

**Planning Commission Findings for Denial of Planning Application #52-10 (CUP #10-10,
ZOA #1-10); Crown Castle DAS Network**

Adopted by the Planning Commission at a Public Hearing on February 8, 2012

Whereas, The California Public Utilities Commission (“CPUC”) designates NewPath as a “competitive local exchange carrier” (“CLEC”). A “CLEC” is a telecommunications provider that competes with the already established local telephone providers (known as “incumbent local exchange carriers,” or “ILECs”) by providing its own network and switching.

Whereas, NewPath has a Certificate of Public Convenience and Necessity (“CPCN”) issued by the CPUC to provide full-facilities competitive local exchange and access state-wide. NewPath’s CPCN was most recently modified by the CPUC on April 13, 2006. NewPath’s CPCN is not site-specific; rather, it applies state-wide.

Whereas, NewPath provides service to wireless communications carriers through the use of a distributed antenna system (“DAS”), which is comprised of a distributed array of antennas individually connected to a central hub. Communications to and from wireless subscribers are picked up at the antennas and transmitted through fiber optic cable to the central hub, where they are “handed off” to NewPath’s clients, who are one or more wireless carriers.

Whereas, NewPath is essentially a “wholesale” provider of wireless facilities for wireless service providers, like MetroPCS.

Whereas, NewPath submitted an application in 2009 to construct a DAS facility in the City of Davis. Staff issued NewPath 37 encroachment and related building permits to construct its DAS facility. On December 5, 2009, the City Manager rescinded all 37 permits on the grounds that (1) NewPath did not comply with the City’s Wireless Telecommunication Facilities Ordinance, DMC, Article 40.29 (“Wireless Ordinance”); (2) the permits for ground based fiber and conduit relied on the location of wireless facilities that had not been approved and may not have met location requirements for wireless facilities in the City’s ordinances; (3) other permits relied on access to public property that is not within public rights of way with permitted access; and (4) certain of the proposed poles and other above-ground facilities are proposed for locations that do not permit above ground facilities.

Whereas, NewPath subsequently filed suit against the City on January 28, 2010 in the United States District Court, Eastern District of California (Case No. 2:10-cv-00236-GEB-DAD) and sought a preliminary injunction allowing it to proceed with its DAS project. The Court denied NewPath’s motion on or about March 19, 2010.

Whereas, The City also filed a complaint against NewPath with the CPUC on March 23, 2010 (CPUC Case No. 10-03-011), alleging violations of CEQA and violations of NewPath’s November 2009 Notice to Proceed (“NTP”) issued by the CPUC.

Whereas, The parties agreed to stay NewPath’s federal court case and the City’s CPUC case to allow NewPath to file a new application for a revised DAS project that would go through a conditional use permit process, including consideration by the Planning Commission and the

City Council.

Whereas, NewPath has since been acquired by Crown Castle.

Whereas, Crown Castle filed an application on May 18, 2011 for DAS network consisting of 25 nodes. The application was deemed complete by City staff on July 15, 2011.

Whereas, The City Council approved installation of three demonstration sites with mock-up of nodes at the following sites:

- a. Site #5
- b. Site #24
- c. Site #22

Whereas, The Planning Commission held a public hearing on August 3, 2011 to consider the Crown Castle conditional use permit application, along with a proposed amendment to the City's Wireless Ordinance, and received public comments on the proposal. To afford opportunity for the applicant and staff to respond to Commission questions and information inquiries on alternatives to the proposed sites and alternative designs, the Commission continued the hearing to September 14, 2011.

The hearing was continued twice and the continued public hearing was held on October 12, 2011. On the day of the hearing, October 12, 2011, Crown Castle submitted additional antenna system and design options for consideration. At the October 12, 2011 hearing, the Planning Commission received public comment and continued the hearing to afford the applicant an opportunity to submit appropriate detailing of the options and to afford review of the additional options presented.

Whereas, The Planning Commission held a third public hearing on January 25, 2012 to consider the entirety of the Crown Castle application, inclusive of all siting and antenna and equipment design options presented to date. The Commission received public comment at the January 25th hearing and deliberated on the merits of the proposed project.

At all three public hearings, in addition to the substantial written comments submitted by members of the public, including two petitions (one with 130 signatures, and another with over 500 signatures) both citing aesthetic incompatibility, substantial oral public comments were submitted as follows:

- August 3, 2011: 21 public commenters, with 20 of them speaking in opposition to the proposal raising concerns which include, among other topics, negative aesthetic concerns
- October 12, 2011: 20 public commenters, with 20 of them speaking in opposition to the proposal raising concerns which include, among other topics, negative aesthetic concerns
- January 25, 2012: 29 public commenters, with 29 of them speaking in opposition to the proposal raising concerns which include, among other topics, negative aesthetic concerns.

Whereas, The Telecommunications Act of 1996 ("TCA"), Pub. L. No. 104-104, 110 Stat. 56

prohibits any local government from “regulat[ing] the placement, construction, and modification of personal wireless service facilities on the basis of environmental effects of radio frequency [“RF”] emissions to the extent that such facilities comply with the [FCC’s] regulations concerning such emissions.” § 704(b); 47 U.S.C. § 332(c)(7)(B)(iv); *MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 736-37 (9th Cir. 2005). Accordingly, purported health effects and public comments related to RF emissions were not considered by the Planning Commission in making its recommendation to the City Council.

Whereas, the Planning Commission must make the following considerations for issuance of a conditional use permit:

In considering an application for a conditional use or nonconforming use, the planning commission or city council shall give due regard to the nature and condition of the proposed or existing use and all adjacent uses and structures. The planning commission or city council may deny an application for a conditional use. In authorizing a conditional use, the planning commission or city council may impose such requirements and conditions with respect to location, construction, maintenance and operation, in addition to those expressly stipulated in this chapter for the particular use, as the planning commission or city council may deem necessary for the protection of adjacent properties and the public interest. DMC 40.30.030

Whereas, the Planning Commission must make the following findings for issuance of a conditional use permit:

- (1) The planning commission or city council shall issue a conditional use permit provided the planning commission or city council is satisfied that the proposed structure or use conforms to the requirements and intent of this chapter and the city master plan, that any additional conditions and requirements stipulated by the planning commission or city council have been or will be met, and that such use will not, under the circumstances of the particular case, constitute a nuisance or be detrimental to the public welfare of the community.
- (2) The planning and building director shall ensure that the development and use is undertaken and completed in compliance with such permit. DMC 40.30.080

Whereas, for wireless telecommunications facilities, the Planning Commission must also make the following additional findings (DMC 40.29.170):

1. The proposed telecommunications site/facility has been designed to minimize its visual and environmental impacts, including the utilization of stealth technology, when applicable.
2. The proposed site has the appropriate zoning, dimensions, slope, design, and configuration for the development of a telecommunication site/facility.
3. That general landscaping considerations as outlined in Section 40.29.130, when applicable, have been complied with to complement the structures and antennae, provide an attractive environment and preserve natural features and elements.

4. Based on information submitted, the proposed telecommunications site/facility is in compliance with all FCC and California Public Utilities Commission (CPUC) requirements.
5. The applicant has demonstrated and confirmed, by independent evaluation of the city, that the site/facility is necessary to address current demand capacity or other technical limitations of the system in order to maintain service levels.

Now therefore, the Planning Commission of the City of Davis, based on the entirety of the public record before it, including all public testimony received, does hereby find as follows:

FINDINGS FOR DENIAL OF ALL SITES (# 1 through 25) With respect to all sites and design options proposed, the Planning Commission **finds that:**

- (1) It is not satisfied that the proposed structures or use conforms to the requirements and intent of the zoning chapter and the city master plan in that the proposed project is not consistent with the provisions of Chapter 40.29 of the Davis Municipal Code and that the proposed amendments to Chapter 40.29 are not appropriate or in keeping with the goals and character of the community as outlined in the specific findings detailed below; and
- (2) The use will, under the circumstances of the particular case, constitute a nuisance or be detrimental to the public welfare of the community; and
- (3) The proposed telecommunications sites/facilities have not been designed to minimize its visual and environmental impacts, including the utilization of stealth technology, when applicable; and
- (4) The proposed sites are not appropriate in zoning, dimensions, design, and configuration for the development of a telecommunication site/facility; and
- (5) The general landscaping considerations, as outlined in Section 40.29.130, have not been complied with to complement the structures and antennae, provide an attractive environment or preserve natural features and elements; and
- (6) The applicant has not demonstrated and confirmed, to the satisfaction of the Commission, that the sites/facilities are necessary to address current demand capacity or other technical limitations of the system in order to maintain service levels.

The Planning Commission also finds as follows:

1. The City has an obvious interest in protecting the character and visual fabric of its neighborhoods. *See Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 724 (9th Cir. 2009) (recognizing that the public rights-of-way form the “visual fabric from which neighborhoods are made”). Wireless providers can access a city’s rights-of-way “in both aesthetically benign and aesthetically offensive ways.” *Id.* at 725. “It is certainly within a city’s authority to permit the former and not the latter.” *Id.*
2. The City of Davis is a progressive community noted for its small-town style, energy, conservation, environmental programs, parks, preservation of trees, plethora of bicycles,

enjoyment of outdoor spaces, and enjoyment of clear views of the skies unimpeded by unnecessary structures and light glare at night as evidenced by the City Outdoor Lighting Control Ordinance Pertinent to the Commission's consideration, the City has since approximately 1971, with very few exceptions, encouraged undergrounding of utilities and prohibited above-ground utilities in new subdivisions. *See, e.g.*, DMC § 36.09.020(g) (including undergrounding of utilities, subject to limited exceptions, amongst required subdivision improvements); *see also* DMC § 38.01.0 (procedures for establishing an underground utility district); DMC § 8B.02.130 (requiring cable and communications operators to underground aerial facilities in underground areas). For those limited projects where undergrounding is infeasible, such as high voltage wires, the City has restricted the location of such utilities to particular rights of way, generally outside residential areas, the historic downtown, scenic corridors and wildlife preservation areas to limit the aesthetic and other environmental impacts.

3. The City has planned and constructed its neighborhoods to achieve an attractive appearance that minimizes the number and appearances of utilities and related equipment. Where vertical structures, such as light and utility poles exist, they are consistent in design and scale throughout neighborhoods.

4. Crown Castle has proposed Wireless Telecommunications Facilities (WTF's) on replacement streetlight poles, new stand-alone poles, and on joint utility poles throughout the City, but primarily in the City's residential areas, and in many cases, less than 30 feet from homes, which detract from the visual appearance of streetscape and enjoyment of skyline views.

In particular, sites 3, 4, 6, 9, and 13 are located within 80 feet of residences; sites 5, 7, 19, and 22 are within 50 feet of residences; and sites 8, 12, 16, 18, 20, and 25 are within 30 feet of residences. Sites 4, 6, 8, 9, 10, 11, 16, 19, 20, 21, and 22 are in close proximity to residences with second stories and would be visible to the residents from their home. Such obstructed residential view sheds are counter to City's aesthetic goals.

The proposed WTF's are far from stealthed, extending 4 to 11 feet above the street light fixture and consisting of: (1) large industrial canisters that are noticeably wider in diameter than the light poles that they replace in the case of the tri-sector pipe and original radome design, or (2) omni "whip" antennas that look out of place and character with the existing light poles that they replace. Antenna options on joint utility poles include panel, tri-sector pipe, or omni antennas affixed to six foot wide cross arms. Some sites, including sites #4, 8, 11, 14, 15, 17, 18, 19, 21, and 23, or options thereof, introduce either entirely new or substantially new vertical structures to locations where either no or considerably smaller vertical elements currently exist. In all instances, the antennas are readily visible, draw more attention and will reduce the aesthetic quality of the neighborhoods.

The proposed sites include not just the antennas appendages, but also include large electrical meters either mounted to the side of the pole or in a ground mounted pedestal with dimensions of 18" wide x 16" deep x 50" high that draw further attention to the DAS sites and serve to clutter the Public Right of Way (PROW).

The proposed ground mounted radio equipment is located in either (1) ground mounted pedestals which, despite architectural treatment options, will clutter the right of way and appear out of

place, or are located (2) within the base of the antenna pole itself which significantly alters the appearance from typical street light poles and draws further attention and will reduce the aesthetic quality of the neighborhoods.

5. These sites establish unwanted precedent for new intrusions in the PROW that are not stealthed in accordance with the provisions of the City's existing Telecommunications Ordinance, but are clearly identifiable as utilities and would instead be going backwards, against many years of undergrounding efforts, for neighborhoods like Wild Horse, Village Homes, and Mace Ranch where there are very limited vertical elements, if any. In Village Homes, for instance, the residents have opted to exclude street lights, but proposed Site # 4 would introduce a new vertical element that is visible from the second story of some Village Homes residents. Such addition of "vertical pollution" is contrary to the City's longstanding undergrounding efforts to improve the aesthetics of the residential neighborhoods, which are the fabric of the community.

Where there are vertical elements, like street lights, there is uniformity to them. The particular street lights within a neighborhood are the same type, height, color, and design. For example, in West Davis where proposed Sites #2, 3, 4, and 5 are located, the street lights are 30' high cobra head street lights. The proposed Crown Castle DAS node destroys that uniformity with the bulky canister extending an additional 10' above the street light, thereby increasing the height of the vertical element by 30%. The large canister catches the eye because it varies significantly from the neighboring vertical elements – disrupting the aesthetics of neighborhoods.

For example, site #8 introduces an unnecessary new vertical element to the neighborhood and would introduce new lighting where light levels are adequate. Vegetative cover and/or background is insufficient to help screen the proposed facility, as proposed.

For further example, site #19 would replace the decorative "acorn" style low profile light fixture with a new, taller light pole. This location is the entry point into the neighborhood on La Paz Drive, south of El Macero Drive, and this location marks the start of the use of decorative light poles from this point south into the neighborhood. A two story home is directly across the street from this light pole and a taller light pole would bring the light fixture up to the level of the second floor windows. The designs submitted present too much of a departure from the design theme of the street light poles in the neighborhood.

6. Significant Gap in Coverage: The Planning Commission does not find that there is a significant gap in coverage. Crown Castle has provided some information regarding MetroPCS's purported gap, but MetroPCS – the actual wireless provider – has not appeared before the City asserting a gap or confirming the existence of a coverage gap requiring all 25 proposed nodes. The evidence of a gap, at best, reflected a penetration gap (i.e., in-building service), not a service gap. In fact, MetroPCS's own website as of February 2, 2012, describes its signal strength in most areas of Davis as "Best" – which it defines as "areas covered by signal strength sufficient for most 'in building' coverage." This conflicting information leads the Commission to question the validity of claims made for gap in coverage.

7. Least Intrusive Means / Alternatives: Even assuming a significant gap in coverage exists, Crown Castle has not come forward with the least intrusive means for covering the purported

gap. Despite ongoing efforts to work with Crown Castle and resolve concerns about the aesthetics of the proposed nodes, Crown Castle has not provided the City with any alternatives that adequately address the City's aesthetic concerns.

- a. Most of the proposed alternatives continue to include options that substantially increase the height of the existing street lights – extending four to eleven feet above the height of the street light.
- b. Options for Crown Castle's proposed network are designed to accommodate multiple carriers, but as of now only has one committed tenant, MetroPCS. As such, the larger canister and tri-sector pipe antenna designs are unnecessary at this time since Crown Castle does not know when, or even if, additional tenants will utilize these nodes. While these larger antenna options may accommodate additional carriers, there is no guarantee that those carriers will, in fact, agree to utilize the system. Therefore, these larger antenna options are an unnecessary visual intrusion.
- c. The smaller four foot tall "whip" antenna design, while smaller in scale than the above mentioned options, accommodates only one carrier. As such, the City must take into consideration the cumulative effects of future such applications that would undoubtedly result in a proliferation of these aesthetically incompatible antennas throughout the City. Where there is already concern about the visual incomparability of these designs, the incompatibility is only exacerbated when considered at the cumulative level with additional such future proposals.
- d. Design alternatives proposed by Crown Castle on October 5, 2011 include introduction of new vertical elements, in the form of either a new "steeple", "tapered cone," "full canister," or "single build" design that are not in character with the existing vertical elements. The proposed "steeple" design bears no relationship to existing utility or architectural elements within Davis neighborhoods and is significantly out of place. The proposed "tapered cone" design bears no relationship to existing utility or architectural elements, save for one very small portion of South Davis where existing electrical transformers exist atop utility poles. The proposed "full canister" design would extend the length of the pole-top cylinder by an additional three feet, for an added total height of 9 feet to existing 29 to 30 foot tall streetlight poles. The applicant purports that the proposed "single build" design provides a "narrow, lower profile canister" when in fact the canister is the same height (72 inches tall), but wider (19.5 inches diameter vs. 16 inches diameter) than the original proposed canister. Introduction of such new vertical elements is contrary to the City's long efforts to underground utilities and minimize vertical elements that detract from the scenic and tree-lined streets of the residential neighborhoods.
- e. The Commission is not convinced that the antenna design options presented by Crown Castle represent the smallest, least intrusive, design options possible. This is demonstrated by the fact that even smaller antenna designs have been incorporated in other communities as demonstrated in the October 12, 2011 staff report. The design alternatives presented by Crown Castle are considered by the Commission to be "ugly" and "obtrusive".

- f. Crown Castle has refused to evaluate, and summarily dismissed consideration of possible sites for co-location of their proposed facilities with nearby “macro” telecommunications facilities by stating that they intend to maintain a presence in the PROW. Several suggested co-location alternative sites were suggested by Planning Commissioners at the August 3, 2011 hearing that the Commission believed would serve the needs of the proposed network, while being more visually compatible with the community. These included sites: 2, 4, 8, 9, 11, 12, 13, and 23.
- g. While corrected several months later, the demonstration sites were not originally constructed in accordance with the construction plans and photo simulations submitted. The demonstration sites have proven to be more visually obtrusive than advertised with antennas that project out (as opposed to being flush-mounted), external conduit, larger/bulkier equipment, and not as streamlined in appearance as the photo simulations suggest. Such issues call into question whether the photo simulations of alternatives are accurate or reliable in relation to what would actually be constructed.

In addition, the Planning Commission **cannot** find that (1) based on information submitted, the proposed telecommunications site/facility is in compliance with all FCC and California Public Utilities Commission (PUC) requirements; or (2) the applicant has demonstrated and confirmed, by independent evaluation of the city, that the site/facility is necessary to address current demand capacity or other technical limitations of the system in order to maintain service levels. [**See Findings #6 and 7 above**].