

**CLERK'S CERTIFICATION**


I, Zoe S. Mirabile, City Clerk of the City of Davis, California, do hereby certify that the foregoing is a full, true and correct copy of RESOLUTION NO. 10-010, SERIES 2010, duly adopted at a regular meeting of the City Council of said city, duly and regularly held at the regular meeting place thereof on the 19th day of January, 2010, at which meeting all of the members of said City Council had due notice and at which meeting a majority thereof was present; that at said meeting said resolution was adopted by the following vote:

AYES: Greenwald, Heystek, Saylor, Souza, Asmundson

NOES: None

I have carefully compared the same with the original minutes of said meeting on file and of record in my office, said resolution is on file in the City Clerk's office and is a full, true and correct copy of the original resolution adopted at said meeting and entered in said minutes. Said resolution has not been amended, modified or rescinded since the date of its adoption and the same is now in full force and effect.

WITNESS my hand and seal of the City of Davis this 19th day of February, 2010.


Zoe S. Mirabile, CMC
City Clerk
City of Davis



RESOLUTION NO. 10-010, SERIES 2010

**RESOLUTION ADOPTING FINDINGS AND DETERMINATIONS RE:
NEWPATH NETWORKS, LLC'S APPEAL OF PERMIT RESCISSION**

WHEREAS, NewPath Networks, LLC ("NewPath") filed an application with the City of Davis in 2009 to construct a distributed antenna system ("DAS") for wireless communication facilities; and

WHEREAS, City staff issued NewPath 37 encroachment and related building permits for its proposed DAS project, which includes 21 antennas on new and existing poles throughout the City of Davis; and

WHEREAS, the City Manager became aware of the DAS project in late November 2009 and issued a Stop Notice Order, effective immediately, for all construction on the project on November 30, 2009; and

WHEREAS, on December 5, 2009, the City Manager rescinded all 37 permits on the grounds that (1) NewPath did not comply with the City's Wireless Telecommunication Facilities Ordinance; (2) the permits for ground based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; and

WHEREAS, NewPath filed a timely appeal of the rescission; and


WHEREAS, the City Council held a duly noticed public meeting on January 19, 2010 to consider the appeal, considering both written and oral testimony from Staff, NewPath, and the public.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Davis that, based on the findings as referenced in Attachment "A" hereto and made a part thereof, the City Council DENIES NewPath Network, LLC's appeal of the City Manager's December 5, 2009 Notice of Rescission.


PASSED AND ADOPTED by the City Council of the City of Davis on this 19th day of January, 2010 by the following vote:

AYES: Greenwald, Heystek, Saylor, Souza, Asmundson

NOES: None


Ruth Uy Asmundson, Ph.D.
Mayor

ATTEST:


Zoe S. Mirabile, CMC
City Clerk

Attachment A
Findings for Denial

Findings for Denial of an Appeal of the City Manager's 12/5/09 Notice of Rescission of Encroachment Permits, and Any Related Building Permits Issued to NewPath Networks, LLC:

1. 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.
2. 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.
3. 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.
4. NewPath is essentially a "wholesale" provider of wireless facilities for wireless service providers, like MetroPCS or Verizon.
5. NewPath submitted an application in 2009 to construct a DAS facility in the City of Davis.
6. Staff issued NewPath 37 encroachment and related building permits to construct its DAS facility.
7. The CPUC issued NewPath a Notice to Proceed ("NTP") for the Davis DAS project on November 25, 2009.
8. The City Manager became aware of the DAS project in late November 2009 and issued a Stop Notice order, effective immediately, for all construction on the project on November 30, 2009.
9. 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; (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.
10. NewPath filed a timely appeal of the rescission to the City Council.
11. The City has a Wireless Telecommunication Facilities Ordinance, DMC 40.29.0 ("Wireless Ordinance") that was, and continues to be, in effect at the time NewPath submitted its application.

12. The Wireless Ordinance contains three categories of proposed wireless facility projects – prohibited projects, exempt projects, and discretionary review projects requiring a conditional use permit. Unless listed as exempt or prohibited, "no wireless telecommunication facility shall be constructed without first undergoing the specific review process and obtaining the prescribed permit." DMC § 40.29.040(b).
- a. Prohibited Projects – Among the list of prohibited projects are telecommunication projects:
- where the combined radio frequency emissions exceeds state or federal standards
 - within residential zones, or within 500 feet of residential zones (subject to certain exemptions for the setback requirement), including public rights of way
 - on sites containing existing or planned public or private school facilities, or within 500 feet of school facilities (subject to certain exemptions for the setback requirement)
 - on existing or planned public parks and/or greenbelts.
- DMC § 40.29.050.
- b. Exempt Facilities – The Wireless Ordinance exempts a number of categories of facilities. DMC § 40.29.060. The only exemption relevant to NewPath's DAS project, however, is the exemption for "Any wireless communication facility, if and only to the extent that a permit issued by the [CPUC] or the rules and regulations of the [FCC] specifically provide that the antenna is exempt from local regulation." DMC § 40.29.060(j).
- c. Facilities Allowed if Authorized Pursuant to CUP Procedures – The remainder of the Wireless Ordinance describes the location and design standards applicable to the remaining telecommunication facilities and requires that such facilities be reviewed in accordance with the CUP procedures set forth in DMC, Article 40.30, which requires (among other things), public notice and a public hearing. DMC §§ 40.29.070; 40.29.160.
13. The permits issued to NewPath violated the City's Wireless Ordinance, as reflected in Attachment #6 to the Staff Report. The Wireless Ordinance prohibits telecommunication projects in residential, school, and public park and/or greenbelt zones. The Wireless Ordinance also requires an additional 500 foot setback requirement from residential and school zones, with specified exceptions.
- a. All of the proposed antennas are located in or within 500 feet of residential, park, greenbelt, or corresponding planned development zones.
- b. In addition, Permit #09-777700192 (3075 E Covell Blvd) is located on City-owned property outside of the right of way and public utility easements. But NewPath does not have an approved lease to utilize that site. Leases of City-owned property require approval by the City Council, which was not obtained. Without the proper approval of

the City Council, the permit is invalid.

- c. One site – Permit # 09-77700244 (1340 Lake Boulevard) – is located in Planned Development for Neighborhood Commercial uses, but is within 500 feet of a residential zone. However, the Wireless Ordinance has an exemption from the 500 foot setback requirement, but any telecommunication facility at this site would be required to go through the CUP process, including notice to the public and a public hearing, and be fully stealthed. DMC § 40.29050(b)(2). This exemption process was not followed.
14. Neither NewPath's CPCN nor NTP fall within the exemption in DMC § 40.29.060(j) of the Wireless Ordinance; nor do they preempt application of the Wireless Ordinance to NewPath's proposed DAS project. Neither the CPCN nor the NTP contain any express preemption of local authority. The NewPath CPCN is not site-specific; rather, it applies state-wide. The NTP is site-specific; however, by its terms, it is limited to the issue of whether the DAS project comes under a CEQA categorical exemption and does not address the applicability of local regulations. The City's Wireless Ordinance does not conflict with the CPCN or NTP, but is instead a local time, place and manner regulation expressly authorized by the Public Utilities Code. Pub. Util. Code § 7901.1 (authorizing local government agencies to "exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed."). In fact, NewPath's CPCN orders NewPath "to comply with all applicable rules adopted in the Local Exchange Competition proceeding ..., as well as other applicable Commission rules, decisions [General Orders], and statutes that pertain to California public utilities, subject to the exemptions granted in this decision;" there is no exemption to Section 7901.1 in NewPath's CPCN. Accordingly, the City Manager did not err in rescinding NewPath's permits for the DAS project.
 15. 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). However, local governments do have a role in determining compliance with the FCC's radio frequency safety regulations. *See* Gov't Code § 65850.6(f); *see also New York SMSA Ltd. P'ship v. Town of Clarkstown*, 603 F. Supp. 2d 715, 730 (S.D.N.Y. 2009); 47 U.S.C. § 332(c)(7)(B)(iv). Recognizing this role, the City's Wireless Ordinance prohibits telecommunications facilities where the combined RF emissions exceed state or federal standards. DMC § 40.29.050(a)(1).
 - a. Whether NewPath's facilities fall within the TCA's preemption is an undetermined issue, but even assuming the preemption applies, NewPath has not disclosed the RF emissions by frequency or power proposed upon activation of the sites, therefore the City cannot determine whether the projects will comply with the FCC RF safety standards at 47 C.F.R. § 1.1310 *et seq.* or the Wireless Ordinance.
 - b. For example, some projects (such as Permit #09-7770247 – 809 La Paz Drive, DAV19) are to be located within 10 to 20 horizontal feet from a residential structure, thus FCC RF safety compliance evaluation is necessary to ensure public safety. NewPath's plans contain a reference to a "future" additional "ADC-URH Cabinet" DAS transceiver that will presumably emit additional RF emissions. Those future RF emissions by

frequency have not been provided to the City, therefore the cumulative impact on compliance with the FCC RF safety standards from multiple transmitters cannot be determined by the City, which in turn means, the permits may not be in compliance with the Wireless Ordinance and its prohibition against any telecommunications facility where the combined RF emission exceed state or local standards.

16. NewPath does not have a vested right to proceed with construction under the improperly issued encroachment permits. "[I]t is well-settled that 'when an administrative agency acts in excess of, or in violation, of the powers conferred upon it, its action thus taken is void.'" *City & County of San Francisco v. Padilla*, 23 Cal.App.3d 388, 400 (1972) (quoting *Ferdig v. State Personnel Bd.*, 71 Cal.2d 96, 104 (1969)); see also *Horowitz v. City of Los Angeles*, 124 Cal.App.4th 1344 (2004) ("[T]he City has no discretion to issue a permit in the absence of compliance [with the municipal code]."); *Golden Gate Water Ski Club v. County of Contra Costa*, 165 Cal.App.4th 249, 259 (2008) ("It follows that the doctrine of equitable estoppel will not be invoked as a matter of law even where a property owner relies on a permit issued by the public entity but the permit violates a zoning ordinance.").

17. Rescission of the improperly issued encroachment and related building permits at issue does not mean NewPath is effectively prohibited from utilizing its CPCN to access the public rights of way. Rescission of the permits simply means NewPath must apply for permits pursuant to the City's Wireless Ordinance. If NewPath shows that particular proposed sites prohibited under the Wireless Ordinance are necessary to eliminate significant gaps in coverage, *i.e.*, there are no reasonable alternative locations permissible under the Wireless Ordinance, then NewPath may seek an exemption from the Wireless Ordinance that is consistent with the City's aesthetic and safety concerns, including consideration of collocation on existing poles or light stanchions.