

CITY OF PLEASANTON
 Planning and Community Development
 Phone: (925) 931-5600; Fax: (925) 931-5600
 200 Old Bernal Avenue, Pleasanton, CA 94566

RECEIVED

DEC 21 2010

APPLICATION FOR DEVELOPMENT REVIEW OF PLEASANTON PLANNING DIVISION

Application No(s): PDRW-38/6890 Koll Center Parkway Date Filed: 9/21/2009

I. CHECK TYPE OF APPLICATION(S):

- Administrative Design Review (\$25)
- Animal Use Permit (\$15)
- Appeal (of Case PDRW-38)
(25% of orig. fee: max. \$25)
- Conditional Use Permit (\$150)
- Condominium Conversion (\$50)
- Design Review (\$50)
- FDP (Flood) Variance (\$50)
- General Plan Amendment (\$250)
- Growth Management (\$200)
- Home Boutique Use Permit (\$25)
- Initial Environmental Assessment (\$25)
- Large Family Daycare (\$15)
- Lot-Line Adjustment (\$50)
- Minor Subdivision (\$50)
- Non-Exempt Home Occupation (\$15)
- Non-residential Satellite Dish (\$50)
- Other:
- Outdoor Dining (\$25)
- Outdoor Display (\$25)
- Preliminary Review
- PUD Development Plan (\$2000)
- PUD Major Modification (\$2000)
- PUD Minor Modification (\$100)
- Rezoning (\$250)
- Sign Design Review (\$15)
- Specific Plan (\$250)
- Specific Plan Amendment (\$250)
- Temporary Use Permit (\$25)
- Tentative Map (\$2000 + \$10/lot)
- Variance (\$50)

II. GENERAL DATA REQUIRED

- A. Name of Applicant (Please Print): Verizon Wireless C/O Complete Wireless Consulting
- B. Address or Location of Property: 6890 Koll Center Road, Pleasanton, CA.
- C. Assessor's Parcel Number(s): 946-4557-002
- D. Site Area (acres/sq. ft.): .77 acres / 1000 sf lease area
- E. Current Zoning: PUD-I/CO F. Proposed Zoning: No proposed change
- G. Existing Use of Property: City owned pump station

H. Description of Proposal: _____
We dispute findings of letter from Brian Dolan, Community Development Director, received via email 12/6/10 denying our project the right to complete our Planning Commission hearing.

Please see attached additional information.

(Refer to appropriate "Informational Guide" for required site plans, elevations, photographs, or other submittals which must accompany your application.)

I. Residential Addition Proposals: From the date on this application, was the original house built within the last 5 years?

- Yes No (NA)

- *If you do not know the answer, please research the property files on the public Laserfiche machine located by the Building and Safety Division at 200 Old Bernal Avenue, Pleasanton.*

(continued on reverse)

III. AUTHORIZATION OF PROPERTY OWNER AND OWNERS ASSOCIATION

J. **PROPERTY OWNER:** In signing this application, I, as property owner, have full legal capacity to, and hereby do, authorize the filing of this application. I understand that conditions of approval are binding and agree to be bound by those conditions, subject only to the right to object at the hearings or during the appeal period. I certify that the information and exhibits submitted are true and correct.

Name (Pls. Print): Michael Roache Daytime Telephone: (925) 931-5017
Company: City of Pleasanton Other Telephone: _____
Address: 200 Bernal Ave Fax: _____
City: Pleasanton Zip: 94566 E-mail: _____
Signature: Letter from city manager previously provided Date: _____

K. **OWNERS ASSOCIATION:** Is the property subject to the rules or guidelines of a homeowners association (HOA) or a business owners association?

Yes No

If yes, did the proposed project receive approval from the HOA/business owners association?

Yes No The HOA/business owners association does not review any proposed construction projects or use changes

- *If yes, please attach a copy of the HOA response.*

Association Contact (Pls. Print): _____ Daytime Telephone: _____
Association Name: _____ Other Telephone: _____
Address: _____ Fax: _____
City: _____ Zip: _____ E-mail: _____

L. **APPLICANT OTHER THAN PROPERTY OWNER:** In signing this application, I, as applicant, represent to have obtained authorization from the property owner to file this application. I agree to be bound by conditions of approval, subject only to the right to object at the hearings on the application or during the appeal period. If this application has not been signed by the property owner, I have attached separate documentation of full legal capacity to file the application. I certify that the information and exhibits submitted are true and correct.

Name (Pls. Print): Mark Lobaugh Daytime Telephone: (916) 217-7513
Company: Complete Wireless/on behalf of Verizon Wireless Other Telephone: _____
Address: 2009 V St. Fax: _____
City: Sacramento Zip: 95818 E-mail: mlobaugh@completewireless.net
Signature: _____ Date: 12/21/10

M. **NOTE ANY OTHER PARTY(IES) WHO SHOULD RECEIVE STAFF REPORTS AND NOTICE OF APPLICATION ON A SEPARATE SHEET AND ATTACH TO APPLICATION.**

IV. SCHOOL FEE AGREEMENT (If a residential project, answer the question below)

Have you signed a School Fee Agreement with the Pleasanton Unified School District?

Yes No NA

If yes, please attach a copy of the signed agreement.



December 20th, 2010

City of Pleasanton, Planning and Community Development
200 Old Bernal Ave
Pleasanton, CA 94566

RECEIVED
DEC 22 2010
CITY OF PLEASANTON
COMMUNITY DEVELOPMENT

Sent via fax, Email and Overnight delivery

RE: PDRW-38 / 6890 Koll Center Parkway

To Whom It May Concern:

In accordance with the City of Pleasanton Municipal Code Sections 18.144.010.050, Complete Wireless Consulting (on behalf of Verizon Wireless) hereby appeals the Community Development Department's determination received December 6, 2010 received via email, denying our project the right to continue with our hearing before the Planning Commission. Please see the attached Appeal Application for additional details.

The Planning and Community Development Department erred in making its determination that our project should be summarily removed from the Planning Commission calendar based on inaccurate information. As such, the applicant should be allowed to complete the Planning Commission hearing and receive a ruling based on the information presented. Furthermore, the Planning Department does not have the unilateral authority to deny an application, by way of simply eluding to remove it from the Planning Commission's agenda, in an effort to quash the application. Each and every applicant, upon submitting the required application materials and fees, has the right to have the application properly acted on by the City (Planning Commission). Complete Wireless Consulting, on behalf of our client, Verizon Wireless hereby appeals staff's unilateral action.

I attempted to file this appeal today, disputing the City's decision to rescind our development application and denying our right to a hearing before the Planning Commission and was informed by the desk Planner: Marion, that according to Janice Stern, we had no right of appeal and therefore the City would not accept my appeal application. When I requested that this decision to not allow this filing be put in writing in order to document this attempt, I was told that this request would need to be made directly to Ms. Stern. After leaving an unanswered voice message for Ms. Stern, I have decided to send this Appeal Application to the attention of the Department of Planning and Community Development and the City Attorney's office, in order to both document and preserve my appeal

www.completewireless.com

2009 V Street
Sacramento, CA 95818
(916) 914-2114 fax

rights. The requisite filing fee of \$25 will follow via overnight delivery, as the clerk I spoke to has stated that he will not accept this payment, per Ms. Stern's direction.

As such, please find the attached Appeal application and copy of the original letter from Brian Dolan dated December 6th, 2010, rescinding our right to a Planning Commission hearing.

Sincerely,



Mark Lobaugh
Complete Wireless Consulting

Cc: Brian Dolan, Community Development Director
Janice Stern, Planning Director
Jonathan Lowell, City Attorney
Nelson Fialho, City Manager

Attachments:

Copy of project rescission letter from Brian Dolan received via email 12/6/10
Appeal Application
Appeal fee in the amount of \$25



December 9, 2010

Brian Dolan
Community Development Director
City of Pleasanton, Planning and Community Development
200 Old Bernal Ave.
Pleasanton, CA 94566

Sent via email and U.S Mail

Re: Response to 12/2/10 letter withdrawing project hearing for the following project:
Verizon Wireless Communications Facility PDRW-38/6890 Koll Center Parkway

Mr. Dolan:

I am writing in response to your letter that I received on December 6th, denying our ability to move forward with our Planning Commission hearing, scheduled for December 8th, 2010. If it is the intent of the City to deny this project based on the assumptions contained in your letter, please state this in your response, after considering the following:

This project was originally submitted to the City of Pleasanton on September 21, 2009. On September 29th, 2009 a letter was provided by your office, stating that the project is "Complete, as it meets the submittal requirements for an existing wireless facility." Since this date I have worked diligently to comply with a steady stream of requests from your office to provide additional exhibits, duplicate studies and in some cases new exhibits for items previously deemed acceptable. In addition, we were asked to coordinate with and supply extensive amounts of data and backup information for a third party consultant, in order to conduct a detailed analysis of alternative sites. Some of these requests have come nearly thirteen months into the review process and after numerous meetings with staff, management and neighbors. We have in good faith complied with these requests for additional and revised exhibits and gone to great lengths to communicate with staff in order to arrive at a mutually acceptable design for the site.

Now after more than 14 months of review and two public hearings before the Planning Commission, we are informed that the proposed location "does not meet the locational requirements of the Pleasanton Municipal Code" and as such our project will be denied the ability proceed with our Use Permit application at this site.

I would respectfully state that I consider this level of service provided by the City of Pleasanton Planning Department to be entirely inadequate, unprofessional and patently unfair to the applicant. Furthermore, I feel this type of ruling and interpretation of the Zoning Ordinance should have been presented to the applicant immediately upon receipt of the application and not 14 months into a long, expensive and arduous planning review process.

RECEIVED


DEC 13 2010

CITY OF PLEASANTON
PLANNING DIVISION

Furthermore, the basis for this denial is in error. Our project does in fact meet the required 300' setback to residentially zoned parcels per Section 18.110.050, subsection (B)(3)(b) which states the exception to this setback requirement: "unless designated as a public and institutional land use in the general plan." I have reviewed the General Plan and the trail parcel referenced as being within the required 300' setback, has a General Plan designation of "Wildland Overlay" and is therefore a public land use and as such, must not be included in the 300' setback calculation. It seems obvious that the intent of the setback requirement is to provide a buffer and setback from residential land uses and not to provide a setback to open space and wildlife corridors, as is the case with the arroyo trail system located between the proposed site and the residential parcels on Corte Monterey.

Based on the above mentioned analysis, I request that the City place this item back on the Planning Commission's agenda for the next regularly scheduled meeting.

Sincerely,



Mark Lobaugh
Complete Wireless Consulting (Consultant for Verizon Wireless)

Cc: Peter Maushardt, Verizon Wireless
Shannon Collins, Verizon Wireless
Alex Goetze, Complete Wireless Consulting, Inc.
Paul Albritton, Esq., Mackenzie & Albritton, LLP
Janice Stearn, City of Pleasanton, Planning Director
Nelson Fialho, City of Pleasanton, City Manager

Attachments: Project Withdrawal Letter, City of Pleasanton, Brian Dolan 12/2/10

THE CITY OF



PLEASANTON

December 2, 2010

Mark Lobaugh
Complete Wireless Consulting, Inc.
2009 V Street
Sacramento, CA 95818

Sent via e-mail and by U.S. Mail

RE: PDRW-38/6890 Koll Center Parkway

Dear Mr. Lobaugh:

It has come to my attention that the proposed wireless facility at 6890 Koll Center Parkway does not meet the locational standards required in Section 18.110.050(C) of the Pleasanton Municipal Code which states: "A personal wireless service facility shall not be located within 300 feet from the property lines of the uses listed in subsections (B)(3)(a) through (B)(3)(e) of this section." Unfortunately, Verizon's proposed wireless facility falls within the uses listed in subsection (B)(3)(b) which includes "[u]ndeveloped residential or agricultural zoning districts or undeveloped planned unit developments with a residential or agricultural zoning designation and without an approved development plan, unless designated as a public and institutional land use in the general plan.

Although the homes on Corte Monterey are more than 300 feet away from the proposed wireless facility, the existing trail at the end of Corte Monterey is less than 300 feet away from the facility and the trail is zoned R-1-6,500 (One Family Residential) district. Moreover, the Pleasanton General Plan 2005-2025 Land Use Map designates the trail as "Open Space – Public Health and Safety" and "Wildland Overlay" as opposed to "Public and Institutional" land use. Accordingly, your application does not meet the locational requirements of the Pleasanton Municipal Code."

We regret that this zoning inconsistency was only recently discovered but staff would like to continue to work with you in order to find another suitable location for Verizon to locate its wireless facility.

If you have any questions, please call me at (925) 931-5600.

Sincerely,

Brian Dolan
Community Development Director

COMMUNITY DEVELOPMENT

P. O. BOX 520, Pleasanton, CA 94566-0802

Planning

200 Old Bernal Ave.
(925) 931-5600
Fax: 931-5483

Building & Safety

200 Old Bernal Ave.
(925) 931-5300
Fax: 931-5478

Engineering

200 Old Bernal Ave.
(925) 931-5650
Fax: 931-5479

Traffic

200 Old Bernal Ave.
(925) 931-5650
Fax: 931-5479

Inspection

157 Main Street
(925) 931-5680
Fax: 931-5484



December 2, 2010

Mark Lobaugh
Complete Wireless Consulting, Inc.
2009 V Street
Sacramento, CA 95818

Sent via e-mail and by U.S. Mail

RE: PDRW-38/6890 Koll Center Parkway

Dear Mr. Lobaugh:

It has come to my attention that the proposed wireless facility at 6890 Koll Center Parkway does not meet the locational standards required in Section 18.110.050(C) of the Pleasanton Municipal Code which states: "A personal wireless service facility shall not be located within 300 feet from the property lines of the uses listed in subsections (B)(3)(a) through (B)(3)(e) of this section." Unfortunately, Verizon's proposed wireless facility falls within the uses listed in subsection (B)(3)(b) which includes "[u]ndeveloped residential or agricultural zoning districts or undeveloped planned unit developments with a residential or agricultural zoning designation and without an approved development plan, unless designated as a public and institutional land use in the general plan.

Although the homes on Corte Monterey are more than 300 feet away from the proposed wireless facility, the existing trail at the end of Corte Monterey is less than 300 feet away from the facility and the trail is zoned R-1-6,500 (One Family Residential) district. Moreover, the Pleasanton General Plan 2005-2025 Land Use Map designates the trail as "Open Space – Public Health and Safety" and "Wildland Overlay" as opposed to "Public and Institutional" land use. Accordingly, your application does not meet the locational requirements of the Pleasanton Municipal Code."

We regret that this zoning inconsistency was only recently discovered but staff would like to continue to work with you in order to find another suitable location for Verizon to locate its wireless facility.

If you have any questions, please call me at (925) 931-5600.

Sincerely,

Brian Dolan
Community Development Director

COMMUNITY DEVELOPMENT

P. O. BOX 520, Pleasanton, CA 94566-0802

Planning	Building & Safety	Engineering	Traffic	Inspection
200 Old Bernal Ave. (925) 931-5600 Fax: 931-5483	200 Old Bernal Ave. (925) 931-5300 Fax: 931-5478	200 Old Bernal Ave. (925) 931-5650 Fax: 931-5479	200 Old Bernal Ave. (925) 931-5650 Fax: 931-5479	157 Main Street (925) 931-5680 Fax: 931-5484

MACKENZIE & ALBRITTON LLP
423 WASHINGTON STREET, SIXTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

TELEPHONE 415 / 288-4000
FACSIMILE 415 / 288-4010
EMAIL: JHEARD@MALLP.COM

January 18, 2011

VIA EMAIL

Planning Commission
City of Pleasanton
200 Old Bernal Avenue
Pleasanton, CA 94566

Re: *Verizon Wireless facility at 6890 Koll Center Parkway (PAP-148)*

Dear Commissioners:

We write on behalf of our client Verizon Wireless to request that you grant its appeal and overturn the Zoning Administrator's denial of its design review application for a wireless facility at 6890 Koll Center Parkway. The proposed facility would consist of a 65-foot faux pine tree designed to match the existing trees on site, an equipment shelter, and an emergency backup generator that, aside from brief periodic testing, would be operated only during prolonged power outages (the "Facility"). The Facility would be located adjacent to Highway 680 on City-owned property that is used as a sewer pump station, and zoned PUD-I/C-O (Planned Unit Development – Industrial/Commercial-Office).

Verizon Wireless chose this location after a prolonged search because it is ideally suited to a wireless facility. Not only is the Facility compatible with the existing use and zoning, it would be largely screened from Highway 680 by an existing line of trees, and located more than 300 feet from the nearest residence. To further reduce the already *de minimis* aesthetic impact, Verizon Wireless has worked extensively with planning staff over many months in order to select bark texture and colors for the tree pole that will most closely match the existing trees on site. As the photosimulations provided by Verizon Wireless amply demonstrate, the Facility would blend in very well with its surroundings and have essentially no aesthetic impact. In fact, as we will explain below, there is no substantial evidence that would support denial, and a denial would violate the rights of Verizon Wireless under the federal Telecommunications Act.

I. Background – Verizon Wireless has Been Subjected to Unreasonable Delay, Shifting Standards, and a Procedural Morass.

Before we turn to the legal analysis, a brief summary of the prolonged history of this application may provide useful context. Verizon Wireless filed its application more than 15 months ago, on September 21, 2009. Planning staff fairly promptly determined the application complete (September 29, 2009), and then spent several months reviewing multiple bark and color samples before issuing a notice of intent to approve the application on April 20, 2010. Neighbors requested a hearing before the Zoning Administrator, objecting to the Facility primarily on the basis of the alleged health threat posed by radio-frequency (“RF”) emissions (a topic preempted by federal law, as we will discuss below), alleged impact on property values (a proxy for the primary RF fears), and aesthetics.

Over the next several months, planning staff responded with a host of requests for additional information, including consideration of other sites, additional coverage maps (including coverage maps of alternatives that Verizon Wireless had already explained were infeasible), and additional photosimulations. Even though planning staff had long ago determined the application complete, Verizon Wireless made every effort to provide the newly requested information. Indeed, it was working diligently to comply with the latest requests when it received a letter dated August 4, 2010, from planning staff denying its application for not providing updated coverage requests within a unilaterally imposed 7-day deadline.

Verizon Wireless appealed that decision to this Commission, and continued to provide additional information requested by planning staff. While the appeal was pending, the City hired Peter Gruchawka, a third-party engineer, to review Verizon Wireless’s explanation of the need to place the Facility at the proposed location, as opposed to alternatives favored by the objecting neighbors. Mr. Gruchawka requested yet another set of coverage maps and other technical information, which Verizon Wireless provided to him along with a detailed letter from its RF Engineer on November 4, 2010. After receiving this information, Mr. Gruchawka informed a Verizon Wireless representative that he concurred with the Verizon Wireless RF Engineer’s analysis, but the City has refused to provide a copy of Mr. Gruchawka’s report (we are submitting a public records request under separate cover).

At roughly the same time, City planning staff came up with an entirely new interpretation of the zoning code that would supposedly require denial of the application. In a letter dated December 2, 2010, and a companion memorandum to the Planning Commission, staff opined that the Facility would not comply with Section 18.110.050 of the Pleasanton Municipal Code, which imposes a 300-foot setback from existing residential uses or property likely to be developed for residential use in the future. This interpretation came over a year after the application was filed, and contradicted staff’s previous statements on the record that “The proposed facility meets the 300 feet locational requirement – 300 feet from the proposed wireless facility to the property lines

of a residential district.” (Staff Report to the Planning Commission for the September 22, 2010, hearing, p. 8.) More importantly, it overlooks the fact that the property alleged to be too close is part of the Arroyo trail system, and clearly not intended to be developed for residential use. That is reflected in its General Plan designation of Open Space – Public Health and Safety, with a Wildlands Overlay.

Based on its misreading of the 300-foot buffer, staff then took the remarkable position that the pending appeal *could not even be heard*, and took it off calendar; indeed, the City at first would not even accept an appeal of that decision, but subsequently did allow Verizon Wireless to file an appeal. The present appeal thus raises both the procedural issue whether staff had the authority to take the original appeal off calendar, and the merits of the original appeal.

As we will explain below, the City’s discretion is substantially constrained by the Federal Telecommunications Act, and a denial would expose the City to liability under several provisions of that statute.

II. Federal Law Constrains the City’s Discretion.

Verizon Wireless is licensed by the Federal Communications Commission (“FCC”) to provide wireless telecommunications services in Pleasanton. Its authority to place wireless facilities in Pleasanton is governed by the Federal Telecommunications Act of 1996 (the “Telecommunications Act”). The Telecommunications Act contains fundamental limits on the right of a local jurisdiction to regulate the placement of wireless facilities. In addition to its well-known pre-emption of local regulation on the basis of concerns over RF emissions,¹ the Telecommunications Act also:

- Requires the City to take final action on a permit application within a reasonable period of time;²
- Requires that any permit denial be in writing and based on substantial evidence in the record;³
- Prohibits unreasonable discrimination among competing wireless carriers;⁴ and
- Bars local regulation that would prohibit or have the effect of prohibiting the provision of personal wireless services.⁵

As we will explain, this appeal implicates several of these provisions.

¹ 47 USC § 332(c)(7)(B)(iv).

² 47 USC § 332(c)(7)(B)(iii).

³ 47 USC § 332(c)(7)(B)(iii).

⁴ 47 USC 332(c)(7)(B)(i)(I).

⁵ 47 USC 332(c)(7)(B)(i)(II).

II. Radio Frequency Emissions

We understand that opposition to the proposed Facility is motivated in large part by concerns over the alleged health effects from RF emissions and the alleged impact on property valuation. Under federal law, decisions based upon RF emissions are beyond the authority of the City and do not qualify as substantial evidence for denial. *Importantly, this preemption includes any "proxy" for RF concerns, such as property value.*

To confirm compliance with the applicable federal standards, Verizon Wireless has submitted a report prepared by consulting engineers Hammett & Edison, Inc., which concludes that with the Facility operating at maximum theoretical power levels, the RF exposure for a person anywhere at ground level near the site would be less than 1% of the applicable public limit. It should also be noted that these results include several "worst-case" assumptions and therefore are expected to overstate actual power density levels.

Federal preemption applies whether the local decision is explicitly based on environmental effects, or through some proxy such as property values. A federal district court in California has determined that in light of the federal preemption of RF regulation, "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." *AT&T Wireless Servs. of Cal., LLC v. City of Carlsbad* (S.D. Cal. 2003) 308 F. Supp. 2d 1148, 1159.

In short, neither the alleged health effects of RF emissions nor any proxy such as property values have any bearing on this appeal.

III. Substantial Evidence

There is no substantial evidence to support a denial in this case. The neighbors object based on RF fears, alleged impact on property values, and aesthetics, but none of these stated objections is supported by substantial evidence. As discussed above, neither explicit concerns about the health effects of RF emissions nor the proxy of alleged impact on property values constitutes substantial evidence. While *real* aesthetic impacts can constitute substantial evidence, the location of the Facility, its stealth design, and the photosimulations provided by Verizon Wireless all refute any claim that the Facility will have adverse aesthetic impacts.

Staff has offered two reasons for denial: the alleged failure to provide requested information, and the eleventh-hour interpretation of the 300-foot residential buffer. Neither is supported by substantial evidence. As discussed above, staff sought the information in question long after declaring the application complete, which means that the City could not legally require the information consistent with the California Permit Streamlining Act. *See* Cal. Gov. Code, §§ 65940 – 942. Furthermore, as discussed

above, Verizon Wireless was working diligently to provide the information when it received the August 4, 2010, letter denying the application. In any event, Verizon Wireless has since provided all of the information in question, so this purported reason for denial is moot.

Staff's more recent rationale for denial is that the Facility is less than 300 feet from a parcel in residential zoning. However, the 300-foot setback in Section 18.110.050 is clearly intended to apply to existing or potential future residential development. There is no realistic possibility that the parcel in question will ever be developed for residential (or any other) use. It is owned by the Alameda County Flood Control District, and used as both a flood drainage channel and part of the Arroyo Trail System. The City's General Plan designates the property as Open Space – Public Health and Safety, with a Wildlands Overlay. Under the General Plan, such property is not suitable for development:

The General Plan Map's conceptual depiction of major arroyos as Open Space-Public Health and Safety applies the Open Space designation to the entirety of flood-control channel rights-of-way as ultimately determined by the City. These arroyos are not to be counted as part of residentially designated gross developable acres.

2005-2025 Pleasanton General Plan, Land Use Element, at 2-22.

The Plan prohibits development in such areas, with a limited exception for one single-family home on pre-existing lots of record. *Id.* at 2-25. That exception would obviously not apply to land owned by a public flood control district.

The Conservation and Open Space Element confirms the lack of any prospect of future residential development, explaining that by designating flood channels as Open Space - Public Health and Safety, "the City intends to protect future development from flood . . . hazards." 2005-2025 Pleasanton General Plan, Conservation and Open Space Element, p. 7-28.

In short, the Facility will be more than 300 feet from any residential use or potential future residential use, and that is all the code requires. There is no substantial evidence for denial based on the 300-foot buffer or any other reason.

IV. Prohibition of Service

This appeal implicates the federal prohibition of service clause in two ways. First, the City's blanket ban in residential and agricultural zones (subject only to narrow exceptions), when coupled with the 300-foot setback and other restrictions, would most likely qualify as a "general ban" or direct prohibition of service. The combined effect of these provisions is to place large contiguous areas of the City off-limits to wireless facilities, without any consideration of their impacts (or lack thereof). We believe a court would find the prohibition in these zones and setback areas to be unlawful on its face.

See Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571, 580 (9th Cir. 2008) (“That is not to say, of course, that a plaintiff could never succeed in a facial challenge. . . . [I]f 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 of roads, the rule constituted an effective prohibition.”).

This is particularly true given the strong evidence that the ban is motivated by preempted RF concerns. That evidence includes the separate bans (and setbacks) for schools, day care facilities, and nursing homes. *See Sprint Spectrum v. Borough of Ringwood*, 386 N.J. Super. 62, 898 A.2d 1054 (2005) (holding that ordinance imposing unusual setback requirements on wireless facilities was preempted RF-based regulation).

Second, a denial would have the effect of prohibiting service as applied to the proposed Facility. Under controlling case law, an individual denial has the effect of prohibiting service when the proposed facility is the least intrusive means of filling a significant gap. *See T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987 (9th Cir. 2009); *see also T-Mobile West Corp. v. City of Agoura Hills*, 2010 U.S. Dist. LEXIS 134329 (C.D. Cal. Dec. 20, 2010).

Here, both elements of this test are easily satisfied. Verizon Wireless has demonstrated that it has a significant gap through the testimony of its RF engineer, as well as coverage maps and a letter from its engineer explaining the nature of the gap. City staff have not really questioned the gap, and we are informed that the City’s third-party engineer has confirmed the gap. However, as noted above, the City has declined to provide us with a copy of his report.

Further, there is no less intrusive alternative than the proposed Facility. This is true for several reasons. Because the City’s regulations effectively rule out nearly all residential and agricultural zones, as well as nearly all sites within 300 feet of such zones, there are very few potential alternatives. Indeed, the ideal location for Verizon Wireless to meet its coverage objective would have been further north, but there were no viable locations further north due to the residential and agricultural bans. The result is that the proposed Facility is as far to the south as Verizon Wireless could locate the Facility without compromising its coverage objective.

This partly explains why the Facility cannot simply be moved to another location further south in the business park, as suggested by staff, the neighbors, and some members of this Commission. In addition, the two other locations in the business park suggested by the City both involve a significant reduction in height, because they lack room for a new pole, and antennas placed on the existing buildings would be no more than 35 feet high, versus 55 feet for the proposed Facility. This 20-foot reduction in height would further compromise Verizon Wireless coverage.

Verizon Wireless has previously explained all of this in the hearings and in correspondence with staff, and its RF engineer provided further explanation and

supporting coverage maps on a confidential basis to the City's expert. Again, we understand that the City's expert found the data and supporting explanation from Verizon Wireless convincing, but have not been provided a copy of his report. In any case, Verizon Wireless chose this location after an exhaustive search, it has fully explored the alternate locations suggested by the City and project opponents, and there are simply no feasible alternatives. On these facts, a denial would constitute an unlawful prohibition of service.

V. Conclusion

Verizon Wireless has worked diligently to locate and design the Facility in such a way that it will be compatible with its surroundings and have no significant impacts of any kind. The Facility meets all standards for approval, and there is no legitimate basis for denial. We ask that you look carefully at the evidence in light of the applicable law, grant the appeal, and approve the Verizon Wireless application.

Very truly yours,



James A. Heard

cc: Jenny Soo (Planning Department)
Jonathan Lowell, Esq. (City Attorney)
Peter Maushardt
Ed McGah, Esq.
Tom Mahr, Esq.
Paul B. Albritton, Esq.
Mark Lobaugh
Alex Goetze

January 21, 2011

City of Pleasanton
Planning Commission
Commissioners- Olson, Narum, Blank, Pearce, Pentin, O'Connor
200 Old Bernal Ave.
Pleasanton, Ca. 94566

Subject: Opposition to Verizon Cell Tower Appeal for 6890 Koll Center
Parkway Park for Jan. 26, 2011 Planning Commission Meeting

Dear Planning Commissioners,

Thank you for taking the time to investigate and listen to our concerns regarding placement of the Verizon Cell Tower at 6890 Koll Center Parkway. We appreciate and acknowledge the hours of work that go into being a member of the Planning Commission. Pleasanton is lucky indeed to have active and concerned residents like you who step into these responsible roles. Local activism is one feature of Pleasanton that gives us pride in our wonderful community and the planning that goes into making it special.

Our local neighborhood of Corte Monterey has been active in letting you know why we oppose this tower in this particular place. The location of this fake tree tower is inappropriate for reasons of health and safety. We believe this fake tree will be an "attractive nuisance" for our children whom we have noted spend hours playing in that area and fishing from the Arroyo. Safety is still our concern for neighborhood children who may see the challenge of climbing the 65 foot tower as another week's adventure and end up hurting themselves. The current modest fencing around the utility yard will not be enough to stop such adventures. Placement of this fake tree will contribute to decreased property values and delays in home sales. We have included a letter from a local real estate broker summarizing his opinion that the cell phone tower should be included as "Material Fact" on the disclosure form when selling property. The fake tree will be an eyesore aesthetically and a sound nuisance, especially during testing, not only to our neighborhood, but to all of those who use the Centennial trail. Every household on our court as well as friends from neighboring streets have signed a letter in opposition which we submitted to you previously.

Although we have not heard the findings of the third party expert, we believe the appellant has not presented compelling information on necessity nor options for alternative locations. Both of these we understand to be a requirement to comply with our ordinances governing cell tower placement.

In talking with neighboring communities, we have learned that what may have started as marginally acceptable towers, disguised as fake pine trees, quickly became "**visual blights**" in their communities within only three years after bleaching in the sun and weathering the storms and wind. They have found that enforcement of any regular maintenance and upkeep to these tree towers was difficult to do unless bullet-proof conditions of approval included clear consequences for failure to perform. Lastly, they have found that ownership of the tower is often difficult to determine and therefore,

performance difficult to mandate. How will you manage these issues to avoid those problems and the complaints that will follow from the neighbors?

The appellant's pictures taken along the Centennial trail and presented in the October 27, 2010 Staff Report were taken before the deciduous trees had dropped their leaves. In that report, the appellant claims only one photo (#27) would expose the tree tower to the trail and homes. Now, since the recent storms, the fake tree will be visible in photos #22 through # 28 which is the length of our court. Since there is no permanent camouflage on the northeast side of the utility lot, this fake tree is visible along the trail, through our windows, doors, and backyards as well as southbound on Interstate 680.

Lastly, the Zoning Administrator determined in December that the facility does meet the locational standards in our municipal code Section 18.110.050(C) as well as is in conflict with the City's General Plan Land Use Map which designates the trail as Open Space- Public Safety and Wildland Overlay. We believe these are significant findings which the Planning Commissioners need to keep in mind. Changes to the General Plan should take time, investigation and open discussion. The appellant is pushing you to waive this normal and lengthy process to benefit his business. We believe such a waiver may be subject to future litigation.

Many questions remain unanswered from our previous letters to you. We hope to hear answers to those and others when we attend on January 26th, especially regarding the excessive 65 foot height needed (higher than the tallest buildings allowed in that area), reason for "line of sight," and the orientation of the tree with antennas, microwave dishes, etc. Additionally, it is not clear at this time if Mr. Lobaugh filed his appeal within the allowable time. If not, this appeal should be denied once again for lack of timeliness.

Thank you for remaining vigilant and active in protecting our City. We look forward to the January 26th meeting and getting final answers. We sincerely request that you support the Zoning Administrator's determination and deny the appeal for this cell tower.

Sincerely,

Gerry Gire

6904 Corte Monterey

(on behalf of the concerned Residents and Neighbors of Corte Monterey-a key access point to the Arroyo del Valle and Centennial Trail)

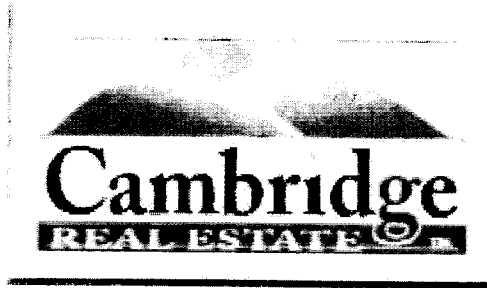
cc.

Planning Commissioners via email to mhoey@ci.pleasanton.ca.us

Janice Stern, Planning Manager, jstern@ci.pleasanton.ca.us

Jenny Soo, Associate Planner, jsoo@ci.pleasanton.ca.us

Attachment: Broker letter dated 11/9/10



Nov. 9, 2010

Re: Material Fact/Cell Tower

A material fact is any information that a buyer of a property may deem important to that buyer. The "Material Fact" may influence the buyer's decision to buy the property or not. It's up to the buyer to determine if the "Material Fact" is important to them. In the case of a cell tower location being disclosed to a potential buyer I would advise an agent to include the information on a disclosure form. Present the form to the buyer and let the buyer decide whether the cell phone tower is an important consideration in the purchase of the property.

A handwritten signature in cursive script that reads "Michael R. Gregg".

Mike Gregg
Broker/Owner
Cambridge Real Estate
Pleasanton, CA. 94566
925-485-1435 off.
925-426-7756 fax.

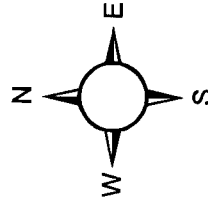
PAP-150

City of Pleasanton

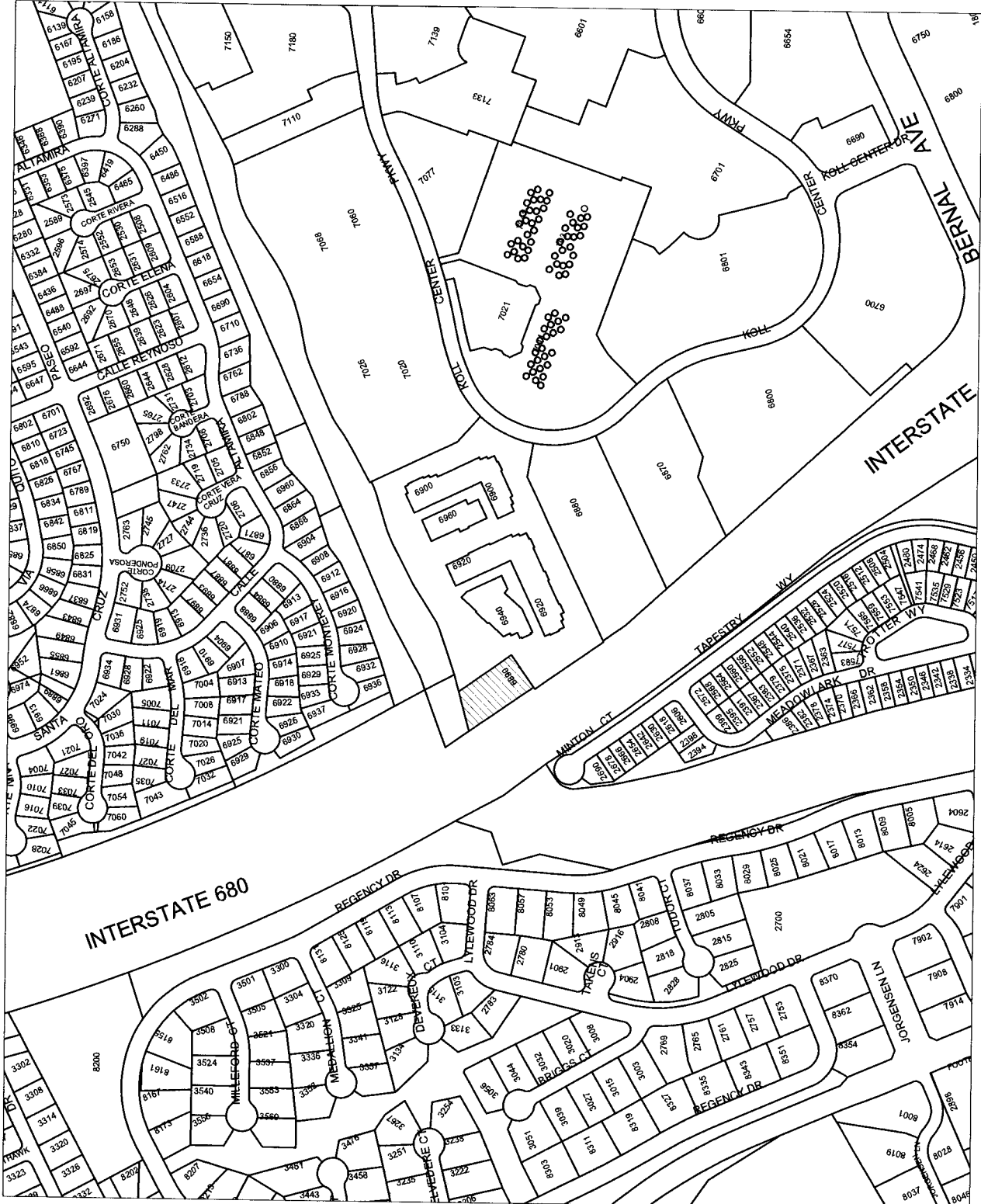
GIS

Department

Vicinity Map



Printed 1/21/2011



PAP-150

City of Pleasanton

GIS

Department

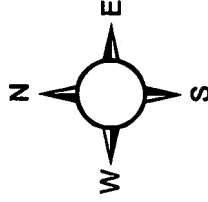


EXHIBIT F



Printed 1/21/2011

