

Merced, CA

AT&T Site ID CVL02828

Appeal Statement – Appeal from Planning Commission Denial Resolution #4137

I write on behalf of New Cingular Wireless PCS, LLC, doing business as AT&T Mobility (AT&T), to appeal the recent decision by the City Planning Commission to deny AT&T's application for a conditional use permit to construct a stealth wireless telecommunications facility at 1717 East Olive Avenue in the City of Merced.

AT&T's proposed facility, which is designed to appear as a pine tree at the rear of the existing church parking area, was carefully designed and located to close a significant gap in AT&T's wireless service coverage. In addition to providing and improving critical 4G LTE and 5G services, the proposed facility will also provide dedicated service for first responders via FirstNet. FirstNet is the first-ever nationwide first-responder wireless network, which AT&T was selected by the federal government to build and manage.

AT&T's significant service coverage gap prevents it from providing reliable in-building and in-vehicle wireless services to hundreds of homes in several neighborhoods, community parks, an elementary school, local churches, and roads throughout this large portion of the city. These are industry-standard coverage goals, which the federal courts routinely uphold in the context of assessing when local governments violate federal law in denying wireless siting applications. In-building wireless coverage is especially important because more than 81% of California adults, and more than 98% of Californians under age 18, rely exclusively or primarily on wireless communications in their homes. In fact, the FCC collects and publishes data on 911 calls and reports that Californians place well over 20 million wireless calls to 911 each year.

AT&T's project team conducted a thorough search of properties in the target gap area. This was particularly challenging as the target gap area is largely residential. Potential collocation opportunities turned out not to be viable solutions. AT&T's most preferred site for a new freestanding facility was Rahilly Park. The city, however, declined to lease space to AT&T at this or other city parks in the target gap area. AT&T examined 10 alternatives and identified the proposed site as the only available and feasible candidate site.

The attached Alternative Sites Analysis, which was submitted as part of AT&T's application, provides details for each of the alternative properties considered. The city has not identified an available and feasible alternative. Denial of this CUP application would, therefore, violate federal law by effectively prohibiting AT&T from providing and improving wireless services. *See 47 U.S.C. § 332(c)(7)(B)(i)(II); T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987, 998-999 (9th Cir. 2009) (when provider demonstrates a significant gap in coverage and that its solution is the least intrusive means, burden shifts to locality to demonstrate existence of available, feasible, and less intrusive alternative).*

On the strength of AT&T's gap evidence, exhaustive search, City Staff approves of AT&T's design and location. City Staff, who diligently analyzed the proposed facility in context of the city's wireless siting regulations, specifically found that AT&T's CUP application is consistent with the Merced Municipal Code and Merced General Plan, including specific findings of

compliance with each and every design and development standard. City Staff also easily concluded that the Proposed Facility is categorically exempt under CEQA. City Staff thus recommended approval of AT&T's CUP application.

Residents voiced concerns primarily about the effects of radio frequency emissions. These concerns were expressed mainly as misplaced fears of purported health effects, and also indirectly as generalized concerns about impacts to property values. AT&T's facility, however, will comply with FCC rules regarding radio frequency emissions. In fact, AT&T submitted an engineering report to demonstrate compliance with the FCC's rules. Because AT&T demonstrated its proposed facility will comply with the FCC's rules, the city is preempted from considering these issues. *See* 47 U.S.C. § 332(c)(7)(B)(iv).

At the public hearing, the Planning Commission denied the project but did not articulate a specific basis for the denial. On October 7th, the Planning Commission issued its Resolution #4137, formally denying AT&T's CUP application and rejecting the categorical exemption under CEQA. The Planning Commission did not support its written denial with substantial evidence, as required under federal law. *See* 47 U.S.C. § 332(c)(7)(B)(iii). Instead, the Planning Commission simply concluded that the proposed facility did not meet unspecified city requirements.

AT&T's proposed facility, however, does indeed meet all applicable requirements for approval. It is the best available and least intrusive means by which AT&T can close its significant service coverage gap in this portion of the city. It is the minimum height necessary to close AT&T's significant service coverage gap. The stealth design will accomplish concealment, will not block scenic corridors, and will minimize visibility of the facility. It will appear as a pine tree at the rear of this church parking lot. AT&T is open to design conditions and has worked closely with City Staff on facility design.

To the extent the Planning Commission's Resolution #4137 may have intended to deny AT&T's application as somehow not qualifying for federal preemption, the Planning Commission failed to articulate its reasoning or any specific conclusion. For the sake of clarity, AT&T has demonstrated that denial will effectively prohibit AT&T from providing personal wireless service, which violated the Telecommunications Act, 47 U.S.C. § 332(c)(7)(B)(i)(II). The city has not met its reciprocal burden under the judicial test for effective prohibition because it did not identify any available, feasible, and less intrusive means.

The City Council has an opportunity now to right this wrong. We urge you to approve AT&T's appeal, find the project categorically exempt under CEQA, and approve AT&T's CUP application. City Council should approve AT&T's appeal and application expeditiously as the city is already in violation of the 150-day timeframe to act under federal law. *See* 47 U.S.C. § 332(c)(7)(B)(ii); 47 C.F.R. 1.6003(c)(iv). Indeed, under state law, AT&T could cause this application to be deemed approved. *See* Cal. Gov't Code § 65964.1(a). AT&T would rather work collaboratively with the city, and to that end will propose a tolling agreement to extend the city's deadline to a date certain under these laws. If agreed to, the city will no longer be in default if this timing requirement.

Alternative Sites Analysis



Proposed



view from E. Olive Avenue looking north at site

AT&T Mobility

Wireless Telecommunications Facility

At

Bear Creek Community Church

1717 E Olive Ave, Merced, CA 95340

Site ID: CVL02828

Introduction

New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (“AT&T”) has a significant gap in its service coverage in the City of Merced. AT&T proposes to install a new 55-foot-tall wireless communications facility (“WCF”) disguised as a monopine tree at the rear of the Bear Creek Community Church (“Proposed Facility”) as a means to fill AT&T’s gap in coverage in this portion of the city. This property is located in an (R-1-6) Low Density Residential zoning district in the city of Merced, County of Merced. The Proposed Facility consists of twelve panel antennas (three sets of four antennas) mounted on a pole and camouflaged as a monopine tree (“monopine”), with related equipment to be housed within a 6-foot-high sound barrier fenced enclosure installed with maintenance free PVC sound proof panels adjacent to the monopine tower. The Proposed Facility is designed to minimize visual impacts, blend within the existing environment, and the antennas will be painted green and obscured by the faux pine branches. The new site location will have very little negative effect on the aesthetic quality of its surroundings due to the existing church structure/s located on the property. Effectively the existing building/s will screen much of the facility from residences and the public right of way. The Proposed Facility is the least intrusive means to fill the significant gap of the alternatives investigated by AT&T as explained below.

Objective

AT&T Mobility has identified a significant gap in its service coverage in the City of Merced, Merced County in an area roughly bordered by E. Donna Dr to the north, McKee Rd to the east, Oregon Dr to the south, and Cherokee Ave to the west. The Proposed Facility will improve coverage to many dozens of homes in several neighborhoods, community parks, elementary school, local churches and other points of interest in the immediate vicinity. The service coverage in this portion of the city is described in the accompanying Radio Frequency propagation maps.

Methodology and Zoning Criteria

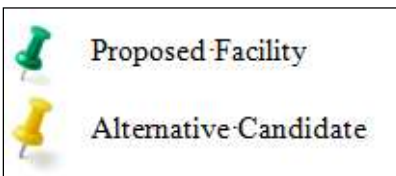
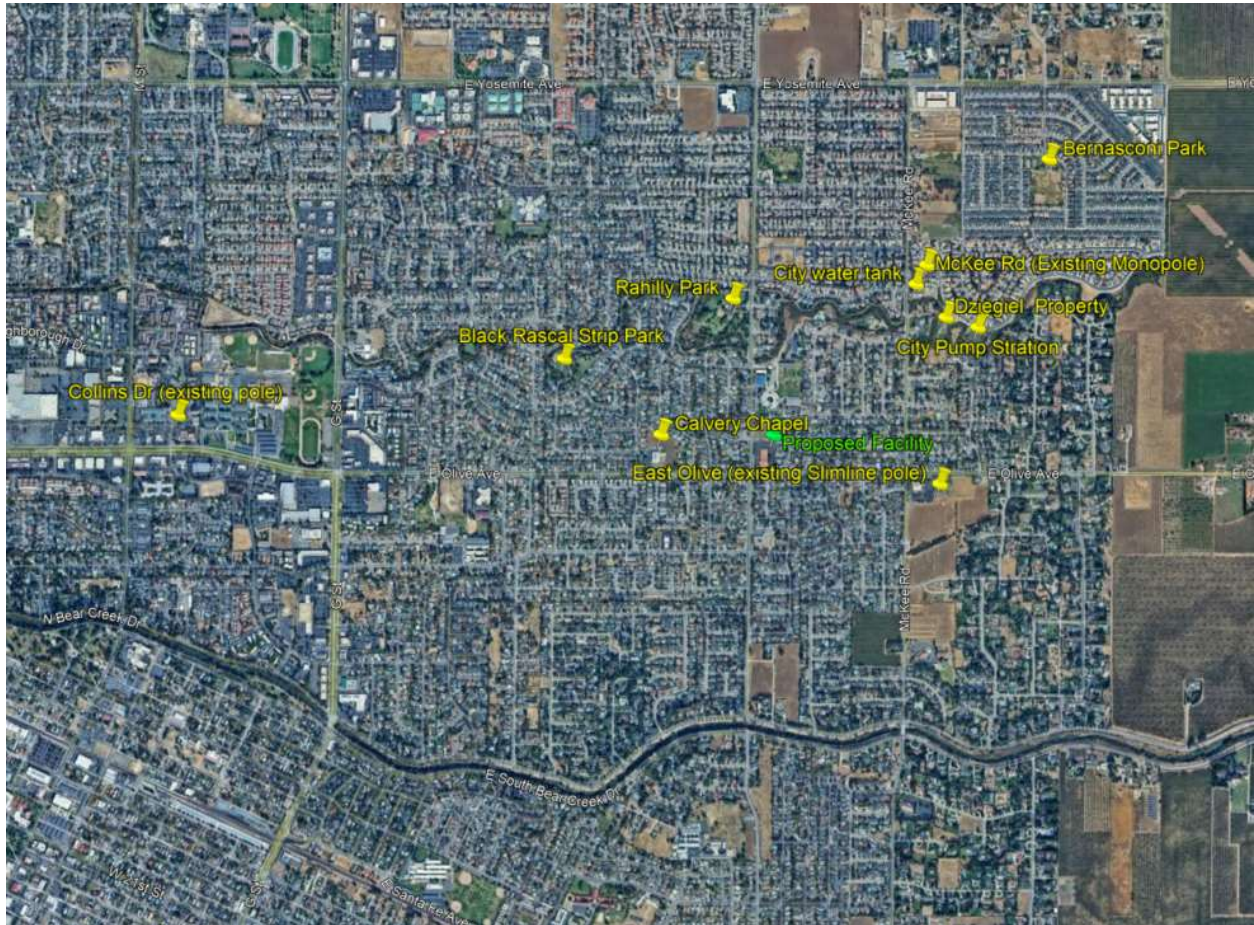
The location of a WCF to fill a significant gap in coverage is dependent upon topography, zoning, existing structures, collocation opportunities, available utilities, access and a willing landlord. Wireless communication is line-of-sight technology that requires WCFs to be in relatively close proximity to the wireless handsets to be served.

AT&T seeks to fill a significant gap in service coverage using the least intrusive means under the values expressed in the City of Merced Municipal Code. AT&T seeks to meet the Code requirements and provide the best available design by placing this Monopine WCF in an (R-1-6) Low Density Residential Use zone district at the minimum height needed to address the significant service coverage gap.

Analysis

AT&T investigated potential alternative sites for facilities to fill the identified coverage gap in this portion of the city. AT&T searched for, but did not find, feasible collocation opportunities in and around the coverage objective. Due to the need for antennas with a centerline height of (53) feet above ground level, AT&T proposed a stealth WCF in the form of a Monopine tower. The following map shows the locations of the Proposed Facility and the alternative sites that AT&T investigated. The alternatives are discussed in the analysis which follows.

Location of Candidate Sites



Proposed Facility – Bear Creek Community Church 1717 E Olive Ave, Merced, CA



Conclusion: Based upon location, a willing landlord and the superior coverage as shown in the AT&T Radio Frequency coverage service maps, the Proposed Facility is the least intrusive means for AT&T to meet its service coverage objective.

This (R-1-6) Low Density Residential Zoned District Use property is located at 1717 East Olive Ave, Merced, CA. AT&T proposes to install a 55-foot stealth monotree tower to camouflage its twelve antennas. The Proposed Facility is the best available design to minimize visual impacts in the area. The site location will have No negative effect on the aesthetic quality of its surroundings due to the existing church structure/s located on the property adjacent to the proposed site. Effectively the existing church building/s will screen much of the facility from residents and travelers in the area. The Proposed Facility is the least intrusive means to fill the significant gap of the alternatives investigated by AT&T.

Alternative 1 – McKee Rd (existing Monopole tower) 3360 McKee Rd, Merced, CA



Conclusion: Not Viable or available

The Existing 72 ft. tall Monopole tower is located approximately 0.56 miles northeast from the Proposed Facility. The existing Monopole tower is owned by Crown Castle Corporation and is Not viable due to unavailable tower space, structural capacity and insufficient ground lease space within the existing Crown Castle leased premises for AT&T's proposed equipment.

Alternative 2 – City water tank, McKee Rd, Merced, CA



Conclusion: Not available

The City of Merced owned water tank is located approximately 0.51 miles northeast of the proposed Facility. The city public works and engineering Dept were not interested in leasing antenna space on the existing water tank and or ground space at the property to AT&T for a WCF.

Alternative 3 – Dziegiel Property, Creekview Dr, Merced, CA



Conclusion: Not available

This property is located approximately 0.50 miles northeast from the Proposed Facility. The property owners were not interested in leasing ground space to AT&T for a WCF.

Alternative 4 – Calvary Chapel Church, 1345 E Olive Ave, Merced, CA



Conclusion: Not available

This property is located approximately 0.25 miles west from the Proposed Facility. The church board/representatives were not interested in leasing ground space to AT&T for a WCF.

Alternative 5 – East Olive (existing Slimline Monopole), 2222 E Olive Ave, Merced, CA



Conclusion: Not Viable

The Existing 50 ft. tall Slimline Monopole tower is located approximately 0.42 miles southeast from the Proposed Facility. The existing Slimline Monopole tower is owned by Crown Castle Corporation and is Not viable due to unavailable tower space and structural capacity for AT&T's proposed equipment.

Alternative 6 – Rahilly Park, 3400 Parsons Ave, Merced, CA



Conclusion: Not available

The City of Merced owned Rahilly Park is located approximately 0.37 miles northwest of the proposed Facility. The city and its Parks Dept. staff investigated this park location as a possible site for a new WCF, and City staff/representatives advised that at this time the city is not interested in pursuing a lease with AT&T for a WCF at the Rahilly park location.

Alternative 7 – Black Rascal Strip Park, Merced, CA



Conclusion: Not available

The City of Merced owned Park is located approximately 0.54 miles northwest of the proposed Facility. Due to its location well to the northwest of AT&T's service objective, a WCF here does Not serve the target area and would not close AT&T's significant service coverage gap.

Alternative 8 – Collins Dr, (existing Slimline pole) 3168 Collins Dr, Merced, CA



Conclusion: Not feasible

This property is located approximately 1.43 miles west from the Proposed Facility. Due to its location well to the west of AT&T's service objective, a WCF here does Not serve the target area and would not close AT&T's significant service coverage gap.

Alternative 9 – City Storm Pump Station #43 Creekview Dr, Merced, CA



Conclusion: Not Viable or Feasible

This undeveloped parcel owned by the city of Merced is located approximately 0.50 miles northeast from the proposed Facility. The undeveloped property is not viable due to inadequate access, environmental impact and lack of usable ground space for a wireless communications facility (“WCF”). Additionally, the city of Merced public works Dept. advised that this property would not be a suitable location for a new “WCF”.

Alternative 10 – Bernasconi Neighborhood Park Jardin Way, Merced, CA 95340



Conclusion: Not available

The city owned neighborhood Park is located approximately 0.92 miles northeast of the proposed Facility. The city and its Parks Dept. staff investigated this park location as a possible site for a new WCF and stated that this park location is not available to AT&T for the reason of shortage of available lease space for a WCF. Additionally, a WCF at this location would be more visible than at the Proposed Facility, especially from nearby residential neighborhoods. The Proposed Facility is less intrusive than a WCF at this neighborhood park location.

Conclusion

The Proposed Facility is the least intrusive means by which AT&T can close its significant service coverage gap in this portion of the City of Merced. Denial of AT&T’s application or a reduction in height would materially inhibit AT&T’s ability to provide and improve service in this portion of the city.