

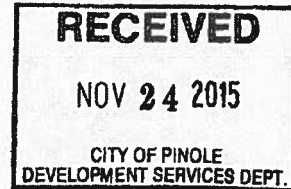
MACKENZIE & ALBRITTON LLP
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SENDER'S EMAIL: JHEARD@MALLP.COM

November 23, 2015

VIA: Hand Delivery

Ms. Patricia Athenour
City Clerk
City of Pinole
2131 Pear Street
Pinole, CA 94564



RE: Appeal of the Planning Commission's Denial of Verizon Wireless Communications Facility Proposed at 2518 Pfeiffer Lane, Pinole, CA; File Numbers: CUP 14-13, DR 14-26

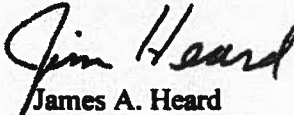
Dear Ms. Athenour:

On behalf of our client Verizon Wireless, we are filing this letter to appeal the Pinole Planning Commission's decision to deny the Conditional Use Permit and Design Review applications for the Verizon Wireless Communications Facility proposed at 2518 Pfeiffer Lane. The Planning Commission took this action at their regularly scheduled meeting on Monday, November 16, 2015.

This appeal is based on the following grounds: (1) the Planning Commission denial was not based on substantial evidence in violation of both California law and 47 U.S.C. § 332 (c)(7)(B)(iii); and (2) the denial would constitute a prohibition of personal wireless services in violation of 47 U.S.C. § 332 (c)(7)(B)(i)(II). Verizon Wireless reserves the right to present additional evidence and argument in support of this appeal before the matter is heard by the City Council.

Enclosed please find a check for the appeal fee in the amount of \$803.00.

Sincerely,


James A. Heard

Enclosures

Patricia Athenour

From: Jim Heard [jheard@mallp.com]
Sent: Wednesday, January 27, 2016 2:56 PM
To: Patricia Athenour
Cc: Ben Reyes; Winston Rhodes; pamela nobel
Subject: Verizon Wireless appeal of the Planning Commission's Denial of Verizon Wireless Communications Facility Proposed at 2518 Pfeiffer Lane, Pinole, CA; File Numbers: CUP 14-13, DR 14-26
Attachments: 2016 01 27 Ltr to Pinole City Council.pdf

Dear Ms. Athenour:

I am attaching a letter regarding the appeal referenced above on behalf of our client Verizon Wireless, which we understand will be heard on February 9, 2016. Please distribute the attached letter to the Mayor and Council Members along with the packet for that meeting.

Jim Heard
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January 27, 2016

VIA: Email to City Clerk

Mayor Roy Swearingen
Mayor Pro Tem Debbie Long
Council Members Peter Murray, Tim
Banuelos, and Maureen Toms
Pinole City Council
2131 Pear Street
Pinole, CA 94564

**RE: Appeal of the Planning Commission's Denial of Verizon Wireless
Communications Facility Proposed at 2518 Pfeiffer Lane, Pinole, CA;
File Numbers: CUP 14-13, DR 14-26**

Dear Mayor Swearingen, Mayor Pro Tem Long, and Council Members:

We submit this letter on behalf of our client Verizon Wireless in support of its appeal of the Planning Commission's denial of the Conditional Use Permit and Design Review applications referenced above (the "Denial"). As we will explain, Verizon Wireless has worked long and hard to bring improved wireless service to the residents of Pinole while avoiding any significant aesthetic or other impacts on the community. Even though the faux water tower design presented to the Planning Commission met that goal and complied with all standards for approval under the Pinole Municipal Code (the "Code"), Verizon Wireless has once again gone back to the drawing board in order to address the concerns raised in the Denial. Since filing its appeal, Verizon Wireless has submitted detailed plans for a modified design that would further minimize the project's already insignificant impacts. Specifically, the modified design would conceal the antennas inside a faux chimney, significantly reduce the project's footprint, move it away from the edge of a bluff on the property, and eliminate the backup diesel generator.

In considering this appeal, we ask you to focus on the facts and the applicable law, rather than the hyperbole and opinion of those who will inevitably oppose *any* wireless facility. Based on the facts and the law, the Planning Commission Denial was unsupportable and must be overturned. Any other course would violate not just the City's Code, but federal law as well.

I. Background: Verizon Wireless Has Been Working For More Than Five Years To Improve Wireless Service in Pinole.

Verizon Wireless's efforts to bring improved service to Pinole began in 2010. As some of you may recall, Verizon Wireless first sought approval for a facility in Pinole Valley Park (the "Park Facility"), at a location proposed by City staff. After the City signed a lease with Verizon Wireless and issued final zoning approval for the Park Facility, federal officials asserted that it would violate use restrictions imposed as a condition of federal funding when the City purchased the park. In hopes of avoiding litigation, the City and Verizon Wireless thereafter entered into a settlement agreement. We will not take your time to discuss the full terms of that agreement, but in general terms it called for Verizon Wireless to lease and seek the City's approval of an alternative site at 2518 Pfeiffer Lane (the "New Site"), and deferred any discussion of possible liability until the conclusion of those efforts.

This appeal concerns the New Site contemplated under the settlement agreement. While the settlement agreement does not require you to grant the appeal, denying it would give Verizon Wireless grounds to terminate the settlement agreement. But we do not urge you to grant the appeal based on the settlement agreement. We urge you to grant it because Verizon Wireless has gone the extra mile in order to address any legitimate concerns raised by City staff and the community, and designed a project that complies with all applicable requirements of the Code. As we explain below, granting the appeal is not only consistent with the Code, it is required under federal law.

II. Further Delay or Denial Would Violate Federal Law.

A. Federal Law Limits the City's Discretion.

While the federal Telecommunications Act of 1996 generally preserves local land use authority over the placement and construction of wireless communications facilities, it places several restrictions on such authority. Three of those restrictions are most relevant here. First, local governments must take final action on the permit applications within a reasonable period of time.¹ Second, any denial of an application must be in writing, and based on substantial evidence.² Finally, local governments may not regulate wireless facilities based on their radio-frequency ("RF") emissions, so long as those emissions are below the limits set by the Federal Communications Commission ("FCC").³ Here, there is no dispute that the Verizon Wireless facility will operate well below the FCC limits.

¹ 47 U.S.C. § 332(c)(7)(B)(ii).

² 47 USC § 332(c)(7)(B)(iii).

³ 47 U.S.C. § 332(c)(7)(B)(iv).

B. Further Delay Would Be Unlawful.

The first restriction will become significant only in the event that project opponents seek to continue the hearing, which in our experience is a common delaying tactic. Under controlling regulations of the FCC, the deadline for final action on an application to install a new cell tower is generally 150 days after the application is filed.⁴ This deadline can be extended by mutual agreement, or by the time it takes an applicant to provide additional information requested within 30 days after the application was filed.⁵ In this case, Verizon Wireless has already agreed to extend the applicable deadline through February 17, 2016. Delaying your decision beyond that date without the consent of Verizon Wireless would violate federal law.

C. There Is No Substantial Evidence That Would Support Denial.

The second restriction on local authority – the requirement that any denial must be based on substantial evidence – is central to this appeal. As interpreted under controlling federal court decisions, this requirement means that a denial is unlawful unless it is *based on requirements set forth in the local code* and supported by evidence in the record.⁶ In considering this issue, it is critical to note that concern about RF emissions does *not* constitute substantial evidence for denial. Moreover, federal preemption applies not just to regulation that is explicitly based on RF emissions, but also to efforts to circumvent such preemption through some proxy such as aesthetics or property values.⁷

Here, there is no substantial evidence that would support denial. In a thorough and well-reasoned report to the Planning Commission, the City's expert planning staff concluded that the project as originally proposed met all requirements for approval under the Code, and that it will have no significant environmental impacts. The Planning Commission essentially ignored staff's analysis, and denied the application based on the exaggerated and inaccurate concerns of anti-wireless activists.

Even though those concerns did not justify the Denial, Verizon Wireless has nonetheless attempted to address them by submitting an alternative, modified design that further reduces the project's already *de minimis* impacts. The more salient changes involve replacing the faux water tower with a faux chimney extension that will extend no

⁴ See *In Re: Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review, Etc.*, FCC 09-99 (FCC November 18, 2009) (the "Ruling").

⁵ Ruling, ¶¶ 49, 52.

⁶ See *Metro PCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 725 (9th Cir. 2005) (denial of application for wireless facility must be "authorized by applicable local regulations and supported by a reasonable amount of evidence (i.e., more than a 'scintilla' but not necessarily a preponderance).").

⁷ See, e.g., *AT&T Wireless Servs. of Cal. LLC v. City of Carlsbad* (S.D. Cal. 2003) 308 F. Supp. 2d 1148, 1159 (in light of federal preemption, "concern over the decrease in property values may not be considered as substantial evidence if the fear of property value depreciation is based on concern over the health effects caused by RF emissions"); *Calif. RSA No. 4, d/b/a Verizon Wireless v. Madera County* (E.D. Cal. 2003) 332 F. Supp. 2d 1291, 1311 ("complaints about property values were really a proxy for concerns about possible environmental effects of RF [emissions], which cannot provide the basis to support a decision").

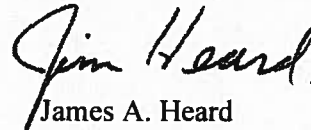
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more than 7 feet above the highest ridge of the existing garage roof, eliminating the diesel backup generator, reducing the project's footprint, and moving it 30 feet back from the edge of a bluff on the property that was a focus of opponents' concerns.

III. Conclusion

In short, there was no legitimate basis for the Denial, but the alternative design eliminates any colorable basis for objecting to the project. This Council should reverse the Planning Commission and approve either the original design or the modified design. We look forward to seeing you at the hearing, and would be happy to answer any questions you may have in the meantime.

Sincerely,



James A. Heard

cc: Ben Reyes, Esq. (City Attorney)
Winston Rhodes, AICP (Planning Mgr.)
Pamela Nobel