

MARIN COUNTY BOARD OF SUPERVISORS

RESOLUTION NO. _____

A RESOLUTION DENYING THE JONES APPEAL AND AFFIRMING THE PLANNING COMMISSION'S DECISION TO DENY THE PRESBYTERY OF THE REDWOODS (AT&T) CONDITIONAL USE PERMIT AND DESIGN REVIEW
10 BAYVIEW DRIVE, SAN RAFAEL
ASSESSOR'S PARCEL: 186-132-26

SECTION I: FINDINGS

1. **WHEREAS**, the applicant, Epic Wireless LLC, on behalf of AT&T Wireless and the property owner, is requesting Use Permit and Design Review approval to construct a new 33 foot five inch tall wireless communications facility (WCF) disguised as a bell tower on the grounds of the St. Luke Presbyterian Church lot located in San Rafael. The WCF project entails building a new 12 foot by 12 foot wide and 33 foot five inch tall faux bell tower structure at the front of the church to house and camouflage nine-panel antennas (three sets of three antennas), 15 relay radio units (RRUs) and associated equipment cabinets. The proposed structure would be set back at least 65 feet from all property lines. The WCF and associated equipment would be installed within the proposed faux bell tower and would provide 4G and LTE wireless service. The property is located at 10 Bayview Drive, San Rafael, further identified as Assessor's Parcel 186-132-26.
2. **WHEREAS**, on May 28, 2020, the Marin County Deputy Zoning Administrator held a duly noticed public hearing to take public testimony and consider the project, and denied the project.
3. **WHEREAS**, on June 4, 2020, the applicant submitted a timely appeal of the Presbytery of the Redwood (AT&T) Use Permit and Design Review denial. The appeal letter was amended on June 11, 2020.
4. **WHEREAS**, on July 2020, the Marin County Planning Commission was scheduled to hold a duly noticed public hearing to take public testimony and consider the project, and the hearing was postponed at the applicant's request. As part of the postponement, the applicant agreed to extend the Federally mandated deadline (also known as shot-clock) to October 31, 2020, during which time any appeal to the Board of Supervisors must occur.
5. **WHEREAS**, the applicant submitted a revised project to the Marin County Deputy Zoning Administrator at the hearing for consideration and to the Planning Commission two days prior to the hearing without the required technical studies for evaluation, including but not limited to photo-simulations, radiofrequency report, and noise analysis.
6. **WHEREAS**, the revised projects the applicant submitted are not the subject matter of this appeal.

7. **WHEREAS**, on September 28, 2020, the Marin County Planning Commission held a duly noticed public hearing to take public testimony and consider the project, denied the appeal by the applicant and upheld the Deputy Zoning Administrator's denial of the project.

8. **WHEREAS**, on October 8, 2020, Carl Jones, an AT&T Agent, submitted a timely appeal of the Presbytery of the Redwood (AT&T) Use Permit and Design Review denial.

9. **WHEREAS**, on October 13, 2020, the Marin County Board of Supervisors held a duly noticed public hearing to consider the merits of the project and the bases of appeal, and to take public testimony related to the project.

10. **WHEREAS**, the bases of appeal are insufficient to overturn the Planning Commission's decision, for the reasons discussed below.

A. The applicant asserts that the Planning Commission denied the application following a public hearing where misplaced concerns about radiofrequency emissions predominated the public discussion.

Federal law prohibits cities and counties from considering radiofrequency ("RF") emissions as a basis for denying or regulating wireless facilities if (as is the case here) the applicant has demonstrated that the proposed wireless facility complies with the Federal Communications Commission's (FCC) RF emissions regulations. At the hearing, and during the deliberation process, the Planning Commission noted that health concerns are not a factor to consider whether the proposed facility complies with relevant County laws related to design and placement. Although there was a fair amount of public comment related to potential health concerns as a result of prolonged exposure to electromagnetic field (EMF) and RF due to the project, the Planning Commission did not deny the project on the basis of health concerns.

B. The applicant asserts that the proposed project would address AT&T's coverage gaps in a visually unobtrusive manner.

The topography in the area slopes up from the south to north, from the San Rafael Bay to the north to the project site and beyond. Available views are both immediate and distant in nature, including a view of San Rafael Bay, the San Rafael Bridge, distant cities, distinctive geologic features such as the East and West Marin Islands, Marin Islands National Wildlife Refuge, hillside terrain, wooded canyons, ridges or bodies of water. Since the existing development on the church site was done in a manner that was sensitive to preserving the views enjoyed by the properties to the north, northwest, and northeast, varying degrees of views are available and enjoyed by these properties.

The photo-simulations report prepared and submitted by the applicant demonstrates that views to the north would not be affected due to significant topographical change, and existing trees would conceal the proposed site when viewed from Point San Pedro Road or Beach Drive to the south. However, the applicant did not prepare, nor submit, photo-simulations of views to the south, southwest, and southeast, either from private properties or from Bayview Drive. Further, the story-poles installed on the site demonstrate that the proposed bell tower would be prominently visible from Bayview Drive (north), and would permanently impair and degrade views to the south. Unlike the narrower church steeple located a mere few feet away from the proposed structure, the proposed structure would be

placed in a manner that would cause degradation to views to the south, southwest and southwest.

The County's Telecommunications Facilities Policy Plan (TFPP) includes objectives, programs and policies intended to preserve and minimize impacts to scenic views, including Policy VIS 2.2, Program VIS 2.2.8, which mandate that new structures must be designed to be architecturally compatible with surrounding structures using appropriate techniques to hide, disguise, and/or blend into the surrounding environment, including landscaping, color, and other methods to minimize the facility's visual impact as well as be compatible with the architectural character of the surrounding buildings or structures in terms of color, size, proportion, style, and quality. The proposed tower is inconsistent with the TFPP Policy VIS 2.1 because it results in visual impairments.

Finally, the applicant alleges it has exhaustively examined alternative sites. There is nothing in the record from the applicants to demonstrate that, for example, other commercial properties are unavailable. Similarly, no analysis has been provided by the applicant to demonstrate why collocation on existing water tanks within the City of San Rafael is not viable or technically impossible or unavailable for collocation. The applicant submitted a revised design to the Deputy Zoning Administrator at the hearing, and submitted revised plans to the Planning Commission two days prior to the hearing. Both of these revised plans effectively concede that the application that is the actual subject of the appeal (while also not recommended for approval) is not the "least intrusive."

C. The applicant asserts that the location of the facility on the site would be the least intrusive.

The obtrusiveness of the proposed facility might be reduced if the equipment cabinets could be located underground, at the ground-level or at a lower elevation below the roofline while antennas and other essential receptors are attached to the existing church steeple. Another less intrusive design the applicant does not seem to have considered is a well-crafted monopine antenna structure, located amongst the mature trees along the southern property line.

The details of the proposed design are not aesthetically acceptable for a residential area as the design would result in a project that is incompatible with the existing structures on the site as well as the surrounding residential neighborhood and would cause irreversible impairment to distinct views. Further, the applicant's own photo-simulations and Alternative Site Analysis failed to consider other design alternatives such as monopole-type installations on the lowest point of the site or attachments to the existing steeple.

D. The applicant asserts that the Planning Commission's denial of the proposed project constitutes an effective prohibition.

Considerations of aesthetics in a denial of an application for a wireless facility are permissible when based on substantial evidence in the record. However, a denial based on aesthetics would not be permissible if such denial would result in an effective prohibition. Under 47 USC. Section 332 ("Section 332"), a local government cannot regulate the placement, construction, and modification of personal wireless service facilities where such regulation has the effect of actually or effectively prohibiting service. A decision, a regulation, or application denial, prohibits or has the effect of prohibiting the provision of

personal wireless services within the meaning of Federal law if it: (1) bans the provision of personal wireless services outright or (2) has effectively prohibited the provision of such services. Showing the mere potential for prohibition is not sufficient to overcome local discretionary review power.

The Planning Commission's decision did not permanently preclude AT&T, or any other wireless provider for that matter, from this location. Instead, the denial is specific to this application and is based on aesthetics and design compatibility. The property owner and AT&T can redesign the proposed wireless facility to better fit into the site and community and minimize visual impacts if they choose to as they have been informed.

No evidence has been provided by the applicant to demonstrate that another design, such as a monopine facility, attachment to the existing church steeple, or replacement of the church steeple, would be technically and physically infeasible.

E. The denial was not based on substantial evidence, as required by 47 USC. Section 332(c)(7)(B)(iii).

The "substantial evidence" test is met by findings that are "authorized by applicable local regulations and ... supported by a reasonable amount of evidence (i.e., more than a 'scintilla' but not necessarily a preponderance.)" The findings by the Deputy Zoning Administrator meet this substantial evidence test, and thus the grounds for appeal cited by the applicant are not valid. As set forth in the written findings, the County considers the visual appeal of a wireless facility to be comparatively more sensitive in residential areas and comparatively less sensitive for industrial and sparsely populated rural areas. In addition, the Planning Commission found that the proposed equipment is not designed in a manner compatible with the church on the property and the nearby residential areas where views would be impacted.

F. The denial results in a prohibition of service and therefore is prohibited by 47 U.S.C. Section 332(c)(7)(B)(i)(II).

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. There is no bright-line rule regarding when a gap is "significant," and the determination is based on a fact-specific analysis. Staff has accepted the applicant's representation that there is an existing a gap in service.

To support construction of a facility to close a significant gap, the provider must demonstrate that the manner in which it proposes to fill the significant gap in service is the "least intrusive" means. To do so the provider must be able to show that it has made a good faith effort to identify and evaluate less intrusive alternatives, such as consideration of less sensitive sites, alternative system designs, alternative tower designs, placement of antennas on existing structures, etc.

The applicant did not sufficiently evaluate other technically feasible and potentially available design alternatives, that would likely be less visually intrusive. If the applicant does not demonstrate that they have evaluated all available design options, the "least intrusive means" test will continue to apply, along with the County's ability to manage aesthetics that

most closely conform to the local values as expressed in local law. Therefore, denial of the proposed design does not constitute generally a prohibition of service under 47 U.S.C. 332(c)(7).

11. **WHEREAS**, projects that are denied are exempt from environmental review under Section 15061 (b)(4) of the California Environmental Quality Act.

12. **WHEREAS**, the project is inconsistent with the Marin County Telecommunications Facilities Policy Plan (TFPP) for the following reasons:

A. The TFPP states that wireless telecommunications facilities should be sited to avoid or minimize land use conflicts. The TFPP policies establish a general preference for non-residential sites for wireless facilities. TFPP policy LU 1.4 ranks location preferences in seven categories:

1. Industrial sites
2. Commercial sites
3. Public facilities sites
4. Agricultural sites
5. Mixed use sites
6. Open space and recreational sites
7. Residential sites

The preferred priority location for placement of wireless facility is based on sites, rather than zoning districts. The site for the proposed wireless facility is developed with a church, which is an institutional use similar to public facilities and commercial sites in terms of preferences. However, the design of the proposed project itself is inconsistent with the goals and policies contained in the TFPP. Specifically, the appellants failed to evaluate other design alternatives, such as a monopole structure or attachment to the existing church steeple, as both options would potentially provide the least intrusive design. The applicant did not demonstrate that other technically feasible and potentially available design alternatives would be not be less visually intrusive than the proposed design. Therefore, the denial is specific to this application and is based on aesthetics and design compatibility.

B. The facility would allow AT&T to provide communications services for the area and would allow the carrier to continue to provide a reliable source of wireless communications to residents, businesses, and emergency service providers in the County.

The service (coverage) maps for the application show that there is low coverage for the surrounding area and there are no buildings or existing monopoles for co-location to achieve the required coverage results. While the site is zoned residential, it has been used as a religious facility. The proposed tower would provide improved coverage for the surrounding area and benefit the local community and public services.

The least preferred location, as set forth in the TFPP, is a residential site located in a residential neighborhood. Although the subject site is not residential, it is in a residential neighborhood. Therefore, it is particularly important that the design be compatible with the surrounding residential community. The applicant's photo-simulations and Alternative Site Analysis fail to sufficiently evaluate other possible designs.

- C. The applicant submitted a Radio Frequency Emissions Compliance Report, prepared by Waterford Consultants, LLC., dated February 3, 2020, which concludes that the proposed facility would not result in significant risks with respect to human exposure to RF and EMF radiation because the proposed facility would generate maximum ambient radio frequency levels that are below the applicable public exposure limit established by the Federal Communications Commission (FCC).
- D. Visual and aesthetic compatibility policies VIS 1 and 2 specify that telecommunications facilities should be sited and designed to avoid or minimize adverse visual effects. The TFPP also encourages stealth design to minimize visual effects. The project is not sited, nor designed, in a manner to avoid or minimize adverse visual impacts. The story-pole demonstrates that the proposed bell tower would be prominently visible from Bayview Drive (north) and the residences to the north, unlike the narrower church steeple located a mere few feet away from the proposed structure. In addition, views to the south, southwest and southwest would be impaired.
- E. TFPP policy OI 1 requires that telecommunications facilities be constructed, maintained and operated in a manner that does not adversely affect public safety or result in noise or traffic impacts. Noise levels associated with the operation of the facility would be minimal. With the exception of routine maintenance visits by a cellular site technician, the facility would not generate other traffic trips to the property. Therefore, the proposed facility would neither generate significant levels of noise nor traffic.

13. **WHEREAS**, the project is inconsistent with the mandatory findings for Conditional Use Permit approval (Marin County Code Section 22.48.040).

A. The proposed use is allowed, as a conditional use, within the subject zoning district and complies with the applicable provisions of this Chapter.

The site is zoned R1-B4 (Single-Family Residential Combined District) zoning district but is used as a religious institution. A wireless facility is permitted at this location subject to a conditional use permit under Marin County Code Section 22.10.030. Although the site is suitable for the project as it would allow for generous setbacks from all property lines, and has existing mature trees and vegetation along the perimeter of the site which would further screen a wireless facility from the right-of-way, the proposed project is inconsistent with the goals and policies contained in the TFPP. Specifically, the proposed development would be visually intrusive and would adversely affect views from surrounding properties.

B. The design, location, and size of the proposed use are compatible with the existing and future land uses in the vicinity.

The proposed project is inconsistent with this finding because the design of the wireless facility is incompatible with the existing church on the property and the surrounding residential neighborhood due its placement on the site and poor design. The project, as proposed, would be in front of the sanctuary building, and is not architecturally integrated into the building and does not represent the least intrusive design to accomplish the project's goals.

- C. That granting the Conditional Use Permit will be detrimental to the public interest, health, safety, convenience, or welfare of the County, or injurious to the property or improvements in the vicinity and zoning district in which the real property is located.**

The proposed project is inconsistent with this finding because the design of the project is incompatible with the site and would result in adverse impacts to views from surrounding properties.

14. **WHEREAS**, the project is inconsistent with the mandatory findings for Design Review approval (Marin County Code Section 22.42.060).

- A. The proposed development complies with either the Single-family or Multi-family Residential Design Guidelines, as applicable, the characteristics listed in Chapter 22.16 (Discretionary Development Standards) and any applicable standards of the special purpose combining districts provided in Chapter 22.14 of this Development Code.**

There are no specific standards provided in Chapter 22.14 or in the Single-Family Design Guidelines that apply to the proposed project. The Multi-family Residential Design Guidelines includes requirements for screening roof mounted wireless antennas, which does not apply in this case since the proposed project is not a roof mounted wireless facility.

The proposed project is inconsistent with the Discretionary Development Standards because it is not designed to avoid adversely affecting natural resources or the character of the local community. The project would not avoid or minimize visual impacts to the San Rafael Bay, the San Rafael Bridge, distant cities, distinctive geologic features such as the East and West Marin Islands, Marin Islands National Wildlife Refuge, hillside terrain, wooded canyons, ridges or bodies of water.

- B. The proposed development provides architectural design, massing, materials, and scale that are compatible with the site surroundings and the community.**

Visual and aesthetic compatibility policies VIS 1 and 2 specify that telecommunications facilities should be sited and designed to avoid or minimize adverse visual effects. The TFPP also encourages stealth design to minimize visual effects. The story-pole demonstrates that the proposed bell tower would be prominently visible from Bayview Drive (north) and the residences to the north, unlike the narrower church steeple located a few feet away from the proposed structure. Views to the south and southwest would also be impaired.

- C. The proposed development results in site layout and design that will not eliminate significant sun and light exposure or result in light pollution and glare; will not eliminate primary views and vistas; and will not eliminate privacy enjoyed on adjacent properties.**

While the proposed project would not impact privacy enjoyed by adjacent properties, the project is not sited, nor designed, in a manner to avoid or minimize adverse visual impacts. In fact, the proposal would cause irreversible impairment to distinct views due to its placement on the site and the massing of the proposed structure. Further, the applicant's own photo-simulations and

Alternative Site Analysis failed to consider other design alternatives such as monopole-type installations on the lowest point of the site or attachments to the existing steeple.

D. The proposed development will not adversely affect and will enhance where appropriate those rights-of-way, streetscapes, and pathways for circulation passing through, fronting on, or leading to the property.

The proposed project is not expected to result in any permanent impacts to public rights-of-way, streetscapes, and pathways for circulation because the project would occur entirely within the subject site, and no off-site improvements are proposed.

E. The proposed development will provide appropriate separation between buildings, retain healthy native vegetation and other natural features, and be adequately landscaped consistent with fire safety requirements.

Although the site is suitable for the project as it would allow for generous setbacks from all property lines, and has existing mature trees and vegetation along the perimeter of the site, the project as designed would cause degradation to views to the south, southwest and southwest due to poor design and placement. Specifically, the proposed development would be visually intrusive and adversely affect views from surrounding properties.

SECTION II: ACTION

NOW THEREFORE, BE IT RESOLVED that the Marin County Board of Supervisors denies the appeal and sustains the Planning Commission's decision to deny the Presbytery of the Redwoods (AT&T) Conditional Use Permit and Design Review.

SECTION III: VOTE

PASSED AND ADOPTED at a regular meeting of the Board of Supervisors of the County of Marin, State of California, on the 13th day of October, 2020, by the following vote to wit:

AYES: SUPERVISORS

NOES:

ABSENT:

KATIE RICE, PRESIDENT
MARIN COUNTY BOARD OF SUPERVISORS

ATTEST:

Matthew H. Hymel
Clerk of the Board of Supervisors

