obstruction permit, with all of the proper safety signage and cones to identify the work in the public right-of-way. The applicant will also be required to abide by all City traffic safety codes during construction.

Appellants Issue #12

Alternative site analysis inaccurate

The appellants state that the appeal is based on "Alternative site analysis inaccurate," but make no statements supporting this basis for appeal. The appellants attached the letter dated July 29, 2013 from Mr. Perez to support their claim, which was previously submitted to and considered by the City.

In the letter dated July 29, 2013, the appellant, Mr. Perez states: "Alternative site analysis is inaccurate/proposed location is not the best out of all of the alternatives. (a) Matthew Yergovich claims that only 'existing' infrastructure is to be used...; (b) Matthew Yergovich claims that this location is not immediately near any houses...; (c) Matthew Yergovich claims that other poles south along Girvin have a reduced elevation insufficient for signal propagation, as do the poles north toward Aitken..."

Staff Response

The applicant submitted an accurate and adequate Site Design Alternatives Analysis (see July 31, 2013 Staff Report, ***Attachment C***), as required by the City's Telecommunications Regulations, and as explained in detail in the July 31, 2013 staff report. Contrary to appellant's claim, although the applicant will be replacing the existing pole, the applicant will be using the overall Joint Pole Authority (JPA) utility pole existing infrastructure for all interconnected sites within the surrounding area. Also, the applicant selected the particular site because the utility pole will be located in the public right-of-way greater than 50 feet away from the nearest house and due to engineering constraints the site was most sufficient for signal propagation and interconnection with the nearest adjacent sites in the network.

Appellants Issue #13

OPC 17.128.070(B) and OPC 17.136.050(B) (Oakland Planning Code, Telecommunications and Design Review Procedure)

The appellants state that the appeal is based on "OPC 17.128.070(B) and OPC 17.136.050(B)," but make no statements supporting this basis for appeal.

Staff Response

The proposed project meets all the required findings under Planning Code section 17.136.050(B), Non-Residential Regular design review criteria, and all the additional required findings under section 17.128070(B), design review criteria for macro facilities. At its meeting on July 31, 2013, the Planning Commission adopted all required Findings for Approval based on all of the evidence in the record.

The appellants simply refer to two Planning Code sections without further explanation. The appellants have not raised any specific questions or concerns relating to any of the required findings, and have not stated specifically wherein it is claimed there was error or abuse of discretion by the Planning Commission. Planning Code section 17.136.090 requires the appeal to "state specifically wherein it is claimed there was an error or abuse of discretion by the Commission or wherein its decision is not supported by the evidence in the record." The appellants have failed to do so and there is simply no basis to support this claim in their appeal.

Appellants Issue #14

OPC 17.136.090 (Oakland Planning Code, Design Review Procedure)

The appellants state that the appeal is based on "OPC 17.136.090" but make no statements supporting this basis for appeal.

Staff Response

As stated in staff response to appellant's issue #13, above, the proposed project meets all the required findings under Planning Code section 17.136.050(B), Non-Residential Regular design review criteria, and all the additional required findings under section 17.128070(B), design review criteria for macro facilities.

The appellants simply refer to Planning Code section 17.136.090 without further explanation, and have failed to specifically challenge the Planning Commission's findings. The appellants have not stated specifically wherein it is claimed there was error or abuse of discretion by the Planning Commission, and there is simply no basis to support this claim in their appeal.

POLICY ALTERNATIVES

The City Council has the option of taking one of the following alternative actions instead of the action recommended in the resolution (to deny the appeal and uphold the decision of the Planning Commission), which accompanies this staff report:

1. Grant the appeal and reverse the decision of the Planning Commission thereby denying the project. Staff has prepared an alternative resolution and findings for denial so that this action may be taken upon conclusion of the public hearing.

2. Deny the appeal and uphold the decision of the Planning Commission, but impose additional and/or revised conditions on the project and/or modify the project, solely related to the appellate issues. Depending on the revisions, this option may also require the City Council to continue the item to a future hearing so that staff could prepare and the City Council has an opportunity to review the proposed revisions.

3. Continue the item to a future meeting for further information or clarification, solely related to the appellate issues.

4. Refer the matter back to the Planning Commission for further consideration on specific issues/concerns of the City Council, solely related to the appellate issues. Under this option, the appeal would be forwarded back to the City Council for decision.

PUBLIC OUTREACH/INTEREST

The appeal was publicly noticed and discussed with the appellants by staff. With the City's permission, the applicant installed a story pole at the site so that Councilmembers, staff and the public could view a representation of the proposed height. Staff conducted a site visit to view the story poles and concluded that the proposal remains supportable. Attached to this staff report are photographs of the story poles (***Attachment F***).

COORDINATION

This agenda report and legislation have been reviewed by the Office of the City Attorney and by the Controller's Bureau.

COST SUMMARY/IMPLICATIONS

This appeal action would have no fiscal impact.

SUSTAINABLE OPPORTUNITIES

Economic: The project would have no economic impact.

Environmental: The project includes a satisfactory emissions report and would not have an adverse effect on the environment.

Social Equity: The project would not affect social equity.

CEQA

The modified proposal is to attach wireless telecommunications antennae and related equipment to a new replacement wooden utility pole. Although the site is receiving a new replacement utility pole in the exact same location, the site is part of an overall Joint Pole Authority (JPA) infrastructure. Thus, even though a replacement pole will be installed, the interconnected wiring will remain and will be reconnected to the new replacement pole.

Should the Council deny the appeal and uphold the Planning Commission's approval, the proposed telecommunications facilities are exempt from environmental review under the California Environmental Quality Act (CEQA) under CEQA Guidelines sections 15301 (minor alterations), 15183 (projects consistent with a community plan, general plan or zoning) 15302, (replacement or reconstruction of existing structures and facilities), 15303 (small facilities or structures, installation of small new equipment and facilities in small structures), and 15061(b)(3) of the CEQA Guidelines (general rule). None of the exceptions to the exemptions in CEQA Guidelines section 15300.2 are triggered by the proposed telecommunications facilities. Specifically, a) the location is not designated hazardous or critical; b) the telecommunications facilities do not have a cumulative impact because other telecommunications facilities are

dispersed from each other and not in the same places such that any visual or noise impacts do not cumulate; c) utility facilities are common in the public right-of-way and are not an unusual circumstance; d) the area is not a scenic highway; e) the area is not a hazardous waste site; and, f) there is no change to a historical resource.

Should the Council uphold the appeal and thereby reverse the Planning Commission's approval, CEQA Guidelines Section 15270 (projects which are disapproved) would apply.

For questions regarding this report, please contact Michael Bradley, Planner I, at (510) 238-6935 or mbradley@oaklandnet.com

Respectfully submitted,

Rachel Flynn, Director
Planning and Building Department

Reviewed by:
Scott Miller, Zoning Manager

Prepared by:
Michael Bradley, Planner I
Bureau of Planning

Attachments:

A. ***Appeal #A13233, filed August 12, 2013***
B. ***May 1, 2013 Planning Commission Staff Report with Attachments (including satisfactory emissions report)***
C. ***July 31, 2013 Planning Commission Staff Report with Attachments (including satisfactory emissions report)***
D. ***Public notice and property notification list***
E. ***Applicant, AT&T's Response to Appeal, filed May 30, 2014***
F. ***Photographs of the story poles.***

Community and Economic Development Agency

CITY OF OAKLAND APPEAL FORM FOR DECISION TO PLANNING COMMISSION, CITY COUNCIL OR HEARING OFFICER

ATTACHMENT A

PROJECT INFORMATION

Case No. of Appealed Project: DR13-055

Project Address of Appealed Project: 6239 Elderberry Drive Oakland, CA 94611

Assigned Case Planner/City Staff: Michael Bradley

RECEIVED
AUG 12 2013
City of Oakland
Planning & Zoning Division

APPELLANT INFORMATION:

Printed Name: Manuel Perez & Dr. Christy Heber Phone Number: (510) 27[illegible]55 90

Mailing Address: 6239 Elderberry Drive Alternate Contact Number: (510) 2[illegible]

City/Zip Code Oakland 94611 Representing:

Email: tinoperezlaw@gmail.com

An appeal is hereby submitted on:

☐ **AN ADMINISTRATIVE DECISION (APPEALABLE TO THE CITY PLANNING COMMISSION OR HEARING OFFICER)**

YOU MUST INDICATE ALL THAT APPLY:

- ☐ Approving an application on an Administrative Decision
- ☐ Denying an application for an Administrative Decision
- ☐ Administrative Determination or Interpretation by the Zoning Administrator
- ☐ Other (please specify) _____

Please identify the specific Adminstrative Decision/Determination Upon Which Your Appeal is Based Pursuant to the Oakland Municipal and Planning Codes listed below:

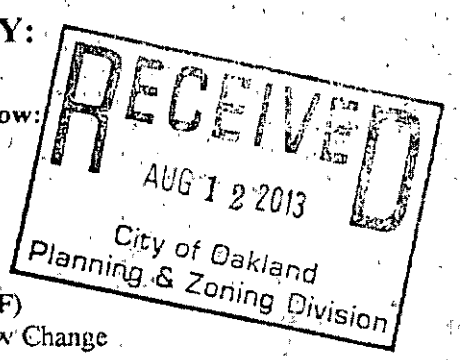
- ☐ Administrative Determination or Interpretation (OPC Sec. 17.132.020)
- ☐ Determination of General Plan Conformity (OPC Sec. 17.01.080)
- ☐ Design Review (OPC Sec. 17.136.080)
- ☐ Small Project Design Review (OPC Sec 17.136.130)
- ☐ Minor Conditional Use Permit (OPC Sec. 17.134.060)
- ☐ Minor Variance (OPC Sec. 17.148.060)
- ☐ Tentative Parcel Map (OMC Section 16.304.100)
- ☐ Certain Environmental Determinations (OPC Sec. 17.158.220)
- ☐ Creek Protection Permit (OMC Sec 13.16.450)
- ☐ Creek Determination (OMC Sec. 13.16.460)
- ☐ City Planner's determination regarding a revocation hearing (OPC Sec. 17.152.080)
- ☐ Hearing Officer's revocation/impose or amend conditions (OPC Secs. 17.152.150 &/or 17.156.160)
- ☐ Other (please specify) _____

(continued on reverse)

(Continued)

☒ **A DECISION OF THE CITY PLANNING COMMISSION (APPEALABLE TO THE CITY COUNCIL)** ☒ Granting an application to: ART OR ☐ Denying an application to: (Cingular wireless)

YOU MUST INDICATE ALL THAT APPLY:



Pursuant to the Oakland Municipal and Planning Codes listed below:

- ☐ Major Conditional Use Permit (OPC Sec. 17.134.070)
- ☐ Major Variance (OPC Sec. 17.148.070)
- ☒ Design Review (OPC Sec. 17 136 090)
- ☒ Tentative Map (OMC Sec 16.32.090)
- ☐ Planned Unit Development (OPC Sec. 17.140.070)
- ☒ Environmental Impact Report Certification (OPC Sec. 17 158 220F)
- ☐ Rezoning, Landmark Designation, Development Control Map, Law Change (OPC Sec. 17.144.070)
- ☐ Revocation/impose or amend conditions (OPC Sec 17.152.160)
- ☐ Revocation of Deemed Approved Status (OPC Sec. 17.156.170)
- ☒ Other (please specify) Oakland Municipal Code Section 12.36 OPC 17.128.070(3) OPC 17.136.050(B)

FOR ANY APPEAL: An appeal in accordance with the sections of the Oakland Municipal and Planning Codes listed above shall state specifically wherein it is claimed there was an error or abuse of discretion by the Zoning Administrator, other administrative decisionmaker or Commission (Advisory Agency) or wherein their/its decision is not supported by substantial evidence in the record, or in the case of Rezoning, Landmark Designation, Development Control Map, or Law Change by the Commission, shall state specifically wherein it is claimed the Commission erred in its decision.

You must raise each and every issue you wish to appeal on this Appeal Form (or attached additional sheets). Failure to raise each and every issue you wish to challenge/appeal on this Appeal Form (or attached additional sheets), and provide supporting documentation along with this Appeal Form, may preclude you from raising such issues during your appeal and/or in court. However, the appeal will be limited to issues and/or evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.

The appeal is based on the following: *(Attach additional sheets as needed.)*

(Please see attached sheet)

Supporting Evidence or Documents Attached. *(The appellant must submit all supporting evidence along with this Appeal Form*; however, the appeal will be limited evidence presented to the decision-maker prior to the close of the public hearing/comment period on the matter.

(Continued on reverse)

City of Oakland Appeal Form: (this this the attached sheet)
DR13-055
6239 Elderberry Drive
Oakland, CA 94611
Manuel Perez/Dr. Christy Hiebert

THE APPEAL IS BASED ON THE FOLLOWING:

1. Oakland Municipal Code Section 12.36-Protected Tree Ordinance(Oak Tree)
2. Health related concerns from radiation and electromagnetic field, ie cancer and other neurodegenerative diseases
3. Obstruction of views-Visual Impact negatively effected
4. Property Boundary dispute regarding claimed public right of way
5. Aesthetic concerns
6. Reduced property value
7. Not exempt from Environmental Review-under CEQA
8. Lack of Notice as to proposed CEQA exemptions
9. Public Nuisance-Noise related concerns fans(cooling equipment)
10. Fire Danger-close proximity to wooded environs
11. Traffic Safety Concerns-Dangerous location-near a blind sloped corner
12. Alternative site analysis inaccurate
13. OPC 17. 128.070(B) and OPC 17.136.050(B)
14. OPC 17.136.090

(Continued)

Manuel Perez — 8/12/13

Signature of Appellant or Representative of Appealing Organization — *Date*

Below For Staff Use Only

Date/Time Received Stamp Below:

RECEIVED
AUG 12 2013
City of Oakland
Planning & Zoning Division

Cashier's Receipt Stamp Below:

#2

Christina Hiebert, MD
christyhiebert@gmail.com
www.facebook.com/nocelltower.montclair
6239 Elderberry Drive
Oakland, CA 94611
July 29, 2013

Oakland City Planning Commission
Re Case File DR13055

Dear Commission Members:

I am writing again to ask for you to deny the application from AT&T to build a cellular tower at 6239 Elderberry Drive The current plans in this application will allow the removal of an existing 43" PG&E utility pole and the construction of A NEW 47'6" utility pole in its place so that a cellular DAS node can be installed. The construction would be at the base of my property, which I use as my permanent residence with my husband and two small children. My request for disallowing this application is multifaceted, and I have displayed a number of my concern below:

1. Traffic safety concerns: The intersection at Girvin and Elderberry is a sloped blind corner, and as it stands already a significant traffic risk (Picture #1, #2). Any additional work, construction, or vehicle parking at this intersection would potentially increase traffic accidents at the site of the proposed tower.

2. View from primary living space: Given my property has a steep grade, the pole and cell tower box would be directly parallel with my living room windows. The pole can also be visualized from all 3 of my decks/outdoor living spaces (Picture #3). This tower would depreciate the beauty of my hillside view, which we consider to be "our Yosemite". The fact that there would be a telecommunications facility blocking part of our view will have a negative impact on the future value of our home. Additionally, after consultation with real estate professionals, at a minimum, we would be required to disclose the potential for health related effects, if we ever chose to sell this property. This disclosure could lead to the depreciation of my home value.

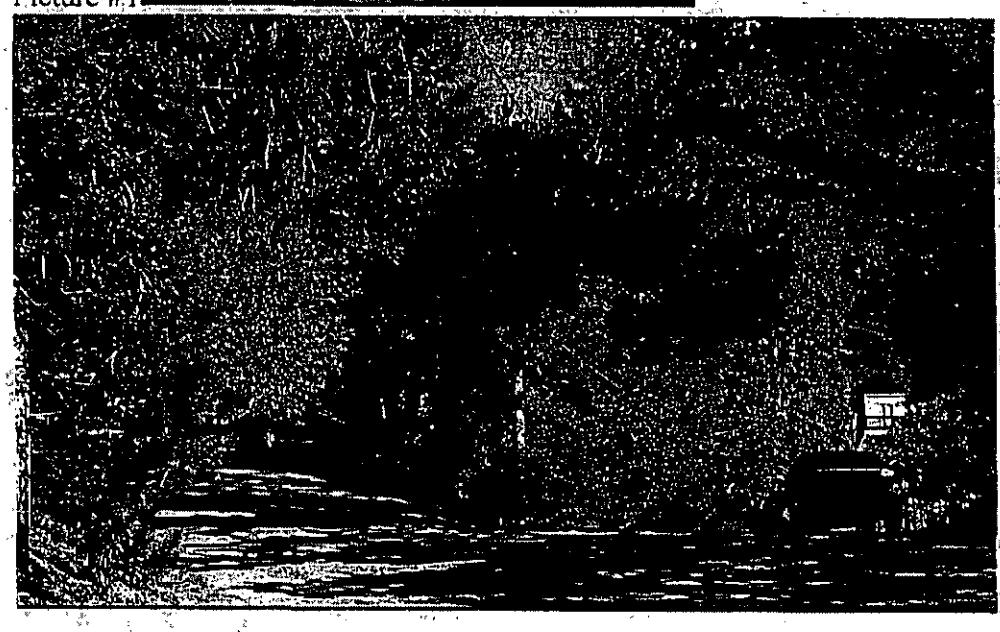
3. Public nuisance / sound concerns, fire hazard: Even low decibel noise can be easily heard in our quiet, mountainous valley. The fans included in the plans would operate to cool the equipment when it became too hot. If the sound level this fan produce exceeded local sound ordinances, then the City and AT&T would be liable for this Public Nuisance. In addition, there is a significant amount of vegetation in close proximity to the proposed wireless telecommunications facility. The new proposal highlights the idea to "hide" the box in the midst of our protected coastal Oak trees (Picture #4) The Oakland Hills would be especially susceptible to this increased fire hazard.

4. Lack of concern for community: When the commission postponed decision on this matter when it was initially propose in April, the representative Michael Yergovich from AT&T expressed on the record his desire to meet the needs and address the concern for the residents. No one from this company has made an attempt to contact me concerning this plan in the last 3 months.

I think that this is an inappropriate location for such a tower, and ask that you reject this application. Thank you for your support.

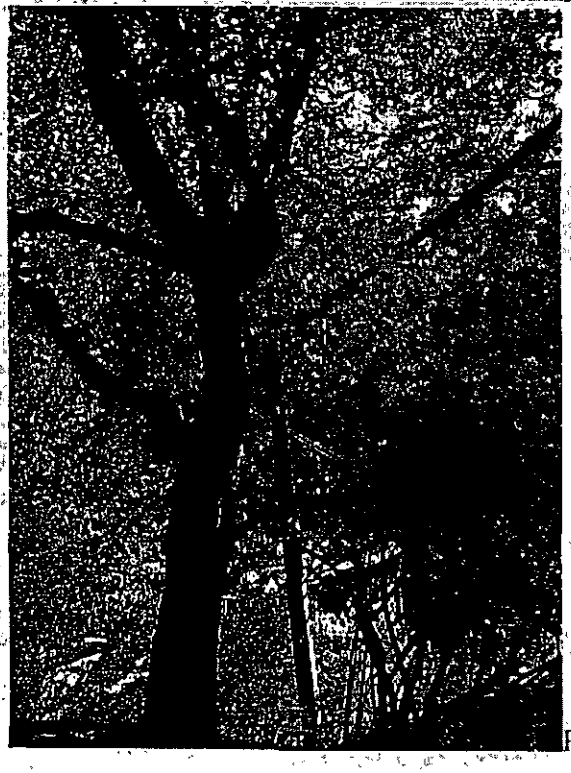
Sincerely, Christina Hiebert, MD

Picture #1



Picture#2

Picture #3



Picture #4

July 29, 2013

Oakland City Planning Commission
RE: Case file DR13055

Dear Commission Members:

I am writing to ask you to deny the application proposal from AT&T to install a wireless telecommunications macro facility at 6239 Elderberry Drive. This proposal would allow removal of an already existing 43' power line pole and the construction of a new 47' – 6" pole.

My request for denying the application is multifaceted and I have displayed a number of my concerns below:

1. **ENVIRONMENTAL CONCERNS:**
   a. **Proposal is not Exempt:**
      AT&T claims that they are categorically exempt from having an Environmental Review based on Section 15301 of the California Environmental Quality Act(CEQA), additions and alterations to existing facilities. However, the proposal from AT&T calls for new infrastructure, a "NEW" pole to replace an "EXISTING" pole". A new pole by definition is not an addition or alteration to existing facilities, and should not qualify under the above exemption for environmental review.

   b. **Protected Tree Ordinance: (Oakland Municipal Code 12.36)**
      There are multiple Coastal Live Oak Trees in the immediate vicinity of the proposed location of the new pole, several of which are on the property of 6239 Elderberry Drive. Oakland Municipal Code Section 12.36 requires a permit if work "*might*" damage or destroy a protected tree. Any person found violating Oakland's Protected Tree Ordinance shall be deemed guilty of an infraction, in addition to being held liable for damages. The Oak trees have helped prevent soil erosion on the hillside, thus stabilizing the foundation of our home. Additionally, these Oak trees have contributed to the habitat and food source for a diversity of animals. If any tree roots or any other parts of these protected trees are damaged as a result of the new infrastructure put in place(a new pole), we will seek full enforcement of the applicable laws.

2. **PROPERTY BOUNDRY DISPUTE:**
   The AT&T proposal calling to install a wireless communications device onto a new pole located in a public right-of-way is in dispute. The residents at 6239 Elderberry Drive do not concede that this proposal is for a location in a public right-of-way. After review of the grant deed and its corresponding assessor maps, the Forestland Manor-Lot 2359 maps from 1927-1928, and after consultation from representatives of Grubb Realty, we are informed and believe the location of the pole is on property owned by the residents of 6239 Elderberry Drive.

3. **ALTERNATIVE SITE ANALYSIS IS INACCURATE/PROPOSED LOCATION IS NOT THE BEST OUT OF ALL OF THE ALTERNATIVES:**
   Matthew Yergovich, in his letter, dated April 23, 2013 lists several things that are completely inaccurate in his alternative site analysis.
   a. **Matthew Yergovich claims that only "existing" infrastructure is to be used:**
      In his analysis, he states, that by placing the equipment onto an "existing pole, AT&T does not need to propose any new infrastructure in the area." However, a new larger pole being installed replacing the existing pole is not a minor addition or alteration. It is new infrastructure. If it is a choice between a pole that needs new infrastructure, and

one in a different location that does not, it seems a logical choice would be for the alternative pole that does not require uprooting.

b. **Matthew Yergovich claims that this location is not immediately near any houses:** This is also incorrect. The proposed site of the wireless communications device is in very close proximity to our residence at 6239 Elderberry Drive. Most importantly, the proposed site is just feet from where our 11 month old daughter and 2 ½ year old son sleep at night.

c. **Matthew Yergovich claims that other poles south along Girvin have a reduced elevation insufficient for signal propagation, as do the poles north toward Aitken:** Again, this is an inaccurate statement. There are power poles on Girvin and Aitken that have at least the same elevation, if not a higher elevation, than the proposed location at 6239 Elderberry Drive.

In conclusion, there are other alternative sites that are more reasonable than the proposed location of 6239 Elderberry Drive. These alternative sites do not require new infrastructure, are father away from houses than the proposed location, and are sufficiently elevated to reach the intended coverage area of AT&T. For the all of the above reasons, I urge the Planning Commission to deny the AT&T application. Thank you for consideration and support.

Sincerely,

Manuel "Tino" Perez
6239 Elderberry Drive Oakland, CA 94611

Christina Hiebert, MD
nocelltowermontclair@gmail.com
www.facebook.com/nocelltower.montclair
6239 Elderberry Drive
Oakland, CA 94611
April 15, 2013

Oakland City Planning Commission
Re. Case file DR13055

Dear Commission Members:

I am writing to ask you to deny the application from AT&T to build a cellular tower at 6239 Elderberry Drive. This application will allow the addition of a 7 foot cellular grid atop a 43ft power line pole at the edge of my property. I recently purchased and moved into the property as my permanent residence with my family, which includes my daughter Vida (8 months) and my son Benicio (2 years).

My request for disallowing this application is multifaceted, and I have displayed my concern below:

1. Health Concerns: Radio frequency radiation emitted from these towers is potentially carcinogenic, especially to young children. My children, as well as others in this populated area may be placed at an elevated risk for the development of multiple health conditions, including cancer as a result of this exposure.

2. Traffic safety concerns: The intersection at Girvin and Elderberry is a sloped blind corner, and as it stands already a significant traffic risk. Any additional work, construction, or vehicle parking at this intersection would potentially increase traffic accidents at the site of the proposed tower.

3. Environmental beauty: Our family, in addition to many of the local residents elects to live in the community because of its display of natural beauty. Given my property has a steep grade, the pole and cell tower box would be directly parallel with my living room windows. This tower would rise above the tree line and depreciate the beauty of my mountain view, and possibly lead to the depreciation of my home value.

I think that this is an inappropriate location for such a tower, and ask that you reject this application. Thank you for your support.

Sincerely,

Christina Hiebert, MD

Oakland City Planning Commission,

My wife and I own the house at 6240 Elderberry Dr in Oakland CA. We would like to petition the Oakland City Planning Commission to deny the permits required for AT&T to install a wireless telecommunications facility on the existing utility pole at the intersection of Girvin Dr. and Elderberry Dr. (Case file number DR13055).

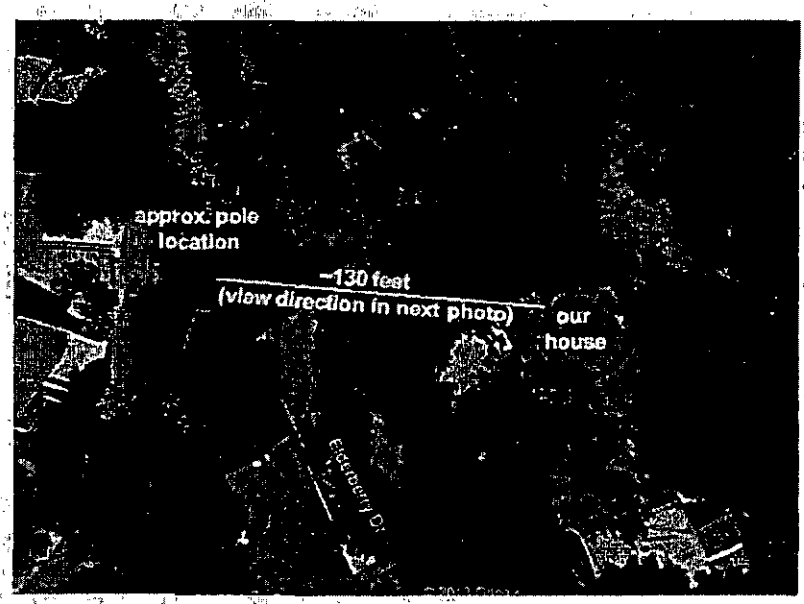
We object to this installation for several reasons.

- **Proximity and elevation relative to house** – The proposed location places the telecommunication antennas within ~100 feet of our house and ~150 feet of where we, including our 4 month old son, sleep (see attached photos). In addition, the antenna will be at a lower elevation than our residence by ~10 feet.
- **Impact on view and property value** – This location significantly impacts our view of the beautiful valley from all of our windows that face to the south. We spend a lot of time on our deck relaxing, and the proposed antenna would now be the most prominent feature of our view. One of the reasons we bought our home last year was this view, and we are concerned that having telecommunications antennas blocking the view will impact the future value of our home.
- **Radio wave transmission path** – The proximity of the antenna and the low relative elevation guarantees that radio waves traveling to the tower will also be traveling through our home, bedrooms, and ourselves. My wife works from home and is there essentially 22+ hours a day on average. Our newborn son is also there all day long. We would definitely feel safer without having the tower at that location.
- **Impact on Piedmont Pines utility pole undergrounding plan** – As I am sure you are aware, the Piedmont Pines neighborhood had begun an undergrounding initiative to put utility lines underground. We are very supportive of this measure, and will be actively working to extend the effort to our neighborhood. Undergrounding the lines benefits the neighborhood and the utility. Allowing telecommunications antennas to be installed on the poles will reduce the incentives for the utility to underground lines, and increases the likelihood it will not be done in our neighborhood.
- **Lack of business case** – We have not seen a presentation of AT&Ts business case for installing the antenna on the pole on Girvin that justifies ignoring these issues. We use AT&T for our mobile phones, and we have no issue getting reception at our house or anywhere else in line of sight of the proposed location.

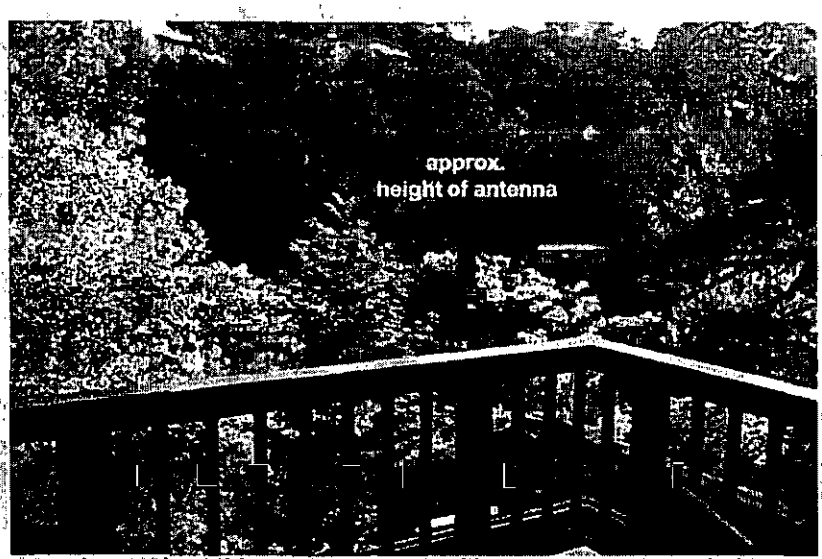
For the above reasons, my wife and I would like to petition the planning commission to reject AT&T's application for installing telecommunications antennas on Girvin. Unfortunately, my wife and I are not able to attend the meeting on May 1st, but we are available for discussion or to give further input.

Thank you for considering our concerns,

Christopher Fuller, Ph.D. and Cara Counter-Fuller
6240 Elderberry Drive, Oakland 94611



Location of pole relative to house at 6240 Elderberry Dr



Approximate view of from house impacted by new antenna on Girvin Drive.

Petition to deny application for AT&T Cellular tower at 6239 Elderberry Drive, Oakland

Petition summary and background	Application for an AT&T cellular tower placement on private residential property at 6239 Elderberry Drive.
Action petitioned for	We, the undersigned, are concerned citizens who urge our leaders to act now to stop the cell tower at 6239 Elderberry Drive

Printed Name	Signature	Address	Comment	Date
Christina Hebert		6239 Elderberry Dr Oakland, CA 94611		4/14/13
Deborah Auen		6240 Elderberry Dr. Oakland, CA 94611	extremely dangerous corner; would create hazard	4/16/13
DOROTHY J. EDGAR	Dorothy J. Edgar	6218 Elderberry Dr. Oakland, CA 94611		4/16/13
Ivan M. Tousley	Ivan M Tousley	6665 Girvin Dr Oakland 94611		4/16/13
CHRIS FULLER		6240 Elderberry Dr Oakland 94611	would be eye level to our house. We have a 4 month old	4/17/13
[illegible]	[illegible]	6225 Elderberry Drive	health concerns, traffic safety during construction	4/17/13
Jill Haubold	Jill Haubold	6254 Elderberry Dr	NO Tower	4.30.13
Tino Perez	Tino Perez	6239 Elderberry Dr. Oakland, CA 94611	site location will negatively impact view and in a dangerous spot on a sharp corner	5.1.13

Protected Trees Ordinance

General Information

A permit must be applied for before removing a protected tree. A permit is also required if work might damage or destroy a protected tree. A protected tree is Coast Live Oak four inches or larger in diameter, measured four and a half feet above the ground, or any other species nine inches in diameter or larger, except Eucalyptus and Monterey Pine trees.

Eucalyptus trees are not protected and no permit is required. Monterey Pines do not require a permit but the species must be verified by city staff prior to removal. There is no charge for Monterey Pine verification.

If a tree is hazardous and presents an immediate threat to safety or property, the permit process may be waived b the city staff prior to removal. An inspector from the Tree Section will respond to your request for a hazardous tree inspection in twenty-tour hours or less. There is no charge for this service. You must be the tree owner to request a permit waiver. You cannot ask for a permit waiver to remove your neighbor's tree.

Permit applications are taken at two locations. Development-related applications are taken at the Zoning Desk, 250 Frank Ogawa Plaza, 2nd floor. Development is considered to be any activity regulated by the City of Oakland, and which requires design reviver or a zoning, building, grading or demolition permit. Non-development applications are taken at the Tree Services Office, Building 4 at 7101 Edgewater Drive. Non-development is typically a homeowner wishing to remove a tree growing in their front or back yard. City-owned trees on City lots or in the right-of-way are also subject to the permit process unless they are an immediate hazard.

The minimum fee for a development-related application is currently $250.00, and for non-development, $250.00. Up to ten trees may be listed on an application for the minimum fee. An extra $8 per tree is charged for the 11th through 100th tree.

It takes a minimum of five weeks to process a permit application. The request may be approved or denied based on the criteria listed in the Protected Trees Ordinance. The tree(s) on the application are posted for 20 working days. Once a permit is approved or denied, the permit is held for a five-working-day appeal period. If there are no appeals, the permit is issued. If a permit is appealed, the procedures and timeframes very depending on the type of permit application.

The information on this page is a summary of the Protected Trees Ordinance, Chapter 12.36 of the Oakland Municipal Code (http://library.municode.com/HTML/16308/level2/TIT12STSIPUPL_CH12.36PRTR.html).

Chapter 12.36 PROTECTED TREES

Sections:

12.36.010 Intent and findings.
12.36.020 Definitions.
12.36.030 Application for permits.
12.36.040 Permit required.
12.36.050 Criteria for tree removal permit review.
12.36.060 Conditions of approval.
12.36.070 Procedure—Development-related tree removals.
12.36.080 Procedure—Non-development-related tree removals.
12.36.090 Procedure—City-owned tree removals.
12.36.100 Appeals—Development-related tree removal permits.
12.36.110 Appeals—Non-development-related tree removal permits.
12.36.120 Appeals—City-owned tree removal permits.
12.36.130 Emergency situations.
12.36.140 Exemptions.
12.36.150 Enforcement and penalties.
12.36.160 Investigation of violations.
12.36.170 Violation hearing.
12.36.180 Cost of tree removal permit violation investigation, enforcement, and replacement plantings a lien.
12.36.190 Notice of lien—Tree removal permit violation investigation, enforcement, replacement plantings.
12.36.200 Liabilities.

12.36.010 Intent and findings.

The ordinance codified in this chapter is enacted in recognition of the following facts and for the following reasons:

A. Among the features that contribute to the attractiveness and livability of the city are its trees, both indigenous and introduced, growing as single specimens, in clusters, or in woodland situations. These trees have significant psychological and tangible benefits for both residents and visitors to the city.

B. Trees contribute to the visual framework of the city by providing scale, color, silhouette and mass. Trees contribute to the climate of the city by reducing heat buildup and providing shade, moisture, and wind control. Trees contribute to the protection of other natural resources by providing erosion control for the soil, oxygen for the air, replenishment of groundwater, and habitat for wildlife. Trees contribute to the economy of the city by sustaining property values and reducing the cost of drainage systems for surface water. Trees provide screens and buffers to separate land uses, landmarks of the city's history, and a critical element of nature in the midst of urban settlement.

C. For all these reasons, it is in the interest of the public health, safety and welfare of the Oakland community to protect and preserve trees by regulating their removal; to prevent

unnecessary tree loss and minimize environmental damage from improper tree removal; to encourage appropriate tree replacement plantings; to effectively enforce tree preservation regulations; and to promote the appreciation and understanding of trees.

12.36.020 Definitions.

For the purposes of this chapter, the meaning and construction of words and phrases hereinafter set forth shall apply:

"Applicant" means either one of the following:

1. The owner of the real property upon which the protected tree(s) involved in a tree removal permit and/or site inspection applications are located, also referred to herein as the tree owner;
2. The agent of the property owner (tree owner), as established by legally binding written stipulations between the property owner and the agent for the property owner.

"dbh (diameter at breast height)" means trunk diameter measured at four and one-half feet above the ground. For multistemmed trees, a permit is required if the diameter of all individual trunks when added together, equals or exceeds the minimum size stipulated for the species.

For convenience in the field, circumferences are considered equivalent to diameter as follows

Diameter	Circumference
4"	12"
9"	28"

"Development related" means any activity regulated by the city of Oakland and which requires design review or a zoning, building, grading or demolition permit.

"Nonnative" means any tree species which does not naturally occur within the Oakland city limits.

"Protected perimeter" means an area of land located underneath any protected tree which extends either to the outer limits of the branches of such tree (the drip line) or such greater distance as may be established by the Office of Parks and Recreation in order to prevent damage to such tree

"Protected tree" means a protected tree for the purpose of this chapter is the following:

1. On any property, Quercus agrifolia (California or Coast Live Oak) measuring four inches dbh or larger, and any other tree measuring nine inches dbh or larger except Eucalyptus and Pinus radiata (Monterey Pine);
2. Pinus radiata (Monterey Pine) trees shall be protected only on city property and in development-related situations where more than five Monterey Pine trees per acre are proposed to be removed. Although Monterey Pine trees are not protected in non-development-related situations, nor in development-related situations involving five or fewer

trees per acre, public posting of such trees and written notice of proposed tree removal to the Office of Parks and Recreation is required per Section 12.36.070A and Section 12.36.080A.

3. Except as noted above, Eucalyptus and Monterey Pine trees are not protected by this chapter.

"Topping" means elimination of the upper twenty-five percent or more of a tree's trunk(s) or main leader(s).

"Tree" means a woody perennial, usually with one main trunk, attaining a height of at least eight feet at maturity.

"Tree removal" means the destruction of any tree by cutting, regrading, girdling, interfering with the water supply, or applying chemicals, or distortion of the tree's visual proportions by topping

"Tree reviewer" means a city employee in the classification of Arboricultural Inspector, Tree Supervisor II or Tree Supervisor I assigned by the Director of Parks and Recreation to review, inspect and prepare findings for all tree removal permit applications and appeals of decisions related thereto.

"Working day" means Monday through Friday, except officially designated city holidays.

(Prior code § 7-6.02)

12.36.030 Application for permits.

All applications for tree removal permits shall only be made by applicants, as defined in this chapter, and no person who does not meet the definition of an applicant shall be issued a tree removal permit

(Prior code § 7-6.03)

12.36.040 Permit required.

A. A protected tree may not be removed without a tree removal permit.

B. A tree removal permit, if one is required, shall be authorized by the Tree Reviewer prior to the approval of any building, grading, or demolition permit application, and shall only be issued to the applicant concurrent with or subsequent to all other necessary permits pertinent to site alteration and construction.

C. Tree removal permits shall be transferrable from one applicant to another applicant only upon the following conditions:

1. The new applicant must meet the eligibility criteria set forth in Section 12.36.020
2. Prior to transfer, a written, notarized statement must be provided to the Tree Reviewer by the permit holding applicant and the new applicant identifying the new applicant by name, address, and telephone number, and stating the reason and effective date for the permit transfer;
3. The permit holding applicant and new applicant must present proper identification to the Tree Reviewer;
4. The new applicant must pay the fee established by the master fee schedule of the city for tree removal permit transfers;
5. The transfer must be approved by the Tree Reviewer Approval shall be granted, if the

requirements of subsections (C)(1), (2), (3) and (4) of this section are met

D. All tree removal permits shall remain valid for one year from the date of permit issuance. An additional one year extension shall be granted upon receipt of a written request from the permit applicant by the Tree Reviewer No tree removal permit shall remain valid for a period in excess of two years from the date of permit issuance. The applicant must pay the fee established by the master fee schedule of the city for tree removal permit extensions.

12.36.050 Criteria for tree removal permit review.

A. In order to grant a tree removal permit, the city must determine that removal is necessary in order to accomplish any one of the following objectives

1. To insure the public health and safety as it relates to the health of the tree, potential hazard to life or property, proximity to existing or proposed structures, or interference with utilities or sewers;
2. To avoid an unconstitutional regulatory taking of property;
3. To take reasonable advantage of views, including such measures as are mandated by the resolution of a view claim in accordance with the view preservation ordinance (Chapter 15.52 of this code);
4. To pursue accepted, professional practices of forestry or landscape design Submission of a landscape plan acceptable to the Director of Parks and Recreation shall constitute compliance with this criterion;
5. To implement the vegetation management prescriptions in the S-11 site development review zone.

B. A finding of any one of the following situations is grounds for permit denial, regardless of the findings in subsection A of this section:

1. Removal of a healthy tree of a protected species could be avoided by.
   a. Reasonable redesign of the site plan, prior to construction;
   b. Trimming, thinning, tree surgery or other reasonable treatment.
2. Adequate provisions for drainage, erosion control, land stability or windscreen have not been made in situations where such problems are anticipated as a result of the removal.
3. The tree to be removed is a member of a group of trees in which each tree is dependent upon the others for survival.
4. The value of the tree is greater than the cost of its preservation to the property owner The value of the tree shall be measured by the Tree Reviewer using the criteria established by the International Society of Arboriculture, and the cost of preservation shall include any additional design and construction expenses required thereby This criterion shall apply only to development-related permit applications

C. In each instance, whether granting or denying a tree removal permit, findings supporting the determination made pursuant to subsection A or B of this section, whichever is applicable, shall be set forth in writing.

(Prior code § 7-6.05)

12.36.060 Conditions of approval.

The following conditions of approval, depending upon the facts of each application, may be issued in

conjunction with any tree removal permit:

A. Adequate protection shall be provided during the construction period for any trees which are to remain standing. Measures deemed necessary by the Tree Reviewer in consideration of the size, species, condition and location of the trees to remain, may include any of the following:

1. Before the start of any clearing, excavation, construction or other work on the site, every protected tree deemed to be potentially endangered by said site work shall be securely fenced off at a distance from the base of the tree to be determined by the Tree Reviewer. Such fences shall remain in place for duration of all such work. All trees to be removed shall be clearly marked. A scheme shall be established for the removal and disposal of logs, brush, earth and other debris which will avoid injury to any protected tree.
2. Where proposed development or other site work is to encroach upon the protected perimeter of any protected tree, special measures shall be incorporated to allow the roots to breathe and obtain water and nutrients. Any excavation, cutting, filing, or compaction of the existing ground surface within the protected perimeter shall be minimized. No change in existing ground level shall occur within a distance to be determined by the Tree Reviewer from the base of any protected tree at any time. No burning or use of equipment with an open flame shall occur near or within the protected perimeter of any protected tree.
3. No storage or dumping of oil, gas, chemicals, or other substances that may be harmful to trees shall occur within the distance to be determined by the Tree Reviewer from the base of any protected trees, or any other location on the site from which such substances might enter the protected perimeter. No heavy construction equipment or construction materials shall be operated or stored within a distance from the base of any protected trees to be determined by the tree reviewer. Wires, ropes, or other devices shall not be attached to any protected tree, except as needed for support of the tree. No sign, other than a tag showing the botanical classification, shall be attached to any protected tree.
4. Periodically during construction, the leaves of protected trees shall be thoroughly sprayed with water to prevent buildup of dust and other pollution that would inhibit leaf transpiration.
5. If any damage to a protected tree should occur during or as a result of work on the site, the applicant shall immediately notify the Office of Parks and Recreation of such damage. If, in the professional opinion of the Tree Reviewer, such tree cannot be preserved in a healthy state, the Tree Reviewer shall require replacement of any tree removed with another tree or trees on the same site deemed adequate by the Tree Reviewer to compensate for the loss of the tree that is removed.
6. All debris created as a result of any tree removal work shall be removed by the applicant from the property within two weeks of debris creation, and such debris shall be properly disposed of by the applicant in accordance with all applicable laws, ordinances, and regulations.

B Replacement plantings shall be required in order to prevent excessive loss of shade, erosion control, groundwater replenishment, visual screening and wildlife habitat in accordance with the following criteria:

1. No tree replacement shall be required for the removal of nonnative species, for the

removal of trees which is required for the benefit of remaining trees, or where insufficient planting area exists for a mature tree of the species being considered

2. Replacement tree species shall consist of Sequoia sempervirens (Coast Redwood), Quercus agrifolia (Coast Live Oak), Arcutus menziesii (Madrone), Aesculus californica (California Buckeye) or Umbellularia californica (California Bay Laurel).
3. Replacement trees shall be of twenty-four (24) inch box size, except that three fifteen (15) gallon size trees may be substituted for each twenty-four (24) inch box size tree where appropriate.
4. Minimum planting areas must be available on site as follows.
   a. For Sequoia sempervirens, three hundred fifteen square feet per tree;
   b. For all other species listed in subsection (B)(2) of this section, seven hundred (700) square feet per tree.
5. In the event that replacement trees are required but cannot be planted due to site constraints, an in lieu fee as determined by the master fee schedule of the city may be substituted for required replacement plantings, with all such revenues applied toward tree planting in city parks, streets and medians.

Plantings shall be installed prior to the issuance of a certificate of occupancy, subject to seasonal constraints, and shall be maintained by the applicant until established. The Tree Reviewer may require a landscape plan showing the replacement planting and the method of irrigation. Any replacement planting which fails to become established within one year of planting shall be replanted at the applicant's expense.

C. Workers compensation, public liability, and property damage insurance shall be provided by any person(s) performing tree removal work authorized by a tree removal permit.

D. The removal of extremely hazardous, diseased, and/or dead trees shall be required where such trees have been identified by the Tree Reviewer

E. Any other conditions that are reasonably necessary to implement the provisions of this chapter.

12.36.070 Procedure—Development-related tree removals.

A. Notice and Posting of Monterey Pine Removals. Any property owner or arborist who intends to remove one or more Monterey Pine trees from any parcel must notify the Office of Parks and Recreation in writing of the address, number and size of Monterey Pine trees to be removed, with such notice addressed to the Tree Reviewer, Park Services Division, 7101 Edgewater Drive, Oakland, CA 94621.

In addition, the public posting procedures detailed in subsections F of this section shall be required for all Monterey Pine tree removal situations.

B. Pre-application Design Conference. Prior to the submission of a tree removal permit application, a prospective applicant may request a pre-application design conference or a design review checklist conference by filing a request with the City Planning Department.

The pre-application design conference shall be convened by City Planning staff, and shall include the applicant, the Tree Reviewer, City Planning staff, Public Works staff (if necessary), and property owners of parcels located adjacent to the site of the proposed tree removal. The purpose of the pre-application

design conference shall be to review proposed tree removals and determine whether alternative designs might be possible which would reduce the number of trees to be removed.

The results of the pre-application design conference shall be advisory, and shall not be binding on the prospective applicant; however, failure of a prospective applicant to reasonably incorporate the advisory findings made at the pre-application design conference into a subsequent tree removal permit application may be considered by the Tree Reviewer when making final permit determinations.

C. Application. In any development-related situation which requires removal or possible damage to a protected tree or trees, including application for design review, zoning permits, planned unit developments, or land subdivisions, a tree removal permit application must be filed with the City Planning Department at the same time any zoning permit, design review, planned unit development, or land subdivision application is filed in accordance with the requirements of the regulations governing such applications.

All applicants for tree removal permits shall provide two copies of a survey and site plan as specified by Section 12.36.080 of the Oakland Municipal Code and Section 302(c) of the Oakland Building Code. All such surveys and site plans shall indicate the location, species, and dbh of all protected trees located within thirty (30) feet of proposed development activity on the subject property, regardless of whether or not the protected trees in question are included on any tree removal permit application; those protected tree(s) which are proposed for removal shall also be clearly identified.

The applicant shall also be required to certify in writing that the applicant has read, understood, and shall comply with the terms and provisions of this title, including any conditions of permit approval made pursuant thereto.

D. Initial City Review. The City Planning Department shall review and receive all applications for development-related tree removal permits.

In those cases where a tree removal permit is required, the applicant shall submit a tree removal permit application. Tree removal permits shall be required for all protected trees which are to be removed by the applicant, or which are located within ten feet of the proposed building footprint or perimeter of earthwork. City Planning staff shall then:

1. Accept the tree removal permit application after confirming that the required information has been provided by the applicant;
2. Collect the fee established by the master fee schedule of the city for tree removal permit review from the applicant, who shall pay such fee;
3. Advise the applicant of the requirement to mark all protected trees proposed for removal in plain view of the street with water soluble paint using a numbering scheme consistent with the numbering scheme used on the survey and site plan;
4. Issue the applicant sufficient summary notices to be posted and maintained by the applicant in clear public view from all street frontages of the subject property; and
5. Immediately forward the original tree removal permit application to the Office of Parks and Recreation for further processing.

E. CEQA Review. All tree removal permit applications shall be reviewed by the Tree Reviewer under the California Environmental Quality Act (CEQA) within five working days of permit application receipt using checklists established for this purpose.

Exemption from CEQA shall be determined by the application of criteria which take into account the

existing property use (developed versus undeveloped), the total extent of requested tree removals, and the size of any individual protected tree proposed for removal.

In the event the Tree Reviewer determines that additional CEQA review is required, a referral shall be made to the City Planning Department within five working days of permit application receipt. City Planning staff shall review all referrals within established CEQA review time frames, and shall notify the Tree Reviewer of the projected CEQA completion date.

F. Site Posting. The applicant shall paint a sequential number of not less than twelve (12) inches in height on each protected tree proposed for removal, and shall post the summary notices as required herein within two days after making an application for a tree removal permit. The painted numbers and summary notice shall not be removed until such time as a tree removal permit is issued or denied by the city for the tree(s) in question.

Failure of the applicant to properly post any tree tag or summary notice shall result in the extension of all time limits established for a permit application until such time as the applicant has provided proper tree and/or site posting.

G. Application Verification. The Tree Reviewer, within four working days of receipt of a permit application, shall notify the applicant whether the application is complete and accepted for filing. If the Tree Reviewer determines that a permit application is incomplete, the notice to the applicant shall set forth the reasons for the incompleteness, and the application shall be deemed rejected. If the applicant is not notified by the Tree Reviewer within four working days, said permit application shall be deemed complete.

H. Public Notice and Input. The Office of Parks and Recreation shall, within ten working days of permit application, notify occupants and proper owners of all parcels located adjacent to the site of proposed tree removal(s) in writing of the fact that a tree removal permit application has been made, the name of the applicant, and the closing date for public input. Notice to occupants shall be addressed to "Occupant." The Office of Parks and Recreation shall accept public comment regarding a tree removal permit application for a period of not less than twenty (20) working days following verification of proper site posting.

I. Site Inspection. The Tree Reviewer of the Office of Parks and Recreation shall review all tree removal inspection requests, and shall inspect all such sites within five working days after the application is filed.

J. Site Design Conference. The City Planning Department shall meet and confer with the applicant, the Tree Reviewer and concerned parties in an effort to achieve a design which will accommodate the jeopardized tree(s). Such site design conference shall be convened not later than ten working days after permit application.

This time limit may be modified by the mutual consent of the applicant, the City Planning Department, and the Office of Parks and Recreation. In addition, when an application for a Planned Unit development or land subdivision is filed with the city, the City Planning Department shall convene a design conference with the applicant, concerned parties and the Tree Reviewer to address tree removal issues.

K. Permit Determinations. The Tree Reviewer of the Office of Parks and Recreation shall review all tree removal permit applications and shall be responsible for making all necessary findings for approval or denial of such permit applications, including attaching all necessary conditions of approval. Any public input or comments shall be noted by the Tree Reviewer.

L. Permit Issuance and Denial. Based upon the determinations of the Tree Reviewer, except as

otherwise stated herein and except as necessitated by CEQA review, the Office of Parks and Recreation shall issue or deny a tree removal permit application within twenty (20) working days of application. The Office of Parks and Recreation shall hold all tree removal permits until the appeal deadline established in Section 12.36.100 has expired.

If an application for tree removal is approved and not appealed, a tree removal permit shall be issued by the Office of Parks and Recreation and immediately forwarded to the Office of Public Works. The Office of Public Works shall hold all tree removal permits until determinations are made regarding any other permit applications affecting the project in question. Once all permit applications for a particular project have been approved, the Office of Public Works shall issue the applicable tree removal permit.

If an application for tree removal is approved and not appealed, but any other related permit application affecting the project in question is denied, the tree removal permit shall be withheld by the Office of Public Works until such time as all permit applications for said project are approved

If the application for tree removal is denied and not appealed, it shall be returned to the applicant by the Office of Public Works, along with the reasons for denial provided by the Office of Parks and Recreation.

Following issuance of a tree removal permit, the applicant shall post a copy thereof in plain view on the site while tree removal work is underway.

M. Appealed Permits. Once a decision has been made regarding an appeal of a tree removal permit or application for tree removal, such permit or application for tree removal shall be processed as described in subsection L of this section.

N. Suspended Permits. The Tree Reviewer, after notice to the tree permit holder, may, in writing, suspend a permit issued under the provisions of this code whenever the Tree Reviewer, based upon substantial evidence, determines that a permit was issued in error either because the applicant supplied incorrect information, the applicant failed to supply all relevant information, and such information could not have been reasonably discovered by the Tree Reviewer during the site investigation, or that work done pursuant to the permit has resulted in violation of this code or some other related code, ordinance, or resolution.

The notice to the tree permit holder shall state the grounds for suspension. In addition, it shall state the conditions that must be satisfied to have the suspension lifted. The notice shall also state the permit holder, upon receipt of the notice, may submit evidence to the Tree Reviewer indicating that there are no grounds for permit suspension. Upon receipt of any such evidence, the Tree Reviewer shall immediately review the evidence and, within two working days of receipt of said evidence, shall notify the permit holder in writing whether the suspension shall be lifted

The decision of the Tree Reviewer shall be final unless appealed within five working days, pursuant to Section 12.36.100.

(Prior code § 7-6.071)

12.36.080 Procedure—Non-development-related tree removals.

A. Notice and Posting of Monterey Pine Removals. Any property owner or arborist who intends to remove one or more Monterey Pine trees from any parcel must notify the Office of Parks and Recreation in writing of the address, number and size of Monterey Pine trees to be removed, which such notice addressed to the Tree Reviewer, Park Services Division, 7101 Edgewater Drive,

Oakland, CA 94621.

In addition, the public posting procedures detailed in subsection F of this section shall be required for all Monterey Pine tree removal situations.

B. Pre-application Design Conference. Prior to the submission of a tree removal permit application, a prospective applicant may request a pre-application design conference by filing a written request with the Office of Parks and Recreation.

The pre-application design conference shall be convened by the Tree Reviewer, and shall include the applicant, the Tree Reviewar, City Planning staff, Public Works staff (if necessary), and property owners of parcels located adjacent to the site of the proposed tree removal. The purpose of the pre-application design conference shall be to review proposed tree removals and determine whether alternatives might be possible which would reduce the number of trees to be removed.

The results of the pre-application design conference shall be advisory, and shall not be binding on the prospective applicant; however, failure of a prospective applicant to reasonably incorporate the advisory findings made at the pre-application design conference into a subsequent tree removal permit application may be considered by the Tree Reviewer when making final permit determinations.

C. Application. In any non-development-related situation which requires removal or possible damage to a protected tree or trees, a tree removal permit application must be filed with the Office of Parks and Recreation at 1520 Lakeside Drive (Parks and Recreation Main Office) or at 7101 Edgewater Drive, Room 405 (Park Services Division Office).

All applicants for tree removal permits shall provide a site plan as specified by the city. All such site plans shall indicate the location, species, and dbh of all protected trees which are proposed for removal.

The applicant shall also be required to certify in writing that the applicant has read, understood, and shall comply with the terms and provisions of this chapter, including any conditions of permit approval made pursuant thereto.

D. Initial City Review. The Office of Parks and Recreation shall review all applications for non-development-related tree removal permits.

In those cases where a tree removal permit is required, the applicant shall submit a tree removal permit application. Tree removal permits shall be required for all protected trees which are to be removed by the applicant. Parks and Recreation staff shall then:

1. Accept the tree removal permit application after confirming that the required information has been provided by the applicant;
2. Collect the fee established by the master fee schedule of the city for tree removal permit review from the applicant, who shall pay such fee;
3. Issue a sufficient number of tree tags to the applicant, one of which is to be posted and maintained by the applicant in plain view of the street on each protected tree;
4. Issue the applicant sufficient summary notices to be posted and maintained by the applicant in clear public view from all street frontages of the subject property, and
5. Immediately forward the original tree removal permit application to the Tree Reviewer for further processing.

E. CEQA Review. All tree removal permit applications shall be reviewed by the Tree Reviewer under the California Environmental Quality Act (CEQA) within five working days of permit application

receipt using checklists established for this purpose.

Exemption from CEQA shall be determined by the application of criteria which take into account the existing property use (developed versus undeveloped), the total extent of requested tree removals, and the size of any individual protected tree proposed for removal.

In the event the Tree Reviewer determines that additional CEQA review is required, a referral shall be made to the City Planning Department within five working days of permit application receipt. City Planning staff shall review all referrals within established CEQA review time frames, and shall notify the Tree Reviewer of the projected CEQA completion date.

F. Site Posting. The applicant shall place one of the tree tags issued by the city on each protected tree, and shall post the summary notices as required herein within two days after making an application for a tree removal permit. The tags and notice shall not be removed until such time as a tree removal permit is issued or denied by the city for the tree(s) in question

Failure of the applicant to properly post any tree tag or summary notice shall result in the extension of all time limits established for a permit application until such time as the applicant has provided proper tree and/or site posting.

G. Application Verification. The Tree Reviewer, within four working days of receipt of a permit application, shall notify the applicant whether the application is complete and accepted for filing. If the Tree Reviewer determines that a permit application is incomplete, the notice to the applicant shall set forth the reasons for the incompleteness, and the application shall be deemed rejected. If the applicant is not notified by the Tree Reviewer within four working days, said permit application shall be deemed complete.

H. Public Notice and Input. The Office of Parks and Recreation shall, within ten working days of permit application, notify occupants and property owners of all parcels located adjacent to the site of proposed tree removal(s) in writing of the fact that a tree removal permit application has been made, the name of the applicant, and the closing date for public input. Notice to occupants shall be addressed to "Occupant." The Office of Parks and Recreation shall accept public comment regarding a tree removal permit application for a period of not less than twenty (20) working days following verification of proper site posting.

I. Site inspection. The Tree Reviewer of the Office of Parks and Recreation shall review all tree removal inspection requests, and shall inspect all such sites within five working days after the application/request is filed.

J. Permit Determinations. The Tree Reviewer of the Office of Parks and Recreation shall review all tree removal permit applications and shall be responsible for making all necessary findings for approval or denial of such permit applications, including attaching all necessary conditions of approval.

Any telephone calls or written comments received regarding the tree removal permit application shall be considered in the preparation of findings, and written records of such calls and/or comments shall be entered into the permanent permit file.

K. Permit Issuance and Denial. Based upon the determinations of the Tree Reviewer, and except as otherwise stated herein, the Office of Parks and Recreation shall issue or deny a tree removal permit application within twenty (20) working days of application. The Office of Parks and Recreation shall hold all tree removal permits until the appeal deadline established in Section 12.36.100 has expired.

If an application for tree removal is approved and not appealed, a tree removal permit shall be issued by the Office of Parks and Recreation and immediately forwarded to the applicant.

If the application for tree removal is denied and not appealed, it shall be returned to the applicant by the Office of Parks and Recreation, along with the reasons for denial

Following issuance of a tree removal permit, the applicant shall post a copy thereof in plain view on the site while tree removal work is underway

L. Appealed Permits. Once a decision has been made regarding an appeal of a tree removal permit or application for tree removal, such permit or application for tree removal shall be processed as described in subsection K of this section.

M. Suspended Permits The Tree Reviewer, after notice to the tree permit holder, may, in writing, suspend a permit issued under the provisions of this code whenever the Tree Reviewer, based upon substantial evidence, determines that a permit was issued in error either because the applicant supplied incorrect information, the applicant failed to supply all relevant information, and such information could not have been reasonably discovered by the Tree Reviewer during the site investigation, or that work done pursuant to the permit has resulted in violation of this code or some other related code, ordinance, or resolution.

The notice to the tree permit holder shall state the grounds for suspension In addition, it shall state the conditions that must be satisfied to have the suspension lifted. The notice shall also state the permit holder, upon receipt of the notice, may submit evidence to the Tree Reviewer indicating that there are no grounds for permit suspension. Upon receipt of any such evidence, the Tree Reviewer shall immediately review the evidence and, within two working days of receipt of said evidence, shall notify the permit holder in writing whether the suspension shall be lifted.

The decision of the Tree Reviewer shall be final unless appealed within five working days, pursuant to Section 12.36.110.

(Prior code § 7.6.072)

12.36.090 Procedure—City-owned tree removals.

A. Tree Posting. Except as exempted in Section 12.36.140, all city-owned trees proposed for removal shall be posted by the Office of Parks and Recreation. A tree tag shall be affixed to each tree proposed for removal in plain view of the street. The tags shall not be removed until such time as tree removal is approved or denied by the city for the tree(s) in question

B. Public Notice and Input. The Office of Parks and Recreation shall, within ten working days of tree posting, notify property owners of all parcels located adjacent to the site of proposed tree removal(s) in writing of the fact that city-owned trees have been proposed to be removed, and the closing date for public input. The Office of Parks and Recreation shall accept public comment regarding the proposed removal of city-owned trees for a period of not less than twenty (20) working days following proper site posting.

C. Tree Removal Determinations. The Tree Reviewer of the Office of Parks and Recreation shall review all proposed city-owned tree removals and shall be responsible for making all necessary findings for approval or denial of such removals, including attaching all necessary conditions of approval.

Any telephone calls or written comments received regarding the public input period shall be considered in the preparation of findings, and written records of such calls and/or comments shall be entered into the permanent Tree Reviewer files.

D. Tree Removal Approval and Denial. Based upon the determinations of the Tree Reviewer, and

except as otherwise stated herein, the Office of Parks and Recreation shall approve or deny city-owned tree removals within twenty (20) working days of application. The Office of Parks & Recreation shall suspend all city-owned tree removals until the appeal deadline established in Section 12.36.120 has expired.

If the proposed tree removal(s) are approved and not appealed, the city-owned tree(s) shall be removed in accordance with regular work schedules.

If the proposed tree removal(s) are not approved, the city-owned tree(s) shall not be removed

Following approval of city-owned tree removal, the Office of Parks and Recreation shall post a public notice thereof in plain view on the site while tree removal work is underway.

E. Appealed Permits. Once a decision has been made regarding an appeal of city-owned tree removal, such tree removal shall be processed as described in subsection D of this section.

(Prior code § 7-6.073)

12.36.100 Appeals—Development-related tree removal permits.

Any person with standing as defined herein may appeal a tree removal permit decision made by the Office of Parks and Recreation to the City Council

A. Standing. A decision of the Office of Parks and Recreation with regard to a development-related tree removal permit may be appealed by the applicant or the owner of any adjoining or confronting property. In the case of a planned unit development or subdivision, the decision may be appealed by the owner of any property adjoining or confronting any parcel of the planned unit development or subdivision. As used herein, the term "adjoining" means immediately next to, and the term "confronting" means in front or in back of.

B. Venue. All such appeals shall be made to the City Council. The decision of the City Council shall be final.

C. Procedure. The appeal shall be filed within five working days after the date of a decision by the Office of Parks and Recreation, and shall be made on a form prescribed by and filed with the City Clerk. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Director of Parks and Recreation or wherein such decision is not supported by the evidence in the record

Upon receipt of such appeal, the City Clerk shall set the appeal for hearing at the next available City Council meeting The hearing date set by the City Clerk shall be not more than thirteen (13) working days from the date of the decision by the Office of Parks and Recreation.

The City Clerk shall, not less than five days prior to the date set for the hearing on appeal, give written notice to the appellant and any known adverse parties, or their representatives, of the time and place of the hearing.

In considering the appeal, the City Council shall determine whether the proposed tree removal conforms to the applicable criteria. It may sustain the decision of the Office of Parks and Recreation or require such changes or impose such reasonable conditions of approval as are, in its judgement, necessary to ensure conformity to said criteria.

If the appeal is not finally disposed of by the City Council within eighteen (18) working days of the date of the decision by the Office of Parks and Recreation, said decision shall be deemed

affirmed, and the permit appeal denied

Should an appeal be filed during an officially declared City Council recess, the City Manager shall be authorized to appoint a Hearing Officer to hear the appeal and make a final determination on the appeal. All provisions of this section shall apply to such administrative appeal hearings, and the decision of the Hearing Officer shall be final.

D. The appellant shall pay the fee established by the master fee schedule of the city for tree removal permit appeals.

12.36.110 Appeals—Non-development-related tree removal permits.

Any person with standing as defined herein may appeal a non-development-related tree removal permit decision made by the Office of Parks and Recreation to the Park and Recreation Advisory Commission.

A. Standing. A decision of the Office of Parks and Recreation with regard to a non-development-related tree removal permit may be appealed by the applicant or the owner of any adjoining or confronting property. As used herein, the term "adjoining" means immediately next to, and the term "confronting" means in front or in back of.

B. Venue. All such appeals shall be made to the Park and Recreation Advisory Commission. The decision of the Park and Recreation Advisory Commission shall be final

C. Procedure. The appeal shall be filed at 1520 Lakeside Drive within five working days after the date of a decision by the Office of Parks and Recreation, and shall be made on a form prescribed by and filed with the Director of Parks and Recreation. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Director of Parks and Recreation or wherein such decision is not supported by the evidence in the record.

Upon receipt of such appeal, the Director of Parks and Recreation shall set the appeal for hearing at the next available Park and Recreation Advisory Commission meeting. The Director of Parks and Recreation shall, not less than five days prior to the date set for the hearing on appeal, give written notice to the appellant and any known adverse parties, or their representatives, of the time and place of the hearing.

In considering the appeal, the Park and Recreation Advisory Commission shall determine whether the proposed tree removal conforms to the applicable criteria. It may sustain the decision of the Office of Parks and Recreation or require such changes or impose such reasonable conditions of approval as are, in its judgement, necessary to ensure conformity to said criteria.

If the appeal is not finally disposed of by the Park and Recreation Advisory Commission within thirty (30) working days of the date of the decision by the Office of Parks and Recreation, said decision shall be deemed affirmed, and the permit appeal denied.

Should an appeal be filed during an officially declared Park and Recreation Advisory Commission recess, the City Manager shall be authorized to appoint a Hearing Officer to hear the appeal and make a final determination on the appeal. All provisions of this section shall apply to such administrative appeal hearings, and the decision of the Hearing Officer shall be final

D. Fee. The appellant shall pay the fee established by the master fee schedule of the city for tree removal permit appeals.

(Prior code § 7-6.082)

12.36.120 Appeals—City-owned tree removal permits.

Any person with standing as defined herein may appeal a city-owned tree removal decision made by the Office of Parks and Recreation to the Park and Recreation Advisory Commission and the City Council.

A. Standing. A decision of the Office of Parks and Recreation with regard to a city-owned tree removal may be appealed by any concerned resident of the city.

B. Venue. All appeals shall be made to the Park and Recreation Advisory Commission. The decision of the Park and Recreation Advisory Commission may be further appealed to the City Council, whose decision shall be final.

C. Procedure. The appeal shall be filed within five working days after the date of a decision by the Office of Parks and Recreation, and shall be made on a form prescribed by and filed with the Director of Parks and Recreation. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Director of Parks and Recreation or wherein such decision is not supported by the evidence in the record

Upon receipt of such appeal, the Director of Parks and Recreation shall set the appeal for hearing at the next available Park and Recreation Advisory Commission meeting. The Director of Parks and Recreation shall, not less than five days prior to the date set for the hearing on appeal, give written notice to the appellant and any known adverse parties, or their representatives, of the time and place of the hearing.

In considering the appeal, the Park and Recreation Advisory Commission shall determine whether the proposed tree removal conforms to the applicable criteria. It may sustain the decision of the Office of Parks and Recreation or require such changes or impose such reasonable conditions of approval as are, in its judgement, necessary to ensure conformity to said criteria.

Any decision of the Parks and Recreation Advisory Commission may be appealed to the City Council.

Should an appeal be filed during an officially declared Park and Recreation Advisory Commission or City Council recess, the City Manager shall be authorized to appoint a Hearing Officer to hear the appeal and make a final determination on the appeal. All provisions of this section shall apply to such administrative appeal hearings, and the decision of the Hearing Officer shall be final.

D. Fee. The appellant shall pay the fee established by the master fee schedule of the city for tree removal permit appeals.

(Prior code § 7-6.083)

12.36.130 Emergency situations.

In case of an emergency in which a protected tree is in so dangerous a condition as to pose an immediate threat to safety or property, the Director of Parks and Recreation or the Director of Public Works,

or their respective designees, shall be empowered to waive the requirement for a tree removal permit. Supervisory personnel for East Bay municipal utility district, Pacific Bell, Pacific Gas and Electric Company, and Alameda County flood control and water conservation district shall also be authorized to conduct emergency tree removal without a tree removal permit.

The removal of a protected tree under emergency conditions shall be reported to the Office of Parks and Recreation on the first business day following the emergency tree removal.

12.36.140 Exemptions.

A. City of Oakland. In situations which require the removal of hazardous trees located on city property, a tree removal permit shall not be required. Hazardous city trees shall be verified by city staff using the criteria contained in Chapter 12.40 of this code hazardous tree ordinance.

B. Other Public Agencies. A tree removal permit shall be required for removal of protected trees as defined in this chapter, unless the agency has previously and continuously demonstrated that it has adopted a vegetative management program that is consistent with the city's tree policies, as enunciated in this code and the Oakland comprehensive plan. The Parks and Recreation Advisory Commission shall review the vegetation management plans annually or upon any major revisions to ascertain exemption status.

In accordance with the California Public Utilities Code, Rules 35 of General Order 95, reasonable clearance of branches, foliage or trees on Pacific Gas and Electric property to allow the safe and reliable operation of utilities shall be exempt from tree removal permit requirements

C. Court Mandated Tree Removals. A tree removal permit shall not be required for the removal of any protected tree mandated by a court of law in accordance with Chapter 15.52 of this code (view preservation ordinance) or Chapter 12.40 of this code hazardous tree ordinance

12.36.150 Enforcement and penalties.

A Except in compliance with the terms of this chapter, no person shall remove, damage, or endanger any protected tree in the city.

B. Any person violating any of the provisions of this chapter shall be deemed guilty of an infraction.

C. Park Rangers, Senior Park Rangers, Supervising Park Rangers, Senior Park Supervisor, Senior Tree Supervisor, Arboricultural Inspector, and Management Assistant (Parks) of the city of Oakland are authorized to enforce the provisions of this chapter and, pursuant to the provisions of Section 5 of the California Penal Code, are further authorized to arrest without a warrant any person violating said chapter.

D. A violation shall be liable for all costs associated with the investigation and enforcement of this chapter by the city.

E. In addition, a violator shall be required to provide replacement trees and/or fees, but not to exceed the value of the tree or trees legally removed or damaged, as evaluated by the formula developed by the International Society of Arboriculture

F. An applicant or property owner who fails to comply with the provisions of this chapter, or who violates said provisions, shall not receive a certificate of occupancy from the city for any project wherein such noncompliance and/or violations have occurred until such time as the provisions of this

chapter have been fully satisfied.

G. The remedies set forth in subsections A through G of this section shall be considered alternative, and shall be in addition to any other remedies available to the city in law or equity.

(Prior code § 7-6.11)

12.36.160 Investigation of violations.

When, in the opinion of the Tree Reviewer, a violation of this chapter may have occurred, the Tree Reviewer shall investigate the alleged violation(s) and make written preliminary findings. If the preliminary findings suggest that a violation of this chapter has occurred, the Tree Reviewer shall notify the alleged violator and/or property owner, if different than the alleged violator, in writing. The notice shall include a description of each alleged violation, and shall provide the alleged violator and/or property owner ten working days in which to respond in writing, or to request a hearing before the City Council, or both. The notice shall also indicate that, if the alleged violator and/or property owner do not respond within the ten working day period, the preliminary findings of the Tree Reviewer shall become final, and the alleged violator and/or property owner shall become subject to the provisions of Sections 12.36.180 and 12.36.190.

(Prior code § 7-6.12)

12.36.170 Violation hearing.

If the alleged violator and/or property owner, pursuant to Section 12.36.160, requests a hearing before the City Council, the date of the hearing shall be set within five working days of the city's receipt of the request for a hearing. Written notice of the hearing, which may be continued from time to time, shall be given to alleged violator and/or property owner at least five working days prior to the hearing.

At the hearing, the alleged violator and/or property owner shall have the burden of disapproving the preliminary findings of the Tree Reviewer. In the event any party requesting a hearing fails to appear, the decision of the Tree Reviewer shall become final, and the violator shall be subject to the provisions of Sections 12.36.180 and 12.36.190.

At the close of the hearing, the City Council, using the evidence in the record, shall determine whether any violations of this chapter have occurred. The decision of the City Council shall be supported by written findings, and shall be final. A copy of the City Council's findings shall be served on the alleged violator and/or property owner.

th any case in which the City Council determines that a violation has occurred, the violator shall be subject to the provisions of Sections 12.36.180 and 12.36.190.

(Prior code § 7-6.13)

12.36.180 Cost of tree removal permit violation investigation, enforcement, and replacement plantings a lien.

The costs outlined in Section 12.36.150 above shall constitute a special assessment against the real property whereupon a tree removal permit violation has been investigated, confirmed and enforced. Said costs shall be itemized in writing in a report of assessment. The Director of Parks and Recreation shall cause a copy of the report of assessment to be served upon the owner of said property not less than five days prior to the time fixed for confirmation of said assessment: service may be by enclosing a copy of the

report of assessment in a sealed envelope, postage prepaid, addressed to the owner at his or her last known address as the same appears on the last equalized assessment rolls of the city, and depositing same in the United States mail, and service shall be deemed completed at the time of deposit in the United States mail.

A copy of the report of assessment shall be posted in the Office of Parks and Recreation at least three days prior to the time when the report will be submitted to the City Council. After the assessment is made and confirmed, it shall be a lien on said real property.

Such lien attaches upon recordation in the Office of the County Recorder, Alameda County, by certified copy of the resolution of confirmation. After confirmation of the report, a certified copy shall be filed with the County Auditor, Alameda County, on or before August 10th. The description of the parcel reported shall be that used for the same parcel as the County Assessor's map books for the current year. The County Assessor shall enter each assessment on the county tax rolls opposite the parcel of land. The amount of the assessment shall be collected at the same time and in the same manner as ordinary municipal taxes are collected, and shall be subject to the same penalties and the same procedure for foreclosure and sale in case of delinquencies as provided for ordinary municipal taxes.

12.36.190 Notice of lien—Tree removal permit violation investigation, enforcement, replacement plantings.

The lien mentioned in Section 12.36.180 shall take the following form:

NOTICE OF LIEN

Pursuant to authority vested in me by Resolution No.;#rule; C.M.S., of the Council of the City of Oakland, passed on the _____ day of ;#rule;,19_____ and the provisions of Chapter 12.36, of the Oakland Municipal Code. I did, on the _____ day of ;#rule;, 19_____ initiate a tree removal permit violation investigation, an enforcement of this chapter, and replacement paintings to be made at the location hereinafter described at the expense of the owners thereof, in the amount of $;#rule;, and that said amount has not been paid nor any part thereof, and the City of Oakland does hereby claim a lien upon the hereinafter described real property in said amount, the same shall be a lien upon the said property until said sum with interest thereon at the legally allowable rate from the date of the recordation of this lien in the Office of the County Recorder of the County of Alameda, State of California, has been paid in full. The real property hereinafter mentioned and upon which a lien is claimed is that certain parcel of land lying and being in the City of Oakland, County of Alameda, State of California, and particularly described as follows, to wit:

(insert description of property)

Dated this _____ day of ;#rule;, 19_____.

_____

Director of Parks and Recreation
CITY OF OAKLAND

(Prior code § 7-6.132)

12.36.200 Liabilities.

A. The issuance and exercise of a permit pursuant to this chapter shall not be deemed to establish any public use or access not already in existence with regard to the property to which the permit is applicable.

B. The issuance of a permit pursuant to this chapter shall not create any liability of the city with regard to the work to be performed, and the applicant for such permit shall agree to hold harmless the city and is officers and employees from any damage or injury that may occur in connection with, or resulting from, such work.

(Prior code § 7-6.15)

USDA NRCS
United States Department of Agriculture
Natural Resources Conservation Service

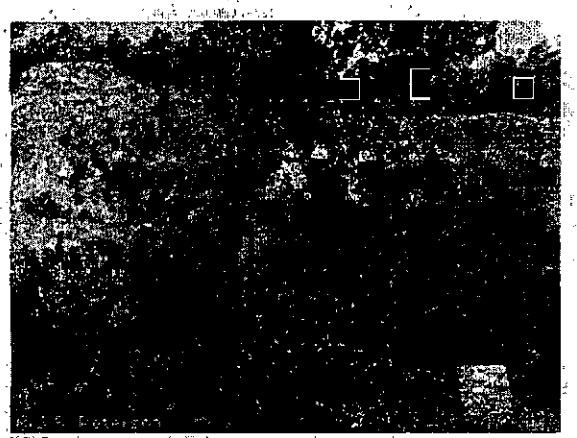
Plant Guide

COAST LIVE OAK

Quercus agrifolia Nee

Plant Symbol = QUAG

Contributed by: Santa Barbara Botanic Garden & USDA NRCS National Plant Data Center



J S. Peterson
USDA NRCS NPDC
@ PLANTS

Use

Erosion: Coast live oaks stabilize soil on slopes, provide an organic-rich litter, and contribute to a habitat for a diversity of insects, birds, and mammals.

Wildlife. Acorns are an important food source for birds, small mammals, and deer. Deer may browse the young foliage.

Ethnobotanic: Native Americans used acorns as an important food staple and early European colonists found that its wood made a superior charcoal for use in a variety of industries, including baking and preparing mortar.

Landscape and beautification: Coast live oak is an important element in both natural and man-made landscapes, providing shade and an aesthetic quality.

Status

Please consult the PLANTS Web site and your State Department of Natural Resources for this plant's current status, such as, state noxious status and wetland indicator values.

Description

General: Oak Family (Fagaceae). Coast live oak, an evergreen tree 10 to 25 m tall, has a broad, dense crown and widely spreading branches The lower limbs of ungrazed trees often recline on the ground. Mature bark is gray and shallowly furrowed Leaves are oblong to oval, 2 to 6 cm in length, cupped, with entire to toothed margins. The upper surface is strongly convex, deep green and smooth, but the lower surface is paler, with hairy-tufted vein axils. Like all oaks, coast live oak is monoecious and wind-pollinated. Acorn cups are composed of thin, flat scales The one-seeded nuts are 2 to 4 cm long, narrowly conical, and mature in one year. On average, trees have high acorn production once every 2 to 3 years. Flowering takes place from February to April. Fruits mature between August and October.

Distribution: Coast live oak occurs in the coast ranges from north central California southward to northern Baja California. For current distribution, please consult the Plant Profile page for this species on the PLANTS Web site.

Establishment

Adaptation It grows in well-drained soils on bluffs, gentle slopes, and canyons, and can be found up to 1400 m in elevation. This species is adapted to relatively warm, wet winters and dry summers moderated by fog and cool temperatures, but does not occur where the ground freezes. Although tolerant of various soil types, live oak prefers a deep loam. Common associates include species of sumac, lemonade berry, and toyon. Coast live oak is particularly well adapted to fire. Branches may produce new shoots after having been lightly burned Trunks exposed to moderate fires often resprout from the base Like most oaks, it has an obligate relationship with mycorrhizal fungi, which provide critical moisture and nutrients

Propagation by seeds. Oak seeds do not store well and consequently seeds should be planted soon after maturity Nuts are considered ripe when they separate freely from the acorn cap and fall from the tree Care should be taken to collect local fruits, because they may be adapted to local environmental conditions Viable nuts are green to brown and have unblemished walls. Nuts with discoloration or sticky exudates, and small holes caused by insect larvae, should be discarded

Propagation of coast live oak is highly successful by direct seeding at the beginning of winter. Once a site is chosen, prepare holes that are 10 inches in diameter and 4 to 5 inches deep. One gram of a slow-release fertilizer should be placed in the bottom and covered by a small amount of soil. Place 6 to 10 acorns in each hole at a depth of 1 to 2 inches. Temporary enclosures should be used to minimize herbivory by rodents or birds. A simple enclosure can be constructed from a 1 quart plastic dairy container with the bottom removed and a metal screen attached. Near the end of the first season, seedlings should be thinned to 2 or 3 per hole and to 1 seedling by the second season. Supplemental watering may be necessary if a drought of 6 weeks or more occurs during the spring.

Container Planting: Seeds may be planted in one-gallon containers, using well-drained potting soil that includes slow-release fertilizer. Tapered plastic planting tubes, with a volume of 10 cubic inches, also may be used. Seeds should be planted 1 to 2 inches deep and the soil kept moist. Seedlings should be transplanted as soon as the first true leaves mature. Planting holes should be at least twice as wide and deep as the container. Seedlings may require watering every 2 to 3 weeks during the first season. Care should be taken to weed and mulch around young plants until they are 6 to 10 inches tall.

Management

Natural live oak regeneration from seeds tends to occur sporadically during winters with above average precipitation that falls evenly throughout the season. Seedlings are especially sensitive to trampling and too herbivory by rodents, deer, and cattle. Common insects include moth larvae and tent caterpillars. Mature trees are especially susceptible to oak crown and root rot fungi (e.g., *Inonotus*, *Ganoderma*, and *Laetiporus*) which decay wood in trunks and roots. Activities that disturb or compact soil around trees, including construction and livestock grazing need to be avoided or carefully managed within the near the zone of leaf canopy. Summer irrigation near oaks should also be avoided, especially in urban landscapes, because it promotes oak root and crown rot. When desirable, mature trees consumed by fires may be allowed to recover from stump sprouts if replanting on large tracts is uneconomical

Cultivars, Improved and Selected Materials (and area of origin)

It is best to plant species from your local area, adapted to the specific site conditions where the plants are to be grown. This species is available from most native plant nurseries within its range Contact your local Natural Resources Conservation Service (formerly Soil Conservation Service) office for more information. Look in the phone book under "United States Government." The Natural Resources Conservation Service will be listed under the subheading "Department of Agriculture."

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Prepared By and Species Coordinator

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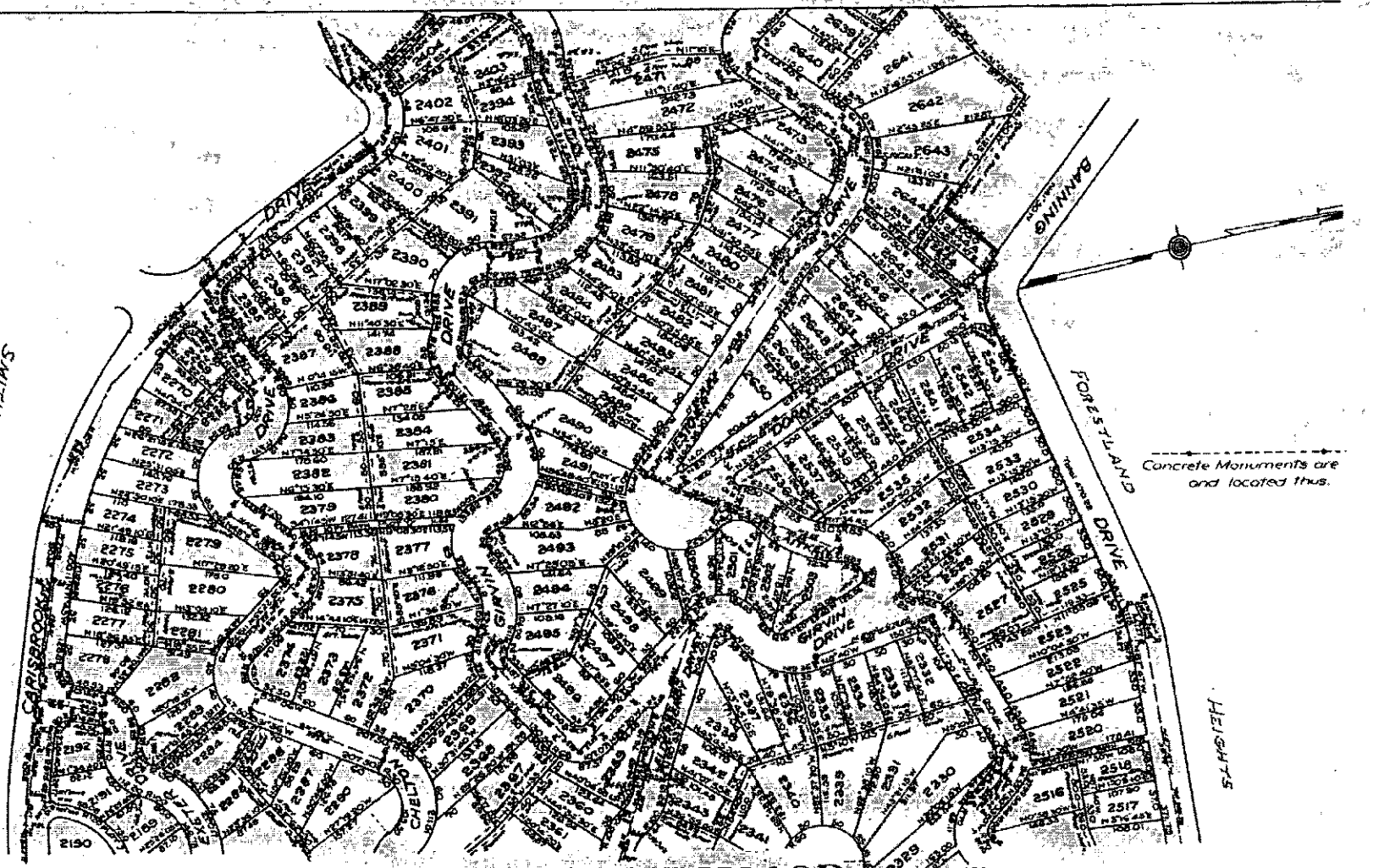
Edited 18sep00 jsp. 29may03 ahv; 060809 jsp

For more information about this and other plants, please contact your local NRCS field office or Conservation District, and visit the PLANTS Web site<http://plants.usda.gov> or the Plant Materials Program Web site <http://Plant-Materials.nrcs.usda.gov>

Read about Civil Rights at the Natural Resources Conservation Service.



FORESTLAND MANOR,

OAKLAND, ALAMEDA COUNTY.

CALIFORNIA.

L. Hammedieu & Wilson Inc.
Oakland, California

Civil & Subdivision Engineers,
Scale: 1 inch = 100 feet.

AUGUST, 1927.

Sheet No. Two (2) of Four (4) Sheets.

B K D

PINOLE

Cellphone tower proposal defeated

Residents voiced health, aesthetic, fire concerns

By Tom Lochner

Matt Bielby, left, shown with his wife, Moira, and their 16-month-old daughter, Caroline, organized a petition drive urging rejection of the cellphone tower. The family lives near the proposed site in Pinole.

PINOLE — The City Council has rejected a proposed ground lease with Verizon for a cellphone tower in Pinole Valley Park after residents voiced aesthetic concerns as well as a range of fears, including cancer, neurodegenerative diseases and fire.

"You cannot risk my children's health over $25,000 revenue," one resident implored the City Council on Tuesday, in a reference to the annual rent — actually $26,400 to start, increasing by 2 percent each year for up to 25 years — that the city stood to collect from the deal.

She was one of about a dozen residents to speak during an two-hour discussion of the cell tower. Another was Matt Bielby, who lives near the proposed site and organized the opposition and a petition drive urging rejection of the tower.

Several cited what they said were scientific studies linking increased incidences of cancer among people residing near cellphone towers. Others, expressing less certainty about the supposed cancer link, came down on the side of caution anyway.

"I have no proof that cellular radiation causes cancer," said resident Sal Spezzano. "But I don't have any proof that it doesn't cause cancer."

Verizon Wireless Inc. wanted to build the tower and an associated building on about 1,000 square feet off Pinole Valley Road, east of Wright Avenue, in the eastern end of the park.

Verizon attorney Paul Albritton and some council members noted that a tower would emit radio frequencies, not powerful electromagnetic fields such as those produced by high-voltage electrical transmission lines. Albritton said there are cellphone antennas on the rooftops of apartment buildings in San Francisco.

Other residents warned that installing a tower in the easternmost, densely wooded section of the park could result in a wildland fire and threaten homes in the Pinole Valley, especially because the facility would be equipped with a diesel fuel tank for a standby generator.

Resident Anthony Gutierrez argued that "some terrorist or some other deranged person could turn the tower's 100-plus-gallon diesel tank into a bomb."

Still others said a 78-foot antenna, even one disguised as a tree, would spoil the pristine quality of the eastern end of the park. Resident David Rupert likened it to installing a cell tower on Half Dome in Yosemite National Park, adding, "this part of Pinole is my Yosemite."

Several residents who said they are Verizon subscribers questioned the need for a tower in the area, saying their cellphone reception is fine. But Albritton noted that the proliferation of mobile Internet applications is driving the need for more antennas.

The vote to reject the lease was 4-1, with Councilman Roy Swearingen dissenting.

Albritton did not say what his company would do in reaction to the council's vote. He was not available for comment at his San Francisco law office Friday. But earlier in Tuesday's meeting, before the council vote, Albritton said:

"If this lease were not to go forward, that doesn't mean that there isn't going to be a Verizon Wireless tower in that area. It just means that it's going to be perhaps slightly displaced."

"Verizon Wireless will provide the service under its federal mandate to do so," he added.

Earlier, Albritton had rejected a suggestion by Councilman Peter Murray to build the tower near a eucalyptus grove deeper inside the park, noting the current site was chosen after a lengthy and costly environmental review.

SPRINT TELEPHONY PCS, L.P., a Delaware limited partnership, Plaintiff-Appellant/Cross-Appellee, and PACIFIC BELL WIRELESS LLC, a Nevada limited liability company, dba Cingular Wireless, Plaintiff, v. COUNTY OF SAN DIEGO, a division of the State of California; GREG COX, in his capacity as a supervisor of the County of San Diego; DIANNE JACOB, in her capacity as a supervisor of the County of San Diego; PAM SLATER, in her capacity as a supervisor of the County of San Diego; RON ROBERTS, in his capacity as a supervisor of the County of San Diego; BILL HORN, in his capacity as a supervisor of the County of San Diego, Defendants-Appellees/Cross-Appellants.

Nos. 05-56076, 05-56435

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

543 F.3d 571; 2008 U.S. App. LEXIS 19316; 45 Comm. Reg. (P & F) 1317

June 24, 2008, Argued and Submitted, Pasadena, California
September 11, 2008, Filed

SUBSEQUENT HISTORY: Later proceeding at *Sprint Telephony PCS, L.P. v. San Diego County, 129 S. Ct. 1661, 173 L. Ed. 2d 992, 2009 U.S. LEXIS 1995 (U.S., 2009)*
US Supreme Court certiorari denied by *Sprint Telephony PCS, L.P. v. San Diego County, 2009 U.S. LEXIS 4783 (U.S., June 29, 2009)*

PRIOR HISTORY: [1]**
Appeals from the United States District Court for the Southern Distrfict of California. D.C. No. CV-03-1398-BTM. Barry Ted Moskowitz, District Judge, Presiding.
Sprint Telephony PCS, L.P. v. County of San Diego, 377 F. Supp. 2d 886, 2005 U.S. Dist. LEXIS 18737 (S.D. Cal., 2005)

DISPOSITION: AFFIRMED with respect to the *ß 1983* claim; otherwise REVERSED. Costs on appeal awarded to Defendants - Appellees/Cross-Appellants.

COUNSEL: Daniel T. Pascucci and Nathan R. Hamler, Mintz Levin Cohn Ferris Glovsky and Popeo PC, San Diego, California, for the plaintiff-appellant/cross-appellee.

Thomas D. Bunton, Senior Deputy County Counsel, County of San Diego, San Diego, California, for the defendants-appellees-cross-appellants.

Andrew G. McBride and Joshua S. Turner, Wiley Rein LLP, Washington, D.C.; William K. Sanders, Deputy City Attorney, San Francisco, California, Joseph Van Eaton, Miller & Van Eaton, P.L.L.C., Washington, D.C.; John J. Flynn III, Nossaman, Guthner, Knox & Elliott, LLP, Irvine, California; T. Scott Thompson, Davis Wright Tremaine, LLP, Washington, D.C.; and Elaine Duncan and Jesus G. Roman, Verizon California, Inc., Thousand Oaks, California, for amici curiae.

JUDGES: Before: Alex Kozinski, Chief Judge, and Andrew J. Kleinfeld, Michael Daly Hawkins, A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, Susan P. Graber, [**2] Ronald M. Gould, Marsha S. Berzon, Richard C. Tallman, and Jay S. Bybee, Circuit Judges. GRABER, Circuit Judge. GOULD, Circuit Judge, concurring.

OPINION BY: Susan P. Graber

OPINION

[*573] GRABER, Circuit Judge:

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in U.S.C. Titles 15, 18 & 47) ("the Act"), precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. In 2003, Defendant County of San Diego enacted its Wireless Telecommunications Facilities ordinance. San Diego County Ordinance No. 9549, ß 1 (codified as San Diego County Zoning Ord. ßß 6980-6991, 7352 ("the Ordinance")). The Ordinance imposes restrictions [*574] and permit requirements on the construction and location of wireless telecommunications facilities. Plaintiff Sprint Telephony PCS alleges that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. The district court permanently enjoined the County from enforcing the Ordinance, and a three-judge panel of this court affirmed. *Sprint Telephony PCS, L.P. v. County of San Diego, 490 F.3d 700 (9th Cir. 2007).* [**3] We granted rehearing en banc, *527 F.3d 791 (9th Cir. 2008)*, and we now reverse.

FACTUAL AND PROCEDURAL HISTORY

The County of San Diego enacted the Ordinance "to establish comprehensive guidelines for the placement, design and processing of wireless telecommunications facilities in all zones within the County of San Diego." San Diego County Ordinance No. 9549, ß 1. The Ordinance categorizes applications for wireless telecommunications facilities into four tiers, depending primarily on the visibility and location of the proposed facility. San Diego County Zoning Ordinance ß 6985. For example, an application for a low-visibility structure in an industrial zone generally must meet lesser requirements than an application for a large tower in a residential zone. *Id.*

Regardless of tier, the Ordinance imposes substantive and procedural requirements on applications for wireless facilities. For example, non-camouflaged poles are prohibited in residential and rural zones; certain height and setback restrictions apply in residential zones; and no more than three facilities are allowed on any site, unless "a finding is made that colocation of more facilities is consistent with community character." [**4] *Id.* An applicant is required to identify the proposed facility's geographic service area, to submit a "visual impact analysis," and to describe various technical attributes such as height, maintenance requirements, and acoustical information, although some exceptions apply. *Id.* ß 6984. The proposed facility must be located within specified "preferred zones" or "preferred locations," unless those locations are "not technologically or legally feasible" or "a finding is made that the proposed site is preferable due to aesthetic and community character compatibility." *Id.* ß 6986. The proposed facility also must meet many design requirements, primarily related to aesthetics. *Id.* ß 6987. The applicant also must perform regular maintenance of the facility, including graffiti removal and proper landscaping. *Id.* ß 6988.

General zoning requirements also apply. For example, hearings are conducted before a

permit is granted, *id.* ß 7356, and on appeal, if requested, *id.* ß 7366(h). Before a permit is granted, the zoning board must find:

> That the location, size, design, and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with **[**5]** consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
>
> 2. The availability of public facilities, services and utilities;
>
> 3. The harmful effect, if any, upon desirable neighborhood character;
>
> 4. The generation of traffic and the capacity and physical character of surrounding streets;
>
> 5. The suitability of the site for the type and inten sity of use or development which is proposed; and to
>
> 6. Any other relevant impact of the proposed use[.]

[*575] *Id.* ß 7358(a). The decision-maker retains discretionary authority to deny a use permit application or to grant the application conditionally. *Id.* ß 7362.

Soon after the County enacted the Ordinance, Sprint brought this action, alleging that the Ordinance violates *47 U.S.C ß 253(a)* [1] because, on its face, it prohibits or has the effect of prohibiting Sprint's ability to provide wireless telecommunications services. Sprint sought injunctive and declaratory relief under the *Supremacy Clause* and *28 U.S.C. ß 1331*, and damages and attorney fees under *42 U.S.C. ß 1983*. The County argued that *ß 253(a)* did not apply to the Ordinance, because *47 U.S.C. ß 332(c)(7)* exclusively governs wireless regulations, and that, in any event, the Ordinance is **[**6]** not an effective prohibition on the provision of wireless services. The County also argued that damages and attorney fees are unavailable because Congress did not create a private right of action enforceable under *42 U.S.C. ß 1983*.

> 1 In its complaint, Sprint also alleged that the Ordinance violated another subsection of *47 U.S.C. ß 253*. The district court dismissed that cause of action for failure to prosecute, and Sprint does not challenge that dismissal on appeal.

The district court first held that facial challenges to a local government's wireless regulations could be brought under either *ß 253(a)* or *ß 332(c)(7)*, because neither is exclusive. The district court next held, relying on our decision in *City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001)*, that the Ordinance violated *ß 253(a)*. The district court therefore permanently enjoined the County from enforcing the Ordinance against Sprint. Finally, the district court held that a claim under *42 U.S.C. ß 1983* for a violation of *ß 253(a)* was not cognizable and granted summary judgment to the County on that claim. The parties cross-appealed. A three-judge panel of this court affirmed, and we granted rehearing en banc.

STANDARDS [**7] OF REVIEW

We review for abuse of discretion the district court's grant of a permanent injunction, but review its underlying determinations "by the standard that applies to that determination." *Ting v. AT&T, 319 F.3d 1126, 1134-35 (9th Cir. 2003)*.

DISCUSSION

Sprint argues that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act. As a threshold issue, the parties dispute *which* provision of the

Act--*47 U.S.C. ß 253(a)* or *47 U.S.C. ß 332(c)(7)(B)(i)(II)*--applies to this case.

A. *The Effective Prohibition Clauses of 47 U.S.C. ß 253(a) and 47 U.S.C. ß 332(c)(7)(B)(i)(II)*

When Congress passed the Act, it expressed its intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. at 56; *see also Ting, 319 F.3d* **[*576]** *at 1143* ("[T]he purpose of the . . . Act is to 'provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition.'" (quoting H.R. Rep. No. 104-458, **[**8]** at 113 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 124)). The Act "represents a dramatic shift in the nature of telecommunications regulation." *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n, 184 F.3d 88, 97 (1st Cir. 1999)*; *see also Ting, 319 F.3d at 1143* (characterizing the Act as a "dramatic break with the past"). Congress chose to "end [] the States' longstanding practice of granting and maintaining local exchange monopolies." *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 405, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)* (Thomas, J., concurring in part, dissenting in part).

Congress did so by enacting *47 U.S.C. ß 253*, a new statutory section that preempts state and local regulations that maintain the monopoly status of a telecommunications service provider. *See Cablevision of Boston, 184 F.3d at 98* ("Congress apparently feared that some states and municipalities might prefer to maintain the monopoly status of certain providers . . . . *Section 253(a)* takes that choice away from them. . . ."). *Section 253(a)* states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or **[**9]** intrastate telecommunications service."

The Act also contained new provisions applicable only to *wireless* telecommunications service providers. The House originally proposed legislation requiring the Federal Communications Commission ("FCC") to regulate directly the placement of wireless telecommunications facilities. *See* H.R. Rep. No. 104-204(I), ß 107, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61. But the House and Senate conferees decided instead to "preserve [] the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." H.R. Rep. No. 104-458, ß 704, at 207-08 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 124, 222.

Accordingly, at the same time, Congress also enacted *47 U.S.C. ß 332(c)(7). Section 332(c)(7)(A)* preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities, subject to enumerated limitations in *ß 332(c)(7)(B)*. One such limitation is that local regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." *Id. ß 332(c)(7)(B)(i)(II)*.

We have **[**10]** interpreted *ß 332(c)(7)(B)(i)(II)* in accordance with its text. In *Metro PCS, Inc. v. City of San Francisco, 400 F.3d 715, 730-31 (9th Cir 2005)*, we held that a locality runs afoul of that provision if (1) it imposes a "city-wide general ban on wireless services" or (2) it actually imposes restrictions that amount to an effective prohibition.

Our interpretation of *ß 253(a)*, however, has not hewn as closely to its nearly identical text. Again, *ß 253(a)* states: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunica-

tions service." In *Auburn*, we became one of the first federal circuit courts to interpret that provision. We surveyed district court decisions and adopted their broad interpretation of its preemptive effect. *Auburn, 260 F.3d at 1175-76.* In the course of doing so, we quoted *ß 253(a)* somewhat inaccurately, inserting an ellipsis in the text of *ß 253(a). Id. at 1175.* We held that "[s]ection 253(a) preempts 'regulations that not only "prohibit" outright the ability of any entity to provide telecommunications services, but also **[**11]** those that "may . . . have the effect of prohibiting" the provision of such services.'" *Id.* (quoting *Bell Atl.-Md., Inc. v. Prince George's County, 49 F. Supp 2d 805, 814 (D. Md. 1999), vacated and remanded on other grounds, 212 F.3d 863 (4th Cir. 2000))*; *see also Qwest Commc'ns Inc. v. City of Berkeley, 433 F.3d 1253, 1258 (9th Cir. 2006)* (invalidating the locality's regulations **[*577]** because they "may have the effect of prohibiting telecommunications companies from providing services"); *Qwest Corp. v. City of Portland, 385 F.3d 1236, 1241 (9th Cir. 2004)* (emphasizing that "regulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by *ß 253(a)*]"). It followed from that truncated version of the statute that, if a local regulation merely "create[s] a substantial . . . barrier" to the provision of services or "allows a city to bar" provision of services, *Auburn, 260 F.3d at 1176*, then *ß 253(a)* preempts the regulation. Applying that broad standard, we held that the municipal regulations at issue in *Auburn* were preempted because they imposed procedural requirements, charged fees, authorized civil and criminal penalties, and--"the ultimate **[**12]** cudgel"--reserved discretion to the city to grant, deny, or revoke the telecommunications franchises. *Id*

Our expansive reading of the preemptive effect of *ß 253(a)* has had far-reaching consequences. The *Auburn* standard has led us to invalidate several local regulations. *See Berkeley, 433 F.3d at 1258* (holding that Berkeley's regulations were preempted by *ß 253(a)*); *Portland, 385 F.3d at 1239-42* (reversing the district court's holding that Portland's regulations survived preemption and remanding for additional analysis). Three of our sister circuits also have followed our broad interpretation of *ß 253(a)*, albeit with little discussion. *See P.R Tel. Co v. Municipality of Guayanilla, 450 F.3d 9, 18 (1st Cir. 2006)* (citing *Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1269 (10th Cir. 2004))*; *Santa Fe, 380 F.3d at 1270* (quoting *Auburn, 260 F.3d at 1176*); *TCG N.Y., Inc. v. City of White Plains, 305 F.3d 67, 76 (2d Cir. 2002).* Applying our *Auburn* standard, federal district courts have invalidated local regulations in tens of cases across this nation's towns and cities. *See, e.g., NextG Networks of Cal, Inc. v. County of Los Angeles, 522 F. Supp. 2d 1240, 1253 (CD. Cal. 2007)*; *TC Sys., Inc. v. Town of Colonie, 263 F. Supp. 2d 471, 481-84 (N.D.N.Y. 2003)*; **[**13]** *XO Mo., Inc. v. City of Maryland Heights, 256 F. Supp. 2d 987, 996-98 (E.D. Mo. 2003).*

But the tension between the *Auburn* standard and the full text of *ß 253(a)* has not gone unnoticed. *See City of Portland v. Elec. Lightwave, Inc., 452 F. Supp. 2d 1049, 1059 (D. Or. 2005)* ("The Ninth Circuit's interpretation of the scope of *section 253(a)* appears to depart from the plain meaning of the statute . . . ."); *Qwest Corp. v. City of Portland, 200 F. Supp. 2d 1250, 1255 (D. Or. 2002)* (construing the *Auburn* standard as dictum because reading *ß 253(a)* as preempting regulations that *may* have the effect of prohibiting telecommunications services "simply misreads the plain wording of the statute"), *rev'd by Portland, 385 F.3d at 1241* ("Like it or not, both we and the district court are bound by our prior ruling [in *Auburn*]."); *see also Newpath Networks LLC v City of Irvine, No. SACV-06-550, 2008 U.S. Dist. LEXIS 72833, 2008 WL 2199689, at *4 (C D. Cal Mar 10, 2008)* (noting that "the Court is sympathetic to Irvine's argument that judicial decisions in this area have not been particularly instructive in telling municipalities how they may regulate in accordance with the .

. . Act"). Recently, the Eighth Circuit rejected the **[**14]** *Auburn* standard and held that, to demonstrate preemption, a plaintiff "must show actual or effective prohibition, rather than the mere possibility of prohibition." *Level 3 Commc'ns, L.L.C. v. City of St. Louis, 477 F.3d 528, 532-33 (8th Cir. 2007)*; *see also AT&T Commc'ns of Pac. Nw., Inc. v City of Eugene, 177 Ore. App. 379, 35 P.3d 1029, 1047-48 (Or. Ct. App. 2001)* (implicitly rejecting the *Auburn* standard).

We find persuasive the Eighth Circuit's and district courts' critique of *Auburn*. **[*578]** *Section 253(a)* provides that "[n]o State or local statute or regulation . . . may prohibit or have the effect of prohibiting. . . provi[sion of] . . . telecommunications service." In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that "a plaintiff suing a municipality under *section 253(a)* must show **[**15]** actual or effective prohibition, rather than the mere possibility of prohibition." *Level 3 Commc'ns, 477 F.3d at 532.*

Although our conclusion rests on the unambiguous text of *ß 253(a)*, we note that our interpretation is consistent with the FCC's. *See In re Cal. Payphone Ass'n, 12 F.C.C.R. 14191, 14209 (1997)* (holding that, to be preempted by *ß 253(a)*, a regulation "would have to actually prohibit or effectively prohibit" the provision of services); *Nat'l Cable & Telecomms. Ass'n v Brand X Internet Servs., 545 U.S. 967, 980, 125 S. Ct. 2688, 162 L. Ed. 2d 820 (2005)* (holding that the two-step *Chevron U.S A. Inc v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)*, analysis applies to FCC rulings). Were the statute ambiguous, we would defer to the FCC under *Chevron*, as its interpretation is certainly reasonable. *467 U.S. at 843.* Our narrow interpretation of the preemptive effect of *ß 253(a)* also is consistent with the presumption that "express preemption statutory provisions should be given a narrow interpretation." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492, 496 (9th Cir. 2005).*

Our present interpretation of *ß 253(a)* is buttressed by our interpretation of the same **[**16]** relevant text in *ß 332(c)(7)(B)(i)(II)* -- "prohibit or have the effect of prohibiting." In *MetroPCS*, to construe *ß 332(c)(7)(B)(i)(II)*, we focused on the *actual* effects of the city's ordinance, not on what effects the ordinance *might possibly* allow. *400 F 3d at 732-34.* Indeed, we rejected the plaintiff's argument that, because the city's zoning ordinance granted discretion to the city to reject an application based on vague standards such as "necessity," the ordinance necessarily constituted an effective prohibition. *Id. at 724, 732.* Consequently, our interpretation of the "effective prohibition" clause of *ß 332(c)(7)(B)(i)(II)* differed markedly from *Auburn's* interpretation of the same relevant text in *ß 253(a)*. *Compare MetroPCS, 400 F.3d at 731-35* (analyzing, under *ß 332(c)(7)(B)(i)(II)*, whether the city's ordinance and decision *actually* have the effect of prohibiting the provision of wireless services), *with Portland, 385 F.3d at 1241* ("[R]egulations that *may* have the effect of prohibiting the provision of telecommunications services are preempted [by *ß 253(a)*]."); *compare also MetroPCS, 400 F.3d at 732* (rejecting the argument that "the City's zoning 'criteria,' which allow for [permit] **[**17]** 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"), *with Auburn, 260 F.3d at 1176* (holding that the city's ordinance is an effective prohibition under *ß 253(a)*, in large part because the "city reserves discretion

to grant, deny, or revoke the [telecommunications] franchises").

When Congress uses the same text in the same statute, we presume that it intended the same meaning. *See N. Sports, Inc. v. Knupper (In re Wind N' Wave),* **[*579]** *509 F.3d 938, 945 (9th Cir. 2007)* (applying the presumption); *Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1432 (9th Cir. 1991)* ("We must presume that words used more than once in the same statute have the same meaning."); *see also Smith v. City of Jackson, 544 U.S. 228, 233, 125 S. Ct 1536, 161 L. Ed. 2d 410 (2005)* (plurality opinion) ("[W]e begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); *id. at 261* (O'Connor, J., concurring **[**18]** in the judgment) (stating that the presumption should apply in the absence of "strong evidence" to the contrary). We see nothing suggesting that Congress intended a different meaning of the text "prohibit or have the effect of prohibiting" In the two statutory provisions, enacted at the same time, in the same statute.

Our holding today therefore harmonizes our interpretations of the identical relevant text in *ßß 253(a)* and *332(c)(7)(B)(i)(II)* [2] Under both, a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient.

2 We make no comment on what differences, if any, exist between the two statutory sections in other contexts.

Because Sprint's suit hinges on the statutory text that we interpreted above--"prohibit ot have the effect of prohibiting"--we need not decide whether Sprint's suit falls under *ß 253* or *ß 332*. As we now hold, the legal standard is the same under either.

B. *The Effective Prohibition Standard Applied to the County of San Diego's Ordinance*

Having established the proper legal **[**19]** standard, we turn to Sprint's facial challenge to the Ordinance. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).* [3]

3 The Supreme Court and this court have called into question the continuing validity of the *Salerno* rule in the context of *First Amendment* challenges. *See, e.g., Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190, 170 L Ed. 2d 151 (2008)*; *Hotel & Motel Ass'n of Oakland v. City of Oakland, 344 F.3d 959, 971-72 (9th Cir. 2003).* In cases involving federal preemption of a local statute, however, the rule applies with full force. *See Hotel & Motel Ass'n, 344 F.3d at 971* ("To bring a successful facial challenge outside the context of the *First Amendment*, 'the challenger must establish that no set of circumstances exists under which the [statute] would be valid.'" (alteration in original) (quoting *Salerno, 481 U.S at 745*)); *see also Anderson v. Edwards, 514 U S 143, 155 n 6, 115 S. Ct 1291, 131 L. Ed. 2d 178 (1995)* (unanimous opinion) (applying *Salerno* to a federal preemption facial challenge **[**20]** to a state statute).

The Ordinance plainly is not an outright ban on wireless facilities. We thus consider whether the Ordinance effectively prohibits the provision of wireless facilities. We have no difficulty concluding that it does not.

The Ordinance imposes a layer of requirements for wireless facilities in addition to the zoning requirements for other structures. On the face of the Ordinance, none of the requirements, individually or in combination, prohibits the construction [*580] of sufficient facilities to provide wireless services to the County of San Diego.

Most of Sprint's arguments focus on the discretion reserved to the zoning board. For instance, Sprint complains that the zoning board must consider a number of "malleable and open-ended concepts" such as community character and aesthetics; it may deny or modify applications for "any other relevant impact of the proposed use"; and it may impose almost any condition that it deems appropriate. A certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally [**21] true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance--the provision of wireless services and other valid public goals such as safety and aesthetics. In any event, Sprint cannot meet its high burden of proving that "no set of circumstances exists under which the [Ordinance] would be valid," *Salerno, 481 U.S. at 745*, simply because the zoning board exercises some discretion.

The same reasoning applies to Sprint's complaint that the Ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application. Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition. Moreover, if a telecommunications provider believes that the zoning board is [**22] in fact using its procedural rules to delay unreasonably an application, or its discretionary authority to deny an application unjustifiably, the Act provides an expedited judicial review process in federal or state court. *See 47 U.S.C. ß 332(c)(7)(B)(ii) & (v).*

We are equally unpersuaded by Sprint's challenges to the substantive requirements of the Ordinance. Sprint has not identified a single requirement that effectively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest set-backs, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.

That is not to say, of course, that a plaintiff could never succeed in a facial challenge. If an ordinance required, for instance, that all facilities be underground and the plaintiff introduced evidence that, to operate, wireless facilities must be above ground, the ordinance would effectively prohibit it from providing services. Or, if an ordinance mandated that no wireless facilities be located within one mile of a road, a plaintiff could show that, because of the number and location [**23] of roads, the rule constituted an effective prohibition. We have held previously that rules effecting a "significant gap" in service coverage could amount to an effective prohibition, *MetroPCS, 400 F.3d at 731-35*, and we have no reason to question that holding today.

In conclusion, the Ordinance does not effectively prohibit Sprint from providing wireless services. Therefore, the Act does not preempt the County's wireless telecommunications ordinance.

C. *Section 1983 claim*

We adopt the reasoning and conclusion of the three-judge panel that *42 U.S.C. ß 1983* **[*581]** claims cannot be brought for violations of *47 U.S.C. ß 253*. *Sprint Telephony, 490 F.3d at 716-18*; *accord Santa Fe, 380 F.3d at 1266-67*; *see also Kay v. City of Rancho Palos Verdes, 504 F.3d 803, 812-15 (9th Cir. 2007)* (holding that *ß 1983* claims cannot be brought for violations of *47 U.S.C. ß 332*).

AFFIRMED with respect to the *ß 1983* claim; otherwise REVERSED. Costs on appeal awarded to Defendants - Appellees/Cross-Appellants.

CONCUR BY: GOULD

CONCUR

GOULD, Circuit Judge, concurring:

I concur in full in Judge Graber's majority opinion, holding that *Section 253(a)* preempts any state or local law that actually or effectively prohibits provision of telecommunication **[**24]** services. I write separately to add my view that normally local governments will have the ability to enforce reasonable zoning ordinances that might affect where and how a cellular tower is located, but that will not effectively prohibit cellular telephone service. Zoning ordinances, in my view, will be preempted only if they would substantially interfere with the ability of the carrier to provide such services. Cases of a preempted zoning ordinance will doubtless be few and far between, and the record in this case shows that telecommunication services here were not effectively barred by the zoning ordinance.

SPRINT PCS ASSETS, L.L.C., a Delaware limited liability company, wholly-owned by Sprint Telephony PCS, LP, a Delaware limited partnership, Plaintiff-Appellee, v. CITY OF PALOS VERDES ESTATES, a California municipality; CITY COUNCIL OF THE CITY OF PALOS VERDES ESTATES, its governing body; JOSEPH SHERWOOD, in his official capacity as Mayor Pro Tem of the City of Palos Verdes Estates; JOHN FLOOD, in his official capacity as Councilmember of the City of Palos Verdes Estates; ROSEMARY HUMPHREY, in her official capacity as Councilmember of the City of Palos Verdes Estates; DWIGHT ABBOTT, in his official capacity as Councilmember of the City of Palos Verdes Estates; JAMES F. GOODHART, in his official capacity as Councilmember of the City of Palos Verdes Estates, Defendants-Appellants.

No. 05-56106

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

583 F.3d 716; 2009 U.S. App. LEXIS 22514; 48 Comm. Reg. (P & F) 951

July 6, 2009, Argued and Submitted, Pasadena, California
October 14, 2009, Filed

PRIOR HISTORY: [1]**

Appeal from the United States District Court for the Central District of California. D.C. No. CV-03-00825-AHS. Alicemarie H. Stotler, District Judge, Presiding.

Sprint PCS Assets LLC v. City of Palos Verdes Estates, 2008 Cal. LEXIS 280 (Cal., Jan. 3, 2008)

COUNSEL: Scott J. Grossberg, Richard R. Clouse, Amy R. von Kelsch-Berk, and Angelica A. Arias of Cihigoyenetche, Grossberg & Clouse, Ranco Cucamonga, California, and Daniel P. Barer of Pollak, Vida & Fisher, Los Angeles, California, for the appellants.

John J. Flynn III, Gregory W. Sanders, and Michael W. Shonafelt of Nossaman, Guthner, Knox & Elliott, LLP, Irvine, California, for the appellee.

JUDGES: Before: Barry G. Silverman, Kim McLane Wardlaw, and Jay S. Bybee, Circuit Judges. Opinion by Judge Wardlaw.

OPINION BY: Kim McLane Wardlaw

OPINION

[*719] WARDLAW, Circuit Judge:

The City of Palos Verdes Estates ("City") appeals the grant of summary judgment in favor of Sprint PCS Assets, L.L.C. ("Sprint"). We must decide whether the district court erred in concluding that the City violated the Telecommunications Act of 1996 ("TCA"), Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in various sections of U.S.C titles 15, 18, and 47), when it denied Sprint permission to construct two wireless telecommunications facilities in the City's public rights-of-way. Specifically, **[**2]** we must decide (1) whether the City's denial is supported by substantial evidence, as required by *47 U.S.C. § 332(c)(7)(B)(iii)*, and (2) whether the City's denial constitutes a prohibition on the provision of wireless service in violation of *47 U.S.C §§ 253(a)* and *332(c)(7)(B)(i)(II)*. Because the City's denial is supported by substantial evidence, and because disputed issues of material fact preclude a finding that the decision amounted to a prohibition on the provision of wireless service, we reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

The City is a planned community, about a quarter of which consists of public rights-of-way that were designed not only to serve the City's transportation needs, but also to contribute to its aesthetic appeal. In 2002 and 2003, Sprint applied for permits to construct wireless

telecommunications facilities ("WCF") in the City's public rights-of-way. The City granted eight permit applications but denied two others, which are at issue in this appeal. One of the proposed WCFs would be constructed on Via Azalea, a narrow residential street, and the other would be constructed **[*720]** on Via Valmonte, one of the four main entrances to the City. Sprint acknowledged **[**3]** that it already served four thousand customers in the City with its existing network but stated that the proposed WCFs were nonetheless needed to replace its existing infrastructure.

A City ordinance ("Ordinance") provides that WCF permit applications may be denied for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property." Palos Verdes Estates, Cal., Ordinances ch. 18.55.040(B)(1). Under the Ordinance, the City's Public Works Director ("Director") denied Sprint's WCF permit applications, concluding that the proposed WCFs were not in keeping with the City's aesthetics. The City Planning Commission affirmed the Director's decision in a unanimous vote.

Sprint appealed to the City Council ("Council"), which received into evidence a written staff report that detailed the potential aesthetic impact of the proposed WCFs and summarized the results of a "drive test," which confirmed that cellular service from Sprint was already available in relevant locations in the City. The Council also heard public comments and a presentation from Sprint's representatives. The Council issued a resolution affirming the denial of Sprint's permit applications. **[**4]** It concluded that a WCF on Via Azalea would disrupt the residential ambiance of the neighborhood and that a WCF on Via Valmonte would detract from the natural beauty that was valued at that main entrance to the City.

Denied permits by the Director, the Commission, and the Council, Sprint took its case to federal court, seeking a declaration that the City's decision violated various provisions of the TCA. The district court concluded that the City's decision was not supported by substantial evidence and thus violated *47 U.S.C. § 332(c)(7)(B)(iii)*. This determination was premised on a legal conclusion that California law prohibits the City from basing its decision on aesthetic considerations. The district court also concluded that the City violated *47 U.S.C. §§ 253* and *332(c)(7)(B)(i)(II)* by unlawfully prohibiting the provision of telecommunications service, finding that the City had prevented Sprint from closing a significant gap in its coverage. The City timely appeals.

II. JURISDICTION AND STANDARD OF REVIEW

The district court exercised jurisdiction pursuant to *28 U.S.C. § 1331*. We have jurisdiction pursuant to *28 U.S.C § 1291*. "We review summary judgment de novo." *Nelson v. City of Davis, 571 F.3d 924, 927 (9th Cir. 2009)* **[**5]** (citation omitted). Summary judgment is appropriate only if the pleadings, the discovery, disclosure materials on file, and affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed R. Civ. P. 56(c)*. All justifiable factual inferences must be drawn in the City's favor, and we must reverse the grant of summary judgment if any rational trier of fact could resolve a material factual issue in the City's favor. *See Nelson, 571 F.3d at 927*.

III. DISCUSSION

The tension between technological advancement and community aesthetics is nothing new. In an 1889 book that would become a classic in city planning literature, Vienna's Camillo Sitte lamented:

> [T]here still remains the question as to whether it is really necessary to purchase these [technological] advantages at the tremendous price of abandoning all artistic beauty in the layout of cities. **[*721]** The innate conflict between the picturesque and the practical cannot be eliminated merely by talking about it; it will always be present as something intrinsic to the very nature of things.

Camillo Sitte, City Planning According to Artistic Principles 110 (Rudolph Wittkower **[**6]** ed., Random House 1965) (1889).

The TCA attempts to reconcile this "innate conflict." On the one hand, the statute is intended to "encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56. On the other hand, it seeks "to preserve the authority of State and local governments over zoning and land use matters." *T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 992 (9th Cir. 2009)* (citation omitted). The TCA seeks a balance by placing certain limitations on localities' control over the construction and modification of WCFs. *See 47 U.S.C. §§ 253(a), 332(c)(7)(B)*. This appeal involves a challenge to the district court's conclusion that the City exceeded those limitations.

A. *Section 332(c)(7)(B)(iii)*

One of the limitations that the TCA places upon local governments is that "[a]ny decision . . . 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." *47*

U.S.C. § 332(c)(7)(B)(iii). As we have explained, "The upshot is simple: this Court may not overturn the [City's] decision on 'substantial evidence' grounds if that decision **[**7]** is authorized by applicable local regulations and supported by a reasonable amount of evidence." *MetroPCS, Inc. v. City & County of S.F., 400 F.3d 715, 725 (9th Cir. 2005)*. [1] Thus, we must determine (1) whether the City's decision was authorized by local law and, if it was, (2) whether it was supported by a reasonable amount of evidence. Both requirements are satisfied here.

1 The district court did not have the benefit of our decision in *MetroPCS* when it issued its order granting Sprint summary judgment on its claims under *47 U.S.C. §§ 253* and *332(c)(7)(B)(iii)*. Indeed, there has been considerable development in this area of the law since the district court resolved Sprint's motion. *See, e.g., Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008); City of Anacortes, 572 F.3d at 987*.

1. The City's decision was authorized by local law.

"[W]e 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." *MetroPCS, 400 F.3d at 724*. As noted above, the Ordinance authorizes the denial of WCF permit applications on aesthetic grounds. Also relevant for our purposes **[**8]** is the California Public Utilities Code ("PUC"), which provides telecommunications companies with a right to construct WCFs "in such manner and at such points as not to incommode the public use of the road or highway," *Cal. Pub. Util. Code § 7901*, and states that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." *Id. § 7901.1*. The district court erred in concluding that the City's consideration of aesthetics was invalid under the PUC. [2] The California Constitution **[*722]** gives the City the authority to regulate local aesthetics, and neither *PUC § 7901* nor *PUC § 7901.1* divests it of that authority.

2 During the pendency of this appeal, pursuant to Cal. R. Ct. 8.548(a), we requested that the California Supreme Court decide whether *PUC §§ 7901* and *7901.1* permit public entities to regulate the placement of telephone equipment in public rights-of-way on aesthetic grounds. The California Supreme Court denied our request, concluding that a decision on that issue may not be determinative in these federal proceedings. Accordingly, the task now before us is to predict how the California Supreme Court **[**9]** would resolve the issue. *See Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007)*. We may look to the state's intermediate appellate courts for guidance. *Id.* While the question of whether California's municipalities have the power to consider aesthetics in deciding whether to grant WCF permit applications has been addressed by us and the California Courts of Appeals, it has not been resolved in a published opinion on which we may rely. *See Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge, 182 Fed. Appx. 688, 690-91 (9th Cir. 2006)* (city may not consider aesthetics); *Sprint Telephony PCS v. County of San Diego, 140 Cal. App. 4th 748, 44 Cal. Rptr. 3d 754, 764-66 (Cal. Ct. App. 2006)* (city may consider aesthetics) *superseded by 49 Cal. Rptr. 3d 653, 143 P.3d 654 (Cal. 2006); see also 9th Cir. R. 36-3* (unpublished dispositions are not precedent); *Cal. R. Ct. 8.1115* (no citation or reliance on unpublished opinions).

i. California's Constitution

The California Constitution authorizes local governments to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." *Cal. Const. art. XI, § 7*. California's Supreme Court has explained **[**10]** that a " 'city's police power under this provision can be applied only within its own territory and is subject to displacement by general state law but otherwise is as broad as the police power exercisable by the Legislature itself.'" *Fisher v. City of Berkeley, 37 Cal. 3d 644, 209 Cal. Rptr. 682, 693 P.2d 261, 271 (Cal. 1984)* (quoting *Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001, 1009 (Cal. 1976)); see also Conn. Indem. Co. v. Super. Ct. of San Joaquin County, 23 Cal. 4th 807, 98 Cal. Rptr. 2d 221, 3 P.3d 868, 872 (Cal. 2000)* (state constitution provides city with "general authority to exercise broad police powers"). There is no question that the City's authority to regulate aesthetics is contained within this broad constitutional grant of power. *See Landgate, Inc. v. Cal. Coastal Comm'n, 17 Cal. 4th 1006, 73 Cal. Rptr. 2d 841, 953 P.2d 1188, 1198 (Cal. 1998)* (aesthetic preservation is "unquestionably [a] legitimate government purpose[ ]"); *Ehrlich v. City of Culver City, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, 450 (Cal. 1996)* ("[A]esthetic conditions have long been held to be valid exercises of the city's traditional police power.")

Thus, the threshold issue is not, as Sprint argues and the district court apparently believed, whether the PUC authorizes the City to consider aesthetics in deciding whether to grant a WCF **[**11]** permit application, but is instead whether the PUC divests the City of its consti-

tutional power to do so. [3] Therefore, the question [*723] actually before us is whether the City's consideration of aesthetics is "in conflict with general laws." *Cal. Const art. XI, § 7.* "A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by . . . legislative implication." *Action Apartment Ass'n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232, 63 Cal. Rptr. 3d 398, 163 P.3d 89, 96 (Cal. 2007)* (citation and quotation omitted). "Local legislation is contradictory to general law when it is inimical thereto." *Id.* (citation and quotation omitted). Absent a specific legislative indication to the contrary, we presume that there is no conflict where the local government regulates an area over which it has traditionally exercised control. *See id.* Sprint has the burden of demonstrating that a conflict exists. *See id.* We conclude that neither *PUC § 7901* nor *PUC § 7901.1* conflicts with the City's default power to deny a WCF permit application for aesthetic reasons.

> 3 Sprint urges us to approach the question differently, relying on language from *Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 116 P. 557 (Cal. 1911)*, that
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> > [i]t [**12] is universally recognized that the state in its sovereign capacity has the original right to control all public streets and highways, and that except in so far as that control is relinquished to municipalities by the state, either by provision of the state constitution or by legislative act not inconsistent with the Constitution, it remains with the state legislature.
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> *Id. at 562.* The defect in Sprint's argument is that it contemplates a relinquishment of state sovereignty through statute only, thus turning a blind eye to the constitutional grant of power contained in *Cal. Const. art. XI, § 7.* Our observation that the City possesses constitutionally based police powers over aesthetics is entirely consistent with the *Hopkins* court's recognition that the utility companies' right to construct telegraph facilities remained subject to "the lawful exercise by the city of such rights in regard to such use as it has under the police power." *Hopkins, 116 P. at 563*; *see also id. at 562* (city retains power to do "such things in regard to the streets and the use thereof as were justified in the legitimate exercise of the police power"); *see also Pac. Tel. & Tel. Co. v. City & County of S.F., 51 Cal. 2d 766, 336 P.2d 514, 519 (Cal. 1959)* [**13] (telephone franchise is a matter of state concern but city still controls the particular location and manner in which public utility facilities are constructed in the streets). The *Hopkins* court refrained from articulating the scope of the city's police powers because, unlike in this appeal, that was "a question in no way involved in [the] case." *Hopkins, 116 P. at 562-63.*

ii. PUC § 7901

The City's consideration of aesthetics in denying Sprint's WCF permit applications comports with *PUC § 7901*, which provides telecommunications companies with a right to construct WCFs "in such manner and at such points as not to incommode the public use of the road or highway." *Cal. Pub. Util. Code § 7901.* To "incommode" the public use is to "subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.)." 7 The Oxford English Dictionary 806 (2d ed. 1989); *see also* Webster's New Collegiate Dictionary 610 (9th ed. 1983) ("To give inconvenience or distress to."). The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a [**14] WCF, and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying, and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination.

The absence of a conflict between the City's consideration of aesthetics and *PUC § 7901* becomes even more apparent when one recognizes that the "public use" of the rights-of-way is not limited to travel. It is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions. *See* Ray Gindroz, *City Life and New Urbanism, 29 Fordham Urb. L.J. 1419, 1428 (2002)* ("A primary task of all urban architecture and landscape design is the physical definition of streets and public spaces as places of shared use."); Kevin Lynch, The Image of the City 4 (1960) ("A vivid and integrated physical setting, capable of producing a sharp image, plays a social role as well. It can furnish the raw material for the symbols and collective memories of group communication."); Camillo Sitte, City Planning According to Artistic Principles 111-12 (Rudolph Wittkower ed., Random House 1965) [**15] (1889) ("One must keep in mind that city planning in particular must allow full and complete participation to art, because it is this type of artistic endeavor, above [*724] all, that affects formatively every day and every hour of the great mass of the population . . ."). As Congress and the California Legislature have recognized, the "public use" of the roads might also encompass recreational functions. See, e.g., *Cal. Pub.*

Util. Code § 320 (burying of power lines along scenic highways); *23 U.S.C. § 131(a)* (regulation of billboards near highways necessary "to promote . . . recreational value of public travel . . . and to preserve natural beauty").

These urban planning principles are applied in the City, where the public rights-of-way are the visual fabric from which neighborhoods are made. For example, the City's staff report explains that Via Valmonte, which is adorned with an historic stone wall and borders a park, is "cherished for its rural character, and valued for its natural, unspoiled appearance, rich with native vegetation." Meanwhile, Via Azalea is described as "an attractive streetscape" that creates a residential ambiance. That the "public use" of these rights-of-way encompasses **[**16]** more than just transit is perhaps most apparent from residents' letters to the Director, which explained that they "moved to Palos Verdes for its [a]esthetics" and that they "count on this city to protect [its] unique beauty with the abundance of trees, the absence of sidewalks, even the lack of street lighting."

Thus, there is no conflict between the City's consideration of aesthetics in deciding to deny a WCF permit application and *PUC § 7901*'s statement that telecommunications companies may construct WCFs that do not incommode the public use of the rights-of-way.

iii. PUC § 7901.1

Nor does the City's consideration of aesthetics conflict with *PUC § 7901.1*'s statement that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." *Cal. Pub. Util. Code § 7901.1*. That provision was added to the PUC in 1995 to "bolster the cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise." S. Comm. on Energy, Utilities, and Commerce, **[**17]** Analysis of S.B. 621, Reg. Sess., at 5728 (Cal. 1995); *see also id.* ("[I]ntent of this bill is to provide the cities with some control over their streets."). [4] If the preexisting language of *PUC § 7901* did not divest cities of the authority to consider aesthetics in denying WCF construction permits, then, a fortiori, neither does the langauge of *PUC § 7901.1*, which only "bolsters" cities' control.

> 4 We cite the legislative history only to put the statute in its historical context; we do not rely upon it to discern the statute's meaning

Aesthetic regulations are "time, place, and manner" regulations, [5] and the California **[*725]** Legislature's use of the phrase "are accessed" in *PUC § 7901.1* does not change that conclusion in this context. Sprint argues that the "time, place and manner" in which the rights-of-way "are accessed" can refer only to when, where, and how telecommunications service providers gain entry to the public rights-of-way. We do not disagree. However, a company can "access" a city's rights-of-way in both aesthetically benign and aesthetically offensive ways. It is certainly within a city's authority to permit the former and not the latter. [6]

> 5 In the *First Amendment* context, **[**18]** California courts have recognized that governments' aesthetic-based regulations fall within the rubric of "time, place, and manner" regulations. *See, e.g., Showing Animals Respect & Kindness v. City of W. Hollywood, 166 Cal. App. 4th 815, 83 Cal. Rptr 3d 134, 141 (Ct. App. 2008)* (ordinance with declared purpose of improving city aesthetics was valid time, place, and manner regulation); *Union of Needletrades, AFL-CIO v. Super. Ct. of L.A. County, 56 Cal. App. 4th 996, 65 Cal. Rptr. 2d 838, 850-51 (Ct. App. 1997)* (requirement that leaflets comport with mall's general aesthetics constituted valid time, place, and manner regulation). We see no principled basis on which to distinguish aesthetic "time, place, and manner" regulations in the *First Amendment* context from aesthetic "time, place, and manner" regulations in the context of *PUC § 7901.1*.
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> 6 Our conclusion that the language of *PUC § 7901.1* does not conflict with the City's consideration of aesthetics in denying WCF permit applications is supported by the California Legislature's use of materially identical language in the California Coastal Act, which provides that:
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> > The public access policies of this article shall be implemented in a manner that takes into account the need to **[**19]** regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to . . [t]he need to provide for the management of access areas so as to protect . . the aesthetic values of the area by providing for the collection of litter.
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> *Cal. Pub. Res. Code § 30214(a)(4)*. If Sprint's narrow interpretation of *PUC § 7901.1* were correct, it would follow that, in the California Coastal Act, the Legislature explicitly stated that

the need to regulate the time, place, and manner of access depends on the need to protect aesthetic values, but that, in *PUC § 7901.1*, the Legislature meant to say that control over the time, place, and manner of access excluded control over aesthetics. We see no reason to ascribe this inconsistency to the California Legislature, however.

Our interpretation of California law is consistent with the outcome in *City of Anacortes*, in which we rejected a *§ 332(c)(7)(B)(iii)* challenge to a city's denial of a WCF permit application that was based on many of the same aesthetic considerations at issue here. *City of Anacortes, 572 F.3d at 994-95*. There, the city determined that the proposed WCF would have "a commercial **[**20]** appearance and would detract from the residential character and appearance of the surrounding neighborhood"; that it "would not be compatible with the character and appearance of the existing development"; and that it would "negatively impact the views" of residents *Id. at 989-90*. We noted that the city ordinance governing permit applications required the city to consider such factors as the height of the tower and its proximity to residential structures, the nature of uses of nearby properties, the surrounding topography, and the surrounding tree coverage and foliage. *Id. at 994*. We stated that "[w]e, and other courts, have held that these are legitimate concerns for a locality." *Id.* (citing *T-Mobile Cent., LLC v. United Gov't of Wyandotte County, Kan. City, 546 F.3d 1299, 1312 (10th Cir. 2008); Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d 490, 494 (2d Cir. 1999)*). What was implicit in our decision in *City of Anacortes* we make explicit now: California law does not prohibit local governments from taking into account aesthetic considerations in deciding whether to permit the development of WCFs within their jurisdictions.

Sprint warns that this conclusion will allow municipalities **[**21]** to run roughshod over WCF permit applications simply by invoking aesthetic concerns However, our decision in no way relieves municipalities of the constraints imposed upon them by the TCA. A city that invokes aesthetics as a basis for a WCF permit denial is required to produce substantial evidence to support its decision, and, even if it makes that showing, its decision is nevertheless invalid if it operates as a prohibition on the provision of wireless service in violation of *47 U.S.C. § 332(c)(7)(B)(i)(II)*. Nor does our **[*726]** decision constitute a judgment on the merits of the City's decision in this case. Our function is not to determine whether the City's denial of Sprint's permit applications was a proper weighing of all the benefits (e.g., economic opportunities, improved service, public safety) and costs (e.g., the ability of residents to enjoy their community) of the proposal, but is instead to determine whether the City violated any provision of the TCA in so doing.

2. The City's decision was supported by such relevant evidence that a reasonable mind might accept as adequate.

"[W]hile the term 'substantial evidence' is not statutorily defined in the Act, the legislative history of **[**22]** 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.'" *MetroPCS, 400 F.3d at 723* (quoting H.R. Conf. Rep. No 104-458, at 208 (1996)). A municipality's decision that is valid under local law will be upheld under the TCA's "substantial evidence" requirement where it is supported by "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id. at 725* (quoting *Town of Oyster Bay, 166 F.3d at 494*)

The City's finding that the proposed WCFs would adversely affect its aesthetic makeup easily satisfies this standard. The Council reviewed propagation maps and mock-ups of the proposed WCFs and a report that detailed the aesthetic values at stake. It had the benefit of public comments and an oral presentation from Sprint's personnel. From the entirety of the evidence, one could reasonably determine, as the City did, that the Via Azalea WCF would detract from the residential character of the neighborhood and that the Via Valmonte WCF would not be in keeping with the appearance of that main entrance to the City. Consequently, we find that **[**23]** the City's decision was supported by substantial evidence, and we reverse the district court.

B. ***Section 332(c)(7)(B)(i)(II)***

The TCA provides that a locality's denial of a WCF permit application "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)*. "[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." *MetroPCS, 400 F.3d at 731.* [7] The "effective prohibition" inquiry "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." [8] *Id at 731*. Because we conclude that Sprint has not shown the existence of a significant gap as a matter of law, we do not reach the second element of the analysis.

7 We focus on the "effective prohibition" clause because the City has not adopted a "general ban" on wireless services. *See MetroPCS, 400 F.3d at 731*. To the contrary, the City's ordinance contemplates the construction of WCFs,

and the City has repeatedly granted permits for WCF construction **[**24]** in the past.

8 We have adopted the "multiple provider rule," which focuses the "significant gap" inquiry on the issue of whether a particular provider is prevented from filling a significant gap in its own service coverage; the availability of wireless service from other providers in the area is irrelevant for purposes of this analysis. *MetroPCS, 400 F.3d at 733.*

The district court's legal conclusion that Sprint established the existence **[*727]** of a "significant gap" rests on two purportedly undisputed facts: (1) "[w]ithout either facility, [Sprint's] network will contain significant gaps in coverage" and (2) existing wireless coverage in the City was "based on obsolete facilities needing replacement." These factual findings were insufficient to support summary judgment because they were disputed in the record below.

1. Significance of the Gap

"'[S]ignificant gap' determinations are extremely fact-specific inquiries that defy any bright-line legal rule." *Id. at 733.* Yet Sprint and the district court take a bare-bones approach to this inquiry. The district court simply declared, as a matter of fact and fiat, that there was "a significant gap" in Sprint's coverage in the City. Sprint defends this **[**25]** factual finding on appeal, arguing that its presentation of radio frequency propagation maps was sufficient to establish a "significant gap" in coverage. We disagree. Sprint's documentation stated that the proposed WCFs would provide "good coverage" for .2 to .4 miles in various directions. However, it remains far from clear whether these estimates were relative to the coverage available from existing WCFs or to the coverage that would be available if there were no WCFs at all (i.e., if the existing WCFs were removed). In any event, that there was a "gap" in coverage is certainly not sufficient to establish that there was a "significant gap" in coverage. *See id. at 733 n.10* ("[T]he relevant service gap must be truly 'significant . . . .' "); *id. at 733* ("The TCA does not guarantee wireless service providers coverage free of small 'dead spots . . . .' ").

The district court found that there was a "gap" in Sprint's coverage but failed to analyze its legal significance. District courts have considered a wide range of context-specific factors in assessing the significance of alleged gaps. *See, e.g., Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus, 197 F.3d 64, 70 n.2 (3d Cir. 1999)* **[**26]** (whether gap affected significant commuter highway or railway); *Powertel/Atlanta, Inc. v. City of Clarkston, No. 1:05-CV-3068, 2007 U.S. Dist. LEXIS 56638, 2007 WL 2258720, at *6 (N.D. Ga. Aug. 3, 2007)* (assessing the "nature and character of that area or the number of potential users in that area who may be affected by the alleged lack of service"); *Voice Stream PCS I, LLC v. City of Hillsboro, 301 F. Supp. 2d 1251, 1261 (D. Or. 2004)* (whether facilities were needed to improve weak signals or to fill a complete void in coverage); *Nextel Partners, Inc. v. Town of Amherst, 251 F. Supp. 2d 1187, 1196 (W.D.N.Y. 2003)* (gap covers well traveled roads on which customers lack roaming capabilities); *Am. Cellular Network Co., LLC v. Upper Dublin Twp., 203 F. Supp. 2d 383, 390-91 (E.D. Pa. 2002)* (considering "drive tests"); *Sprint Spectrum, L.P. v. Town of Ogunquit, 175 F. Supp. 2d 77, 90 (D. Me. 2001)* (whether gap affects commercial district); *APT Minneapolis, Inc. v. Stillwater Twp., No. 00-2500, 2001 U.S. Dist. LEXIS 24610, 2001 WL 1640069, at *2-3 (D. Minn. June 22, 2001)* (whether gap poses public safety risk). Here, the district court said nothing about the gap from which it could have determined its relative significance (i.e., whether preventing **[**27]** its closure was tantamount to a prohibition on telecommunications service), nor did Sprint's counsel offer any support for a conclusion that the gap was significant. [9]

9 During oral argument, Sprint's counsel was unable to explain satisfactorily on what basis the district court found that the gap was significant. He acknowledged that there was a dispute as to the significance of the gap in Sprint's coverage within the City, and he even conceded that he had seen nothing in the record that led him to believe that the matter was uncontested.

[*728] *2. Obsolescence of Existing WCF Network*

We need not decide whether the TCA's anti-prohibition language even covers situations, like that presented here, in which a telecommunications service provider seeks to replace existing WCFs, as contrasted with the more typical situation in which the provider seeks to construct new WCFs. It is sufficient to note that the record does not establish the obsolescence of the old facilities as a matter of uncontested fact. Sprint's representatives not only failed to explain why the existing facilities were no longer usable, but they actually undermined that position by pointing out that those facilities were currently **[**28]** serving some four thousand residents and acknowledging at the public hearing that Sprint service was generally available in the City. Residents' comments at the public hearing and the drive test results contained in the staff report submitted to the Council further illustrate that Sprint's existing network was, at the very least, functional. Consequently, we reverse the grant of summary judgment in Sprint's favor on its *§ 332(c)(7)(B)(i)(II)* "effective prohibition" claim.

C. *Section 253*

The district court also concluded that the City's ordinance was "preempted by the *Supremacy Clause*, insofar as it conflicts with *section 253(a)* of the Telecom Act." However, due to intervening changes in the law, this *Supremacy Clause* claim is no longer viable. *See Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571, 578 (9th Cir. 2008)* (en banc) (overruling *City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001)*, and holding that "a plaintiff suing a municipality under *section 253(a)* must show actual or effective prohibition, rather than the mere possibility of prohibition" (citation omitted)); *see also City of Anacortes, 572 F.3d at 993*. Moreover, we need not decide whether *§ 253* contemplates **[**29]** "as applied" challenges. Insofar as Sprint seeks to advance an "as applied" challenge under *§ 253*, we conclude, for the reasons set forth above, that Sprint has not demonstrated a prohibition on the provision of wireless service as a matter of law. *See Sprint Telephony, 543 F.3d at 579* ("We need not decide whether Sprint's suit falls under *§ 253* or *§ 332*. As we now hold, the legal standard is the same under either.").

IV. CONCLUSION

Because the City's decision to deny Sprint's application for a permit to construct two new WCFs was supported by substantial evidence and because disputed issues of material fact preclude a finding that the decision constituted a prohibition on the provision of wireless service, we **REVERSE and REMAND**.

CEQA

The California Environmental Quality Act

Title 14. California Code of Regulations
Chapter 3. Guidelines for Implementation of the California Environmental Quality Act

Article 19. Categorical Exemptions

Sections 15300 to 15333

15300. Categorical Exemptions

Section 21084 of the Public Resources Code requires these Guidelines to include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall, therefore, be exempt from the provisions of CEQA.

In response to that mandate, the Secretary for Resources has found that the following classes of projects listed in this article do not have a significant effect on the environment, and they are declared to be categorically exempt from the requirement for the preparation of environmental documents.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15300.1. Relation to Ministerial Projects

Section 21080 of the Public Resources Code exempts from the application of CEQA those projects over which public agencies exercise only ministerial authority. Since ministerial projects are already exempt, categorical exemptions should be applied only where a project is not ministerial under a public agency's statutes and ordinances. The inclusion of activities which may be ministerial within the classes and examples contained in this article shall not be construed as a finding by the Secretary for Resources that such an activity is discretionary.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15300.2. Exceptions

(a) Location. Classes 3, 4, 5, 6, and 11 are qualified by consideration of where the project is to be located -- a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant. Therefore, these classes are considered to apply all instances, except where the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies.

(b) Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.

(c) Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

(d) Scenic Highways. A categorical exemption shall not be used for a project which may result in damage to scenic resources, including but not limited to, trees, historic buildings, rock outcroppings, or similar resources, within a highway officially designated as a state scenic highway. This does not apply to improvements which are required as mitigation by an adopted negative declaration or certified EIR.

(e) Hazardous Waste Sites. A categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code

(f) Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.

Note: Authority cited: Section 21083, Public Resources Code; References. Sections 21084 and 21084.1, Public Resources Code; *Wildlife Alive v. Chickering* (1977) 18 Cal.3d 190; *League for Protection of Oakland's Architectural and Historic Resources v City of Oakland* (1997) 52 Cal.App.4th 896; *Citizens for Responsible Development in West Hollywood v. City of West Hollywood* (1995) 39 Cal.App.4th 925, *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810; *Association for the Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720; and *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464

Discussion: In *McQueen v Mid-Peninsula Regional Open Space* (1988) 202 Cal. App 3d 1136, the court reiterated that categorical exemptions are construed strictly, shall not be unreasonably expanded beyond their terms, and may not be used where there is substantial evidence that there are unusual circumstances (including future activities) resulting in (or which might reasonably result in) significant impacts which threaten the environment.

Public Resources Code Section 21084 provides several additional exceptions to the use of categorical exemptions. Pursuant to that statute, none of the following may qualify as a categorical exemption: (1) a project which may result in damage to scenic resources, including but not limited to, trees, historic buildings, rock outcroppings, or similar resources within a scenic highway (this does not apply to improvements which are required as mitigation for a project for which a negative declaration or EIR has previously been adopted or certified; (2) a project located on a site included on any list compiled pursuant to Government Code section 65962.5 (hazardous and toxic waste sites, etc.); and (3) a project which may cause a substantial adverse change in the significance of a historical resource.

15300.3. Revisions to List of Categorical Exemptions

A public agency may, at any time, request that a new class of categorical exemptions be added, or an existing one amended or deleted. This request must be made in writing to the Office of Planning and Research and shall contain detailed information to support the request The granting of such request shall be by amendment to these Guidelines.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15300.4. Application By Public Agencies

Each public agency shall, in the course of establishing its own procedures, list those specific activities

which fall within each of the exempt classes, subject to the qualification that these lists must be consistent with both the letter and the intent expressed in the classes. Public agencies may omit from their implementing procedures classes and examples that do not apply to their activities, but they may not require EIRs for projects described in the classes and examples in this article except under the provisions of Section 15300.2.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15301. Existing Facilities

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use.

Examples include but are not limited to:

(a) Interior or exterior alterations involving such things as interior partitions, plumbing, and electrical conveyances;

(b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services;

(c) Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety).

(d) Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, unless it is determined that the damage was substantial and resulted from an environmental hazard such as earthquake, landslide, or flood;

(e) Additions to existing structures provided that the addition will not result in an increase of more than

(1) 50 percent of the floor area of the structures before the addition, or 2,500 square feet, whichever is less; or

(2) 10,000 square feet if:

(A) The project is in an area where all public services and facilities are available to allow for maximum development permissible in the General Plan and

(B) The area in which the project is located is not environmentally sensitive.

(f) Addition of safety or health protection devices for use during construction of or in conjunction with existing structures, facilities, or mechanical equipment, or topographical features including navigational devices;

(g) New copy on existing on and off-premise signs;

(h) Maintenance of existing landscaping, native growth, and water supply reservoirs (excluding the use

of pesticides , as defined in Section 12753, Division 7, Chapter 2, Food and Agricultural Code).

(i) Maintenance of fish screens, fish ladders, wildlife habitat areas, artificial wildlife waterway devices, streamflows, springs and waterholes, and stream channels (clearing of debris) to protect fish and wildlife resources;

(j) Fish stocking by the California Department of Fish and Game.

(k) Division of existing multiple family or single-family residences into common-interest ownership and subdivision of existing commercial or industrial buildings, where no physical changes occur which are not otherwise exempt;

(l) Demolition and removal of individual small structures listed in this subdivision;

(1) One single-family residence. In urbanized areas, up to three single-family residences may be demolished under this exemption.

(2) A duplex or similar multifamily residential structure. In urbanized areas, this exemption applies to duplexes and similar structures where not more than six dwelling units will be demolished.

(3) A store, motel, office, restaurant, or similar small commercial structure if designed for an occupant load of 30 persons or less. In urbanized areas, the exemption also applies to the demolition of up to three such commercial buildings on sites zoned for such use.

(4) Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences.

(m) Minor repairs and alterations to existing dams and appurtenant structures under the supervision of the Department of Water Resources.

(n) Conversion of a single family residence to office use.

(o) Installation, in an existing facility occupied by a medical waste generator, of a steam sterilization unit for the treatment of medical waste generated by that facility provided that the unit is installed and operated in accordance with the Medical Waste Management Act (Section 117600, et seq., of the Health and Safety Code) and accepts no offsite waste.

(p) Use of a single-family residence as a small family day care home, as defined in Section 1596.78 of the Health and Safety Code.

Note: Authority cited: Section 21083, Public Resources Code, References Sections 21084, Public Resources Code; *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307.

Discussion: This section describes the class of projects wherein the proposed activity will involve negligible or no expansion of the use existing at the time the exemption is granted. Application of this exemption, as all categorical exemptions, is limited by the factors described in section 15300.2. Accordingly, a project with significant cumulative impacts or which otherwise has a reasonable possibility of resulting in a significant effect does not quality for a Class 1 exemption.

15302. Replacement or Reconstruction

Class 2 consists of replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same

purpose and capacity as the structure replaced, including but not limited to:

(a) Replacement or reconstruction of existing schools and hospitals to provide earthquake resistant structures which do not increase capacity more than 50 percent.

(b) Replacement of a commercial structure with a new structure of substantially the same size, purpose, and capacity.

(c) Replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity.

(d) Conversion of overhead electric utility distribution system facilities to underground including connection to existing overhead electric utility distribution lines where the surface is restored to the condition existing prior to the undergrounding.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15303. New Construction or Conversion of Small Structures

Class 3 consists of construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. The numbers of structures described in this section are the maximum allowable on any legal parcel. Examples of this exemption include, but are not limited to:

(a) One single-family residence, or a second dwelling unit in a residential zone. In urbanized areas, up to three single-family residences may be constructed or converted under this exemption.

(b) A duplex or similar multi-family residential structure, totaling no more than four dwelling units.◆ In urbanized areas, this exemption applies to apartments, duplexes and similar structures designed for not more than six dwelling units.

(c) A store, motel, office, restaurant or similar structure not involving the use of significant amounts of hazardous substances, and not exceeding 2500 square feet in floor area. In urbanized areas, the exemption also applies to up to four such commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive.

(d) Water main, sewage, electrical, gas, and other utility extensions, including street improvements, of reasonable length to serve such construction.

(e) Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences.

(f) An accessory steam sterilization unit for the treatment of medical waste at a facility occupied by a medical waste generator, provided that the unit is installed and operated in accordance with the Medical Waste Management Act (Section 117600, et seq., of the Health and Safety Code) and accepts no offsite waste.

Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21084 and 21084.2, Public Resources Code.

Discussion: This section describes the class of small projects involving new construction or conversion of existing small structures. The 1998 revisions to the section clarify the types of projects to which it applies. In order to simplify and standardize application of this section to commercial structures, the reference to "occupant load of 30 persons or less" contained in the prior guideline was replaced by a limit on square footage. Subsection (c) further limits the use of this exemption to those commercial projects which have available all necessary public services and facilities, and which are not located in an environmentally sensitive area.

15304. Minor Alterations to Land

Class 4 consists of minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry or agricultural purposes. Examples include, but are not limited to

(a) Grading on land with a slope of less than 10 percent, except that grading shall not be exempt in a waterway, in any wetland, in an officially designated (by federal, state, or local government action) scenic area, or in officially mapped areas of severe geologic hazard such as an Alquist-Priolo Earthquake Fault Zone or within an official Seismic Hazard Zone, as delineated by the State Geologist.

(b) New gardening or landscaping, including the replacement of existing conventional landscaping with water efficient or fire resistant landscaping.

(c) Filling of earth into previously excavated land with material compatible with the natural features of the site;

(d) Minor alterations in land, water, and vegetation on existing officially designated wildlife management areas or fish production facilities which result in improvement of habitat for fish and wildlife resources or greater fish production;

(e) Minor temporary use of land having negligible or no permanent effects on the environment, including carnivals, sales of Christmas trees, etc;

(f) Minor trenching and backfilling where the surface is restored;

(g) Maintenance dredging where the spoil is deposited in a spoil area authorized by all applicable state and federal regulatory agencies;

(h) The creation of bicycle lanes on existing rights-of-way.

(i) Fuel management activities within 30 feet of structures to reduce the volume of flammable vegetation, provided that the activities will not result in the taking of endangered, rare, or threatened plant or animal species or significant erosion and sedimentation of surface waters. This exemption shall apply to fuel management activities within 100 feet of a structure if the public agency having fire protection responsibility for the area has determined that 100 feet of fuel clearance is required due to extra hazardous fire conditions.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

Discussion: This section describes the class of projects involving minor alterations to the land. The 1998 revision to the section specified that this exemption applies to fuel management activities which will not

impact threatened or endangered species or result in significant erosion or sedimentation.

15305. Minor Alterations in Land Use Limitations

Class 5 consists of minor alterations in land use limitations in areas with an average slope of less than 20%, which do not result in any changes in land use or density, including but not limited to:

(a) Minor lot line adjustments, side yard, and set back variances not resulting in the creation of any new parcel;

(b) Issuance of minor encroachment permits;

(c) Reversion to acreage in accordance with the Subdivision Map Act.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15306. Information Collection

Class 6 consists of basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource. These may be strictly for information gathering purposes, or as part of a study leading to an action which a public agency has not yet approved, adopted, or funded.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15307. Actions by Regulatory Agencies for Protection of Natural Resources

Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15308. Actions by Regulatory Agencies for Protection of the Environment

Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environ- mental degradation are not included in this exemption.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public

Resources Code; *International Longshoremen's and Warehousemen's Union v Board of Supervisors*, (1981) 116 Cal. App. 3d 265.

Discussion: This section reflects the ruling in *International Longshoremen's and Warehousemen's Union v. Board of Supervisors*, (1981) 116 Cal. App. 3d 265. That decision ruled that the use of categorical exemption Class 8 was improper for a change in a county air pollution rule that allowed a doubling of the emissions of oxides of nitrogen. The court followed the ruling in *Wildlife Alive v Chickering*, (1976) 18 Cal. 3d 190 that provided that where there is a reasonable possibility that a project or activity may have a significant effect on the environment, an exemption is improper.

15309. Inspections

Class 9 consists of activities limited entirely to inspections, to check for performance of an operation, or quality, health, or safety of a project, including related activities such as inspection for possible mislabeling, misrepresentation, or adulteration of products.

Note: Authority cited: Section 21083, Public Resources Code. Reference: Section 21084, Public Resources Code.

15310. Loans

Class 10 consists of loans made by the Department of Veterans Affairs under the Veterans Farm and Home Purchase Act of 1943, mortgages for the purchase of existing structures where the loan will not be used for new construction and the purchase of such mortgages by financial institutions. Class 10 includes but is not limited to the following examples:

(a) Loans made by the Department of Veterans Affairs under the Veterans Farm and Home Purchase Act of 1943.

(b) Purchases of mortgages from banks and mortgage companies by the Public Employees Retirement System and by the State Teachers Retirement System.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15311. Accessory Structures

Class 11 consists of construction, or placement of minor structures accessory to (appurtenant to) existing commercial, industrial, or institutional facilities, including but not limited to.

(a) On-premise signs;

(b) Small parking lots;

(c) Placement of seasonal or temporary use items such as lifeguard towers, mobile food units, portable restrooms, or similar items in generally the same locations from time to time in publicly owned parks, stadiums, or other facilities designed for public use.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15312. Surplus Government Property Sales

Class 12 consists of sales of surplus government property except for parcels of land located in an area of statewide, regional, or areawide concern identified in Section 15206(b)(4). However, even if the surplus property to be sold is located in any of those areas, its sale is exempt if:

(a) The property does not have significant values for wildlife habitat or other environmental purposes, and

(b) Any of the following conditions exist:

(1) The property is of such size, shape, or inaccessibility that it is incapable of independent development or use; or

(2) The property to be sold would qualify for an exemption under any other class of categorical exemption in these Guidelines; or

(3) The use of the property and adjacent property has not changed since the time of purchase by the public agency.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

Discussion: In *McQueen v. Midpeninsula Regional Open Space District* (1988) 202 Cal. App. 3d 1136, the court stated that the terms 'sale' and 'acquisition' are not interchangeable and reaffirmed that exemptions must comply with the "specific terms" of the exemption which are to be narrowly construed.

15313. Acquisition of Lands for Wildlife Conservation Purposes

Class 13 consists of the acquisition of lands for fish and wildlife conservation purposes including (a) preservation of fish and wildlife habitat, (b) establishing ecological reserves under Fish and Game Code Section 1580, and (c) preserving access to public lands and waters where the purpose of the acquisition is to preserve the land in its natural condition.

Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15314. Minor Additions to Schools

Class 14 consists of minor additions to existing schools within existing school grounds where the addition does not increase original student capacity by more than 25% or ten classrooms, whichever is less. The addition of portable classrooms is included in this exemption.

Note: Authority cited: Section 21083, Public Resources Code; Reference. Section 21084, Public Resources Code.

15315. Minor Land Divisions

Class 15 consists of the division of property in urbanized areas zoned for residential, commercial, or industrial use into four or fewer parcels when the division is in conformance with the General Plan and zoning, no variances or exceptions are required, all services and access to the proposed parcels to local standards are available, the parcel was not involved in a division of a larger parcel within the previous 2 years, and the parcel does not have an average slope greater than 20 percent

Note: Authority cited: Section 21083, Public Resources Code; Reference Section 21084, Public Resources Code.

15316. Transfer of Ownership of Land in Order to Create Parks

Class 16 consists of the acquisition, sale, or other transfer of land in order to establish a park where the land is in a natural condition or contains historical or archaeological resources and either:

(a) The management plan for the park has not been prepared, or

(b) The management plan proposes to keep the area in a natural condition or preserve the historic or archaeological resources. CEQA will apply when a management plan is proposed that will change the area from its natural condition or cause substantial adverse change in the significance of the historic or archaeological resource.

Note: Authority cited: Section 21083, Public Resources Code; Reference Sections 21084, 21083 2, and 21084.1, Public Resources Code.

Discussion: In *McQueen v Midpeninsula Regional Open Space District* (1988) 202 Cal. App. 3d 1136, the court ruled that the taking or acquiring property "as-is" does not constitute a "natural condition" when there is substantial evidence in the record that hazardous waste has been upon it

15317. Open Space Contracts or Easements

Class 17 consists of the establishment of agricultural preserves, the making and renewing of open space contracts under the Williamson Act, or the acceptance of easements or fee interests in order to maintain the open space character of the area. The cancellation of such preserves, contracts, interests, or easements is not included and will normally be an action subject to the CEQA process.

Note: Authority cited: Section 21083, Public Resources Code; Reference Section 21084, Public Resources Code.

15318. Designation of Wilderness Areas

Class 18 consists of the designation of wilderness areas under the California Wilderness System

Note: Authority cited: Section 21083, Public Resources Code; Reference. Section 21084, Public Resources Code.

15319. Annexations of Existing Facilities and Lots for Exempt Facilities

Class 19 consists of only the following annexations:

(a) Annexations to a city or special district of areas containing existing public or private structures developed to the density allowed by the current zoning or pre-zoning of either the gaining or losing governmental agency whichever is more restrictive, provided, however, that the extension of utility services to the existing facilities would have a capacity to serve only the existing facilities.

(b) Annexations of individual small parcels of the minimum size for facilities exempted by Section 15303, New Construction or Conversion of Small Structures.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

Discussion: The exemption under subsection (a) is not allowed if it is foreseeable that utility services would extend into the annexed parcels and have the potential to serve a greater capacity than existing uses. The exemption is also unavailable if "unusual circumstances" under Section 15300.2(c) are found. For example, in *City of Santa Clara v. LAFCO of Santa Clara County*, (1983) 139 Cal. App. 3d 923, the court found that unusual circumstances existed when the annexing city's general plan called for the newly annexed parcels to eventually become residential and industrial rather than the prezoned agricultural use. The unusual circumstances arose from the inconsistency between the prezoned agricultural use and the general plan's designated land use and thus precluded the use of this categorical exemption.

15320. Changes in Organization of Local Agencies

Class 20 consists of changes in the organization or reorganization of local governmental agencies where the changes do not change the geographical area in which previously existing powers are exercised. Examples include but are not limited to:

(a) Establishment of a subsidiary district;

(b) Consolidation of two or more districts having identical powers;

(c) Merger with a city of a district lying entirely within the boundaries of the city.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15321. Enforcement Actions by Regulatory Agencies

Class 21 consists of:

(a) Actions by regulatory agencies to enforce or revoke a lease, permit, license, certificate, or other entitlement for use issued, adopted, or prescribed by the regulatory agency or enforcement of a law, general rule, standard, or objective, administered or adopted by the regulatory agency. Such actions include, but are not limited to, the following:

(1) The direct referral of a violation of lease, permit, license, certificate, or entitlement for use or of a general rule, standard, or objective to the Attorney General, District Attorney, or City Attorney as appropriate, for judicial enforcement;

(2) The adoption of an administrative decision or order enforcing or revoking the lease, permit, license, certificate, or entitlement for use or enforcing the general rule, standard, or objective.

(b) Law enforcement activities by peace officers acting under any law that provides a criminal sanction,

(c) Construction activities undertaken by the public agency taking the enforcement or revocation action are not included in this exemption.

Note: Authority cited: Section 21083, Public Resources Code; Reference. Section 21084, Public Resources Code.

Discussion: The exemption for law enforcement activities by peace officers acting under any law that provides a criminal sanction is based largely on the rationale explained by the court in *Pacific Water Conditioning Association v. City Council*, (1977) 73 Cal. App. 3d 546. There the court noted that enforcement actions are taken long after the public agency, or possibly the State Legislature, has exercised its discretion to set standards governing a certain kind of activity.

15322. Educational or Training Programs Involving No Physical Changes

Class 22 consists of the adoption, alteration, or termination of educational or training programs which involve no physical alteration in the area affected or which involve physical changes only in the interior of existing school or training structures. Examples include but are not limited to:

(a) Development of or changes in curriculum or training methods.

(b) Changes in the grade structure in a school which do not result in changes in student transportation.

Note: Authority cited. Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15323. Normal Operations of Facilities for Public Gatherings

Class 23 consists of the normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose. For the purposes of this section, "past history" shall mean that the same or similar kind of activity has been occurring for at least three years and that there is a reasonable expectation that the future occurrence of the activity would not represent a change in the operation of the facility. Facilities included within this exemption include, but are not limited to, racetracks, stadiums, convention centers, auditoriums, amphitheaters, planetariums, swimming pools, and amusement parks

Note: Authority cited: Section 21083, Public Resources Code; Reference Section 21084, Public Resources Code.

Discussion: This section clarifies what is meant by the term "a past history of the facility being used for the same kind of purpose." The section relates the concept of past history to public expectations for use of the facility in the future. Where the facility has been used for a particular purpose for several years and people expect the use to continue in the future, continuation of that use would not represent a change in the environmental conditions. For example, if a county fair had included a stock car racing meet for each of three consecutive years, people living in the area would have come to expect that the county fair would involve stock car racing in the future. Continuing racing activity would not represent a substantial

change in the environment from what people had come to expect. However, in *Lewis v 17th District Agricultural Ass'n* (1985) 165 Cal. App. 3d 823, the court found that the existence of residential areas near a racetrack constituted "unusual circumstances" (Guidelines section 15300.2 (c)) which removed the racing activity from the exemption. Additionally, the court found that imposing mitigation measures to offset the possible significant adverse change in the environment caused by the activity will not cause the exemption to be applicable unless the mitigation measures result in the elimination of the possibility of a significant adverse change in the environment. The decision to allow stock car racing at a county fair in the first place could well call for some kind of CEQA analysis before starting that activity. Once the activity has been established, however, continuing the activity does not represent a change, and absent a significant change in the use and absent the existence of unusual circumstances. Concerning what are considered normal operations of facilities for public gatherings see *Campbell v Third District Agricultural Association* (1987) 195 Cal.App. 3d 115.

15324. Regulations of Working Conditions

Class 24 consists of actions taken by regulatory agencies, including the Industrial Welfare Commission as authorized by statute, to regulate any of the following:

(a) Employee wages,

(b) Hours of work, or

(c) Working conditions where there will be no demonstrable physical changes outside the place of work.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15325. Transfers of Ownership of Interest In Land to Preserve Existing Natural Conditions and Historical Resources

Class 25 consists of the transfers of ownership of interests in land in order to preserve open space, habitat, or historical resources.[illegible] Examples include but are not limited to:

(a) Acquisition, sale, or other transfer of areas to preserve the existing natural conditions, including plant or animal habitats.

(b) Acquisition, sale, or other transfer of areas to allow continued agricultural use of the areas.

(c) Acquisition, sale, or other transfer to allow restoration of natural conditions, including plant or animal habitats.

(d) Acquisition, sale, or other transfer to prevent encroachment of development into flood plains.

(e) Acquisition, sale, or other transfer to preserve historical resources.

(f) Acquisition, sale, or other transfer to preserve open space or lands for park purposes
Authority cited: Section 21083, Public Resources Code Reference: Section 21084, Public Resources Code.

15326. Acquisition of Housing for Housing Assistance Programs

Class 26 consists of actions by a redevelopment agency, housing authority, or other public agency to implement an adopted Housing Assistance Plan by acquiring an interest in housing units. The housing units may be either in existance or possessing all required permits for construction when the agency makes its final decision to acquire the units.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15327. Leasing New Facilities

(a) Class 27 consists of the leasing of a newly constructed or previously unoccupied privately owned facility by a local or state agency where the local governing authority determined that the building was exempt from CEQA. To be exempt under this section, the proposed use of the facility:

(1) Shall be in conformance with existing state plans and policies and with general, community, and specific plans for which an EIR or Negative Declaration has been prepared;

(2) Shall be substantially the same as that originally proposed at the time the building permit was issued;

(3) Shall not result in a traffic increase of greater than 10% of front access road capacity; and

(4) Shall include the provision of adequate employee and visitor parking facilities.

(b) Examples of Class 27 include, but are not limited to:

(1) Leasing of administrative offices in newly constructed office space.

(2) Leasing of client service offices in newly constructed retail space;

(3) Leasing of administrative and/or client service offices in newly constructed industrial parks.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15328. Small Hydroelectric Projects at Existing Facilities

Class 28 consists of the installation of hydroelectric generating facilities in connection with existing dams, canals, and pipelines where.

(a) The capacity of the generating facilities is 5 megawatts or less;

(b) Operation of the generating facilities will not change the flow regime in the affected stream, canal, or pipeline including but not limited to:

(1) Rate and volume of flow;

(2) Temperature;

(3) Amounts of dissolved oxygen to a degree that could adversely affect aquatic life; and

(4) Timing of release.

(c) New power lines to connect the generating facilities to existing power lines will not exceed one mile in length if located on a new right of way and will not be located adjacent to a wild or scenic river;

(d) Repair or reconstruction of the diversion structure will not raise the normal maximum surface elevation of the impoundment;

(e) There will be no significant upstream or downstream passage of fish affected by the project;

(f) The discharge from the power house will not be located more than 300 feet from the toe of the diversion structure;

(g) The project will not cause violations of applicable state or federal water quality standards;

(h) The project will not entail any construction on or alteration of a site included in or eligible for inclusion in the National Register of Historic Places; and

(i) Construction will not occur in the vicinity of any endangered, rare, or threatened species.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

15329. Cogeneration Projects at Existing Facilities

Class 29 consists of the installation of cogeneration equipment with a capacity of 50 megawatts or less at existing facilities meeting the conditions described in this section.

(a) At existing industrial facilities, the installation of cogeneration facilities will be exempt where it will:

(1) Result in no net increases in air emissions from the industrial facility, or will produce emissions lower than the amount that would require review under the new source review rules applicable in the county, and

(2) Comply with all applicable state, federal, and local air quality laws.

(b) At commercial and institutional facilities, the installation of cogeneration facilities will be exempt if the installation will:

(1) Meet all the criteria described in subdivision (a);

(2) Result in no noticeable increase in noise to nearby residential structures;

(3) Be contiguous to other commercial or institutional structures.

Note: Authority cited: Section 21083, Public Resources Code; Reference. Section 21084, Public Resources Code.

15330. Minor Actions to Prevent, Minimize, Stabilize, Mitigate or Eliminate the Release or Threat of Release of Hazardous Waste or Hazardous Substances.

Class 30 consists of any minor cleanup actions taken to prevent, minimize, stabilize, mitigate, or eliminate the release or threat of release of a hazardous waste or substance which are small or medium removal actions costing $1 million or less.

(a) No cleanup action shall be subject to this Class 30 exemption if the action requires the onsite use of a hazardous waste incinerator or thermal treatment unit or the relocation of residences or businesses, or the action involves the potential release into the air of volatile organic compounds as defined in Health and Safety Code sSection 25123.6, except for small scale in situ soil vapor extraction and treatment systems which have been permitted by the local Air Pollution Control District or Air Quality Management District. All actions must be consistent with applicable state and local environmental permitting requirements including, but not limited to, off-site disposal, air quality rules such as those governing volatile organic compounds and water quality standards, and approved by the regulatory body with jurisdiction over the site.

(b) Examples of such minor cleanup actions include but are not limited to

(1) Removal of sealed, non-leaking drums or barrels of hazardous waste or substances that have been stabilized, containerized and are designated for a lawfully permitted destination;

(2) Maintenance or stabilization of berms, dikes, or surface impoundments;

(3) Construction or maintenance or interim of temporary surface caps;

(4) Onsite treatment of contaminated soils or sludges provided treatment system meets Title 22 requirements and local air district requirements;

(5) Excavation and/or offsite disposal of contaminated soils or sludges in regulated units;

(6) Application of dust suppressants or dust binders to surface soils,

(7) Controls for surface water run-on and run-off that meets seismic safety standards;

(8) Pumping of leaking ponds into an enclosed container;

(9) Construction of interim or emergency ground water treatment systems;

(10) Posting of warning signs and fencing for a hazardous waste or substance site that meets legal requirements for protection of wildlife.

Authority cited: Section 21083, Public Resources Code Reference. Section 21084, Public Resources Code.

15331. Historical Resource Restoration/Rehabilitation.

Class 31 consists of projects limited to maintenance, repair, stabilization, rehabilitation, restoration, preservation, conservation or reconstruction of historical resources in a manner consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings (1995), Weeks and Grimmer.

Note: Authority cited: Section 21083, Public Resources Code. Reference. Section 21084, Public Resources Code.

Discussion: This section establishes an exemption for projects involving the maintenance, rehabilitation, restoration, preservation, or reconstruction of historical resources, provided that the activity meets published federal standards for the treatment of historic properties. These federal standards describe means of preserving, rehabilitating, restoring, and reconstructing historic buildings without adversely affecting their historic significance. Use of this exemption, like all categorical exemptions, is limited by the factors described in section 15300.2 and is not to be used where the activity would cause a substantial adverse change in the significance of a historical resource.

15332. In-Fill Development Projects.

Class 32 consists of projects characterized as in-fill development meeting the conditions described in this section.

(a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.

(b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.

(c) The project site has no value as habitat for endangered, rare or threatened species.

(d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.

(e) The site can be adequately served by all required utilities and public services.

Note: Authority cited: Section 21083, Public Resources Code. Reference: Section 21084, Public Resources Code.

Discussion: This section is intended to promote infill development within urbanized areas. The class consists of environmentally benign in-fill projects which are consistent with local general plan and zoning requirements. This class is not intended to be applied to projects which would result in any significant traffic, noise, air quality, or water quality effects. Application of this exemption, as all categorical exemptions, is limited by the factors described in section 15300.2.

15333. Small Habitat Restoration Projects.

Class 33 consists of projects not to exceed five acres in size to assure the maintenance, restoration, enhancement, or protection of habitat for fish, plants, or wildlife provided that:

(a) There would be no significant adverse impact on endangered, rare or threatened species or their habitat pursuant to section 15065,

(b) There are no hazardous materials at or around the project site that may be disturbed or removed, and

(c) The project will not result in impacts that are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

(d) Examples of small restoration projects may include, but are not limited to:

(1) revegetation of disturbed areas with native plant species;

(2) wetland restoration, the primary purpose of which is to improve conditions for waterfowl or other species that rely on wetland habitat;

(3) stream or river bank revegetation, the primary purpose of which is to improve habitat for amphibians or native fish;

(4) projects to restore or enhance habitat that are carried out principally with hand labor and not mechanized equipment.

(5) stream or river bank stabilization with native vegetation or other bioengineering techniques, the primary purpose of which is to reduce or eliminate erosion and sedimentation; and

(6) culvert replacement conducted in accordance with published guidelines of the Department of Fish and Game or NOAA Fisheries, the primary purpose of which is to improve habitat or reduce sedimentation.

Authority cited: Section 21083, Public Resources Code. Reference: Section 21084, Public Resources Code.

| CERES | CEQA Home | CEQA Guidelines | Wetlands | LUPIN |

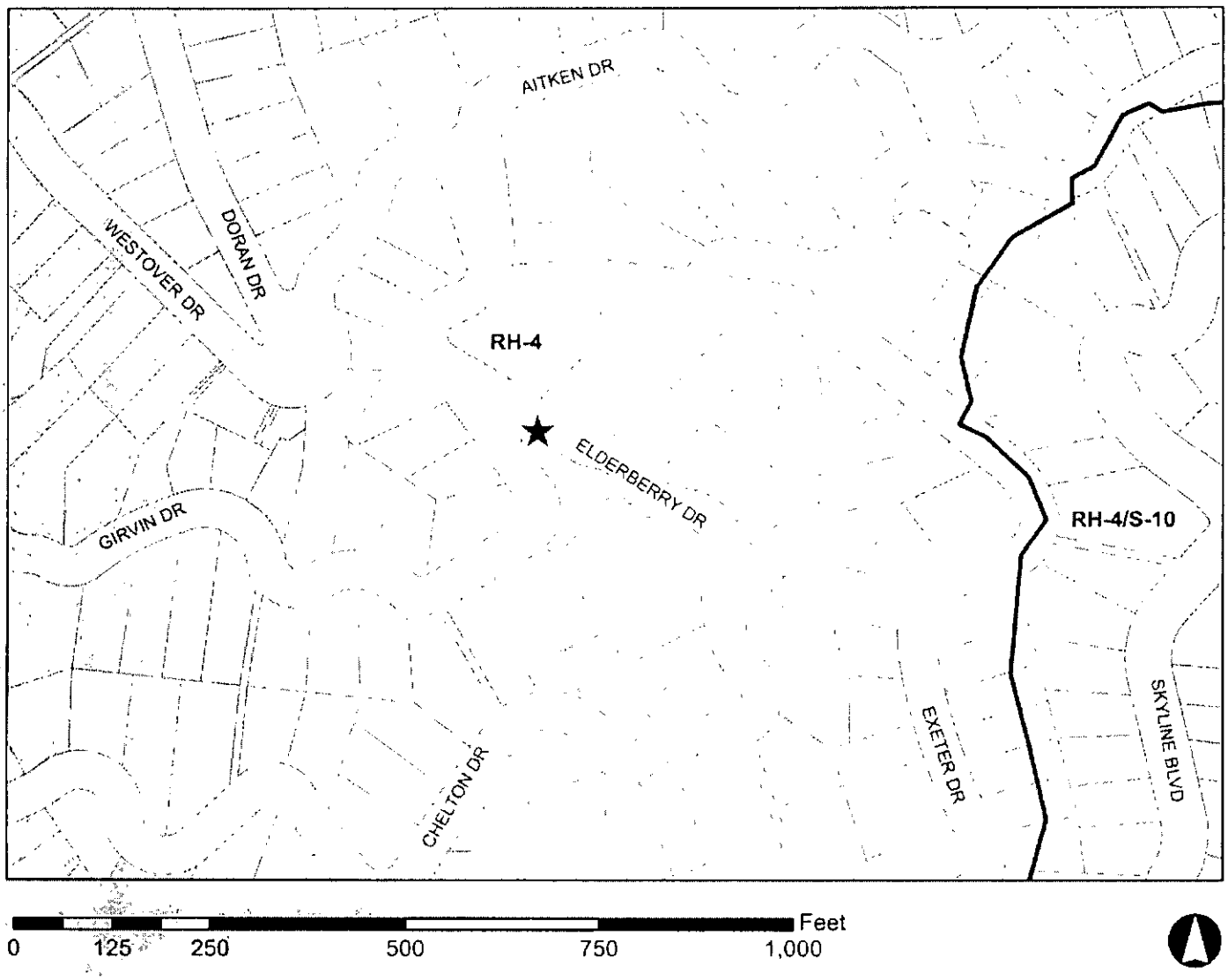
Case File Number: DR13-055 **May 1, 2013**

Location:	**The public Right of Way at the intersection of Elderberry Dr. and Girvin Dr. (adjacent to 6239 Elderberry Dr.) (See map on reverse)**
Assessors Parcel Numbers:	**(048D-7302-001-00) nearest lot adjacent to the project site.**
Proposal:	To install a wireless Telecommunications Facility (AT&T wireless) on an existing 43'-0" high PG&E utility pole located in the public right -of-way; install two panel antennas (two-feet long and ten inches wide) mounted onto a seven-foot tall extension affixed on top of the pole; an associated equipment box, one battery backup and meter boxes within a 6' tall by 18" wide singular equipment box attached to the pole at 8' above the ground.
Applicant:	New Cingular Wireless PCS, LLC For AT&T Mobility
Contact Person/ Phone Number:	Matthew Yergovich (415)596-3474
Owner:	Pacific Gas & Electric. (PG&E)
Case File Number:	**DR13-055**
Planning Permits Required:	Major Design Review to install a wireless Macro Telecommunications Facility to on existing PG&E pole located in the public right -of- way in a residential zone.
General Plan:	Hillside Residential
Zoning:	RH-4 Hillside Residential-4 Zone.
Environmental Determination:	Exempt, Section 15301 of the State CEQA Guidelines; minor additions and alterations to an existing facility Exempt, Section 15183 of the State CEQA Guidelines; projects consistent with a community plan, general plan or zoning.
Historic Status:	Not a Potential Designated Historic Property; Survey rating: n/a
Service Delivery District:	2
City Council District:	4
Date Filed:	February 6th, 2013
Finality of Decision:	Appealable to City Council within 10 Days
For Further Information:	Contact case planner Michael Bradley at **(510) 238-6935** or mbradley@oaklandnet.com

SUMMARY

The proposal is to install a wireless Telecommunications Macro Facility on an existing 43'-0" high PG&E utility pole located in the public right -of- way. New Cingular Wireless PCS for (AT&T Mobility) is proposing to install two panel antennas (two-feet long and ten inches wide) mounted onto a seven-foot tall extension affixed on top of the pole; an associated equipment box, one battery backup and meter boxes within a 6' tall by 18" wide singular equipment box attached to the pole at 8' above the ground. Staff believes, given the topography, mature vegetation, and limited number of near by homes, it will be camouflaged and blend in with the existing heavily wooded area. The proposed project as conditioned, will be designed to meet the established zoning and telecommunication regulations and staff recommends to support the Major Design Review application.

CITY OF OAKLAND PLANNING COMMISSION



Case File: DR13055
Applicant: New Cingular Wireless PCS, LLC / AT&T Mobility
Address: The public Right of Way at the intersection of Elderberry Drive and Girvin Drive
Zone: RH-4

TELECOMMUNICATIONS BACKGROUND

Limitations on Local Government Zoning Authority under the Telecommunications Act of 1996

Section 704 of the Telecommunications Act of 1996 (TCA) provides federal standards for the siting of "Personal Wireless Services Facilities." "Personal Wireless Services" include all commercial mobile services (including personal communications services (PCS), cellular radio mobile services, and paging); unlicensed wireless services; and common carrier wireless exchange access services. Under Section 704, local zoning authority over personal wireless services is preserved such that the FCC is prevented from preempting local land use decisions; however, local government zoning decisions are still restricted by several provisions of federal law.

Under Section 253 of the TCA, no state or local regulation or other legal requirement can prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Further, Section 704 of the TCA imposes limitations on what local and state governments can do. Section 704 prohibits any state and local government action which unreasonably discriminates among personal wireless providers. Local governments must ensure that its wireless ordinance does not contain requirements in the form of regulatory terms or fees which may have the "effect" of prohibiting the placement, construction, or modification of personal wireless services.

Section 704 also preempts any local zoning regulation purporting to regulate the placement, construction and modification of personal wireless service facilities on the basis, either directly or indirectly, on the environmental effects of radio frequency emissions (RF) of such facilities, which otherwise comply with FCC standards in this regard. See, 47 U.S.C. 332(c)(7)(B)(iv) (1996). This means that local authorities may not regulate the siting or construction of personal wireless facilities based on RF standards that are more stringent than those promulgated by the FCC.

Section 704 mandates that local governments act upon personal wireless service facility siting applications to place, construct, or modify a facility within a reasonable time. 47 U.S.C.332(c)(7)(B)(ii). See FCC Shot Clock ruling setting forth "reasonable time" standards for applications deemed complete.

Section 704 also mandates that the FCC provide technical support to local governments in order to encourage them to make property, rights-of-way, and easements under their jurisdiction available for the placement of new spectrum-based telecommunications services. This proceeding is currently at the comment stage.

For more information on the FCC's jurisdiction in this area, contact Steve Markendorff, Chief of the Broadband Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, at (202) 418-0640 or e-mail "smarkend@fcc.gov".

PROJECT DESCRIPTION

The applicant (New Cingular Wireless PCS, LLC. for AT&T Mobility) is proposing to install a wireless Telecommunications Macro Facility on an existing 43'-0" high PG&E utility pole located in the public right –of– way. The project consists of two panel antennas (two-feet long and 10- inches wide) mounted onto a seven-foot tall extension affixed on top of the pole; an

associated equipment box, one battery backup and meter boxes within a 6' tall by 18" wide single equipment box attached to the pole 8'above the ground located in public right -of-way. No portion of the telecommunication facilities will be located on the ground within City of Oakland public right-of-way. The proposed antennas and associated equipment will not be accessible to the public. (See Attachment A).

PROPERTY DESCRIPTION

The existing 43'-0" high PG&E utility pole is located in the City of Oakland public right -of-way adjacent to a steep up sloped parcel at the intersection of Elderberry Drive and Girvin Drive (adjacent to 6239 Elderberry Dr.)

GENERAL PLAN ANALYSIS

The subject property is located within the Hillside Residential General Plan designation. The Hillside Residential Land Use Classification is intended "to identify, create, maintain and enhance neighborhood residential areas that are characterized by detached, single unit structures on hillside lots. The proposed telecommunication facilities will be mounted on an existing PG&E utility pole within the City of Oakland public right-of-way. Its visual impacts will be mitigated since the antennas "climb through" installation while typically not considered aesthetically pleasing, given the topography, mature vegetation, and limited homes nearby, it will be camouflaged and blend in with the existing heavily-wooded area and the equipment cabinet box will be within a single box and painted to match the existing utility pole. Therefore, the proposed unmanned wireless telecommunication facility will not adversely affect or detract from the residential characteristics of the neighborhood.

ZONING ANALYSIS

The project site is located in RH-4 Residential Zone. The intent of the RH-4 Zone is: "to create, preserve, and enhance areas for single-family estate living at very low densities in spacious environments and is typically appropriate to portions of the Oakland hill area. The proposed telecommunication facility is located at the intersection of Elderberry Drive and Girvin Drive (adjacent to 6239 Elderberry Dr.) in a heavily wooded area with very little residence in close proximity. The project requires Regular Design Review, with special findings, to allow the installation of new telecommunication facilities on an existing PG&E pole located in the public right-of-way in a Residential Zone. Special findings required for Design Review approval to ensure that the facility is concealed to the extent possible. These findings are met by this proposal; while the antennas "climb through" installation are typically not considered aesthetically pleasing, given the topography mature vegetation, and limited close homes. The equipment cabinets will be enclosed within a single equipment box painted to match the utility pole. Staff finds that the proposed application meets the applicable RH-4 Hillside Residential zoning regulations for telecommunication facilities.

ENVIRONMENTAL DETERMINATION

The California Environmental Quality Act (CEQA) Guidelines lists the projects that qualify as categorical exemptions from environmental review. The proposed project is categorically exempt from the environmental review requirements pursuant to Section 15301, additions and alterations to existing facilities, and Section 15183, projects consistent with a General Plan or Zoning.

KEY ISSUES AND IMPACTS

1. Regular Design Review

Section 17.136.040 and 17.128.070 of the City of Oakland Planning Code requires a Major Design Review for Macro Telecommunication facilities that are attached to utility poles in the RH-4 zone or that are located within one hundred (100) feet of the boundary of any residential zone. The required findings for Major Design Review are listed and included in staff's evaluation as part of this report.

2. Project Site

Section 17.128.110 of the City of Oakland Telecommunication Regulations indicate that new wireless facilities shall generally be located on designated properties or facilities in the following order of preference:

A. Co-located on an existing structure or facility with existing wireless antennas.
B. City owned properties or other public or quasi-public facilities.
C. Existing commercial or industrial structures in non-residential zones.
D. Existing commercial or industrial structures in residential zones.
E. Other non-residential uses in residential zones.
F. Residential uses in non-residential zones.
G. Residential uses in residential zones.

*Facilities locating on an A, B or C ranked preference do not require a site alternatives analysis. Since the proposed project involves locating the installation of new antennas and associated equipment cabinets on an existing utility pole, the proposed project meets: (B) quasi-public facilities on an existing PG&E utility pole within public right- of - way.

3. Project Design

Section 17.128.120 of the City of Oakland Telecommunications Regulations indicates that new wireless facilities shall generally be designed in the following order of preference:

A. Building or structure mounted antennas completely concealed from view.
B. Building or structure mounted antennas set back from roof edge, not visible from public right-of way.
C. Building or structure mounted antennas below roof line (facade mount, pole mount) visible from public right-of-way, painted to match existing structure.
D. Building or structure mounted antennas above roof line visible from public right of-way.
E. Monopoles.
F. Towers.

* Facilities designed to meet an A & B ranked preference does not require a site design alternatives analysis. Facilities designed to meet a C through F ranked preference, inclusive, must submit a site design alternatives analysis as part of the required application materials. (c) site design alternatives analysis shall, at a minimum, consist of:

a. Written evidence indicating why each higher preference design alternative can not be used. Such evidence shall be in sufficient detail that independent verification could be obtained if required by the City of Oakland Zoning Manager. Evidence should indicate if the reason an alternative was rejected was technical (e.g. incorrect height, interference from existing RF sources, inability to cover required area) or for other concerns (e.g. inability to provide utilities, construction or structural impediments).

City of Oakland Planning staff have reviewed (see attachment A alternative site analysis letter) and determined that the site selected is conforming to all other telecommunication regulation requirements. The project has met design criteria (C) since the antennas will be mounted on existing PG&E pole expansion and will be camouflage partially with the existing mature trees and equipment cabinet box and battery backup box will be within singular equipment box attached to the utility pole painted to match color of an existing PG&E utility pole to minimize potential visual impacts from public view.

4. Project Radio Frequency Emissions Standards

Section 17.128.130 of the City of Oakland Telecommunication Regulations require that the applicant submit the following verifications including requests for modifications to existing facilities:

a. The telecommunications regulations require that the applicant submit written documentation demonstrating that the emission from the proposed project are within the limits set by the Federal Communications Commission. In the document (attachment B) prepared by Hammett & Edison RF Compliance Experts, Inc. Inc. Registered Professional Engineer, the proposed project was evaluated for compliance with appropriate guidelines limiting human exposure to radio frequency electromagnetic fields. According to the report on the proposal, the project will comply with the prevailing standards for limiting public exposure to radio frequency energy and, therefore, the proposed site will operate within the current acceptable thresholds as established by the Federal government or any such agency that may be subsequently authorized to establish such standards.
b. Prior to final building permit sign off, an RF emissions report indicating that the site is actually operating within the acceptable thresholds as established by the Federal government or any such agency who may be subsequently authorized to establish such standards

The RF emissions report, states that the proposed project will not cause a significant impact on the environment. Additionally, staff recommends that prior to the final building permit sign off; the applicant submit a certified RF emissions report stating that the facility is operating within acceptable thresholds established by the regulatory federal agency.

CONCLUSION

Staff believes that the proposed project "climb through" installation are typically not considered aesthetically pleasing, given the topography mature vegetation, and limited near by homes, can be designed to meet the established zoning and telecommunication regulations and recommend to support the Major Design Review application.

RECOMMENDATIONS:

1. Affirm staff's environmental determination
2. Approve Design Review application DR13-055 subject to the attached findings and conditions of approval

Prepared by.

Michael Bradley
Planner I

Approved by:

Scott Miller
Zoning Manager

Approved for forwarding to the
City Planning Commission

Rachel Flynn, Director
Department of Planning and Building

ATTACHMENTS:

A. Project Plans & Photo simulations & Alternative Site Analysis
B. Hammett & Edison, Inc., Consulting Engineering RF Emissions Report
C. Site Alternative Analysis

FINDINGS FOR APPROVAL

FINDINGS FOR APPROVAL:
This proposal meets all the required findings under Section 17.136.050.(B), of the Non-Residential Design Review criteria and all the required findings under Section 17.128.070(B), of the telecommunication facilities (Macro) Design Review criteria and as set forth below: Required findings are shown in **bold** type; reasons your proposal satisfies them are shown in normal type.

17.136.050(B) – NONRESIDENTIAL DESIGN REVIEW CRITERIA:

1. That the proposal will help achieve or maintain a group of facilities which are well related to one another and which, when taken together, will result in a well-composed design, with consideration given to site, landscape, bulk, height, arrangement, texture, materials, colors, and appurtenances; the relation of these factors to other facilities in the vicinity; and the relation of the proposal to the total setting as seen from key points in the surrounding area. Only elements of design which have some significant relationship to outside appearance shall be considered, except as otherwise provided in Section 17.136.060;

The project consists of two panel antennas (two-feet long and 10-inches wide) mounted onto a seven-foot tall extension affixed on top of the pole; an associated equipment box, one battery backup and meter boxes within a 6' tall by 18" wide singular equipment box attached to the pole 8' above the ground, located in the public right -of- way. The proposed antennas and equipment cabinet attached to the utility pole are partially camouflaged to blend in with the existing surrounding heavily wooded area and limited nearby homes. Therefore, the proposal will have minimal visual impacts from public view.

2. That the proposed design will be of a quality and character which harmonizes with, and serves to protect the value of, private and public investments in the area;

The proposal improves wireless telecommunication service in the wooded hillside residential area. The installation will be camouflaged to blend in with the existing surrounding wooded area to have minimal visual impacts on public views. It will protect the value of private and public investments in the area.

3. That the proposed design conforms in all significant respects with the Oakland General Plan and with any applicable design review guidelines or criteria, district plan, or development control map which have been adopted by the Planning Commission or City Council.

The subject site is located within the Hillside Residential General Plan designation classification which is intended to create, maintain, and enhance neighborhood residential areas that are characterized by detached, single unit structures on hillside lots. The proposed unmanned wireless telecommunication facility will be located on an existing PG &E utility pole and will not have significant adversely affect or detract from the residential characteristics of the

neighborhood. Visual impacts will be minimized since the area is heavily wooded with trees partially obscuring views of the pole. Therefore, the Project conforms to the General Plan and applicable Design Review criteria.

17.128.070(B) DESIGN REVIEW CRITERIA FOR MACRO FACILITIES

1. Antennas should be painted and/or textured to match the existing structure:

The proposed antennas will be painted to match the existing PG&E pole and blend with the surroundings.

2. Antennas mounted on architecturally significant structures or significant architectural details of the building should be covered by appropriate casings which are manufactured to match existing architectural features found on the building:

The proposed antennas will not be mounted on building or architecturally significant structure, but rather on a PG&E utility pole.

3. Where feasible, antennas can be placed directly above, below or incorporated with vertical design elements of a building to help in camouflaging:

The proposed antennas will be mounted directly above on an existing PG&E utility pole and painted to match the utility pole which will be camouflaged to blend-in with existing surrounding wooded area.

4. Equipment shelters or cabinets shall be screened from the public view by using landscaping, or materials and colors consistent with surrounding backdrop:

The associated equipment will be within a single equipment box attached to the existing utility pole and painted to match pole blend with surroundings.

5. Equipment shelters or cabinets shall be consistent with the general character of the area.

The proposed equipment cabinets will be compatible with the existing PG &E related equipments.

6. For antennas attached to the roof, maintain a 1:1 ratio for equipment setback; screen the antennas to match existing air conditioning units, stairs, or elevator towers; avoid placing roof mounted antennas in direct line with significant view corridors.

N/A

7. That all reasonable means of reducing public access to the antennas and equipment has been made, including, but not limited to, placement in or on buildings or structures, fencing, anti-climbing measures and anti-tampering devices.

The antennas will be mounted onto a seven-foot tall extension affixed on top of existing 43'-0" high PG&E pole for total of 53' in height, and will not be accessible to the public due to its location. The equipment accommodation and battery backup boxes will also be inside a single equipment box and attached to the pole at a height of 8' above grade.

STANDARD CONDITIONS:

1. Approved Use

Ongoing

a) The project shall be constructed and operated in accordance with the authorized use as described in the application materials for case number **DR13-055**, and the plans dated **December 14, 2012** and submitted on **February 6th, 2013** and as amended by the following conditions. Any additional uses or facilities other than those approved with this permit, as described in the project description and the approved plans, will require a separate application and approval. Any deviation from the approved drawings, Conditions of Approval or use shall required prior written approval from the Director of City Planning or designee.

b) This action by the City Planning Commission ("this Approval") includes the approvals set forth below. This Approval includes: **To install a wireless telecommunications facility (AT&T wireless) on an existing 43'-0" high PG&E utility pole located in public right -of-way; install two panel antennas (two-feet long and 10- inches wide) mounted onto a seven-foot tall extension affixed on top of the pole; an associated equipment box, one battery backup and meter boxes within a 6' tall by 18" wide single equipment box attached to the pole 8' above the ground at the public Right of Way at the intersection of Elderberry Drive and Girvin Drive (adjacent to 6239 Elderberry Dr.), under Oakland Municipal Code 17.128 and 17.136.**

2. Effective Date, Expiration, Extensions and Extinguishment

Ongoing

Unless a different termination date is prescribed, this Approval shall expire **two calendar years** from the approval date, unless within such period all necessary permits for construction or alteration have been issued, or the authorized activities have commenced in the case of a permit not involving construction or alteration. Upon written request and payment of appropriate fees submitted no later than the expiration date of this permit, the Director of City Planning or designee may grant a one-year extension of this date, with additional extensions subject to approval by the approving body. Expiration of any necessary building permit for this project may invalidate this Approval if the said extension period has also expired.

3. Scope of This Approval; Major and Minor Changes

Ongoing

The project is approved pursuant to the **Oakland Planning Code** only. Minor changes to approved plans may be approved administratively by the Director of City Planning or designee. Major changes to the approved plans shall be reviewed by the Director of City Planning or designee to determine whether such changes require submittal and approval of a revision to the approved project by the approving body or a new, completely independent permit.

4. Conformance with other Requirements

Prior to issuance of a demolition, grading, P-job, or other construction related permit

a) The project applicant shall comply with all other applicable federal, state, regional and/or local codes, requirements, regulations, and guidelines, including but not limited to those imposed by the City's Building Services Division, the City's Fire Marshal, and the City's Public Works Agency.

b) The applicant shall submit approved building plans for project-specific needs related to fire protection to the Fire Services Division for review and approval, including, but not

c) limited to automatic extinguishing systems, water supply improvements and hydrants, fire department access, and vegetation management for preventing fires and soil erosion.

5. Conformance to Approved Plans; Modification of Conditions or Revocation

Ongoing

a) Site shall be kept in a blight/nuisance-free condition. Any existing blight or nuisance shall be abated within 60-90 days of approval, unless an earlier date is specified elsewhere.

b) The City of Oakland reserves the right at any time during construction to require certification by a licensed professional that the as-built project conforms to all applicable zoning requirements, including but not limited to approved maximum heights and minimum setbacks. Failure to construct the project in accordance with approved plans may result in remedial reconstruction, permit revocation, permit modification, stop work, permit suspension or other corrective action.

c) Violation of any term, conditions or project description relating to the Approvals is unlawful, prohibited, and a violation of the Oakland Municipal Code. The City of Oakland reserves the right to initiate civil and/or criminal enforcement and/or abatement proceedings, or after notice and public hearing, to revoke the Approvals or alter these conditions if it is found that there is violation of any of the conditions or the provisions of the Planning Code or Municipal Code, or the project operates as or causes a public nuisance. This provision is not intended to, nor does it; limit in any manner whatsoever the ability of the City to take appropriate enforcement actions.

6. Signed Copy of the Conditions

With submittal of a demolition, grading, and building permit

A copy of the approval letter and conditions shall be signed by the property owner, notarized, and submitted with each set of permit plans to the appropriate City agency for this project.

7. Indemnification

Ongoing

a) To the maximum extent permitted by law, the applicant shall defend (with counsel acceptable to the City), indemnify, and hold harmless the City of Oakland, the Oakland City Council, the City of Oakland Redevelopment Agency, the Oakland City Planning Commission and its respective agents, officers, and employees (hereafter collectively called City) from any liability, damages, claim, judgment, loss (direct or indirect)action, causes of action, or proceeding (including legal costs, attorneys' fees, expert witness or consultant fees, City Attorney or staff time, expenses or costs) (collectively called "Action") against the City to attack, set aside, void or annul, (1) an approval by the City relating to a development-related application or subdivision or (2) implementation of an approved development-related project. The City may elect, in its sole discretion, to

participate in the defense of said Action and the applicant shall reimburse the City for its reasonable legal costs and attorneys' fees.

b) Within ten (10) calendar days of the filing of any Action as specified in subsection A above, the applicant shall execute a Letter Agreement with the City, acceptable to the Office of the City Attorney, which memorializes the above obligations. These obligations and the Letter of Agreement shall survive termination, extinguishment or invalidation of the approval. Failure to timely execute the Letter Agreement does not relieve the applicant of any of the obligations contained in this condition or other requirements or conditions of approval that may be imposed by the City.

8. Compliance with Conditions of Approval
Ongoing
The project applicant shall be responsible for compliance with the recommendations in any submitted and approved technical report and all the Conditions of Approval set forth below at its sole cost and expense, and subject to review and approval of the City of Oakland.

9. Severability
Ongoing
Approval of the project would not have been granted but for the applicability and validity of each and every one of the specified conditions, and if any one or more of such conditions is found to be invalid by a court of competent jurisdiction this Approval would not have been granted without requiring other valid conditions consistent with achieving the same purpose and intent of such Approval.

10. Job Site Plans
Ongoing throughout demolition, grading, and/or construction
At least one (1) copy of the stamped approved plans, along with the Approval Letter and Conditions of Approval, shall be available for review at the job site at all times.

11. Special Inspector/Inspections, Independent Technical Review, Project Coordination and Management
Prior to issuance of a demolition, grading, and/or construction permit
The project applicant may be required to pay for on-call special inspector(s)/inspections as needed during the times of extensive or specialized plan check review, or construction. The project applicant may also be required to cover the full costs of independent technical and other types of peer review, monitoring and inspection, including without limitation, third party plan check fees, including inspections of violations of Conditions of Approval. The project applicant shall establish a deposit with the Building Services Division, as directed by the Building Official, Director of City Planning or designee.

12. Days/Hours of Construction Operation
Ongoing throughout demolition, grading, and/or construction
The project applicant shall require construction contractors to limit standard construction activities as follows:

a) Construction activities are limited to between 7:00 AM and 7:00 PM Monday through Friday, except that pile driving and/or other extreme noise generating activities

greater than 90 dBA shall be limited to between 8:00 a.m. and 4:00 p.m. Monday through Friday.

b) Any construction activity proposed to occur outside of the standard hours of 7:00 am to 7:00 pm Monday through Friday for special activities (such as concrete pouring

which may require more continuous amounts of time) shall be evaluated on a case by case basis, with criteria including the proximity of residential uses and a consideration of resident's preferences for whether the activity is acceptable if the overall duration of construction is shortened and such construction activities shall only be allowed with the prior written authorization of the Building Services Division.

c) Construction activity shall not occur on Saturdays, with the following possible exceptions:

i. Prior to the building being enclosed, requests for Saturday construction for special activities (such as concrete pouring which may require more continuous amounts of time), shall be evaluated on a case by case basis, with criteria including the proximity of residential uses and a consideration of resident's preferences for whether the activity is acceptable if the overall duration of construction is shortened. Such construction activities shall only be allowed on Saturdays with the prior written authorization of the Building Services Division.

ii. After the building is enclosed, requests for Saturday construction activities shall only be allowed on Saturdays with the prior written authorization of the Building Services Division, and only then within the interior of the building with the doors and windows closed.

d) No extreme noise generating activities (greater than 90 dBA) shall be allowed on Saturdays, with no exceptions.

e) No construction activity shall take place on Sundays or Federal holidays.

f) Construction activities include but are not limited to: truck idling, moving equipment (including trucks, elevators, etc) or materials, deliveries, and construction meetings held on-site in a non-enclosed area.

PROJECT SPECIFIC CONDTIONS:

13. Radio Frequency Emissions
Prior to the final building permit sign off.
The applicant shall submit a certified RF emissions report stating the facility is operating within the acceptable standards established by the regulatory Federal Communications Commission.

14. Operational
Ongoing.
Noise levels from the activity, property, or any mechanical equipment on site shall comply with the performance standards of Section 17.120 of the Oakland Planning Code and Section 8.18 of the Oakland Municipal Code. If noise levels exceed these standards, the activity causing the noise shall be abated until appropriate noise reduction measures have been installed and compliance verified by the Planning and Zoning Division and Building Services.

15. Equipment cabinets
Prior to building permit Issuances.
The applicant shall submit revised elevations showing associated equipment cabinet are concealed within a single equipment box that is painted to match the utility pole, to the Oakland Planning Department for review and approval.

16. Possible District Undergrounding PG&E Pole
Ongoing
Should the PG &E utility pole be voluntarily removed for purposes of district undergrounding or otherwise, the telecommunications facility can only be re-established by applying for and receiving approval of a new application to the Oakland Planning Department as required by the regulations.

ATTACHMENT A

RECEIVED
FEB 06 2011
City of Oakland
Planning & Zoning Division

at&t

PROPRIETARY INFORMATION

THE INFORMATION CONTAINED IN THIS SET OF CONSTRUCTION DOCUMENTS IS PROPRIETARY BY NATURE. ANY USE OR DISCLOSURE OTHER THAN THAT WHICH RELATES TO CARRIER SERVICES IS STRICTLY PROHIBITED.

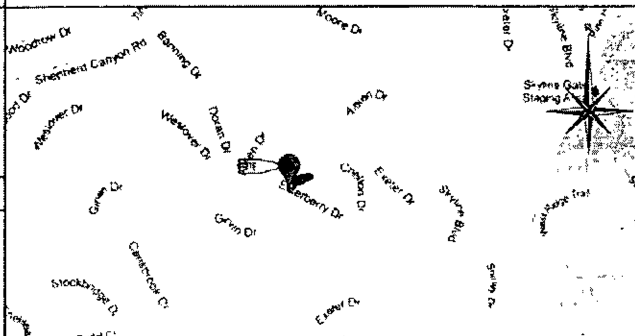
OAKHILLS AT&T SOUTH NETWORK
OAKS-077A
(PROW) ACROSS FROM 6659 GIRVIN DR, OAKLAND, CA 94611

LEGEND & SYMBOLS

ABBREVIATIONS

CODE COMPLIANCE

VICINITY MAP



DRIVING DIRECTIONS

SIGNATURE BLOCK

PROJECT DESCRIPTION

THESE DRAWINGS DEPICT A PORTION OF A DISTRIBUTED ANTENNA SYSTEM (DAS) TELECOMMUNICATIONS NETWORK TO BE CONSTRUCTED BY EXTENET SYSTEMS AND OWNED AND OPERATED BY NEW CINGULAR WIRELESS PCS, LLC IN THE PUBLIC RIGHT OF WAY PURSUANT TO AUTHORITY GRANTED BY THE CALIFORNIA PUBLIC UTILITIES COMMISSION

THE MAIN COMPONENTS OF THIS INSTALLATION ARE:
THE ADDITION OF TWO (2) PANEL ANTENNAS, ONE (1) BBU CABINET, ONE (1) RADIO UNIT, ASSOCIATED ELECTRICAL EQUIPMENT AND MOUNTING BRACKETS AS REQUIRED, LOCATED ON AN EXISTING POLE UTILITY POLE

DRAWING INDEX

T1	TITLE SHEET & PROJECT INFORMATION
T2	GENERAL NOTES AND SCHEDULES
A1	[illegible]
A2	[illegible] ELEVATIONS [illegible]
D1	[illegible] DETAILS

BUILDING / SITE DATA

PROJECT TEAM

at&t

NEW CINGULAR WIRELESS PCS, LLC
4430 ROSEWOOD DR. BLDG 3
PLEASANTON, CA 94588-3050

PROJECT INFORMATION

OAKHILLS AT&T SOUTH NETWORK NODE 077A
ACROSS FROM 6659 GIRVIN DR
OAKLAND, CA 94611

CURRENT ISSUE DATE

12/14/12

ISSUED FOR

ZONING

BY	DATE	DESCRIPTION	REV
			0

PLANS PREPARED BY:

ACI

CONSTRUCTED BY:

next SYSTEMS

SEAL OF APPROVAL

SHEET TITLE

TITLE SHEET AND PROJECT INFORMATION

SHEET NUMBER: T1
REVISION: 0

GENERAL NOTES

Call before you dig
811 / 1-800-227-2600
www.usanorth.org

ROW CONSTRUCTION GENERAL NOTES

LOADING AND ANTENNA CABLE SCHEDULES

WIND LOADING INFORMATION

ANTENNA & CABLE SCHEDULE

at&t

NEW CINGULAR WIRELESS PCS, LLC
4430 ROSEWOOD DR. BLDG 3
PLEASANTON, CA 94588-3050

PROJECT INFORMATION

OAKHILLS AT&T
SOUTH NETWORK
NODE 077A
ACROSS FROM 8659 GIRVIN DR
OAKLAND, CA 94611

CURRENT ISSUE DATE
12/14/12

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CONSTRUCTED BY

net

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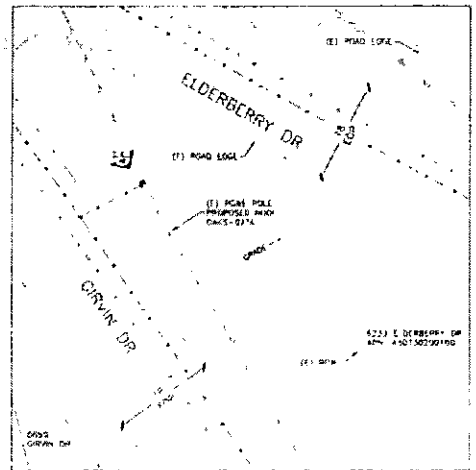
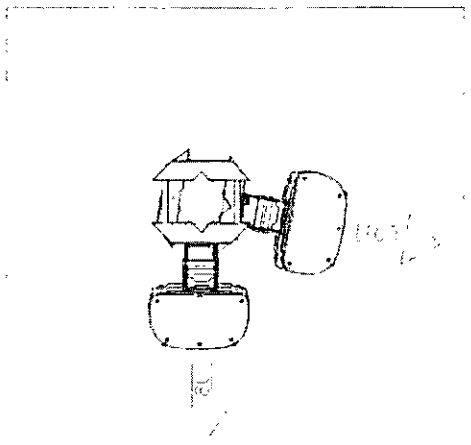
SHEET TITLE

GENERAL NOTES AND SCHEDULES

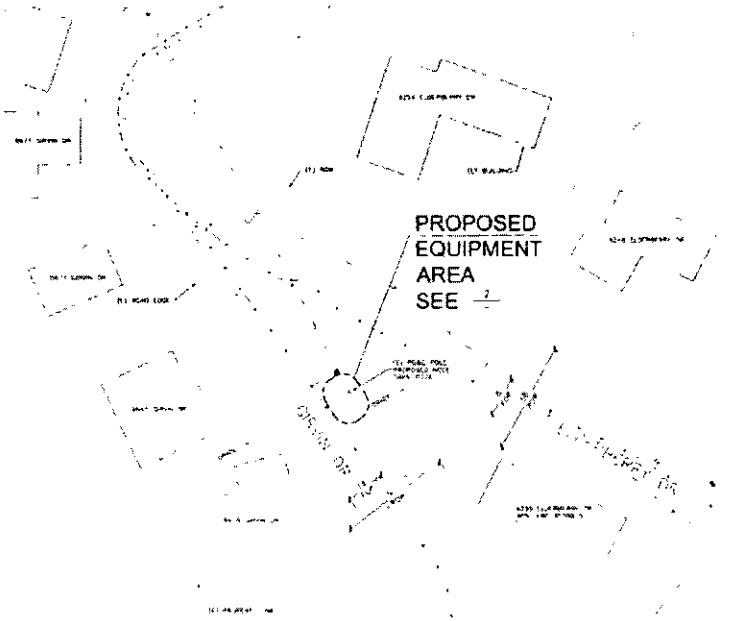
SHEET NUMBER: T2
REVISION: 0



SITE PLAN CLOSEUP SCALE 1" = 40' 2



ANTENNA AZIMUTHS SCALE N.T.S. 3



SITE PLAN SCALE 1" = 50'-0" 1

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NEW CINGULAR WIRELESS PCS, LLC
4435 ROSEWOOD DR, BLDG. 5
PLEASANTON, CA 94588-3050

PROJECT INFORMATION

OAKHILLS AT&T SOUTH NETWORK NODE 077A

ACROSS FROM 6020 GIRVIN DR
OAKLAND, CA 94611

CURRENT ISSUE DATE:

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PLANS PREPARED BY:

ACI
1-800-575-4ACI
5211 Pewaukee Drive
Corrigan, NE 68136

CONSTRUCTED BY:

net SYSTEMS

SEAL OF APPROVAL

SHEET TITLE:

SITE PLAN

SHEET NUMBER: A1

REVISION: 0

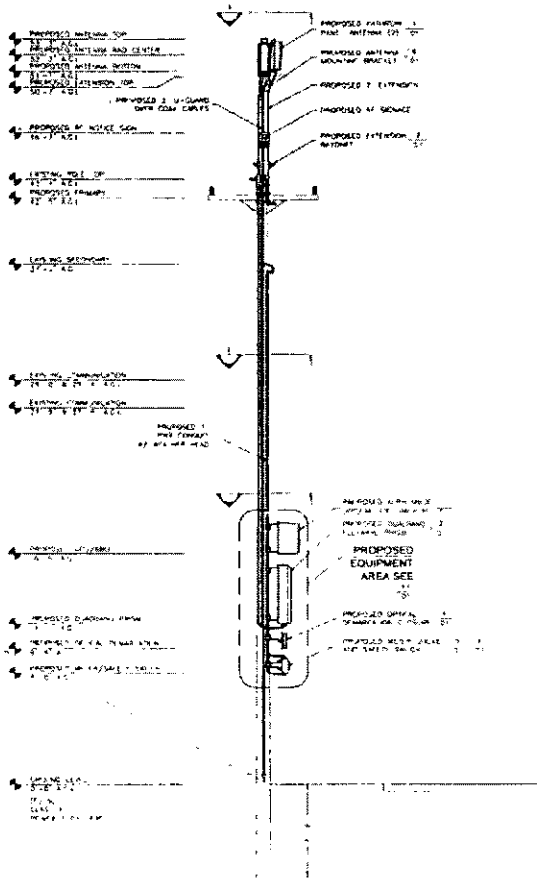
COMMUNICATIONS MAKE-READY

1 INSTALL PG&E 1" SCH 80 CONDUIT AT 4:30 POSITION FOR POWER SERVICE
2 INSTALL 3" SCH 80 U-GUARD AT :30 POSITION OVER COAX
3 INSTALL RADIO DOT OPTIMA METER SOCKET & SAFETY SWITCH 4' OFF OF POLE (USING CONSTRUCTS) AT 6:00 POSITION
4 RELOCATE CLIMBING PEGS AT 3:00 POSITION, 8'-6" AGL TO COMM ZONE, TO 12:00 POSITION

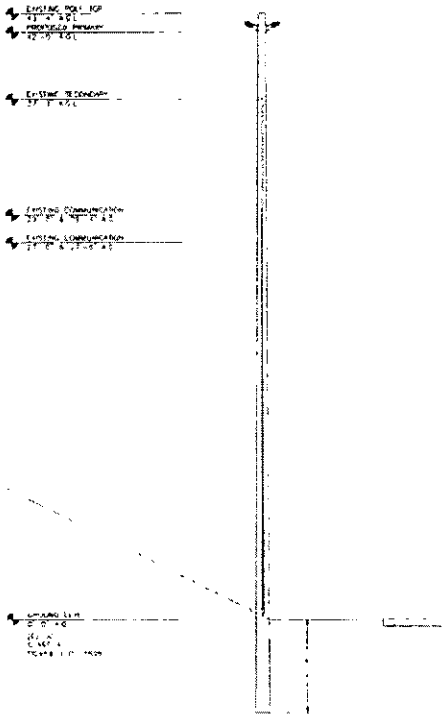
POWER MAKE-READY

1 REFRAME PRIMARY TO 8' CROSS ARM
2 INSTALL 2' POLE TOP EXTENSION
3 INSTALL (2) PANEL ANTENNAS W/ MOUNTING BRACKET ON POLE TOP EXTENSION AT 50'-7" AGL
4 INSTALL COMBINERS AND (4/8) 1/2" COAX
5 INSTALL PG&E WEATHER HEAD AND 1" SCH 80 CONDUIT AT 4:30 POSITION FOR POWER SERVICE
6 INSTALL 3" SCH 80 U-GUARD AT 7:30 POSITION OVER COAX
7 PROVIDE 120/240 3-WIRE SINGLE PHASE, 100 AMP SERVICE, TO 1" PG&E CONDUIT AT 4:30 POSITION TO METER SOCKET FROM SERVICE DROP 37'-1" AGL

MAKE-READY NOTES 4



PROPOSED ELEVATION NORTHWEST SCALE 1/8"=1'-0" 6



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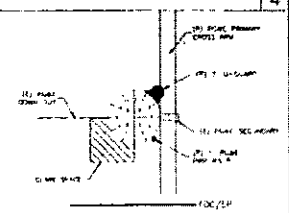
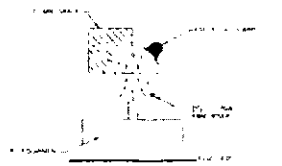


POWER SPACE PLAN VIEW 3

COMM SPACE PLAN VIEW 2



EQUIP SPACE PLAN VIEW 1

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NEW CINGULAR WIRELESS PCS, LLC
4430 ROSEWOOD DR, BLDG 3
PLEASANTON, CA 94588-3050

PROJECT INFORMATION:

OAKHILLS AT&T SOUTH NETWORK NODE 077A

ACROSS FROM 8859 GIRVIN DR
OAKLAND, CA 94611

CURRENT ISSUE DATE

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PLANS PREPARED BY:

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5711 Reservoir Drive
Canton, MI 48187

CONSTRUCTED BY

net SYSTEMS
3076 Alvarado St, Suite 140
San Leandro, CA 94577

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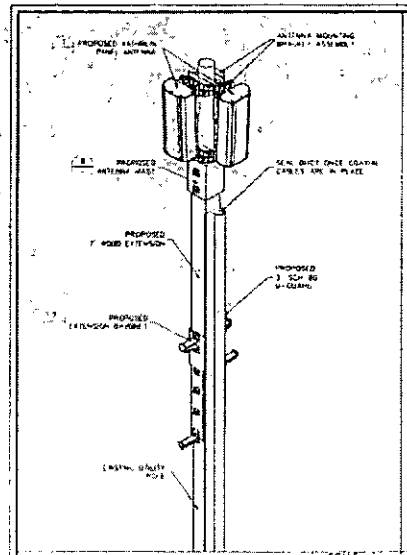
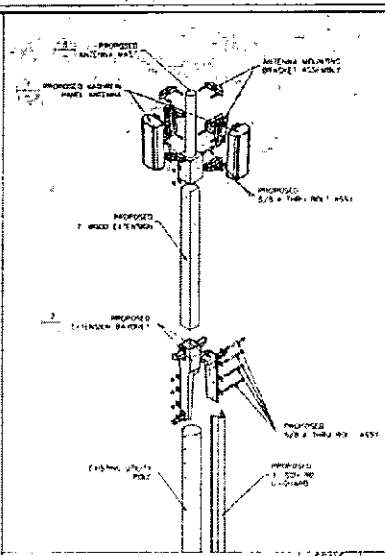
ELEVATIONS & RISER DETAILS

SHEET NUMBER REVISION

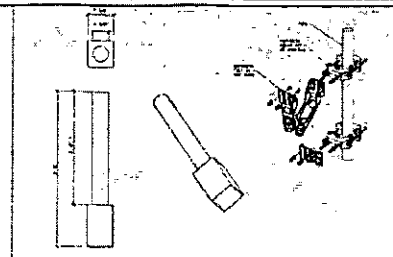
A2 0



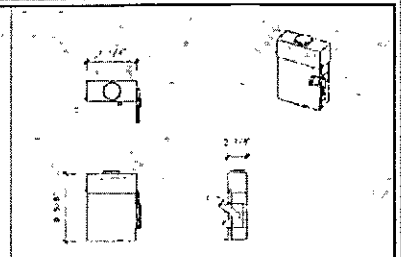
ANTENNA CONFIGURATION SCALE: 3/8"=1'-0" 13



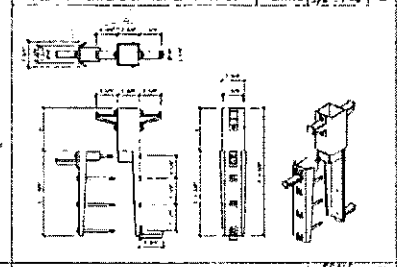
POLE TOP ANTENNA ASSEMBLY SCALE: 3/4"=1'-0" 11



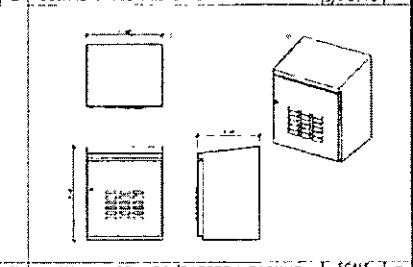
POLE TOP EXTENSION ANTENNA MAST W/ BRKTS SCALE: 3/8"=1'-0" 8



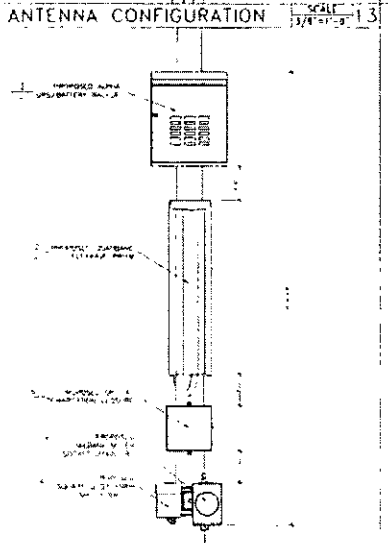
SQUARE D D321NRB SAFETY SWITCH SCALE: 3/4"=1'-0" 4



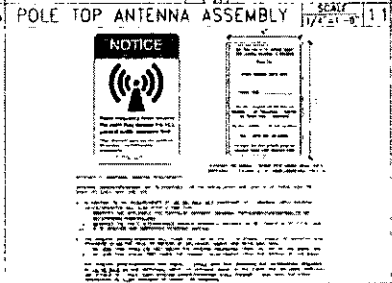
POLE TOP EXTENSION BAYONET SCALE: 3/8"=1'-0" 7



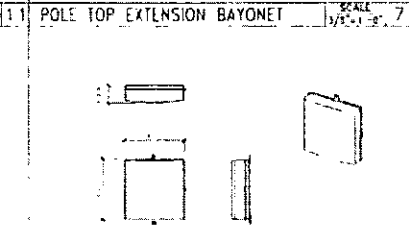
ALPHA MMOE UPS/BATTERY BACKUP SCALE: 3/8"=1'-0" 3



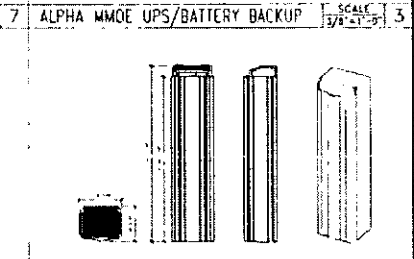
EXTENET EQUIPMENT CONFIG SCALE: 1/2"=1'-0" 12



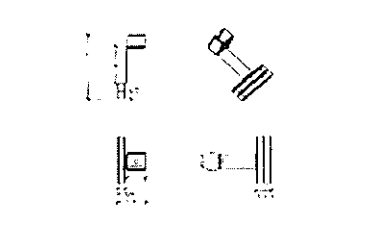
RF WARNING SIGNAGE SCALE: NTS 10



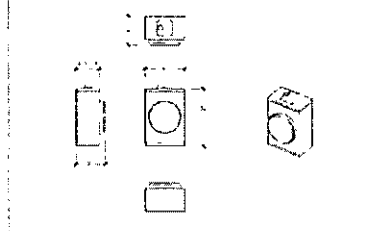
AFL OPTIBOD 760 XL OPTICAL DEMARCATION CLOSURE SCALE: 1"=1'-0" 6



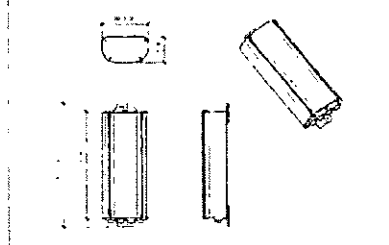
QUADBAND FLEXWAVE PRISM SCALE: 1 1/2"=1'-0" 2



LADDER BRACKET SCALE: 1"=1'-0" 9



MILBANK METER SOCKET U7490-PL SCALE: 1"=1'-0" 5



KATHREIN PANEL ANTENNA SCALE: 1"=1'-0" 1

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NEW CINGULAR WIRELESS PCS, LLC
4430 ROSEWOOD DR, BLDG 1
PLEASANTON, CA 94588-3050

PROJECT INFORMATION

OAKHILLS-AT&T SOUTH NETWORK NODE 077A

ACROSS FROM 6699 LIDDIN DR
OAKLAND, CA 94611

CURRENT ISSUE DATE

12/14/12

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R1		12/ 4/12	ZDs	F

PLANS PREPARED BY:

ACI

CONSTRUCTED BY:

net SYSTEMS

SEAL OF APPROVAL

SHEET TITLE

EQUIPMENT DETAILS

SHEET NUMBER — REVISION

D1 — 0

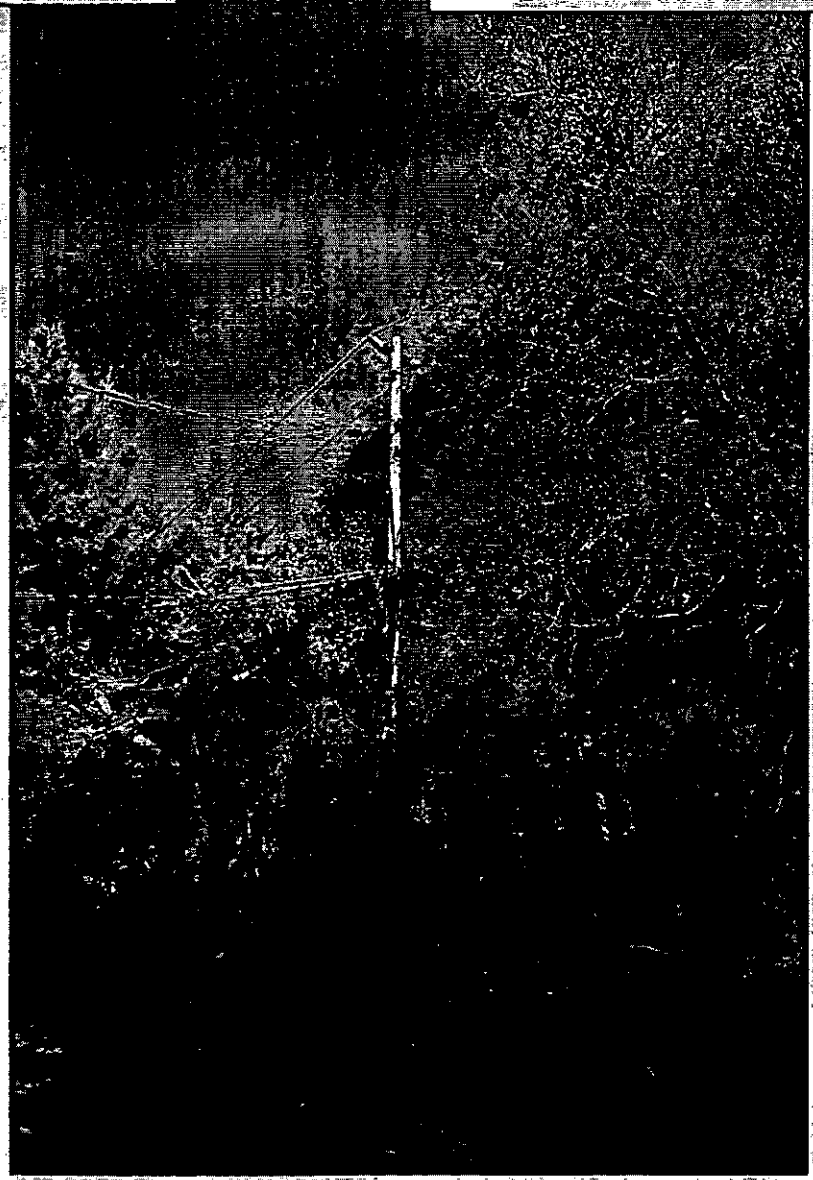
ATTACHMENT A

view from Girvin Drive looking north at site

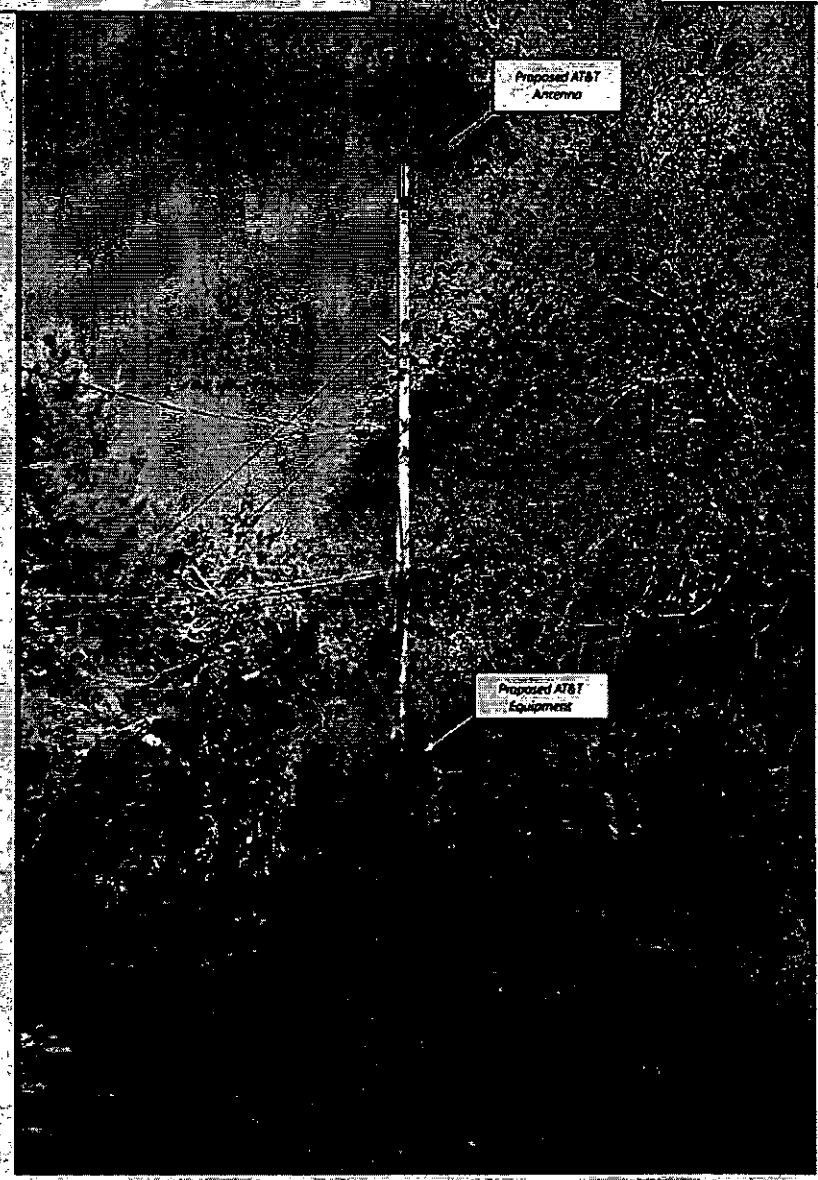
AT&T Wireless

Across From 6659 Girvin Drive, Oakland, CA
Oakhills AT&T South Network Node 077A

Existing



Proposed



AdvanceSim
Photo Simulation Solutions
Contact (925) 202-8507

ATTACHMENT A

ATTACHMENT B

New Cingular Wireless, LLC • 32 Proposed Distributed Antenna System Nodes
Oakland Hills • Oakland, California

Statement of Hammett & Edison, Inc., Consulting Engineers

The firm of Hammett & Edison, Inc., Consulting Engineers, has been retained on behalf of New Cingular Wireless, LLC, a wireless telecommunications service provider, to evaluate 32 distributed antenna system (DAS) nodes proposed to be located in the Oakland Hills area of Oakland, California, for compliance with appropriate guidelines limiting human exposure to radio frequency ("RF") electromagnetic fields.

Executive Summary

New Cingular Wireless proposes to install two directional panel antennas on 32 existing or proposed utility poles sited in the Oakland Hills area of Oakland. The proposed operation will comply with the FCC guidelines limiting public exposure to RF energy.

Prevailing Exposure Standards

The U.S. Congress requires that the Federal Communications Commission ("FCC") evaluate its actions for possible significant impact on the environment. A summary of the FCC's exposure limits is shown in Figure 1. These limits apply for continuous exposures and are intended to provide a prudent margin of safety for all persons, regardless of age, gender, size, or health. The most restrictive FCC limit for exposures of unlimited duration to radio frequency energy for several personal wireless services are as follows:

Wireless Service	Frequency Band	Occupational Limit	Public Limit
Microwave (Point-to-Point)	5,000–80,000 MHz	5.00 mW/cm^2	1.00 mW/cm^2
BRS (Broadband Radio)	2,600	5.00	1.00
AWS (Advanced Wireless)	2,100	5.00	1.00
PCS (Personal Communication)	1,950	5.00	1.00
Cellular	870	2.90	0.58
SMR (Specialized Mobile Radio)	855	2.85	0.57
700 MHz	700	2.35	0.47
[most restrictive frequency range]	30–300	1.00	0.20

Power line frequencies (60 Hz) are well below the applicable range of these standards, and there is considered to be no compounding effect from simultaneous exposure to power line and radio frequency fields.

General Facility Requirements

Base stations typically consist of two distinct parts: the electronic transceivers (also called "radios" or "channels") that are connected to the traditional wired telephone lines, and the passive antennas that send the wireless signals created by the radios out to be received by individual subscriber units.

The transceivers are often located at ground level and are connected to the antennas by coaxial cables. A small antenna for reception of GPS signals is also required, mounted with a clear view of the sky. Because of the short wavelength of the frequencies assigned by the FCC for wireless services, the antennas require line-of-sight paths for their signals to propagate well and so are installed at some height above ground. The antennas are designed to concentrate their energy toward the horizon, with very little energy wasted toward the sky or the ground. Along with the low power of such facilities, this means that it is generally not possible for exposure conditions to approach the maximum permissible exposure limits without being physically very near the antennas.

Computer Modeling Method

The FCC provides direction for determining compliance in its Office of Engineering and Technology Bulletin No. 65, "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radio Frequency Radiation," dated August 1997. Figure 2 attached describes the calculation methodologies, reflecting the facts that a directional antenna's radiation pattern is not fully formed at locations very close by (the "near-field" effect) and that at greater distances the power level from an energy source decreases with the square of the distance from it (the "inverse square law"). The conservative nature of this method for evaluating exposure conditions has been verified by numerous field tests.

Site and Facility Description

Based upon information provided by New Cingular Wireless, that carrier proposes to install 32 new nodes, listed in Table 1 below, in the Oakland Hills area of Oakland. Each node would consist of two Kathrein Model 840-10525 directional panel antennas installed on a new or existing utility pole to be sited in a public right-of-way. The antennas would be mounted with no downtilt at an effective height of about 35 feet above ground and would be oriented in different directions, as shown in Table 1. The maximum effective radiated power in any direction would be 219 watts, representing simultaneous operation by New Cingular Wireless at 104 watts for PCS, 61 watts for cellular, and 54 watts for 700 MHz service. There are reported no other wireless telecommunications base stations at the site or nearby.

New Cingular Wireless, LLC • 32 Proposed Distributed Antenna System Nodes
Oakland Hills • Oakland, California

Node #	Approximate Address	Antenna Orientations	
Node 35	Grizzly Peak Boulevard and Golf Course Drive	116°T	321°T
Node 36	2501 Grizzly Peak Boulevard	65°T	248°T
Node 37	7541 Claremont Avenue	54°T	240°T
Node 39	8071 Claremont Avenue	36°T	215°T
Node 41	Grizzly Peak Boulevard and Skyline Boulevard	149°T	283°T
Node 42	6616 Pine Needle Drive	73°T	344°T
Node 46	1265 Mountain Boulevard	30°T	105°T
Node 47	5925 Sherwood Drive	13°T	285°T
Node 48	Skyline Boulevard and Elverton Drive	153°T	325°T
Node 49	1732 Indian Way	24°T	306°T
Node 50	5612 Merriewood Drive	46°T	110°T
Node 51	5658 Grisborne Avenue	87°T	355°T
Node 52	5826 Mendoza Drive	61°T	121°T
Node 53	6133 Snake Road	43°T	119°T
Node 54	2052 Tampa Avenue	0°T	100°T
Node 55	8211 Skyline Boulevard	98°T	158°T
Node 56	6837 Aitken Drive	65°T	316°T
Node 57	6415 Westover Drive	137°T	302°T
Node 58	6828 Saroni Drive	20°T	100°T
Node 59	2189 Andrews Street	37°T	88°T
Node 60	5879 Scarborough Drive	33°T	81°T
Node 62	2997 Holyrood Drive	21°T	88°T
Node 63	2679 Mountain Gate Way	0°T	80°T
Node 64	Mountain Boulevard and Ascot Drive	29°T	110°T
Node 70	75 Castle Park Way	0°T	70°T
Node 71	3343 Crane Way	72°T	355°T
Node 74	6925 Pinehaven Road	0°T	70°T
Node 75	6776 Thornhill Drive	66°T	127°T
Node 77	6659 Girvin Drive	100°T	180°T
Node 78	7380 Claremont Avenue	55°T	200°T
Node 79	6757 Sobrante Road	70°T	159°T
Node 81	Shepherd Canyon Road and Escher Drive	56°T	209°T

Table 1. New Cingular Wireless Nodes Evaluated

Study Results

For a person anywhere at ground, the maximum RF exposure level due to the proposed operation through is calculated to be 0.0026 mW/cm^2, which is 0.50% of the applicable public exposure limit. The maximum calculated level at the second-floor elevation of any nearby building* is 1.2% of the

* Including nearby residences located at least 9 feet from any pole, based on photographs from Google Maps