



MEMORANDUM

TO: Planning Commission

FROM: Brian Pedrotti, Community Development Director

BY: Shayna Gropen, Assistant Planner

SUBJECT: Consideration of CUP23-006; New 55 Foot Wireless Telecommunication Facility and Finding That This Action Is Exempt From Review Under CEQA Pursuant to State Guidelines Section 15303; Location– 789 Valley Rd; Applicant – Verizon Wireless

DATE: February 6, 2024

SUMMARY OF ACTION:

Approval of the project would allow a new wireless telecommunication facility to be installed on private property in the Office Mixed Use zone.

IMPACT ON FINANCIAL AND PERSONNEL RESOURCES:

None.

RECOMMENDATION:

1) Adopt a Resolution approving Conditional Use Permit 23-006 and 2) Find that this action is exempt from CEQA pursuant to State Guidelines section 15303 for the installation of new small structures and facilities.

BACKGROUND:

Summary of State and Federal Constraints on City Authority:

1. Section 332 is the Primary Federal Limitation on City Authority:

47 U.S.C. § 332 (“Section 332”) is the principal federal law limiting the City’s authority over placement of wireless facilities; however, it nonetheless recognizes and preserves local zoning authority over the placement, construction and modification of wireless communications facilities, provided the locality complies with the following five requirements.

a. Regulation Based on RF Emissions Prohibited

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The health risks associated with the public's exposure to radio frequency (RF) energy has been an area of public concern particularly in light of the public's increasing reliance on mobile devices and the proliferation of mobile technology and its supporting infrastructure. Setting the safety standards for RF emissions is exclusively the responsibility of the federal government, and the responsible agency is the Federal Communications Commission ("FCC"). Thus, Section 332(c)(7)(B)(iv) prohibits the City from denying a wireless facility application based on concerns about RF emissions so long as the applicant has demonstrated that its facilities will comply with FCC standards. The FCC in 1997 issued OET Bulletin 65, which provides technical guidelines for evaluating compliance with the FCC RF safety requirements.

Further, direct or indirect concerns over the perceived health effects of RF emissions may not serve as substantial evidence to support the denial of an application, where an applicant has demonstrated compliance with the FCC's standards for RF emissions.¹ Similarly, claims that a proposed wireless facility will result in diminished property values that are rooted in a concern about the perceived effects of RF emissions cannot constitute substantial evidence supporting a denial of a wireless facility application.²

b. *City Cannot Prohibit the Provision of Personal Wireless Services*

Section 332 restricts the City from establishing regulations or taking any actions that result in the prohibition or effective prohibition of the provision of personal wireless services. The Ninth Circuit has developed its own test for an "effective prohibition". Under the Ninth Circuit's test, denying a wireless application can be found to improperly "prohibit" a carrier's provision of personal wireless services if it prevents a wireless provider from closing a "significant gap" in its own service coverage using the least intrusive means. To support a contention that a site is necessary to close a significant gap, a provider must both demonstrate that a significant gap in service exists and that it has chosen the least alternative means of filling that gap.

There is no bright-line rule for determining when a gap is "significant;" instead, the conclusion is based on a fact-specific analysis of coverage and demand. To satisfy the least intrusive means standard, the applicant must show that it made a good faith effort

¹ See, e.g. *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148 (S.D. Cal. 2003) ("The TCA prohibits local government from basing their decision to deny a permit to construct a wireless site upon evidence which finds its support in fear over the health effects of RF emissions. H.R. Conference Report No. 104-458, 201 (1996).")

² See, *California RSA No. 4 v. Madera County*, 332 F.Supp.2d 1291, 1309 (E.D. Cal. 2003); *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F.Supp.2d 1148, 1161(S.D. Cal. 2003); See also, *Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403 (3d Cir. 1999)(speculative and generalized claims about site visibility and damage to property values are not substantial evidence).

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to identify and evaluate alternatives, such as considering less sensitive sites, alternative system designs, alternative tower designs, and the use of existing structures for antenna placement, and proposes the least intrusive alternative. The applicant must analyze the specific factors in the locality's code rather than solely relying upon generalized observations. Once the applicant has done that, the burden shifts to the locality to rebut the applicant's least intrusive analysis. That is, a municipality is not compelled to accept and may reject the provider's least intrusive means analysis, so long as the locality is able to show that there are some potentially available and technologically feasible alternatives. The provider must be given an opportunity to dispute the availability and feasibility of the alternatives favored by the locality.

c. The City Cannot Discriminate Among Providers of Functionally Equivalent Services

Section 332(c)(7)(B)(i) prohibits the City from “unreasonably discriminat[ing] among providers of functionally equivalent services.” This limitation is intended to prevent the City from dictating a preference for certain technologies.

d. The City Must Act on a Wireless Application Within A Reasonable Time

Section 332 provides that local authorities must make a final decision regarding whether to approve or deny an application within a “reasonable period of time” after the request is filed, taking into account the nature and scope of the request. In 2009, the FCC established “presumptively reasonable periods” for local action on a wireless communications facility siting application—typically referred to as the “shot clocks.” Applications that propose a “collocation” must be approved or denied within 90 days; applications for all other facilities must be approved or denied within 150 days. The FCC has adopted three other “shot clocks” for other types of wireless applications including small wireless facilities subject to a 60 day shot clock if placed on an existing structure of 90 days shot clock if placed on a new or replacement structure, and certain modifications to an existing wireless facility that qualify as an eligible facilities request under 47 CFR 1.6100 are subject to a 60 day shot clock. The City must reach a final decision on a wireless application within the applicable FCC shot clock period (including the completion of all appeals, and issuance of all ancillary permits) or risk a deemed approved remedy.

In 2015, the State Legislature adopted AB 57, codified as Gov. Code Section 65964.1, which provides that if a local government fails to act within the time required by either of the above two FCC shot clocks, the applicant may pursue a “deemed approval” of its application by providing notice to the local government, and the local government would have to go to court within 30 days to try to challenge the deemed granted assertion. In late 2021, Governor Newsom signed into law AB 537, which expanded Gov. Code 65964.1. This change had the net effect of imposing a “deemed granted” remedy for all

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types of wireless facility applications if the applicable shot clock is missed by the local jurisdiction.

e. Any Denial Must Be Supported By Substantial Evidence

Section 332 also requires that any decision to deny a request to build personal wireless facilities “shall be in writing and supported by substantial evidence contained in a written record” submitted contemporaneously with the denial. To determine whether a local government’s decision is supported by substantial evidence within the meaning of the statute, a reviewing court “must be able to identify the reason or reasons why the locality denied the application.” The rationale behind such a denial need not be “elaborate or even sophisticated”—rather, a local authority must provide a rationale clear enough to “enable judicial review.” The City must provide the applicant with written notice of a denial as soon as practicable after the decision has been made.

2. City Cannot Prohibit Telecommunications Services or Impose Moratoria

47 U.S.C. § 253 (“Section 253”) preempts state and local governments requirements that prohibit or have the effect of prohibiting any entity from providing telecommunications services. Otherwise preempted provisions survive if they are within one of two safe harbors. First, Section 253(b) provides that states may “impose, on a competitively neutral basis...requirements necessary to preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications service.” Second, Section 253(c) protects state and local authority to “manage the public rights of way” and “require fair and reasonable compensation from telecommunications providers” for public ROW use on a competitively neutral and nondiscriminatory basis. The Ninth Circuit has held that the “unambiguous text” of Section 253(a) requires a plaintiff to demonstrate either an actual prohibition or that the challenged provisions “actually have the effect of prohibiting the provision” of covered services.” Further, the Ninth Circuit also determined that the phrase “prohibit or have the effect of prohibiting” has the same meaning in both Section 253(a) and Section 332(c)(7)(B)(i)(II). Thus, unless the Ninth Circuit determines otherwise, an applicant must show an actual prohibition to obtain relief under Section 332 or Section 253.

3. State Law Limits on the City’s Authority

There are several state law provisions that affect the City’s ability to regulate wireless facilities. Most relevant here, Gov. Code Section 65964 does three things:

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- All wireless facility permits issued by the City must be effective for at least 10 years, “absent public safety reasons or substantial land use reasons.”
- The City cannot require wireless permittees to post an escrow deposit covering the cost to remove the proposed facility; however, a performance bond requirement securing removal of the facility remains permissible.
- The City cannot require that all wireless facilities are limited to sites owned by particular parties within the City.

The Verizon Application and Prior City Review

The applicant proposes the installation of a new stealth wireless communications facility to be completely concealed within a new 55-foot faux water tower within a 540 square foot lease area, which will be enclosed with a chain link fence. Under federal law, the application is considered an application for a macro wireless facility subject to a 150-day FCC shot clock. On August 14, 2023, the City made the initial determination that the proposed application is a macro wireless facility application subject to the 150 day shot clock. While some of the City’s correspondence identified the proposed facility as a small cell communications facility, the City has treated the application as macro wireless facility application over the course of its review, and provided significant notice outlining the specifics of the application and the proposed facility sought to be constructed, beyond the notice requirements of the City’s Code.

The rear portion of the subject property is enclosed with mesh placed over a chain link fence to screen equipment associated with a wireless telecommunication facility. The subject property is a previously developed parking lot located in the Office Mixed Use (OMU) zoning district (Attachment 2). There is a commercial property to the north, a mixed-use property that includes residential and commercial uses south, a mobile home park to the east, and agricultural uses to the west of the subject property.

Telecommunication facilities are allowed in all mixed use and public facility zoning districts with the approval of a conditional use permit. Specifically, Arroyo Grande Municipal Code Section 16.36.030 and Table 16.36.030(A) provide that commercial Telecommunication facilities are permitted within the OMU zone subject to the approval of a Conditional Use Permit (CUP) and compliance with the Telecommunication Facilities Siting and Permit Submittal Requirements as adopted by City Council Resolution No. 4791, dated April 25, 2017 (the “Telecommunication Requirements”) (Attachment 3). Pursuant to Arroyo Grande Municipal Code Section 16.16.050, the Planning Commission is authorized to approve Conditional Use Permit applications.

Staff Advisory Committee:

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The Staff Advisory Committee (SAC) reviewed the proposed project on November 30, 2023. Members of the SAC include representatives from the City's Public Works Department, Police Department, Engineering Division, and Planning Division. Members of the SAC were supportive of the project as proposed and recommended approval of the project. Members of the SAC reviewed concerns regarding the proximity of the project to surrounding residential uses. Upon providing clarification that the proposed plan meets FCC regulations for RF emissions and all City setback and other location requirements, SAC concerns were resolved and support for the project was confirmed.

Architectural Review Committee

The Architectural Review Committee (ARC) reviewed a proposed conceptual project on December 18, 2023, for purposes of making a recommendation to Planning Commission (Attachment 4). The project was presented conceptually due to the applicant's inability to provide final color and materials samples for the proposed facility due the applicant's process of not finalizing design details such as selecting final color and materials until entitlement approval is obtained. The Committee asked that the applicant consider installing mature landscaping to soften the visual impact, move the facility as far from habitable structures as possible, and consider implementing design elements in either agrarian or Victorian detailing to complement the surrounding structures and uses. The ARC recommended approval of the project in concept, with the condition that the project return to ARC for final review of colors and materials following an approval of the project by Planning Commission, prior to building permit issuance.

ANALYSIS OF ISSUES:

Project Description

The applicant proposes the construction, operation, and maintenance of a new wireless telecommunications facility at 789 Valley Road. The purpose of the proposed facility is to enable Verizon Wireless to meet the capacity demands of subscribers and provide seamless and reliable service in an area that is otherwise not sufficiently covered by existing sites. The applicant indicates that improved capacity is essential to provide service at the quality that customers expect. The proposal includes a new thirty (30) kilowatt diesel generator with a 210-gallon tank to be contained within the 540 square foot enclosure area at the base of the tower.

General Plan Consistency

The General Plan Land Use designation of the property is Mixed-Use, which is intended to provide for a variety of retail, service, commercial, offices, residential, and other compatible uses that support multiple neighborhoods and the greater community. The project is consistent with the many objectives and policies from the Land Use Element. For example, the facility is setback from the property lines in accordance with the design and siting guidelines for telecommunication facilities. The faux water tank screens the

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equipment contained within in a manner than is harmonious with the area’s agrarian land uses.

Land Use Element

LU9: Provide for appropriate maintenance, development and placement of Community Facilities (CF) relative to existing and planned land uses.

LU9-2: Community facilities other than schools, parks and recreation areas may also be conditionally permitted in any other land use designation based on the specific function of the facility, compatible with the site and environs.

LU9-3: Balance the supply and size of Community Facilities with the existing and planned demand for the services they provide based on the General Plan Land Use Element.

LU11: Promote a pattern of land use that protects the integrity of existing land uses, area resources and infrastructure and involves logical jurisdictional boundaries with adjacent communities and the County.

LU11-1.2: Require that adequate buffering and setbacks be provided between dissimilar uses.

LU12-13: Provide appropriate screening for necessary “urban-style” facilities, structures, and features.

Appearance

The proposed facility will be designed as a fifty-five foot (55') tall faux water tank to obscure the view of the antennas that will be located inside. All associated equipment on the ground will be screened from public view by a chain link fence surrounding the equipment and a cloth-lined chain link fence surrounding the property. The facility will consist of three sectors of two antennas each, along with six remote radio units mounted adjacent to the antennas. All brackets, antennas, and remote radio units will be painted to match the faux water tower. The associated equipment cabinets will be placed at the base of the pole within a new eight-foot chain-link fence enclosure. The enclosure area at the base of the tower is a total of 540 square feet. The base of the tower will be ten feet (10') in diameter with four beams supporting a cylindrical brown, faux-wood tank that is approximately ten feet (10') tall. The renderings indicate that the proposed tank will be designed to have a rustic appearance consisting of vertical faux-wood paneling perforated by three horizontal bands, painted to match the wood material.

The Telecommunication Requirements specify that towers located within 300 feet of residentially zoned property should be set back at least fifty feet or the height of the facility,

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whichever is greater, from the residential property. The fifty-five-foot proposed structure height necessitates that the tower be set back fifty-five feet from residential property. The facility is proposed to be setback approximately 83 feet from the nearest residentially zoned property to comply with this requirement (Attachment 4).

The location was selected with several considerations in mind, including technical requirements as defined by Radio Frequency Engineers, topography, radio frequency propagation, elevation, height, access, aesthetics, feasibility of collocation and alternative sites, and amenability of the property owner regarding the negotiation of ground space. Four alternative sites were considered by the applicant, two of which were eliminated based on lack of interest from the respective property owners, and the third was determined to be less optimal due to elevation and location constraints. The water tower design was selected to minimize visual and negative impacts by concealing the equipment where collocation on an existing facility is not feasible (Attachment 5). The proposed facility will not be staffed, and minimal maintenance will be required, therefore traffic impacts associated with the placement of the tower are predicted to be approximately one trip per month. The site is accessed from Valley Road and no changes to the road are proposed as part of the project description.

Exposure Report

The applicant has provided a Radio Frequency Electromagnetic Fields Exposure Report (RF Report) to demonstrate compliance with the Federal Communications Commission (FCC) radio frequency safety guidelines (Attachment 6). The report was conducted by a third-party consultant and utilized computer-simulated analysis of the electromagnetic fields, performing analysis based on FCC's regulations regarding General Population Maximum Permissible Exposure (MPE). The FCC regulations for MPE limits for field strength and power density for the transmitters operating at frequencies of 300 kHz to 100 GHz. This maximum refers to the peak electric and magnetic field strength associated with these fields to which a person may be exposed without harmful effect and with an acceptable safety factor.

The antennas are grouped into sectors pointing in directions to achieve the desired area of coverage. Project plans indicate that the antennas will be directed to the northwest, northeast, and south of the tower location. Figures 1, 2, and 3 contained in the RF Report show that emission exposure levels are at their highest in the general direction of each antenna section. Based on the report provided, a typical six-foot person standing on the ground and on an adjacent building roof will experience exposure levels below the FCC's most stringent General Population MPE Limits. Figure 1 represents General Population Exposure Limits projected at ground level, Figure 2 represents projected exposure at 14', which is the estimated roof elevation of adjacent structures, and Figure 3 represents projected exposure at the antenna elevation of 47'. The report further indicates that areas subject to emissions greater than those allowed by the FCC are located within 90-feet

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from the front face of the proposed antennas at an elevation of 47 feet. No habitable space is located in the areas where RF emissions exceed FCC limits.

Antennas are mounted inside of the 55' tower and are therefore not accessible by the public, however, if a need arises wherein maintenance personnel must work directly in front of the antennas, it is recommended that Verizon be contacted to arrange for the power to be shut down during the work period. Additionally, access to the facility should be controlled to prevent unauthorized access and advisory signage should be installed surrounding the facility to ensure proper notification and disclosure of risk. The RF Report concludes that the anticipated calculations for the proposed site resulted in exposure levels below the FCC's most stringent General Population MPE limits.

Telecommunication Requirements

The Telecommunication Requirements specify that colocation is encouraged to reduce the overall number of freestanding facilities throughout the City. Due to the infeasibility of colocation, the applicant proposes to conceal the equipment and associated antennas within the faux water tank. Innovative design, defined as structures compatible with surrounding architecture or replicating natural environmental features, are encouraged by the Telecommunication Requirements. The use of a faux water tower as a means of minimizing visual impact should be considered by the Planning Commission for compliance with the Telecommunication Requirements.

Although renderings of the proposed structure have been provided (Attachment 7), the applicant has indicated that final materials and designs cannot be verified prior to obtaining planning approval and the subsequent selection of a contractor. Renderings provided by the applicant depict the proposed tower to be constructed from a synthetic, brown wood material. Facilities within 20 miles of the site that have similar appearance and function have been provided as Attachment 8, for reference. The PC is being asked to consider the project as presented and make recommendations based on the design, colors, and materials provided.

The Telecommunication Requirements further state that substantial landscaping or other screening should be provided to visually buffer any adjoining residential uses from the potential visual impacts of the facility. The applicant has not proposed landscaping due to the project site's lack of existing irrigation. However, the equipment will be screened behind a proposed eight-foot chain link fence enclosure. During its review of the project, the ARC asked the applicant to consider installing mature landscaping to soften the visual effect of the structure.

The thirty (30) kilowatt diesel generator with a 210-gallon tank to be contained within the 540 square foot enclosure area at the base of the tower will only be utilized during the

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event of an emergency. The generator shall not exceed noise levels of 45 decibels per Municipal Code Section 9.16.040.

ALTERNATIVES:

The following alternatives are provided for the Commission’s consideration:

1. Approve the project as submitted;
2. Approve the project with conditions;
3. Deny the project; or
4. Provide other direction to staff.

ADVANTAGES:

Approval of the proposed wireless communications facility will increase cellular data capacity in the surrounding areas and allow the applicant to meet capacity demands and provide reliable service for customers. The backup generator will ensure the facility is operable during power outages and emergencies.

DISADVANTAGES:

The placement of a fifty-five-foot faux water tower may alter visual and aesthetic conditions in and around the project area.

ENVIRONMENTAL REVIEW:

The construction of a fifty-five foot wireless telecommunication facility is categorically exempt from the California Environmental Quality Act (“CEQA”) under the Class 3 exemption, which applies to the 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. (State CEQA Guidelines, § 15303.) State CEQA Guidelines Section 15303 provides some, but does not limit project scope to, examples of structures that fall within the Class 3 exemption. The proposed project is a new small facility in an already developed area, and is comparable in scope and function to those structures identified in the language of State CEQA Guidelines Section 15303, including single family homes and duplexes, commercial developments, utility extensions and improvements, and accessory structures.

None of the exceptions outlined in State CEQA Guidelines Section 15300.2 apply. The project will not impact an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies. There will be no cumulative impact of successive projects of the same type in the same place, over time. There will be no significant environmental impact due to unusual circumstances. The project will not result in damage to scenic resources. The project site is not on any list compiled pursuant to Government Code section 65962.5,

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and there are no historical resources on or near the project site that would result in a substantial adverse change as a result of the project. Thus, the project falls within the Class 3 exemption.

PUBLIC NOTIFICATION AND COMMENTS:

The Agenda was posted at City Hall and on the City's website in accordance with Government Code Section 54954.2. Property owners located within 300 feet of the project site were notified of the upcoming public hearing 10 days prior to the scheduled meeting, and the applicant posted a project sign 12 calendar days prior to the date of the public hearing, according to Municipal Code requirements. Public comment received prior to the publication of the agenda is included at Attachment 10.

Attachments:

1. Resolution
2. Project Location
3. Telecommunication Facilities Siting and Permit Submittal Requirements
4. Minutes of the December 18, 2023 ARC Meeting
5. Project Plans
6. Alternative Candidate Analysis
7. Fields Exposure Report
8. Renderings
9. Local Examples
10. Public Comment