

TO: Planning Commission

FROM: Kelvin Parker, Deputy Community Development Director

DATE: November 18, 2019

**SUBJECT: Appeal of DPMN 2017-70219; Appellant: Trevor G. Marshall
(Applicant: Verizon Wireless)**

REQUEST:

Appellant is requesting the Planning Commission reverse the administrative decision approving DPMN 2017-70219 thereby denying the request to install a wireless communications facility at 1634 Newbury Road (Attachment #s 1, 2, and 3).

RECOMMENDATION:

That the Planning Commission adopt the attached resolution (Attachment #4) denying the appeal, thereby upholding the administrative approval of DPMN 2019-70219.

PROJECT DESCRIPTION

The proposed facility consists of nine (9) wireless panel antennas, an emergency generator and related wireless equipment cabinets, with the panel antennas located within a 10' high tower feature. The new tower enclosure acts as an extension of an existing 35' building tower. Associated equipment, including an emergency generator will be installed adjacent to the storage building.

PLANNING COMMISSION REVIEW

In accordance with Section 9-4.2807 of the Thousand Oaks Municipal Code, an applicant or any aggrieved person may appeal a decision of the Community Development Director or his designee to the Planning Commission.

BACKGROUND:

In May of 1988, SUP 88-706 was approved by the Planning Commission to allow construction of a self-storage facility on the subject property. On May 31, 2017, Verizon Wireless submitted the subject Development Permit Minor Modification application (DPMN 2017-70219) to allow the installation of a wireless communications facility at an existing self-storage facility located at 1634

Newbury Road. Since the original submittal, staff has been working with the applicant on design modifications which involved creating a proportional antenna enclosure that adequately camouflages the antennas. The applicant responded to staff's requested design changes by creating a tower element extension that is proportional to the feature it is installed upon. This design also incorporates louvered vents, exterior materials, and exterior colors that are consistent with the existing building.

On July 27, 2017, notice of the request was mailed to all property owners within 500' of the project site. Subsequently, staff received 25 letters of opposition (Attachment #5). Since opposition was received, an Administrative Hearing was required before a decision could be made on the request.

On August 15, 2019, a staff report (Attachment #6) was presented at an Administrative Hearing for the subject request. During that hearing, staff and public testimony were presented. At the conclusion of the hearing, the administrative hearing officer approved DPMN 2019-70219 based on the findings and subject to the conditions contained in the attached approval (Attachment #7).

The administrative hearing officer concluded that the project is consistent with City's Standards and Guidelines for the Installation of Wireless Communications Facilities (Res. 97-197) and Federal Communications Commission's (FCC) established rules for human exposure to Radio Frequency. Additionally, the project was evaluated in accordance with the provisions contained in the California Environmental Quality Act (CEQA) and determined to qualify as "Class 1" categorical exemption from the CEQA provisions.

On August 26, 2019, the subject appeal was submitted (Attachment #8).

DISCUSSION/ANALYSIS:

Standards and Guidelines for Installation of Wireless Communications Facilities (Resolution 97-197)

Wireless facilities are evaluated in accordance with City Council Resolution 97-197, which provides standards and guidelines for new or modified wireless facilities. A guiding policy of these criteria is to minimize visual impacts of wireless sites. In this case, the antennas are within a proposed tower extension that blends with the building design.

Section 4 of the resolution allows wireless facility within commercially zoned properties with the approval of a modification to an existing development permit. Section 5 of Res. 97-197 contains the development standards that are used to

evaluate applications for wireless facilities. Below are excerpts of applicable standards with staff comment as to compliance with the standard:

Section 5B

“Wireless communications facilities shall be located and designed to avoid substantially altering scenic viewsheds.”

Staff Comment

The facility is about 600’ away from 101 scenic corridor. There are also intervening structures that minimizes visibility and the proposed tower element is architecturally compatible with the building.

Section 5I

“Wireless communications facilities shall not be artificially lighted, except as required for security purposes. In such required instances, motion sensor lighting shall be used.”

Staff Comment

The facility does not have lighting that will illuminated the wireless facility.

Section 5J

“Wireless communications facilities shall not bear any signs or advertising other than that required by Federal Communications Commission regulations.”

Staff Comment

No signs are being proposed that advertises the presence of the wireless facility.

Section 5K

“Accessory structures supporting wireless communications facilities shall be designed to be unobtrusive and architecturally compatible with existing structures or surroundings. Accessory structures shall meet the minimum setbacks in the applicable zoning classification unless aesthetic or safety issues warrant an exception, and except when such a setback is not feasible for those facilities which must be located within the public right of way (such as equipment cabinets for micro cells on street light poles or existing utility structures.”

Staff Comment

The equipment enclosure is located within the storage facility and not visible from the exterior. Additionally, it meets all setback requirements for C-2 zoned properties.

Section 5L

“Wireless communications facilities shall be integrated into the design of existing buildings and appurtenant features or structures whenever possible. Examples include building facia, street lighting fixtures, utility poles, flag poles, church steeples, clock towers, public art and artificial vegetation.”

Staff Comment

The antennas will be housed within an extension of the building’s existing tower feature.

Based on the above evaluation, the proposed facility complies with the applicable policy guidelines for installation of wireless communications facilities. The antennas are camouflaged within a tower element that is integrated into the design of the building.

Grounds for Appeal

The appeal form includes an attached letter that contains the appellant’s grounds for appeal with exhibits. The appellant has requested the Planning Commission reverse the hearing officer’s decision and deny the request. The basis for the appeal is provided as an attachment to the appeal application (Attachment #8). Staff has summarized and provided responses to the appellant’s statements below. Please refer to Mr. Marshall’s appeal application for full text for the grounds of appeal.

The appellant statements provided below are enumerated to correspond with statements listed in the grounds for appeal attachment provided in the appeal application.

In opposition to the appeal, legal counsel for Verizon Wireless has provided independent responses to the appellant’s statements for the Planning Commission to consider (Attachment #9).

Appellant's Statement #1

Location of the wireless facility would deny access to numerous shops for residents disabled by EMF since the facility is located within 300' of such areas.

Staff Response

The statements made in Appellant's first basis for appeal lack foundation and the cited authority is not applicable to the underlying project. The U.S. code citation that the Appellant uses pertains to discrimination in the sale or leasing of a dwelling unit. The case cited pertains to a person who was denied service in a restaurant because of the color of his skin.

The underlying assertion made in this first statement is that the wireless facility would emit Radio Frequency (RF). The law clearly establishes that if the proposed site meets federal requirements for RF emissions, City is prohibited from basing a denial on that specific concern if the applicant demonstrates planned compliance with the FCC's standards. The relevant project materials reviewed by Dr. Kramer, a nationally-recognized expert in RF emissions regulations, demonstrate that the proposed project will comply with the FCC standards at 47 C.F.R. §1.1307 et seq., thus any City denial of this project based on RF emissions concerns would violate federal law at 47 U.S.C § 332(c)(7)(B)(iv).

Appellant's Statement #2

During the administrative hearing, a resident asked to be shown copies of maps demonstrating areas of Thousand Oaks not currently served by Verizon Wireless and for which the wireless facility is claimed to be required.

Staff Response

The second basis pertains to a request by Ms. Paige Neilsen at the Administrative Hearing for the subject case for maps on all wireless sites in the City. The City does not have maps depicting each wireless facility from every carrier. Moreover, many of the sites are not Verizon facilities. The next argument in the second basis on appeal is that some individuals tested their personal cellular telephones in the area where the proposed site is to be located and were able to transmit and receive information. Their argument that since some individuals receive a good signal, a carrier does not need to install a new

service is without merit. Verizon has submitted an application for a wireless facility and the City is evaluating that location following federal, State, and local regulations.

Appellant's assertion that Ms. Nielsen's request and any response by City to such request is a violation of 42 USC Section 3604(f)(3) is misplaced. Section 3604 pertains to discrimination against a person in the sale or lease of a dwelling.

Appellant's Statement #3

Mr. Kramer's method of evaluation was deemed unreliable and was not accepted by a Federal Circuit Court.

Staff Response

Appellant's third basis on appeal is that Dr. Kramer's testimony is not credible. He points to a 2003 case in which a court held the party using Dr. Kramer as an expert failed to lay the foundation to use Dr. Kramer's expert testimony. Reliance on that decision is misplaced. Dr. Kramer was not disqualified by the court in the case mentioned and has been established as an expert in multiple cases and hearings including as the expert witness for Sand Francisco in the T-Mobile Est. LLC v. City and County of San Francisco case decided in San Francisco's favor by the California Supreme Court earlier in April 2019. Appellant also fails to submit any expert testimony to contradict Dr. Kramer's testimony. Finally, the administrative hearing was a public quasi-judicial hearing. The evidence submitted by staff, the applicant, and the public were considered by the hearing officer. Appellant has the burden of proof to establish why the Administrative Decision was wrong and has failed to establish any material reasons to do so. In addition, see Verizon's October 18, 2019 letter (Attachment #9) to staff, from the law firm of Gatzke, Dillon & Balance, LLP. which also challenges Appellant's argument.

Appellant's Statement #4

Mr. Kramer's statement at the hearing "ADA does not recognize RF as an ADA covered event" was incomplete and potentially misleading...

Staff Response

Mr. Marshall asserts that the U.S. Access Board ("USAB") "recognizes that multiple chemical sensitivities and electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological,

respiratory or other functions of an individual that it substantially limits one or more of the individual's major life activities." The quote is instructive by the use of the word "may" as such claims are and must be evaluated on a case-by-case basis. There is no claim in the Hearing Officer's record by the Appellant of any actual sensitivity, much less any sensitivity that so severely impair the neurological, respiratory or other functions of the Appellant that it substantially limits one or more of the Appellant's major life activities. Moreover, the Appellant is not a class representative, thus he does not stand in for any other person who can make their own claim and provide the standard of evidence discussed by the USAB.

Mr. Marshall also disagrees with Dr. Kramer's characterization of the *Firstenberg vs Santa Fe* case. The 10th Circuit Court of Appeals made clear that Mr. Firstenberg's electromagnetic sensitivity claims in his complaint were not supportable by federal law as he set out in his complaint. The Court of Appeals dismissed the case by saying that, "...[w]e conclude that Mr. Firstenberg's state-court complaint does not articulate a claim arising under federal law within the meaning of § 1331. We therefore REVERSE the district court's dismissal orders and resulting judgment and REMAND the case to the district court, with instructions to VACATE its judgment and remand the case to state court." (Emphasis in the original.)

Appellant's Statement #5

ADA (Title II) requires the representations of residents with electromagnetic sensitivity to be taken by the Chair (Administrative Hearing Officer) without challenge.

Staff Response

In his fifth basis, Appellant asks more of a question than makes any statement. If residents "X," "Y," and "Z" testified or left statement cards, such information was considered by the hearing officer before his decision was rendered. There was no challenge to any individual's disability at the hearing. Appellant's reliance on *T-Mobile Est. LLC v. City and County of San Francisco* has no bearing on the decision in this appeal. The cited case does not address the FCC's authority to establish minimum federal RF emission standards and the safety factor in place in such standards.

Appellant's Statement #6

The DC Court of Appeals struck down the manner in which FCC had issued preemption of local environmental authority in its recent regulations as “arbitrary and capricious...”

Staff Response

Appellant's sixth basis of his appeal is nonsensical. City is aware of a decision in United Keetoowah Band of Cherokee Indians in Oklahoma, et al. v. Federal Communication Commission, 933 F.3d 728 (2018) that staff surmises Appellant is referring to, however, the decision on said case does not have any bearing on the subject project nor factors the Planning Commission should rely upon in making a decision.

Appellant's Statement #7

The Administrative Hearing Officer should not have accepted Dr. Kramer's summary that resident's complaint (on Federal pre-emption on RF safety) should be directed to members of congress.

Staff Response

Appellant's seventh assertion on appeal is that he did not agree with Dr. Kramer's statement at the administrative hearing that residents' concerns about the RF emissions should be directed to members of Congress. Dr. Kramer's statement was made in addressing comments at the hearing that the City should deny the project based on the assertion the wireless facility would emit RF. Denying a project solely on such basis is prohibited by federal law and regulation, and state law. Based on preemption principles, only the federal government has the authority to modify the federal standards related to RF emissions.

Appellant's Statement #8

Excessive appeal fee is a violation of the American with Disabilities Act. Applicant is demanding a refund of the fee.

Staff Response

Appellant's eighth basis in support of his appeal is a statement that the City fee to appeal the administrative decision is excessive. The fee is set by City Council. The Planning Commission is not authorized to set, approve, or refund the fee charged.

Appellant's Statement #9

The appellant demands reversal of the Administrative Hearing Officer's approval of the project due to health concerns and cited T-Mobile vs City of San Francisco (Exhibit D of Attachment #8).

Staff Response

The ninth basis Appellant asserts is more of a statement. As noted above, his reliance on a California Supreme Court decision as well as a federal decision for the issues before this body are misplaced. The recommendation denying his appeal and confirming the hearing officer's decision to approve DPMN 2017-70219 is based on the City's wireless policy and federal regulations pertaining to wireless communication facilities.

CONCLUSION:

The proposed wireless communications facility complies with FCC RF emission standards as well as the applicable policy guidelines contained in the City's Wireless Communications Facilities Guidelines and Standards (Resolution 97-197). Based on substantial compliance with all applicable standards, staff recommends that the Planning Commission deny the appeal, thereby upholding the Hearing Officer's decision approving the project, as reflected in the attached resolution (Attachment #4).

Prepared by: Wilfredo Chua, Associate Planner

Attachments

- [Attachment #1 – Vicinity Map](#)
- [Attachment #2 – Location Map](#)
- [Attachment #3 – Aerial Photo](#)
- [Attachment #4 – Proposed Planning Commission Resolution](#)
- [Attachment #5 – Letters of Opposition](#)
- [Attachment #6 – Administrative Hearing Staff Report](#)
- [Attachment #7 – Approval Letter](#)
- [Attachment #8 – Appeal Form with Attachments](#)
- [Attachment #9 – Applicant's Response Letter](#)
- [Attachment #10 – Propagation Maps](#)