RESOLUTION NO. 2019-52

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LOS ALTOS TO DENY AN APPEAL OF NEW CINGULAR WIRELESS PCS, LLC DBA AT&T MOBILITY AND TO DENY THE APPLICATIONS FOR PROPOSED WIRELESS INSTALLATIONS AT 12 LOCATIONS LISTED HEREIN

WHEREAS, New Cingular Wireless PCS, LLC dba AT&T Mobility ("Applicant" or "AT&T") filed multiple wireless telecommunications facilities permit applications (the "Applications") to install wireless telecommunications facilities at various locations in Los Altos, CA:

Cell Nodes	Application No.	Location	Date Application Received
AT&T #1	SE19-00009	141 Almond Avenue	3/22/2019
AT&T #2	SE19-00003	687 Linden Avenue	3/22/2019
AT&T #3	SE19-00017	421 Valencia Drive	5/28/2019
AT&T #4	SE19-00004	33 Pine Lane	3/22/2019
AT&T #5	SE19-00010	49 San Juan Court	3/22/2019
AT&T #6	SE19-00011	791 Los Altos Avenue	3/22/2019
AT&T #7	SE19-00005	98 Eleanor Avenue	3/22/2019
AT&T #8	SE19-00006	182 Garland Way	3/22/2019
AT&T #9	SE19-00012	491 Patrick Way	3/22/2019
AT&T #10	SE19-00013	300 Los Altos Avenue	3/22/2019
AT&T #11	SE19-00007	130 Los Altos Avenue	3/22/2019
AT&T #12	SE19-00008	356 Blue Oak Lane	3/22/2019

; and

WHEREAS, on September 17, 2019, the City Manager issued decisions denying the Applications in the form of denial letters; and

WHEREAS, the Applicant submitted appeals of the City Manager's Decisions by letters dated September 20, 2019 (the "Appeal Letters"); and

WHEREAS, the Applicant submitted additional materials on October 28, 2019 in support of its appeal; 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 November 25, 2019, the City sent a Request for Additional Information letter to AT&T detailing the required application content that AT&T had not yet provided related to radiofrequency emissions documents and an acoustic analysis report; and

WHEREAS, on December 4, 2019, the City received the radiofrequency emissions documents and the acoustic analysis from AT&T; and

WHEREAS, on December 17, 2019, a public hearing was held by the City of Los Altos City Council to consider the Applicant's appeals of the City Manager's Decisions regarding the Applications.

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 Applications, the record related to the City Manager's Decisions, 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 Applications were pending as of August 5, 2019 and therefore the Wireless Regulations apply to it.

REQUIRED FINDINGS FOR APPROVAL

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 facilities do 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 for Cell Node Location No. 1 is within 500 feet from a school in a PCF District and does not meet the siting requirements in this section.

Section 4.D. of Resolution 2019-35 states: "Wireless facilities shall only be permitted in the City in accordance with the following table:" The table indicates wireless facilities of the type described in the Applications are permitted in public rights-of-way in non-residential districts with a use permit. The proposed locations of the facilities for Cell Node Location Nos. 2 to No. 12 do not meet this siting requirement.

Thus, the residential zone locations selected for siting Cell Node Location Nos. 2 to No. 12 do not conform with the location requirements of Resolution 2019-35.

2. ***The proposed facilities have 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 the letter to the City Council dated October 28, 2019, AT&T stated that it is willing to allow other carriers to "collocate on the poles utilized by the Small Cell Nodes wherever technically and economically feasible and where collocation would not harm community capability."

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 letter submitted to the City Council dated October 28, 2019, AT&T stated that the noise generated by its equipment will not be "excessive, annoying, or detrimental to the public health, safety, and welfare, and it will not exceed the standards set forth in Chapter 6.16 of the Municipal Code and Resolution 2019-35."

Further, in the letter and additional information submitted in response to the request for additional information dated December 4, 2019, AT&T submitted the acoustic analysis prepared by a Third-Party Consultant and it is reiterated that the proposed telecommunications facilities will comply with the City's noise standards.

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 the Appeal Letter, AT&T asserted its statewide franchise under California Public Utilities Code Section 7901 to access and construct wireless telecommunications facilities in the public right-of-way.

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 designs of the proposed wireless telecommunications facilities do 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 Applications, and finds that the appeal and the Applications should be denied. Because the City Council would deny the appeal and the Applications, it must consider AT&T'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.*

AT&T claimed that the ban on wireless facilities in residential rights-of-way is preempted by federal law. It argued that the ban is a prohibition on personal wireless services and denial would materially inhibits the company's ability to provide and improve service in the area.

i. *The FCC standard should not be applied, and the Ninth Circuit test is appropriate.*

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.*

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 the Radio Frequency Statements submitted as additional submittal by AT&T dated October 28, 2019, AT&T indicates that the existing sites do not provide sufficient high-band, in building LTE service in the gap areas.

No case law was identified by the applicant at the hearing to support the applicant's claim that lack of in-building coverage is the applicable standard.

As noted above, there is no bright line test for a significant gap and the evidence in the record was not persuasive. There was inadequate capacity and coverage information to support a finding of a significant gap. The evidence showed that there was existing service in the areas of the proposed sites, although not the best. Overall, the evidence in the record 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 the Alternative Site Analysis submitted as additional information by AT&T dated October 28, 2019, AT&T presents the alternative site analysis and concludes that the proposed locations are the least intrusive means to fill the significant gaps 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 applicant did not adequately explore whether these could cause some improvements to service.

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

AT&T claims that the proposed installations are consistent with state law, and AT&T suggested that its Section 7901 franchise right is subject only to the City's reasonable and equivalent time, place, and manner regulations under Section 7901.1 and the ban on residential deployments is not "an equivalent regulation."

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, AT&T's statement regarding the interplay of Sections 7901 and 7901.1 is simply incorrect and was rejected 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 the original Applications and resubmittals, AT&T presents the photo-simulations to support the argument that the proposed designs do not impact the public use of roads and highways.

Further, in the Alternatives Analysis submitted as additional submittal by AT&T dated October 28, 2019, AT&T provides information on the aesthetics of the proposed facilities and installation locations, 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, these proposed facilities would be intrusive from an aesthetic perspective due to their size and placement, including the addition of 7 to 10 feet in height to all the poles, and in some sites the addition of cross arms, the lowering of existing cross arms, and the lowering of existing transformers to accommodate the proposed facilities.

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