CITY OF SANTA ROSA
STATE OF CALIFORNIA

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In the Matter of the Application of:

VERIZON

For Conditional Use Permit

Premises: 244 Colgan Ave.
Santa Rosa, CA 95404

Parcel # 044-011-053-000

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MEMORANDUM IN SUPPORT OF APPEAL

Respectfully submitted,

• Vintage Park Apts. and La Esplanada Neighbors

Carmen Gonzalez- 1611 La Esplanada Pl. #111, Santa Rosa, CA 95404
Sue Dolan- 137 Colgan Ave. #2049, Santa Rosa, CA 95404
Melody Stewart- 133 Colgan Ave. #121, Santa Rosa, CA 95404
Michele de Luca- 135 Colgan Ave., #2035, Santa Rosa, CA 95404
Annie Acker- 135 Colgan Ave., #2039, Santa Rosa, CA 95404
Judy Salerno- 141 Colgan Ave., #1087, Santa Rosa, CA 95404
Herbert Lebherz- 1611 La Esplanada Pl. #121, Santa Rosa, CA 95404
Sandra Lebherz- 1611 La Esplanada Pl. #121, Santa Rosa, CA 95404

Community advocates for Colgan Ave. neighbors

• EMF Safety Network
Paul-André Schabracq, Co-director
Sidnee Cox, Co-director
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• SafeTech4SantaRosa
Kim Schroeder
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Mary Dahl
Jennifer and Tom LaPorta

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Preliminary Statement

This memorandum is submitted in support of the appeal of the granting of Verizon's application for a Major Conditional Use Permit and Major Design Review Permit to erect a 69 foot (7 *story*) monopole cell tower at 244 Colgan Ave., Santa Rosa, California. It is submitted on behalf of multiple homeowners whose homes are situated adjacent to or in close proximity to the site for the proposed cell tower, as well as concerned citizens who are in opposition to the construction of the tower at the proposed height and location.

While the proposed location is zoned Light Industrial (IL) just across the street are residential properties consisting primarily of senior and low income apartments. Although it can be argued that a 7 story cell tower facility might be consistent with an industrial or commercial property, the residents across the street will suffer far greater damage and negative consequences. It must be remembered that it is these homeowners who will be forced to look at the tower, while the owner of the property on which it will be erected will not.

The approval of Verizon's application not only violates the City of Santa Rosa zoning regulations, but the legislative intent upon which they are based. Construction of such a tower will inflict upon the nearby homes and surrounding community the precise types of adverse impacts the zoning regulations were enacted to prevent. This tower will "*stick out like a sore thumb*," and will inflict severe and wholly unnecessary adverse aesthetic impacts and loss of property value upon the nearby homes and surrounding community. The proposed tower will *not* be compatible with the community.

Moreover, these unnecessary negative consequences caused by the irresponsible placement of such a facility at the proposed location would be greatly exacerbated by the fact

that, as addressed herein below, the community would derive no benefit, whatsoever, from the installation.

As set forth below, Verizon's application should be denied because:

(a) Verizon has failed to establish that granting the application would be consistent with applicable provisions of the City Zoning Code, including the Telecommunications Facilities provisions, and the City's General Plan.

(b) granting the application would violate not only these applicable provisions, but the legislative intent upon which they are based;

(c) the applicant has failed to establish that the proposed facility: (i) is actually necessary for the provision of personal wireless services within the City of Santa Rosa or (ii) that it is necessary that the facility be built at the proposed site;

(d) the irresponsible placement of the proposed facility would inflict upon the nearby homes and community the precise types of adverse impacts which the applicable provisions of the Zoning Code, Telecommunications Facilities provisions and General Plan were enacted to prevent.

It is respectfully submitted that this appeal should be granted, and Verizon's application denied, and that the denial be written in compliance with the Telecommunications Act of 1996.

POINT I

Granting Verizon's Application for Its Proposed Wireless Telecommunication Facility Would Violate Applicable Laws and the Legislative Intent Upon Which They Were Enacted

As set forth below, Verizon's application should be denied because granting the application would violate the requirements of the City's Zoning Code, including the Telecommunications Facilities provisions and the City's General Plan.

B. Local Municipalities Are Authorized by the TCA to Regulate Telecommunications Facilities

The proliferation of wireless communications facilities has resulted in the need for municipalities to pass legislation to regulate their construction. Although many site developers and cellular service providers will argue that the Telecommunications Act of 1996 (TCA) prohibits local governments from regulating telecommunications facilities, this is simply untrue. The TCA, 47 U.S.C. §332(c)(7) specifically *preserves local zoning authority*. Subsection (A) provides for general authority as follows:

> (7) Preservation of local zoning authority
>
> (A) General authority
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

While subsection (B) forbids a municipality from "unreasonably discriminat[ing] among providers" and from completely "prohibiting the provision of personal wireless services" the fact remains that a municipality may restrict the placement, location, construction, and modification of wireless facilities in their community through zoning regulations. *See, T-Mobile South, LLC v. Roswell,* 135 S.Ct. 808 (2015); *GTE Mobilenet of California Ltd. P'ship v City of Berkley*, 2023 WL 2648197 (D. N.D. CA 2023); *Colfaxnet LLC v City of Colfax,* 2020 WL 6544494 (D. E.D. CA 2020).

"The TCA seeks to strike a balance between its goal of 'encourage[ing] the rapid deployment of new telecommunications technologies' without unduly encroaching on traditional local zoning authority." *New Cingular Wireless PCS LLC d/b/a AT&T Mobility v. Zoning Board*

of Adjustment of the Borough of North Haledon, 469 F.Supp.3d 262 (D. N.J. 2020) *citing, T Mobile Ne. LLC v. City of Wilmington, Del.,* 913 F.3d 311 (3d Cir. 2019). "To this end, it 'expressly preserves the traditional authority enjoyed by state and local government to regulate land use …." *Id., citing, APT Pittsburgh Ltd. P'ship v. Penn Twp. Butler Cty. of Pa.,* 196 F.3d 469 (3d Cir. 1999); *Extenet Systems, Inc. v. Township of North Bergen, New Jersey,* 2022 WL 1591398 (D.N.J. 2022).

Simply stated, the TCA provides that an application to erect a cell tower can – and should – be treated as a land use issue, to be decided by a municipality in an ordinary manner, using the same considerations normally employed in a land use matter.

Consistent with the intent of this federal law, informed local governments have enacted "Smart Planning Provisions," which are local land use regulations designed to:

(a) prevent an *unnecessary proliferation* of wireless facilities while

(b) preventing, to the greatest extent possible, unnecessary adverse impacts upon residential homes and communities due to the irresponsible placement of wireless facilities.

As set forth below, Verizon's application should be denied because granting the application violates not only the *requirements* of the applicable City laws and regulations, but their *legislative intent*.

C. The Shot Clock and Limitations on the Timeframe for a Municipal Decision

The timeframe for municipal review and approval or disapproval of an application to construct, place or modify a personal wireless facility is governed by the Telecommunications Act, 47 U.S.C. §332(c)(7)(B)(ii), otherwise known as the Shot Clock. The applicable section reads as follows:

(B) Limitations

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

This provision requires a local government to "act on any request" within a reasonable period of time. Subpart U to Part 1 of Title 47 §1.6002(a) defines "action" or "to act" on a siting application to mean "a siting authority's grant of a siting application or issuance of a written decision denying a siting application." In other words, once the municipal body charged with deciding a wireless facility application has either approved or denied an application for placement, construction or modification of a wireless facility, (within 150 days or within an agreed upon/tolled date) that municipal body (and therefore the municipality itself) has met its shot clock obligation. A subsequent appeal to a *municipal appellate body* or the filing of a court proceeding by either party has no effect on the shot clock. The shot clock has already been met and no longer constrains the municipality.

From a commonsense perspective, if either the applicant or an interested party (*e.g.* an adjacent homeowner) were to file a lawsuit, would the shot clock keep running until the court made a decision? If so, it would be impossible for a municipality to meet the shot clock timeframe, especially because the speed at which the suit could be heard would be out of the municipality's control. Thus, aside from the plain language of the provision and definitions, common sense dictates that an appeal to a municipal appellate board, commission or council would be outside of or exempt from the constraints of the shot clock.

Furthermore, a "reasonable period of time" for colocation and small cell applications are shorter, but the type of application involved in this current Verizon application is *presumptively* 150 days. This presumption is rebuttable by the municipality upon a showing that the circumstances of a particular application are such that the 150 day timeframe could not reasonably be met. In its 2009 Order, the FCC "clarified that the deadlines were only presumptively reasonable, and that 'local authority will have the opportunity, in any given case that comes before a court, to rebut the presumption that the established timeframes are reasonable' based upon the 'unique circumstances in individual cases.' *See,* 2009 FCC Order at p. 42-44." *Upstate Cellular Network v. City of Auburn,* 257 F.Supp.3d 309 (N.D.N.Y. 2017); *See also, City of Portland v. U.S., 969 F.3d 1020 (9th Cir. 2020); GTE Mobilenet of California v. City of Berkley,* 2023 WL 2648197 (N.D. Calif. 2023).

C. Applicable Local Law

Generally, the overarching principle of zoning legislation is for the benefit and protection of the municipality's citizens. This protection includes preservation of the citizens' property rights and property value, as well as protection of the character of the community and quality of life.

(i) The General Plan

Santa Rosa's General Plan provides a framework upon which municipal decisions concerning development and growth, including all aspects of safety, welfare and well being, are based. It guides and informs the City's planning and zoning functions and represents the community's aspirations for the future.

Clearly, Santa Rosa aspires to be in the forefront of those communities which seek to understand and provide for the needs of *all* of its citizens. This is evidenced by the 2050 General

Plan Vision Statement which includes numerous enlightened goals and policies.

> Santa Rosa is a place where:
>
> - **Just:** Social and environmental justice are achieved for everyone…
> - **Healthy:** All Neighborhoods…are vibrant…and welcoming places for everyone…
> - **Sheltered:** A diverse mix of high quality, safe, thoughtfully designed, efficiently planned, and well-served housing at all affordability levels is available throughout the community to accommodate everyone…
> - **Equitable:** Everyone has what they need to enjoy long, fulfilling, healthy lives…

Santa Rosa's General Plan 2035 includes a Vision, wherein "Santa Rosa is a vibrant community featuring a diverse range of housing… opportunities and where infill development is designed to maintain the local quality of life through *compatibility with adjacent land uses*…. Safe, *livable* residential neighborhoods provide a variety of housing types for households of all income levels." (*emphasis provided*)

The General Plan:

- Outlines a vision of long-range physical and economic development that *reflects the aspirations of the community*, and provides specific implementing policies that will allow this vision to be accomplished;
- Establishes a basis for judging whether specific development proposals and public projects *are in harmony with said vision*;
- Allows city departments, other public agencies, and private developers to design projects that will *enhance the character of the community*…

The Plan's guiding Principles note that "Santa Rosa is a special place set in an agricultural county with an inviting climate, superior natural beauty, desirable residential neighborhoods, and a strong, diversified economy. As the area accepts its share of the region's

growth, *these characteristics must not be sacrificed.* (*emphasis supplied*)

"New high quality development shall be used to improve the areas of Santa Rosa which have undergone deterioration or require increased vitality" and "the entire spectrum of housing needs of community residents shall be anticipated and addressed… In addition, all new non-residential development will participate in meeting local housing needs." It is also clear that through its planning function, the city must "assure that short term decisions reflect long term goals and vision." (General Plan pp 1-6 - 1-7) Where commercial or industrial uses abut residential uses, it is clear that the overriding concern is to preserve and maintain the character of the community and ensure that neighborhoods retain their unique, "vibrant," "welcoming," and "thoughtfully designed" character.

Land use policy consists of factors, including "livability." As set forth in chapter 2 of the General Plan, "the concept of livability is complex and encompasses many aspects of daily urban life. Santa Rosa is valued by its residents for its livability – its comfortable neighborhoods, its relaxed "small town" lifestyle, its vital downtown, its climate, and its beautiful setting in California farming and wine country."

In the context of this appeal, the goal for Land Use and Livability in an industrial area is to "ensure compatibility between industrial development and surrounding neighborhoods." (LUL-K). The resultant policy (LUL-K-1) is to "require industrial development adjacent to residential areas to provide buffers, and institute setback, landscaping, and screening requirements intended to minimize noise, light, and glare and other impacts." It should be noted that because of its proximity to Colgan Creek, screening of the cell tower as a monopine was rejected. Thus, where the wireless facility cannot be screened (or camouflaged) it should not be constructed in that location.

Although the General Plan does not have a separate telecommunications section, the pertinent sections discussed above are more than instructive. The intent of the General Plan and the goals and policies generated as a result, demonstrate that the proposed wireless facility is incompatible with the adjacent residential community, would prove injurious to the neighborhood, destroying its character and ultimately its property values, and should not be constructed at the proposed location of 244 Colgan Avenue. This is especially true where there is no competent proof that the proposed wireless facility is even needed.

(ii) The Zoning Code

The Santa Rosa Zoning Code "implements the goals and policies of the Santa Rosa General Plan by classifying and regulating the uses of land and structures within the City of Santa Rosa. In addition, this Zoning Code is adopted to *protect and to promote the public health, safety, and general welfare of residents, and preserve and enhance the aesthetic quality of the City.*" (*emphasis added*).

§20-10.020 sets for the purpose of the Zoning Code as follows:

> To fulfill these purposes, it is the intent of this Zoning Code to:
>
> A. Provide standards for the orderly growth and development of the City, and guide and control the use of land to provide a safe, harmonious, attractive, and sustainable community;
>
> B. Implement the uses of land designated by the Santa Rosa General Plan and *avoid conflicts between land uses;*
>
> C. Maintain and protect the value of property…
>
> E. Protect the character, and social and economic stability of residential …areas;

F. Assist in maintaining a high quality of life…

It must be noted that although this application is framed as construction of a wireless facility in a "light industrial" zone, this is very misleading. The pinpointed proposed location may be in such a designated spot, but the residents living across the street would disagree. From their vantage point, the proposed tower abuts their homes. Because the proposed cell tower will be very visible to everyone in the neighborhood, consideration should be given to the proximity of numerous residences, and the fact that this location is on the border of zoning districts.

Chapter 20-30 of the Zoning Code provides standards for all development and land uses. The stated purpose of this chapter is to expand upon the standards of the zoning districts and allowable land uses described in Division 2 of the Zoning Code, and address "the details of site planning and project design." §20-30.010.

> These standards are intended to ensure that all development:
>
> A. Produces an environment of stable and desirable character;
>
> B. *Is compatible* with existing and future development; and
>
> C. *Protects the use and enjoyment of neighboring properties, consistent with the General Plan.* (*emphasis added*)

Under §20-30.020, the requirements of chapter 20-30 shall apply to all proposed development and new land uses…and shall be considered *in combination* with the standards for the applicable zoning district. Once again, it's clear that an application to construct a cell tower – even in a light industrial zone – must give way to the overarching principles of maintaining and promoting the "livability" of an adjacent residential community. It cannot be said that a cell tower across from a residential community promotes the livability of that

community.

Construction of a wireless telecommunications facility is further regulated by Chapter 20-44 of the Zoning Code. §20-44.010 sets forth the purpose of the chapter, which is to "provide a uniform and comprehensive set of standards for the development of telecommunication facilities and the installation of antennas." Further, the regulations are intended to accomplish, in part, protecting "residential neighborhoods and the visual character of the City from the potential adverse visual effects of telecommunication facility development…."

Commercial telecommunications facilities are governed by §20-44.060. The pertinent provisions are as follows:

> C. Major facilities. The following facilities are subject to Conditional Use Permit and Design Review and shall comply with all applicable provisions of this Chapter:
>
> 1. All commercial telecommunication facilities, other than exempt or minor facilities…
>
> E. Application requirements for commercial facilities. In addition to the Conditional Use Permit application requirements specified in Chapter 20-50 (Permit Application Filing and Processing), the following information shall be submitted when applying for a minor or major commercial facility:
>
> 1. Area development, service area, and network maps;
> 2. Alternative site or location analysis…
>
> 5. Visual impact analysis, including photo montages, field mockups, line of site sections, and other techniques shall be prepared by or on behalf of the applicant which identifies the potential visual impacts of the facility, at design capacity. Consideration shall be given to views from public areas as well as from private properties. The analysis shall assess visual impacts of the facility, and shall identify and include all

technologically feasible mitigation measures.

F. Design guidelines for commercial facilities. To the greatest extent possible, minor and major commercial telecommunication facilities shall be sensitively designed and located to be compatible with and minimize visual impacts to surrounding areas, including public property. To this end, each facility shall comply with the following design guidelines.

1. Innovative design solutions that minimize visual impacts should be utilized.
2. Telecommunication facilities shall be as small as possible and the minimum height necessary without compromising reasonable reception or transmission.
6. Building mounted telecommunication facilities are encouraged over telecommunication towers.

13. Multiple telecommunication facilities of reduced heights are encouraged to cover a service area where the visual impacts would be less than a single larger and more visually obtrusive tower.
14. Co-location of commercial telecommunication towers and the use of the same site by multiple carriers is required where feasible and found to be desirable.

18. All major commercial telecommunication facilities, other than government owned facilities, shall be prohibited in R zoning districts or within residential areas of a PD zoning district.

G. Commercial transmission tower location. The following regulations shall apply to the location of transmission towers.

1. Analysis of alternative sites. The application for each commercial facility shall include an analysis shall be prepared by or on behalf of the applicant, which identifies reasonable, technically feasible, alternative locations and/or facilities which would provide comparable service. The intention of the alternatives analysis is to present alternative sites which would minimize the number, size and potential

adverse environmental impacts of facilities necessary to provide services. The analysis shall address the potential for co-location at an existing or new tower site and shall explain the rationale for selection of the proposed site in view of the relative merits of any of the feasible alternatives. Approval of the project is subject to the decision making body finding that the proposed site results in the least potentially adverse impacts than any feasible alternative site.

2. Separation between facilities. No telecommunications tower, providing services for a fee directly to the public, shall be installed closer than two miles from another readily visible, uncamouflaged or unscreened telecommunication tower unless it is a co-located facility, situated on a multiple user site, not readily visible, or technical evidence acceptable to the Director or Commission, as appropriate, is submitted showing a clear need for the facility and the infeasibility of co-locating it on an existing tower. Facilities that are not proposed to be co-located with another telecommunication facility shall provide a written explanation why the subject facility is not a candidate for co-location.

Verizon's application should have been denied inasmuch as their proposed cell tower does not comply with the Zoning Code regulations listed above. Examining each applicable provision in order, section (C) makes all facilities subject to the provisions which follow. Subsection (E) requires various documentary submissions, including subsection (1) requiring "area development, service area, and network maps." Verizon responded to that requirement with "Proprietary." This is an unacceptable response. The requirement is clear. If Verizon seeks to construct a cell tower in the City of Santa Rosa, it must comply with all directives. Furthermore, as an entity seeking development approval, based on ***need*** for a cell tower at that

location – as opposed to any other location – it should be required to lay bare its proof.

Subsection (E)(2) (and subsection (G)(1)) requires alternative site or location analysis. Verizon provided a list of alternate sites but does nothing other than state that each particular location "cannot fill service gap." One site also notes "no landlord interest." However, no further explanations are provided. Why couldn't these sites fill the purported service gap? What was the size of the search ring? What was the extent of any testing to determine whether the site would fill any purported service gap? Who performed any testing or examination to determine whether the site would fill any service gap? What was the criteria used to determine what constitutes filling a service gap, *i.e.*, if the site would partially remedy a gap, what percentage would be enough? Would 90% be sufficient or must a site fill a potential gap 100% before it's considered satisfactory? What level of follow up did Verizon perform in its attempts to contact property owners to discuss the possibility of constructing a cell tower on their land?

Subsection (E)(5) requires a visual impact analysis. Because the design changed from a monopine cell tower to a monopole facility, without any camouflage, any photo simulations or other visual analysis is inapplicable. The prior submitted analysis is based on a design that is no longer part of the application. Verizon should be required to submit a new analysis based on a monopole design.

Even assuming we were to accept their prior analysis, it's faulty for other reasons as well. As explained in more detail below, and consistent with the Telecommunications Ordinance §20-40.060- subsection (E)(5), as well as caselaw requires an applicant to take photos from the perspective of those homes that will be affected by the construction of a cell tower facility in their neighborhood. Verizon did not do that. Only two (2) *public* sites were utilized for their visual analysis. No address or other identifying information was provided, just the compass

direction. One is "looking southeast from Colgan Ave." and the other two photos are "looking southwest from Colgan Ave." The "southwest" photos are the same site, but one is taken from closer to the proposed site. No photos are taken from private properties. Although, carriers will often claim that they do not have permission to enter onto private property, there is nothing in the application to indicate that Verizon bothered to ask permission to take photos from any private property.

Again, the photos are deficient because they do not depict a monopole design, nor do the photos identify "the potential visual impacts of the facility, at design capacity" as required by §20-44.060(E)(5).

Subsection (F) imposes further guidelines requiring, to the greatest extent possible, that "commercial telecommunications facilities shall be sensitively designed and located to be compatible with and minimize visual impacts to surrounding areas…." Verizon has made no attempt to comply with this provision. There is no mention of any type of camouflage or screening beyond the initial monopine design. What does Verizon intend to do with the new monopole design to make it compatible with the adjacent residences or to reduce any visual impact?

Subsections (F)(2) and (F)(13) are intended to keep tower height to a minimum. Unfortunately, as discussed further below, once the tower is constructed, Verizon will be able to increase the tower's height by 20 feet ***without*** any further City approval. Therefore, any initial height restrictions are not permanent.

Co-location where feasible and desirable is required by subsections (E)(14) and (G)(3). Verizon's application includes only *one* reference to colocation on an existing T-Mobile tower

which was found to be untenable. There are numerous cell towers within a 2 mile radius which are operated by Verizon as well as by it competitors. Verizon failed to do their due diligence and failed to investigate alternate sites in good faith. In addition, because there are so many other cell towers in the area, the proposed tower would be in violation of subsection (G)(2) as the proposed tower would be within 2 miles of other, uncamouflaged telecommunications towers.

It is important to note that subsection (F)(18) prohibits any major commercial telecommunications facilities in residential zones. It's incongruous to allow such a facility to be erected across the street from residences. The same logic should apply to prevent the tower from causing severe negative impacts to the homeowners *adjacent* to a wireless facility as would benefit those *in* a prohibited residential zone.

In addition to the goals of maintaining the unique character of the surrounding community and preserving the environment with its magnificent views, the City, through its General Plan and zoning laws, seeks to safeguard and "promote the public health, safety, comfort, convenience, prosperity, and general welfare of residents." "[T]he concept of the public welfare is broad and inclusive." *Voice Stream PCS v. City of Hillsboro*, 301 F.Supp.2d 1271 (D. Ore. 2004), (quoting *Berman v. Parker*, 348 U.S. 26, (1954). *Vertical Bridge Development, LLD v. Brawley City Council*, 2023 WL 3568069 (S.D. Calif. 2023). A municipality is within its authority to weigh the benefit of merely improving the existing coverage against the negative aesthetic impact the tower would cause. *Id.*

The values represented by the concept of the "public welfare" are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy .... *Voice Stream, supra.*

Analyzing the City's General Plan and related Zoning Code provisions, it is clear that

Verizon's application does not comply with either the *letter* of the law, nor the *intent* behind these provisions and should have been denied.

D. Public Safety

Verizon's application made reference to improving 911 emergency calls. The City, and the Public, are rightly concerned with safety issues. However, Verizon's cell tower will not improve emergency calls. The nationwide FirstNet first responder network is provided by AT&T. The only way safety and 911 calling would be improved is if AT&T antennae were to be mounted on the proposed cell tower, and even then, it would only be available to AT&T network customers. There is no indication that AT&T will ever collocate on this proposed cell tower or that AT&T would participate in FirstNet by way of the proposed tower as opposed to a tower of their own.

Furthermore, emergency calls made to 911 will connect to *any available network*, regardless of carrier, to complete the call whether an individual trying to connect to 911 is a customer of that carrier or not.

POINT II

The Proposed Tower Will Have a Severe Detrimental Impact on the Aesthetics and Character of the Area

A. Verizon's Irresponsible Placement of Its Proposed Wireless Facility Will Inflict Substantial Adverse Impacts Upon the Aesthetics and Character of the Area

The proposed wireless facility will inflict dramatic and wholly unnecessary adverse impacts upon the area's aesthetics and character. As noted above, the applicable provisions of the Code not only recognize the importance of the visual "feel" of a neighborhood, they codify

its significance, requiring wireless facilities to be compatible with the community. In this instance, Verizon's proposed tower will have a clear negative impact on the surrounding area. There will be no attempt at camouflage, and the tower will be readily visible all over the neighborhood, creating an extremely displeasing aesthetic.

Moreover, Verizon hasn't presented any relevant data demonstrating that the proposed facility is even necessary, let alone that the proposed location is the best possible location to remedy any purported significant gap in coverage Verizon claims exists.

Federal courts around the country, including the United States Court of Appeals for the Ninth Circuit, have held that significant or unnecessary adverse aesthetic impacts are proper legal grounds upon which a local government may deny a zoning application seeking approval for the construction of a wireless telecommunication facility. For example, the United States Court of Appeals for the Ninth Circuit determined that there is nothing to "prohibit local governments from taking into account aesthetic considerations in deciding whether to permit the development of wireless telecommunications facilities (WCFs) within their jurisdictions." *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Ests.*, 583 F.3d 716 (9th Cir. 2009), *see also GTE Mobilenet of Calif. Ltd. P'ship v. City of Berkley,* supra ("Even under a substantial evidence review, zoning decisions based on aesthetic concerns can be valid," and "under the TCA, [a zoning board] is entitled to make an aesthetic judgment as long as the judgment is 'grounded in the specifics of the case,' and does not evince merely an aesthetic opposition to cell-phone towers in general." *citations omitted); and New Cingular Wireless PCS, LLC v. County of Marin, Calif.,* 2021 WL 5407509, (N.D. Calif. 2021).

"[T]he City may consider a number of factors including the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby

properties, the surrounding topography, and the surrounding tree coverage and foliage. We, and other courts, have held that these are legitimate concerns for a locality." *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 994 (9th Cir. 2009). *See also, Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 580 (9th Cir. 2008) (stating that the zoning board may consider "other valid public goals such as safety and aesthetics"); *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County, Kan.,* 546 F.3d 1299, 1312 (10th Cir.2008) (noting that "aesthetics can be a valid ground for local zoning decisions"); and *Cellular Tel. Co. v. Town of Oyster Bay,*

166 F.3d 490, 494 (2d Cir.1999) (recognizing that "aesthetic concerns can be a valid basis for zoning decisions").

Additionally, as is set forth below, Verizon has failed to provide a shred of *probative evidence* to establish that the wireless communications facility is not injurious to the neighborhood and is *actually necessary* to provide personal wireless coverage in the area.

B. Evidence of the Actual Adverse Aesthetic Impacts Which the Proposed Facility Would Inflict Upon the Nearby Homes

As logic would dictate, the people who are best suited to assess the nature and extent of the adverse aesthetic impacts, which an irresponsibly placed wireless telecommunication facility would inflict upon homes in close proximity to the proposed facility, are the residents themselves.

Consistent with this logic, the United States Court of Appeals for the Second Circuit recognized that when a local government is considering a wireless facility application, it should accept, as direct evidence of the adverse aesthetic impacts that a proposed facility would inflict upon nearby homes, statements and letters from the actual homeowners, since they are in the best

position to know and understand the actual extent of the impact they stand to suffer. *See, e.g., Omnipoint Communications Inc. v. The City of White Plains*, 430 F.3d 529 (2d Cir. 2005).

Letters have already been sent to the Planning Commission or City Council by homeowners wanting to express their concerns about the proposed tower. These letters contain specific, personal details from the homeowners regarding the adverse aesthetic impacts that the proposed facility would inflict upon their homes. They fear that the unique character of their community will be damaged by the sight of the tower, which will be everywhere they look, and the homeowners are concerned that local property values will decrease as a result of the looming presence of the facility.

These letters convey all the ways the proposed tower will negatively affect the nearby residents, their views, their enjoyment of their homes and the loss of property values.

Significantly, all of the adverse aesthetic impacts the proposed wireless facilities would inflict upon these homes are entirely unnecessary because Verizon has not demonstrated a significant gap within the City which needs to be filled.

The specific and detailed impacts described by the adjacent and nearby property owners constitute "*substantial evidence*" of the adverse aesthetic impacts they stand to suffer because they are not limited to "generalized concerns." *See GTE Mobilenet, supra; Voice Stream PCS I, LLC v. City of Hillsboro, 301 F.Supp.2d 1251 (D. Or. 2004).*

The severe adverse aesthetic impacts which would be caused by the proposed wireless facility's irresponsible placement which are detailed in these letters, are the precise type of damaging impacts that the Zoning Code was specifically enacted to prevent. Accordingly, Verizon's application should be denied.

C. Verizon's Visual Assessment is Inherently Defective and Should Be Disregarded Entirely

In a hollow effort to induce the City to believe that the installation of the proposed wireless facility would not inflict a severe adverse aesthetic impact upon the adjacent homes, Verizon has submitted what purports to be photo simulations of what the neighborhood would look like if the tower were to be built. However, as noted above, these photo simulations are faulty and ultimately meaningless.

As is undoubtedly known to Verizon, the visual impact analysis presented is inherently defective because it does not serve the purpose for which it has been offered. The reason local governments require photo simulations, or other visual impact studies, of a proposed wireless facility is to require applicants to provide the reviewing authority with a clear visual image of the *actual* aesthetic impacts that a proposed installation will inflict upon the nearby homes and community.

Not surprisingly, applicants often disingenuously seek to minimize the visual impact of these depictions by ***deliberately omitting*** from their photo simulations any images *actually taken from* the nearby homes that would sustain the most severe adverse aesthetic impacts.

In a widely cited case, *Omnipoint Communications Inc. v. The City of White Plains,* 430 F3d 529 (2nd Cir. 2005), the United States Court of Appeals for the Second Circuit explicitly ruled that where a proponent of a wireless facility presents visual impact depictions where they "omit" any images from the perspectives of the homes which are in closest proximity to the proposed installation, such presentations are inherently defective, and should be disregarded.

As was explicitly stated by the federal court: "the Board was free to discount Omnipoint's study because it was conducted in a defective manner. . . ***the observation points***

were limited to locations accessible to the public roads, and no observations were made from the residents' backyards much less from their second story windows" *Id.*

A simple review of the records shows that Verizon has failed to submit a meaningful visual impact analysis. Verizon has not included a single image taken from the vantage point of *any* of the nearby homes that will sustain the most severe adverse aesthetic impacts from the installation of the wireless facility which Verizon seeks to construct in such close proximity to those residences. This, of course, includes a complete absence of any photographic images taken from any of the homes belonging to the homeowners who will actually be affected by the presence of the proposed tower.

Instead, the photo simulations only consist of photos taken from public roads, and from angles and perspectives designed to minimize the appearance of the adverse aesthetic impact. They in no way accurately depict the view the affected residents will see, each and every time they look out their bedroom, kitchen, or living room window, or sit on their patio. This is the exact type of "presentation" which the federal court explicitly ruled to be defective in *Omnipoint*. As such, in accord with the federal court's holding in *Omnipoint*, Verizon's visual impact analysis should be recognized as inherently defective and disregarded in its entirety.

POINT III

§ 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 Would Allow Verizon to Increase the Height of the Proposed Facility Without Further Zoning Approval

As severe as the adverse impacts upon the nearby homes and community would be if the 69 foot facility were constructed as proposed by Verizon, if such a facility were to be built, Verizon could unilaterally choose to increase the height of the facility by as much as twenty (20)

feet. The City would be legally prohibited from stopping them from doing so due to the constraints of the Middle-Class Tax Relief and Job Creation Act of 2012.

§6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 provides that notwithstanding Section 704 of the Telecommunications Act of 1996 or any other provision of law, a State or local government *may not deny, and shall approve*, any eligible request for a modification of an existing wireless facility or base station that does not substantially change the physical dimensions of such facility or base station. *See* 47 U.S.C. §1455(a).

Under the FCC's reading and interpretation of §6409(a) of the Act, local governments are prohibited from denying modifications to wireless facilities unless the modifications will "substantially change" the physical dimensions of the facility, pole, or tower.

The FCC defines "substantial change" to include any modification that would increase the height of the facility by more than ten (10%) percent or by more than "the height of one additional antenna with separation from the nearest existing antenna not to exceed 20 feet, *whichever is greater*." (Emphasis added.) This height increase could not be challenged or prevented by the City.

Simply stated, under the FCC's regulation, if this facility were to be built, Verizon, at any time thereafter, could unilaterally increase the height of any such facility by as much as an additional twenty (20) feet, and there would be no way for the City to prevent such an occurrence, regardless of how many zoning regulations it would violate.

Considering the even more extreme adverse impacts which an increase in the height of the facility would inflict upon the homes and community nearby, Verizon's application should have been denied, especially since, as set forth below, Verizon doesn't actually *need* the

proposed facility.

POINT IV

Verizon Has Failed to Proffer Probative Evidence Sufficient to Establish a Need for the Proposed Wireless Facility at the Location Proposed, or That the Granting of Its Application Would Be Consistent With the Requirements of the City's Zoning Code

The intent behind the provisions of the City's Zoning Code, including the provisions regulating wireless telecommunications facilities, is to promote smart planning of wireless infrastructure within the City.

Smart planning involves the adoption and enforcement of zoning provisions that require wireless telecommunication facilities be *strategically placed* so that they minimize the number of facilities needed while saturating the City with complete wireless coverage (*i.e*., they leave no gaps in wireless service) and avoiding any unnecessary adverse aesthetic or other impacts upon homes and communities situated in close proximity to such facilities.

To determine if a proposed wireless telecommunications facility would be consistent with these planning requirements, sophisticated planning boards require wireless carriers and/or site developers to provide direct evidentiary proof of:

(a) the *precise locations, size, and extent of any geographic gaps in personal wireless services* that are being provided by a specifically identified wireless carrier, which provides personal wireless services within the respective jurisdiction, ***and***

(b) the *precise locations, size, and extent of any geographic areas* within which that identified wireless carrier suffers from a capacity deficiency in its coverage.

The reason that local zoning boards invariably require such information is that without it, the boards are incapable of knowing:

(a) if, and to what extent a proposed facility will remedy any actual gaps or deficiencies which may exist, and

(b) if the proposed placement is in such a poor location that it would all but require that more facilities be built because the proposed facility did not actually cover the gaps in service which actually existed, thereby causing an unnecessary redundancy in wireless facilities within the City.

In the present case, Verizon has wholly failed to provide any hard data to establish that the proposed placement of its facility would, in any way, be consistent with the City's planning provisions. Thus, it has failed to provide actual probative evidence to establish:

(a) the *actual location of* gaps (or deficient capacity locations) in personal wireless services within the City, and

(b) why or how their proposed facility would be the best and/or least intrusive means of remedying those gaps.

Moreover, as will be further discussed below, Verizon failed to present any hard data and has failed to present any useful data at all.

A. The Applicable Evidentiary Standard

Within the context of zoning applications such as the current one filed by Verizon, an applicant is required to prove that there are ***significant*** gaps[1] in its wireless service, that the location of the proposed facility will remedy those gaps, and that the facility is the least intrusive means of remedying that gap.

[1] It should be noted that establishing a gap in wireless services is *not* enough to prove the need for a wireless facility; rather, the applicant must prove that "a significant gap" in wireless service coverage exists at the proposed location. *See, e.g., Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 50 (1st Cir. 2009); *MetroPCS, Inc. v. City and*

The Ninth Circuit has set forth the following requirements, which all applicants seeking to install wireless facilities must prove. The test articulated by the Ninth Circuit requires Verizon to demonstrate that:

> (1) the proposed facility is required in order to close a significant gap in service coverage;
> (2) that the proposed facility is the least intrusive means of remedying the significant gap in service coverage, and
> (3) a meaningful inquiry has been made as to why the proposed facility is the only feasible alternative.

See Am. Tower Corp. v. City of San Diego, 763 F.3d 1035 (9th Cir. 2014); *GTE Mobilenet, supra*; *T-Mobile USA, Inc. v. City of Anacortes*, *supra* 572 F.3d 987 (9th Cir. 2009).

"The TCA does not assure every wireless carrier a right to seamless coverage in every area it serves, and the relevant service gap must be truly 'significant' and 'not merely individual 'dead spots' within a greater service area." *Los Angeles SMSA Limited Partnership v. City of Los Angeles* 2021 WL 4706999 (C.D. Calif. 2021) *quoting MetroPCS, Inc. v. City and County of San Francisco,* 400 F.3d 715 (9th Cir. 2005).

With respect to a "gap in service," "where the holes in coverage are very limited in number or size… the lack of coverage likely will be *de minimis* so that denying applications to construct towers necessary to fill these holes will not amount to a prohibition of service." *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999): *T-Mobile v Town of Islip, supra.*

Further, the *T-Mobile* Court*, citing Willoth,* held that "the fact that T-Mobile may have a need for the Proposed Facility does not 'trump all other important considerations, including the preservation of the autonomy of states and municipalities.'"

More specifically, the United States Court of Appeals for the Ninth Circuit stated in

Am. Tower Corp. v. City of San Diego, *supra,* "[w]hen determining whether a locality has effectively prevented a wireless services provider from closing a significant gap in service coverage, as would violate the federal Telecommunications Act (TCA), some inquiry is required regarding the feasibility of alternative facilities or site locations, and a least intrusive means standard is applied, which requires that the provider show that the manner in which it proposes to fill the significant gap in services is the least intrusive on the values that the denial sought to serve." *Id*. *See also Anacortes*, *supra*. That is, is the proposed tower the least intrusive means in light of the municipality's zoning regulations and the legislative intent behind them?

As previously noted, Verizon has not made a good faith effort to investigate alternate sites for the proposed tower. While there is no "magic" number, the courts have not only looked to the number of sites investigated as alternatives, but also to the amount of detail in that investigation. Verizon has not adequately described its efforts, *i.e*. the dimensions of their search ring, the follow up to letters sent, the degree of coverage at an alternate site compared to the proposed site, and so on, in looking for alternative sites.

Further, it appears that only one competing carrier's (T-Mobile) existing tower was considered and rejected. Were small cell facilities considered instead of the huge monopole? Were micro cells or cellular arrays mounted on buildings considered? What, exactly, is the extent of Verizon's analysis of alternative sites?

An applicant is required to perform their due diligence and conduct a good faith, meaningful investigation into alternative sites. *Up State Tower Co. v Town of Southport, NY* 412 F.Supp.3d 270 (W.D.N.Y. 2019). Interestingly, the *Omnipoint* Court found that where

"other cell companies serve the area…the Board could infer that other towers erected by other companies are in the vicinity, and that Omnipoint had the burden of showing either that those towers lacked capacity for an Omnipoint facility or that (for some other reason) those towers were unavailable to bridge Omnipoint's coverage gap."

Moreover, a local government may reject an application for construction of a wireless service facility in an under-served area without thereby prohibiting wireless services if the service gap can be closed by less intrusive means. *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630 (2d Cir. 1999) *citing Town of Amherst v Omnipoint Communications,* 173 F.3d 9 (1st Cir 2 1999). And a denial is merited where the applicant has identified other potential sites, but stated in conclusory fashion that they were unfeasible and stated…that it was unable to build a less intrusive structure…. *Omnipoint, supra.* In this case, Verizon has also stated in a conclusory fashion, without adequate proof of their investigation, that other, alternate sites were not feasible.

B. Verizon Failed To Submit Any Probative Evidence to Establish the Need For the Proposed Facility at the Height and Location Proposed

Verizon failed to meet its burden of proving that: (1) a significant gap in service exists; (2) its facility would remedy that gap; (3) the proposed tower is compatible with the surrounding community; (4) its proposed placement would minimize the aesthetic impact within the meaning of the applicable sections of the Zoning Code; and (5) a denial of its application would constitute a "prohibition of personal wireless services" within the meaning of 47 U.S.C.A. §332(7)(B)(i)(II).

Glaringly absent from Verizon's application is any "*hard data,"* which could easily be submitted by the applicant, as *probative evidence* to establish that: (a) there is an actual gap in

service which (b) necessitates the construction of a *new* facility, (c) and which requires it to be built at the specifically proposed location, and (d) on the specifically chosen site (as opposed to being built upon any alternative, less-intrusive locations).

Verizon has failed to prove that the proposed location is the best possible location to remedy a significant gap in personal wireless service because no significant gap in service even exists.

Without any meaningful data whatsoever, it is impossible for the City to comply with the planning requirements set forth in its own Zoning Code. Furthermore, without any data, the City cannot accurately evaluate and ascertain whether the proposed location is the least intrusive means of providing personal wireless service to the community because they have no idea where any possible significant gaps may or may not exist. It would be entirely irresponsible and illogical for the City to grant applications for the installation of wireless telecommunications facilities without even knowing where such facilities are actually needed.

(i) FCC and California Public Utilities Commission

Recently, both the FCC and the California Public Utilities Commission have recognized the ***absolute need*** for hard data rather than the commonly submitted propagation maps, which can easily be manipulated to exaggerate need and significant gaps.

As is discussed within the FCC's July 17, 2020, proposed order, FCC-20-94, "[i]n this section, we propose requiring mobile providers to submit a statistically valid sample of on-the-ground data (*i.e.*, both mobile and stationary drive-test data) as an additional method to verify

mobile providers' coverage maps."[2] The FCC defines drive tests as "tests analyzing network coverage for mobile services in a given area, i.e., measurements taken from vehicles traveling on roads in the area."[3] Further within the FCC's proposed order, several commenting entities also agree that drive test data is the best way to ascertain the most reliable data. For example: (i) "City of New York, California PUC, and Connected Nation have asserted that on-the-ground data, such as drive-test data, are critical to verifying services providers' coverage data…;"[4] (ii) California PUC asserted that 'drive tests [are] the most effective measure of actual mobile broadband service speeds';"[5] and (iii) "CTIA, which opposed the mandatory submission of on-the-ground data, nonetheless acknowledged that their data 'may be a useful resource to help validate propagation data…'"[6]

California PUC has additionally stated that "the data and mapping outputs of propagation-based models will not result in accurate representation of actual wireless coverage" and that based on its experience, "drive tests are required to capture fully accurate data for mobile wireless service areas."[7]

Moreover, proposed order FCC-20-94, on page 45, paragraph 105, discusses provider data. Specifically, the FCC states:

> *"The Mobility Fund Phase II Investigation Staff Report*, however, found that drive testing can play an important role in auditing, verifying, and investigating the accuracy of mobile broadband coverage maps submitted to the Commission. The *Mobility Fund Phase II Investigation Staff Report* recommended that the Commission require

[2] *See* page 44 paragraph 104 of proposed order FCC-20-94.
[3] *See* page 44 fn. 298 of proposed order FCC-20-94.
[4] *See* page 45 fn. 306 of proposed order FCC-20-94.
[5] *Id*.
[6] *Id*.
[7] https://arstechnica.com/tech-policy/2020/08/att-t-mobile-fight-fcc-plan-to-test-whether-they-lie-about-cell-coverage/

> providers to "submit sufficient actual speed test data sampling that verifies the accuracy of the propagation model used to generate the coverage maps. *Actual speed test data is critical to validating the models used to generate the maps.*"

(*Emphasis added*)

Most importantly, on August 18, 2020, the FCC issued a final rule in which the FCC found that requiring providers to submit detailed data about their propagation models will help the FCC verify the accuracy of the models. Specifically, 47 CFR §1.7004(c)(2)(i)(D) requires "[a]ffirmation that the coverage model has been validated and calibrated at least one time using on-the-ground testing and/or other real-world measurements completed by the provider or its vendor."

The mandate requiring more accurate coverage maps has been set forth by Congress. "As a result, the U.S. in March passed a new version of a bill designed to improve the accuracy of broadband coverage maps."[8] "The Broadband Deployment Accuracy and Technological Availability (DATA) Act requires the FCC to collect more detailed information on where coverage is provided and to 'establish a process to verify the accuracy of such data, and more.'"[9]

However, despite Congress's clear intent to "improve the quality of the data,"[10] several wireless carriers, have opposed the drive test/real-world data requirement as too costly.

"The project – required by Congress under the Broadband DATA Act – is an effort to improve the FCC's current broadband maps. Those maps, supplied by the operators themselves,

[8] https://www.cnet.com/news/t-mobile-and-at-t-dont-want-to-drive-test-their-coverage-claims/
[9] *Id*.
[10] *Id*.

have been widely criticized as inaccurate."[11]

If the FCC requires further validation and more accurate coverage models, there is no reason this City should not do the same. For the foregoing reasons, dropped call records and drive test data are both relevant and necessary.

(ii) Hard Data and the Lack Thereof

Across the entire United States, applicants seeking approvals to install wireless facilities provide local governments with *hard data,* as both: (a) actual evidence that the facility they seek to build is necessary and (b) actual evidence that granting their application would be consistent with their planning requirements.

The most accurate and least expensive evidence used to establish the location, size, and extent of both *significant gaps* in personal wireless services, and areas suffering from *capacity deficiencies*, are two specific forms of *hard data*, which consist of: (a) dropped call records and (b) actual drive test data. Both local governments and federal courts in California consider hard data in order to ascertain whether or not a significant gap in wireless coverage exists at that exact location.

It must be remembered that a propagation study is only a predictive model of signal strength and coverage. The programs that create the studies use thousands, perhaps millions of calculations and are dependent on the program used and the input parameters defined by the person running the program. Accordingly, the result is only as good as the data input into the program. Additionally, as here, propagation maps usually do not represent *all* frequencies available to the carrier. Lack of one frequency does not mean there is a lack of service in one

[11] https://www.lightreading.com/test-and-measurement/verizon-t-mobile-atandt-balk-at-drive-testing-their-networks/d/d-id/763329

or more other frequencies.

In fact, unlike "expert" reports, RF modeling, and propagation maps – all of which may be manipulated to reflect whatever the preparer wants them to show – *hard data* is straightforward and less likely to be subject to manipulation, unintentional error, or inaccuracy. Dropped call records are generated by a carrier's computer systems. They are typically extremely accurate because they are generated by a computer that already possesses all of the data pertaining to dropped calls, including the number, date, time, and location of all dropped calls suffered by a wireless carrier at any geographic location and for any chronological period. With the ease of a few keystrokes, each carrier's system can print out a precise record of all dropped calls for any period of time, at any geographic location. It is highly unlikely that someone could enter false data into a carrier's computer system to materially alter that information.

In a similar vein, actual drive test data does not typically lend itself to the type of manipulation that is almost uniformly found in "computer modeling," the creation of hypothetical propagation maps, or "expert interpretations" of actual data, all of which are so subjective and easily manipulated that they are essentially rendered worthless as a form of probative evidence. Actual raw drive test data consists of actual records of a carrier's wireless signal's actual recorded strengths at precise geographic locations.

As reflected in the records, Verizon has not provided any type of *hard data* as probative evidence, nor has it presented any form of data whatsoever, despite being in possession of such data. For example, Verizon could – and should – provide documentation regarding the number of residents who would benefit from the proposed tower, or information regarding the number

and kinds of customer service complaints. "The substantial evidence analysis requires the Court to look for 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' that a significant gap in service exists. *New Cingular Wireless PCS v. City of West Covina*, 2023 WL 4422835 (C.D. Calif. 2023) *quoting* Metro PCS, *supra.* Clearly, the actual number of people who would benefit from the proposed tower as well as information regarding actual service complaints and/or dropped calls, would be the best indicators of a significant gap in service.

C. Verizon's Analysis Regarding Its Wireless Coverage Is Contradicted By Their Own Actual Coverage Data

As is a matter of public record, Verizon maintains an internet website at https://www.verizon.com. In conjunction with its ownership and operation of that website, Verizon maintains a database that contains geographic data points that cumulatively form a geographic inventory of their actual *current* coverage for wireless services.

As maintained and operated by Verizon, that database is linked to Verizon's website, and is the data source for an interactive function, which enables users to access Verizon's own data to ascertain both: (a) the existence of Verizon's wireless coverage at any specific geographic location, and (b) the level, or quality of such coverage.

Verizon's interactive website translates their *actual coverage data* to provide imagery whereby areas that are covered by Verizon service are depicted in various shades of blue, and areas where Verizon has a lack (or gap) in coverage, are depicted in white. The website further translates the data from Verizon's database to specify the actual *service level* at any specific geographic location.

A copy of Verizon's coverage map for the area around 244 Colgan Ave., Santa Rosa,

CA can be viewed on Verizon's website and is also attached as **Exhibit "A."** This Exhibit was obtained and printed on March 15, 2024, from Verizon's website.

On its website, the coverage map shows, based on Verizon's *own* data, that there is no significant coverage gap in Verizon's service at 244 Colgan Ave., or anywhere around or in close proximity to it. The coverage map indicates solid levels of service.

This is in stark contrast to the claims made by Verizon in its submission, allegedly supported by their propagation maps. This obvious contrast between the claims made on Verizon's website in order to sell its services to the public and the claims made by Verizon in order to sell its proposed tower to the Planning Commission is striking. If nothing else, these differences demonstrate the ease with which data can be manipulated to suit a particular purpose.

In addition, annexed as **Exhibit "B"** is a map maintained by the FCC, accessible on their website and based on data provided directly by Verizon. This Exhibit was obtained and printed on March 15, 2024, and shows that there are no coverage gaps at or near 244 Colgan Ave., CA.

Both **Exhibits "A"** and **"B"** are based on Verizon's own data and as such, at the very least should be treated as statements against interest.

D. *ExteNet Systems, Inc. v. Village of Flower Hill and Flower Hill Board of Trustees*

On July 29, 2022, the Federal District Court for the Eastern District of New York issued an informative and instructive decision that reiterates the holding in another authoritative and widely cited case, *Willoth*, *supra.* Although not binding on Courts in the state of California, the case is nonetheless persuasive. The Judge noted that while "improved capacity and speed are

desirable (and, no doubt, profitable) goals in the age of smartphones, … they are not protected by the [TCA]." *ExteNet Sys, Inc. v. Vill. of Flower Hill*, 617 F.Supp.3d 125 (E.D.N.Y. 2022). In the *Flower Hill* case, the Board found significant adverse aesthetic and property values impact and, most importantly, no gap in wireless coverage and, therefore, no need even to justify the significant adverse impacts. Quoting *Omnipoint, supra,* the Court found that the lack of "public necessity" can justify a denial under New York law. "In the context of wireless facilities, public necessity requires the provider 'to demonstrate that there was a gap in cell service, and that building the proposed [facility] was more feasible than other options.'" *Id.* Further, the Judge held that "as with the effective prohibition issue, the lack of a gap in coverage is relevant here and can constitute *substantial evidence* justifying denial…And, since one reason given by the Board for its decision was supported by substantial evidence, the Court need not evaluate its other reasons." *Id., (emphasis supplied).*

The applicant bears the burden of proof and must show that there is a significant gap in service – not just a lack of a *particular frequency* of service, *i.e.,* 5G service. A cell phone is able to "downshift" – that is, from 5G to 4G or from 4G to 3G, etc. – if necessary to maintain a call throughout coverage areas. Unless there is an <u>*actual*</u> gap, the call will continue uninterrupted. Therefore, there's only a significant gap when there is ***no service at all***. *Id.*

Similarly, in this instance, in addition to the clear adverse impact on the neighboring properties, Verizon has failed to produce any evidence of a truly <u>*significant gap*</u> in wireless service. Showing a gap in a particular frequency is not sufficient. ***All*** frequencies must be absent for a significant gap to exist. Verizon failed to meet this burden, and thus their application should have been denied.

POINT V

To Comply With the TCA, Verizon's Application Should Be Denied in a Written Decision Which Cites the Evidence Provided Herewith

The Telecommunications Act of 1996 requires that any decision denying an application to install a wireless facility: (a) be made in writing, and (b) be made based upon substantial evidence, which is discussed in the written decision. *See* 47 U.S.C.A. §332(c)(7)(B)(iii).

A. The Written Decision Requirement

To satisfy the requirement that the decision be in writing, a board must issue a written denial which is separate from the written record of the proceeding, and which contains a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons. *See, e.g., MetroPCS v. City and County of San Francisco,* 400 F.3d 715 (2005).

B. The Substantial Evidence Requirement

To satisfy the requirement that the decision be based upon substantial evidence, the decision must be based upon such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

The most authoritative and widely quoted explanation of the TCA's "substantial evidence" requirement comes from *Cellular Tel. Co. v. Town of Oyster Bay*: "substantial evidence implies 'less than a preponderance, but more than a scintilla of evidence'." 166 F.3d 490 (2d Cir. 1999). *See also, GTE Mobilenet, supra.* Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.,*

quoting MetroPCS, Inc. v. City and Cty. of San Francisco, 400 F.3d 715 (9th Cir. 2005). Thus, these interested homeowners have met their burden of proving that Verizon failed to offer sufficient evidence to warrant granting their application and it should be denied.

To ensure that the City's decision to deny this application cannot be challenged under the Telecommunications Act of 1996, it is respectfully requested that the City Council deny Verizon's application in a written decision wherein the City Council cites the substantial evidence upon which it based its determination.

C. The Non-Risks of Litigation

All too often, representatives of wireless carriers and/or site developers try to intimidate local zoning officials with either open or veiled threats of litigation. These threats of litigation under the TCA are, for the most part, entirely hollow.

This is because, even if they file a federal action against the City and win, the Telecommunications Act of 1996 does not entitle them to recover compensatory damages or attorneys' fees, even if they get creative and try to characterize their cases as claims under 42 U.S.C. §1983.[12]

This means that if they were to sue the City and win, the City would not be liable to pay them anything in damages or attorneys' fees under the TCA.

Typically, the only expense incurred by the local government is its own attorneys' fees. Since federal law mandates that TCA cases proceed on an "expedited" basis, such cases typically last a comparatively short time. As a result of the brevity and relative simplicity of such cases, the attorneys' fees incurred by a local government are typically quite small, compared to

[12] *See City of Rancho Palos Verdes v. Abrams*, 125 S.Ct 1453 (2005), *Network Towers LLC v. Town of Hagerstown*, 2002 WL 1364156 (2002), *Kay v. City of Rancho Palos Verdes*, 504 F.3d 803 (9th Cir 2007*), Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687 (3rd Cir 2002).

virtually any other type of litigation.

Conclusion

The Santa Rosa Zoning Code, together with the General Plan applied to the facts and circumstances of this case, together with the applicable provisions of the Telecommunications Act can only result in one determination – Verizon's application should not have been approved and this appeal should be granted.

Verizon has not proven by competent evidence that a need even exists in the area where they propose to install their cell tower. No significant gap has been demonstrated. Nor has Verizon proven that the proposed facility is the least intrusive means of remedying a purported significant gap in service coverage, and they have not shown that a meaningful, good faith inquiry was made as to whether the proposed facility is the least intrusive alternative. Clearly, the proposed tower is not compatible with the nearby community and will have an adverse effect on the adjacent residents. Although the proposed location is technically within a light industrial zone, the spirit and intent of the Zoning Code for the residents *just across the street*, must protect and maintain the character and residential quality of the community.

These facts together with the clear adverse impacts which will befall the nearby residents, and which will affect the character of the of the entire community can result in only one thoughtful, well-reasoned decision. It is respectfully requested that this appeal be granted, and that Verizon's application be denied in its entirety.

Dated: Santa Rosa, CA
March 18, 2024

Respectfully Submitted,

• Vintage Park Apts. and La Esplanada Neighbors

Carmen Gonzalez- 1611 La Esplanada Pl. #111, Santa Rosa, CA 95404
Sue Dolan- 137 Colgan Ave. #2049, Santa Rosa, CA 95404
Melody Stewart- 133 Colgan Ave. #121, Santa Rosa, CA 95404
Michele de Luca- 135 Colgan Ave., #2035, Santa Rosa, CA 95404
Annie Acker- 135 Colgan Ave., #2039, Santa Rosa, CA 95404
Judy Salerno- 141 Colgan Ave., #1087, Santa Rosa, CA 95404
Herbert Lebherz- 1611 La Esplanada Pl. #121, Santa Rosa, CA 95404
Sandra Lebherz- 1611 La Esplanada Pl. #121, Santa Rosa, CA 95404

Community advocates for Colgan Ave. neighbors

• EMF Safety Network
Paul-André Schabracq, Co-director
Sidnee Cox, Co-director
Richard N. Boyd, PhD,
Edmée Danan, MD
Martha Glasser

• SafeTech4SantaRosa

Kim Schroeder
Alex Krohn
Mary Dahl
Jennifer LaPorta
Tom LaPorta

CITY OF SANTA ROSA
STATE OF CALIFORNIA

----------X

In the Matter of the Application of:

VERIZON

For Conditional Use Permit

Premises: 244 Colgan Ave.
Santa Rosa, CA 95404

Parcel # 044-011-053-000

----------X

EXHIBITS IN SUPPORT OF APPEAL

Respectfully submitted,

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Exhibit List

A Verizon Website Wireless Coverage Map

B FCC Coverage Map for Verizon

EXHIBIT A

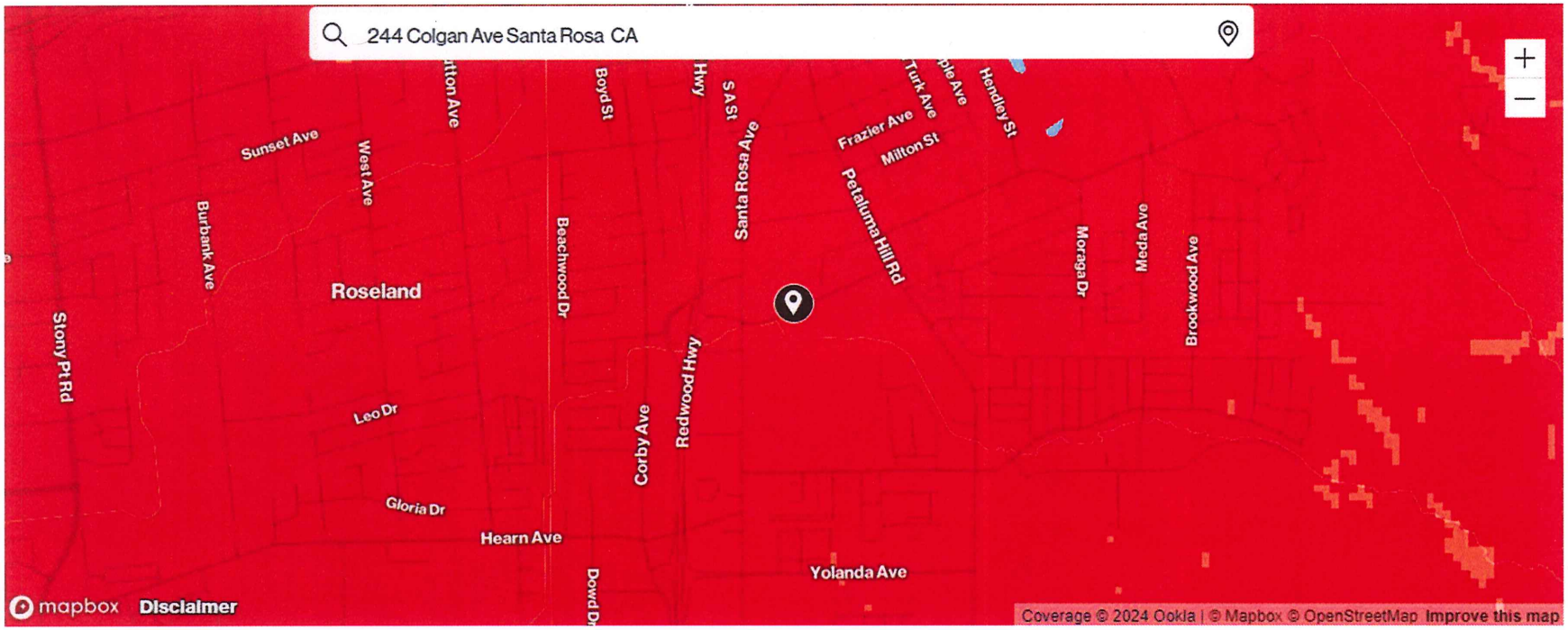
244 Colgan Ave Santa Rosa CA
Sunset Ave
West Ave
Burbank Ave
Roseland
Stony Pt Rd
Leo Dr
Gloria Dr
Hearn Ave
Beachwood Dr
Boyd St
Corby Ave
Redwood Hwy
Santa Rosa Ave
Frazier Ave
Milton St
Petaluma Hill Rd
Turk Ave
Hendley St
Moraga Dr
Meda Ave
Brookwood Ave
Yolanda Ave
mapbox
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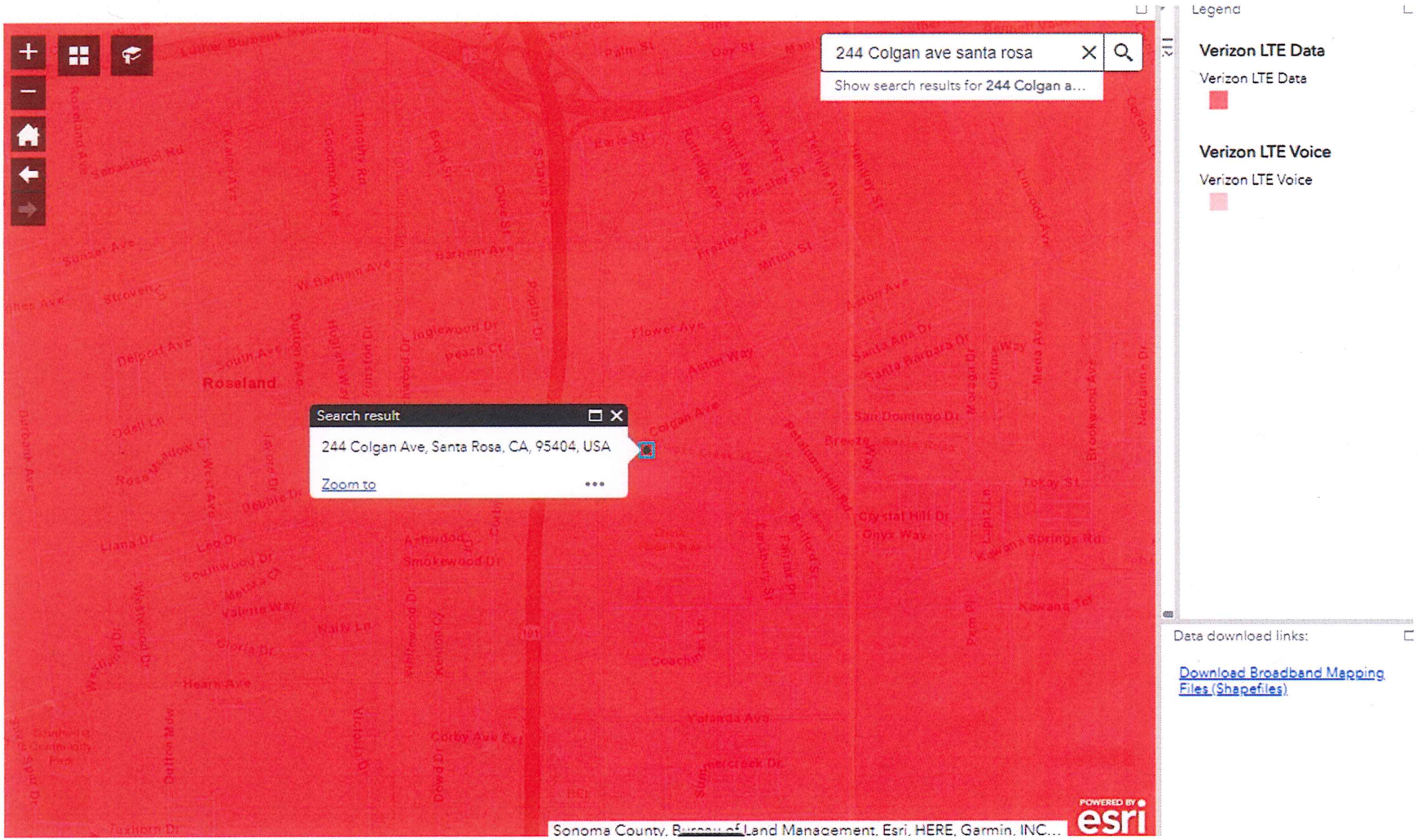
EXHIBIT B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