WIRELESS PROJECT

R2014-00792 | CUP-20140033

ITEMS FOR REVIEW:

ALTERNATIVE SITE ANALYSIS
PROJECT v. BEES ANALYSIS
FCC COMPLIANCE LETTER
PROPERTY VALUE LITERATURE
PHOTOSIMULATIONS

SUBMITTAL DATE:

12.4.2014

PHOTO SIMULATION | PROPOSED PROJECT SITE | **510 WORKMAN MILL ROAD, LA PUENTE**

ALTERNATIVE SITE ANALYSIS

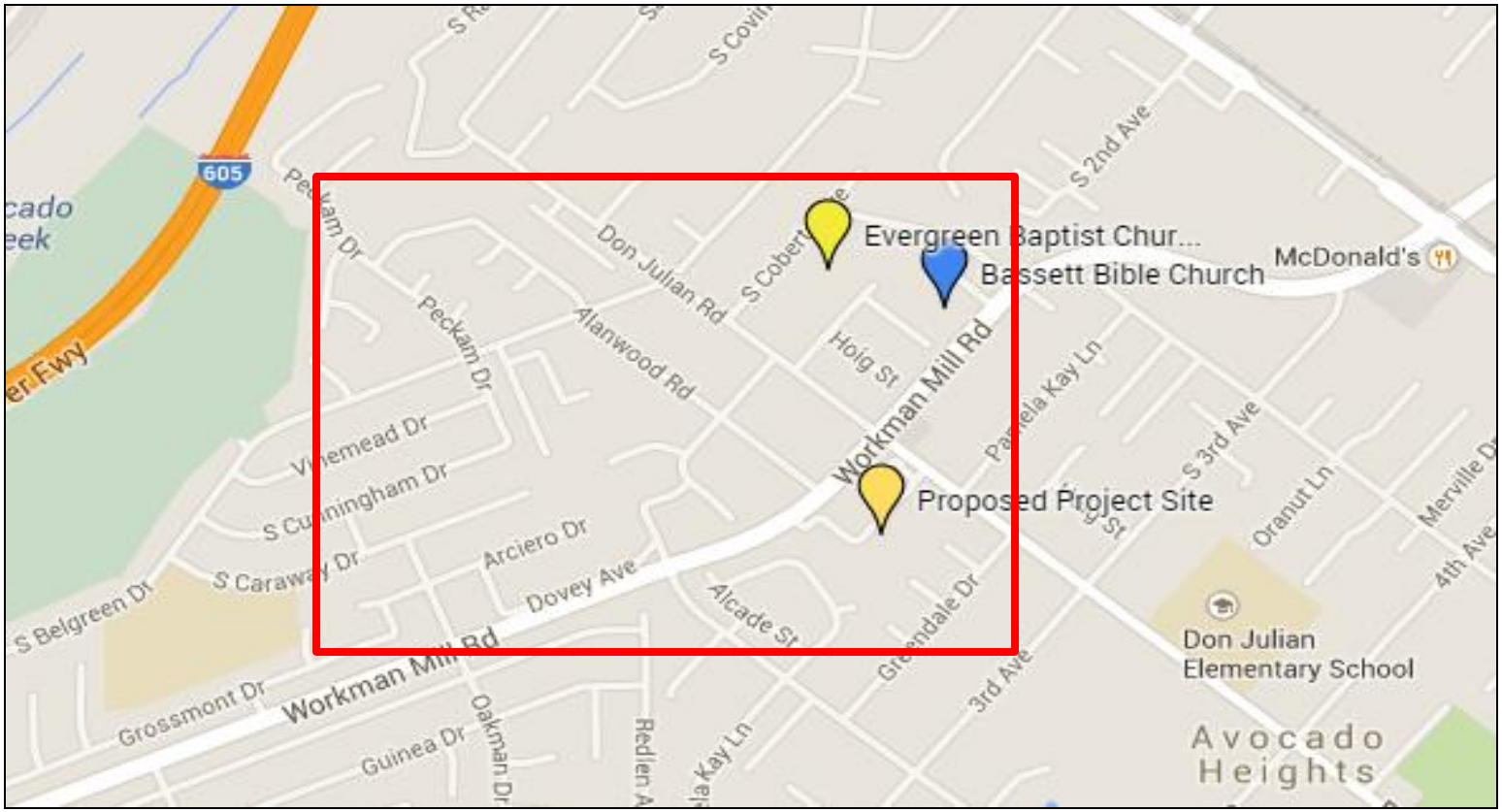
SEARCH AREA & VERIZON-PROPOSED CHOSEN & SELECTED SITES | **p.2**

MAP OF RESIDENT-PROPOSED SITES & VERIZON WIRELESS SITES | **p.3**

RESIDENT-PROPOSED ALTERNATIVE SITES | **pp.4-7**

RESIDENT-PROPOSED SITE COMBINATIONS | **pp.8-9**

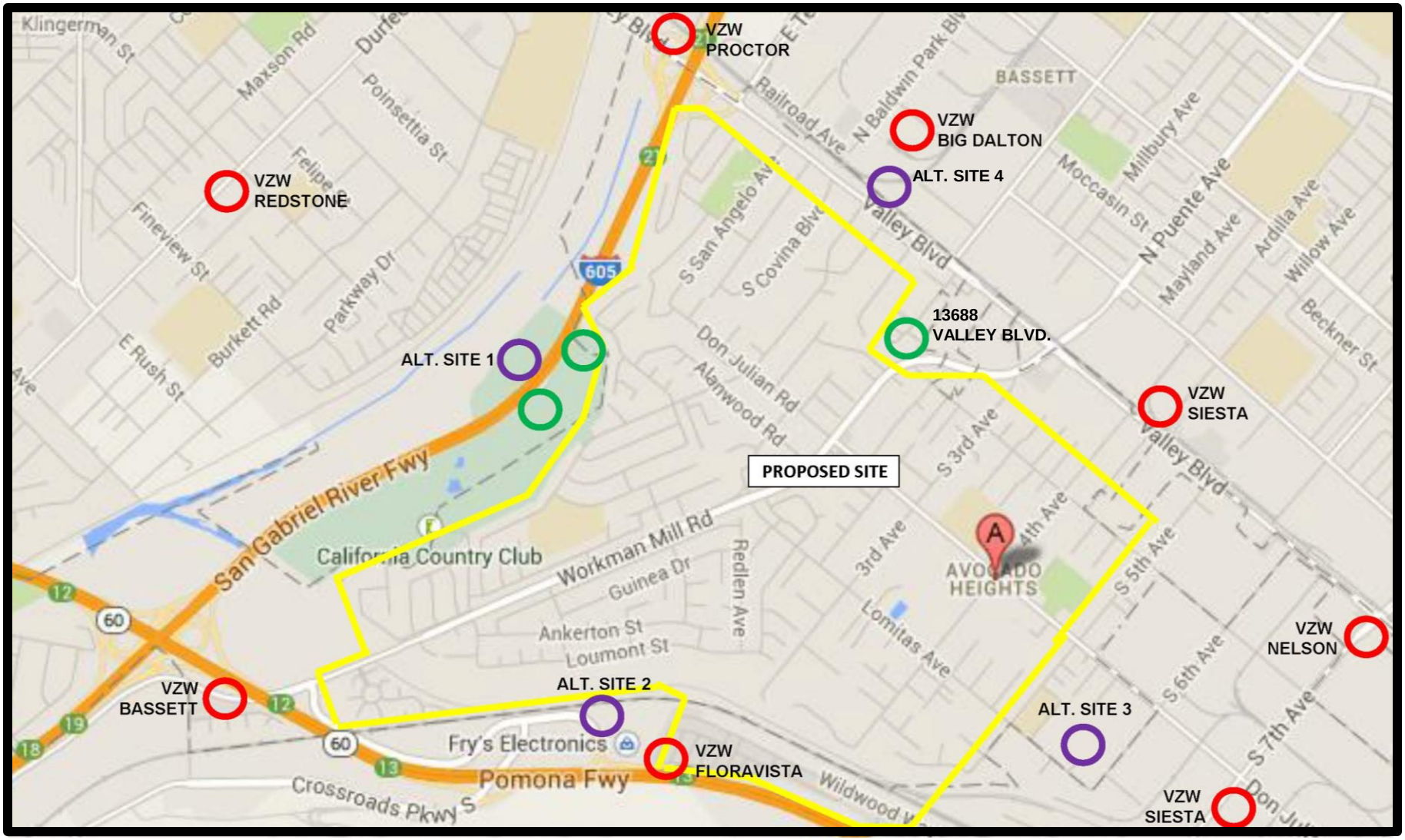
SEARCH AREA & VERIZON–PROPOSED CHOSEN & ALTERNATIVE SITES



ANALYSIS :

- ***EVERGREEN BAPTIST CHURUCH*** **|** They were not interested in hosting a wireless facility.
- ***BASSETT BIBLE CHURUCH*** **|** There was insufficient ground space available for a wireless facility.
- ***PROPOSED PROJECT SITE*** **|** 510 Workman Mill Road was selected primarily because there is adequate space for a wireless facility, the county regulations allow for a wireless site at the proposed location, the property owner is interested in hosting the wireless facility, the wireless facility would fit into the surroundings, and the proposed wireless facility will achieve the project's wireless objective.

RESIDENT–PROPOSED ALTERNATIVE & CO–LOCATION SITES & VERIZON WIRELESS SITES



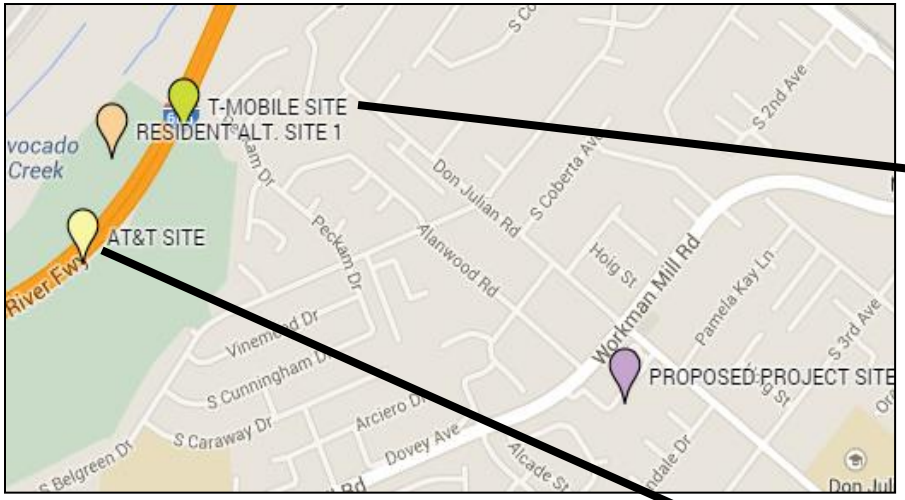
Resident-Proposed Co-Location

Resident-Proposed Alternative Cell Site Locations

Verizon Pole Location

RESIDENT–PROPOSED ALTERNATIVE SITE 1

Country Club | 1509 Workman Mill Road, City of Industry

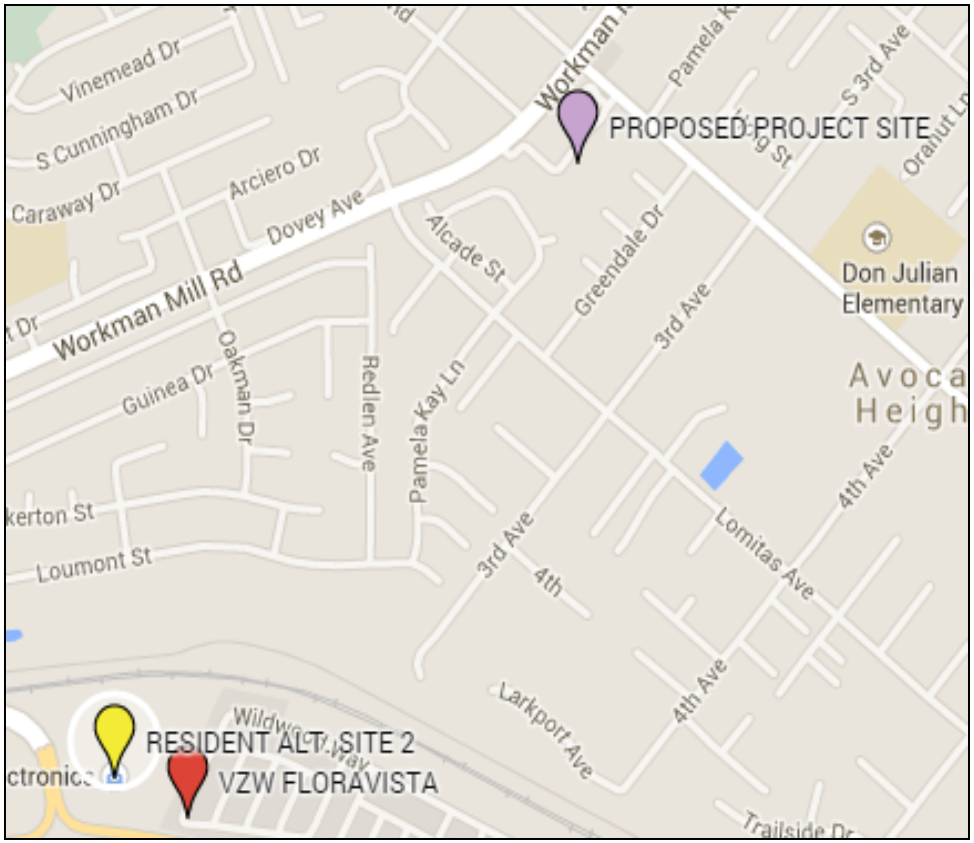


SITE ANALYSIS:

- ***Construction of a new cell site*** at the residents' proposed Alternative Site 1 (country club) will be problematic because:
  1. Construction crews will need to travel lengthy distance of the golf course, which may damage the grass.
  2. The thick grove of trees along the edge of the property leaves little space for another cell site. Permission to remove trees to create adequate space may not be granted.
- ***Co-location at existing T-Mobile site*** will not be feasible because the existing cell tower is 40' high. Verizon's estimated co-location height would be too low: 13' high.
- ***Co-location at existing AT&T site*** will not work because the existing cell tower is 45' high. Verizon's estimated co-location height would be too low: 21' high.

RESIDENT–PROPOSED ALTERNATIVE SITE 2

Fry's Electronics | 13401 Crossroads Prkwy N, City of Industry, CA

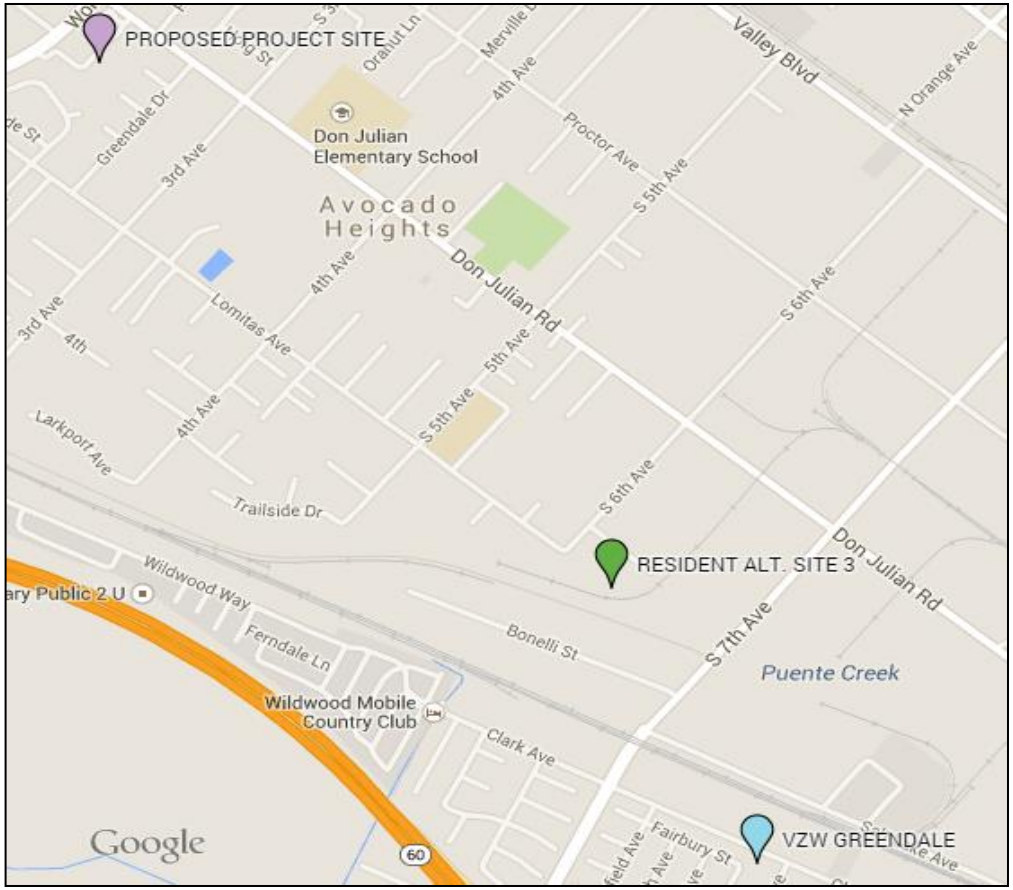


SITE ANALYSIS:

Construction of a new cell site at the residents' proposed Alternative Site 2 would not be effective for Verizon, because Verizon already has a site, Floravista , in progress next to the proposed alternative site.

RESIDENT–PROPOSED ALTERNATIVE SITE 3

Industrial/Commercial Area | West of S. 7th Ave. & Don Julian Rd.

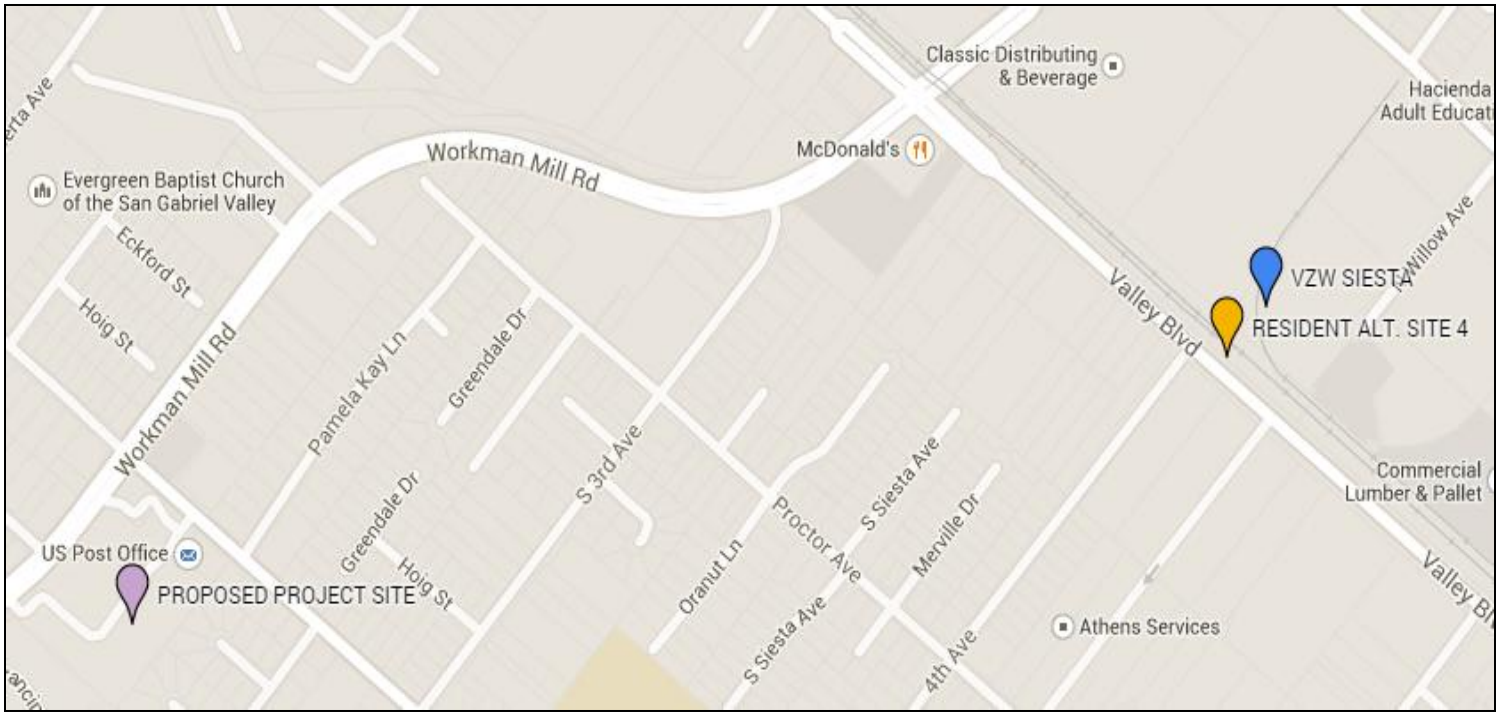


SITE ANALYSIS:

Construction of a new cell site at the residents' proposed Alternative Site 3 would not be effective for Verizon, because Verizon's nearby site, Greendale was recently upgraded so that it provides wireless coverage to the resident-proposed industrial/commercial area.

RESIDENT–PROPOSED ALTERNATIVE SITE 4

North Side of Valley Blvd. | Between S. San Angelo & Workman Mill Rd.

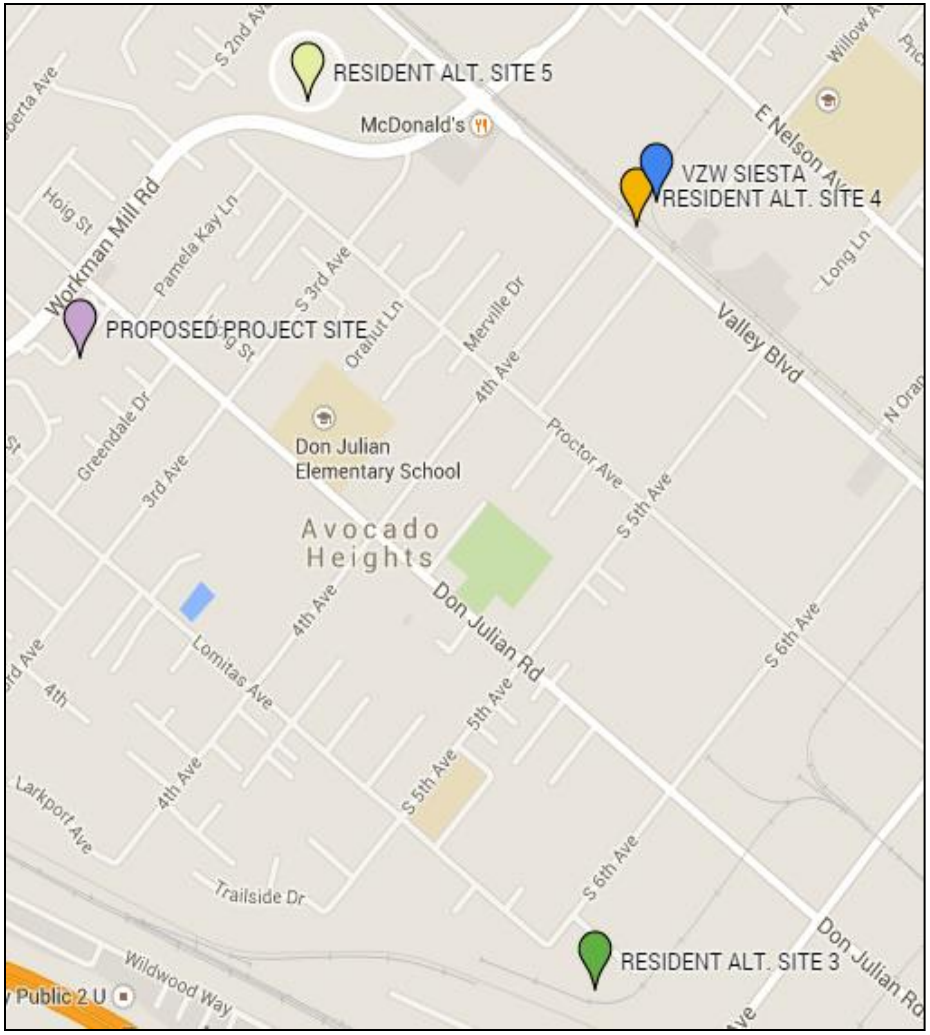


SITE ANALYSIS:

Construction of a new cell site at the residents' proposed Alternative Site 4 would not be effective for Verizon, because Verizon already has an existing cell site, Siesta very close to the proposed alternative site.

RESIDENT–PROPOSED SITE COMBINATION (1) | *Alternative sites 3 & 5*

Alternative Site 3 |West of S. 7th Ave. & Don Julian Rd.
Alternative Site 5 | 13668 Valley Blvd. , La Puente



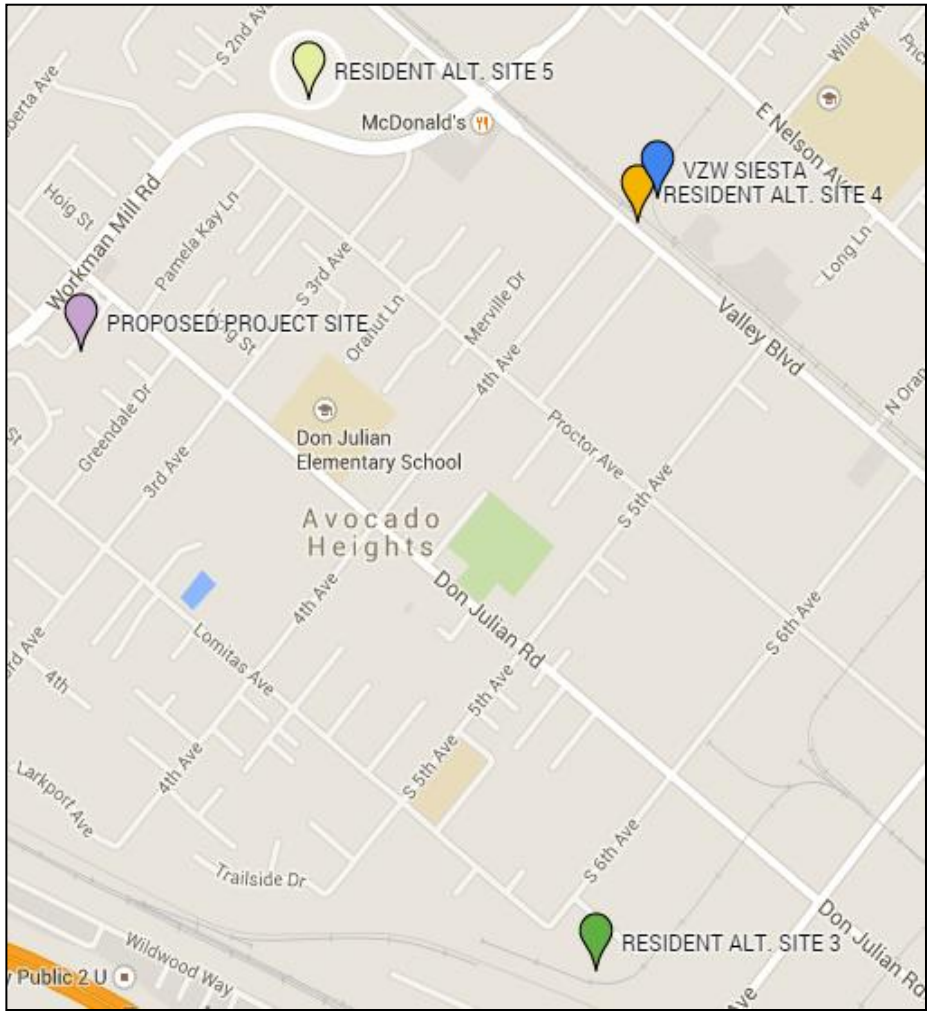
SITE ANALYSIS:

Construction of a new cell site or co-location at the residents' proposed Alternative Site 5 plus the construction of Alternative Site 3 would not be effective because:

- It would be excessive to construct two new cell sites or create one new cell site and co-locate at a second site when Verizon can construct just one new site at the proposed project site to achieve the coverage objective
- Co-locating at the resident-proposed Alternative Site 5 would not be possible because there is no existing wireless facility at that property.
- Constructing a new cell site at the resident-proposed Alternative Site 5 would not work out because there is inadequate space for a stand-alone tower or equipment.
- It would not be effective to construct the residents' Alternative Site 3 because Verizon's existing wireless site, Greendale already provides coverage in Alternative Site 3's area.

RESIDENT – PROPOSED SITE COMBINATION (2) | *Alternative sites 1 & 3*

Alternative Site 1 |1509 Workman Mill Road, City of Industry
Alternative Site 3 | West of S. 7th Ave. & Don Julian Rd.



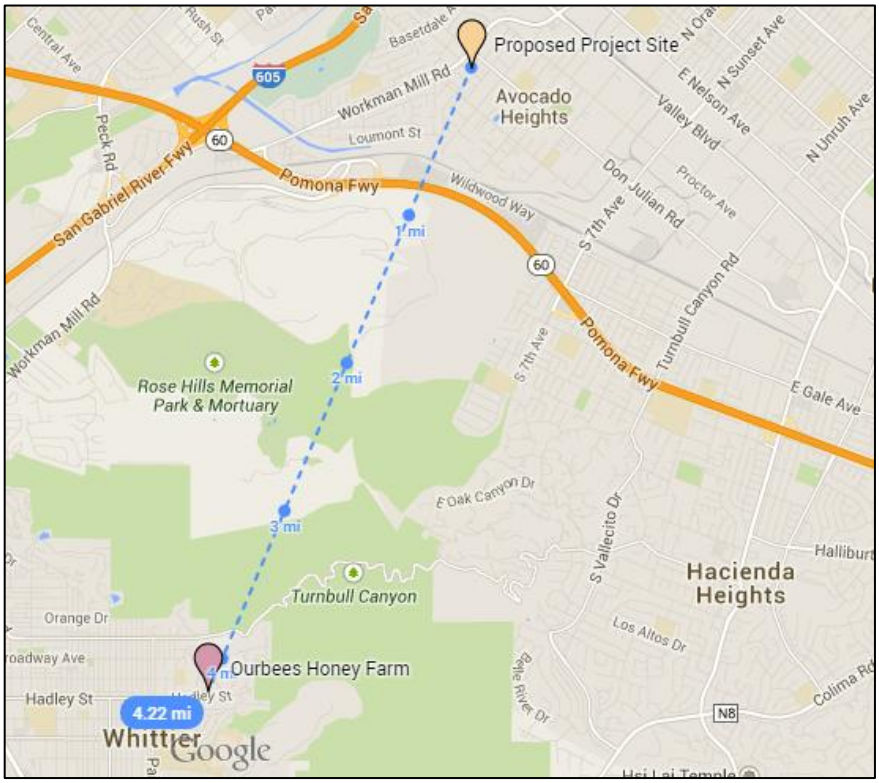
SITE ANALYSIS:

Construction of a new cell sites at the residents' proposed Alternative Site 1 and Alternative Site 3 would not be effective because:

- It would be excessive to construct two new cell sites when Verizon can construct just one new site at the proposed project site to achieve the coverage objective
- Construction of a new cell site at the resident-proposed Alternative Site 1 (country club) would be problematic because:
    1. Construction crews will need to travel lengthy distance of the golf course, which may damage the grass.
    2. The thick grove of trees along the edge of the property leaves little space for another cell site. Permission to remove trees to create adequate space may not be granted.
- It would not be effective to construct the residents' Alternative Site 3 because Verizon's existing wireless site, Greendale already provides coverage in Alternative Site 3's area.

PROJECT v. BEES

The Proposed Project & Bees



- **PROXIMITY** | The proposed wireless facility at 510 Workman Mill Road is 4.22 miles away from the nearest registered bee farm (*please refer to the figure above*).
- **FCC COMPLIANT** | The proposed project will operate at a level that complies with the FCC's RF emission regulations (*please refer to attached FCC RF Emissions Compliance Letter*).
- **ACCORDING TO THE FCC:**

  "Section 332(c)(7) of the Communications Act preserves state and local authority over zoning and land use decisions for personal wireless service facilities, but sets forth specific limitations on that authority. Specifically, a state or local government may not unreasonably discriminate among providers of functionally equivalent services, may not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services, must act on applications within a reasonable period of time, and must make any denial of an application in writing supported by substantial evidence in a written record. The statute also preempts local decisions premised directly or indirectly on the environmental effects of radio frequency (RF) emissions, assuming that the provider is in compliance with the Commission's RF rules." (http://www.fcc.gov/encyclopedia/tower-and-antenna-siting)

- **CATEGORICALLY EXEMPT** | The proposed wireless project is categorically exempt Class 3 (new construction or conversion of small structures pursuant to CEQA reporting requirements).
- **NOT A PROTECTED SPECIES** | According to the U.S. Fish and Wildlife Service and the California Department of Fish and Wildlife, bees are not a protected species.

FCC **COMPLIANCE LETTER**

Verizon Wireless
15505 Sand Canyon Ave.
Building D-1
Irvine, CA 92618

March 18, 2014

Subject: **FCC RF Emissions Compliance**
Verizon Wireless (VzW) Telecommunications Facility,
APN: 8112-022-024, 026 & 028
(Verizon Wireless "Don Julian")

Verizon Wireless' Network Engineering Department conducts radio frequency (RF) emission studies on all sites. The RF emission study is conducted pursuant to the guidelines and specifications provided in FCC OET Bulletin No. 65, Edition 97-01 dated August 1997, entitled *Evaluating Compliance with FCC Guidelines for Human Exposure to Radio Frequency Electromagnetic Fields*. All transmit and receive equipment is manufactured to meet strict FCC requirements. Prior to use, the equipment must have FCC approval as to design, use and technical parameters.

The study evaluated RF emission levels at publicly accessible areas around the Verizon Wireless antennas. The calculations are made assuming 'worst case' conditions i.e., all transmitters operating simultaneously at their maximum power excluding any attenuation.

Based upon Verizon Wireless' engineering study and analysis, this telecommunications facility does not exceed the general population exposure limits in locations that are accessible to the general public, and is in complete compliance with the FCC's RF emission regulations.

Verizon Wireless is committed to assuring the safety and welfare of its employees, the public and the environment. Should you have any additional property related concerns, please contact our property management at (949) 286-8711.

Thank you,

Scott Lee

Radio Frequency Engineer
Verizon Wireless

EXAMINING WIRELESS FACILTIES + PROPERTY VALUE

2 CASES + 1 STUDY

CASE 1 | Cal. RSA No. 4 d/b/a Verizon Wireless v. Madera County, 332 F.Supp.2d 1291 (E.D. Cal. 2003)
CASE 2 | AT&T v. City of Carlsbad, 308 F.Supp.2d 1148 (S.D. Cal. 2003)
STUDY 1 | Wireless Facilities Impact on Property Values (2012)

Briefs and Other Related Documents

United States District Court,E.D. California.
CALIFORNIA RSA NO. 4 d/b/a Verizon Wireless by and through Its General Partner Pinnacles Cellular Inc., Plaintiff,
v.
MADERA COUNTY and the Board of Supervisors of Madera County, Defendants.
No. CV F 02-6605 SMS.

Oct. 10, 2003.

Background: Wireless telephone company sued county board of supervisors, claiming that denial of conditional use permit to build four 30 foot high antennae near existing large water tank was violation of Telecommunications Act. Company moved for summary judgment.

Holdings: The District Court, Snyder, United States Magistrate Judge, held that:

5(1) substantial evidence did not support board's conclusion that antennae were inconsistent with general plan for area;

6(2) substantial evidence did not support rejection of permit on aesthetic grounds;

7(3) substantial evidence did not support conclusion that antennae would reduce real estate values;

8(4) substantial evidence did not support conclusion that antennae would create public health, safety, and welfare problems;

9(5) substantial evidence did not support conclusion that antennae would cause noise pollution; and

10(6) court had authority to order board to issue permit.

Judgment for company.

West Headnotes

[1] **Administrative Law and Procedure 15A 791**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak791 k. Substantial Evidence. Most Cited Cases
"Substantial evidence," sufficient to sustain agency decision, is more than a scintilla and less than a preponderance, and it consists of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

[2] **Administrative Law and Procedure 15A 791**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak791 k. Substantial Evidence. Most Cited Cases
To determine whether there is substantial evidence to support decision of administrative agency, court will view record in its entirety and take account of evidence unfavorable to agency's decision.

[3] **Administrative Law and Procedure 15A 791**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak791 k. Substantial Evidence. Most Cited Cases
The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

[4] **Administrative Law and Procedure 15A 760**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak754 Discretion of Administrative Agency
15Ak760 k. Wisdom, Judgment or Opinion. Most Cited Cases

Administrative Law and Procedure 15A 784.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak784.1 k. In General. Most Cited Cases
When the record clearly precludes an agency decision from being justified by a fair estimate of the worth of the testimony of witnesses or the agency's informed judgment on matters within its special competence, or both, that decision must be set aside.

[5] **Zoning and Planning 414 384.1**

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Substantial evidence, required by Telecommunications Act, did not support conclusion of county board of supervisors, that construction of four 30 foot high wireless telephone transmission antennae was inconsistent with general plan for area; placement furthered plan objective of preserving open space, since antennae

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

were sited next to 50,000 gallon water tank rather than in open space, and antenna furthered another planning objective, encouraging utilities. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[6] **Zoning and Planning 414 384.1**

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Substantial evidence, required by Telecommunications Act, did not support conclusion of county board of supervisors, that construction of four 30 foot high wireless telephone transmission antennae would be denied on aesthetic grounds; antennae would be virtually invisible, narrowing to two inches at top, and presence of "massive," "ugly" 50,000 gallon water tank within few feet of proposed antennae already precluded aesthetic concerns. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[7] **Zoning and Planning 414 384.1**

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Substantial evidence, required by Telecommunications Act, did not support conclusion of county board of supervisors, that construction of four 30 foot high wireless telephone transmission antennae would lower real estate values; generalized statements of concern about values were insufficient evidentiary support, in light of promoter's evidence that unobtrusive antennae of type proposed in present case did not effect values. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[8] **Zoning and Planning 414 384.1**

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 k. In General. Most Cited Cases
Substantial evidence, required by Telecommunications Act, did not support conclusion of county board of supervisors, that construction of four 30 foot high wireless telephone transmission antennae would create public health, safety and welfare problems; wireless company submitted evidence that antennae would satisfy safety standards, and opponents did not present countervailing evidence. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[9] **Zoning and Planning 414 384.1**

414 Zoning and Planning
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

414k384.1 k. In General. Most Cited Cases
Substantial evidence, required by Telecommunications Act, did not support conclusion of county board of supervisors, that construction of four 30 foot high wireless telephone transmission antennae would cause noise pollution; wireless company provided evidence that antennae would give off sound equivalent to human whisper, and claims that sounds carried well in area's mountain setting lacked substantiation. Communications Act of 1934, § 332(c)(7)(B), as amended, 47 U.S.C.A. § 332(c)(7)(B).

[10] **Federal Courts 170B 11**

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk10 Issuance of Writs
170Bk11 k. Mandamus. Most Cited Cases

Mandamus 250 99

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k99 k. Making and Enforcement of Police Regulations. Most Cited Cases
Federal court had authority, under Telecommunications Act, to issue order in nature of mandamus commanding county board of supervisors to issue conditional use permits allowing for building of wireless telephone antennae, following determination that board violated Act in denying permit application. Communications Act of 1934, § 332(c)(7)(B)(v), as amended, 47 U.S.C.A. § 332(c)(7)(B)(v).

***1293** Ronald Edward Van Buskirk, Pillsbury Winthrop LLP, San Francisco, CA, for plaintiff.
Douglas W. Nelson, Madera County Counsel, Madera, CA, for defendants.

ORDER GRANTING PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (DOC. 12)

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION (DOC. 11)

ORDER SETTING INFORMAL TELEPHONIC STATUS CONFERENCE for **OCTOBER 31, 2003, at 11:00 A.M.**

SNYDER, United States Magistrate Judge.
The motion of Plaintiff for summary judgment and summary adjudication came on regularly for hearing on Thursday, September 25, 2003, at 9:30 a.m. in Courtroom 4 before the Honorable Sandra M. Snyder, United States Magistrate Judge. Ronald E. Van Buskirk and Diana Graves of Pillsbury Winthrop appeared on behalf of Plaintiff, and Douglas W. Nelson of the Madera County Counsel's Office appeared on behalf of Defendants. The Court had reviewed all the papers submitted in support of and in opposition to the motion. After argument, the matter was submitted to the Court.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

INTRODUCTION 1

FN1. The introduction is derived from the parties' joint summary of facts.

Plaintiffs are proceeding with an action asserting a violation of 47 U.S.C. § 332(c)(7)(B). The matter has been referred to the Magistrate Judge for all proceedings, including the entry of final judgment, pursuant to 28 U.S.C. § 636(c), Fed.R.Civ.P. 73(b), and Local Rule 73-301.

Plaintiff, Verizon Wireless ("VZW"), has filed a motion for summary judgment on its claims under Section 704 of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)(B)), challenging the denial by the County of Madera ("County") of VZW's application for a conditional use permit for a wireless facility in the Yosemite Lakes Park ("YLP") subdivision in Coarsegold, California. The parties have completed briefing on the summary judgment motion and submitted the administrative record of the County's action to the Court. [FN2] Plaintiff's request that the Court ***1294** take judicial notice of various documents concerning legislative history and portions of a zoning ordinance will be granted.

FN2. See Record of Proceedings, Vol. 1 of 1, pages 0001-0475.

Pursuant to the parties' consent and the June 18, 2003 status conference order, [FN3] the County has filed its Amended Answer dated June 20, 2003. The parties also complied with the direction to "jointly file a summary of all facts in the record material to the motion for summary judgment, which shall be accompanied by a collection of excerpted portions of the record reflecting the facts material to a review of the substantiality of the evidence or to any other issue in dispute."

FN3. Order Following Summary Judgment Status Conference, dated June 18, 2003.

VZW has asserted three claims under Section 704:(1) that the County failed to issue a written decision as required by the statute; (2) that the County lacked substantial evidence to deny the use permit in the circumstances; and (3) that the County's action amounts to a prohibition of wireless service in violation of Section 704. Under the Amended Answer, the County does not dispute the first claim. The County does dispute claims 2 and 3.

The parties submitted a joint summary of facts bearing upon the Section 704 claims asserted by VZW and an appendix of documents and transcript excerpts from the administrative record upon which each side relies to support its position on the disputed claims. The excerpts have been highlighted to show the precise evidence relied on by each side. [FN4]

FN4. VZW has highlighted pertinent facts in support of its claims in yellow. The Court has reviewed the entire record submitted by the parties on April 28, 2003, as well as the excerpts and the matters of which the Court has taken judicial notice.

FACTS

The facts are taken from the parties' joint summary of facts as augmented by the

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Court's review of the record.

I. *Description of the Facility*

In December, 2000, California RSA No. 4, doing business as Verizon Wireless ("VZW"), filed a site approval application (Application No.2000-36) with the Madera County Planning Department for a use permit to install a telecommunications facility approximately 1,500 feet southwest of the intersection of Blue Heron Way and North Dome Drive (otherwise named "Outlot D") in the YLP subdivision in Coarsegold, California. *Administrative Record ("AR") 0034.*

The VZW application proposed a wireless communications facility consisting of four six (6)-inch diameter poles, 25 feet in height, with attached whip antennas, with a combined height of approximately 30 feet. The poles would be located approximately four feet from an existing 50,000 gallon water tank 25 feet in height. The water tower is an existing for-profit commercial use on Outlot D and is served by an existing road and public utilities; Outlot D is subject to an easement from the Yosemite Lakes Owners' Association, granted in 1976, for construction and operation of public utility facilities including telephone lines and necessary appurtenant facilities. *AR 0001, 0471.23-0471.27; AR 0096-97 (May 7, 2002 Planning Commission Staff Report); AR 0179-0185 (August 20, 2002 Memo from Appellant to Board of Supervisors).*

Three refrigerator-sized cabinets to house telecommunications equipment would be placed approximately 45 feet from the base of the water tank on a 15 by 15 foot concrete pad. The equipment cabinets would be located within an existing fenced area around the tank and would not ***1295** be visible from the adjacent housing community. The closest residence is more than 250 feet from the equipment cabinets. *AR 0107, 0187, 0192, 0471.11.*

II. *Zoning and General Plan Designations*

The proposed site for the facility is located in a OS/MHA (Open Space/Manufactured Housing Architectural Review Overlay) zoning district which allows telecommunications facilities with approval of a conditional use permit. *AR 0054, 0096 -97.*

The proposed facility is lower than the 35 foot maximum allowable height for structures in the open space zone. *AR 0096-97.*

Madera County General Plan Policy 3.J.1 states that the County shall "facilitate the provision of adequate gas and electric, communications and telecommunications services and facilities to serve existing and future needs while minimizing noise, electromagnetic and visual impacts on existing and future residents." *AR 0208.*

III. *Description of the County's Actions*

The Planning Department prepared and submitted to the County Planning Commission a Staff Report recommending approval of the project. *AR 0052-0058.* The Staff Report included attachments of supporting documents from VZW; four letters opposing the project; recommendations in favor of the project from the County Engineer, County Road Department, and Count Fire Department; and a proposed Mitigated Negative Declaration. *AR 0059-0085.* Both the Staff Report and the

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Mitigated Negative Declaration stated that the project would have no significant environmental impacts, no significant community impacts, and would not violate the spirit or intent of the zoning ordinance. *AR 0052, 0079-81, 0094, 0127-0129.*

On February 6, 2001, the Planning Commission held a public hearing to consider VZW's application. [FN5] VZW presented testimony in support of the project. Ten persons spoke in opposition to the project, and a petition with 251 signatures was submitted opposing the project. The Commission was advised that the YLP Homeowners Association owned Outlot D and that the Association Board of Directors had given VZW permission to apply for the use permit, although the Board and VZW were still negotiating a lease. *AR 0088-89, 0095.* The Planning Commission stated that "the proposed towers were the least intrusive of any tower they have approved", but denied the application without prejudice because VZW was still negotiating lease terms with the YLP Homeowners Association as the site owner. *AR 0089.*

FN5. The transcript of the hearing is not available. (A.R. at 86.)

Following finalization of the lease agreement with the Homeowners Association, VZW requested that the Planning Commission reconsider the use permit. *AR 0092.*

The Planning Department submitted a second Staff Report to the Planning Commission recommending approval of the project. *AR 0094-0100.* The Staff Report concluded the project would have no significant impacts and recommend adoption of the Mitigated Negative Declaration. *AR 0098.* The Staff Report noted that one additional letter in opposition had been submitted; attached the four opposition letters to the report; and noted that a survey of YLP Homeowners Association members indicated 71% of those responding were in favor of the project. *AR 047.14.*

***1296** The Planning Commission held a public hearing on reconsideration of the permit on May 7, 2002. [FN6] VZW presented its application to the Planning Commission and testified that VZW required the proposed facility to fill a "dead area" along Highway 41 and that this site provided the best coverage to the area while providing access to the infrastructure required to build and maintain the facility. *AR 0154.* The Planning Commission received testimony from seven local residents stating concerns that the installation of the facility would violate the CC & R's of the Homeowner's Association, encourage further development in the area, decrease property values due to perceived health risks, present actual health risks from Radio Frequency ("RF") radiation, and generate noise. *AR 0154-0155.*

FN6. The transcript of this hearing is not available.

Following the public hearing, the Planning Commission voted to deny the permit, finding that the facility: (1) "will not violate the spirit or intent" of the zoning ordinance; (2) "the use of open space for a cell tower was contradictory to the General Plan" and "the granting of this Conditional use permit will not be consistent with the 1995 General Plan because it is not compatible with the objectives, policies, general land uses, and programs specified in the General Plan and will inhibit or obstruct the attainment of those articulated policies"; (3) the proposed use will be contrary to the public health, safety, or general welfare of the citizens of Madera County"; (4) "the perceived health risk of the cell tower could affect the surrounding property owners"; (5) "the proposed use will be hazardous, harmful, noxious, offensive, or a nuisance by reason of noise, dust,

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

smoke, odor, glare or other similar factors"; (6) "the possible noise generated by the fans in the equipment shed could be too loud for the surrounding property owners;" (7) the "proposed use will cause a substantial effect upon the property values and general desirability of the neighborhood or of the County"; (8) "past studies have been done on perceived health risks lowering the property values in some areas." *AR 0156-0157.*

On May 14, 2002, pursuant to County ordinances, VZW appealed the Planning Commission's denial to the Board of Supervisors. *AR 0158.*

On August 20 and 23, 2002, VZW submitted photo-simulations, scientific reports on noise and RF radiation, emergency services support letters, access road improvement descriptions, petitions in support of the facility, evidence of lease and other entitlement approvals granted by the YLP Homeowners Association for the site on Outlot D, and other project information to the Board of Supervisors. (A.R. at 179-210.)

On August 27, 2002, the Board of Supervisors held a public hearing to consider VZW's appeal. *AR 0170.* At the hearing, members of the public presented letters, petitions and testimony in favor of and opposed to the facility. Eight community members testified in support of the facility. *AR 0471.57-047167.* Six community members testified against the facility, raising concerns over use of a recreational/greenbelt area, alternative sites, equipment noise, health effects of RF radiation, public perception of decreased property values, and the Homeowner Association entitlement issues. *AR 0471.67-0471.88.* VZW presented exhibits and expert testimony addressing the lack of any visual impacts, the YLP Homeowners Association entitlements to the site, planning and zoning compatibility, RF radiation safety, the basis for their belief of the lack of alternative sites, the lack of any noise impact, and project support from emergency service ***1297** agencies. *AR 0471.6-0471.60.* VZW's evidence included exhibits with drive test results and signal coverage maps with and without the proposed site, as showing the need for the facility. *AR 0219-0222.*

Following the hearing, the Board voted 3-1 to deny the permit. The Board did not issue any findings or written decision. *AR 0416, 0472.1.*

IV. *Summary of Facts relating to the Substantial Evidence Claim*

A. *Staff Reports*

The Mitigated Negative Declaration prepared by the Madera County Environmental Committee finds, "No adverse environmental impact is anticipated from this project... no significant amounts of traffic, noise, dust, light, or glare will result from this development, [and] that no biological or cultural resources will be degraded ...." *AR 0127-0129.*

The Planning Department Staff analysis of the proposed facility states:
(a) the maximum allowable height in the OS (Open Space) zoning district is 35 feet and the current proposal will not exceed this requirement (*AR 0097*);
(b) the existing 50,000 gallon water tank located on the project site has a height of 25 feet, the proposed telecommunications poles will be placed within four feet of this tank and the whip antennas proposed for the tops of the poles will bring the maximum height of the poles to 30 feet, which is five feet in excess of the existing tank (*AR 0097*);

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

(c) the applicant has expressed a willingness to paint or treat the poles and accessory equipment to match the color of the existing water tank and this measure will minimize the visibility of the facility (*AR 0097*); and
(d) conditions will be placed upon the project requiring removal of the facility should it become inoperative in the future (*AR 0097*).

The Planning Department Staff recommended that the use permit be granted with the following findings:
(a) *The proposed project does not violate the spirit or intent of the Zoning Ordinance because* the proposal meets the intent of the zoning ordinance which encourages location criteria which minimizes the visibility of communications facilities. This project would utilize a low elevation of thirty feet and the proximity to an existing structure to minimize its visibility from surrounding properties. *AR 0098.*
(b) *The proposed project is not contrary to the public health, safety or general welfare in that* the proposal, in accordance with findings made by the FCC (Federal Communications Commission), will not pose a threat to public health or safety. Construction and operation of the facility must meet FCC standards for radio frequency operations. *AR 0098.*
(c) *The proposed project is not hazardous, noxious, offensive or a nuisance because of noise, dust, smoke, odor, glare, or similar factors in that* the proposal, an unmanned telecommunications facility, will not generate any of the above concerns. The facility will be unmanned and will generate only a minimal amount of noise from on-site electrical equipment. Parking and circulation areas within the project lease area must be maintained with gravel or another form of surfacing to reduce dust. The facility will not generate smoke or odors. The communication antennas will be painted in such a manner as to reduce glare and blend in with the existing water tank. *AR 0098.*
(d) *The proposed project will not for any reason cause a substantial, adverse effect upon the property value and general desirability of the neighborhood or* ****1298*** *of the County in that* the placement of the antennas as proposed will have limited visibility from surrounding developed property. The visual impacts of the proposed facility will be significantly less than those which could occur from a full-scale freestanding communications tower. The proposal will utilize the existing water tank to help reduce the visual impact of the proposal. *AR 0098.*

B. *Public Testimony*

The YLP Homeowners Association conducted a survey which indicated 71% of respondents supported the facility (71% of 490 responding out of a total of 2,050 owners). *AR 0210.*

The record contains numerous community petitions (approximately 550 signatures) and 53 individual letters and public comments in support of the facility. *AR 0202, 0203 (letters from County Fire Department and Sierra Ambulance Service), 0319-0415 471.62-471.76.* The record contains numerous community petitions (approximately 55 signatures) and about twenty letters and public comments in opposition to the facility. *AR 0124-126, 0223-0318, 471.67-471.88.* Further, sixty-one form letters were submitted objecting to the "towers" on various grounds. *AR 0250-0311.* Fewer than 40 of the form letters listed specific concerns, such as the "concern over health risks", the "perception of potential danger from electromagnetic fields" and that "noise levels may be an excessive nuisance." *AR 0250-0311.*

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

C. *Expert Testimony*

During the Board hearing, VZW provided expert testimony in response to all expressed community concerns regarding suitability of the parcel, zoning compatibility, visibility and visual impacts of the facility, RF safety, need for the site to obtain signal coverage, and noise:
(a) "Outlot D is essentially unregulated because it has a water tower, has been used for for-profit public utility purposes.... The easement that was granted [for the water tower] refers not only to the water facilities, but any public utility facilities, including electric power cables, telephone line, liquid waste disposal. So this is a use that is compatible with the historic use of the site and consistent with the terms and conditions of the Declaration of Restrictions."

Comments of Robert Rosatti, attorney for YLP Homeowners Association regarding authority of YLP Homeowners Association to enter into lease with VZW. AR 0471.21-0471.25.

(b) The proposed project is compatible with the General Plan, zoning and county policy related to telecommunications facilities. *Comments of Arlan Nickel, Planning Representative for Verizon Wireless, AR 0208, 0471.28-0471.31.*

(c) The County has a telecommunications policy that favors siting facilities either (1) in agricultural areas; (2) on existing structures, such as barn silos, water or PG & E towers; and (3) adjacent to existing structures. *AR 0471.30.*
(d) "The project design is four very simple steel poles which are located next to an existing very large 500,000 gallon water tank .... [T]his is not a pristine and open-space area. This is a utility easement that is used for utility purposes here... when you hear testimony-in fact, we've heard several times already that this is pristine open-[ ] this is not it. This is the utility easement."

Comments and visual presentation of Arlan Nickel, Planning Representative for Verizon Wireless, AR 0183-0185, 0471.8-0471.12.

***1299** (e) VZW presented approximately five photo-simulations during the Board hearing from various angles to demonstrate that "the water tank cannot be viewed from most of the areas around the Yosemite Lakes Park area. What we did is we drove around the various streets and roads in the community and looked at the various vantage points where we could look back from various intersections to the water tank." *Comments and visual presentation of Arlan Nickel, Planning Representative for Verizon Wireless, AR 0183-0185, 0471.8-0471.12.*

(f) "This site will comply with the prevailing [electromagnetic safety] standards, not only in the [ ], but in fact all of the standards world wide that I am familiar with easily and by a significant margin." *Comments and report of Robert D. Webber, Consulting Electrical Engineer with Hammet & Edison, Inc. AR 0194-200, 0471.31-0471.32.*

(g) "When we proposed this location here [Mt. Revis], and I requested radio tests, I actually looked at going higher which would have meant a tower. And the difference in the coverage... was not significant enough. And that's because of the terrain. It's a challenge with the terrain here to place one site to cover all of [Highway] 41." *Comments and coverage test results presented by Linda Mendiola, Radio Engineer for Verizon. AR 0219-222, 0471.37-0471.44.*

(h) There are "certain standards that the county imposes on what is a permissible

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

noise level... the noise from these cabinets are going to be well below the counties compatibility standards and in a range where most people would say... inside a common residence [the noise will be] barely audible if indeed audible at all." *Comments and noise analysis presented by Bill C. Thiessen, Senior Noise Consultant with Brown Buntin Associates. AR 0187-0192, 0471.46-0471.48.* The noise analysis demonstrates that the noise levels created by the facility will be approximately 23dBA, which is analogous to the volume of a whisper from four to six feet away. *AR 0188-189.* This noise level falls well below the Madera County night-time noise level allowance of 45dBA. *AR 0471.47.*

No expert testimony was presented in opposition to the project.

IV. *Summary of Facts relating to the Prohibition of Services Claim* FN7

FN7. Although the Court does not reach this issue, the facts are set forth to provide context for the Defendants' actions.

Members of the Board supported the improvement of VZW's coverage along Highway 41. *AR 0471.88-0471.89.*

VZW needs this site to remedy a lack of universal signal coverage in the area and provide consistent service along Highway 41 and other roads in Madera County. *AR 0073, 0116, 0180. 0471.37.*

The transcript reflects discussion between VZW and the Board regarding alternative locations which could provide adequate wireless coverage. *AR 0471.37-0471.44*

VZW testified at the Board hearing that this site is necessary to provide wireless services to this section of Yosemite Lakes Park and Highway 41. *AR 0179-0181, 0471.37-0471.44.*

VZW submitted Drive Test maps and Projected Coverage Area maps that demonstrated that the facility is essential to provide access to wireless service on Highway 41. *AR 0219-0221, 0471.41-0471.44.*

VZW submitted a memorandum to the Board which states:
***1300** "The land parcel where the water tank is located is extremely well suited for a communications facility. This location has electrical power and telephone utilities close by, as well as an existing access road. Virtually no other hilltop locations in the surrounding area have these qualities (utilities and a road in existence) and which also provide the strategic coverage of Hwy. 41 and the YLP area."

AR 0180. VZW's Radio Engineer explained the technical aspects of siting a telecommunications facility. AR 0471.37-0471.44. She showed the County diagrams and maps illustrating the signal strength of VZW's network with and without the proposed facility. *AR 0219-0222, 0471.40.*

The Board of Supervisors had no information or testimony before it to contradict the Radio Engineer's testimony that this particular site was the only feasible location to serve this section of Highway 41 and Yosemite Lakes Park.

In response to the County's questions and suggestions regarding potential alternative locations, VZW's radio engineer testified that the suggested options

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

were not feasible or could not provide the necessary service. *AR 0471.40-0471.44.*

Supervisor Silva and Supervisor Dominici expressed disbelief that VZW could not locate another site along Highway 41 which would provide the same coverage as the Mt. Revis proposal. *AR 0471.41-0471.43, 0471.90.*

There was no scientific information presented to the Board of Supervisors to show any alternative site was feasible to provide the needed coverage along Highway 41 and in the Yosemite Lakes Park area.

ANALYSIS

I. *Subject Matter Jurisdiction*

Title 47 U.S.C. § 332(c)(7)(b)(v) provides:
Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commissioner for relief.

The section contains language customarily used in statutes of limitations, and it has been so interpreted. *Airtouch Cellular v. City of El Cajon*, 83 F.Supp.2d 1158, 1162 (S.D.Cal.2000) (recognizing the effectiveness of a tolling agreement to extend time to file an action in federal court). There is no dispute that there has been final action in this case within the meaning of the statute. Thus, the Court has subject matter jurisdiction pursuant to § 332 and 28 U.S.C. § 1331 (civil actions arising under the laws of the United States).

II. *Summary Judgment Standards*

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Under usual summary judgment practice, the moving party
[A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

***1301** *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It is the moving party's burden to establish that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir.1978).

However, in an action such as this in which the Plaintiff challenges the final decision of an administrative agency, the Court does not utilize the standard analysis for determining whether a genuine issue of material fact exists. In

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Occidental Engineering Co. v. INS, 753 F.2d 766, 769-70 (9th Cir.1985), Occidental challenged the denial by the Immigration and Naturalization Service (INS) of the employer's petition to reclassify one of its employees. In the appeal of the district court's grant of the motion for summary judgment, the Ninth Circuit stated:

Occidental contests the district court's grant of summary judgment on the grounds that there exist disputed issues of material fact. But there are no disputed facts that the district court must resolve. That court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did. De novo factfinding by the district court is allowed only in limited circumstances that have not arisen in the present case. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971); *Proietti v. Levi*, 530 F.2d 836, 838 (9th Cir.1976); *Dredge Corporation v. Penny*, 338 F.2d 456, 462 (9th Cir.1964). The appellant confuses the use of summary judgment in an original district court proceeding with the use of summary judgment where, as here, the district court is reviewing a decision of an administrative agency which is itself the finder of fact. In the former case, summary judgment is appropriate only when the court finds there are no factual issues requiring resolution by trial. In the latter case, summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did.

It thus must be determined whether or not where is substantial evidence in the record to support Defendants' findings.

III. *Substantial Evidence*

RSA asserts that Defendants' decision to deny the CUP is not supported by substantial evidence.

Title 47 U.S.C. § 332(c)(7)(B)(iii) provides:

Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

[1] [2] In enacting this statute, it was the intent of Congress to apply "the traditional standard used for judicial review of agency actions." H.R.Rep. No. 104-458 at 208, reprinted in 1996 U.S.C.C.A.N. 10. Substantial evidence is more than a scintilla and less than a preponderance, and it consists of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; to determine the substantiality of evidence, a court will view the record in its entirety and take account of evidence unfavorable to the agency's decision. *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490, 523, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981); ***1302***Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 408 (3d Cir.1999); *Aegerter v. City of Delafield*, 174 F.3d 886, 888-89 (7th Cir.1999); *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 493-94 (2d Cir.1999); *MetroPCS, Inc. v. City and County of San Francisco*, 259 F.Supp.2d 1004, 1010 (N.D.Cal.2003); *Airtouch Cellular v. City of El Cajon*, 83 F.Supp.2d 1158, 1164 (S.D.Cal.2000). Local and state zoning laws govern the weight to be given the evidence. *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2nd

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Cir.1999); *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 248 F.3d 101, 106 (3d Cir.2001).

In performing this review, the Court is mindful that § 332(c)(7)(B)(iii) does not substitute the federal courts for local legislatures, which are still empowered to make decisions within the express limits of § 332. As the court stated in *Amherst, N.H. v. Omnipoint Communications*, 173 F.3d 9, 13 (1st Cir.1999):
The statutory provision before us, 47 U.S.C. § 332(c)(7), is a deliberate compromise between two competing aims-to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers. [FN3]
FN3. An initial House version of this provision required the formation of an FCC rulemaking committee charged with developing a uniform national policy for the deployment of wireless communication towers. The bill as it emerged from conference committee rejected such a blanket preemption of local land use authority, but retained specific limitations on local authority now reflected in the statute itself. See H.R. Conf. Rep. No. 104-458, at 207-09 (1996).

However, it is also established that in enacting the statute, Congress was concerned with the inconsistent and occasionally conflicting "patchwork of requirements" that could inhibit deployment of personal communications services, and it endeavored to expand wireless services and increase competition among providers by reducing the regulation and bureaucracy precluding steady and rapid expansion of service and protecting against decisions by local authorities that are irrational and without substance. *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 57 (1st Cir.2001) (quoting *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township*, 181 F.3d 403, 407 (3d Cir.1999), quoting in turn from H.R. Rep. 104-204). Under the Act, local governments retain control over decisions regarding the placement, construction and modification of personal wireless service facilities (§ 332(c)(7)(A)) so long as they are 1) supported by substantial evidence (§ 332(c)(7)(B)(iii)); and 2) do not a) unreasonably discriminate among providers of functionally equivalent services (§ 332(c)(7)(B)(i)), b) prohibit or have the effect of prohibiting the provision of personal wireless services (*id.*), or c) are not based on the environmental effects of radio frequency emission to the extent that such facilities comply with the Federal Communications Commission's regulations concerning such emissions (§ 332(c)(7)(B)(iv)). *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d at 57-58.

[3] [4] The reviewing court must take into account contradictory evidence in the record. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Penobscot Air Servs., Ltd. v. Fed. Aviation Admin.*, 164 F.3d 713, 718 (1st Cir.1999) (citations omitted). However, this review, though highly deferential, "is not a rubber stamp." *Id.* at 718 n. 2. An agency, and by extension the ***1303** Board, "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Id.* at 718 (quoting *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 378, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998)). When the record "clearly precludes the... decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both," that decision must be set aside. *Id.* (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490, 71 S.Ct. 456, 95 L.Ed. 456 (1951)).

There is a dispute as to which party bears the burden of proof with respect to

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

substantial evidence. See *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d at 496-97 (finding it unnecessary to decide); *Airtouch Cellular*, 83 F.Supp.2d at 1164 (accepting the parties' stipulation that the city bear the burden of proof); *MetroPCS*, 259 F.Supp.2d at 1010. In the absence of Ninth Circuit authority, the Court accepts the concession of Plaintiff at hearing, which reflects the position of the Northern District of California in *MetroPCS* and of the First Circuit that the burden should be on the communications company because the decision, pursuant to Congress's intent, should be evaluated like any other administrative decision, and the standard should be deferential to the administrative agency, which in this case is the local board. *MetroPCS*, 259 F.Supp.2d at 1010 (citing *Second Generation Properties L.P. v. Town Pelham*, 313 F.3d 620, 627 (1st Cir.2002)).

Defendants argue that the basis of the County's decision was unclear and that thus the matter should be remanded. Title 47 U.S.C. § 332(c)(7)(B)(v) provides that when an action is brought by one adversely affected by final board action, the court shall hear and decide such action on an expedited basis. Here, the complete record of the proceedings is before the Court. Other than the making of formal or written findings, no other purpose for a remand has been suggested by Defendants. It does not appear that any evidence exists that has not already been presented to the County. Further, the issues have been fully briefed, and Defendants have made various arguments. At the hearing on this motion, Defendant's counsel asserted that the only issue before the County was aesthetics; however, in their papers, Defendants have asserted various reasons in support of the County's decision. In the amended answer, Defendants assert that the reasons for the denial were inconsistency with the general plan; the use would be contrary to the public health, safety or general welfare; the communications facility would cause a substantial impact on property values based on the perceived health risks; and it would be a nuisance because of noise. In their opposition to the motion for summary judgment, Defendants argue that the decision was supported by aesthetic considerations; effects on property values because of aesthetic impact; and Madera's policy, as reflected in the general plan, of preserving open space. They also assert that the record is devoid of evidence to support a conclusion that the Defendants' denial of the facility prohibits or has the substantial effect of prohibiting personal wireless services within the meaning of § 332(c)(7)(B)(ii).

In order to avoid further delay, the Court performs its statutory duty to review the record to determine if substantial evidence supports the County's decision.

A. *Inconsistency with the Policy to Preserve Open Space as Articulated in the General Plan*

[5] A conditional use is a use of land or structures dependent upon exceptional circumstances***1304** allowed in any particular part of a zoned district by the granting of a permit. Madera County Zoning Ordinance, § 18.04.125. Uses permitted by the zoning ordinance, those specified in the zoning district regulations, and any other uses not specifically provided for may be approved by the zoning agency (here, the planning commission). § 18.92.010. A conditional use permit shall be granted only if it is found that the proposed use will not violate the spirit or intent of the zoning ordinance; will not be contrary to the public health, safety or general welfare; will not be hazardous, harmful, noxious, offensive or a nuisance by reason of noise, dust, smoke, odor, glare or other similar factors; and will not for any other reason cause a substantial adverse effect upon the property values and general desirability of the neighborhood or of the county. § 18.92.030. With respect to process, the planning commission hears appeals from the zoning administrator, and the board of supervisors hears appeals

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

from the decisions of the planning commission. § § 18.108.110-18.108.120.

State law provides that a zoning ordinance may provide for a zoning administrator (here, the planning director of the county pursuant to § 18.02.050 of the zoning ordinance) or a zoning agency (here the planning commission pursuant to § 18.02.060) to hear and decide applications for conditional uses, but no standards are set for the determination. Cal. Govt.Code. § 65901. In granting or denying a conditional use permit (CUP), the body acting performs an administrative or quasi-judicial act. *Goat Hill Tavern v. City of Costa Mesa,* 6 Cal.App.4th 1519, 1525, 8 Cal.Rptr.2d 385 (1992) (citing *Topanga Ass'n. for a Scenic Community v. County of Los Angeles,* 11 Cal.3d 506, 517, 113 Cal.Rptr. 836, 522 P.2d 12 (1974)).

Decisions on CUP's must be consistent with the general plan. *Neighborhood Action Group for the Fifth District v. County of Calaveras,* 156 Cal.App.3d 1176, 1187, 203 Cal.Rptr. 401 (1984); *Land Waste Management v. Contra Costa County Board of Supervisors,* 222 Cal.App.3d 950, 957-58, 271 Cal.Rptr. 909 (1990). In the context of analyzing the consistency of zoning ordinances with a general plan, an action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. *Corona-Norco Unified School Dist.,* 17 Cal.App.4th 985, 994, 21 Cal.Rptr.2d 803 (1993) (relying on General Plan Guidelines, p. 212, Governor's Office of Planning and Research, 1990); *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors,* 62 Cal.App.4th 1332, 1336, 74 Cal.Rptr.2d 1 (1998).

In the present case, outlot D is a parcel of 514 acres designated in the 1995 Madera County General Plan as open space. It is designated in the Coarsegold Area Plan as open space and public open space. (A.R. at 53.) The zoning district designation for the parcel is "Open Space/Manufactured Housing Architectural Review Overlay." (A.R. at 52-53.) The parcel is surrounded by vacant and developed single family residential and small-lot agricultural properties to the north, east, and west, with agricultural properties to the south. (*Id.*)

Communications tower/wireless communications facilities are permitted in such a parcel with a CUP. § 18.50.010(C)(6). The uses permitted and the structure height regulations in a manufactured housing architectural overlay district, which includes YLP, are the same as those permitted for the underlying zoning districts, with exceptions for manufactured housing installations, for which there are additional regulations. § § 18.84.010(A), 18.84.030, ***1305** 18.84.060. Section 18.88.040 provides that communications equipment buildings and supporting structures shall be permitted in any district, subject to review by the zoning administrator. [FN8] Section 18.50.010(A)(5) of the Zoning Ordinance permits in open space districts major transmission lines for greater than 70 KV, interregional gas transmission lines, or trunk communication.

FN8. Section 18.04.121 defines a "[c]ommunication tower/wireless communications facility" to include any structure used to support a device utilized to transmit, relay and/or receive wireless communication together with the equipment and structures necessary to operate such a facility. A "communications equipment building" is any building housing operating electrical and mechanical equipment necessary for the conduct of a public utility communications business with or without personnel. § 18.04.120.

Goal 5.H of the Madera County General Plan, adopted October 24, 1995, is to preserve and enhance open space lands to maintain the natural resources of the

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

county. Policy 5.H.1 provides that the county shall support the preservation and enhancement of natural land forms, natural vegetation, and natural resources as open space. To the extent feasible, the county shall permanently protect as open space areas of natural resource value, including wetlands preserves, riparian corridors, woodlands, and flood plains. *Id.*

Simultaneously, Goal 3J of the Madera County General Plan provides with respect to utilities that Goal 3J is to provide efficient and cost-effective utilities. The County shall facilitate the provision of adequate communications service and facilities to serve existing and future needs while minimizing noise, electromagnetic, and visual impacts on existing and future residents. § 3.J.1 at 46; A.R. at 0471.29. Madera County telecommunications policies also stated at the time of the County's action that the most appropriate sites for the location of a communications facility or tower in accordance with county policies were first, agricultural areas; second, on existing structures, such as barns, silos, water or PG & E towers; and adjacent to existing structures. (A.R. at 0471.30.)

A consideration of all aspects of the plan shows that the preservation of natural resources in open spaces is a valued goal, and that the protection should be permanent for some types of open space, such as areas of natural resource value, including wetlands preserves, riparian corridors, woodlands, and flood plains. However, coexisting goals are providing efficient and cost-effective utilities; facilitating the provision of adequate communications service and facilities; and minimizing noise, electromagnetic, and visual impacts.

Defendant contends that the parcel is a recreational area and points to form letters and individual letters of several residents regarding their decision to locate there because of, and their appreciation for, the natural beauty of the area. (Def.'s Opp. at 5-6.) This contention speaks to the recreational use of the larger parcel. However, nothing in the record indicates that the natural land forms or vegetation would be significantly compromised by the project; as is discussed in more detail below, the generalized aesthetic objections are without foundation. Further, although the recreational use may be the principal use of the larger open space of the parcel, the northerly portion of the parcel at the precise location of the proposed facility has been used for a substantial period of time for a for-profit public utility to which the communications facility would be attached. The 50,000 gallon water tank belonged to a for-profit public utility pursuant to Madera County's previous variance. (A.R. at 0471.23-.24.)

***1306** Given the present use of the site and the design of the project, permitting the project would have permitted achievement of both the preservation of what natural resources were present as well as achievement of the goal of facilitating telecommunications services with the least visual impact and noise. Because the precise area of the site is not open space, prohibition of the project would not have significantly served the goal of protecting open space. The Court notes that the County simultaneously permitted in the open space districts uses similar to the communications facility, such as major transmission lines greater than seventy kilovotes. (*Id.* at 0471.30.) The County had also previously granted CUP's to approve wireless communications towers in consistent circumstances. (*Id.*)

Defendant argues that some of the expressed concerns of the residents related to the aesthetic effects of the facility. These concerns are treated in more detail below. Another concern was that permitting the facility would lead to other similar commercial ventures. (A.R. at 223-318.) Although co-location was encouraged, no other company had indicated interest in the site. (*Id.* at 471.38.) The record reveals only one reference to another pending application; it was from

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Cingular Wireless for a traditional cell tower operation on the east side of Highway 41 down near the intersection of the Highway and Yosemite Springs Parkway. Although it was in the same general area, it was not for the Revis Mountain site. [FN9] Plaintiff's representative stated at the hearing that no other companies had expressed an interest in the Revis site. (A.R. at 38-39.) Thus, the fear of other commercial ventures was objectively unreasonable, speculative, and not supported by the record.

FN9. The record also reflects that two other communications facilities existed at distances of seven miles from the water tower. (A.R. at 95.)

Considering all the evidence in the record, the Court concludes that granting the CUP would have permitted preservation of natural space as well as facilitation of efficient, cost-effective telecommunications facilities at the most appropriate sites. Substantial evidence does not support the conclusion that the project was inconsistent with the general plan.

B. *Aesthetics*

[6] Defendants argue that residents of the vicinity of the proposed facility believed that the facility would be an eyesore that could adversely affect their views and property values. Defendants rely on the principle that aesthetic considerations are a valid basis for the exercise of the local police power and for a decision on a conditional use permit. Defendants cite *Kucera v. Lizza*, 59 Cal.App.4th 1141, 1148, 69 Cal.Rptr.2d 582 (1997), which upheld local regulation of trees for the purpose of preserving light and space.

The Court accepts the proposition that Defendants retain local control over land use issues generally, including aesthetics. The issue, however, is whether this particular decision was supported by substantial evidence.

A substantial body of evidence established that the antennae, which were two inches in diameter at the top, were largely invisible to persons situated at the north, northeast and northwest of the water tank, where most of the residential development in YLP had occurred. (A.R. at 179, 183.) A memorandum from Nickel, his testimony, and an accompanying visual presentation showed that because of screening provided by oak, pine trees and brush, even the water tank itself could not be viewed from most of the areas around YLP. (*Id.* at ***1307** 0471.9-.10; 179.) It was visible from an area near Blue Heron Court. (*Id.* at 0471.10.) Dennis Bell, who could see the tank from his patio, testified that the antennae would not worsen the view. (*Id.* at 0471.62-.63.) A few other residents wrote that any intrusion into the "greenbelt" was slight; because the massive water tank existed already, the "monstrous" tank nullified any visual objection. (*Id.* at 361, 356, 366.) Several residents wrote that the type of antennae to be installed were almost invisible at any significant distance, (*id.* at 342, 357), and the antennae would not be obtrusive or an eyesore. (*Id.* at 322, 342.)

The record does reflect that the antennae would be visible from the Dutton residence and another residence on North Dome Drive. (*Id.* at 78, 184.) The minutes of the Planning Commission meeting of February 6 confirm that several property owners had homes facing the lot and that the facility would be "visually intrusive." (*Id.* at 88.) One resident who lived very close to the tank sought to have the property preserved in its native state and stated that the four antenna poles would make the top of Revis Mountain "more ugly than it already is," although

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

he stated that the ugly water tank had been there since the inception of the park. (*Id.* at 74-75.) Two other residents objected to the unsightliness of an "array of poles and antennas, with guy wires and blinking lights," which would not look natural and would detract from the natural appearance. (*Id.* at 76.) One resident of Blue Heron Way who lived about 400 to 600 feet from the site wrote that he could see the site and objected that "four cell phone transmitting towers" would be visible and distasteful. (*Id.* at 225-26.)

Constituent testimony and letters, in combination with other evidence or circumstances, can constitute substantial evidence supporting a denial on aesthetic grounds. *AT & T Wireless PCS v. City Council of Virginia Beach*, 155 F.3d 423, 424-31 (4th Cir.1998) (where the majority of the citizens expressed repeated opposition to towers in a heavily wooded residential district with no above-ground power lines or significant commercial development); *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 58 (1st Cir.2001) (a denial based not only on aesthetics but also attractive nuisance and adverse effect on property values was upheld where the provider sought to erect a 150-foot-high lattice telecommunications tower, painted contrasting red and white, and a related equipment shed, propane tank and utility pole, surrounded by an eight-foot-high fence painted green and topped with three rows of barbed wire, atop a fifty-foot hill in an open field at the center of town in a low-density residential area in a suburban agricultural zone, 1300 feet from two forty-foot-high water towers, within 200 to 300 feet of residences, and within 350 feet of an elementary school); *Aegerter v. City of Delafield*, 174 F.3d 886, 889-891 (7th Cir.1999) (denial of application to replace existing 360-foot-tall tower in a residential area on a high hill with a 422-foot-high tower fifty-one inches wide at the base because of an inappropriate expanding commercial use and lack of aesthetic harmony with the neighborhood was held to be supported by substantial evidence where although it was a legal nonconforming use, it conflicted with a developing policy to limit such structures in residential neighborhoods, and there was evidence of negative effect on property values in the form of testimony by residents that they had moved into the area with the understanding that the present tower could not be expanded); *Airtouch Cellular v. City of El Cajon*, 83 F.Supp.2d 1158 (S.D.Cal.2000) (finding substantial evidence (letters; petition; testimony regarding aesthetics, property values, safety, and privacy; and ***1308** photographs) to support denial of an application to install multiple antennae on top of a water tower owned by a water district and to build a 360-square-foot building in a residential suburban area 120 to 135 feet from the nearest residence because of over-intensification of services, a preference to locate in commercial zones when possible, adverse effects on property values, noise, and safety).

However, limited speculative or generalized expressions of concern for aesthetics have been held not to constitute substantial evidence. *Omnipoint Corp. v. Zoning Hearing Bd.* 181 F.3d 403 (3d Cir.1999) (holding that the absence of a study on the effects of such a facility on property values and an absence of a showing of lack of adverse effect on the general character of the neighborhood did not justify a denial of a special exception to permit a 114-foot monopole in a sparsely populated mountainous region of a township on the basis of aesthetics/visibility and related decline in property values where ninety-foot-high trees would surround the pole and where the main objections were general and speculative (eleven neighbors briefly addressed the visibility and presented no evidence regarding property values) and concerned health effects); *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2nd Cir.1999) (denial of special use permits to construct antennae on water towers based on safety issues, lack of consideration of noise and traffic, and aesthetic concerns held not to be supported by substantial evidence where the telephone company submitted evidence of need for the site, evidence suggesting no

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

adverse effect on the character of the neighborhood or value of nearby real estate, and scientific evidence on radio frequency emissions (RFE's), and the opposition consisted mostly of commentary by citizens regarding perceived health threats and occasional generalized expressions of concern regarding aesthetics or the effect on property values); *Telespectrum v. Public Service Com'n of Kentucky, 227 F.3d 414 (6th Cir.2000)* (holding that denial of an application to erect a 199-foot tower in a heavily wooded rural area devoted to agriculture, more than 1000 feet from four residences in the area and not subject to local zoning or land use requirements, was not supported by substantial evidence where the provider researched all other electronically possible sites but found them unavailable or inappropriate, presented a licensed appraiser's testimony that property values would not be hurt that was based on studies, and the opposition was a single homeowner's generalized fears to health and property values); *see Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1219 (11th Cir.2002)* (holding that generalized concerns of citizens about aesthetics were insufficient to constitute substantial evidence, characterizing the point of law as permitting aesthetic concerns to support denial of a permit where there is substantial evidence of the visual impact of the tower before the board, and citing *Southwestern Bell Mobile Sys., Inc. v. Todd, 244 F.3d 51, 61 (1st Cir.2001)*, *Omnipoint, 181 F.3d 403*, *Aegerter, 174 F.3d 886*, *Oyster Bay, 166 F.3d 490*, and *Telespectrum, 227 F.3d 414* in support).

Here, the small quantum of evidence consists in the main of generalized aesthetic concerns. Some of the expressions of concern were clearly based on mistaken assumptions about the nature of the facility, such as its being a tower or a brightly lighted protrusion. The few objections of the neighbors living near the site amount to assertions of aesthetic intrusion or degradation. In view of the over-arching presence of the concededly ugly and massive water storage tank, which predated the building of all the homes concerned in this discussion, these assertions regarding several small antennae are without a factual foundation and are tantamount to ***1309** speculative and generalized concerns. Common sense dictates that because of the small size and painted surfaces involved [FN10], the antennae will not even be visible to the vast majority of the inhabitants of the area. Although the record contains photographs, the photographs merely demonstrate the *de minimis* presence of the antennae, which appear as the most minor augmentation of the water storage tank, a looming, massive structure that, where visible, dominates the scene. Thus, the photographs are not evidence that could reasonably be accepted as substantial evidence of any visual impact or as substantial support for an assertion of visual obtrusiveness or degradation.

FN10. The Court considers the project as it was presented to the County, and thus with the conditions developed during the local process. *See, e.g.*, A.R. at 97-100.

As to the cabinets, there is no evidence that the cabinets, which would be enclosed and fenced, would be visible to anyone who was not at the site itself, which already contained extensive chain link fencing around the water tank. (*Id.* at 183.)

Accordingly, the Court finds that a denial based on aesthetic considerations is not supported by substantial evidence.

C. *Property Values*

[7] A generalized fear of decline in property values, particularly when opposed by

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

expert testimony that studies existed that showed no adverse effects from the facility in question, has been held not to be substantial evidence to support a denial. *Omnipoint Corp. v. Zoning Hearing Bd.* 181 F.3d 403, 409 (3d Cir.1999). An expert's analysis will constitute substantial evidence. *Cellular Telephone Co. v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 72-73 (3d Cir.1999).

To the extent that Defendants rely on aesthetic concerns as a basis for a reduction in property values, Defendants point to no specific evidence, as distinct from a generalized concern about aesthetics, that would support a finding that property values would diminish because of the appearance of the proposed facility. The record does not provide more than a scintilla of evidence in this regard.

The record contains significant evidence that the facility would not negatively affect property values. The Staff Report to the Planning Commission, dated February 6, 2001, states that the project will not cause any substantial or adverse effect upon the property values or general desirability of the neighborhood or of the county because of the limited visibility of the antennae to the surrounding developed property. (*Id.* at 56.) The memorandum and testimony of Arlan Nickel, site acquisition representative of Plaintiff, before the planning commission indicates that the project was designed to blend into the industrial or public utility land use found adjacent to the water tank; situating both the antennae and cabinets near the tank would almost eliminate any additional visual impact and render the project virtually invisible to the residential areas of YLP. (*Id.* at 71.) Nickel expressly based his opinion that the particular type of installation would not have any adverse effect on property values or general desirability on "experiences we have had with other similar wireless installation in other communities." (*Id.* at 71.) Nickel testified that a variety of towers did not lower property values when they blend with their surroundings, such as office buildings or homes. (*Id.* at 143.)

The record did contain letters from neighbors who represented that they had moved into the neighborhood with the expectation that it would remain open space. (*Id.* at 76, 125.) However, the space significantly***1310** affected by the project was not an area of pristine open space, but rather was a utility easement already being utilized by a for-profit utility company. The facility was not inconsistent with the maintenance of open space because it was not located in open space, but rather in an area in which use by a public utility was already established and extensive.

One resident located within 300 feet of the site whose property was adjacent to the service road wrote that neighbors had shown her real estate industry studies that indicated that a cell phone site would lower property values because of the perceived danger of the facilities. (*Id.* at 241.) Another letter from a resident of North Dome stated that property values were impacted by perceived health threats; she stated that she enclosed an article, which did not follow her letter in the record, but which was apparently quoted by another resident during testimony. (*Id.* at 243, 0471.74.) It appears that the article concerned decline in property values caused by proximity to towers with transmission lines and perception of a danger from the lines; the identity of the source appears to be the Illinois Real Estate letter. The testimony was to the effect that because over fifty percent of the residents of YLP who sent in form letters were concerned with the health effects of cell antennae, it could be inferred that there would be a decline caused by the proposed facility. (*Id.*) Another resident testified about a court case involving a taking of private property for public use in which a utility company sought an easement for power lines; the court considered that dangers associated with power lines had a depressing effect on the market value of

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

adjacent properties. (*Id.* at 0471.79-.80.)

More generally, several residents feared that 1) the EMF's generated by the facility were a health risk, (*id.* at 124, 143, 226, 244); 2) perception of a health risk caused by the EMF's would cause a reduction in property values (*id.* at 78) or a reduced population of buyers due to the perception of a health risk (*id.* at 226, 239, 241, 243); or 3) the project would result in proliferation of antennae or other commercial uses, (*id.* at 126, 142, 225, 233, 239, 244, 250). Over thirty form letters cited both an actual and perceived health risk, as well as proliferation and a generalized concern for property values. (*Id.* at 250-311.) Other communications expressed a generalized concern regarding property values. (*Id.* at 88, 253-54,)

The reference to real estate studies was generalized; no specific study or testimony by a qualified expert appears in the record. An article about transmission lines, which are not a part of the communications facility in question, does not constitute expert evidence regarding the effects on property values of a wireless telephone facility.

The concern regarding proliferation is not supported by any evidence of any other applications and thus is speculative. As Defendant's counsel effectively conceded during argument, the concerns regarding property values in this case cannot meaningfully be distinguished from a generalized fear of the possible environmental effects of EMF's. Where the project complies with the Commission's regulations of radio frequency emissions, fear of possible environmental effects of EMF's are not a valid basis for denial of a permit pursuant to § 332(c)(7)(B)(iv), which provides:
No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless services facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply ***1311** with the Commission's regulations concerning such emissions.

See *New Par v. City of Saginaw*, 301 F.3d 390, 398 (6th Cir.2002); *Telespectrum, Inc. v. Public Service Commission of Kentucky*, 227 F.3d 414, 424 (6th Cir.2000); *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2nd Cir.1999).

In summary, the record contains evidence that the particular design and nature of the proposed facility are such that property values would not decline. Although the record contains considerable evidence of concern about reduced property values, it is a generalized concern based on the presence of a cell site and actual or perceived health threats therefrom. The complaints about property values were really a proxy for concerns about possible environmental effects of RFE's, which cannot provide the basis to support a decision concerning the placement or construction of a facility.

The Court concludes that in light of the whole record, substantial evidence does not support the conclusion that the site would lower property values.

D. *Public Health, Safety, and General Welfare*

[8] Defendants do not indicate what evidence would support a decision that the project was contrary to the public health, safety, and general welfare. The record contains extensive evidence supporting the safety of the project: 1) the conclusion of the Staff Report to the Planning Commission of February 6, 2001, to

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

the effect that in accordance with the findings made by the FCC, the project would not pose a threat to public health or safety, and that it would have to meet FCC standards for radio frequency operations, (*id.* at 55); the independent report of the consulting engineering firm Hammett & Edison to the effect that the site will produce only 500 watts of power in any direction, and only 5.5 per cent or less of the allowable FCC standards for power levels for wireless antenna facilities, which would decline to 1 per cent rapidly, (*id.* at 180, 194-200); the testimony of Robert Wella, the senior engineer at Hammett & Edison, that the project met all safety requirements and that at the nearest residence, the highest calculated result was a tiny fraction of one percent of the amount permitted by the safety standard, (*id.* at 0471.31-.32); and the support of the Madera County Fire Department and Sierra Ambulance Service, as well as the YLP chief of security, for the anticipated increase in the ability to receive emergency calls and to investigate emergencies with the privacy that the cell phones would provide, (*id.* at 0471.55-.56, 0471.61-.62, 337).

In view of an absence of countervailing evidence in the record, the Court concludes that substantial evidence does not support the conclusion that the project would be contrary to the public health, safety, and general welfare.

E. *Nuisance Because of Noise*

[9] The Planning commission Staff Report of February 6, 2001, indicated that only a minimal amount of noise would be generated from electrical equipment on the site. (*Id.* at 55.) A memorandum of Arlan Nickel dated January 11, 2001, indicated that small air conditioning units would produce a very low level of noise as the machinery would cycle on and off in operation; from a distance of fifty to seventy-five feet, the noise would be imperceptible to adjacent properties. (*Id.* at 70.) The mitigated negative declaration of the Madera County Environmental Committee stated that no significant amount of noise would result. (*Id.* at 80.)

Bill Thiesen, senior consultant with the firm of Brown-Buntin Associates of Visalia, testified that his firm studied the potential***1312** noise impacts from the equipment cabinets. The main source of noise, cooling fans, would be reduced by the metal cabinets, which were several hundred feet from the nearest residences; one residence was further buffered by the presence of the water storage tank between the cabinets and the residence. Thiesen took the noise levels at five feet as measured by the manufacturer and calculated with a straight geometric progression therefrom what the noise would be several hundred feet from the cabinets; the methodology was conservative so that the actual numbers would be even smaller than calculated. At most, as calculated the noise levels at the nearest residences were in the twenties and thirties of decibels, which would be inaudible or barely audible. A whisper is twenty decibels. (*Id.* at 471.45-.48.) Madera County's permissible noise level at night was forty-five decibels. (*Id.* at 471.48.) Thiesen recommended that the one side of the cabinets that generated the most noise be situated so that it did not face the residences nearby. (*Id.* at 471.46.) Plaintiff further offered to enclose them with a concrete block structure which would completely block out all noise. (*Id.* at 471.48.)

A report confirming this testimony was submitted. (*Id.* at 187-92.) The report noted that with respect to the closest house, which was 250 feet away, the water storage tank stood between the house and the antennae of the facility; the next closest house was more than 300 feet away. (*Id.* at 192.)

Residents expressed their fear that the site would be noisy at the meeting before

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

the Planning Commission on February 6, 2001. (*Id.* at 88.) One resident wrote that the cooling systems would be noisy, and that noise travels in the mountains. (*Id.* at 226.) Another family with a disabled adult son who was overly sensitive to sound wrote that the son might be irritated by the noise if engaging in recreation in the area and that the forty-decibel noise level would be heard by people using the area for recreation. (*Id.* at 237-40.) Some of the form letters previously mentioned had checks by an item that read, "The noise levels may be an excessive nuisance in the local neighborhood due to the way sound travels in the foothills." (See, e.g., *id.* at 254.) A resident who represented that she lived closest to the water tower testified that she could hear every word that is said when the "water people" went up to the water tower, and she could hear the pumps going all night long. (*Id.* at 0471.72-.73.) Another resident who lived probably within a few hundred meters of the water tower testified that sound traveled and was amplified by the mountains; she could hear everything, including music and dogs barking, within a hundred acres of where she lived. (*Id.* at 471.76.) Another resident testified that she had visited a wireless telephone facility on Lilly Mountain described as "similar," and she had heard two different noises emanating from the equipment at "very loud levels." (*Id.* at 75.)

The complaint about being able to hear people servicing the water tank is not shown to be applicable to the telecommunications facility, which will require only two service visits monthly that will occur between eight a.m. and five p.m. (*Id.* at 66.) Likewise, there is no foundation for the conclusion that the Lilly Mountain facility was significantly similar to the proposed facility for Revis Mountain. There is no basis for an inference that a neighbor who could hear music of unspecified volume and dogs barking would necessarily hear the running of the cooling fans, which was tantamount to the whisper of a human voice.

The proposition that sound travels differently or farther in the mountains, expressed***1313** by residents and one supervisor, appears to have been based on the experience of the persons who commented on the phenomenon. However, there are no data on the travel of a sound at as low a decibel level as that in the instant case in the specific location and terrain of the proposed facility. There is no evidentiary basis for intelligent application of the general principle that sound travels differently in the mountains. A conclusion that the noise from the cooling fans would be heard by anyone is essentially speculative and does not constitute substantial evidence to support a conclusion that the noise constituted a nuisance, which is defined by California law as anything which is injurious to health, or is indecent or offensive to senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. Cal. Civ.Code § 3479.

Accordingly, the Court concludes that substantial evidence does not support a finding that the CUP should be denied because the proposed facility would constitute a nuisance because of noise.

In summary, because the Court concludes that the denial of the CUP was not supported by substantial evidence and thus cannot stand, the Court does not reach the additional issue of whether the County's denial of the CUP prohibited, or had the effect of prohibiting, provision of wireless services within the meaning of 47 U.S.C. § 332(c)(7)(i)(II). *See New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir.2002) (approving a district court's decision to order issuance of a permit upon a finding of lack of substantial evidence to support denial of the permit); *Cellular Tel.Co. v. Board of Adjustment for the Borough of Paramus*, 37 F.Supp.2d 638, 652 (D.N.J.1999) (holding that in view of the court's order to issue the permit based on a lack of substantial evidence, it was unnecessary to reach

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

additional issues).

IV. *Remedy*

[10] The statute does not specify the appropriate remedy if a court determines that a local authority violated the requirements of the statute. However, the statute clearly empowers, and indeed enjoins, the Court to hear and decide the case before it. 47 U.S.C. § 337(c)(7)(B)(v). It has been held that where remand would serve no useful purpose, an order granting equitable relief in the nature of an injunction or mandamus to the local authority to issue the relevant permits is an appropriate remedy under the statute where a local zoning decision prohibiting a CUP is not supported by substantial evidence. *New Par v. City of Saginaw*, 301 F.3d 390, 399-400 (6th Cir.2002); *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1220-22 (11th Cir.2002) (noting that federal courts may issue all writs in support of their jurisdiction pursuant to 28 U.S.C. § 1651); *Brehmer v. Planning Bd.*, 238 F.3d 117, 120-22 (1st Cir.2001); *Omnipoint Corp. v. Zoning Hearing Board*, 181 F.3d 403, 409-10 (3rd Cir.1999); *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 497 (2nd Cir.1999).

As previously noted, there is no suggestion by either party that any additional evidence is needed. All grounds for denial of the CUP advanced by Defendants have been addressed. No evidentiary or other purpose for a remand has been suggested. Ordering the granting of the permit would effectuate the Court's determination and Congress's intention that the case be heard "on an expedited basis." 47 U.S.C. § 337(c)(7)(B)(v).

Defendant asserts that it would be illegal under unspecified portions of the California Environmental Quality Act (CEQA) to order the CUP to issue without a certification of the adequacy of the mitigated negative declaration. The Court disagrees with defense counsel's suggestion advanced***1314** at the hearing that this Court steps into the shoes of the County. Congress has imposed upon the Court the obligation to hear and decide the question of whether the County's denial of the CUP was in writing and was supported by substantial evidence; however, there is no indication in the statutory scheme that Congress intended this Court to undertake the functions of the local decision maker. This Court's remedial power is sufficiently broad to effectuate its decision. *See Brehmer v.Planning Board of the Town of Wellfleet*, 238 F.3d 117, 121-22. However, Defendants retain the power to do all that is necessary and proper in order to comply with the Court's order regarding issuance of the CUP.

V. *Remaining Issues*

In the motion for partial summary judgment and summary adjudication, Plaintiff prayed for summary adjudication based on a violation of 47 U.S.C. § 332(c); it reserved for adjudication or trial its due process and 1983 claims. (Mot. at 2.) At the hearing, Plaintiff's counsel stated that Plaintiff had trailing claims for damages and attorney's fees. A review of the complaint does not reveal any claim or prayer in which damages was mentioned. Plaintiff's complaint states the following claims: 1) violation of the Telecommunications Act of 1996 (47 U.S.C. § 332) warranting injunctive relief; 2) violation of the Communications Act of 1934 and the FCC regulatory scheme warranting injunctive relief; 3) arbitrary and capricious denial of property rights pursuant to the Fifth and Fourteenth Amendments warranting injunctive relief; 4) violation of 42 U.S.C. § 1983 warranting injunctive relief; 5) administrative mandamus pursuant to Cal.Code Civ.

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

Proc. § 1094.5 for abuse of discretion and acts undertaken in the absence of substantial evidence warranting equitable relief; and 6) declaratory relief. All the claims and the concluding prayer of the complaint seek in essence the issuance of the CUP. Thus, there is no trailing claim for damages before the Court. Further, it appears that by way of this motion, Plaintiff has become entitled to all the substantive relief sought in the complaint. However, Plaintiff will be given an opportunity to explain what remains to be adjudicated in a telephonic status conference.

There is a prayer for costs of suit and attorney's fees in the complaint. The legal basis for any claim for attorney's fees is not clear. However, Plaintiff may make an appropriate application for costs and fees.

Accordingly, it IS ORDERED that

1. Plaintiff's request for judicial notice in support of motion for summary judgment IS GRANTED; and

2. Plaintiff's motion for summary adjudication on Plaintiff's claim of violation of 47 U.S.C. § 332(c)(7) IS GRANTED with respect to Plaintiff's claims that Defendants failed to render their decision denying Plaintiff's application for the conditional use permit in writing and Plaintiff's claim that there was a lack of substantial evidence to support the denial of the conditional use permit within the meaning of 47 U.S.C. § 332(c)(7)(B)(iii) and (iv); the motion is otherwise denied; and

3. In order to inform the Court of the status of the proceedings, counsel for the parties ARE ORDERED to participate in a telephonic status conference set for October 31, 2003, at 11:00 a.m.

IT IS SO ORDERED.

E.D.Cal.,2003.
California RSA No. 4 v. Madera County
332 F.Supp.2d 1291

Briefs and Other Related Documents (Back to top)

• 1:02CV06605 (Docket) (Dec. 20, 2002)

END OF DOCUMENT

© 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.

C
Motions, Pleadings and Filings

United States District Court,
S.D. California.

AT & T WIRELESS SERVICES OF CALIFORNIA LLC, a Delaware Limited Liability Company, D/B/A **AT & T Wireless,** Plaintiff,
v.
CITY OF **CARLSBAD,** et al., Defendants.

No. 01 CV 2045 JM(LAB).

Feb. 3, 2003.

Background: Cellular provider brought suit challenging city's decision to deny conditional use permit (CUP) to place "stealth" **wireless** antenna site on residentially zoned property, alleging violations of Telecommunications Act. Parties filed cross motions for partial summary judgment.

Holdings: The District Court, Miller, J., held that:
(1) testimony of city's expert was not admissible under *Daubert* standard;
(2) evidence was insufficient to support city's rejection of CUP application;
(3) city could not base denial on policy that did not exist at time cellular provider made its application;
(4) provider was not equitably estopped from asserting its claim;
(5) mandamus was appropriate remedy for violation of Telecommunications Act;
(6) city violated provider's equal protection rights; and
(7) fact issues precluded summary judgment on § 1983 claim.
Motions granted in part and denied in part.

West Headnotes

[1] Federal Civil Procedure 2504
170Ak2504 Most Cited Cases
Claim alleging a lack of substantial evidence for a zoning decision in violation of the Telecommunications Act of 1996 (**TCA**) is especially amenable to decision at summary judgment since the court's only role is to determine if substantial evidence exists within the administrative record that would support the zoning decision. Communications Act of 1934, § 332, as amended, 47 U.S.C.A. § 332; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] Evidence 508
157k508 Most Cited Cases

[2] Evidence 555.2
157k555.2 Most Cited Cases
Trial judge has duty to ensure that the scientific principles that underlie an expert's conclusions are both relevant to the issue at hand and reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[3] Evidence 555.2
157k555.2 Most Cited Cases
Trial court's duty under *Daubert* to act as a gatekeeper regarding admissibility of scientific expert testimony applies with equal force to expert testimony which is based upon experience and training rather than on science per se. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[4] Evidence 555.2

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

157k555.2 Most Cited Cases
Where an expert opinion is not a product of independent research unrelated to the current lawsuit, the party proffering it must come forward with other objective, verifiable evidence that the testimony is reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[5] Evidence 555.2
157k555.2 Most Cited Cases
In determining if objective, verifiable evidence supports the expert's testimony, the court may consider whether the methods used to generate the expert opinion have been subjected to peer review and publication; whether the technique can be tested; the known potential rate of error; and whether the expert's methodology is generally accepted within his or her field of expertise. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[6] Evidence 555.2
157k555.2 Most Cited Cases
In cellular provider's suit challenging denial of conditional use permit (CUP) for **wireless** antenna in residential zone, city did not meet its burden under *Daubert* of showing reliability of opinion of its expert that other sites were potentially suitable for antenna; expert's conclusions were not product of independent research, and expert did not present any objective criteria by which court might evaluate his opinion. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[7] Zoning and Planning 685
414k685 Most Cited Cases
Under Telecommunications Act of 1996 (**TCA),** Congress intended to place upon unsuccessful applicant for zoning approval to operate cellular site the burden of establishing a particular decision is unsupported by substantial evidence. Communications Act of 1934, § 332(c)(7), as amended, 47 U.S.C.A. § 332(c)(7).

[8] Zoning and Planning 703
414k703 Most Cited Cases
In determining whether telecommunications zoning decision is supported by substantial evidence, court may not consider evidence outside the administrative record nor overturn reasonable determinations by the local authority even if evidence to the contrary exists. Communications Act of 1934, § 332(c)(7), as amended, 47 U.S.C.A. § 332(c)(7).

[9] Zoning and Planning 703
414k703 Most Cited Cases
In determining whether telecommunications zoning decision is supported by substantial evidence, the court applies common sense and need not accept as substantial evidence impossible, incredible, unfeasible, or implausible testimony. Communications Act of 1934, § 332(c)(7), as amended, 47 U.S.C.A. § 332(c)(7).

[10] Zoning and Planning 703
414k703 Most Cited Cases
In determining whether telecommunications zoning decision is supported by substantial evidence, the court reviews the entire record in determining if substantial evidence exists including evidence which contradicts the findings. Communications Act of 1934, § 332(c)(7), as amended, 47 U.S.C.A. § 332(c)(7).

[11] Zoning and Planning 384.1
414k384.1 Most Cited Cases
When public testimony in the record regarding zoning application for cellular site is almost exclusively directed to health effects, there must be substantial evidence of some legitimate reason for rejecting the applications to avoid the conclusion that the denials were based health effects, an impermissible basis for denial under Telecommunications Act. Communications Act of 1934, § 332(c)(7)(B)(iv), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iv).

[12] Zoning and Planning 384.1
414k384.1 Most Cited Cases
City's decision to deny conditional use permit for "stealth" cell site in existing residence was not supported by substantial evidence, notwithstanding city's cited reasons of aesthetic concerns and possible decline in property values, where public testimony before both planning commission and city council, as well as critical letters from residents, focused primarily on potential health effects of facility, which was impermissible basis for denying permits under Telecommunications Act; aesthetic concerns about proposed garage extension to residence in which equipment would be located appeared to be afterthought, fear about declining property values was impermissibly based on perceived fear of health effects from facility, and there was no evidence that cellular sites might proliferate

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

in neighborhood. Communications Act of 1934, § 332(c)(7)(B)(iii, iv), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii, iv).

[13] Zoning and Planning 376
414k376 Most Cited Cases
Under Telecommunications Act, city may not arbitrarily impose new conditional use permit (CUP) criteria not in place at the time of plaintiff's application for zoning permit for cell site. Communications Act of 1934, § 332(c)(7), as amended, 47 U.S.C.A. § 332(c)(7).

[14] Zoning and Planning 376
414k376 Most Cited Cases
City could not rely on purported policy of requiring cellular provider to show that no feasible alternatives existed in non-residential locations to deny application for conditional use permit (CUP) to use existing residence as stealth cell site, where policy was not in place until after cellular provider's application was complete and there was no evidence that it memorialized existing city policy. Communications Act of 1934, § 332(c)(7), as amended, 47 U.S.C.A. § 332(c)(7).

[15] Zoning and Planning 377
414k377 Most Cited Cases
City did not meet burden of showing that cellular provider withheld known facts in application for conditional use permit (CUP) to operate cell site in residential neighborhood, as required to show that provider was equitably estopped from claiming that denial of CUP was not supported by substantial evidence under Telecommunications Act; city expert's testimony had been rejected as unreliable and thus was insufficient to show basis for estoppel, and claim that provider withheld information about necessary sister site lacked evidentiary support. Communications Act of 1934, § 332(c)(7), as amended, 47 U.S.C.A. § 332(c)(7).

[16] Mandamus 99
250k99 Most Cited Cases
Mandamus compelling the local authority to act was an appropriate remedy for a violation of Telecommunications Act of 1996 (**TCA**) for unlawful denial of permit application for cell site in residential neighborhood, notwithstanding that city was working with cell provider to find feasible alternative site. Communications Act of 1934, § 332(c)(7), as amended, 47 U.S.C.A. § 332(c)(7).

[17] Zoning and Planning 384.1
414k384.1 Most Cited Cases
City unreasonably discriminated between providers of equivalent services under Telecommunications Act by making zoning decisions that, without reasonable basis, granted first applicant a conditional use permit (CUP) to proceed with "stealth" cell site in residential zone but denied second applicant a CUP for a similar site. Communications Act of 1934, § 332(c)(7)(B)(i)(I), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

[18] Constitutional Law 228.2
92k228.2 Most Cited Cases
Even though local land use decisions are presumptively constitutional where no fundamental right or suspect class is involved, an equal protection violation will be found where the local government decision bears no rational relationship to a legitimate government interest. U.S.C.A. Const.Amend. 14.

[19] Constitutional Law 228.2
92k228.2 Most Cited Cases

[19] Zoning and Planning 384.1
414k384.1 Most Cited Cases
City acted unreasonably by discriminating between the applications when it denied cellular provider's application for conditional use permit (CUP) in residential neighborhood without a legitimate basis after granting earlier application of another provider for cell site in same neighborhood, and city therefore violated cellular provider's equal protection rights; there was evidence that cellular provider had poor coverage in area, like predecessor applicant, and provider's status as third cell provider in neighborhood was not basis to deny permit. U.S.C.A. Const.Amend. 14.

[20] Federal Civil Procedure 2491.5
170Ak2491.5 Most Cited Cases
Genuine issues of fact, as to whether city or its officials could be held liable in damages for denying conditional use permit (CUP) to cellular provider for cell site in violation of Telecommunications Act, precluded summary

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

judgment on § 1983 claim. 42 U.S.C.A. § 1983; Communications Act of 1934, § 332(c)(7), as amended, 47 U.S.C.A. § 332(c)(7); Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

***1151** Michael A Attanasio, Cooley Godward, San Diego, CA, Jeremy H Stern, Cole Raywid and Braverman, El Segundo, CA, ***1152** Adam Caldwell, Edward L Donohue, Cole Raywid and Braverman, Washington, DC, for **AT & T Wireless** Service of California, LLC, a Delaware Limited Liability Company dba AT & T **Wireless**, plaintiff.

Ronald R Ball, City of **Carlsbad**, City Attorneys Office, **Carlsbad,** CA, Roberta R Sistos, Burke Williams and Sorensen, San Diego, CA, for City of **Carlsbad,** City Council of the City of **Carlsbad,** The City Council of the City of **Carlsbad,** Claude A Lewis, in his Official Capacity as a member of the City Council, Ann J Kulchin, in her Official Capacity as a member of the City Council, Ramona Finnila, in her Official Capacity as a member of the City Council, Matt Hall, in his Official Capacity as a member of the City Council, Julianne Nygaard, in her Official Capacity as a member of the City Council, City of **Carlsbad,** Planning Commission, Jeff Segall, in his Official Capacity as a member of the Planning Commission, Bill Compas, in his Official Capacity as a member of the Planning Commission, Ann L'Heureux, in her Official Capacity as a member of the Planning Commission, Courtney Heineman, in her Official Capacity as a member of the Planning Commission, Julie Baker, in her Official Capacity as a member of the Planning Commission, Seena Trigas, in her Official Capacity as a member of the Planning Commission, Robert Neilsen, in his Official Capacity as a member of the Planning Commission, defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION AND CROSS-MOTION FOR SUMMARY ADJUDICATION; DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY ADJUDICATION

MILLER, District Judge.

I. INTRODUCTION

Plaintiff **AT & T Wireless ("**ATT") (successor in interest to GTE) has filed suit under, *inter alia,* section 704 of the Telecommunications Act of 1996 ("**TCA") (**47 U.S.C. § 332(c)(7)) alleging that the City of **Carlsbad,** as well other city employees acting in their official capacities, (cumulatively the "city") unlawfully denied ATT's application for Conditional Use Permit ("CUP") No. 00-36. ATT requested the CUP in order to place a "stealth" **wireless** antenna site on residentially zoned property located at 7512 Cadencia Street. The key issue for purposes of the pending motions, [FN1] is whether the city's findings denying ATT's application for CUP No. 00-36 are supported by substantial evidence in the administrative record and were not impermissibly based on public concern over the health effects of radio frequency ("RF") emissions from the site in violation of the **TCA.** Pursuant to Local Rule 7.1(d)(1), the court finds these motions appropriate for decision without oral argument.

> FN1. The parties have filed cross motions for summary adjudication on counts one and three, and plaintiff has filed a motion for summary adjudication on counts seven through ten. Neither party seeks summary adjudication on counts four, five, and six. The claims for which summary adjudication is sought are as follows: (1) count one 47 U.S.C. § 332(c)(7)(B)(iv)prohibition on denying permit to construct a cell site based upon RF emissions; (2) count two 47 U.S.C. § 332(c)(7)(B)(i)(I)-prohibition on unreasonable discrimination between cellular providers; (3) count three 47 U.S.C. § 332(c)(7)(B)(iii)requirement of substantial evidence for denying cell site application; (4) count seven procedural due process under California and federal constitutions; (5) count eight equal protection under California and federal constitutions; (6) count nine 42 U.S.C. § 1983; (7) count ten-Cal. Code Civ. Proc. § 1094.5-administrative mandamus.

*1153 II. BACKGROUND

In early 2000, GTE applied for a conditional use permit ("CUP") in order to place a **wireless** personal service facility ("cell site" or "**wireless** site") on San Diego Gas and Electric's Tower 173. A cell site at that location would have allowed GTE to fill its cellular service coverage gap at the eastern end of the La Costa Valley (i.e., Cadencia gap) and along Santa Fe road. The city, however, denied GTE's application thereby forcing ATT (GTE's successor in interest) to replace the proposed Tower 173 site with two separate sites: one site to cover the Cadencia coverage gap and a second site to cover the remaining portions of the gap on Rancho Santa Fe Road. [FN2] To cover the

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

Cadencia gap, ATT submitted CUP application No. 00-36 for a cell site at 7512 Cadencia Street; the site would include six antennas and a radio base station to be housed on the privately owned property. [FN3] The antennas and base station were designed to look like part of the existing house: four antennas would be placed on the two existing chimneys with the remaining two antennas built into a fake third chimney designed to look like the existing chimneys; the radio base station would be housed in a 400 square foot extension to the existing 800 square foot garage. [FN4] This design was modeled on a very similar cell site owned by Pacific Bell ("Pac Bell") located on a house a block away from ATT's proposed site for which the city had previously granted Pac Bell a CUP. Like the Pac Bell site, ATT's antennas were designed to be embedded in the chimney, and thus invisible to the eye, with the only difference between the two sites being that Pac Bell's radio equipment was housed on wall-mounted cabinets on the back of the house rather than being enclosed in a fake garage. [FN5]

FN2. AR, p. 106; 108.

FN3. AR, p. 468, 345.

FN4. AR, pp. 417, 628-635.

FN5. Plaintiff's Motion for Summary Adjudication on Counts II and VII to X, Ex. 4, p. 1.

Planning Commission Hearing

On May 16, 2001, the planning commission hearing on ATT's application was held. Christer Westman, the city planner on this application, recommended that the planning commission approve ATT's application and supported the recommendation with findings of the planning department. Specifically, the department found the site (1) had no aesthetic effects as it could not be distinguished from being a part of the house, (2) would only require one to two trips per month by ATT to maintain, (3) did not create noise that would intrude into the neighborhood, and (4) lacked any environmental impact. [FN6] Westman also stated in a prior report that the General Plan recognized that "that these types of facilities are necessary and essential to the infrastructural support of urban land uses." [FN7] Sixteen residents testified in opposition to the application, ten of whom expressed concerns over the health effects that RF emissions could cause, notwithstanding the residents having been informed that the planning commission could not base its decision on such concerns. [FN8] Residents also testified to concerns about aesthetics, whether alternative sites had been considered, and over the area becoming "antenna alley." [FN9] Of the two residents who raised aesthetic concerns, only Jon ***1154** Nerenberg testified that the aesthetics of the project bothered him since it would extend the garage closer to his house. [FN10] In addition, more than one resident expressed concern over property values decreasing based on possible health effects from the cell site's RF emissions. [FN11] The planning commissioners, while stating that they could not consider the possible health effects caused by RF emissions, did ask the applicant and the city planner about such emissions from the proposed facility. [FN12] Ultimately, the planning commission denied the application on the expressed concerns of the residents (e.g., aesthetics, commercialization, decrease in property values, etc.) resulting in ATT's appeal to the city council.

FN6. AR, Part IX, pp. 3, 64-64. The planning department report also contained the statement that there were no feasible alternatives because, as the city planner stated before the planning commission, the planning department accepted the applicants verbal representations that there were no feasible alternatives. AR, p. 346; Part IX, p. 64.

FN7. AR, p. 346.

FN8. AR, pp. 108-114; Part IX, pp. 30-62.

FN9. AR, Part IX, pp. 30-62.

FN10. One other resident besides Jon Nerenberg expressed aesthetic concerns, yet his concerns dealt with the aesthetics of green utility boxes added along the sidewalk to accommodate cell sites; however, ATT stated in response that its site definitely did not require such a box. AR, Part IX, pp. 53-55, 77. In addition, other residents expressly stated that aesthetics were not a problem because the additions were "in a house

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

similar to what we all live in." AR, Part IX, pp. 40, 49.

FN11. One planning commissioner expressly relied on the concern over decrease in property values due to the possible health effects of RF emissions in voting against the application. AR, Part IX, pp. 43, 47, 82.

FN12. AR, Part IX, 4:6-17, 25:9-23, 69-70.

City Council Hearings

On August 21, 2001, the first city council meeting was held regarding ATT's proposed cell site. When the city council opened the hearing to public comment, Ms. Horen, who was the lead resident at both the city council and planning commission hearings, testified about concern over the unknown cumulative health effects caused by RF emissions from the proposed cell site, the Pac Bell site, and ham radio in the neighborhood. In response, the mayor requested the city attorney's legal advice on whether such emissions could be considered since he thought the planning commission had considered the RF emissions in denying the application. [FN13] The city attorney responded by stating that the city could not consider the RF emissions to the extent they did not exceed the parameters set by the Federal Communications Commission ("FCC"). [FN14] When the mayor then asked certain residents about aesthetic concerns, the response was that there was a "philosophical" opposition to the aesthetics of the additions and that the additions could not be made out from the road due to the property's elevation. [FN15] The decision on the appeal was delayed because the mayor wanted further information concerning the RF emissions from the Pac Bell site stating that if the emissions were anywhere near negative (presumably in comparison to the FCC guidelines) he would oppose ATT's application, but if positive would vote for approval. [FN16]

FN13. AR, Part VII, pp. 21-22.

FN14. AR, Part VII, pp. 21-22.

FN15. AR, Part VII, pp. 19, 23-24. Mr. Nerenberg again stated his opposition based on aesthetics, *supra.*

FN16. AR, Part VII, p. 43. The city also requested a study on the combined RF emissions from the proposed ATT site and the existing Pac Bell site. AR, pp. 244-250.

In the interim, the mayor received a number of letters, from people who did not testify either before the city council or planning commission, largely stating that they were opposed to ATT's application due to the unknown health effects and asking why alternate sites could not be explored. [FN17]

FN17. AR, pp. 149-158.

At the next and final hearing on September 18, 2001, the mayor voted to deny ***1155** the application, even though the Pac Bell emissions were one percent of the allowed emissions under FCC guidelines. The mayor based his vote on concerns over more cell sites being located in the neighborhood and the lack of city guidelines on the issue. [FN18] The council ultimately denied ATT's appeal by a three to two vote. The mayor closed the hearing by stating the need for a report on what the city can and cannot legally do regarding cell site applications and added "I have a real problem with violating the rules ... but I think there are rules and there are certain things you have to look at as far as what is best for our community in general." [FN19]

FN18. AR, Part VI, pp. 6, 16. The city requested that Pac Bell provide it with a study of its RF emissions and requested a study of the combined RF emissions from the FCC. AR,

FN19. AR, Part VI, p. 18.

On October 3, 2001, after the final hearing, but before the written resolution, **Carlsbad** Policy No. 64 was "adopted." [FN20] The city expressly incorporated policy No. 64 in its resolution denying ATT's CUP application requiring that ATT seek "guidance" from the policy in making a new application for a cell site. ATT responded by filing this action and bringing two separate motions for summary adjudication: (1) on counts one and three, to

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

which the city filed a cross-motion; and (2) on counts two and seven through ten.

FN20. The city argues that Policy No. 64 was not adopted on this date, but rather merely put into writing since it had, allegedly, existed throughout the application process by ATT, see discussion *infra.*

III. DISCUSSION

A. Legal Standards on Summary Judgment

[1] A court may grant summary judgment when there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322- 23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912, 919 (9th Cir.2001). Additionally, summary adjudication is appropriate on discrete claims where no genuine issues of material fact exist as to that claim. Fed.R.Civ.P. 56(a). Furthermore, a claim alleging a lack of substantial evidence for a zoning decision in violation of the Telecommunications Act of 1996 ("**TCA")** is especially amenable to decision at summary judgment since the court's only role is to determine if substantial evidence exists within the administrative record that would support the zoning decision. *See, e.g., Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490, 495, 497 (2d Cir.1999) (affirming grant of summary judgment where district court reviewed administrative record for substantial evidence under the **TCA);** *National Tower, LLC v. Plainville Zoning Board of Appeals,* 297 F.3d 14, 22 (1st Cir.2002) (under **TCA** substantial evidence claim, court merely reviews administrative record to determine if evidence exists to support a reasonable conclusion); *Airtouch Cellular v. City of El Cajon,* 83 F.Supp.2d 1158, 1164 (S.D.Cal.2000) (granting summary judgment on substantial evidence claim under **TCA** based on review of administrative record).

B. Motion to Exclude Kramer as City's Expert

Prior to addressing the merits of the motions, the court addresses ATT's motion in limine to exclude the testimony of the city's sole expert, Jonathan Kramer, on the issue of the alleged suitability of several alternative locations for ATT's proposed facility. [FN21]

FN21. Kramer had been designated to also testify on the due diligence of plaintiff under industry custom in seeking alternative sites. However, due to the city's violation of the court's discovery order, a sanction was imposed on the city such that Kramer's testimony, even if allowed, is limited to the opinions and statements rendered in his tentative report and in his August 27, 2002 deposition. *See Order Granting in Part Plaintiff's Motion for Discovery Sanctions,* November 6, 2002. Consequently, the court only considers whether Kramer's testimony as stated in the tentative report and his August 27, 2002 deposition is reliable and relevant. Lastly, because the tentative report and deposition testimony do not address industry custom in performing due diligence, the court looks only at whether Kramer's testimony is admissible on the issue of the suitability of alternative sites.

***1156** [2][3] The admissibility of expert witness testimony is governed by Federal Rule of Evidence ("FRE") 702 which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid. 702. In the watershed case of *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court established that the trial court must act as a gatekeeper to prevent "junk science" from entering the courtroom in the guise of "expert" testimony. *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592-93, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). While the trial judge's inquiry under FRE 702 does not focus on the conclusions generated by expert witness testimony, the trial judge's duty is to ensure that the scientific principles that underlie the conclusions are both relevant to the issue at hand and reliable. *Id.* at 595, 113 S.Ct. 2786. Additionally, the Supreme Court recently held in *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), that the principles established in *Daubert* apply with equal force to expert testimony which is

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

based upon experience and training rather than on science per se. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 149, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (holding that FRE 702 applies to all offers of expert witness testimony requiring that the trial court determine the reliability and relevance of the offered submissions); *See also* Fed.R.Evid. 702, Advisory Committee Notes (2000 Amendments) ("amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.").

[4][5] In any event, expert testimony, whether experience based or strictly scientific, must be reliable. As explained by the Ninth Circuit, where the expert opinion is not a product of independent research unrelated to the current lawsuit, "the party proffering it must come forward with other objective, verifiable evidence that the testimony," is reliable. *Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1317-18 (9th Cir.1995) ("*Daubert II* ") (Ninth Circuit opinion on remand from *Daubert v. Merrel Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)); *see also, Cabrera v. Cordis,* 134 F.3d 1418, 1422-23 (9th Cir.1998) (holding expert testimony properly excluded under *Daubert* where testimony was prepared solely for litigation, lacked any supporting research, and there was no showing of support for witness' conclusions in peer-review articles or any outside research); Fed.R.Evid. 702, Advisory Committee ***1157** Notes (2000 Amendments) (party putting forward expert has the burden of proving by a preponderance of the evidence that the testimony is reliable and relevant) (*citing Bourjaily v. U.S.,* 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987)). In determining if objective, verifiable evidence supports the expert's testimony, the court may consider whether the methods used to generate the expert opinion have been subjected to peer review and publication; whether the technique can be tested; the known potential rate of error; and whether the expert's methodology is generally accepted within his or her field of expertise. *See Daubert,* 509 U.S. at 593-94, 113 S.Ct. 2786.

[6] In this case, even assuming Kramer is a qualified expert in radio frequency engineering, the city has failed to show by a preponderance of the evidence that Kramer's conclusions in the tentative report and in his August 27, 2002 deposition are reliable. First, the city does not present any evidence that Kramer's testimony and conclusions resulted from independent research unconnected with this case. Rather, the city hired Kramer with the express purpose that he study ATT's technical requirements and reach conclusions about possible alternative locations for ATT's **wireless** phone site. [FN22] Second, the city admits that Kramer's conclusions about possible alternative sites were based solely on a comparison of the documents provided him by ATT and his physically visiting potential alternative sites. While Kramer opines on the availability of potential alternative sites in light of ATT's coverage goals and search ring, [FN23] Kramer never presents any objective criteria by which the court may evaluate his opinion. This finding is reinforced by Kramer's deposition testimony where Kramer states the basis for his conclusions that other cell sites were potentially available: "it is clear to an expert that these were potential sites that bear full investigation." [FN24] What is notably lacking, despite the city's assertion to the contrary, is any evidence that explains for the court how the review of the documents allowed Kramer to conclude the availability of alternative sites. Consequently, the reliability of Kramer's conclusions are seriously compromised, and the court accords the conclusions virtually no weight at all.

FN22. The city presents a somewhat confusing argument on exactly what purpose Kramer's testimony was to serve in this case. The city designated Kramer as an expert on two issues:
(a) That suitable locations other than 7512 Cadencia exist for placement of AT & T's **wireless** facility; and,
(b) **AT & T** fell below the customary standard in conducting a due diligence investigation for suitable locations other than 7512 Cadencia.
See Defendants' Designation of Expert, 2:4-10. The city concedes that Kramer will not give an opinion on the second matter, yet states in its brief that Kramer "was not retained as an expert to find alternative sites, but to opine on the quality of ATTW's search for alternative sites." Defendants' Opposition to Plaintiff's Motion to Exclude Kramer, 7:1-3. Thus, the city appears to make contradictory statements as to the purpose of Kramer's testimony. Furthermore, the tentative report issued by Kramer specifically makes conclusions about the best site and other alternative sites for ATT's **wireless** facilities. Jystad Decl. in Support of Plaintiff's Motion to Exclude, Ex. 13, pp. 7-8. As such, Kramer's testimony does, in fact, focus on finding potential alternative sites.

FN23. A "search ring" is the area mapped out by the **wireless** phone service provider within which the provider has determined a **wireless** site is needed to provide cell phone service or "coverage."

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

FN24. Defendants' Opposition to Plaintiff's Motion to Exclude, Ex. B, 35:15-36:5.

***1158** *C. Did the City Impermissibly Base its Decision to Deny ATT's Application on Concerns about the Health Affects from Radio Frequency Emissions in Violation of 47 U.S.C. § 332(c)(7)(B)(iv) or Does Substantial Evidence Support the Decision?* [FN25]

FN25. This section discusses the cross-motions on counts I and III jointly since the key issue is whether or not substantial evidence exists to support the city's findings denying ATT's permit application.

Burden of Proof

[7] Under the **TCA,** Congress explicitly requires local governments to state in writing any denial of a request to place or construct a personal **wireless** service facility and base the decision on substantial evidence in a written record. [FN26] An initial issue raised in the briefs is which party has the burden of proof for establishing that the decision is or is not supported by substantial evidence. Given the text and legislative history of the **TCA,** the court concludes that Congress intended that the permit applicant bear the burden of showing a lack of substantial evidence for the decision. [FN27] Under § 332(c)(7)(A), Congress makes clear that nothing in the **TCA** is meant to preempt local government's ability to exercise its traditional zoning authority in regulating the placement of cell sites except for the specific limitations stated in § 332(c)(7). One of the requirements Congress placed on government in this regard is to predicate the denial of a permit upon a written decision supported by substantial evidence. This has been the standard for review of government zoning in California for some time. *See, e.g., Harris v. City of Costa Mesa,* 25 Cal.App.4th 963, 969, 31 Cal.Rptr.2d 1 (1994) (applying substantial evidence standard to the denial of plaintiff's application for a conditional use permit). The **TCA** simply extends the substantial evidence standard traditionally applied by state law. This legislative intent is clearly reflected in the legislative history of the **TCA** which provides " 'substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions." H.R. Conference Report No. 104-458, p. 201 (1996). Given Congress's adoption of the traditional substantial evidence standard and the explicit statement that local government continue to generally exercise its traditional zoning authority, the court finds, in the absence of contrary authority or persuasive argument, that ***1159** Congress intended to place upon the applicant in a case such as this the burden of establishing a particular decision is unsupported by substantial evidence.

FN26. Section 704 of the **TCA** states in relevant part:
Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal **wireless** service facilities shall be in writing and supported by substantial evidence contained in a written record.
47 U.S.C. § 332(c)(7)(B)(iii).

FN27. The Second Circuit recently noted, without deciding, that a split among district courts exists over whether the applicant or local government bears the burden of proof as to whether substantial evidence exists. *Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490, 496-97 (1999). However, the district courts, noted by the Second Circuit, that placed the burden on the government to establish substantial evidence did so either with no reasoning or simply by citing reasoning from an Iowa state court decision that found the **TCA** preempted state law which placed the burden of proof on the applicant to show the lack of substantial evidence. *See, e.g., Sprint Spectrum L.P. v. Town of Easton,* 982 F.Supp. 47, 49 (D.Mass.1997) (*citing United States Cellular Corp. v. Board of Adjustment of City of Des Moines,* Polk County District Court, LACL No. CL 00070195 (Iowa District Court for Polk County, January 2, 1997)). However, **TCA** preempted local zoning authority only in a limited number of areas and the burden of proof was not included in any such limitation. Therefore, to find that the **TCA** preempts the traditional placement of the burden of proof on the applicant contravenes the text and history of § 332(c)(7) as discussed above.

Substantial evidence

[8][9][10] As has oft been repeated, substantial evidence "mean[s] less than a preponderance, but more than a scintilla of evidence." *Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490, 494 (2d Cir.1999) (applying

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

substantial evidence standard under the **TCA);** *see also, Cellular Telephone Co. v. Zoning Bd. of Ho-Ho-Kus,* 197 F.3d 64, 71 (3d Cir.1999) (citations omitted) (same). In other words, substantial evidence " 'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Oyster Bay,* 166 F.3d at 494 (*quoting Universal Camera v. NLRB,* 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). Under this standard, the court may not consider evidence outside the administrative record nor overturn reasonable determinations by the local authority even if evidence to the contrary exists. *Id.* However, in applying the substantial evidence standard, the court applies common sense and need not "accept as substantial evidence impossible, incredible, unfeasible, or implausible testimony." *Airtouch Cellular v. City of El Cajon,* 83 F.Supp.2d 1158, 1164 (S.D.Cal.2000) (applying the substantial evidence standard under 47 U.S.C. § 332(c)(7)(B)(iii)). Additionally, the court reviews the entire record in determining if substantial evidence exists including evidence which contradicts the findings. *Zoning Bd. of Ho-Ho-Kus,* 197 F.3d at 71; *Oyster Bay,* 166 F.3d at 494.

[11][12] In this case, application of the substantial evidence standard is tempered by the limitations in the **TCA** that prohibit local government from denying an application to construct a cell site based upon the environmental effects of radio frequency ("RF") emissions from the proposed **wireless** site:

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal **wireless** service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv). Significantly, the conference report on the **TCA,** adopted by Congress, makes clear that local government may not indirectly base its decision to deny an application to place a cell site upon concern over the environmental effects of RF emissions:

> The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction, or modification of CMS facilities *directly or indirectly* on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations...

H.R. Conference Report No. 104-458, 201 (1996) (emphasis added). Given this legislative history, the court concludes that 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 [FN28] caused by RF emissions. Thus, direct or indirect concerns over the health effects of RF emissions may not serve as substantial evidence to support the denial of an application. Accordingly, when public testimony in the record "is almost exclusively ***1160** directed to health effects, there must be substantial evidence of some legitimate reason for rejecting the applications to avoid the conclusion that the denials were based on the impermissible health effects ground." *Oyster Bay,* 166 F.3d at 495 (*citing Iowa **Wireless** Servs. L.P. v. City of Moline, Illinois,* 29 F.Supp.2d 915 (C.D.Ill.1998)). In this case, then, the court must examine the proffered findings to determine if (1) they are based on legitimate concerns and (2) substantial evidence supports those concerns. [FN29]

FN28. *Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490, 494 n. 3 (2d Cir.1999) (holding statutory terms "concern over environmental effects" from RF emissions included concern over health effects caused by such emissions).

FN29. The court acknowledges that its role is not to divine the intent of the council members in making their decision, but rather to look at the administrative record to see if substantial evidence exists. *See City of Fairfield v. Superior Court,* 14 Cal.3d 768, 772, 122 Cal.Rptr. 543, 537 P.2d 375 (1975) (holding plaintiff cannot depose council members about the intent in making a decision to deny a use permit application because such information is irrelevant to whether the decision was supported by substantial evidence). However, the court considers council members' statements at the various hearings since such statements are part of the administrative record before the court. *See Harris v. City of Costa Mesa,* 25 Cal.App.4th 963, 971, 31 Cal.Rptr.2d 1 (1994) (where in reviewing the record for substantial evidence to support the denial of a conditional use permit the court stated, "In addition to the findings stated in the council's resolution, we look to the transcript of the hearing for statements made by the council members. It is proper to look for findings in oral remarks made at a public hearing at which both parties were present, which was recorded and of which a written transcript could be made.") (quotations and citation omitted).

The city makes a number of arguments that substantial evidence supports legitimate findings. Generally, the findings alleged to support the city's decision can be placed into the two following categories: (1) lack of

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

compatibility with the surrounding neighborhood; and (2) lack of evidence presented to the council about the unavailability of alternative sites.

Lack of Compatibility with the Neighborhood

The city argues that substantial evidence supports the findings that placing the cell site in the neighborhood would be in conflict with the character of the area because of aesthetic concerns, possible decline in property values, and an intensification of uses due to the fact that another cell site exists about a block away. However, after reviewing the administrative record as a whole, these findings are not supported by substantial evidence.

The public testimony before both the planning commission and city council emphasized community concern over the health effects of the RF emissions. [FN30] Additionally, the record is replete with letters to the planning department, planning commission, and Mayor Lewis, objecting to the application based upon possible health effects caused by RF emissions and questioning why the site cannot go elsewhere. [FN31] This fact is further emphasized by the mayor's statement at the city council hearing that while the planning commissioners stated they were not considering the health affects of RF emissions in denying ATT's permit application, purportedly following the city attorney's advice as stated at the hearing, this is exactly what they did. [FN32] While the city may undoubtedly hear residents' concerns over the health effects of RF emissions, such concerns do not constitute a legitimate basis to deny an application. Substantial evidence must otherwise exist in support of a legitimate basis for an application denial to avoid the conclusion that the city denied the permit due to impermissible health concerns. *Oyster Bay,* 166 F.3d at 495.

FN30. AR, Part IX, pp. 30-60; Part VII, pp. 15:2-17:11, 19:23-20:4.

FN31. AR, pp. 148-158, 406-416.

FN32. AR, Part VII, pp. 21-22

***1161** The first basis raised to support the denial is aesthetics, yet no reasonable person could find credible and substantial evidence supports such a finding. Rather, a review of the record as a whole leads to the conclusion that aesthetics were raised because it was known, after repeated instruction by city attorneys, that basing the decision on health concerns would be unlawful. [FN33] For example, before the planning commission Ms. Horen and Ms. Dice testified that they were opposed to the site because of possible health effects; Ms. Horen said nothing about aesthetics and Ms. Dice stated that the appearance is acceptable but that she was concerned over the commercial facility being disguised as a residence. [FN34] In fact, when aesthetic concerns were discussed at both the planning commission and city council hearings, only one person, Mr. Nerenberg, directly stated that he could see the addition and that it would be an eyesore. [FN35] In contrast, when the mayor questioned Ms. Horen at the city council hearing whether she was opposed to the aesthetics of the building, Ms. Horen stated that she was opposed to the "philosophical aesthetics of it all." [FN36] Moreover, when looking at the drawings submitted by ATT, included in the administrative record, the garage extension is merely a third garage door added onto a large house on a one acre lot located in a neighborhood "which is developed with very large residential structures." [FN37] As such, given that only one person, Mr. Nerenberg, stated that he could actually see the addition and gave a specific reason why he was aesthetically opposed to the garage expansion, the court concludes that substantial evidence does not support the finding that the application was denied based on the aesthetic concerns. [FN38]

FN33. AR, Part IX, pp. 4, 25, 69-72 (discussions at the planning commission hearing concerning RF emissions from the site and the commission's ability to consider such emissions in deciding the permit application); Part VII, 20-21 (city attorney's advice to the city council concerning its ability to consider the RF emissions).

FN34. AR, IX, pp. 30-33, 49.

FN35. AR, Part IX, pp. 56-58; Part VII, pp. 24-26. In fact, the mayor commented that he had been to Cadencia street and could not tell that the Pac Bell site was anything other than a home. AR, Part VII, pp. 13- 14. In comparison the ATT site is similarly designed in that the antennas are hidden under stucco

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

attached to the chimneys and the radio base station is housed in a garage expansion.

FN36. AR, Part VII, pp. 19-20. Ms. Horen added that she was really concerned with the health affect and property values caused by siting **wireless** personal service facilities in the area. AR, Part VII, pp. 19-20.

FN37. AR, p. 346 (Planning Department Report to the Planning Commission, May 16, 2001).

FN38. The city also relied on the finding that neighbors objected the commercial-like garage addition since instead of a four-car garage it would be a six-garage. However, no resident testified that other homes had more or less garages. In fact, the only resident who stated that she thought the addition looked "commercial" added that she could not even see the extension when driving on the street. Accordingly, the finding about a "massive" garage being out of character seems to be nothing more than an attempt to restate that it was aesthetically displeasing, which, as discussed above, is not supported by substantial evidence.

Turning to the issue of property values, the city specifically found that the site would negatively affect the property values of the nearby homes based upon the perceived fear of the health effects caused by the RF emissions. [FN39] However, 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 ***1162** effects of RF emissions. H.R. Conference Report No. 104-458, 201 (1996). As such, the concern over property value depreciation based on fear over RF emissions does not constitute a legitimate basis for an application denial under the **TCA.** Additionally, no evidence exists in the record that property values will decline simply from the additions to the home. [FN40]

FN39. AR, Part I, p. 8.

FN40. Mr. Nerenberg testified that the additional garage will negatively affect his property values, but he presented no evidence to either the city council or planning commission to support this assertion. AR, Part VII, 26.

As to the "intensification of uses within the neighborhood," this finding is not supported by substantial evidence. First, neighbors expressed concern that the neighborhood would become "antenna alley" and that there would be a saturation of cell sites since the Pac Bell cell site and a ham radio, used by the property owner, were also located close to the proposed ATT site. The planning commission and city council reiterated this point by repeatedly expressing concerns that the neighborhood would become inundated with "five, six, seven of such facilities." [FN41] However, what is notably missing from the record is any evidence to even suggest that a third or fourth company, much less numbers five, six and seven, were seeking to site in the area. [FN42] Moreover, the concern over "antenna alley" could not be aesthetic since the antennas and equipment at the site are designed to look like the house and thus could not be seen from the exterior. Second, the argument that a six-car garage is out of character with the neighborhood is not supported by the record because under the municipal code any home owner could expand his or her garage to be a six-car garage. [FN43] Residents stated concern over the area becoming "non-residential" and commercial due to the added cell sites. Yet, there simply is no evidence that the cell site would cause the area to look commercial since the site looks like a part of a large house in a neighborhood with very large houses [FN44] and there is no evidence that the trips or noise generated by the ATT site would be intrusive into the neighborhood. [FN45] In contrast to the lack of ***1163** evidence supporting the finding that ATT's site would commercialize the neighborhood, the testimony of the residents shed light on the true underlying concern over the neighborhood becoming "antenna alley" as illustrated by Ms. Horen's statements before the city council:

FN41. AR, Part VI, p. 6; Part IX, p. 79-81.

FN42. The city argues that ATT's RF engineer, Mr. Tech, admitted that another site would go within a mile of the proposed site. However, this misconstrues his testimony since his reference to a mile radius had to do with the coverage provided by the proposed site and not the distance between the proposed site and another site. AR, Part IX, p. 24.

FN43. The city does not contest that a home owner could expand his or her garage as a matter of right to house vehicles, but argues that ATT's "as-of-right" argument lacks merit because the extension is a

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

nonconforming use which is not as of right. Reply in Support of Defendants' Cross-Motion for Summary Adjudication of Counts I and III, p. 7 n. 9. However, this argument misses the point since the issue, when the city states a six car garage is out of character with the neighborhood, is not what is housed inside the garage but its exterior appearance in comparison to the neighborhood. Thus, because anyone in the neighborhood could expand to have a six car garage, which involves only three garage doors, the "out-of-character" argument lacks any evidentiary support.

FN44. The planning department report to the planning commission states, "The proposed project is located in a low density residential neighborhood which is developed with very large residential structures." AR, Part II, p. 346.

FN45. Residents were concerned over increased traffic and stated before the planning commission that they saw Pac Bell workers checking the green boxes located on the streets quite regularly. AR, Part IX, pp. 54- 55; Part VII, p. 23. However, ATT made clear that no such green box was necessary to develop the proposed site, and the city planner testified that only one to two trips per month by ATT workers would occur to check on the site showing that any traffic increase would be minimal. AR, Part IX, pp. 64, 77. Additionally, while the issue of noise was raised, the planning department found that the noise would not be intrusive in addition to the fact that ATT agreed to insulate the faux garage to alleviate any concerns over noise. AR, Part IX, p. 64; Part VII, p. 30. As such, substantial evidence does not exist to support the proposition that ATT's proposed site would cause an intensification of uses that would "commercialize" the neighborhood.

> It's an emotional issue that people have, and even though we are not allowed to speak of health concerns, as you know, there are no long-term studies of low level radiation, the effects on the community. And so there is kind of a palpable fear and a concern about those issues and especially in this neighborhood which we now call antenna alley because we already got one that kind of slid in very quickly, and ... [a]cross the street at 7535 there is a ham radio station ...So now we're talking about across the street a new installment of **AT & T**.

AR, Part VII, p. 15. In sum, this underlying fear of "antenna alley" is not substantiated by any evidence in the record that other cellular providers will seek to locate in the neighborhood, and lacks any basis for concern other than detrimental health effects.

Alternative Sites and Policy No. 64

[13] In addition to the lack of compatibility with the neighborhood, the city argues the lack of evidence "that alternative locations ... have not been exhaustively explored," [FN46] establishes substantial evidence to support the denial of ATT's permit application. The pertinent question on this issue is whether or not the city imposed such criteria at the time of ATT's application since the city may not arbitrarily impose new CUP criteria not in place at the time of plaintiff's application. *See New Par v. City of Saginaw,* 301 F.3d 390, 398 (6th Cir.2002) (denial of variance based on criteria not part of relevant city ordinance does not constitute substantial evidence); *Group EMF, Inc. v. Coweta County,* 131 F.Supp.2d 1335, 1343 (N.D.Ga.2000) (county's denial of permit to build cell site due to applicant's failure to consider alternative cell sites was not supported by substantial evidence because the local ordinance imposed no such requirement); *Virginia Metronet, Inc. v. Board of Supervisors,* 984 F.Supp. 966, 974 n. 14 (E.D.Va.1998) ("In order be supported by substantial evidence, the proffered reasons must comport with the objective criteria in existence ... Governing bodies cannot simply arbitrarily invent new criteria in order to reject an application.")

FN46. AR, p. 29 (Resolution No.2001-309).

[14] The city claims that ATT was required to demonstrate that no feasible alternatives in non-residential locations existed, pursuant to Policy No. 64, for a CUP to be granted. However, the criteria stated in Policy No. 64 is irrelevant because the administrative record contradicts any reasonable argument that Policy No. 64 was the guiding policy at the time ATT's application was complete. [FN47] First, Policy No. 64 was not written until almost a year ***1164** after ATT's application was complete and two weeks after the city council denied ATT's application. [FN48] Second, Senior City Planner Christer Westman testified before the planning commission that the city lacked any policy that would guide the planning department in addressing the proliferation of cell site applications for

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

residential neighborhoods. [FN49] In contrast, Policy No. 64 states that its purpose is to guide staff in reviewing the placement of cell sites including placement within residential neighborhoods. [FN50] Third, the city does not point to any evidence in the record that Policy No. 64 in fact memorializes existing city policy. Finally, findings in the city's resolution contradict that this written policy was in place at the time of the application since it imposes the requirement that no feasible alternative exist for a cell site to be placed in residential neighborhoods, yet the resolution denied the application for failing to exhaustively explore other residential and commercial sites. [FN51] Therefore, the city cannot rely on Policy No. 64 as a basis of substantial evidence to support the findings because to do so would impose criteria on ATT's application not in place when ATT completed the application process.

FN47. The city argues in its reply brief in support of its motion for summary adjudication, that Policy No. 64 is merely a guideline for applying for a CUP suggesting that ATT could have received a CUP without following the "guidelines" set forth in the policy. Defendants' Reply in Support of Defendants' Cross-Motion for Summary Adjudication of Counts I and III, 5:17-27. This argument lacks merit given the city's contradictory statement that ATT's failure to show any feasible alternatives to the proposed site as required by Policy No. 64 constitutes substantial evidence supporting the denial. Defendants' Cross-Motion for Summary Adjudication of Counts I and III, 19:7-19.

FN48. AR, p. 345; Part VI, p. 1.

FN49. AR, IX, p. 63.

FN50. AR, p.12.

FN51. AR, p. 15; AR, p. 8.

Apart from Policy No. 64, the city argues that the application failed to meet the relevant CUP criteria established by **Carlsbad** Municipal Code § 21.42.020 that the site be necessary or desirable for the development of the city. [FN52] Despite the General Plan's recognition that cell sites are "necessary and essential to the infrastructural support of urban land uses," [FN53] the city found that the cell site was not necessary because ATT failed to exhaustively examine alternatives to avoid the intensification of uses in the proposed neighborhood and to sufficiently attempt to obtain a site at a commercial center to be built. However, these finding collapse in light of the fact that they are based on the city's concern over the intensification of uses in the neighborhood [FN54] which, in turn, lacks substantial evidence in support of such a finding (see discussion *supra*). Additionally, the city found that several residents testified to being subscribers to ATT and having adequate coverage in the area to be covered by the proposed site which the city now argues constitutes substantial evidence for showing that the site was neither necessary nor desirable. However, the record belies the argument that substantial evidence supports this finding. While several residents testified to having adequate cell phone coverage in the relevant area, a review of the record shows that only two residents stated they subscribed to ATT. [FN55] While the residents' statements are evidence that the city should consider, two statements that ATT does have adequate coverage does not reach the level of substantial evidence especially in light of the contrary testimony by ATT's engineer that a coverage gap exists in the area. [FN56] Therefore, substantial ***1165** evidence does not support the findings that relate to the CUP criteria set forth in **Carlsbad** Municipal Code § 21.42.020.

FN52. **Carlsbad** Municipal Code § 21.42.020 states in relevant part:
A conditional use permit shall be granted only if the following facts are found to exist in regard thereto: (1) That the requested use is necessary or desirable for the development of the community."
Defendants' Reply in Support of Defendants' Cross-Motion for Summary Adjudication, Ex. B.

FN53. AR, p. 346.

FN54. AR, pp. 8, 9.

FN55. AR, Part IX, pp. 37, 41, 46, 51.

FN56. AR, IX, p. 24.

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

In sum, having reviewed the administrative record the court cannot reasonably conclude that the evidence supporting the denial decision was substantial especially in light of the high degree of attention drawn to the concern over the health effects of RF emissions by the residents, planning commission, and city council. Therefore, the city's decision in denying ATT's applications violated § 332(c)(7)(B)(iii) and (c)(7)(B)(iv) and cannot stand.

Equitable Estoppel

[15] As an affirmative defense, the city argues that ATT should be equitably estopped from litigating the substantial evidence claim (47 U.S.C. § 332(c)(7)(B)(iii)count three) because ATT withheld relevant information from the city during the CUP process on the availability of alternative cell sites. [FN57] Such evidence, the city argues, would itself have established substantial evidence for denying plaintiff's application making equitable estoppel proper.

FN57. The city has filed a motion to amend its answer in order to include the estoppel defense. However, because the city has failed to carry its burden in establishing that equitable estoppel applies in this case, the court denies the city's motion to file a first amended answer.

In order to prevail on a claim of equitable estoppel, the city must establish the following:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.

United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir.1970) (citation omitted); *TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 695 n. 19 (9th Cir.1990) (citations omitted). The city presents three facts that documents uncovered during discovery, but not presented during the application process, allegedly reveal: (1) ATT withheld a coverage map showing adequate coverage for the relevant area; (2) ATT identified alternative non-residential sites; and (3) ATT required a sister site to compliment the proposed site but the information was not disclosed. The city relies on the expert testimony of Jonathan Kramer in establishing the first two "known facts" in light of the documents produced by ATT. Consequently, because Kramer's testimony lacks reliability, the city has failed to meet its burden to establish that the first two facts are actually facts and thus cannot establish the first prong of the estoppel defense. [FN58]

FN58. The court rejects the city's argument that its estoppel defense is not dependent in any way on Kramer's testimony since it is Kramer's "expert" analysis of the documents produced that the city uses to establish ATT had adequate coverage and viable alternative sites. *See* Defendants' Cross-Motion for Summary Adjudication of Counts I and III, 21:6-22:2.

On the third fact, the city's argument that ATT withheld information about a necessary sister site to the proposed site lacks evidentiary support. ATT's engineer did state before the planning commission that the proposed site would only cover a one-mile radius and that an additional site would be needed which is corroborated by the Gonsalves affidavit. However, the city mischaracterizes these statements by arguing that ATT required a second site in order to allow the proposed site to operate properly. [FN59] The city has presented no evidence ***1166** that the proposed site and sister site cannot function without the other. Rather, the undisputed evidence shows, as stated by Gonsalves, that the proposed site is not structurally dependent upon the building of another site. [FN60] In other words, the proposed site does not need an additional site to cover the one-mile radius it is intended to cover. [FN61] Accordingly, the city has failed to show that this last fact is "known" by ATT because it has not presented evidence that the fact, as it describes it, exists. Therefore, the city's estoppel argument fails because the city has not met its burden in establishing the elements of its affirmative defense.

FN59. AR, Part IX, 23:5-14

FN60. Gonsalves Affidavit, 3:4-6.

FN61. The third fact, the need for an additional site, is also pertinent to the city's California Environmental Quality Act ("CEQA") argument. This argument lacks any merit given that the city has failed to establish that a second site will be environmentally significant " 'in that it will likely change the scope or nature of

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

the initial project or its environmental effects.' " *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm. Of the City of Oakland,* 91 Cal.App.4th 1344, 1360, 111 Cal.Rptr.2d 598 (2001) (*quoting Laurel Heights Improvement Ass'n v. Regents of Univ. of Calif.,* 47 Cal.3d 376, 396, 253 Cal.Rptr. 426, 764 P.2d 278 (1988)). Because the only interaction between the two possible sites is that they will cover the same area, there is no evidence that suggests that a second site will change the environmental impact of the first site other than causing more RF emissions which the city and state may not consider.

D. Administrative Mandamus

[16][17] ATT requests that the court issue a writ of administrative mandamus based upon the city's violation of § 332(c)(7) [FN62] requiring that the city grant the application for the CUP. While the city argues that ATT has not shown that the remedies under the **TCA** are inadequate, this court follows the decisions laid down by a number of Circuits which have held that an injunction compelling the local authority to act is an appropriate remedy for a violation of § 332(c)(7). *See Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490, 497 (2d Cir.1999) (noting that a majority of district courts have held injunction appropriate to remedy a violation of the **TCA** and holding injunction imposed by district court appropriate since this best serves the purpose of the "**TCA's** stated goal of expediting this type of action."); *Preferred Sites, LLC v. Troup County,* 296 F.3d 1210, 1222 (11th Cir.2002) (injunction appropriate remedy for violation of § 332(c)(7)); *Omnipoint Corp. v. Zoning Hearing Board of Pine Grove Township,* 181 F.3d 403, 410 (3d Cir.1999) (upholding injunction imposed by district court for violation of § 332(c)(7)(B)(iii) because "[i]njunctions are proper forms of relief under § 332(c)(7)(B)(v)") [FN63] (citation ***1167** omitted). The city argues that administrative mandamus is not appropriate because the city is working with ATT to find a feasible alternative site outside a residential area. However, such cooperation by the city is a result of its unlawful denial of ATT's permit application. Consequently, remanding the decision would allow the city to benefit from its unlawful decision and would frustrate the purpose of the **TCA** that actions brought under it be decided on an expedited basis. Therefore, administrative mandamus is appropriate in this case.

FN62. ATT also filed a motion for summary adjudication on count two (violation of § 332(c)(7)(B)(i)(I) prohibiting unreasonable discrimination between providers of equivalent services). Because ATT seeks the essentially the same relief under count two as it does under counts one and three (injunctive and declaratory relief), the court need not address count two. However, the court notes that the lack of substantial evidence to support the denial of ATT's application giving rise to the conclusion that the city impermissibly based its decision on health effects also shows a violation of § 332(c)(7)(B)(i)(I) because no reasonable basis exists for granting Pac Bell's application for a CUP but denying the application submitted by ATT.

FN63. Section 332(c)(7)(B)(v) provides in part:
Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.
47 U.S.C. § 332(c)(7)(B)(v).

E. Violation of Equal Protection

[18][19] In addition to its claims under the **TCA,** ATT argues that the city's actions violated ATT's right to equal protection under both the California and United States Constitutions. [FN64] The equal protection clause of the Fourteenth Amendment "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Even though local land use decisions are presumptively constitutional where no fundamental right or suspect class is involved, an equal protection violation will be found where the local government decision bears no rational relationship to a legitimate government interest. *Del Monte Dunes v. Monterey,* 920 F.2d 1496, 1508-09 (9th Cir.1990) (plaintiff stated an equal protection claim where complaint alleged that city unreasonably and arbitrarily limited use of plaintiff's property and required property be set aside for open space without imposing such conditions and restrictions upon owners of similarly situated property). The city argues that it had a legitimate basis for discrimination because ATT had adequate coverage in the area, failed to exhaustively examine other possible

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

sites, and was the third **wireless** site in the neighborhood whereas Pac Bell was the second. However, these arguments lack support since the court is convinced that the undisputed evidence shows that the city denied the application because of the public outcry over the possible health effects from RF emissions. Additionally, each of the alleged bases for discrimination lack support. First, ATT has submitted an unrebutted affidavit of Gonsalves, as well as the testimony of its engineer Mr. Tech, showing that ATT has poor to no coverage in the Cadencia area which is the same reason Pac Bell located in the area. [FN65] Second, the failure to explore alternative sites is not a legitimate basis for discrimination given that this is based on concerns of over-intensification, which, as discussed above, lacks evidentiary support leaving the court to conclude that the city denied the permit due the health effects issue. Moreover, to the extent that the city argues that Policy No. 64 requires examination of non-residential alternatives, such a basis is arbitrary and unreasonable since the policy was not in existence when ATT's application was completed, *supra.* Third, simply because ATT is the third **wireless** site in the area does not mean that its permit may be denied unless there is some rational basis for denying the application. Fourth, denying the permit because the garage extension is out of character with ***1168** the neighborhood lacks evidentiary support since garage expansions are allowed as a matter of right under the municipal code, *supra.* Consequently, the city acted unreasonably by discriminating between the applications submitted by ATT and Pac Bell when it denied ATT's application without a legitimate basis and therefore violated ATT's rights under the Fourteenth amendment.

FN64. Because ATT essentially analyzes its equal protection claim under the U.S. Constitution, the court applies federal law to ATT's claim.

FN65. Gonsalves Affidavit, ¶ 18. To the extent that the city relies on the expert testimony of Jonathan Kramer to support the argument on coverage, the court does not take such testimony into account because of its unreliability, *supra.*

F. Procedural Due Process

ATT argues that the city's policy of requiring no feasible alternatives prior to granting a CUP that would allow a cell site in a residential neighborhood is void for vagueness on its face and as applied to ATT. However, because the court has granted ATT's request for administrative mandamus requiring the city to grant CUP application 00-36, the court denies ATT's motion for summary judgment on this claim as it is moot.

G. 42 U.S.C. § 1983

[20] To prevail on a § 1983 claim, the plaintiff must prove that (1) the defendant acted under the color of law in committing the conduct at issue and (2) such conduct deprived plaintiff of some right, privilege or immunity protected by the Constitution or laws of the United States. 42 U.S.C. § 1983; *Haygood v. Younger,* 769 F.2d 1350, 1354 (9th Cir.1985) (en banc). [FN66] Because the court finds that significant questions of fact and law remain as to whether the named defendants may be found liable under § 1983, the court denies plaintiff's motion for summary judgment on this claim. [FN67]

FN66. In addition to declaratory and injunctive relief, ATT seeks compensatory damages under the Federal Civil Rights based upon violations of its rights under the **TCA.** A number of courts have split on whether the **TCA** implicitly forecloses a suit for damages under § 1983. *See Nextel Partners Inc. v. Kingston Township,* 286 F.3d 687, 695 n. 7 (noting the split among district courts on whether the **TCA** forecloses a § 1983 action and holding that the **TCA** is sufficiently comprehensive to foreclose suit under § 1983). However, because the court has set the § 1983 issue for further briefing, *see* n.69 *infra,* it does not address this issue at this time.

FN67. The court has requested, in a letter to be sent to the parties concurrently with this order, that the parties submit further briefing as to whether § 1983 liability may be imposed on the named defendants. The specific issues the court seeks to have addressed will be set forth in the letter.

IV. CONCLUSION

For the foregoing reasons, the court **grants** ATT's motions for summary adjudication on counts one, two, three,

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

eight, and ten, but **denies** ATT's motion for summary adjudication on count seven and nine. Furthermore, the court denies the city's cross-motion for summary adjudication on counts one and three and **denies** the city's motion to file a first amended answer.

IT IS SO ORDERED.

308 F.Supp.2d 1148

Motions, Pleadings and Filings (Back to top)

• 3:01CV02045 (Docket) (Nov. 06, 2001)

END OF DOCUMENT

Copr. © 2004 West. No Claim to Orig. U.S. Govt. Works.

Wireless Communications Initiative Study

Wireless Facilities Impact on Property Values

November 2012

Background

Wireless technology has dramatically changed the way the world communicates. There are over 6 billion wireless phones being used worldwide. In the United States the number of wireless phones is greater than the population. Conversely, with the advent of smart phones and wireless devices, there is increasing strain being put our already stressed wireless infrastructure. The goal of the Wireless Communications Initiative (WCI) is to enable the deployment of a 21st century wireless infrastructure. Silicon Valley is clearly driving wireless innovation and the region has consistently been an early adopter of these products.

However, compared to feature phones, smartphones place 24 times the demand on wireless networks, and smart devices such as tablets command 120 times as much. Carriers are trying to respond to this revolution in technology by deploying what is called Next Generation technology. Carriers tout the capacity of their 4G or LTE (Long Term Evolution) networks as significantly more efficient in managing the burgeoning demand placed on networks by applications such as streaming video.

The significant challenge facing the next phase in technology deployment is the need to place wireless facilities in residential neighborhoods. These facilities need to be closer to consumers to allow signals to be accessible within homes. This is increasingly important given that about 30 percent of homes rely solely on wireless phone service. In addition, almost 400,000 calls to 911 are made each day using wireless phones. Access to a wireless network has now become a public safety imperative.

Carriers are working with cities to identify neighborhood sites for wireless facilities. However, this task has been made more difficult in some cases when a few residents raise concerns about the placement of wireless towers. These residents oppose carrier applications because of

trepidations related to Radio Frequency (RF) emissions or suspicions about a negative impact on property values. The anxiety that wireless towers impact property values has been a powerful argument used by opponents to carrier applications. Oftentimes, anecdotal evidence is used to bolster these arguments, absent any factual evidence regarding the veracity of these claims.

Carrier and city attempts to address these concerns can lead to long delays in deploying and upgrading wireless facilities. It isn't unusual for a single application to be delayed for a year or more while community concerns are being addressed.

This study has been designed to assess the actual effects of wireless facilities on property values. We have the capability to consider wireless facilities that have been in place for several years. We can look at hundreds of recent real estate transactions to determine what effects are present.

The Study Partners

The Santa Clara County Association of REALTORS® and the Silicon Valley Association of REALTORS® (SILVAR) partnered with WCI to produce the study. The members of these two organizations are involved with most transactions involving single family residences in Silicon Valley. The Associations are over 100 years old and have a rich history paralleling the growth of the region. The organizations represent thousands of real estate agents who have a deep commitment to furthering the professionalism of the industry.

In addition, WCI partnered with MLS Listings to perform the actual data analysis. MLSListings, Inc. was founded in 2007 by a collaboration between several established regional multiple listing services, notably Silicon Valley's RE InfoLink and California's Central Valley MLS. The company created by this merger, MLSListings Inc. serves nearly 16,000 subscribers and 6,000 firms. MLSListings typically handles listings totaling nearly $70 billion annually.

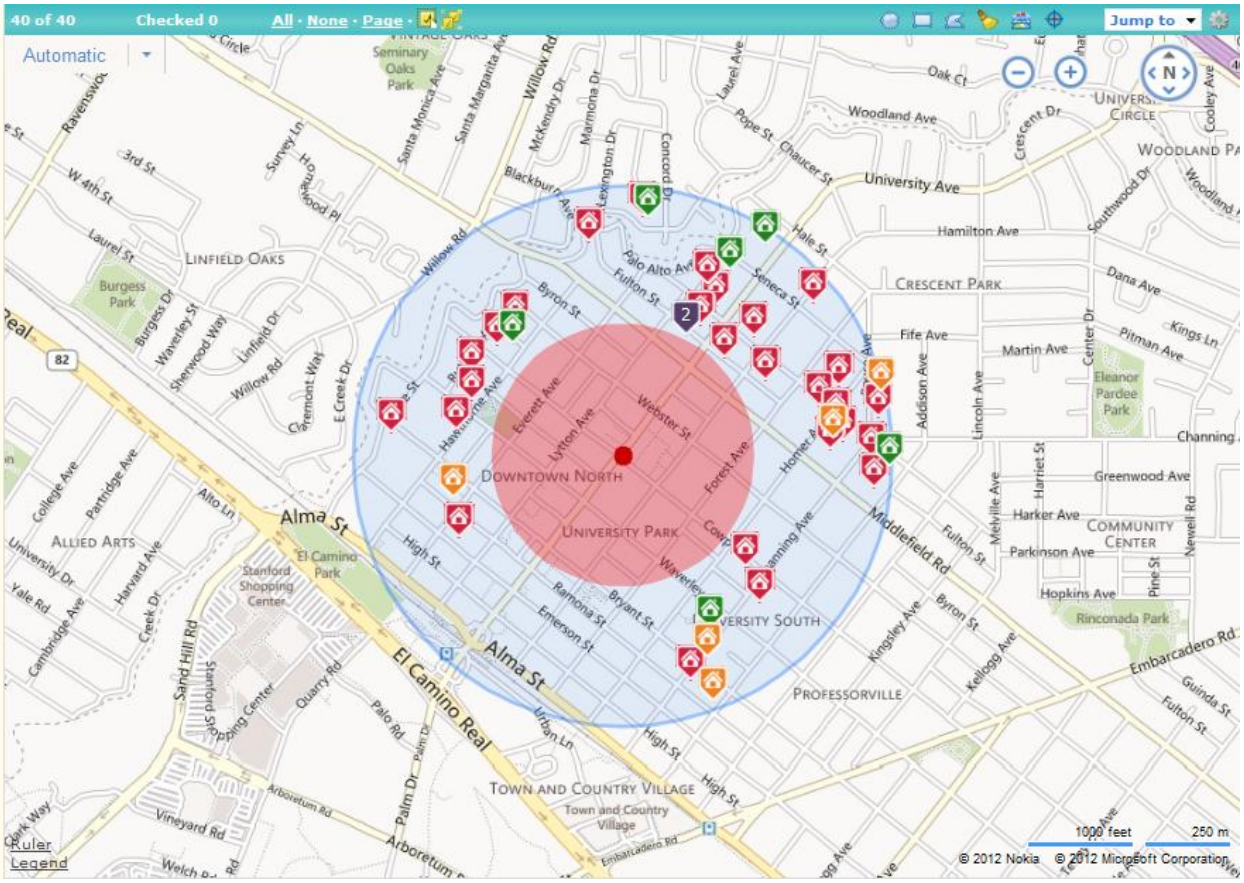
See Appendix B for more information about these organizations.

The Methodology

The data was compiled using over 1600 single-family home transactions from January to September 2012. A total of 70 wireless sites were selected in Palo Alto, Redwood City, Saratoga and San Jose. The survey compared the "list" and "sale" price for transactions based on the distant from the wireless facility. The transactions were grouped by those 1) within 1/8th of a mile, 2) 1/8 to a quarter mile and 3) a quarter to one-half mile.

In addition, the study included all types of wireless facilities. These facilities may be A) a wireless tower, B) equipment placed on buildings (e.g. church, offices) or C) placed on a utility structure (e.g. pole, tower).

See Appendix D for sample photographs of the sites.



Sample MLS listing data query

The chart below displays the aggregated results for the study. The list and sale prices are an aggregate of the all of the transactions that occurred within the specified distance from the wireless site during January to September 2012. The fourth column is derived as a percentage of the sale price to the list price.

	Total List Price	Total Sale Price	%List to Sale
Palo Alto			
0-0.125 mile	$ 33,093,000	$ 34,243,125	**103%**
0.125-0.25	$ 219,641,507	$ 233,276,629	**106%**
0.25-0.5	$ 1,058,288,821	$ 1,094,507,081	**103%**
Redwood City			
0-0.125 mile	$ 9,111,888	$ 9,306,000	**102%**
0.125-0.25	$ 36,670,398	$ 36,738,500	**100%**
0.25-0.5	$ 91,938,794	$ 92,571,249	**101%**
Saratoga			
0-0.125 mile	$ 11,116,000	$ 11,168,000	**100%**
0.125-0.25	$ 77,914,560	$ 77,601,045	**100%**
0.25-0.5	$ 353,092,390	$ 350,550,126	**99%**
San Jose			
0-0.125 mile	$ 29,024,249	$ 28,695,250	**99%**
0.125-0.25	$ 57,135,400	$ 57,075,940	**100%**
0.25-0.5	$ 157,404,541	$ 158,404,215	**101%**

A listing of the addresses for the wireless sites is in Appendix A.

Conclusion

It is quite clear from the data that the distance from a wireless facility has no apparent impact on the value or sale price of a home. The relationship between the list and sale price remained the same no matter how close the property was to the wireless facility. In addition, we see that all the cities in the survey had similar results. The sites across all cities represent a variety of properties including those in neighborhoods with higher priced homes versus those in communities with more moderately priced homes.

Most real estate professionals believe there are multiple factors that affect property values. These professionals still believe in the old adage that there are three factors: location, location, location. However, it is quite obvious that the overall economic climate can have an overriding effect on the real estate market. This year has seen a significantly stronger market for home sales, both in the number of transactions and sellers' ability to obtain their asking price. Other factors that tend to impact property values include schools and access to transportation.

This study should provide a data-based explanation of the relationship between home values and the proximity to wireless facilities. The conclusions can be understood to suggest that communities and carriers have done well in considering the placement of the technology. The Wireless Communications Initiative believes this continued commitment to resolving deployment issues will benefit our region and its neighborhoods.

(Appendix A)

Wireless Facilities Included In Study

Palo Alto

1082 Coronado

101 Alma St

1985 Louis Road

3990 El Camino

305 N California

10950 Channing

1501 Page Mill Rd

200 Page Mill Rd

2047 bayshore

2300 Geng Rd

260 Sheridan

2666 E Bayshore Rd

2675 Hanover St

2701 Middlefield Rd

300 Pasteur Dr

3000 Alexis

3141 Maddux Dr

3401 & 3431 Hillview

345 Hamilton Ave

3475 Deer Creek Rd

3600 W Bayshore Rd

3600 Middlefied

3672 Middlefied

3862 Middleflied

4009 Miranda

4243 Manuela Ave

4249 El Camino Real

488 University Ave

525 University Ave

531 Stanford Ave

695 Arastradero

711 Colorado

724 Arastradero

850 Webster St

855 El Camino

900 Blake Wilbur Dr

799 Arastradero

760 Porter

3000 El Camino Real

675 El Camino Real

2595 E Bayshore

Junipero & Stanford

Page Mill & Foothill

Redwood City

3025 Jefferson Ave

468 Grand St

1175 Palomar

1251 Annette

2900 Whipple Ave

Saratoga

14407 Big Basin Way

14000 Fruitvale

13000 Glen Brae

13750 Prune Blossom

14091 Quito Rd

12770 Saratoga Ave

1777 Saratoga Ave

13601 Saratoga Ave

20508 Saratoga Los Gatos

19491 Saratoga Los Gatos

12393 Saratoga Sunnyvale

12413 Saratoga Sunnyvale

Hwy 9 & Quito

San Jose

2827 Flint Ave

930 Remillard Ct

3675 Payne Ave

144 S Jackson

366 Saint Julie Dr

1529 Newport Ave

1200 Fleming Ave

2110 Story Rd

1635 Park Ave

1700 Moffat St

Disclaimer: the data was pulled on 10/2/2012 pulling only single family residence (class 1 in MLSListings, Inc.) with a time frame of all sales from 1/1/2012 to 10/2/2012

Appendix B

Santa Clara County Association of REALTORS®

History

Santa Clara County Association of REALTORS®, established in 1896, has a long and rich history paralleling the history of Santa Clara Valley. SCCAOR, the first trade association in California, is the largest real estate board in Northern California, and was listed as one of the nation's top 20 associations by the Foundation of the American Society of Association Executives. It has come a long way since its first members took potential buyers to preview properties in horse-drawn buggies.

Over the years, its members have made very significant contributions, both in the real estate industry and to the quality of life in Santa Clara County, through their community service activities. Santa Clara County Association of REALTORS®'s history is one of recognizing changing needs in the real estate industry, economy, and technology, and leading the way in responding to those needs.

Santa Clara County Association of REALTORS® was the first real estate board in California to employ a Government Affairs Director to represent the interest of property owners, REALTORS® and the real estate industry, at all levels of government. Threats to property rights remain an increasingly "hot" item on legislative agendas.

The Board's educational activities for members and the public consistently win state and national awards for high quality and leadership, including the Real Estate Assistants Program, developed in 1994. Ongoing classes and seminars provide Members with the most current, professional education for the benefit of their clients and their careers.

In support of the many communities our members serve, SCC REALTORS® FOUNDATION, a nonprofit corporation designed to direct Member's monetary contributions to the most vital community needs, was formed in 1991.

Integrity, strength and innovation are the foundation of Santa Clara County Association of REALTORS®'s history. In the same tradition, established during the past century, we are committed to being an industry leader, bringing positive action and service to our Members and communities for the next 100 years.

The Silicon Valley Association of REALTORS®

The Silicon Valley Association of REALTORS® (SILVAR) is a professional trade organization representing over 4000 REALTORS® and Affiliate members engaged in the real estate business on the Peninsula and in the South Bay. SILVAR promotes the highest ethical standards of real estate practice, serves as an advocate for homeownership and homeowners, and represents the interests of property owners in Silicon Valley.

It is the duty and responsibility of every REALTOR® member of this Association to abide by the "Code of Ethics" of the National Association of REALTORS®. The term "REALTOR®" is a registered collective membership mark which identifies a real estate professional who is a member of the National Association of REALTORS® & who subscribes to its strict Code of Ethics.

MLSListings, Inc. was founded in 2007 as a collaboration between several established regional multiple listing services, notably Silicon Valley's RE InfoLink and California's Central Valley MLS. As the company created by this merger, MLSListings Inc. serves nearly 16,000 subscribers and 6,000 firms in Santa Clara, Santa Cruz, Monterey, San Mateo, San Benito, Merced, San Joaquin and Stanislaus Counties – an area of approximately 28,000 square miles, reaching from San Francisco to Big Sur, and including some of the most valuable real estate in the world. MLSListings typically handles listings totaling nearly $70 billion annually.

In April, 2008, MLSListings, Inc. joined with three other Northern California MLS services – San Francisco MLS, Bay Area Real Estate Services, and MetroList Services – in an unprecedented alliance to share multiple listing data throughout Northern California. This new alliance serves nearly 50,000 brokers in 19 Northern California Counties, a total population of nearly 9 million people.

Appendix C

Wireless Site Photographs (Sampling)

366 St. Julie Drive, San Jose

2110 Story Road, San Jose

3675 Payne, San Jose

12770 Saratoga Ave, Saratoga

14407 Big Basin Way

675 El Camino, Palo Alto

1082 Colorado St. Palo Alto

1985 Louis Road, Palo Alto

4009 Miranda, Palo Alto

4243 Manuela, Palo Alto, CA

2575 Hanover, Palo Alto

PHOTO SIMULATIONS | VERSION 3

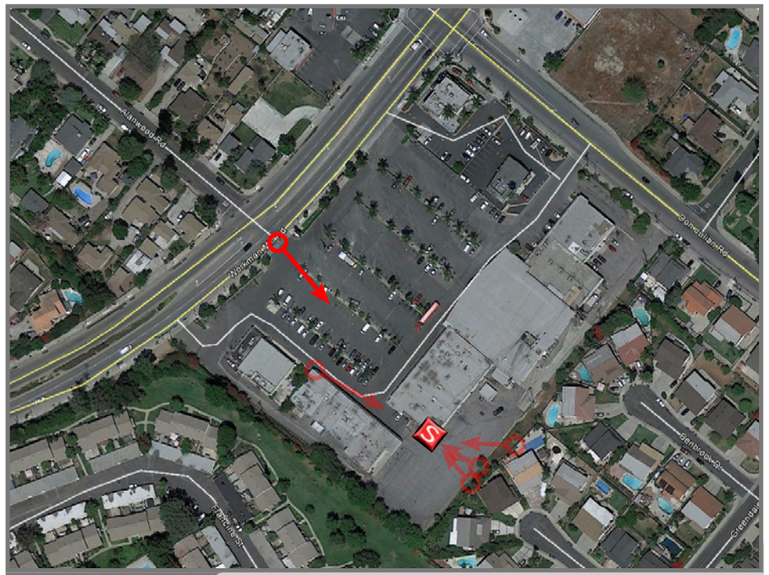
verizon wireless

Don Julian

510 Workman Mill Road La Puente CA 91746

ARTISTIC engineering
AEsims.com
877.9AE.sims

View 1



Location ©2014 Google Maps

Existing

Proposed Looking southeast from Workman Mill Road

Accuracy of photo simulation based upon information provided by project applicant.

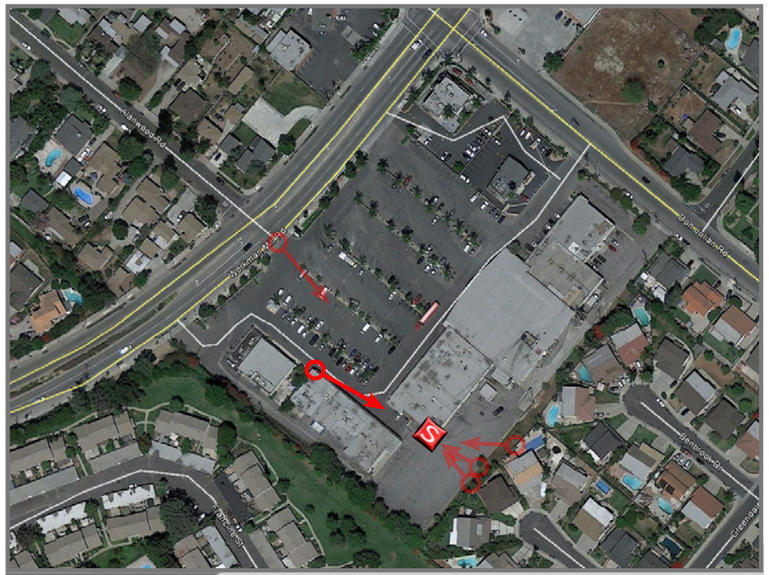
verizon wireless

Don Julian

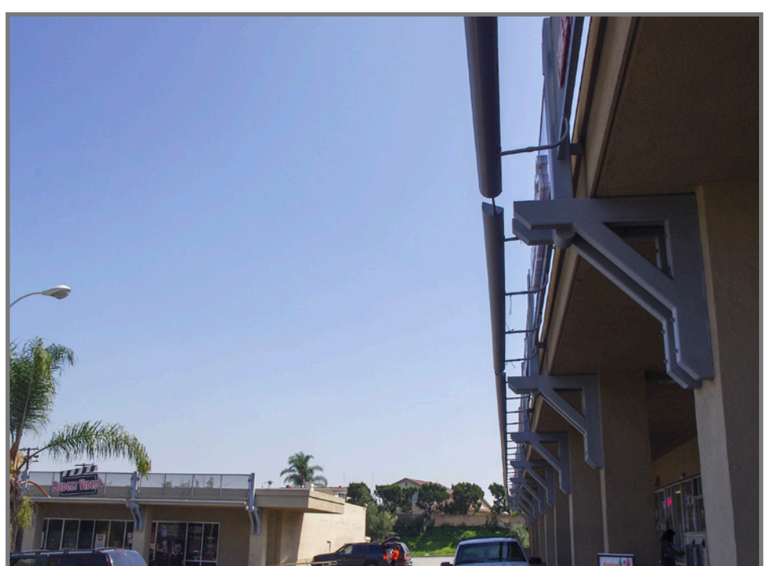
510 Workman Mill Road La Puente CA 91746

ARTISTIC engineering
AEsims.com
877.9AE.sims

View 2



Location ©2014 Google Maps



Existing

Proposed Looking southeast from parking lot

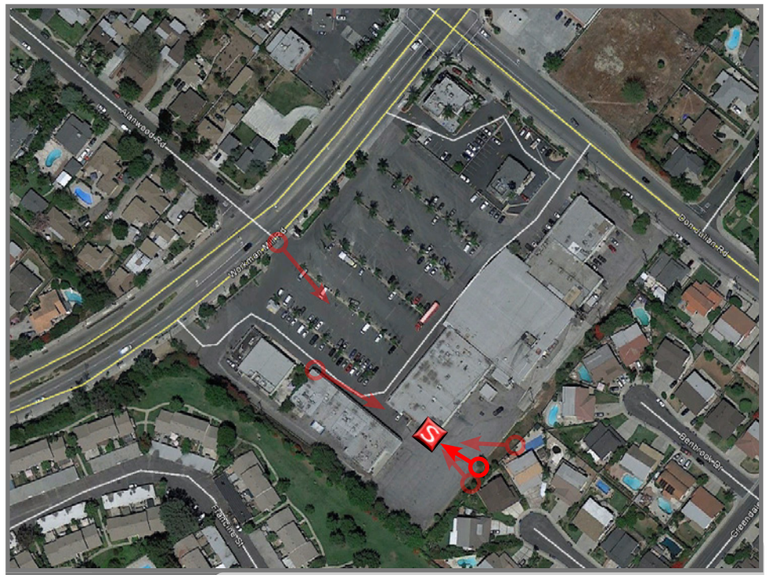
Accuracy of photo simulation based upon information provided by project applicant.

Don Julian

510 Workman Mill Road La Puente CA 91746

ARTISTIC engineering
AEsims.com
877.9AE.sims

View 3



Location

©2014 Google Maps

Existing

Proposed Looking northwest from near site

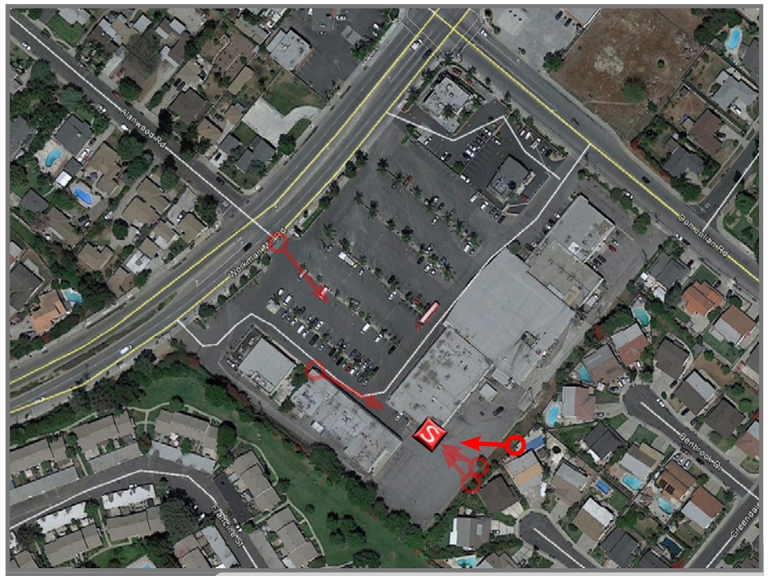
Accuracy of photo simulation based upon information provided by project applicant.

Don Julian

510 Workman Mill Road La Puente CA 91746

ARTISTIC engineering
AEsims.com
877.9AE.sims

View 4



Location

©2014 Google Maps

Existing

Proposed Looking west from residential property line

Accuracy of photo simulation based upon information provided by project applicant.

Don Julian

510 Workman Mill Road La Puente CA 91746

ARTISTIC engineering
AEsims.com
877.9AE.sims

View 5

Location

©2014 Google Maps

Existing

Proposed Looking northwest from residential property line

Accuracy of photo simulation based upon information provided by project applicant.