City of Sonoma
Appeal Application Form

For City Use
Date Received FEB 3 2020
By

- A copy of the rights of appeal and the City's appeal procedures may be found on the reverse of this form
- The fee to file an appeal must accompany this form
- Appeals must be filed with the **City Clerk** within **fifteen (15) calendar days** of the action
- Appeals must address issues raised or decisions made at previous hearings. Appeal hearings cannot be used as a forum to introduce new issues
- In order for your appeal to be valid this form must be filled out completely.

Feel free to attach additional sheets or supporting documentation as may be necessary.

APPELLANT INFORMATION: (Please Print)

Name: The CBR Group c/o Verizon Wireless
Address: 2840 Howe Road, Suite E, Martinez, CA 94553
Phone: 1-415-806-2323

Name:
Address:
Phone:

I/We the undersigned do hereby appeal the decision of the:

☑ Planning Commission ☐ Design Review Commission

☐ City Planner or Department Staff ☐ Other:

Regarding: Site-006
(Title of project or application)

Located at: near 574- 552 Fifth Street West
(Address)

Made on: January 23, 2020
(Date decision was made)

I/We hereby declare that I/We are eligible to file an appeal because:
(Refer to Section 19.84.30-A, Eligibility, on the reverse)

Please see Letter dated February 3, 2020 RE: Appeal of Conditions of Approval 1 and 16 Planning Commission Approval of Use Permits Site-006 (near 574- 552 Fifth Street West), Site-007 (near 550 Second Street West) and Site-012 (near 25 McDonell Street) - Verizon Wireless Small Cells in the Right-of-Way

The facts of the case and basis for the appeal are:

Please see Letter dated February 3, 2020 RE: Appeal of Conditions of Approval 1 and 16 Planning Commission Approval of Use Permits Site-006 (near 574- 552 Fifth Street West), Site-007 (near 550 Second Street West) and Site-012 (near 25 McDonell Street) - Verizon Wireless Small Cells in the Right-of-Way

I/We request that the Appeal Body take the following specific action(s):

Please see Letter dated February 3, 2020 RE: Appeal of Conditions of Approval 1 and 16 Planning Commission Approval of Use Permits Site-006 (near 574- 552 Fifth Street West), Site-007 (near 550 Second Street West) and Site-012 (near 25 McDonell Street) - Verizon Wireless Small Cells in the Right-of-Way

Signed: _____ 2.3.20
Signature Date

_____
Signature Date

Sonoma Municipal Code Chapter 19.84

APPEALS

19.84.010 Purpose of chapter. Determinations or actions of the city planner and city commissions may be appealed as provided by this chapter. (Ord. 2003-02 § 3, 2003).

19.84.020 Appeal subjects and jurisdiction. Determinations and actions that may be appealed, and the authority to act upon an appeal shall be as follows:

A. Code Administration and Interpretation. The following determinations and actions of the city planner and department staff may be appealed to the planning commission or the design review commission, as applicable, and then to the council:

1. Determinations on the meaning or applicability of the provisions of this development code that are believed to be in error, and cannot be resolved with staff;

2. Any determination that a permit application or information submitted with the application is incomplete, in compliance with state law (Government Code Section 65943); and

3. Any enforcement action in compliance with Chapter 19.90 SMC, Enforcement of Development Code Provisions.

B. Land Use Permit and Hearing Decisions. Decisions of the city planner on zoning clearances may be appealed to the planning commission or the design review commission, as applicable. Decisions by a commission may be appealed to the council. (Ord. 2003-02 § 3, 2003).

19.84.30 Filing of appeals.

A. Eligibility. An appeal may be filed by:

1. Any person affected by an administrative determination or action by the city planner, as described in SMC 19.84.020(A);

2. In the case of a land use permit or hearing decision described in SMC 19.84.020(B), by anyone who, in person or through a representative, appeared at a public hearing in connection with the decision being appealed, or who otherwise informed the city in writing of the nature of their concerns before the hearing;

3. Except as otherwise provided by law or ordinance of this city, any member of the city council may, at his/her discretion, appeal any final decision of any city commission board or official, to the city council. If an appeal is made by a council member, there shall be a presumption applied that the reason for the appeal is because the appealed decision or interpretation has significant and material effects on the quality of life within the city of Sonoma. No inference of bias shall be made because of the appeal and no other reason need be stated by the council person in his/her notice of appeal. Appeals made according to this subsection shall not be subject to any fees.

B. Timing and Form of Appeal. All appeals shall be submitted in writing on a city application form, and shall specifically state the pertinent facts of the case and the basis for the appeal. Appeals shall be filed in the office of the city clerk within 15 days following the final date of the determination or action being appealed.

C. Fee. Appeals shall be accompanied by the filing fee set by the city council's fee resolution, except as provided for in subsection (A)(3) of this section.

D. Scope of Land Use Permit Appeals. An appeal of a decision by the city planner or commission on a land use permit shall be limited to issues raised at the public hearing, or in writing before the hearing, or information that was not known at the time of the decision that is being appealed.

E. Effect of Filing an Appeal. The filing of a valid appeal shall have the effect of staying the issuance of any permit until such time as the matter on appeal is resolved. (Ord. 2003-02 § 3, 2003).

19.84.040 Processing of appeals.

A. Scheduling of Hearing. After an appeal has been received in compliance with the procedures listed in SMC 19.84.030(B), Timing and Form of Appeal, the appeal shall be transmitted to the city planner who shall place the item on the next available commission agenda, or the city clerk shall schedule the matter for the next available council agenda, as applicable to the appeal.

B. Report. After the appeal hearing has been scheduled, the city planner shall prepare a report on the matter, and forward the report to the appropriate appeal body.

C. Joining an Appeal. Only those persons who file an appeal within the 15-day appeal period in compliance with SMC 19.84.030(A), Eligibility, shall be considered the appellants of the subject permit. Any person who wishes to join an appeal shall follow the same procedures for an appellant in compliance with subsection (A) of this section. No person shall be allowed to join an appeal after the end of the 15-day appeal period.

D. Action and Findings.

1. General Procedure. The appeal body shall conduct a public hearing in compliance with Chapter 19.88 SMC, Public Hearings. At the hearing, the appeal body may consider any issue involving the matter that is the subject of the appeal, in addition to the specific grounds for the appeal.

   a. The appeal body may affirm, affirm in part, or reverse the action, decision, or determination that is the subject of the appeal, based upon findings of fact about the particular case. The findings shall identify the reasons for the action on the appeal and verify the compliance or noncompliance of the subject of the appeal with the provisions of this development code.

   b. When reviewing a decision on a land use permit, the appeal body may adopt additional conditions of approval that may address other issues or concerns than the subject of the appeal.

2. Appeals to the City Council.

   a. By an Appellant. A decision by a commission may be appealed to the city council as provided by SMC 19.84.030, Filing of appeals.

   b. Council's Decision Is Final. The decision of the council on an appeal shall be final.

   c. Tie Vote. A tie vote by the city council with regard to an appeal shall result in the affirmation of the decision of the body whose decision was appealed.

E. Effective Date of Appeal Decision. A decision by the commission is effective on the sixteenth day after the decision, when no appeal to the decision has been filed with the council. A decision by the council is effective as of the date of the decision. A final decision by the city council with regard to an appeal shall take the form of a resolution. (Ord. 2003-02 § 3, 2003).

MACKENZIE & ALBRITTON LLP
220 SANSOME STREET, 14TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE 415/288-4000
FACSIMILE 415/288-4010
PA@MALLP.COM

February 3, 2020

City Council
City of Sonoma
No. 1 The Plaza
Sonoma, California 95476

Re: Appeal of Conditions of Approval 1 and 16
Planning Commission Approval of Use Permits Site-006 (near 574-552 Fifth Street West), Site-007 (near 550 Second Street West) and Site-012 (near 25 McDonell Street)
Verizon Wireless Small Cells in the Right-of-Way

Dear Councilmembers:

We write on behalf of Verizon Wireless to appeal the Planning Commission's decision of January 23, 2020, to apply two problematic conditions of approval to the above-referenced approved use permits. For each permit, Condition 1 would, in part, require Verizon Wireless to place a single radio in an underground vault instead of mounting it to a pole as proposed. Condition 16 would require a use permit modification if Verizon Wireless uses new technology to increase effective radiating power greater than 25 percent.

Verizon Wireless appeals Condition 1 because it violates the federal Telecommunications Act in two ways. First, the decision to require the radio underground is not supported by substantial evidence, in violation of 47 U.S.C. Section 332(c)(7)(B)(iii). The Commission imposed undergrounding in reliance on staff's photographs of nearby underground vault covers. Those vaults are for other types of utilities, not wireless infrastructure, and their presence does not prove that undergrounding is feasible for radios, which contain sensitive computer equipment.

The Commission disregarded Verizon Wireless's evidence in the record that undergrounding is infeasible.[1] With a sleek, narrow profile and all cables hidden, the radio is designed for attachment to a street light pole, but not for underground conditions. The radio is designed to be passively cooled when pole-mounted, but if underground, it requires a cooling fan and vents, plus a sump pump to remove stormwater. Excavation for a vault of the size required for all of this equipment may be impeded by limited sidewalk space and existing underground utilities. Undergrounding also presents operational challenges. For example, when sump pumps have stopped during a power

[1] *Verizon Small Cell Underground Vaulting Feasibility Analysis*, October 3, 2018.

outage, underground radios failed due to stormwater intrusion. When cooling fans could not operate continuously, radios overheated. Such damage disables a small cell for an extended period of time, compromising network reliability. Verizon Wireless's field experience has been that undergrounding small cell radios is unreliable due to water intrusion, overheating, and noise, and it is not technically feasible for these reasons. Verizon Wireless reminded the Commission of the infeasibility of undergrounding radios on January 23, 2020, in a letter and during hearing testimony.

The City's 1996 telecommunications ordinance, applicable at the time Verizon Wireless filed for permits, requires that "telecommunication support facilities (i.e., vaults, equipment rooms, utilities, and equipment enclosures)...shall be placed in underground vaults to the extent possible." Sonoma Municipal Code § 5.32.110(B)(4). At the Commission's January 23, 2020 hearing, City Attorney John Abaci interpreted "possible" to mean "feasible, and without there being any practical constraints."[2] The Commission provided no evidence to contradict the conclusion that undergrounding the radio is infeasible, let alone the substantial evidence required by federal law. An aesthetic preference for undergrounding does not trump its infeasibility. Because Verizon Wireless provided evidence confirming that it is impossible, the relevant code does not require undergrounding.

We note that the City's new wireless facilities ordinance requires that accessory equipment be placed underground unless there are infeasible constraints, or "except as may be determined by the reviewing authority." Sonoma Municipal Code § 5.30.080(H). The new ordinance also allows up to six cubic feet of pole-mounted equipment. Code § 5.30.080(D)(2)(c). Verizon Wireless's antenna, radio and disconnect switch total under three cubic feet—less than half the volume allowed.

The undergrounding condition violates a second Telecommunications Act provision because it is prohibitive. The Federal Communications Commission (the "FCC") has ruled that for small cells, technically infeasible requirements lead to a prohibition of service in violation of 47 U.S.C. Sections 253(a) and 332(c)(7)(B)(i)(II). This is because technically infeasible aesthetic requirements, including those regarding undergrounding, are unreasonable, and by materially inhibiting wireless service, they have the effect of prohibiting of service. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Declaratory Ruling and Third Report and Order, FCC 18-133 (September 27, 2018), ¶¶ 37, 86-87, 90.

Even if feasible, undergrounding would pose considerably more impact. Excavation and subsequent construction would take 30 to 45 days, with considerable noise and long sidewalk and street closures. In contrast, if simply affixing the radio to the pole, construction would take three to five days.

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[2] Full video available at:
https://sonomacity.civicweb.net/filepro/document/32264/Special%20Planning%20Commission%20-%20Jan%2023%2C%202020.html?splitscreen=true&widget=true&media=true

Verizon Wireless originally proposed a design with two or three radios on wood utility poles, and now proposes one narrow radio on new street light pole as a compromise to avoid infeasible undergrounding requirements. At the January 23, 2020 hearing, Commission Vice Chair Ron Wellander commented on the lesser impact of a pole-mounted radio, saying "I do not think that vaulting this radio makes a significant aesthetic improvement." To mandate undergrounding would disincentivize the aesthetically-preferred street light design, and Verizon Wireless would instead pursue the original utility pole design. Because it is excessive and would violate federal law, Verizon Wireless asks the Council to modify Condition 1 to eliminate the undergrounding requirement.

Condition 16 also violates the Telecommunications Act because it regulates based on radio frequency emissions. However, the City cannot regulate based on emissions if a facility is shown to comply with the FCC's radio frequency exposure guidelines. 47 U.S.C. § 332(c)(7)(B)(iv). If Verizon Wireless submits an engineer's radio frequency exposure report confirming that a proposed modification complies, the City cannot impose any requirement (such as a more onerous permit process) based on a change in emissions. Further, the City cannot regulate based on the technical and operational aspects of wireless technology, as that is the FCC's exclusive jurisdiction. *See New York SMSA Ltd. Partnership v. Town of Clarkstown,* 612 F.3d 97, 105-106 (2nd Cir. 2010). As it exceeds the City's authority, Verizon Wireless asks the Council to strike Condition 16.

Verizon Wireless reserves the right to supplement these grounds for appeal. This letter accompanies the City of Sonoma *Appeal Application Form* and a check for the required appeal filing fee. At your convenience, please confirm the timely receipt of this appeal to the above email address.

Very truly yours,

Paul B. Albritton

verizon

THE CBR GROUP
COMMUNICATIONS BASED RESOURCE GROUP

February 3, 2020

VIA HAND DELIVERY

Mr. David Storer, Planning Director
City of Sonoma
No. 1 the Plaza
Sonoma, CA

RE: Verizon Wireless Small Cells in the Right-of-Way - Appeal of Conditions of Approval 1 and 16 - Planning Commission Approval of Use Permits Site-006 (near 574- 552 Fifth Street West) - Verizon Wireless Small Cells in the Right-of-Way

Dear David,

Pursuant to the Planning Commission Approval on January 23, 2020 for the three sites listed above, CBR Group is filing an appeal letter to contest two of the conditions, so that we may move for with improving Verizon Wireless Service in Sonoma for their residents, employees, visitors and emergency service providers who rely on their service.

The submitted items include the following:

- City of Sonoma Appeal Application Form for Sonoma 006
- Mackenzie & Albritton LLP Appeal Letter dated February 3, 2020
- Use Permit Appeal Fee of $400.00

If you have questions please feel free to contact Allison Holleman at 925-699-7460 or Allison@TheCBRGroup.com.

Sincerely,

The CBR Group, Inc.

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THE CBR GROUP, INC.
2840 HOWE ROAD, SUITE E
MARTINEZ, CA, 94553

JPMORGAN CHASE BANK, NA
1125 ARNOLD DR
MARTINEZ, CA 94553
90-7162/3222

3956

02/03/2020

PAY TO THE ORDER OF City of SONOMA

$**400.00

Four hundred and 00/100********** DOLLARS

PROTECTED AGAINST FRAUD

City of SONOMA

MEMO Sonoma 006 Appeal Fee of PC Approval for Sonoma

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THE CBR GROUP, INC.

02/03/2020	**City of SONOMA**		3956
		Appeal Fee of PC Approval for Sonoma 006, 007, 01	400.00

Chase Checking 8755	Sonoma 006 Appeal Fee of PC Approval for Sonoma 006, 007, 012 400.00