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NEVADA COUNTY BOARD OF SUPERVISORS
Board Agenda Memo #1

MEETING DATE: February 13, 2017

TO: Board of Supervisors

FROM: **Brian Foss, Planning Director**

SUBJECT: A Resolution denying the appeal filed by Johanna Finney, Cynthia Pierce, Alex Giron, Lisa Reinhardt, Shawn Blue, Ryan McVay, Krsna Bryant, Govida Bryant, Matt King, Dorothy Sullivan and Don Rivenes regarding the Zoning Administrator's November 29, 2017 adoption of the Mitigated Negative Declaration (EIS17-0022) and approval of the Conditional Use Permit (CUP17-0015) for AT&T Mobility dba AT&T Wireless (PLN17-0073) located at 19406 Burning Bush Road, Nevada City (APN 34-090-03), and sustaining the Zoning Administrator's approval of the Conditional Use Permit for AT&T Mobility dba AT&T Wireless.

RECOMMENDATION: Adopt the attached Resolution (Attachment 1) to deny the appeal, and uphold the decision of the Zoning Administrator to approve Conditional Use Permit (CUP17-0015) for the AT&T Cell Tower Telecommunication Facility project.

FUNDING: This hearing will have no impact on the General Fund. This project will impact the Planning Department's FY 17/18 budget for staff time.

ATTACHMENTS:

1. Board Agenda Memo #2,
 - a. Supplemental Information
 - b. All Written Public Comments Received
2. Resolution to Deny the Appeal and Affirm the Zoning Administrator's Decision to Approve the Conditional Use Permit
3. Appeal to the Board of Supervisors
4. Final Project Approval Letter
5. November 29, 2017 Zoning Administrator Staff Report
6. November 29, 2017 Zoning Administrator Memo
7. November 29, 2017 Zoning Administrator Summary of Proceedings
8. Comment Letters and Materials Received Post November 29, 2017 Public Hearing
9. Updated Technical Reports
 - a. Environmental Noise Assessment
 - b. Radio Frequency – Electromagnetic Energy Compliance Report

BACKGROUND

On June 30, 2017, Appellants AT&T Mobility dba AT&T Wireless applied for a Conditional Use Permit (CUP17-0015) through their representative Shore2Shore Wireless. The project, construction/installation of an unmanned telecommunication facility, includes a 130-foot tall mono-pine cell tower with nine (9) panel antennas and 18 remote radio head/units installed on the mono-pine, and 80" by 80" walk-in utility cabinet, 15kW emergency backup generator with 54-gallon diesel tank located within an acoustical cabinet, two manually operated outdoor light fixtures with cut-off shields and the entire lease site (30-feet by 30-feet) will be enclosed by a six-foot high redwood fence.

On November 29, 2017, the Zoning Administrator held a public hearing and conditionally approved a use permit for the proposed project supported by a California Environmental Quality Act (CEQA) Mitigated Negative Declaration (MND) and Nevada County findings. On December 11, 2017, the Appeal Notification was received by the Nevada County Clerk's office. The written Statement of Appeal was amended December 29, 2017, adding more detail to the Appellants arguments to deny the project. The Board of Supervisors accepted the appeal on January 9, 2018, and set the appeal hearing date for February 13, 2018.

Project Setting: The project is within a 30-foot by 30-foot leased area contained within a 10.76-acre private parcel owned by Pamela Swartz, located in an unincorporated area of Nevada County at 19406 Burning Bush Road. The parcel, APN 34-090-03, is located approximately one-half mile northwest of Cooper Road. The nearest residence is located within the same parcel, approximately 200-feet from the project lease area. The subject property is developed with a residence, a two-story horse barn and other accessory buildings. The nearest neighboring residence to the project lease site is approximately 450 feet to the southeast. The project site is located equidistant between California State Highway 20 (Hwy 20), and North Bloomfield Road, a County-maintained minor collector road. The

project site is approximately five (5) miles northeast of downtown Nevada City. The project lease-site is accessed via a private paved driveway that splits off of Burning Bush Road within the project parcel. Burning Bush Road is directly accessed off of Royal Plum Way. Burning Bush Road serves five (5) parcels and Royal Plum Way serves a total of 12 parcels in the vicinity.

The site lies at an approximate elevation of 3,633.5 feet above mean sea level. The general overall topography of the project parcel moderately slopes downhill toward the west at an average slope of 9%, towards the north at a 30% average downhill slope and to the south at a down slope of approximately 15%. To the east the slope increases by 60-feet over a distance of 500 feet (approximately 12%).

The General Plan land use designation for the project site is Forest-40 (FOR-40) and the zoning district is Forest-40 (FR-40). The FR zoning designation identifies areas for the protection, production and management of timber, timber support uses, including but not limited to equipment storage, temporary offices, low intensity recreation uses and open space. Single family dwellings are a permissible use in the FR zoning district as are new communication towers with a conditional use permit.

The adjoining parcels range in size from 2.51 acres (the two parcels to the east), 11.55 acres (the adjoining parcel to the south), 10.72 acres (the adjoining parcel to the west), and 172.64 acres (the adjoining parcel to the north). One of the adjoining parcels to the east is developed with a residence and the parcels to the north and south are developed with a residence each.

THE APPEAL: The appeal (Attachment 2) cites several reasons under each of three (3) over-arching regulatory umbrellas why the appellant believes the Zoning Administrator's decision should be reconsidered. Generally, (1) the appeal challenges the adequacy of the California Environmental Policy Act (CEQA) Initial Study Mitigated Negative Declaration (MND) environmental document finding of no significant effect; (2) the appeal argues that the approved project is inconsistent with the Nevada County General Plan and Land Use and Development Code; and (3) the appeal states that there is inadequate documentation to confirm that the project is consistent with the Telecommunication Act of 1996.

Argument 1: CEQA

The appellant concludes that the CEQA document was not adequate for the following reasons stated below. These six argument focus areas that are listed here are also restated in the Appellant's arguments under the Nevada County's General Plan and Land Use policies.

1. EIR should have been prepared. An MND does not provide the level of environmental analysis appropriate for the cell tower project and an EIR should have been prepared.
2. Migratory Bird Impacts. The biological section of the checklist identifies no significant impacts to migratory birds and, specifically, there lacked a nesting survey to determine if there were any active avian nests present on and off-site.

3. Noise Impacts. The noise section of the Initial Study did not consider change to existing (ambient) noise levels with the installation of the project. Noise was only analyzed based on the county noise standards. The HVAC system was not included nor was the cumulative effects of co-located carriers evaluated.
4. Aesthetics Impacted. The Aesthetic analysis used information that does not adequately represent the affected view sheds for both public and private properties.
5. Radio Frequency Impacts. The County conducted no analysis of the environmental effects of radio frequency emissions.
6. Conflict with County General Plan and Land Use. The MND does not identify or discuss how the project is inconsistent with the County General Plan and Code.

CEQA prescribes whether projects and actions are exempt, can be qualified exempt or require some level of environmental analysis to disclose potential impacts and identify mitigation or avoidance strategies to make a finding of less than significant impact. The discretionary review of communication towers are not exempt under the CEQA environmental analysis process.

1. An Initial Study was prepared by Nevada County Staff to evaluate the proposed project's potential impacts in nineteen (19) resource categories consistent with the CEQA guidelines. With the exception of two (2) resource categories (air quality standards and tribal cultural resources), the staff analysis found less than or no significant impacts would be created by the installation or operation of the Cell Tower Communication Facility based on the project description and the information in the record. The two identified potential impacts required the identification of mitigation. An MND was prepared to identify mitigation measures for the two potential impacts. With the inclusion of the mitigation measures (3-A and 17-A), the CEQA analysis made a finding of no significant impact. Therefore, there is no requirement to prepare an EIR.

2. A Biological Inventory was conducted by Edward (Ted) Beedy, PhD. Dr. Beedy's methods included a records search of the California Department of Fish and Wildlife's California Natural Diversity Database, U.S. Fish and Wildlife Service data base and the California Native Plant Society Electronic Inventory. Dr. Beedy also consulted the Nevada County Natural Resource Report to identify the distribution and extent of habitat and the relationships between habitats and special-status species in a local and regional context. On May 25, 2017 (peak nesting season), Dr. Beedy conducted his field investigation of the project area. He concluded in the Biological Inventory that no suitable habitat exists in or near the project area to support listed and other special-status species. Dr. Beedy noted in the report that the California Spotted Owl (*Strix occidentalis*) exists on the slopes below the project area, but would not be effected by the installation of the proposed cell tower. The executive summary of the Biological Inventory concluded that any potential impacts to wildlife or plants can be avoided with Standard Construction Conditions that include pre-construction survey for nesting birds should trees need to be removed or heavily trimmed during the nesting season (March 1 through September 1).

3. CEQA relies on individual counties and municipalities to adopt and put in to practice their own individual noise policies and standards. Nevada County noise standards consider existing or ambient noise levels in its Leq standard metric which measures the average noise level at a given location over a given time frame and Lmax standard metric that measures average maximum noise level at a given location and during a given time period. Though on-site noise studies are typically not required for cell tower projects, the applicant is required to provide a noise assessment for their project using modeling protocol that is acceptable for the type of noise to be emitted. The applicant submitted an Environmental Noise Assessment Report prepared October 17, 2017. The Report does discuss the physics of noise and what would be expected should one or two additional co-locating carriers come on line. A doubling of a noise source increases the dBA by 3 decibels and a third would be barely audible by the human ear. The report did not address the potential noise to be produced by the proposed HVAC system. A condition of approval was added to the Conditional Use Permit requiring the applicant to submit specification sheets with any building permit application certifying that all proposed equipment, including future co-located equipment and change-outs, in conjunction with existing equipment will fall within the Nevada County noise standards (L-II 4.1.7). An amended Environmental Noise Assessment Report was submitted January 29, 2018. The updated report includes the HVAC system and has provided additional detail regarding the absorption properties of the acoustical cabinet, the redwood fence that will surround the cell tower communication facility and noise dissipation over distance.

The noise findings were made based on a worse-case scenario. The original noise modeling did not include the HVAC thus a condition of approval was added requiring certified specifications confirming the communication facility will meet noise standards. The updated report confirms that the proposed is well within Nevada County noise standards including the HVAC system and co-location of up to two additional carriers.

4. CEQA aesthetic standards do not require a visual or aesthetic assessment be conducted from a view that is not open to the public. Therefore no views were evaluated from private property. The project area contains no identified scenic resources, is not located within a designated historic district nor can it be seen from a state scenic highway. The cell tower lease area is located on private property near the top of a knoll surrounded by tall incense cedars and ponderosa pines (approximately 70 to 100 feet tall). The tower does extend 30-feet above the tallest tree.

The view shed to this location is predominately from a perspective looking up-slope through a forest of mixed conifer and hardwoods. Because of this view perspective the mono-pine is not easily noticeable. In other words, the trees in the foreground as you look uphill within a forested context, such as the project site and surrounding parcels, prevent a direct line of site to the top of the knoll and you do not see the mono-pine towering 30 feet over the tallest pines until you are on the property on which the project is proposed with a clear line of site. There is a view of the Mono-Pine from Burning Bush Road as a driver would veer off to the right to continue on Burning Bush Road just prior to entering the private driveway of the property owner for this proposed project site. The mono-pine tower

is visible yet screened by existing trees of which some seem taller than the mono-pine because of the perspective of the view looking uphill. The simulation for this view represents a worse-case because the photo was taken in the late Fall when many of the trees that screen the view have shed all of their leaves.

Nevada County Code requires new towers, when installed in a location that is not developed with communication facilities or other public or quasi-public uses to blend with the surroundings and the existing natural and man-made environment so as to be effectively unnoticeable. Based on the simulations submitted with the application the mono-pine as described in the project description will be effectively unnoticeable.

5. A Radio Frequency Electromagnetic Energy Compliance Report (RF Report) was submitted with the cell tower communication facility application. Based on worse-case predictive modeling, there are no modeled exposures on any accessible ground walking/working surface related to AT&T's proposed antennas that exceed the FCC's occupational and/or general public exposure limits. Nevada County has been provided with an updated RF Report for the purpose of documenting more detail about the extent of the emission nodes, how co-location facilities will also meet the FCC's maximum exposure limits and to provide better documentation of the maximum power density levels generated at the nearest walking/working surface for each antenna. The updated report confirms the findings of the originally submitted report. The document does report that at the antenna face level radio frequency emissions may exceed the FCC's general public limit within 35 feet of the antenna. However, the distance away from the antenna at which the emission node reaches ground level the maximum power density levels are significantly decreased and below the FCC's limits.

6. The project lease site is located within a 10.76 acre private parcel in a Rural district. The General Plan land use designations FOR-40 and the parcel is also zoned FR-40. The FR zoning designation provides areas in the rural parts of the County for protection, production, and management of timber; timber support uses; including but not limited to equipment storage, temporary offices, low intensity recreation and open space. The Rural zoning designation FR-40 includes both cell towers and communication facilities as a permissible Institutional/Public use with a conditional use permit. The Nevada County General Plan nor the Land Use and Development Code considers cell towers or communication facilities as either a commercial or industrial use. As is expected with public infrastructure, the employment of public utilities is found to be a use consistent within many land uses and zoning designations. Cell towers and communication facilities are permissible uses throughout most of Nevada County.

Argument 2: Approved Project Inconsistent with Nevada County's General Plan and Land Use and Development Code.

The permitted use was reviewed and found compatible with the General Plan. As described in the Staff Report for the project, it furthers the General Plan's goals and policies including

promoting Economic Development through providing an improved communication network, the retention of local jobs through the ability to work remotely, provides a necessary service to the County residents and benefits the local economy.

The project reflects Open Space values and Resource Conservation by using a minimal amount of space (30 feet by 30 feet) for the cell tower and its communication equipment and the potential for up to two co-locating carriers. The project site was designed to be located in an existing open area where there is no need for the removal of trees and within an area where the ground has already been disturbed. There are no surface water features that will be effected by the construction/installation of the project on or off the project property. The project meets Circulation goals by making efficient use of existing roads without decreasing levels of service.

Staff found that the project is consistent with the Land Use element of the General Plan. The General Plan prevents incompatibility between land uses through zoning. Policy 1.6.1 and 1.6.2 of the General Plan establish zones which follow General Plan designations which were established to “protect, enhance, and complement existing communities and neighborhoods.” The project parcel has the Forest (FOR) designation in the General Plan and as shown on the General Plan Land Use Designation Compatibility Matrix under 1.6.1 the FR zone is compatible with the General Plan’s FOR designation. By setting zones for certain types of land uses, the General Plan separates incompatible uses. The Cell Communication Tower facility is consistent with the Land Use element of the General Plan because it will be fulfilling public service infrastructure needs by bringing communication connectivity to an area of the County that does not presently have full digital coverage.

Within Title 3, The Land Use and Development Code, the Zoning Regulations are found. Article II contains the definitions for the Zoning Districts designated in Nevada County along with the lists of permissible uses by zoning districts and setback standards. The land uses within at least a two mile radius of the project parcel have all been designated as Rural land use districts (AG, FOR, AG-EST and TPZ). Rural designations are intended to provide for development of compatible uses within a rural setting. Such uses may include rural residential at maximum densities ranging from 5 to 160 acre per dwelling (very low density); agriculture operations and supporting agriculture production; natural resource production and management; low-intensity recreation; and depending on the development pattern and character of an area, availability of public facilities and services.

The project lease site (30-feet by 30-feet) is located just outside of the 30-foot setback of the northern and eastern property boundaries. The 130-foot cell tower will be located within the lease site and approximately 41-feet from the northern and eastern property boundaries. In Section L-II 3.8 of the Land Use and Development Code, Communication Towers and Facilities, D.6 states that applications for cell towers that are located a distance that is less than 100% of their height from a property line, a habitable structure or other tower, shall include a report by a structural engineer licensed by the State of California certifying that the proposed tower is designed to withstand without failure the maximum

forces expected from wind, earthquakes and ice when the tower is fully loaded with antennas, transmitters and other equipment and camouflaging. The AT&T application included the structural report that was stamped and signed by a California State licensed engineer. This project is located within a rural land use designation and is not located within or adjacent to a residentially zoned district and, therefore, is only required to be consistent with the setback standards required for rural districts. The setback standard for side and rear setbacks is 30-feet.

The appellant states that the project is not consistent with goal 9.1 under the Noise element because the expected noise level is not articulated, rather the conditional use permit prescribes that the not-to-exceed noise standards. To that end, Policy 9.1.1 establishes and continues to reassess the noise environment for a realistic set of noise standards. The appellant suggests that 9.1.2e, the imposition of a more restrictive standard, should apply and the County should give consideration to the unique conditions currently in the area. The General Plan already gives consideration to the County's unique Rural land use areas. Rural land use districts have the lowest noise level standards of all land uses in the County. All of Nevada County's Rural land use districts are unique and thus this was recognized when the noise standards were set for the County.

To enhance emergency ingress and egress, two turn-outs along Burning Bush Road and two turn-outs along Royal Plum Way are required by the conditional use permit by the County Fire Marshal. The turn-out locations and sizes were field verified between the applicant and the County Fire Marshall. The locations were specifically selected at places along the roads where wide dirt shoulders already exist and can be easily improved and where very little vegetative management would be required. The statement that the project will significantly increase the exposure of people or structures to wildland fires is not supported by either the County Fire Marshall or Cal Fire. All equipment will be enclosed in metal cabinets and are UL listed. The generator, HVAC and telecommunication mechanical equipment presents no greater a threat than other infrastructure or private HVAC and generator systems in the local area or County wide.

Fire Hazard Zones do not dictate Defensible Space regulations. The fire code does identify a 100-foot clearance area around structures. Clearance does not equate to a complete removal of all vegetation. Typically trees are limbed up and ladder fuels are removed. The Defensible Space regulations do not extend past property boundaries for individual property owners. In the instance of this project, defensible space would be achieved by clearing vegetation from two sides to 100-feet and the other two sides of the project that are at the 30-foot setback would require clearing only to the property line.

The utility easement represented on the submitted plan sheets has not been acquired by AT&T. The Conditional Use Permit requires the applicant to provide documentation of the utility easement acquisition prior to the issuance of a building permit. A new alignment would need to be addressed in an amended application if it were proposed in a previously undisturbed location that could result in impacts to sensitive resources that have not been evaluated with the current proposal.

Argument 3: Inadequate documentation to confirm that the project is consistent with the Telecommunication Act of 1996.

A Radio Frequency Electromagnetic Energy Compliance Report (RF Report) was submitted with the cell tower communication facility application. Based on worse-case predictive modeling, there are no modeled exposures on any accessible ground walking/working surface related to AT&T's proposed antennas that exceed the FCC's occupational and/or general public exposure limits.

Nevada County has been provided with an updated RF Report (January 29, 2018) for the purpose of documenting more detail about the extent of the emission nodes, how co-location facilities will also meet the FCC's maximum exposure limits and to provide better documentation of the maximum power density levels generated at the nearest walking/working surface for each antenna. The updated report confirms the findings of the originally submitted report. The document does report that at the antenna face level radio frequency emissions may exceed the FCC's general public limit within 35 feet of the antenna. However, at the distance away from the antenna at which the emission node reaches ground level the maximum power density levels are significantly decreased and below the FCC's limits.

APPEAL CONCLUSION: The Board of Supervisors does not have to adhere to the determination of the Nevada County Zoning Administrator; however, staff finds there is no compelling reason not to accept the project approval. Staff finds that the project is consistent with the County Land Use and Development Code and General Plan for the reasons discussed above.

Many concerns were raised during the public hearing before the Zoning Administrator, and the Zoning Administrator exercised his independent judgment, to determine that the project impacts were all mitigated to a less than significant level. The summary of proceedings document the public hearing the the Zoning Administrator's justification for project approval (Attachment 7).

SUMMARY: The findings and record in support of the Zoning Administrator's final decision are found in the attached November 29, 2017 Zoning Administrator staff report, the November 29, 2017 Memorandum, and the November 29, 2017 summary of proceedings (Attachments 5, 6, and 7). Before taking action on this appeal, the Board should independently consider the Zoning Administrator's staff report, memorandum and meeting minutes with the discussion and reasoning presented in this report. Collectively, this information provides the reasons in support of those new findings listed in the Resolution to deny the appeal, and uphold approval of the Use Permit.

CONTINUANCE OF APPEAL HEARING FROM FEBRUARY TO MARCH

Based on new concerns submitted in a letter by Mr. Steve Michelsen, staff recommended a continuance at the February 13, 2018 Board of Supervisor's meeting.

Please refer to the attached Board Agenda Memo #2, 1a Supplemental Information and 1b, Additional Letters Received, to review staff's summary of the new concerns, Mr. Steve Michelsen's letter and AT&T's response.

Please contact me should you require additional information or background.

Item Initiated by: Coleen Shade, Senior Planner

Approved by: Brian Foss, Planning Director