City of Culver City

Staff Report Details (With Text)

File #:	22-822	**Version:**	1	**Name:**	Appeal of the Administrative Approval of Wireless Telecommunications Facilities Encroachment Permits to AT&T for 1) 5770 Uplander Way, No. U19-0441, and 2) 5839 Green Valley Circle, No. U19-0439, and 3) 6174 Buckingham Parkway, No. U19-0443, and 4) Staff'
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Title:	CC - PUBLIC HEARING: Appeal of the Administrative Approval of Wireless Telecommunications Facilities Encroachment Permits to AT&T for 1) 5770 Uplander Way, Permit No. U19-0441, and 2) 5839 Green Valley Circle, Permit No. U19-0439, and 3) 6174 Buckingham Parkway, Permit No. U19-0443.				
Sponsors:					
Indexes:					
Code sections:					
Attachments:	1. 2022_05_23 ATT1 Application Approvals.pdf, 2. 2022_05_23 ATT2 Appeal.pdf, 3. 2022_05_23 ATT3 Independent Analysis Performed by CTC.pdf				

Date	Ver.	Action By	Action	Result
5/23/2022	1	City Council Meeting Agenda		
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CC - PUBLIC HEARING: Appeal of the Administrative Approval of Wireless Telecommunications Facilities Encroachment Permits to AT&T for 1) 5770 Uplander Way, Permit No. U19-0441, and 2) 5839 Green Valley Circle, Permit No. U19-0439, and 3) 6174 Buckingham Parkway, Permit No. U19-0443.

Meeting Date: May 23, 2022

Contact Person/Dept: Joe Susca/Public Works-Administration
Phone Number: 310-253-5636

Fiscal Impact: Yes [] No [X] **General Fund:** Yes [] No [X] **Attachments:** [X]

Commission Action Required: Yes [] No [X] **Date:**

Public Notification: (E-Mail) Meetings and Agendas - City Council (05/18/2022); (E-Mail) Evelina Baras, Appellant (03/23/2022 and 04/25/2022, and 05/03/2022); Ursula Moran, AT&T External Affairs (03/23/2022 and 04/25/2022 and 05/03/2022)

Department Approval: Yanni Demitri (03/15/2022)

RECOMMENDATION

Staff recommends the City Council consider the appeal by Fox Hills resident Evelina Baras (the "Appellant") of staff's approval of three American Telephone and Telegraph (AT&T) wireless telecommunications facilities encroachment permits located at 1) 5770 Uplander Way, Permit No. U19-0441; and 2) 5839 Green Valley Circle, Permit No. U19-0439; and 3) 6174 Buckingham Parkway, Permit No. U19-0443, and render a decision on each of the three applications by either:

1. Denying one or more of the appeals and approving, respectively, one or more of AT&T's wireless encroachment permits with the same conditions as the staff approval or with modified conditions, and adopting a finding that each of the approvals is categorically exempt from CEQA pursuant to CEQA Guidelines §15303(e); **OR**

2. Granting one or more of the appeals and denying, respectively, one or more of AT&T's wireless encroachment permit applications for reasons specified by the City Council.

PROCEDURES

1. Mayor calls on staff for a staff report and City Council Members pose questions to staff as desired.
2. Mayor opens a public hearing, providing the Appellant the first opportunity to speak, followed by the Applicant and then the general public.
3. Applicant and Appellant are given one final opportunity to provide rebuttal comments.
4. Mayor seeks a motion to close the public hearing after all testimony has been presented.
5. City Council discusses the matter and arrives at its decision.

BACKGROUND

Wireless carriers are considered "telephone corporations" under section 7901 of the California Public Utilities Code, permitting them to install equipment within the public rights-of-way (PROW). Under sections 7901 and 7901.1, however, cities maintain the ability to reasonably control the time, place, and manner in which wireless facilities are installed and has the authority to regulate their aesthetics.

The typical small cell equipment site is comprised of one or more antennas and radios and related equipment mounted upon a pole that is connected to a fiber optic cable backhaul and a power source. Some small cell sites include electric meters, and/or contain batteries to operate the equipment in the event of a power outage.

On October 28-29, 2019, AT&T submitted four wireless telecommunications facility applications to obtain encroachment permits for the installation of small cell equipment upon four City-owned streetlights in the Fox Hills area (the "wireless facilities"). In each instance, AT&T proposed to replace the existing streetlights with stealth integrated pole designs. As discussed below, one application was later withdrawn, and the remaining three are the subject of this appeal.

Per the City's requirements, AT&T submitted site plans, equipment diagrams (the equipment is the

same for each of the locations, which include Ericcson brand model 4402 and/or 2205 radios), integrated street light replacement specifications (all of which are Davit brand poles with matching shrouds), and analyses related to each of their visual impacts, noise impacts, and their structural calculations and specifications.

AT&T also submitted Radio Frequency (RF) emission reports prepared and signed by an independent California-registered electrical engineer demonstrating that the RF emissions from the wireless facilities comply with FCC guidelines that limit public exposure to RF emissions. AT&T also provided a minimum of two alternative locations for each of their placements. In evaluating the alternative sites, AT&T stated, and staff concurred, that the alternative locations in the immediate vicinity were all closer to residential dwellings and as such, they would have a greater visual impact upon residents since two sites being proposed by AT&T are adjacent to commercial parking lots and one is adjacent to Fox Hills Park. (To view the alternative sites, see pages 20-28, 83-91, and 144-153 of Attachment No. 1 *Application Approvals*).

Initially, staff determined each of the applications was incomplete. However, through a submit and resubmit-with-changes process, AT&T eventually responded with submittals that were deemed complete. Per the City's requirements, AT&T mailed notification letters via U.S. Post to all persons within 500' of each location and affixed posters upon the streetlight poles of the proposed small cell sites announcing their intention to install their wireless facilities. In response to the public notifications, some residents voiced concerns about the wireless facilities, and staff took the lead to work with AT&T and those residents to address them. As a result of one resident's objection to one site, AT&T agreed to relocate that site, by building a new Stand-Alone Pole, next to a parking facility which is located across the street from the concerned resident's home. As a result of this compromise, that wireless facility will now be placed further away from the resident's dwelling, without affecting AT&T's service objective, and the affected resident was pleased with this solution. As a result, AT&T has withdrawn their original application and agreed to prepare and submit another application for the Stand-Alone Pole at the new location. That application has not yet been filed with the City and is not part of this appeal.

Staff's evaluation of the remaining three applications now under appeal concluded that AT&T complied with all of the City's requirements contained in Culver City Municipal Code ("CCMC") Section 11.20.065 to obtain an encroachment permit, and without exception, adhered to all of the City's applicable design and development standards. On February 14, 2022, staff approved each of the three applications (See Attachment 1 - *Application Approvals)*. On February 16, 2022, a timely appeal was filed objecting to staff's approval of all three wireless encroachment permits by the Appellant pursuant to CCMC Section 11.20.065.D.3 (the "Appeal"). To accommodate the Appellant's personal schedule, consideration of the Appeal was delayed twice until the May 23, 2022 City Council meeting.

DISCUSSION

Section 11.20.065.D.3(a) of the CCMC states the following:

> *Any person adversely affected by the decision of the Public Works Director/City Engineer pursuant to this Section may appeal the decision to the City Council, which may decide the issues de novo, and whose written decision will be the final decision of the City. Any appeal shall be conducted so that a timely written decision may be issued in compliance with any*

legally-required deadline.

The Appeal:

The Appeal includes claims of adverse effects regarding all three of the wireless facility locations collectively (See Attachment 2 - *Appeal).* Listed below are the claims contained in the Appeal and responses to each claim*:*

Claim:

Error in fact and dispute of findings that the above-reference wireless facilities are not detrimental to the public health, safety and welfare; these facilities meet applicable requirements and standards of state and federal law; sufficient probative evidence provided by the applicant to determine whether the information submitted in the application is true and correct.

D.C. Circuit Court of Appeals in its unanimous 8/9/2019 ruling in Case No.18- 1129, vacated the portion of Federal Communications Commission (FCC) Order 18-30 that exempted "small" cells from environmental review under the National Environmental Policy Act (NEPA) and historic preservation review under the National Historic Preservation Act (NHPA), and remanded the matter to the FCC.

The anticipated nationwide deployment of approximately 800,000 "small" WTFs by 2026 is clearly a federal undertaking, because the wireless industry licenses its wireless spectrum frequencies from the federal government. That makes every "small" WTF planned for the City of Culver City a part of this federal undertaking.

Therefore, this 8/9/2019 DC Circuit Court ruling renders every "small" WTF application in the City of Culver City incomplete, because the FCC has not yet addressed the remanded issue. Per this ruling every Small Cell WTF, including the three aforementioned facilities should undergo an environmental review. Such review was not submitted, the city was informed about it, but no evidence was produced and added to the applications. Thus, these facilities do not meet all the applicable requirements of federal law and applications should be denied.

Response:

AT&T's applications to the City were filed a couple months after this Court decision was rendered. The case referred to by the Appellant is *United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc'ns Comm'n*, 933 F.3d 728 (D.C. Cir. 2019). It is correct that federal agencies such as the FCC are required to comply with NEPA and NHPA in taking federal action related to wireless. It is also true that this Court decision overturned the FCC's attempt to exempt small wireless facilities from the federal rules requiring federal agency review of historical and environmental impacts. As a result, the existing federal rules for federal agency review continue to apply. However, the City is not a federal agency and is not subject to NEPA or NHPA. Therefore, this Court decision had and has no impact on the City's review obligations and does not render every small cell application in the City incomplete.

Claim:

The City determined that the installation is not detrimental to public health, safety and welfare, despite the large number of residents protesting and opposing these installations right across from homes, based on well documented property value reduction, disruption of the quiet enjoyment of our streets, complete lack of radiofrequency radiation monitoring and the obsolete FCC maximum exposure limits. See: Federal Court case, August 13th, 2021, regarding the FCC not addressing non-ionizing radiation health and environmental effects. There is a large body of peer-reviewed scientific studies documenting negative health effects of non-ionizing radiation on people, all living organisms and nature, at much lower than current FCC RF exposure limits. Although health threats cannot be grounds for denial of application, they should inform how seriously the application review is conducted because each small cell WTF installed is potentially detrimental to those exposed to it on a daily basis. Properties with views sell for 42 percent more than those without views. Specifically for the application AT&T Small Cell LDRAH-004A -6174 Buckingham Parkway, U19-0443 an antenna devalues the views over the park from the property. The public has sent letters and provided information about property devaluation when any size cellular antenna is placed in the vicinity of the home.

Response:

RF Emissions: The FCC is the regulatory agency that establishes RF guidelines nationwide to limit public exposure to emissions, and the City refers to those guidelines when evaluating RF emission reports submitted by applicants.

As mentioned above, AT&T submitted a report for each proposed facility that was evaluated by staff and determined to show compliance with FCC guidelines. In preparation for this Appeal hearing, the City hired Columbia Telecommunications Corporation ("CTC") to independently review the AT&T reports. CTC is an independent Information Technology and engineering consulting firm specializing in telecommunications with nearly 40 years of experience. CTC provides expert advisory services on the technical, strategic, and the business aspects of wireless telecommunications facilities to hundreds of local government clients nationwide. Staff assigned CTC the task of independently evaluating the RF emission reports submitted by AT&T to verify staff's conclusion that the proposed facilities for each of the three locations comply with FCC guidelines limiting public exposure to RF emissions. CTC reviewed the reports and concurred with staff's determination, concluding that:

"The supporting documentation AT&T includes engineering studies of RF field emissions prepared by the independent engineering consulting firm of Hammett & Edison (H&E). That study calculates the general public and occupational levels of RF exposure in the vicinity of the proposed facility and finds that it will be within the FCC's allowable exposure limits.

In summary, our independent calculations of RF exposure are fully consistent with those presented by H&E. Our findings for the 3 sites examined indicate that in the close proximity of those sites at or near the mount structure base at a 6 ft. elevation the

maximum exposure for the public is less than 5% of the FCC permissible limit. At the antenna elevation of 38' the direct line-of-sight public radiation extends 12' from the pole, the closest building is 35' from the wireless facility. We are not aware of any existing wireless facilities in the proximity of the 3 sites that would produce cumulative radiation to a level where the FCC guidelines would be exceeded." (See Attachment 3 - *Independent Analysis Performed by CTC*).

Reduced Property Values: The Appellant provided no support for the claim about property value reduction. Moreover, the concern appears to be tied closely to concerns about RF emissions exposure. The City may not deny a wireless facility application based on concern about RF emissions exposure if the facility complies with FCC guidelines*. As discussed above, here the evidence in the record and confirmed by CTC is that all three proposed facilities will comply with the FCC guidelines. To the extent the Appellant's concern about property values relates to aesthetics, the City's adopted Design and Development Standards ("Standards") require certain aesthetic requirements be observed that mitigate the visual impact small cell equipment create. The Davit brand integrated streetlight and matching shroud AT&T is proposing for each location adhere to those Standards. The integrated streetlights will house all the small cell equipment within them and complement the surrounding streetlights by matching their color, material, and finishes. To view the before/after photographic simulation images for each location, see pages 30-32, 92-95, and 152-157 of Attachment No. 1 *Application Approvals*.

(*In AT&T Wireless Servs. v. City of Carlsbad, 308 F. Supp. 2d 1148, 1161 (S.D. Cal. 2003). the city made a finding that the wireless facility would "negatively affect property values of nearby homes based upon the perceived fear of the health effects cause by the RF emissions." The court held against Carlsbad, ruling that cities may not regulate based on the "direct or indirect concerns over the health effects of RF." The court explained that a denial could not be based on substantial evidence (as required by law) "…if the fear of property value depreciation is based on concerns over the health effects caused by RF emissions.")

Disruption of the Quiet Enjoyment of our Streets: The independent noise impact studies submitted with each of the three applications concluded that the sound levels created by operating the small cell equipment does not exceed the limits established in Chapter 9.07 of the CCMC -- *Noise Regulations* or the limits established in the Noise Element of the City's General Plan.

Complete Lack of Radio Frequency Radiation Monitoring: The City can and does require a report from the applicant confirming that the proposed facility will comply with FCC RF emissions exposure guidelines. As noted earlier, AT&T submitted RF emission exposure reports, prepared and signed by an independent California-registered electrical engineer, demonstrating that the RF emissions from the wireless facilities will comply with FCC guidelines that limit public exposure to RF emissions. However, the City cannot require a wireless permit holder to engage in ongoing activities concerning RF emissions compliance, such as continuous monitoring and reporting. In a California case on this topic, the Court stated that requirements that purport to authorize the City to monitor and enforce the FCC's RF regulations "are invalid because they intrude on the preempted area of RF emissions." Crown *Castle USA Inc, v. City of Calabasas*, Superior Court of California, County of Los Angeles, Case No. BS140933, January 24, 2014 (Chalfant, J.). The City can undertake its own monitoring. Staff is in the process of hiring an RF emissions testing firm to conduct random tests to determine if installed facilities are operating in compliance with FCC

guidelines limiting public exposure. This testing will include the three sites that are the subject of this Appeal, if the Appeal is denied.

Claim:

The city staff expressed on multiple occasions during in person meetings and over email and phone communication that they will work with the applicant to find solutions that are acceptable both for the community and AT&T. As per city staff, AT&T agreed to have a meeting in the community to do a walk around and identify possible alternative site locations that would meet the carrier's objective. The AT&T representative and the Public Works Director confirmed on Nov 15, 2021 that they would be present at the meeting. On November 16, 2021, the Public Works Director did not attend and the AT&T sent another representative (Eukon Group Bardo Osorio), who per his own assertion was not qualified to evaluate any potential alternative sites, to be installed further away from residences. The city staff reassured the residents that it is working with AT&T on the meeting, however, neither in November, December, January or February did such a meeting occur. AT&T explained that the holidays did not allow for scheduling, yet after the holidays, they did not follow through. Finally, AT&T falsely stated that they already had a meeting on site (as explained earlier the meeting was not productive or helpful as their rep was not authorized or qualified to locate alternative sites) and would not be having another meeting.

The city had sufficient time to hire an independent consultant to research feasible alternative locations as they had more than 3 months to accomplish this task. They could have presented the result of such research to AT&T to expedite and aid in the process and avoid the long and fruitless wait for the walk through. When asked to list specific alternative sites offered for applicant review by the city, which the applicant denied as feasible, the Public Works Director did not produce such a list. Therefore, we conclude that the city did not provide specific alternative site options for the applicant to consider in lieu of the applicant's own lack of such efforts. There is a credibility issue with AT&T, as per their conduct.

Response:

Regarding the comments about meetings, AT&T complied with all of the public noticing requirements related to its applications. Meetings are not required though staff did try to facilitate meetings and the Appellant is correct that only one voluntary meeting was attended by AT&T.

Regarding alternatives, the City's application form requires AT&T to submit a minimum of two alternative locations to their proposed site in their application and AT&T did submit the required two alternatives for all three sites. Staff reviewed those alternative locations for placement which were in the vicinity of the proposed sites because small wireless facilities serve relatively small areas. All of the alternative locations provided were closer to residential dwellings and as such, would have caused a greater visual impact upon residents since AT&T's first choices are not as close to residential dwellings and are, instead, located adjacent to commercial parking lots or Fox Hills Park.

Claim:

Andrew Campanelli, the top telecom attorney in the nation, who has written the most

protective regulatory ordinances for wireless facilities, states "the agents of applicants seeking to build wireless facilities are known to submit patently false or materially misleading information and documentation to local zoning boards in support of applications seeking approvals for desired wireless facilities. The most common false documents proffered to local planning boards and zoning boards include things such as false or materially misleading propagation maps, patently false FCC compliance reports, false certifications of "need" and misleading and/or defective visual impact analyses, among others."

It is a fact that the wireless providers have been negligent and/or untruthful. Thus, blatantly trusting the applicant statements does not produce conclusive determination. On multiple occasions city staff stated that they "trust the applicant and thus do not feel the need" to inquire further evidence of the claims made by the applicant. The application review process is flawed as it does not require the City Engineer to critically analyze information provided and instead encourages complete reliance on the applicant's supposed integrity, not factual evidence.

Response:

The Appellant has not provided evidence that the information contained in the three AT&T applications are defective, false, or otherwise misleading, and staff has no independent reasons to believe that the applications contain false or misleading information. The City requires all wireless facility applicants to sign a City application, which application contains the following certification just above the signature line:

> *I (we) hereby certify under penalty of perjury that (1) after diligent investigation, the information provided pursuant to this Application Form is true, accurate, and complete to the best of my (our) knowledge and belief; and (2) upon completion of the work proposed, the permitted personal wireless services facility will comply with all applicable laws, regulation, practices or other requirements under federal, state, or local law, including, but not limited to, building and electrical codes, the FCC's radio frequency emissions standards, and the requirements of the Americans with Disabilities Act.*

Furthermore, the RF emissions report was prepared by an independent electrical engineer, who faces revocation of their license if it is proven that his/her findings in the RF analysis is incorrect or skewed.

Claim:

The TCA typically only requires approvals of applications for wireless facilities where the respective applicant establishes that it suffers from "a significant gap" in personal wireless services, and their proposed application is the least intrusive means of remedying such gap.

Significant Gap in Coverage and Least Intrusive Means to close a proven gap in coverage are defined by the United States Court of Appeals, Ninth Circuit in METROPCS v. The CITY AND COUNTY OF SAN FRANCISCO (http://caselaw.findlaw.com/us-9th-circuit/1406360.html): as the ability to make a call (a Telecommunications Services).

The U.S. Court of Appeals for the 9th Circuit's interpretation of the TCA is still the prevailing case law today. MetroPCS, Inc. v. City & County of San Francisco (9th Cir. 2005) 400 F.3d

715. Computer generated propagation maps alone cannot be admitted as evidence. Drive test data and maps for the significant gap of coverage and dropped calls logs for claims of capacity increase should be submitted with the application to be considered.

There was not enough probative evidence in the applications of a significant gap of coverage and that the chosen sites are the only feasible and least intrusive locations possible to close the gap. The reviewing authority failed to request sufficient hard data proof from the applicant to demonstrate that all the alternative sites options were considered and exhausted before requesting the placement of AT&T's chosen location.

Carriers such as AT&T are increasing the density of their wireless networks to provide faster video streaming and internet data. Cell phone towers and services are regulated under Title Two, in the Telecommunications Act. Cell towers are only for cell phone calls and texts, not for the internet of things, not for data transmission, which is regulated under Title One. Data transmission is already paid for by our taxes and should be wired aka Fiber Optics To The Premises (FTTP) for faster, more secure and safer internet downloads.

AT&T wants these Small WTF to improve capacity issues. Yet, there was no probative evidence in the application to substantiate this claim. Such bold and conclusory claims by an applicant that a potentially less intrusive alternative site cannot be used because it "would not meet" the applicant's "coverage objectives" should be uniformly rejected because such terminology is inherently meaningless.

Among the most important of "coverage objectives" desired by site developers is to place their facilities at the least expensive sites possible, irrespective of whatever adverse impacts they might inflict upon adjacent and nearby properties.

An applicant asserts a claim that a proposed wireless facility is necessary to remedy a capacity deficiency. The city did not require an applicant to provide probative evidence, that being hard data in the form of actual dropped call records from the carrier which purportedly suffers from the capacity deficiency being alleged. Similar to drive test results, dropped call records are inexpensive to provide, and provide accurate hard evidence of the existence or absence of a capacity deficiency in a carrier's personal wireless services. Wireless carriers possess dropped call data and can provide simple printouts reflecting the number, and percentage of dropped calls they sustained in any geographic area for any period of time. This data shows what percentage of calls in a specific geographic area are "a failed", meaning that their customers were unable to initiate, maintain and conclude calls without loss of service.

Thus, there is lack of findings of the sufficient probative evidence provided by the applicant to determine whether the information submitted in the application is true and correct.

Response:

AT&T's applications are for small wireless facilities* in the public right-of-way. As noted earlier, the City's authority to review these applications is limited by the FCC's Small Cell Order and state law (e.g., Pub. Util. 7901). The significant gap test discussed by the Appellant is not applicable to these applications because the FCC's Small Cell Order, adopted in 2018, and upheld by the Ninth Circuit, replaced the significant gap test with a materially inhibits test for small wireless facilities. As a result, the City cannot require wireless telecommunications firms to provide probative evidence

that a gap in coverage exists to justify the installation of small wireless facilities. Paragraph 37 of the FCC Small Cell Order provides "a state or local legal requirement could materially inhibit service in numerous ways-not only by rendering a service provider unable to provide an 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. Thus, an effective prohibition includes materially inhibiting additional services or improving existing services."

When wireless facilities are used for both voice and data communications (such as AT&T's three proposed small wireless facilities), the FCC has determined that they are regulated under Title II of the TCA which includes Section 332(c)(7)**. This means the City's decision on these applications is subject to the requirements in the FCC Small Cell Order (which interprets and applies Section 332(c)(7) and other provisions of Title II).

The City's application does not require any proof of an effective prohibition unless the applicant makes such a claim to justify a request for a waiver of the City's aesthetic standards. Since AT&T did not request any such waivers for any of its three applications, it did not need to demonstrate any effective prohibition.

The City's procedures require that wireless applicants submit justifications for their proposed placements of wireless facilities, consistent with the City's limited authority to regulate aesthetics (as discussed above), and a minimum of two alternative locations. AT&T submitted such justifications and alternatives for each of their three proposed sites. As such, AT&T has met the City's application requirements regarding justification and alternatives.

*CTC, the City's technical consultant confirmed this: "*Upon review of the application materials we have determined that each of the proposed facilities meets [Section 47 CFR 1.6002(l)] items (1)-(6) of the definition of Small Wireless Facility."* (See Attachment 3 - *Independent Analysis Performed by CTC).*

***See Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2017) (para. 190 states: *"Consistent with the statutory provisions and Commission precedent, we consider infrastructure that will be deployed for the provision of personal wireless services, including third -party facilities such as neutral-host deployments, to be 'facilities for the provision of personal wireless services' and therefore subject to section 332(c)(7) as 'personal wireless service facilities' even where such facilities also may be used for broadband Internet access services."*; upheld in relevant part in *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

Claim:

Last and not least, the applicant's proof of insurance is only required after the fact the application had already been approved. With each Small WTF approved the city increases the radiation pollution of the street and potentially exposes itself to costly lawsuits by the injured residents, since there is no insurance coverage for this occurrence in the applications. This must change now and starting with these applications, since the clause that "City bears no risk or liability as a result of the installations" is already in the ordinance. That is, unless the City Council is willing to answer to the public when people will start getting injured.

In closing, if these installations are to become operational, how often and who will be testing the RF emissions from these WTF's and how would the residents know that the testing was accurate?

Based on false, misleading or incomplete information in the applications, lack of a NEPA review and applicant's failure of keeping an agreement to meet in the field with the Fox Hill community members to look into acceptable and less intrusive alternative sites, the applications should not

have been approved.

To remedy the aforementioned lack of information, the Public Works Director/City Engineer or City Council could have done the following:

Conducted a review of these applications by an independent RF Engineer who works for a 3rd party without conflicts of interest to the carrier and the City, to confirm or disprove AT&T various claims, lacking probative evidence.

Modified the condition for the approval of these applications, dependent on AT&T giving good faith effort to provide alternative sites which are further away from the residences, to meet community's needs, as per their initial agreement (for the walk through meeting in Fox Hills). As per the city ordinance, "The approving authority (Public Works Director/City Engineer or City Council, as the case may be) may impose additional conditions, remove conditions, or otherwise modify the standard conditions applicable to a wireless encroachment permit in its sole discretion on a case-by-case basis."

The City Council unanimously agreed to consider updating the ordinance to create more protection for the residents, and the recent updated ordinance draft identifies 600 feet setback from schools, childcare facilities and parks. All the three approved application permits are within 600 feet of either a park or a school. And adding such modifications would adhere to the planned changes in the ordinance.

Response:

AT&T already has a certificate of insurance on file with the City that was provided when AT&T signed the City's General Terms and Conditions and Light Pole Facilities Addendum (which agreement is required, in addition to a wireless encroachment permit, to attach small cell equipment upon City-owned poles).

A City-approved encroachment permit is issued upon receipt of an applicant's certificate of insurance that complies with the City's insurance coverage requirements (among other items, such as evidence that they maintain an active business license). The City adopted Standard Conditions of Approval ("COA") for wireless encroachment permits that include insurance requirements (via City Council Resolution No. 2018-R109). Those conditions apply unless the approving authority chooses to modify them for a particular application approval. Those COAs were included in the three AT&T permit approvals issued by staff on February 14, 2022. Subsequently, on February 28, 2022, the City Council adopted enhanced insurance requirements that now require, among other things, coverage for claims of bodily injury sustained from excessive RF emissions. If the City Council denies the appeals and approves the three AT&T applications (or any one of them), the City Council can modify the COAs for the approved permits to include the enhanced insurance requirements.

The Appellant also requested that the City Council consider conditioning any approval of the three applications on compliance with a 600 feet setback from schools, licensed childcare facilities and parks. However, the FCC Small Cell Order requires the City may only apply reasonable aesthetic standards for the installation of wireless facilities, which may include locational standards, if they are published in advance of the applications. Although on February 28, 2022 the City Council did adopt revised Standards that added the City's preferred locations for placement of small wireless facilities, those preferences cannot be applied to these three applications since they were submitted in 2019, long before the current

location preferences were adopted.

FINDINGS REQUIRED FOR APPROVAL

CCMC Section 11.20.065(G)(1) provides the following findings are required for approval of a wireless encroachment permit for a small wireless facility:

1. *Findings required for approval.*

a. …the Public Works Director/City Engineer or City Council, as the case may be, shall approve an application if, on the basis of the application and other materials or evidence provided in review thereof, it finds the following:

i. The facility is not detrimental to the public health, safety, and welfare;

ii. The facility complies with this Section and all applicable design and development standards; and

iii. The facility meets applicable requirements and standards of State and Federal law.

FEDERAL REQUIREMENTS RELATED TO DENIAL OF WIRELESS PERMIT APPLICATIONS

Federal law requires that if a wireless facility application is denied, the denial decision must be "in writing and supported by substantial evidence contained in a written record." 47 U.S.C. Section 332 (c)(7)(B)(iii). The law also requires that the denial and the reasons for denial be issued essentially contemporaneously. *T-Mobile South, LLC v. City of Roswell, Ga*., 574 U.S. 293 (2015). Thus, if the City Council determines that the appeal should be granted, thereby denying one or more of AT&T's permit applications, the City Council should explain its denial of such permit application(s) by specifically indicating which finding(s) for approval cannot be made and the reasons such finding(s) cannot be made.

FISCAL ANALYSIS

There is no fiscal impact associated with denying or granting the Appeal.

ATTACHMENTS

1. 2022_05_23 ATT1 Application Approvals
2. 2022_05_23 ATT2 Appeal
3. 2022_05_23 ATT3 Independent Analysis Performed by CTC

MOTIONS

That the City Council:

If the Council intends to approve any applications:

1. Deny the appeal(s) and approve AT&T's wireless encroachment permits for *[insert as applicable]* 1) 5770 Uplander Way, Permit No. U19-0441, and/or 2) 5839 Green Valley Circle, Permit No. U19-0439, and/or 3) 6174 Buckingham Parkway, Permit No. U19-0443; and adopt a finding that each of them is categorically exempt from CEQA pursuant to CEQA Guidelines §15303(e). Further, these wireless encroachment permits shall be subject to:

    a. the same conditions in the existing staff approval; or

    b. the same conditions in the staff approval, except the insurance requirements shall be the those adopted by Resolution 2022-R020 on February 28, 2022;

OR

If the Council intends to deny any applications:

(*Note: If the City Council decides to deny any applications, the motion for denial should specifically indicate which finding(s) for approval cannot be made and the reasons such finding(s) cannot be made based on substantial evidence in the record. No CEQA analysis or determination is required for a denial.)*

2. Grant the appeal(s) and deny AT&T's wireless encroachment permits for *[insert as applicable]* 1) 5770 Uplander Way, Permit No. U19-0441, and/or 2) 5839 Green Valley Circle, Permit No. U19-0439, and/or 3) 6174 Buckingham Parkway, Permit No. U19-0443 because the following findings for approval cannot be made for the following reasons: *[insert as applicable*]