COUNTY OF MENDOCINO
STATE OF CALIFORNIA

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In the Matter of the Application of:

New Cingular Wireless PCS, LLC
d/b/a AT&T Mobility

MEMORANDUM
IN SUPPORT

Application for a Major Use Permit

Premises: 20201 Manzanita Dr, CA

Use Permit #: U_2019-0011

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MEMORANDUM IN SUPPORT

Respectfully Submitted,

Frances Grasse
Uta Baviere
Eryn Schon-Brunner & Jeffery Brunner
Mary Holcomb
John Gomez
Linda Gabrielson
John Jeavons
Cynthia Raiser Jeavons
Jerry L. & Linda A. Shrum
David & Cathy Ortiz
Rain and Maya Youngstrom
Wayne Granfors & Susan Soss
James Roth
William & Marilu Paulson
Vanessa and David French
Oliver & Arlene Kolkmann
Susan Monteleone & Kris Wagner

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Preliminary Statement

New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (hereinafter "*AT&T*") has filed an application for a Major Use Permit, seeking to install a nearly fifteen (15) story cell tower, in a residential neighborhood where no existing structure currently stands taller than two (2) stories in height. This Memorandum is submitted in support of the Appeal from the decision rendered by the Planning Commission.

As set forth hereinbelow, the Appeal should be granted, because:

(a) *AT&T* has failed to establish that granting the application would be consistent with smart planning requirements under the Mendocino County Code;

(b) granting the application would violate both the Mendocino County Code and the legislative intent of the Code;

(c) the irresponsible placement of such a massive tower at the proposed location would inflict upon the nearby homes and community the precise types of adverse impacts which the Mendocino County Code was enacted to prevent;

(d) there are far less intrusive alternative locations where the desired facility could be built, in greater conformity with the requirements of the Mendocino County Code.

As such, we respectfully submit that the Appeal be granted and *AT&T's* application be denied and denied in a manner that does not violate the Telecommunications Act of 1996.

POINT I

Granting *AT&T* Permission to Construct a Massive fifteen (15) Story Cell Tower at the Location it Proposes Would Violate Both the Requirements Under the County Code and Legislative Intent Based Upon Which Those Requirements Were Enacted by the County

As set forth hereinbelow, the Appeal should be granted and *AT&T's* application should be denied because granting the application would violate both the *requirements* of the Mendocino County Code, as well as the *legislative intent* behind those requirements.

As is explicitly set forth within its text, the very purpose for which the County of Mendocino enacted the County Code was to, among other things, "protect and promote the public health, safety, morals, peace, comfort, convenience, prosperity and general welfare"[1] and "to promote orderly community development."[2]

Further, on August 4, 2015, the Board of Supervisors for the County of Mendocino adopted Resolution No. 15-121, the purpose of such resolution was to

> Provide a uniform and comprehensive set of guidelines for the development, operation, and maintenance of wireless communications facilities consistent with applicable federal regulations. The guidelines are designed to protect and promote public health, safety, community welfare, zoning integrity and the aesthetic quality of the county, and to minimize the adverse impacts of wireless communications facilities, in conforming with goals and policies of the General Plan...

It has been determined, pursuant to Section §20.236.020, that to legally install the proposed facility *AT&T* must obtain a Major Use Permit. Specifically, Section §20.236.020 states "[a]ll other proposed wireless communication facilities that do not qualify for an exception or the Administrative Permit process must apply for a Major Use Permit or as otherwise prescribed in the County Zoning Code."

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[1] *See* Section §20.004.015 of the Mendocino County Zoning Code.
[2] Id.

As set forth hereinbelow, and as established by the admissible evidence being submitted herewith, if *AT&T's* application was to be granted, the irresponsible placement of a tower at the location proposed by *AT&T* would inflict upon the nearby homes and residential community the precise types of adverse impacts which the County Code was specifically enacted to prevent.

A. *AT&T's* Application Does Not Comply With The Requirements to Grant a Major Use Permit

A simple review of the record reflects that *AT&T's* application must be denied because such application, and all of its supporting submissions, wholly fail to establish that the application complies with the requirements and limitations of both Section §20.236 of the County Code, which specifically deals with "Towers and Antennas" as well as the Guidelines for the Development of Wireless Communication Facilities adopted in 2015.

As set forth above *AT&T* must obtain a Major Use Permit to legally install the proposed facility. Pursuant to Section §20.196.020 prior to granting a Major Use Permit applicants must prove:

(A) That the establishment, maintenance or operation of a use or building applied for is in conformity to the General Plan;

(B) That adequate utilities, access roads, drainage and other necessary facilities have been or are being provided;

(C) That such use will not, under the circumstances of that particular case, constitute a nuisance or be detrimental to the health, safety, peace, morals, comfort or general welfare of persons residing or working in or passing through the neighborhood of such proposed use, or be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the county; provided, that if a proposed building or use is necessary for the public health, safety or general welfare, the finding shall be to the effect;

(D) That such use preserve the integrity of the zoning district.

AT&T has wholly failed to comply with Section §20.196.020 of the Mendocino County Code and the Guidelines for the Development of Wireless Communication Facilities adopted in 2015. The guidelines "apply to all wireless communication facilities subject to obtaining a Use Permit."[3] Moreover, Resolution No. 15-121 states that "wireless communications facilities shall be sited and designed to minimize adverse impacts on communities, neighborhoods, vistas, and natural resources to protect public health, safety and welfare." Also in Resolution No. 15-121, the Board of Supervisors acknowledges the "detrimental impacts" wireless communication facilities could have on the community.

Specifically, the Board notes that "[s]tructures associated with wireless communications facilities, including antennas, antenna towers, lighting, equipment shelters, generators, fences and access roads can interfere with views, natural vegetation, quiet seclusion, scenic values and rural quality of life."

As is set forth hereinbelow, *AT&T* has failed to provide a shred of *probative evidence* to establish that the wireless telecommunications facility is not injurious to the surrounding community. *AT&T's* application essentially contends that the wireless facility will blend in with the trees already existing at the site. However, contradicting that assertion, Attachments "N" through "Q" of the Planning Commission Staff Report clearly demonstrate that the proposed facility will loom over every surrounding tree and will *stand out like a sore thumb*.

[3] *See* page 1 of the Guidelines for the Development of Wireless Communication Facilities.

B. The Proposed Cell Tower Would Inflict Dramatic and Wholly Unnecessary Adverse Impacts Upon the Aesthetics and Character of The Area

Recognizing the likely adverse aesthetic impacts which an irresponsibly placed cell tower would inflict upon nearby homes and residential communities, the County of Mendocino enacted Section §20.236 of the County Code and the Guidelines for the Development of Wireless Communication Facilities to regulate the placement of cell towers to prevent unnecessary adverse aesthetic impacts upon same.

Specifically, on page 7 of the Guidelines for the Development of Wireless Communication Facilities it states "[c]ommunications facilities shall be located and designed to minimize visibility and to be visually compatible with their surroundings." On the same page the guidelines also set forth that "[c]ommunications facilities should result in a minimal visual impact for those residents in the immediate area and for those in the larger community who view these facilities from a distance."

It is beyond argument that the irresponsible placement of *AT&T's* massive fifteen (15) story tower in a residential neighborhood where no other structures stand more than two (2) stories in height, would cause the massive tower to *stand out like a sore thumb*, to dominate the skyline, and to inflict substantial adverse aesthetic impacts upon the nearby homes.

Additionally, set forth in the Guidelines for the Development of Wireless Communication Facilities are which sites are most preferred and which are least preferred. Specifically, the guidelines state:

> Highly visible sites and sites within or near residential areas or schools are least preferred and will only be considered when there is compelling evidence that no other feasible alternative exists. Industrial or Commercial properties are generally preferred locations for wireless communication facilities.

Here, *AT&T* is seeking to install the proposed wireless facility near a residential area, a least preferred site, without providing any compelling evidence to demonstrate that there is no other feasible alternative location.

Moreover, as has been held by federal courts, including the United States Court of Appeals for the Second Circuit, significant and/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 cell tower. *See* Omnipoint, infra.

(i) Evidence of the Actual Adverse Aesthetic Impacts Which the Proposed Tower Would Inflict Upon the Nearby Homes

As logic would dictate, the persons who are best suited to accurately assess the nature and extent of the adverse aesthetic impacts which an irresponsibly placed cell tower would inflict upon homes in close proximity to the proposed tower, are the homeowners themselves.

Consistent with same, The United States Court of Appeals for the Second Circuit has recognized that when a local government is entertaining a cell tower application, it should accept, as direct evidence of the adverse aesthetic impacts which a proposed tower would inflict upon nearby homes, statements and letters from the actual homeowners, because 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 F2d 529 (2nd Cir. 2005).

Federal Courts have consistently held that adverse aesthetic impacts are a valid basis on which to deny applications for proposed wireless facilities. *See* Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005), T-Mobile Northeast LLC v. The Town of Islip, 893 F.Supp.2d 338 (2012).

In a letter dated June 3, 2020 addressed to the Mendocino County Planning Commission, AT&T claimed that "the large majority of opponents live more than two miles away from the proposed facility, and that the majority of residents who live closer support the project." However, this statement is entirely inaccurate. As will be demonstrated below and within Exhibit "A" several residents who live in extremely close proximity are vehemently opposed to the installation of the proposed Tower.

Annexed as "substantial evidence" of the wholly unnecessary and substantial adverse aesthetic impacts which the irresponsible placement of *AT&T's* nearly fifteen (15) story tower would inflict upon the nearby homes are letters from the owners of those homes who detail, from their personal perspective, the specific adverse aesthetic impacts their homes and residential properties would suffer if the massive tower proposed by *AT&T* were permitted to be built so close to their respective homes.

Annexed collectively herein as Exhibit "A," are letters from: Ryan Weidaw, 4500 Lakewood Dr., Willits CA; Eryn Schon-Brunner and Jeffrey Brunner, 20150 Manzanita Drive, Willits CA; Mary Holcomb, 4601 Lakewood Drive, Willits CA; Joanna Weidaw, 4400 Lakewood Drive, Willits CA; April Hunter, 4655 Bear Canyon Road, Willits CA; Kris Wagner and Susan Monteleone, 4575 Lakewood Drive, Willits CA; Linda Cardana Gabrielson, 20150 Manzanita Drive, Willits CA; Kathryn A. Neff, 1400 Hilltop Drive, Willits CA; and Marilyn Townsend, Willits CA.

Within each of those letters, the homeowners personally detail the adverse aesthetic impacts that the proposed tower would inflict upon their respective homes. They have provided detailed and compelling explanations of the dramatic adverse impacts their properties would suffer if the proposed installation of a massive cell tower is permitted to proceed.

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," but instead contain detailed descriptions of how the proposed tower would dominate their views from their "dining room," "bedroom," "bathroom," "family room," "deck" and backyards, and generally from all over their properties. As detailed therein, the substantial adverse aesthetic impacts which the irresponsible placement of the proposed tower would inflict upon the nearby homes, are the precise type of injurious impacts which Policy PQP-8.4 of the General Plan Policy for Public/Quasi-Public Facilities and Services was specifically intended to prevent.

(ii) *AT&T* Has Failed to Submit Any Type of Visual Assessment to the County

In a hollow effort to induce the County to believe that the installation of a massive nearly fifteen (15) story cell tower *would not* inflict a severe adverse aesthetic impact upon the adjacent homes, *AT&T* has chosen not to submit any pictures demonstrating how the proposed facility will look from the surrounding community, or any other supporting documentation.

As is undoubtedly known to *AT&T*, if a Visual Assessment was presented to the Board it would demonstrate that the proposed facility will be injurious to the surrounding residential community.

The whole purpose for which local governments require photo-simulations of a proposed cell tower is to require applicants to provide the reviewing authority with a clear visual image of the *actual* aesthetic impacts that a proposed installation is going to inflict upon the nearby homes and residential community.

Not surprisingly, applicants often seek to disingenuously minimize the visual impact

depictions, by ***deliberately omitting*** from any such photo-simulations, any images **actually taken from** the nearby homes which would sustain the most severe adverse aesthetic impacts.

In Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 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 wherein they "omit" any images from the actual perspectives of the homes which are in closest proximity to the proposed installation, such presentations are inherently defective, and should be disregarded by the respective government entity that received it.

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.*

Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005),

A simple review of the documents submitted by *AT&T* reflects that they do not include a single image taken from any of the nearby homes which will sustain the most severe adverse aesthetic impacts from the installation of the massive tower which *AT&T* seeks to construct in such close proximity to those homes.

This, of course, includes a complete absence of any photographic images taken from any of the homes belonging to the homeowners whose adverse aesthetic impact letters are collectively annexed hereto as Exhibit "A."

Which is the exact type of "presentation" which the federal Court explicitly ruled to be defective in Omnipoint.

C. The Proposed Installation Will Inflict Substantial and Wholly Unnecessary Losses in the Values of Adjacent and Nearby Residential Properties

In addition to the adverse impacts upon the aesthetics and residential character of the area at issue, the irresponsible placement of such a massive cell tower in such close proximity to nearby residential homes would contemporaneously inflict upon such homes a severe adverse impact upon the actual value of those residential properties.

As established by the evidence being submitted herewith, if *AT&T* is permitted to install the wireless facility it proposes in such close proximity to nearby homes, they would inflict upon the homes dramatic losses in property value, to the extent that the homeowners would suffer significant losses in the values of their residential properties.

Across the entire United States, both real estate appraisers[4] and real estate brokers have rendered professional opinions that simply support what common sense dictates.

When large cell towers are installed unnecessarily close to residential homes, such homes suffer material losses in value which typically range anywhere from 15% to 20%.[5]

In the worst cases, cell towers built near existing homes have caused the homes

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[4] *See e.g.* a February 22, 2012 article discussing a NJ appraiser's analysis wherein he concluded that the installation of a Cell Tower in close proximity to a home had reduced the value of the home by more than 10%, go to http://bridgewater.patch.com/articles/appraiser-t-mobile-cell-tower-will-affect-property-values

[5] In a series of three professional studies conducted between 1984 and 2004, one set of experts determined that the installation of a Cell Tower in close proximity to a residential home reduced the value of the home by anywhere from 1% to 20%. These studies were as follows:

The Bond and Hue - *Proximate Impact Study* - The Bond and Hue study conducted in 2004 involved the analysis of 9,514 residential home sales in 10 suburbs. The study reflected that close proximity to a Cell Tower reduced price by 15% on average.

The Bond and Wang - *Transaction Based Market Study*

The Bond and Wang study involved the analysis of 4,283 residential home sales in 4 suburbs between 1984 and 2002. The study reflected that close proximity to a Cell Tower reduced the price between 20.7% and 21%.

The Bond and Beamish - *Opinion Survey Study*

The Bond and Beamish study involved surveying whether people who lived within 100' of a Cell Tower would have to reduce the sales price of their home. 38% said they would reduce the price by more than 20%, 38% said they would reduce the price by only 1%-9%, and 24% said they would reduce their sale price by 10%-19%.

to be rendered wholly unsaleable.[6]

As has been recognized by federal courts, it is perfectly proper for a local zoning authority to consider, as direct evidence of the reduction of property values that an irresponsibly placed wireless facility would inflict upon nearby homes, the professional opinions of licensed real estate brokers, (as opposed to appraisers) who provide their professional opinions as to the adverse impact upon property values which would be caused by the installation of the proposed cell tower *See* Omnipoint Communications Inc. v. The City of WhitePlains, 430 F2d 529 (2nd Cir. 2005). This is especially true when they are possessed of years of real estate sales experience within the community and specific geographic area at issue.

As evidence of the adverse impact that the proposed cell tower would have upon the property values of the homes which would be adjacent and/or in close proximity to it, annexed hereto as Exhibit "B" are letters setting forth the professional opinions of licensed real estate professionals, who are acutely familiar with the specific real estate market at issue, and who submit their professional opinions that the installation of the proposed massive fifteen (15) story tower would cause property values of the affected homes to be reduced by ten (10%) to twenty percent (20%) (or more), and would make those homes more difficult to sell, even at reduced purchase prices.

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[6] Under FHA regulations, no FHA (federally guaranteed) loan can be approved for the purchase of any home which is situated within the fall zone of a cell tower. *See* HUD FHA HOC Reference Guide Chapter 1 - hazards and nuisances. As a result, there are cases across the country within which: (a) a homeowner purchased a home, (b) a cell tower was thereafter built in close proximity to it, and (c) as a result of same, and the homeowners could not sell their home, because any buyer who sought to buy it could not obtain an FHA guaranteed loan. *See, e.g.* October 2, 2012 Article ". . .Cell Tower is Real Estate Roadblock" at http://www.wfaa.com/news/consumer/Ellis-County-Couple--Cell-tower-making-it-impossible-to-sell-ho me--172366931.html.

Given the significant reductions in property values that the proposed installation would inflict upon the nearby homes, the granting of *AT&T's* application would inflict upon the residential neighborhood the very type of injurious impacts which the County Code and the Guidelines for the Development of Wireless Communication Facilities were specifically intended to prevent. Accordingly, *AT&T's* application should be denied.

D. The Proposed Installation is in Violation of a Covenant affecting Pine Mountain Estates Unit #3

In addition to the proposed facility violating Section §20.236 of the County Code and the Guidelines for the Development of Wireless Communication Facilities, *AT&T's* proposed tower will also violate the Declaration of Restrictions, Conditions, Covenants and Agreements Affecting Real Property Known as Pine Mountain Estates Unit #3.

Paragraph 16 of the Declaration contains a covenant which states that

> [n]o structure on any lot shall be used for any purpose other than a dwelling house, guest house or appurtenant outhouse, private boat house, or private float, and more particularly, and with the intent of limiting the foregoing restrictions, not store, flat, double house, radio tower... shall be built or placed upon such property... or conducted for commercial purposes on such property.

While the proposed tower itself is not going to be located on the property which such Covenant controls, the access road to the proposed tower will be located on such property. Pursuant to the Covenant, the property may not be used for any commercial purpose. However, *AT&T* will use the access road located on Pine Mountain Estate Unit #3 each and every time it must perform maintenance on the proposed tower, typically this occurs once a month.

As *AT&T* is a commercial business entity and its services are commercial uses, locating the access road on the property subject to the Covenant contained in paragraph 16 is a violation of the Covenant and cannot be permitted.

POINT II

§ 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 Would Allow *AT&T* to Increase the Height of the Proposed Tower Without Further or Prior Zoning Approval

As substantial as the adverse impacts upon the nearby homes and communities will be if the proposed cell tower was constructed at the one hundred forty three (143) foot height currently proposed by *AT&T*, if such tower were to be built, *AT&T* might unilaterally choose to increase the height of the tower to as much as one hundred sixty three (163) feet, and the County 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 of the height of the tower, plus the

height of an additional antenna, plus a distance of ten (10) feet to separate a new antenna from the pre-existing top antenna, up to a maximum height increase of twenty (20) feet.

Considering the even more substantial adverse impacts which an increase in the height of the cell tower to twelve (12) stories would inflict upon the homes and communities nearby, *AT&T*'s application should be denied.

Once again, this is especially true since, as set forth in Point III hereinbelow, *AT&T* has not even established that the proposed tower is actually needed to provide wireless coverage within the County.

POINT III

AT&T Has Failed To Proffer Probative Evidence Sufficient to Establish a Need For the Proposed Tower at the Location and Height Proposed, or That the Granting of its Application Would be Consistent With the Smart Planning Requirements of the County Code

The obvious intent behind the provisions of Section §20.236 and the Guidelines for the Development of Wireless Communication Facilities, were to promote "smart planning" of wireless infrastructure within the County.

Smart planning involves the adoption and enforcement of zoning provisions which require that cell towers be *strategically placed* so that they minimize the number of towers needed to saturate the County with complete wireless coverage, while contemporaneously avoiding any unnecessary adverse aesthetic or other impacts upon homes and communities situated in close proximity to such towers.

Entirely consistent with that intent, Section §20.236 and the Guidelines for the Development of Wireless Communication Facilities, were adopted as smart planning provisions which were enacted to regulate the "placement" of cell towers to minimize their potential negative impacts.

To enable them to determine if a proposed cell tower would be consistent with smart planning requirements, sophisticated zoning and planning boards require site developers to provide direct evidentiary proof of:

(a) the precise locations, size, and extent of any geographic gaps in personal wireless services which are being provided by *AT&T*, 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 because, without it, the Board is incapable of knowing: (a) if, and to what extent a proposed tower will remedy any actual gaps or deficiencies which may exist, (b) if the proposed height for a tower is the minimum height needed to remedy such gaps, and (c) if the proposed placement is in such a poor location that it would all but require that more towers will need to be built because the proposed tower did not actually cover the gaps in service which actually existed, thereby causing an unnecessary redundancy in cell towers within the County.

In the present case, *AT&T* has failed to provide any substantial hard data to establish that the proposed placement of its tower would, in any way, be consistent with the smart planning, and by virtue of same, 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 County, and (b) why or how their proposed massive cell tower would be the best and/or least intrusive means of remedying those gaps.

A. *AT&T* Has Failed to Submit Probative Evidence to Establish The Need for The Proposed Tower at The Height and Location Proposed

(i) The Applicable Evidentiary Standard

To the extent that applicants seeking to build cell towers seek to have their applications reviewed under the "Public Necessity" standard established in Consolidated Edison co. v. Hoffman, 43 N.Y.2d 598 (1978), the applicant must prove that the new cell tower it proposes is "a public necessity that is required to render safe and adequate service" and that there are compelling reasons why their proposed installation is more feasible than at other locations. *See* T Mobile Northeast LLC v. Town of Islip, 893 F.Supp.2d. 338 (2012).

Within the context of zoning applications such as the current application that has been

filed by *AT&T*, the applicant is required to prove [1] that there are gaps in a specific wireless carrier's service, [2] that the location of the proposed facility will remedy those gaps, and [3] that the facility presents a "minimal intrusion on the community." Id.

As logic would dictate, it is critical that the Board make factual determinations regarding these specific issues, and that it issues a written decision setting forth those determinations, and citing the evidence based upon which it makes its factual determinations.

In the absence of same, any determination which the Board ultimately makes could easily be challenged by the applicant, by the filing of a complaint based upon the Board's failure to make such determinations.

As has been clearly enunciated by the Court in T-Mobile, if a local zoning board denies a cell tower application, it must do so within a written decision which sets forth its factual determinations, and cites the evidence based upon which it made those determinations:

> "[E]ven one reason given for the denial is based upon substantial evidence, the decision of the local zoning body cannot be disturbed [by a federal court]"

T Mobile Northeast LLC v. Town of Islip, 893 F.Supp.2d. 338, 354 (2012).

(ii) *AT&T* Has Failed To Meet Its Burdens

It is beyond argument that *AT&T* has failed to establish to meet its burdens of proving: (a) that its proposed tower is a Public Necessity, (b) that, as proposed, its tower would present a minimal intrusion on the community," (c) that its proposed placement would minimize its aesthetic intrusion, and (d) that denial of its applications 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 *AT&T'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 Public

Necessity for the tower being proposed, which (b) not only necessitates the installation of a new tower, but (c) requires it to be built at the specifically chosen location, (d) on the specifically chosen site (as opposed to being built upon alternative less-intrusive locations), and (e) contemporaneously requires that it be built at an elevation no lower than the height now being proposed by *AT&T*.

(iii) Hard Data and the Lack Thereof

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

The most accurate and least expensive form of *hard data* which can be used as evidence to establish the location, size, and extent of *significant gaps* in personal wireless services is *drive test data*.

The most accurate and least expensive form of *hard data* that can be used as evidence to establish the location, size, and extent of a geographic area suffering from a *deficiency in capacity* in personal wireless services, is *dropped call records*.

Unlike "Specialist's reports," RF modeling and propagation maps, all of which are most often manipulated to reflect whatever the preparer wants them to show, *hard data* is straightforward and much less likely to be subject to manipulation, unintentional error or inaccuracy.

Drive Test Data

Actual drive test data does not encompass and does not typically involve 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 easily manipulated, that they are essentially rendered worthless as a form of probative evidence.

To obtain drive test data, all that is required is the performance of a drive test. This involves attaching a recording device to a cell phone and driving through any given area to test for gaps in wireless service. The device records wireless signal strength every few milliseconds so that in a two-hour drive test, the device records several hundred thousand recorded signal strengths, which collectively depict a complete and accurate record of the existence, or lack, of any significant gap in wireless service.

Hard drive test data consists of the actual records of the actual recorded strengths of a carrier's wireless signal at precise geographic locations.

Dropped Call Record

Dropped call records are generated by a carrier's computer systems. They are typically extremely accurate because they are generated by a computer which 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 clicks of a few keystrokes, each carrier's system can printout a precise record of all dropped calls for any period of time, at any geographic location, and the likelihood that someone would enter false data into a carrier's computer system to materially alter that information is highly unlikely.

As is reflected in the record in the case, *AT&T* has not provided either of these forms of *hard data* as probative evidence.

Instead, *AT&T* has provided only its own vague analyses regarding existing and potential coverage. A simple review of the submissions from *AT&T* reflects that they contain no hard data, *whatsoever*.

The maps presented by *AT&T* were not actually based on any hard data recorded from any actual drive test, simply because no such drive test was conducted. Concomitantly, the maps do not possess any probative value in establishing: (a) the existence of any significant gap in personal wireless service, or any capacity deficiency, much less (b) the location and geographic size of any actual gap in service or area suffering from a capacity deficiency.

Without providing a shred of hard data to support the same, and after manipulating the actual data, *AT&T* arrived at what was undoubtedly their pre-determined conclusion that *AT&T* "needs" to have this massive one hundred forty three (143) foot tower, to enable *AT&T* to provide reliable wireless services within the County.

B. *AT&T's* Provided Analysis Regarding its Wireless Coverage is Contradicted By *AT&T's* Own Actual Coverage Data

As is a matter of public record, *AT&T* maintains an internet website at the internet domain address of https://www.att.com.

In conjunction with its ownership and operation of that website, *AT&T* contemporaneously maintains a database that contains geographic data points that cumulatively form a geographic inventory of *AT&T's actual current* coverage for its wireless services.

As maintained and operated by *AT&T*, that database is linked to *AT&T's* website, and functions as the data-source for an interactive function, which enables users to access *AT&T's* own data to ascertain both: (a) the existence of *AT&T's* wireless coverage at any specific geographic location, and (b) the level, or quality of such coverage.

AT&T's interactive website translates *AT&T's actual coverage data* to provide imagery whereby areas that are covered by *AT&T's* service are depicted in blue, and areas where *AT&T* has a lack (or gap) in coverage, are depicted in white.

Contemporaneously, the website further translates the data from *AT&T's* database to specify the actual *coverage* at any specific geographic location. Exhibit "C," which is being submitted together with this Memorandum, is a true copy of a record obtained from *AT&T's* website[7] on October 16, 2020.

This Exhibit depicts *AT&T's* actual wireless coverage at 20201 Manzanita Drive, Willits, CA, that being the specific geographic location at which *AT&T* seeks to install its proposed tower under the claim that *AT&T* "needs" such tower to remedy a gap in *AT&T's* personal wireless service at and around such location.

[7] http://www.att.com.

As reflected within Exhibit "C," *AT&T's* own data reflects that there is no coverage gap in *AT&T's* service at that precise location, or anywhere around or in close proximity to it.

Specifically, the area in which *AT&T* seeks to install the proposed facility is shown in blue. Areas on the map depicted in blue "represent *AT&T's* owned and operated LTE coverage areas." The area to the west of the proposed site is depicted in green and the areas to the east and south of the proposed site are shown in orange. While *AT&T* might claim that the areas depicted in green and orange represent coverage gaps that is inaccurate. As is detailed on *AT&T's* website coverage is still provided in these locations. Significant gaps in coverage only exist in areas on the map which are depicted in white. Here, there are no white areas on the map and thus, it is unreasonable for *AT&T* to claim there is a significant gap in coverage. Even in areas where coverage is not perfect, does not necessarily mean there is a significant gap in coverage at such location.

Moreover, *AT&T's* submissions are entirely void of any hard data or probative evidence that establishes that *AT&T needs* the tower being proposed and *AT&T's* own data affirmatively contradicts what it placed in its application. As such, it is beyond argument that *AT&T* has wholly failed to submit documentation that "demonstrates and proves" that *AT&T's* proposed tower is necessary *for AT&T* to provide personal wireless services within the County.

As such, *AT&T's* application for a Special Use Permit should be denied.

POINT IV

To Comply With the TCA, *AT&T*'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 local government must issue a written denial which is separate from the written record of the proceeding, and the denial must contain 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. "Substantial evidence" means "less than a preponderance, but more than a scintilla."

Review under this standard is essentially deferential, such that Courts may neither engage in their own fact-finding nor supplant a local zoning board's reasonable determinations. *See e.g.* American Towers, Inc. v. Wilson County, Slip Copy 59 Communications Reg. P & F 878 (U.S.D.C. M.D. Tennessee January 2, 2014)[3:10-CV-1196]

To ensure that the Board's decision cannot be challenged under the Telecommunications

Act of 1996, it is respectfully requested that the Board deny *AT&T*'s application in a separate written decision, wherein the Board cites the evidence upon which it based its final determination.

C. The Non-Risks of Litigation

All too often, representatives of wireless carriers and/or site developers seek 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 County, and win, the Telecommunications Act of 1996 does not enable them to recover compensatory damages or attorneys' fees, even when they get creative and try to characterize their cases as claims under 42 U.S.C. §1983.[8]

This means that if they sue the County and win, the County does not 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 only months rather than years.

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 virtually any other type of federal litigation—as long as the local government's counsel does not try to "maximize" its billing in the case.

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[8] *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).

Conclusion

In view of the foregoing, it is respectfully submitted that the Appeal be granted and that *AT&T*'s application for a Major Use Permit be denied in its entirety.

Respectfully Submitted,

Frances Grasse
Uta Baviere
Eryn Schon-Brunner & Jeffery Brunner
Mary Holcomb
John Gomez
Linda Gabrielson
John Jeavons
Cynthia Raiser Jeavons
Jerry L. & Linda A. Shrum
David & Cathy Ortiz
Rain and Maya Youngstrom
Wayne Granfors & Susan Soss
James Roth
William & Marilu Paulson
Vanessa and David French
Oliver & Arlene Kolkmann
Susan Monteleone & Kris Wagner