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June 4, 2020

VIA OVERNIGHT DELIVERY

Marin County Planning Commission
3501 Civic Center Drive, Suite 308
San Rafael, CA 94903

Re. AT&T Proposed Wireless Telecommunications Facility; Site ID CCL04747
Bell Tower at St. Luke Presbyterian Church, 10 Bayview Drive
Appeal from Denial by Deputy Zoning Administrator

Dear Marin County Planning Commissioners:

I write on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T), to respectfully request the Planning Commission approve AT&T's appeal and application to install a 30-foot tall stealth wireless telecommunications facility disguised as a bell tower near an entrance to the St. Luke Presbyterian Church ("Proposed Facility") in San Rafael. AT&T has a significant service coverage gap in this portion of Marin County, and is proposing the best possible stealth design in the best available location. The project will enhance the community and provide very important wireless services, including FirstNet services to support police officers, firefighters, paramedics, and other first responder communications.

This project is supported by Planning Staff and is consistent with the Marin County Municipal Code, Marin Countywide Plan, and the Marin County Telecommunications Facilities Policy Plan because the Proposed Facility will minimize visual effects. The Planning Division Staff Report to the Marin County Deputy Zoning Administrator provided an overall positive review of the location and aesthetics of the Proposed Facility, which were fully vetted through the County's design review process. And through that process AT&T agreed to modify its design based on Staff's recommendations if the modified design is approved.

On May 28, 2020, however, the Deputy Zoning Administrator denied the application following a public hearing where misplaced concerns about radio frequency emissions predominated the public discussion. The County cannot deny the application on this basis, nor can the County deny the application based on a small number of general concerns about aesthetics. Indeed, federal law requires approval of the Proposed Facility because denial will effectively prohibit AT&T's ability to provide and improve wireless services in this portion of the County, which violates the Telecommunications Act of 1996. The purpose of this letter is to provide the Planning Commission with an overview of the Proposed Facility and to apply key requirements of federal law to AT&T's application.

AT&T's Proposed Facility

AT&T proposes to construct this stealth wireless facility to provide and improve vital wireless services for the County's residents, businesses, and visitors. AT&T has a significant gap in service coverage in the County in the vicinity of the Proposed Facility (see attached Radio Frequency Statement – Attachment A). This gap is significant because the area includes dozens of homes in multiple neighborhoods, a marina, offices and businesses near the harbor, a school, parks, a busy one-mile stretch of Point San Pedro Road, and other points of interest in the immediate vicinity. The Radio Frequency Statement explains that placing the Proposed Facility as a feature to St. Luke Presbyterian Church will close AT&T's service coverage gap in this area. At this location, this relatively short bell tower design allows AT&T to locate its antennas high enough to serve this gap area, which is particularly challenging due to varying terrain and mature vegetation. The stealth design will be integrated with the existing church building, and the exterior of the Proposed Facility will be finished in materials to match the existing building.

To responsibly address its service coverage needs, AT&T thoroughly investigated and analyzed numerous alternative sites and designs to make sure that its Proposed Facility is the least intrusive means to close AT&T's service coverage gap. AT&T's analysis is summarized in the attached Alternative Sites Analysis (Attachment B), which was submitted to the County in connection with this application. AT&T has taken care to select a location to reduce impacts to the community while maintaining a clear line-of-sight for signals to provide adequate service coverage to the gap area. AT&T exhaustively searched for alternatives, analyzing all non-residential properties in the gap area and beyond. These properties include the San Rafael Fire Station, two elementary schools, and the businesses in and around the nearby marina and harbor. In all, AT&T examined six alternative properties, which would not be able to close AT&T's significant service coverage gap and would result in greater visual impacts on the surrounding area. Through all its efforts, AT&T identified St. Luke Presbyterian Church as the only available property from which AT&T could feasibly close its gap.

The location at the church is the only viable location for the Proposed Facility. In fact, AT&T and the Church thoroughly evaluated alternative locations and designs for the wireless facility on the Church's property. The Church's analysis of those alternatives is summarized in the attached Cell Tower Location Selection report (Attachment C), which the Church prepared and submitted to the County as part of the administrative record for AT&T's application. This report describes the Church's goals to select a site that would be minimally intrusive to the surrounding neighborhood, blend with its campus, and enhance the architectural elements of its property. The Church ruled out alternatives for faux pine tree facilities (monopines) in its parking lot and on the west side of its property based on how visible those designs would be at those locations. The Church then considered several locations for a bell tower design to enhance the church sanctuary or its fellowship hall. Ultimately, the Church opted to allow a bell tower design at a rear entranceway where it would not be visible from Point San Pedro Road or from its driveway access on Bayview Drive. The Church determined, and AT&T agrees, that this location best blends with the existing architecture, enhances the appearance of the Church, and minimizes visibility to the neighboring areas.

As AT&T's photo simulations (Attachment D) depict, the bell tower will be an amenity to the Church and will have very minimal visual impact to the area. Views from the few locations from which the bell tower will be visible will be enhanced by the appearance of this church structure. Additionally, AT&T erected a mockup of this bell tower design at the Church's selected location. Photos of the mockup (Attachment E) were provided to the County by a nearby resident and the Church. As you can see from the photos, the bell tower has very little impact in the area other than to add a picturesque structure to the landscape. More recently, at County Staff's recommendation, AT&T developed an alternative bell tower that is somewhat taller but skinnier. AT&T submitted drawings for this alternative design (Attachment F). After devoting significant time and energy to selecting the best available site and design, AT&T is confident that the Proposed Facility is the least intrusive means by which AT&T can close its significant gap in service coverage in this portion of Marin County.

Approval of AT&T's Proposal is Required Under Federal Law

The federal Telecommunications Act of 1996, 47 U.S.C. § 332 ("Act"), provides rights to wireless service providers and establishes limitations upon state and local zoning authorities with respect to applications for permits to construct personal wireless service facilities. The United States Supreme Court has explained that the Act was enacted in part to prioritize and streamline deployment of wireless technologies on a national basis.¹

Rapid deployment of wireless telecommunications facilities, like the Proposed Facility, is an important national issue, especially given the trend of Americans eliminating traditional landline telephone service in favor of wireless communications. The Center for Disease Control and Prevention (CDC) tracks the rates at which American households are shifting from landlines to wireless telecommunications. According to the CDC, 75% of California households rely exclusively or primarily on wireless phones.² In addition, the FCC conservatively estimates that 70% of 911 calls are placed using mobile devices.³ Now more than ever, robust wireless services are critical for personal, business, and first responder communications.

Under the federal Telecommunications Act of 1996, 47 U.S.C. § 332 ("Act"), local governments are specifically precluded from considering any alleged effects of radio frequency emissions in making decisions as to the siting of wireless telecommunications facilities "to the extent such facilities comply with the FCC's regulations concerning such emissions."⁴ The Act also provides that the County may only deny AT&T's applications based on "substantial

¹ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115-16 (2005) ("Congress enacted the Telecommunications Act of 1996 (TCA), 110 Stat. 56, to promote competition and higher quality in American telecommunications services and to 'encourage the rapid deployment of new telecommunications technologies.' Ibid. One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers.").

² Center for Disease Control and Prevention, December 2019 National Health Interview Survey Early Release Program, available at https://www.cdc.gov/nchs/data/nhis/earlyrelease/Wireless_state_201912-508.pdf.

³ See *Eleventh Annual Report to Congress on State Collection and Distribution of 911 and Enhanced 911 Fees and Charges*, FCC, December 19, 2019, at 10 (available at <https://www.fcc.gov/file/17724/download>) (in 2018, nearly 150 million 911 calls came from wireless phones).

⁴ See 47 U.S.C. § 332(c)(7)(B)(iv).

evidence.”⁵ The “substantial evidence” requirement means that a local government’s decision must be “authorized by applicable local regulations and supported by a reasonable amount of evidence.”⁶ In other words, a local government must have specific reasons that are both consistent with the applicable regulations and supported by substantial evidence in the record to deny a permit.

Concerns about the effects of radio frequency emissions cannot qualify as substantial evidence. A federal court in California has explained that such concerns are not substantial evidence whether raised directly or if other concerns are raised to mask fears over the health effects from radio frequency emissions.⁷ Citing the Act and its legislative history, the Court explained:

Accordingly, when public testimony in the record ‘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 on the impermissible health effects ground.’⁸

Likewise, with respect to aesthetics, courts within the Ninth Circuit and elsewhere have long agreed that general concerns about aesthetics do not constitute substantial evidence to support denial of a permit to install a wireless telecommunications facility.⁹ In *Madera County*, the U.S. District Court for the Eastern District of California cited authority from the Second, Sixth, and Eleventh Circuits for the proposition that “generalized expressions of concern regarding aesthetics” fail to meet the substantial evidence threshold under the Act.¹⁰

During the Deputy Zoning Administrator’s hearing, the public discussion was predominated by fears about radio frequency emissions associated with the Proposed Facility. Because the Proposed Facility will comply with the FCC’s radio frequency emissions standards, these concerns cannot support the denial. In connection with AT&T’s application, a radio frequency emissions compliance analysis was performed by David H. Kiser, California Registered Professional Engineer. The Radio Frequency Emissions Compliance Report, which was submitted with AT&T’s application, confirms that the Proposed Facility will operate within applicable FCC exposure limits.

The Deputy Zoning Administrator and one resident also raised concerns about aesthetics, stating that the church bell tower would create a view impact. These concerns are not supported

⁵ 47 U.S.C. § 332(c)(7)(B)(iii).

⁶ *Metro PCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 725 (9th Cir. 2005), abrogated on other grounds, *T-Mobile South, LLC v. City of Roswell*, 135 S.Ct. 808 (2015).

⁷ *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F.Supp.2d 1148, 1159 (S.D. Cal. 2003) (quoting H.R. Conference Report No. 104-458, 201 (1996), and noting that residents’ concerns cannot be considered if the fears are animated by concerns over the health effects caused by RF emissions).

⁸ *Id.* at 1159-60 (citing *Cellular Tel. Co. v. Town of Oyster Bay*, 116 F.3d 490, 495 (2d Cir. 1999)).

⁹ See *California RSA No. 4 v. Madera County*, 332 F.Supp.2d 1291, 1309 (E.D. Cal. 2003) (citing *Omnipoint Corp. v. Zoning Hearing Bd.*, 181 F.3d 403, 409 (3d Cir.1999)).

¹⁰ *Id.* at 1308 (citing *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2nd Cir. 1999), *Telespectrum v. Public Service Com'n. of Kentucky*, 227 F.3d 414 (6th Cir. 2000), and *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1219 (11th Cir. 2002)).

by substantial evidence. This resident submitted a photograph of AT&T's mockup for the Proposed Facility that depicts the bell tower rising slightly into a view from his property (see Attachment E). He asserted that the Proposed Facility would partially block his bay view. Church members who were invited onto this resident's property took a photo from the very same vantage point (see Attachment E). That photo, which was also provided for the County's consideration, shows that the resident's view impact of the bell tower was greatly exaggerated by zooming in to a small portion of his much wider view. The Church's photo demonstrates quite clearly that the bell tower will be hardly noticeable across the resident's view.

Last month, the resident made clear that his primary concern is the height of existing trees on the church property that impacts a portion of his bay view. In fact, the resident agreed to withdraw his opposition to AT&T's application if the Church promised to trim those trees. ~~Not only did the Church agree, AT&T had agreed to foot the five-figure bill for the tree trimming. Unfortunately, the resident backed out of the agreement without warning the day of the hearing.~~ But the resident's annoyance with the Church's trees is no reason to deny AT&T's application. His redirected complaints about the bell tower are too general to amount to substantial evidence and are contradicted by the non-zoomed photograph of his view with the mock-up in place.

The Act also prohibits a local government from denying an application for a wireless telecommunications facility where doing so would "prohibit or have the effect of prohibiting the provision of personal wireless services."¹¹ Courts have found an "effective prohibition" exists where a wireless provider demonstrates (1) a significant gap in wireless service coverage, and (2) that the proposed facility would provide the "least intrusive means," in relation to the land use values embodied in local regulations, to provide the service coverage necessary to fill that gap.¹² Under this judicial test, if a wireless provider satisfies both of these requirements, state and local standards that would otherwise be sufficient to permit denial of the facility are preempted, and the municipality must approve the wireless facility.¹³ When a wireless provider presents evidence of a significant gap and the absence of a less intrusive alternative, the burden shifts to the local government to prove that a less intrusive alternative exists. In order to meet this burden (and overcome the presumption in favor of federal preemption), the local government must show that another alternative is available that fills the significant gap in coverage, that it is technologically feasible, and that it is "less intrusive" than the proposed facility.¹⁴

More recently, the FCC has confirmed its rulings that an effective prohibition occurs whenever the decision of a local government materially inhibits wireless services.¹⁵ The FCC explained that the "effective prohibition analysis focuses on the service the provider wishes to

¹¹ 47 U.S.C. §332(c)(7)(B)(i)(II).

¹² See e.g., *Metro PCS, Inc.*, 400 F.3d at 734-35; *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 726 (9th Cir. 2009).

¹³ See *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 999 (9th Cir. 2009).

¹⁴ *Id.* at 998-99.

¹⁵ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order*, FCC 18-133 (September 27, 2018) ("*Infrastructure Order*") at ¶¶ 34-42 (FCC rejects the need for wireless providers to meet judicially-created coverage gap and least intrusive means tests); see also, *In the Matter of California Payphone Association Petition for Preemption, Etc.*, Opinion and Order, FCC 97-251, 12 FCC Rcd 14191 (July 17, 1997).

provide, incorporating the capabilities and performance characteristics it wishes to employ, including facilities deployment to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless service for the benefit of the public.”¹⁶ Thus, a local government “could materially inhibit service in numerous ways – not only by rendering a service provider unable to provide existing service in a new geographic area or by restricting the entry of a new provider in providing service in a particular area, but also by materially inhibiting the introduction of new services or the improvement of existing services.”¹⁷

Here, AT&T has demonstrated its significant service coverage gap and that it seeks the least intrusive means to close that gap. AT&T needs to construct the Proposed Facility to provide and improve wireless services to this portion of Marin County. As AT&T’s Radio Frequency Statement shows, the Proposed Facility is necessary to provide LTE service, and AT&T’s radio frequency propagation maps that are exhibits to the Radio Frequency Statement depict the service gap that AT&T is experiencing in this portion of Marin County. These maps show that AT&T lacks adequate wireless service in this portion of the County, and the Radio Frequency Statement explains how the Proposed Facility will close that gap.

AT&T has worked hard to identify the right solution to its service needs in the County. Specific search areas for the Proposed Facility were developed by radio frequency design engineers who, as the Radio Frequency Statement explains, rely on complex tools and data sources to find suitable locations from a network design standpoint. AT&T investigated alternative sites and designs, but none could serve as a feasible alternative. Thus, AT&T identified the Proposed Facility as the best available and least intrusive means to address its needs to improve wireless services. Denying AT&T’s application will effectively prohibit vital wireless services. Accordingly, the County must approve AT&T’s application for the Proposed Facility as designed or with the modified design that County Staff prefers.

Conclusion

AT&T is diligently seeking to upgrade its network to provide and improve wireless services to this part of Marin County. County Staff correctly found that AT&T’s design and proposed solution meets the County’s standards. AT&T has shown that federal law strongly supports (indeed, mandates) approval, and there has been no substantial evidence proffered on which the County could deny AT&T’s application. I urge the Planning Commission to approve the appeal and AT&T’s application.

Sincerely,

/s/ John di Bene

John di Bene

¹⁶ *Infrastructure Order* at n. 95.

¹⁷ *Id.* at ¶ 37.

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Attachment A: AT&T Radio Frequency Statement
Attachment B: Alternative Sites Analysis
Attachment C: St. Luke Cell Tower Location Selection
Attachment D: Photo Simulations
Attachment E: Photographs of Mockup
Attachment F: Alternative Bell Tower Design Drawings

cc: Brian E. Washington, Esq., County Counsel
Immanuel Bereket, Senior Planner