



CITY OF ALBANY

OCT 29 2010

COMMUNITY DEVELOPMENT

City of Albany

PLANNING & ZONING APPEAL

ATTACHMENT 3



GENERAL INFORMATION		Date of decision being appealed. 10 / 26 / 2010	
Who: Any Applicant or party with standing may appeal an administrative decision by Planning staff or a Planning & Zoning Commission action		Type of decision: Please check one	
When: A written appeal must be filed within 14 calendar days of the administrative or Commission action		Administrative	<input type="checkbox"/>
Where: Appeals of administrative decisions are filed with the Community Development Department. Appeals of Planning & Zoning Commission actions are filed with the City Clerk		Planning & Zoning Commission	<input checked="" type="checkbox"/>
Cost \$550 00 (non-refundable)		Municipal Code or Zoning Ordinance Section	<input type="checkbox"/>
Process Appeals of Planning Staff decisions will be considered by the Planning & Zoning Commission. Appeals of Planning & Zoning Commission decisions will be heard before the City Council. For appeals of Planning & Zoning Commission decisions on items not requiring a Public Hearing, the appeal will be set for formal City Council consideration within 30 days. For items which required a Public Hearing, the City Council will schedule a Public Hearing within 30 days to consider the appeal.		If you have any questions regarding this procedure, please call the City Clerk at (510) 528-5720 or Planning Division at (510) 528-5760.	
Description of Project <u>Minor modifications to existing minor utility facility (Verizon Wireless cell site) at 1100 Eastshore (Golden Gate Fields)</u>			
Applicant Name <u>Chad Christie for Verizon Wireless*</u>	Appellant Name <u>Verizon Wireless, c/o James A Heard, Esq</u>	Address <u>423 Washington St #6 San Francisco, CA 94111</u>	
Address <u>See Appellant Address</u>	Address <u>423 Washington St #6 San Francisco, CA 94111</u>	Phone Number <u>415-288-4000</u>	
Phone Number <u>See Appellant Address</u>	Phone Number <u>415-288-4000</u>	Basis of Appeal (Please be precise) <u>See attached letter</u>	
Signature <u><i>J. Heard</i></u>		Date <u>10/28/10</u>	
Date Filed: <u>10/29/10</u>	Received by: <u><i>JH</i></u>	Fee: \$ <u>550</u>	Receipt #: <u>66819</u>
Appeal Agenda Date:		P & Z <input type="checkbox"/>	City Council <input type="checkbox"/>

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October 29, 2010

HAND DELIVERED

City Council
City of Albany
1000 San Pablo Avenue
Albany CA 94706

Re *Verizon Wireless upgrade to existing wireless facility at 1100
Eastshore, Albany (Golden Gate Fields)*

Dear Council Members

We write on behalf of our client Verizon Wireless to appeal the October 26, 2010, decision of the Planning and Zoning Commission meeting purporting to deny the request of Verizon Wireless for ministerial, staff-level approval of minor modifications to its existing cell site at Golden Gate Fields. In the interest of time, we are submitting this appeal before receiving any written decision or statement of the basis for the Commission's decision, aside from a summary provided by the City's outside counsel. Accordingly, the following statement of the grounds for the appeal is of necessity somewhat general. We reserve the right to submit a more detailed statement of our client's position after the City provides a written decision, and to include additional grounds for the appeal to the extent necessary to address aspects of the Commission's decision that have not yet been revealed to us.

I. Background: The Modifications Have No Adverse Impacts of Any Kind

Before turning to the legal analysis, we wish to stress the extremely minor, unobtrusive nature of both the existing facility and the modifications in question. The existing facility consists of panel antennas attached to the pre-existing observation tower at Golden Gate Fields, and electronic equipment installed in an equipment shelter adjacent to the base of the tower. As far as we can determine, it has never been the subject of any complaints or controversy.

It is important to note that Verizon Wireless proposes *both aesthetic and technological upgrades* to the facility. Verizon Wireless proposes to replace the six

existing antennas with new panel antennas of approximately the same size as well as add three new panels in a new sector, along with a single small microwave dish (2 feet in diameter)¹ To improve the aesthetics of the facility, Verizon Wireless proposes to move all of the antennas much closer to the tower envelope so as to reduce their visual profile (see photosimulations enclosed as composite **Exhibit A**)

From a technological perspective, the proposed modifications will enable Verizon Wireless to provide an enhanced, fourth-generation (or "4G") service known as Long Term Evolution, or LTE. Among other capabilities, LTE will enable Verizon Wireless to provide enhanced wireless broadband service. Expanding wireless broadband services by upgrading existing cell sites with new technology is a significant national priority supported by both Congress and the Federal Communications Commission ("FCC"). The FCC recently auctioned off spectrum to carriers to use for LTE and other advanced wireless services, and Verizon Wireless purchased a portion of that spectrum. In order to use this acquired spectrum and provide LTE service in the City of Albany, it is essential that Verizon Wireless be able to upgrade the Golden Gate Fields facility.

Unfortunately, we understand that the Commission took the view that there is no way to approve these aesthetic and technological upgrades to the facility because they involve new equipment and the existing facility is non-conforming. As we will explain below, that position is erroneous and unlawful for several reasons.

II. Summary of Grounds for Appeal

Based on the information presently available, the Commission's decision violates local, state, and federal law in the following respects:

- The Commission acted without authority because the Verizon Wireless application appeared on the agenda as an informational item, and in any event was properly subject to ministerial approval by City staff.
- The Commission violated the right of Verizon Wireless to due process of law under the California and U.S. Constitutions. Verizon Wireless was informed that its application was on the Commission's agenda as an information item simply to inform them of staff's intended ministerial approval, and had no notice that the Commission was being asked to take any action on the application.
- The staff report stated incorrectly that the existing facility is a non-conforming use. In fact, the existing facility was properly approved as a minor utility in a use permit issued in 1994, and minor utilities are a conditionally permitted use in the

¹ Verizon Wireless also proposes to install new equipment within the existing equipment shelter, but that equipment will not be visible or have any other impact.

WF zone Verizon Wireless was informed in an email from the City's outside counsel that staff concurred with this interpretation, and the staff report to the Commission correctly describes the existing use as "minor utility"

Consequently, there is no basis for describing the existing facility as a non-conforming use

- If the City interprets the zoning code as prohibiting wireless facilities in the WF zone, and thus prohibiting any modification of the existing facility, that determination would have the effect of prohibiting service in violation of the federal Telecommunications Act² These minor modifications to the existing facility are the least intrusive means – and in fact the only feasible means – of filling a significant gap in 4G wireless broadband service In addition, a ban on facilities in the WF zone, when coupled with the effective ban in all residential zones and the serious impediments to wireless facilities in *any* zone under the Albany wireless regulations, constitutes an unlawful general ban on wireless facilities
- The Commission acted without substantial evidence in violation of both California land use law and the Telecommunications Act³ We understand that the Commission's decision was premised on its conclusion that wireless facilities are not permitted in the WF zone As discussed above, the facility is a minor utility use and as such, conditionally permitted in the WF zone In addition, the modifications will improve the existing appearance of the facility, and will not create any noise, traffic, or other impacts legitimately regulated under the Albany Municipal Code
- The Albany Municipal Code is preempted to the extent it purports to require discretionary review – or denial – of the application As explained above, the modifications will have no adverse impacts of any kind Because there are no legitimate zoning impacts to review, discretionary review here would put the City in the unlawful business of regulating the technical means by which Verizon Wireless provides service to its customers, an area regulated exclusively by the FCC⁴

² See 47 USC 332(c)(7)(B)(i)(II)

³ 47 USC § 332(c)(7)(B)(iii)

⁴ *New York SMSA I P v Town of Clarkstown*, 603 F Supp 2d 715 725 (S D N Y 2009) ("A town plainly may not impose separate, stricter certification requirements for wireless technology than those set forth by the FCC"), *affirmed* 2010 U S App LEXIS 13364 (2d Cir June 30, 2010) See also *Freeman v Burlington Broadcasters, Inc*, 204 F 3d 311, 320 (2d Cir 2000) ("Congress intended the FCC to possess exclusive authority over [all] technical matters related to radio broadcasting"), *Nat'l Broadcasting Co v United States* 319 U S 190, 217 (1943) (Congress granted to the FCC "comprehensive powers to promote and realize the vast potentials of radio") This authority extends to both "determining the number, placement, and operation of cellular towers and other infrastructure," *Bastien v AT&T Wireless Serv*,

- Under California law, rights concerning the construction and deployment of telecommunications services are generally understood to incorporate the “natural evolution of communications technology” *Salvaty v Falcon Cable Television*, 165 Cal App 3d 798, 803 (1985), *see also Williams Communications, LLC v City of Riverside*, 114 Cal App 4th 642, 653 (2004) Thus, under state law, the existing use permit must be read to encompass and authorize such routine technical upgrades This is particularly true here, since the original permit did not restrict the number or placement of antennas and Verizon Wireless is proposing to *improve* the facility’s aesthetic profile
- Because the City’s regulations are preempted to the extent they purport to require discretionary review, the appropriate process is ministerial staff approval in the form of a zoning clearance The planning director is authorized to issue a zoning clearance “upon determining that the proposed development complies with the *applicable* regulations and standards of this Chapter” AMC § 20 100 020(C)(1) (emphasis added) Due to federal preemption, the City’s wireless regulations – and the prohibition of facilities in the WF zone – are not “applicable”
- Verizon Wireless will comply with all applicable provisions of the City’s building and electrical codes, and that is all the City may lawfully require here

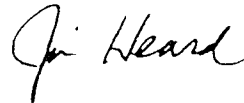
Conclusion

Like other wireless carriers that bid on available spectrum at public auctions, Verizon Wireless paid the United States Treasury a very large sum of money to secure FCC licenses to operate on these frequencies Given that Verizon Wireless is simply upgrading existing equipment, and the only visible change will be an improvement to the facility’s appearance, the City is required to yield to federal authority here It cannot lawfully deny the application, nor can it require Verizon Wireless to undergo the burdensome requirements of discretionary zoning review Based upon the foregoing, we ask that you overturn the erroneous decision of the Planning and Zoning Commission and instruct the planning department immediately to issue a zoning clearance for the building permit sought by Verizon Wireless Verizon Wireless needs to move forward as soon as

Inc, 205 F 3d 983, 988 (7th Cir 2000), and the technical and engineering aspects of telecommunications facilities *Head v New Mexico Bd of Examiners in Optometry*, 374 U S 424, 430 n 6 (1963) (stating that the FCC’s ‘ jurisdiction over technical matters is clearly exclusive’), *see also Southwestern Bell Wireless, Inc v Johnson County Bd of County Comm’rs*, 199 F 3d 1185, 1190 (10th Cir 1999) (‘ The Act created the FCC and empowers it to regulate radio communications including ‘technical and engineering aspects ’), *Cellular Phone Taskforce v FCC*, 205 F 3d 82, 96 (2d Cir 2000) (holding that state and local governments do not have the authority to regulate the operations of wireless service facilities)

possible with the technology upgrades required to provide the next generation of services to its customers in Albany

Very truly yours,

A handwritten signature in black ink that reads "Jim Heard". The signature is written in a cursive, slightly slanted style.

James A Heard

cc Greg Stepanicich, Esq
Jeff Bond (Principal Planner)
Peter Maushardt
Ed McGah, Esq
Tom Mahr, Esq
Paul B Albritton, Esq

**EXHIBIT A – PHOTOSIMULATIONS
(3 PAGES FOLLOW)**

Existing



View south from Rydin Rd (On Ramp to I-80 South) Close Up

Proposed



 **verizon**wireless
We never stop working for you.®

"GOLDEN GATE FIELD"
1100 Eastshore Hwy
APN 066-2680-003

Existing



View southwest from Buchanan St (close up)

Proposed

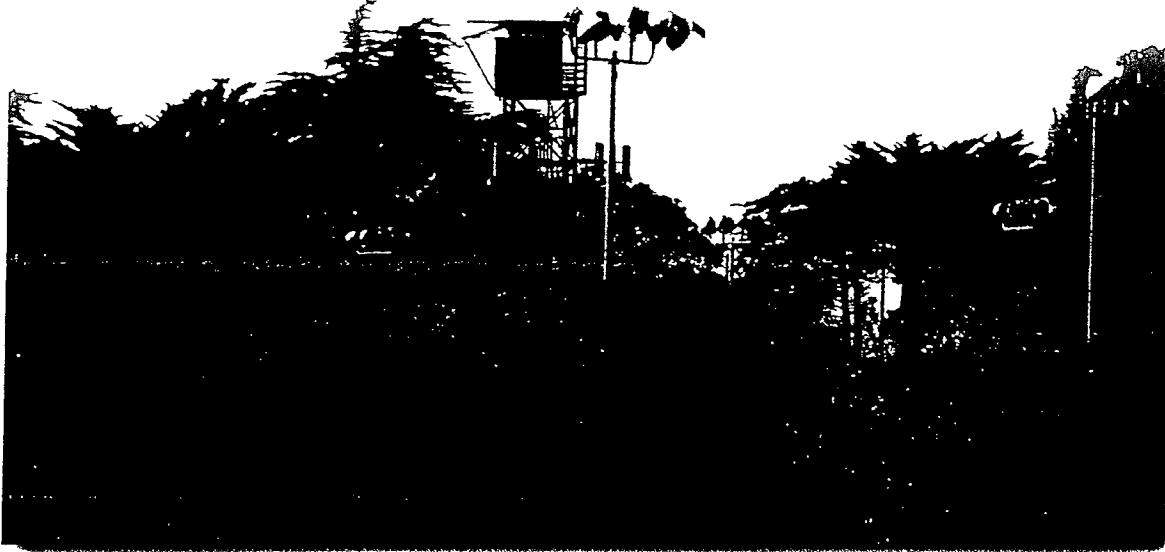


On Air LLC 925-250-5945

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APN 066-2680-003

Existing



View west from Buchanan St at I-80 off ramp (close up)

Proposed



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"GOLDEN GATE FIELD"
1100 Eastshore Hwy
APN: 066-2680-003