

RESOLUTION NO. 2019-51

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LOS ALTOS
TO DENY AN APPEAL OF GTE MOBILENET OF CALIFORNIA LIMITED
PARTNERSHIP DBA VERIZON WIRELESS AND TO DENY THE
APPLICATION FOR A PROPOSED WIRELESS INSTALLATION AT 155
ALMOND AVENUE**

WHEREAS, July 16, 2019, GTE Mobilenet of California Limited Partnership dba Verizon Wireless (“Applicant” of “Verizon”) filed a wireless telecommunications facilities permit application, Application No. SE19-00019, (the “Application”) to install a wireless telecommunications facility at 155 Almond Avenue, Los Altos, CA 94022; and

WHEREAS, on September 11, 2019, the City Manager issued a decision denying the Application in the form of a denial letter; and

WHEREAS, the Applicant submitted an appeal of the City Manager’s Decision by letter dated September 16, 2019; and

WHEREAS, the Applicant submitted an additional letter and exhibits dated October 23, 2019 in support of its appeal (the “Appeal Letter”); and

WHEREAS, on October 29, 2019 a public hearing was opened by the City of Los Altos (the “City”) City Council to consider the Applicant’s appeal of the City Manager’s Decision regarding the Application and was continued to a later date, with the verbal agreement of the Applicant to extend the applicable FCC shot clock, and later confirmed in writing to extend the time for final action to December 31, 2019; and

WHEREAS, on December 17, 2019, a public hearing was held by the City of Los Altos City Council to consider the Applicant’s appeal of the City Manager’s Decision regarding the Application.

NOW THEREFORE, BE IT RESOLVED, that the City Council of the City of Los Altos, based on the evidence contained in the written record, which includes the Application, the record related to the City Manager’s Decision, the appeal letters and supporting documentation and written submissions provided to Council, and the record of the oral testimony given by, among others, the Applicant, City officials, and the public at public hearings held on October 29, 2019 and December 17, 2019, hereby makes the following findings:

APPLICABLE STANDARDS

1. *Ordinance 2019-460 (new Ch. 11.12) and Resolution 2019-35 (Design and Siting Standards) apply to this Application.*

On August 5, 2019, the City of Los Altos adopted Ordinance 2019-460, to repeal and replace Ch. 11.12 of the Municipal Code, and Resolutions 2019-35 and 2019-36, which collectively address placement of wireless facilities within the City limits (“Wireless Regulations”). Section

11.12.030(A)(1) of the new Ordinance requires that these new provisions be applied to all pending permit applications. The Application was pending as of August 5, 2019 and therefore the Wireless Regulations apply to it.

REQUIRED FINDINGS FOR APPROVAL ON APPEAL

Under Municipal Code Section 11.12.210, the City Council must limit its review on appeal to whether the project should be approved or denied in accordance with the provisions of Municipal Code Chapter 11.12 and any applicable design and siting guidelines. In order to approve an application to install a wireless telecommunications facility in the public right-of-way, six positive findings set forth in Municipal Code Section 11.12.080 must be made. The Council makes the following findings:

1. ***The proposed facility does not comply with all applicable provisions of Chapter 11.12 of the Municipal Code, and with design and siting guidelines adopted by the City Council, and will be in compliance with all applicable building, electrical, and fire safety codes.***

Section 4.E. of Resolution 2019-35 states: “No facilities shall be permitted within 500 feet of any school in a PCF District.” The location of the proposed wireless facility is located within 500 feet from a school in a PCF District and does not meet the siting requirements in this section. Thus, the location selected for siting this wireless facility does not conform with the location requirements of Resolution 2019-35.

2. ***The proposed facility has not been designed and located to achieve compatibility with the community to the maximum extent reasonably feasible.***

Finding 2 was made for the same reasons described under Finding 1 above.

3. ***The applicant has submitted a statement of its willingness to allow other carriers to collocate on the proposed wireless telecommunications facility wherever technically and economically feasible and where collocation would not harm community compatibility.***

In Exhibit G of the Appeal Letter, Verizon stated its willingness to allow collocations “wherever technically and economically feasible and where collocation would not harm community compatibility.”

Further, in the application resubmittal by Verizon dated October 25, 2019, the applicant stated its willingness to allow collocation “so long as the Company’s equipment does not interfere with Verizon’s service and does not impact the structural integrity of the pole.”

4. ***Noise generated by equipment will not be excessive, annoying or be detrimental to the public health, safety, and welfare and will not exceed the standards set forth in Chapter 6.16 of the Municipal Code and Resolution 2019-35.***

In the application resubmittal by Verizon dated October 25, 2019, the applicant includes a Small Cell Noise Report prepared by a Third-Party Consultant indicating that “the noise

produced from operation of the proposed remote radio units (RRUs) and associated wireless telecommunication equipment will comply with the Exterior Noise Limits as outlined in the Los Altos Municipal Code, Section 6.16.050 at the nearest residential property line.”

5. *The applicant has provided substantial written evidence supporting the applicant's claim that it has the right to enter the public right-of-way pursuant to state or federal law.*

In Exhibit H of the Appeal Letter, the Associate General Counsel for GTE Mobilenet of California Limited Partnership dba Verizon Wireless, Jesus G. Roman, states that GTE Mobilenet is authorized to use the public right-of-way and operate in California pursuant to a Certificate of Public Convenience and Necessity (CPCN) granted by the California Public Utilities Commission (CPUC) and because it is deemed pursuant to law to hold a Wireless Identification Registration (WIR). Exhibit H also contained a screen shot of the CPUC website showing CPCN entries for GTE Mobilenet.

6. *The applicant has demonstrated that the facility will not interfere with the use of the public right-of-way, existing subterranean infrastructure, or the city's plans for modification or use of such location and infrastructure.*

The submitted design of the proposed wireless telecommunications facility does not indicate any physical interferences with the use of the public right-of-way.

Based on the above analysis, the City Council cannot make all the positive findings for approval of the Application, and finds that the appeal and the Application should be denied. Because the City Council would deny the appeal and the Application, it must consider Verizon's claim that an exception must be granted.

REQUIRED FINDINGS FOR GRANT OF AN EXCEPTION

Municipal Code Section 11.12.090(A) allows for exceptions pertaining to Chapter 11.12 if the City makes certain findings. Pursuant to Section 11.12.090(A) of the Municipal Code, an exception pertaining to Chapter 11.12 may be granted if the City makes one or more of the following findings:

1. Denial of the facility as proposed would violate federal law, state law, or both; **or**
2. A provision of Chapter 11.12, as applied to the applicant, would deprive applicant of its rights under federal law, state law, or both.

Pursuant to Section 11.12.090(D), the burden of proof is on the Applicant.

1. *The applicant has not demonstrated that an exception from Chapter 11.12 is warranted.*
 - a. *The Applicant has not demonstrated that a denial of the facility as proposed would violate federal law.*

Verizon claims that a denial of its application would constitute an unlawful prohibition of service under federal law. Further, Verizon claims that a prohibition exists applying either the test established by the Ninth Circuit Court of Appeals or the one established in the FCC Small Cell Order (33 FCC Rcd. 9088).

Verizon also claims that the ban on wireless facilities in the residential public right-of-way is preempted by federal and state law.

- i. *The Ninth Circuit test should be applied to evaluate Verizon's effective prohibition claim.*

In the Ninth Circuit, case law interpreting 47 U.S.C. Sections 332 and 253 determined that a denial can be found to improperly “prohibit” personal wireless services if it prevents a wireless services provider from closing a “significant gap” in its own service coverage using the least intrusive means. In the Small Cell Order, the FCC rejected that Ninth Circuit standard for small wireless facilities and found that a local regulation will “have the effect of prohibiting wireless telecommunications services if it materially inhibits the provision of such services.” The FCC’s “materially inhibits” standard should not be applied here because according to the U.S. Supreme Court, a plain language ruling by a court of appeals, such as the Ninth Circuit, trumps the determination of a regulatory agency. *See National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967, 982-983 (2005). Therefore, unless the Ninth Circuit determines otherwise, an applicant must show an actual prohibition to obtain relief under Section 332 or Section 253. The current FCC “materially inhibits” standard does not require an actual prohibition.

- ii. *The Applicant has not demonstrated that there is a significant gap in service.*

Federal law does not guarantee wireless service providers coverage free of small “dead spots.” Under existing case law, “significant gap” determinations are fact-specific inquiries that defy any bright-line legal rule. For example, context specific factors that have been considered in assessing the significance of alleged gaps include: whether the gap affected significant commuter highway or railway; assessing the nature and character of that area or the number of potential users in that area who may be affected by the alleged lack of service; whether the gap covers well-traveled roads on which customers lack roaming capabilities; and whether the gap poses public safety risk.

Applying the Ninth Circuit test, in Exhibit J of the Appeal Letter, Verizon indicates that there is a significant gap in reliable LTE in-building and in-vehicle service coverage in the City.

However, the evidence in the record was not persuasive. The evidence showed there was existing service in the area of the proposed site, although not the best, particularly during certain hours immediately before and after school. The evidence did not show any significant gap.

- iii. *The Applicant has not demonstrated that the proposed installation is the least intrusive means to fill a significant gap in service.*

Applying the Ninth Circuit test, in Exhibit K of the Appeal Letter, Verizon presents the alternative site analysis and concludes that the proposed location is the least intrusive means to fill the significant gap in service.

However, the evidence in the record was not persuasive. The evidence showed that the only alternatives that were considered were locations in the public right of way. Alternatives such as improvements to other towers, equipment changes, or other network changes were briefly discussed and the evidence from Verizon's RF expert was that these types of network changes could cause some improvements to service. Overall, the evidence in the record did not show any significant gap.

b. *The Applicant has not demonstrated that a denial of the facility as proposed would violate state law.*

Verizon claims that the City has "some discretion over the time, place, and manner of such access [under Cal. Pub. Util. Code Section 7901.1], and may review aesthetic and other site-specific impacts." However, Verizon concludes that the City's ban on wireless installations in the residential public right-of-way restricts installation in the majority of the City's public rights-of-way in violation of Section 7901. Ultimately, Verizon is making a facial challenge that the ban on wireless facilities in the public right-of-way is unlawful, meaning that the ban is unlawful on its face rather than based on when or how it is applied.

Under California Public Utilities Code Section 7901, telephone companies may not "incommode the public use of the road or highway," which means that their franchise to use the public right-of-way is not unfettered. Local governments may regulate wireless installations in the public right-of-way to ensure that they do not incommode the public use. This local government authority includes aesthetic regulations for wireless installations. Therefore, a local government must perform a location-specific analysis of a proposed wireless facility to determine if it will incommode with the use of the public right-of-way.

Further, Verizon's statement that the City has "some discretion" over the time, place, and manner of Verizon's access to the public right-of-way under Section 7901.1 is a misleading statement. As was confirmed by the California Supreme Court in the *T-Mobile W. LLC v. City & Cty. Of San Francisco* case, Section 7901.1's "equivalent regulation" requirement only applies to local regulation of the *temporary access* for construction; it does not limit local authority under Section 7901 to regulate *longer term impacts* that might incommode the public use.

In Exhibit A of the Appeal Letter, Verizon presents the photo-simulations to support the argument that the proposed design does not impact the public use of roads and highways. Further, in the Alternatives Analysis in Exhibit K of the Appeal Letter, Verizon provides information on the aesthetics of the proposed facility and installation location, and it addresses the reasons that it feels the alternative installation sites are less intrusive or viable.

Based on the evidence in the record, as discussed above, this proposed facility would be intrusive from an aesthetic perspective due to its size and placement.

I HEREBY CERTIFY that the foregoing is a true and correct copy of a Resolution passed and adopted by the City Council of the City of Los Altos at a meeting thereof on the 17th day of December 2019 by the following vote:

AYES: Pepper, Fligor, Bruins, Enander, Lee Eng
NOES: None
ABSENT: None
ABSTAIN: None



Janis C. Pepper, MAYOR

Attest:



Dennis Hawkins, CMC, CITY CLERK