

Notice of Determination

To:

☐ Office of Planning and Research

For U.S. Mail:

P.O. Box 3044

Sacramento, CA 95812-3044

Street Address:

1400 Tenth St.

Sacramento, CA 95814

☒ County Clerk

County of:

Fresno

Address:

2221 Kern Street

Fresno, CA 93721

From:

Public Agency:

Address:

Contact:

Phone:

City of Kingsburg

1401 Paper Street

Kingsburg, CA 93631

Greg Collins, contract city planner

(559) 734-8737

Lead Agency (if different from above):

Address:

Contact:

Phone:

SUBJECT: Filing of Notice of Determination in compliance with Section 21108 or 21152 of the Public Resources Code.

State Clearinghouse Number (if submitted to State Clearinghouse):

Project Title: Lentzer Homes, annexation, pre-zoning, and Tract No. 6094Project Location (include county): West of Mendocino south of Kern Avenue in Kingsburg.Project Description: Lentzer Homes is seeking a number of planning applications from the City of Kingsburg. They include: 1) annexation of 10.02 acres; 2) pre-zoning from the AE-20 to R-1-7 district; 3) approval of PSD; and approval of Subdivision Tract No. 6094 for 34 single-family residential lots.This is to advise that the City of Kingsburg has approved the above described project on 6/18/15 and has made the following determinations regarding the above described project:

(Date)

1. The project [☐ will ☒ will not] have a significant effect on the environment.
2. ☐ An Environmental Impact Report was prepared for this project pursuant to the provisions of CEQA.
☒ A Negative Declaration was prepared for this project pursuant to the provisions of CEQA.
3. Mitigation measures [☐ were ☐ were not] made a condition of the approval of the project.
4. A mitigation reporting or monitoring plan [☐ was ☐ was not] adopted for this project.
5. A statement of Overriding Considerations [☐ was ☐ was not] adopted for this project.
6. Findings [☐ were ☐ were not] made pursuant to the provisions of CEQA.

This is to certify that the final EIR with comments and responses and record of project approval, or the negative Declaration, is available to the General Public at:

Signature (Public Agency)

Title

Date

Date Received for filing at OPR

Authority cited: Sections 21083, Public Resources Code.
Reference Section 21000-21174, Public Resources Code.

Revised 2005

FILED

JUN 19 2015

TIME

FRESNO COUNTY CLERK

By

DEPUTY

**ASK CLERK FOR FILE

CITY OF KINGSBURG NEGATIVE DECLARATION

Planning and Development Department, 1401 Draper Street, Kingsburg, California, 93631;

APPLICANT: LENNAR HOMES INC

PROJECT TITLE: Lennar Homes of California, Inc.

1. Annexation of 10.02 acres, Annexation 2015-01
2. Zoning Ordinance Amendment 2015-01, AE-20 to R-1-7
3. Conditional Use Permit for Planned Unit Development, CUP 2015-01
4. Tentative Subdivision Map for 34 single-family lots, Vesting Tentative Subdivision Map Tract No. 6094

PROJECT LOCATION: The subject territory is located between Fourteenth and Mendocino Avenues south of East Kamm Avenue in Kingsburg. The APN is 394--080-01. The property situated in the northwest quarter of Section 23, Township 16 South, Range 22 East, MDB and M.

PROJECT DESCRIPTION:

1. Initiating the annexation of 10.02 acres into the City of Kingsburg and the detachment of same from the County of Fresno, consistent with the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, Division 3, commencing with Section 56000 of the California Government Code.
2. Amend the zone classification on the subject site from the county's AE-20 (exclusive agriculture, twenty acre minimum) zone to Kingsburg's R-1-7 (single family residential, one unit per 7,000 square feet) zone.
3. Approve Conditional Use Permit 2015-01 for a Planned Unit Development.
4. Approve Vesting Tentative Subdivision Tract Map No. 6094 for 34 single-family residential lots.

FINDINGS OF NO SIGNIFICANCE:

1. The project does not have the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory.
 2. The project does not have the potential to achieve short-term economic gain, to the disadvantage of long-term environmental goals.
 3. The project does not have the potential to have impacts which are individually limited but cumulatively considerable.
 4. The project will not cause substantial adverse effects on people, either directly or indirectly.
-

DETERMINATION:

On the basis of an initial environmental assessment and the findings mentioned above, the City of Kingsburg determines that the project will not have a significant impact on the environment.



City Planner



Date Adopted

INITIAL ENVIRONMENTAL STUDY

1.0 PROJECT OVERVIEW

BACKGROUND

Applicant: Lennar Homes Inc.

Location:

The subject property located between Fourteenth and Mendocino Avenues south of East Kamm Avenue in Kingsburg; the APN 396-15-152, containing 10.02 acres. The property currently is located in the county of Fresno.

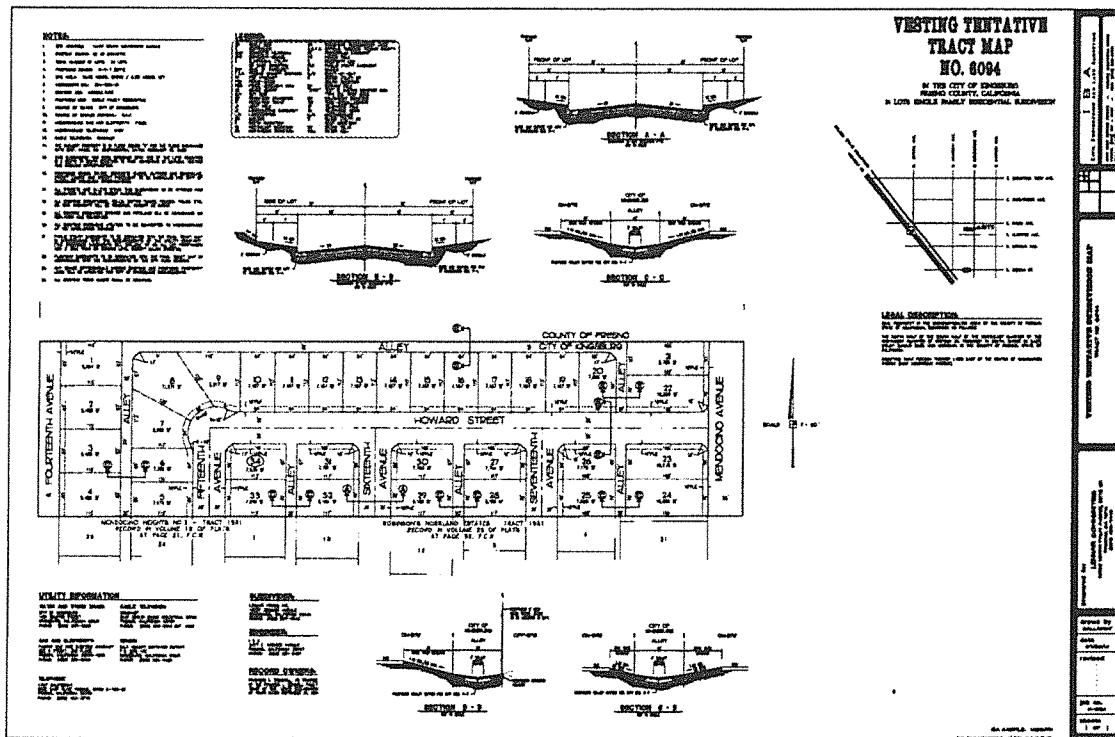


Request:

The applicant is seeking approval of four planning requests. They are:

- 1) annexation of 10.02 acres into the city of Kingsburg;

- 2) a change of zone from the county's AE-20 zone to Kingsburg's R-1-7 zone;
- 3) approval of a conditional use permit for a planned unit development (PUD) for residential uses proposed for the subject property; and
- 4) approval of a vesting tentative subdivision map to create 34 single-family residential lots.



Zone:

The subject property is zoned AE-20 (exclusive agriculture, 20-acre minimum).

General Plan:

The Kingsburg General Plan designates the subject property for "medium density residential"; the North Kingsburg Specific Plan classifies the property as "residential single family."

Site:

The subject property contains a single family dwelling with out buildings; the balance of the property is generally fallow. Surrounding land uses are as follows:

North: Single-family dwellings

Lennar Homes of California Inc.

East: single family dwellings
West: single family dwellings
South: single-family dwellings

Water:

Water will be provided to the site by the City of Kingsburg.

Sewer:

The SKF County Sanitation District will provide sewer collection and treatment.

Police and Fire Services:

Police protection and fire suppression will be provided by the City of Kingsburg.

4.0 DISCUSSION OF POTENTIAL ENVIRONMENTAL IMPACTS

This section of the Initial Study analyzes potential impacts of the proposed project. For each topic issue a determination of the magnitude of the impact is made (via checklist) and then the impact is analyzed and discussed. Where appropriate, mitigation measures are identified that will reduce or eliminate an impact.

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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I. AESTHETICS -- Would the project:

1. Have a substantial adverse effect on a scenic vista?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project will not have an adverse impact on the visual environment. The subject property is surrounded by existing residential development. The subject site does provide an open space vista for residences that look onto the property, however, given that is totally surrounded residential uses surrounding residences can not expect that the site remain in open space.

The residence that exists on the eastern side of the property is bordered by a grove of mature trees. These trees are not scheduled to be removed, and they will become part of the mature landscape on lots 21 and 22.

2. Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: There are not any significant scenic resources on the subject property including trees, rocks or historic buildings.

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| 3. Substantially degrade the existing visual character or quality of the site and its surroundings? | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

Discussion: The project will be consistent with the visual character of the immediate neighborhood in that residential uses bound the site on all four sides. The proposed residential development will be an extension of the type of residential development that exists immediately south of the subject site.

- | | | | | |
|--|--------------------------|--------------------------|-------------------------------------|--------------------------|
| 4. Create a new source of substantial light or glare that would adversely affect day or nighttime views in the area? | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
|--|--------------------------|--------------------------|-------------------------------------|--------------------------|

Discussion: The only new source of light that will be introduced into the area will be street lighting that will be installed when the subdivision is constructed. There will be new lighting associated with each new residence constructed, however, this will be compatible with light produced by residential uses that currently bound the subject site on all four sides.

II. AGRICULTURE AND FOREST RESOURCES: In determining whether impacts to agricultural resources are significant environmental effects, lead agencies may refer to the California Agricultural Land Evaluation and Site Assessment Model (1997) prepared by the California Dept. of Conservation as an optional model to use in assessing impacts on agriculture and farmland. In determining whether impacts to forest resources, including timberland, are significant environmental effects, lead agencies may refer to information compiled by the California Department of Forestry and Fire Protection regarding the state's inventory of forest land, including the Forest and Range Assessment Project and the Forest Legacy Assessment project; and the forest carbon measurement methodology provided in the Forest Protocols adopted by the California Air Resources Board. Would the project:

1. Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland), as shown on the maps prepared pursuant to the

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
Farmland Mapping and Monitoring Program of the California Resources Agency, to non-agricultural use?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Discussion: The proposed project will urbanize approximately 10 acres of land that was once used for the growing of row crops and tree fruit. These trees were removed some years ago and the farming of row crops was discontinued because it was difficult to effectively farm.

2. Conflict with existing zoning for agricultural use, or a Williamson Act contract?

☐ ☐ ☐ ☒

Discussion: The proposed subdivision is not under an agricultural preserve contract nor will it adversely impact existing agricultural uses. The nearest farm is a vineyard located slightly north and east of the subject site, on the east side of Mendocino Avenue.

3. Conflict with existing zoning for, or cause rezoning of, forest land (as defined in Public Resources Code section 12220(g)) or timberland (as defined in Public Resources Code section 4526)?

☐ ☐ ☐ ☒

Discussion: The site is not zoned for forestry and is not forested.

4. Result in the loss of forest land or conversion of forest land to non-forest use?

☐ ☐ ☐ ☒

Discussion: The site is not forested and the project will not impact forest land.

5. Involve other changes in the existing environment, which, due to their location or nature, could result in conversion of Farmland, to non-agricultural use or conversion of forestland to non-forest use?

☐ ☐ ☒ ☐

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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Discussion: The project will result in conversion of farmland to non-farmland, however, this one time farm is surrounded on four sides by residential development and the site is earmarked for urban development under Kingsburg's North Kingsburg Specific Plan. The subject property is surrounded by land that is within the Kingsburg city limits. The project is considered to be an urban infill project.

III. AIR QUALITY -- Where available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make the following determinations. Would the project:

1. Conflict with or obstruct implementation of the applicable air quality plan?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project will have little if any impact on the Air District's air quality plan. Given that the project is an urban infill project, the VMT generated by this project will be significantly less than a similar residential project constructed on the fringe of the community. Further, because of the subdivision's close proximity to downtown Kingsburg, local schools and parks, many persons will walk to these destinations rather than drive.

1. Violate any air quality standard or contribute substantially to an existing or projected air quality violation?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project will not violate any air quality standards. Air emissions will be generated during the construction phase of the project but the Air District's fugitive dust rules will ensure that the project will not violate the District's standards for dust emissions.

2. Result in a cumulatively considerable net increase of any

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
criteria pollutant for which the project region is non-attainment under an applicable federal or state ambient air quality standard (including releasing emissions which exceed quantitative thresholds for ozone precursors)?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Discussion: The proposed project will not generate significant criteria pollutants for which the region is non-attainment nor will emissions exceed thresholds established by the SJVAPCD for ozone precursors.

3. Expose sensitive receptors to substantial pollutant concentrations?

☐ ☐ ☐ ☒

Discussion: Residents that live in the proposed subdivision will not be exposed to any substantial pollutant concentrations - four sides of the site are occupied by residential subdivisions. There are no land uses within the immediate area of the site that generate any significant levels of pollution.

4. Create objectionable odors affecting a substantial number of people?

☐ ☐ ☒ ☐

Discussion: The project is not expected to result in odors that will affect residents on or adjacent to the site. The construction of the subdivision will not create any odors that will be obnoxious to surrounding residents. In fact, agriculture that recently existed on the site generated more odors than the proposed residential subdivision.

IV. BIOLOGICAL RESOURCES --

Would the project:

1. Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive,

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The proposed project will not have an adverse impact on special status species - plants or animals. Because the subject property was intensively farmed for over 40 years, the likelihood of any special status species inhabiting the site is remote especially given the cultural practices associated with farming - spraying, picking, hedging, irrigating and mowing/discing.

2. Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, and regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: There is no riparian woodland that exists on the neither subject site nor is they're any sensitive natural communities. The site is currently fallow but at one time contained row crops and vineyards.

3. Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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Discussion: The subject property does not contain a wetland as defined by Section 404 of the Clean Water Act. Further, the site does not contain any soil types that are associated with wetlands, called hydrophytic soils.

4. Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The proposed project will not impede the migration of fish or wildlife species. The site is currently fallow and does not contain any watercourses or native habitat. There are mature trees located on the east side of the property.

5. Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: There are no local policies or ordinances in Kingsburg protecting biological resources.

6. Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: There are no adopted habitat conservation plans that apply to the project site.

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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V. CULTURAL RESOURCES --

Would the project:

1. Cause a substantial adverse change in the significance of a historical resource as defined in '15064.5?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: There are no historical structures on the site nor has the site been identified by the Southern San Joaquin Valley Archaeological Information Center as a site that contains a historical resource.

2. Cause a substantial adverse change in the significance of an archaeological resource pursuant to '15064.5?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: Although there are no known archaeological resources located on the subject property, the proposed project could result in disturbance of subsurface archaeological resources during excavation and/or grading. If this occurs, the developer will comply with the requirements of CEQA that regulate archaeological and historical resources (Public Resources Code Section 21083.2 and 21084.1), and all local, state and federal regulations that regulate archaeological and historical resources, if during the course of development on the sites archeological or human remains are encountered.

3. Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: Although there are no known paleontological resources located in the study area, the proposed project does have the potential to directly or indirectly destroy a paleontological resource. If any cultural or paleontological materials are uncovered during project activities, work in the area shall halt until professional cultural resources evaluation and/or data recovery excavation can be planned and implemented.

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
4. Disturb any human remains, including those interred outside of formal cemeteries?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Discussion: Due to past disturbance of the site's soils it is unlikely that any human remains exist at the site. However, should any human remains be discovered during grading and construction, the Fresno County Coroner must be notified immediately. *(The Coroner has two working days to examine the remains and 24 hours to notify the Native American Heritage Commission [NAHC] if the remains are Native American. The most likely descendants then have 24 hours to recommend proper treatment or disposition of the remains, following the NAHC guidelines).*

VI. GEOLOGY AND SOILS -- Would the project:

Expose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving:

1. Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: While Kingsburg is located in an area that is subject to ground shaking from earthquakes, the distance to faults that will be the likely cause of ground motions is sufficient so that potential impacts are reduced. The City requires all new structures to be built in Kingsburg be consistent with Zone II seismic standards of the Uniform Building Code.

2. Strong seismic ground shaking?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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Discussion: See response to VI. a. i. above. With incorporation of Zone II seismic standards, the potential for significant impacts due to seismic ground shaking will be minimal.

3. Seismic-related ground failure, including liquefaction?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The soils (Delhi loamy sand) throughout the project area are not subject to liquefaction.

4. Landslides?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The project area occupies level ground and therefore the potential for landslides is remote.

5. Result in substantial soil erosion or the loss of topsoil?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project area occupies level ground and the project area soils do not contain erosive qualities. Therefore, the potential for soil erosion or loss of topsoil is remote.

6. Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: Soils on the project site (Delhi loamy sand) are considered to be stable. Further, the project area occupies relatively level ground and therefore the potential for unstable construction conditions are less than significant.

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
7. Be located on expansive soil, as defined in Table 18-1-B of the Uniform Building Code (1994), creating substantial risks to life or property?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Discussion: The project site is not located on expansive soils.

8. Have soils incapable of adequately supporting the use of septic tanks or alternative wastewater disposal systems where sewers are not available for the disposal of wastewater?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The proposed subdivision will be required to connect to the city's sewer system when residential construction commences.

VII. GREENHOUSE GAS

EMISSIONS: Would the project:

1. Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: Greenhouse gas emissions (GHG) are emissions of various types of gases that are believed to be causing an increase in global temperatures, which is affecting the world's climate patterns. Scientists recognize GHG resulting from human activities, particularly the use of machinery that burns fossil fuels for power. Key greenhouse gases include carbon dioxide, methane, nitrous oxide, and hydro fluorocarbons.

Greenhouse gas emissions will occur primarily during the construction of the project, generated by the operation of motorized equipment. Each single-family unit will also generate green house gases primarily from home heating and cooling and the operation of motorized vehicles. The volume of GHG generated by this 34-lot single-family

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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residential subdivision is insignificant when compared to emissions generated by the City of Kingsburg or the Valley as a whole. Due to energy conservation regulations (Title 24) implemented throughout the State coupled with motorized vehicles becoming more fuel efficient, the single family residential subdivision of today generate fewer GHG than subdivisions that were built 10 or 20 years ago.

2. Conflict with any applicable plan, policy or regulation of an agency adopted for the purpose of reducing the emissions of greenhouse gases?

☐ ☐ ☒ ☐

Discussion: The Kingsburg General Plan does not have any plans, policies or regulations pertaining to the regulation of greenhouse gas emissions. Therefore, the project will not be in conflict with these plans, policies or regulations.

VIII. HAZARDS AND HAZARDOUS MATERIALS: Would the project:

1. Create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials?

☐ ☐ ☒ ☐

Discussion: The project will not involve the transport, use or disposal of hazardous materials. Mendocino Avenue may periodically be used for the transportation of hazardous materials; however, the likelihood of spills occurring adjacent to the subdivision is very remote.

2. Create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment?

☐ ☐ ☐ ☒

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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Discussion: The project does not involve the handling, storage or transportation of hazardous materials.

3. Emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The project does not involve the handling, storage or transportation of hazardous materials.

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The project site is not included on any list of known hazardous materials sites compiled pursuant to Government Code Section 65962.5.

4. For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard for people residing or working in the project area?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The subject area is not adjacent to a public or private airport.

5. For a project within the vicinity of a private airstrip, would the project result in a safety hazard for people residing or working in the project area?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The subject area is not adjacent to a public or private airport.

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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6. Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The project will not impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan. The proposed subdivision is not adjacent to a roadway, highway or freeway that serves as a major route for the movement of emergency vehicles. Should these types of vehicles utilize Mendocino Avenue, traffic exiting the proposed subdivision would be restricted from entering Mendocino until emergency vehicles have cleared the intersection of Howard Street and Mendocino Avenue.

7. Expose people or structures to a significant risk of loss, injury or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: There are no wildlands on the project site that might be the source of a fire.

IX. HYDROLOGY AND WATER QUALITY -- Would the project:

1. Violate any water quality standards or waste discharge requirements?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: There will be no discharge of runoff into any surface waters. Storm water runoff will be diverted to drop inlets throughout the subdivision. The stormwater will then flow to Kingsburg's storm water retention basins, or to an on-site basin.

2. Substantially deplete groundwater supplies or interfere substantially

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The subdivision will assist in the depletion of the local aquifer because each residence will consume on average about 1050 gallons per day - less in winter months and more in summer months. The city now requires water meters for all new residential development. This metering will serve to reduce water consumption; however, the entire Kings River Basin is in an overdraft condition and therefore any pumping of water from the underlying aquifer in the Kingsburg area aggravates the overdraft condition.

Based on the above water consumption figures, the project will not have a significant impact on the ground water environment but it will have a cumulative impact on the Kings River Water Basin's aquifer. Metering of water usage and complying with the State's mandate for reduced water consumption will reduce the project's impact on the cumulative impact of water consumption.

3. Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, in a manner that would result in substantial erosion or siltation on- or off-site?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project area's drainage patterns will not be significantly altered. All the drainage that emanates from the project site will be diverted to Kingsburg's storm drainage system or to an on-site retention basin.

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Impact |
|--|--------------------------------------|---|-------------------------------------|--------------------------|
| 4. Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner that would result in flooding on- or off-site? | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

Discussion: Surface runoff will be transported from the site by means of the subdivision's storm water drainage system that will be composed of gutters, drop inlets and storm drainage pipes. Through this system storm water will be diverted to Kingsburg's retention pond system.

- | | | | | |
|---|--------------------------|--------------------------|-------------------------------------|--------------------------|
| 5. Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff? | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
|---|--------------------------|--------------------------|-------------------------------------|--------------------------|

Discussion: All storm water runoff will be retained in Kingsburg's storm water retention basins. This basin system has the capacity to accommodate the additional runoff that will be generated by the proposed subdivision.

- | | | | | |
|---|--------------------------|--------------------------|-------------------------------------|--------------------------|
| 6. Otherwise substantially degrade water quality? | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
|---|--------------------------|--------------------------|-------------------------------------|--------------------------|

Discussion: No aspect of the project is expected to degrade water quality. No water from the site will enter any adjacent surface water systems and therefore water quality will not be degraded.

- | | | | | |
|--|--|--|--|--|
| 7. Place housing within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary or | | | | |
|--|--|--|--|--|

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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Flood Insurance Rate Map or other
flood hazard delineation map?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The subject area is not within a 100-year floodplain.

8. Place within a 100-year flood hazard
area structures that would impede or
redirect flood flows?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The subject territory is not within a 100-year floodplain and therefore floodwaters will not be impeded by structures built in the project area.

9. Expose people or structures to a
significant risk of loss, injury or
death involving flooding, including
flooding as a result of the failure of a
levee or dam?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project site is located downstream from Pine Flat Dam, which holds back the Kings River. A break in the dam could potentially flood the subject property depending upon what time of year the dam would break, and more importantly, the amount of water behind the dam. The probability of a dam break is extremely low.

10. Inundation by seiche, tsunami, or
mudflow?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The project is located about 100 miles inland from the Pacific Ocean, the closest source of a seiche or tsunami. There are no aspects of the project that reasonably present the danger of a mudflow.

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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X. LAND USE AND PLANNING -

Would the project:

1. Physically divide an established community?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The proposed project will not physically divide the Kingsburg community. The site is located on the north side of the community and represents a logical extension of the urbanized part of the city.

2. Conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project is consistent with the Land Use Element of the General Plan as well as the North Kingsburg Specific Plan, which designates the property for "low density residential" uses. The proposed subdivision and its associated residential dwellings should be constructed consistent with the design guidelines of the North Kingsburg Specific Plan.

3. Conflict with any applicable habitat conservation plan or natural community conservation plan?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The project site is not subject to any habitat or natural community conservation plan.

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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XI. MINERAL RESOURCES --

Would the project:

1. Result in the loss of availability of a known mineral resource that would be of value to the region and the residents of the state?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The site is not known to harbor mineral resources that would be valuable to the region. The site is not on a floodplain, which is an area that normally supports sand and gravel resources.

2. Result in the loss of availability of a locally important mineral resource recovery site delineated on a local general plan, specific plan or other land use plan?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The site is not known to harbor mineral resources that would be valuable to the region.

XII. NOISE -- Would the project result in?

1. Exposure of persons to or generation of noise levels in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The proposed project will not generate any excessive noise nor will it expose persons to excessive noise levels. Because the subject site is surrounded by existing residential uses, the likelihood of future residents being exposed to excessive noise levels is remote. Further, roadways that surround the subject property do not have significant levels of car or truck traffic to generate a significant amount of roadway noise.

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
2. Exposure of persons to or generation of excessive ground borne vibration or ground borne noise levels?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Discussion: There is no significant ground borne vibrations in the project area or on surrounding properties.

3. A substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The proposed project will not increase ambient noise levels on lands adjacent to the subject property. The transition of the subject site from agriculture to single-family dwellings will reduce the level of noise being generated from the site. Farming practices are generally noisier than single-family subdivisions in that they operate larger equipment.

4. A substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: Construction activities associated with residential development creates very little noise compared to construction associated with commercial or industrial development. As individual homes, roads and infrastructure are being constructed, noise beyond ambient levels will be generated, however, this increase in noise levels will only occur during day time hours and will only last for the period of time that it takes to complete the subdivision project. When all construction within the development has been completed the project will have a less than significant impact on the noise environment.

5. For a project located within an airport land use plan or, where such a plan has not been adopted, within				
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Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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two miles of a public airport or public use airport, would the project expose people residing or working in the project area to excessive noise levels?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project site is not within an airport land use plan and therefore will not be subjected to any noise generated by air traffic.

6. For a project within the vicinity of a private airstrip, would the project expose people residing or working in the project area to excessive noise levels?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The project site is not located within the vicinity of any private airstrips.

XIII. POPULATION AND HOUSING

-- Would the project:

1. Induce substantial population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure)?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project is not considered to be growth-inducing but growth-accommodating. Some households will relocate to Kingsburg to take advantage of the newer housing that will be provided by the project while other households will move into these new homes from existing homes in the community. The construction of 34 new single family dwellings in Kingsburg is deemed an insignificant growth-inducing project when compared to Kingsburg's population of 11,685 and its housing unit count of 4,115 units.

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
2. Displace substantial numbers of existing housing, necessitating the construction of replacement housing elsewhere?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Discussion: There are no dwelling units that will be demolished as a result of this project.

3. Displace substantial numbers of people, necessitating the construction of replacement housing elsewhere?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: No existing dwellings will be removed as a result of the project.

XIV. PUBLIC SERVICES

Would the project result in substantial adverse physical impacts associated with the provision of new or physically altered governmental facilities, need for new or physically altered governmental facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times or other performance objectives for any of the public services:

Fire protection?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project area is served by the City of Kingsburg's fire department. The Department has one full-time Fire Chief, three-full time Captain/Paramedics, six full-time Firefighter/Paramedics, and up to 20 Paid Call Firefighters who are responsible for responding to emergency situations and respond to both fire and emergency medical service. This Department is fully staffed 24 hours a day 365 days a year. A city fire

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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station located at 1460 Marion Street is 1.5 miles from the subject property. The subject site is within a 5-minute response time of the Marion Street fire station.

The project will be required to pay Kingsburg's public safety impact fee. Funds accrued by this fee are used to purchase equipment to accommodate growth and development of the community. Under the Uniform Building Code all residential dwelling are required to install sprinkler systems. Fire hydrants will be required to be installed throughout the subdivision.

Police protection?

☐ ☐ ☒ ☐

Discussion: The subject property receives police protection services from the Kingsburg Police Department. The Department is headquartered in facilities located at the Kingsburg Police Department located at 1300 California Street in Kingsburg. The project site is within the current patrol area of the police department.

New residential development is required to pay Kingsburg's public safety impact fee. A portion of this fee helps purchase equipment and vehicles for the police department.

Schools?

☐ ☐ ☒ ☐

Discussion: The construction of 34 single-family dwellings will generate approximately .75 school-aged children per unit, or about 25 students. Kingsburg's school system includes public and charter schools. Within the greater Kingsburg area there are six elementary schools, five middle schools and two high schools. Assuming that these students are equally distributed over these 13 schools, each school would need to accommodate two additional children once the residential project has been completed. This number of additional students is insignificant when compared to the total number of students in each school.

New residential development is required to pay school impact fees. These funds finance future school construction or expansion.

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
Parks?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Discussion: The construction of 34 single-family dwellings will not have a significant impact on Kingsburg's park system in that the system can absorb additional persons on the grounds and within the buildings of Kingsburg's park and recreation system.

New residential development is required to pay park impact fees. These funds finance future park construction or expansion.

Other public facilities?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The project will not have any impact on other public facilities in the area.

XV. RECREATION --

1. Would the project increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated?

☐ ☐ ☒ ☐

Discussion: There might be a slight increase in the number of persons using local parks, however, this number will be low because this project only involves the construction of 34 single family dwellings.

2. Does the project include recreational facilities or require the construction or expansion of recreational facilities that might have an adverse physical effect on the environment?

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Discussion: The proposed residential project will pay park development impact fees, which will be used to build new parks or upgrade existing parks.

XV. TRANSPORTATION/TRAFFIC

-- Would the project:

1. Exceed the capacity of the existing circulation system, based on an applicable measure of effectiveness (as designated in a general plan policy, ordinance, etc.), taking into account all relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths, and mass transit?

☐ ☐ ☒ ☐

Discussion: A less than significant impact is expected. The project will generate approximately 316 trips per day, most of which, will occur during the peak hours of 6 to 9 am and 4 to 6 pm. Approximately 32 trips would be generated during the peak morning hours and 25 trips during the peak evening hours. Mendocino is operating at a LOS of C. The additional traffic from the proposed subdivision that would utilize this roadway would not cause a significant impact on this roadway - reducing the LOS from a C to a D. In addition, some traffic from the subdivision may utilize streets south of the subdivision thereby avoiding the use of Mendocino Avenue. The distribution of traffic onto these streets south of the subject site further minimizes the impact of traffic generated

1. Conflict with an applicable congestion management program, including, but not limited to level of service standards and travel demand measures, or other standards established by the county congestion management agency for designated roads or highways?

☐ ☐ ☒ ☐

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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Discussion: Traffic generated by the project is not expected to conflict with Fresno County's Congestion Management Program.

2. Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project is not expected to affect air traffic patterns.

3. Substantially increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The project will not have an adverse impact of the level of service (LOS) of Mendocino Avenue. There may be some delays at the intersection of Mendocino and Howard during peak morning and evening hours but these delays will be brief.

4. Result in inadequate emergency access?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: The project area can easily be accessed by emergency vehicles. Police and fire will travel north on Mendocino Avenue and turn left on Howard Street into the subdivision.

5. Conflict with adopted policies, plans, or programs supporting alternative transportation (e.g., bus turnouts, bicycle racks)?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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Discussion: The project will not conflict with any policies, plans, or programs supporting alternative transportation.

XVII. UTILITIES AND SERVICE SYSTEMS: Would the project:

1. Exceed wastewater treatment requirements of the applicable Regional Water Quality Control Board?

☐ ☐ ☒ ☐

Discussion: The project will not generate a significant amount of wastewater because only 34 single-family homes are proposed for construction. The SKF treatment plant has ample capacity to handle the additional effluent that will be generated by this project. The effluent will be typical residential wastewater. Presently, the SKF is operating at 50 percent of plant capacity. The plant has a treatment capacity of 8.0 million gallon per day; the plant is currently treating 4.1 million gallons per day.

2. Require or result in the construction of new water or wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects?

☐ ☐ ☒ ☐

Discussion: As discussed above in XVI. 1., the project will not significantly impact the SKF's wastewater treatment plant nor will it require its expansion.

Kingsburg's water system is composed of six wells, pulling water from depths that range from 500 to 800 feet, and a transmission system that is composed of pipes of varying diameters and fire hydrants. According to the city engineer, the City has an ample water supply to accommodate the water needs of the proposed subdivision.

Kingsburg residents use approximately 350 gallons per day per person. This figure increases significantly during the summer months when the outside irrigation demand rises and falls dramatically in the winter months when outside irrigation is not necessary.

	Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
3. Require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant environmental effects?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Discussion: The proposed subdivision is designed to channel storm water runoff into the subdivision's gutter system, which will be conveyed to an off-site storm water retention basin or to an on-site basin. The project will not have an adverse impact on the city's storm drainage system.

4. Have sufficient water supplies available to serve the project from existing entitlements and resources, or are new or expanded entitlements needed?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The proposed subdivision will be connected to the city's water system. The city has ample water and pressure to serve this subdivision. The city will require the installation of water meters, which will assist in reducing water consumption. Currently, Kingsburg residents use about 350 gallons per day per person. With the installation of meters and the public's heightened awareness about the "drought" this per capita figure should fall in the coming years.

5. Result in a determination by the wastewater treatment provider that serves or may serve the project that it has adequate capacity to serve the project's projected demand in addition to the provider's existing commitments?	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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Discussion: The wastewater generated by the proposed subdivision will be treated at the SKF Wastewater Treatment Plant. The Plant can easily accommodate the type and volume of effluent generated by the subdivision; the plant is operating at 50 percent capacity.

6. Be served by a landfill with sufficient permitted capacity to accommodate the project's solid waste disposal needs?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Discussion: The City of Kingsburg contracts with Mid-Valley for solid waste collection and recycling services. The proposed subdivision will be integrated into Mid-Valley's pick up routes, which already include adjoining properties.

7. Comply with federal, state, and local statutes and regulations related to solid waste?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
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Discussion: All construction waste will be recycled or disposed of properly.

Potentially Significant Impact	Less Than Significant with Mitigation	Less Than Significant Impact	No Impact
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**XVIII. MANDATORY FINDINGS
OF SIGNIFICANCE --**

1. Does the project have the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of a rare or endangered plant or animal or eliminate important examples of the major periods of California history or prehistory?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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2. Does the project have impacts that are individually limited, but cumulatively considerable? ("Cumulatively considerable" means that the incremental effects of a project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects)?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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3. Does the project have environmental effects that will cause substantial adverse effects on human beings, either directly or indirectly?

<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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Potentially Significant <u>Impact</u>	Less Than Significant with <u>Mitigation</u>	Less Than Significant <u>Impact</u>	No <u>Impact</u>
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CHECKLIST PREPARED BY:

Gregory F. Collins, contract city planner
Name

5-5-15
Date



FCC's Wireless Facility Rules Implementing Section 6409(a)

Wednesday, May 6, 2015 Opening General Session; 1:00 – 3:00 p.m.

Harriet A. Steiner, City Attorney, Davis

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This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Indian Wells
(760) 568-2611
Irvine
(949) 263-2600
Los Angeles
(213) 617-8100
Ontario
(909) 989-8584



500 Capitol Mall, Suite 1700, Sacramento, CA 95814
Phone: (916) 325-4000 | Fax: (916) 325-4010 | www.bbklaw.com

Riverside
(951) 686-1450
San Diego
(619) 525-1300
Walnut Creek
(925) 977-3300
Washington, DC
(202) 785-0600

League of California Cities City Attorneys' Spring Conference

FCC's Wireless Facility Rules Implementing Section 6409(A)

Wednesday, May 6, 2015

Prepared by:

Harriet A. Steiner
Partner, Best Best & Krieger LLP

Joshua Nelson
Associate, Best Best & Krieger LLP

FCC's Wireless Facility Rules Implementing Section 6409(a)

As the popularity of smartphones, tablets and similar devices increases, wireless carriers continue to upgrade their networks, increasing their footprint and density. Cities play an important role in this deployment of wireless communications facilities with traditional land use regulations, seeking to balance the need for faster, better service and the aesthetic and other impacts these facilities have on localities.

The Federal Communications Commission ("FCC") recently issued regulations that require cities to approve some collocations at previously approved facilities. These collocations are not limited to traditional telecommunications towers but apply to essentially any communications facility. This paper discusses these regulations and their impact on cities' land use authority. To provide context for the new rules, the paper first outlines the various federal and state laws that preempt city authority over wireless communications facilities. It then discusses the federal statute, Section 6409¹ of the Middle Class Tax Relief and Job Creation Act of 2012 (H.R. 3630, P.L. 112-96), that the FCC relied on to adopt the new regulations. Lastly, the paper outlines the FCC regulations and potential city responses.²

Background – Existing Federal and State Preemption

California cities are preempted from regulating various aspects of wireless communications facility siting by both state and federal law. Below is a brief overview of the federal and state limitations on local control.

A. Telecommunications Act of 1996 §§ 332(c)(7) and 253

The Telecommunications Act of 1996 ("TCA") both recognized local zoning authority over wireless communications facilities ("WCF") and placed limitations on that authority.

47 U.S.C. section 253 precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. Such ordinances are expressly preempted by federal law.

47 U.S.C. section 332 preserves local authority over individual zoning decisions regarding the placement, construction and modification of WCFs, subject to the enumerated limitations on that authority set forth in that section. (*Sprint Telephony PCS, L.P. v. County of San Diego* (9th Cir. 2008) 543 F.3d 571, 576 ("*Sprint II*").³

The TCA limitations are both procedural and substantive. They are enumerated and explained in more detail below.

1. Decision on Application Must Be Made within Reasonable Period of Time

The City must act on any request for authorization to place, construct, or modify a WCF within a reasonable period of time after the request is filed, taking into account the nature and scope of such request.

¹ Section 6409 is referred to in this paper as Section 6409(a) or simply 6409(a).

² A coalition of cities are currently challenging the regulations in federal court. This challenge is beyond the scope of this paper.

³ Section 332(c)(7)(A) reads: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."

In 2009, the FCC issued a ruling adopting what is referred to as the “Shot Clock”, establishing “presumptively reasonable periods” for local action on a WCF siting application.⁴ Under the ruling, local governments must review WCF applications for completeness within thirty days from the time the application is submitted by the wireless carrier. Excluding time when the application is incomplete, the agency has ninety days to review and decide on collocation applications and one hundred fifty days to review and decide on all other siting applications.⁵

The FCC’s ruling authorizes applicants to file lawsuits if local agencies fail to act within these timelines, and, if sued, the agency must prove that it acted “reasonably” when it failed to act within these time frames. The ruling expressly authorizes these time limitations to be extended by mutual consent of the parties and tolls the thirty-day period while such an agreement is in place. The Shot Clock exists independently of state law so cities must comply with the Shot Clock as well as applicable state requirements like the Permit Streamlining Act.

As part of the Section 6409(a) regulations discussed below, the FCC clarified some factors of the Shot Clock. First, the Shot Clock applies regardless of any local moratoria. Second, the Shot Clock begins to run “when an application is first submitted, not when it is deemed complete.”⁶ The FCC also clarified that after an applicant responds to an incompleteness notice, a local government may then only toll the Shot Clock if it notifies the applicant within ten days that the request information remains incomplete. The local government must “specify the code provision, ordinance, application instruction, or otherwise publically-stated procedures that require the information to be submitted.”⁷

2. Decision to Deny Must be in Writing

Any decision to deny a request to place, construct, or modify personal wireless service facilities must be in writing.

To satisfy the “written ruling” requirement, localities must provide their reasons for denying a siting application. However, they are not required to provide their reasons in the denial notice itself so long as the reasons are sufficiently clear and are provided or made accessible to the applicant essentially contemporaneously with the written denial letter or notice. (*T-Mobile South, LLC v. City of Roswell, GA* (2015) 574 U.S. ____, Slip Op. No. 13-975.). (*Metro PCS, Inc. v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d 715, 723.) Of course, the adoption of a resolution that contains findings in addition to a discussion of the evidence to support the findings will satisfy this requirement.

Note that this requirement is similar to that already generally applicable to quasi-adjudicatory decisions under California law – i.e., such decisions must be based on written findings. (*Topanga v. County of Los Angeles* (1974) 11 Cal.3d 506.)

⁴ See *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 25 FCC Rcd 11157 (F.C.C. 2010); *In re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Rcd 13994 (F.C.C. 2009). See also *City of Arlington v. FCC* (2013) 569 U.S. ____.

⁵ As discussed below, the new FCC regulations establish a third category of applications that are entitled to a sixty-day shot clock.

⁶ *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting* FCC 14-153 (F.C.C. 2014), ¶ 263.

⁷ *Id.*

3. Decision to Deny Must Be Supported by Substantial Evidence

Any decision to deny a request to place, construct, or modify personal wireless service facilities must be supported by substantial evidence contained in a written record.

To satisfy the “substantial evidence” standard, the decision must be (1) authorized by local regulations; and (2) supported by substantial evidence. (*Metro PCS, Inc. v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d at 725.) “Substantial evidence” in the context of WCF applications is the same as that applicable for judicial review of agency decisions generally. It means “such relevant evidence as reasonable minds might accept as adequate to support a conclusion.” (*Id.*) It must be more than a “mere scintilla” but not necessarily a preponderance. (*Id.*) While this standard of review is deferential to the local agency, the court will review the record in its entirety, including evidence opposed to the local agency’s decision.

Assuming the governing municipal code provisions for the relevant permit application allow or require a city to consider aesthetic factors in making its decision on the permit, evidence regarding aesthetic impacts may be considered and can constitute substantial evidence.⁸ The City’s constitutionally reserved “police power authority” includes the authority to regulate based on aesthetics. (*T-Mobile USA, Inc. v. City of Anacortes* (9th Cir. 2009) 572 F.3d 987; *Sprint PCS Assets, LLC v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 722-723.)

In *T-Mobile USA, Inc. v. City of Anacortes*, T-Mobile applied for a special use permit to erect a 116-foot monopole in order to close a service gap and expand its coverage in the city. The city denied the permit on the basis of its municipal code, which authorized it to consider a number of aesthetic factors including the height of the proposed tower, the proximity of the tower to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, and the surrounding tree coverage and foliage. (*City of Anacortes*, 572 F.3d at 994.)

The court concluded there was substantial evidence concerning the city’s stated aesthetic concerns to justify denial of the application under its municipal code. The evidence that the court pointed to as being “substantial” included: “a number of residents claim[s] that the monopole would have a detrimental impact on the surrounding residential property, that the pole would not be completely screened, and that it would interfere with residents’ views of the Cascade Mountains and other scenic views.” (*Id.* at 994-995.)

Note that even where substantial evidence exists to support a decision to deny a WCF permit, the denial may still be prohibited by the TCA if it unreasonably discriminates among providers of functionally equivalent services, or effectively prohibits the provision of wireless services (see below).

4. Decision May Not Be Based on or Regulate Radio Frequency Emissions

Cities may not regulate placement, construction or modification of WCFs based on radio frequency (“RF”) emissions if the proposed wireless facility complies with FCC RF emissions regulations. Cities may also not attempt to regulate the operation of WCFs based on these

⁸ *City of Palos Verdes Estates*, 583 F.3d at 725; *City of Anacortes*, 572 F.3d at 994, citing, *Sprint II*, 543 F.3d at 580 [stating that the zoning board may consider “other valid public goals such as safety and aesthetics”]; *T-Mobile Cent., LLC v. Unified Gov’t of Wyandotte County* (10th Cir. 2008) 546 F.3d 1299, 1312 [noting that “aesthetics can be a valid ground for local zoning decisions”]; *Cellular Tel. Co. v. Town of Oyster Bay* (2d Cir. 1999) 166 F.3d 490, 494 [recognizing that “aesthetic concerns can be a valid basis for zoning decisions”]; *Voice Stream PCS I, LLC v. City of Hillsboro* (D. Or. 2004) 301 F.Supp.2d 1251, 1255.

concerns, e.g., by conditioning a permit to construct a WCF on a requirement to eliminate RF interference with appliances in a nearby home or a city's public safety system. (*Freeman v. Burlington Broadcasters* (2d Cir. 2000) 204 F.3d 311; *Southwestern Bell Wireless v. Johnson County Bd. of Commissioners* (10th Cir. 1999) 199 F.3d 1185.)

However, cities most likely can impose reasonable requirements on an applicant/operator to demonstrate the WCF complies with FCC RF emission standards. The statute itself appears to allow such requirements in that it only preempts local regulation of RF emissions "to the extent such facilities comply with the [FCC]'s regulations concerning such emissions." (47 U.S.C. § 332(c)(7)(B)(iv).)

The FCC and Local and State Advisory Committee of the FCC published a guide for local officials to help determine whether a facility complies with FCC standards. It can be found online at <http://www.fcc.gov/encyclopedia/radio-frequency-safety>.

5. Cities May Not Unreasonably Discriminate Among Providers of Functionally Equivalent Services

The regulation of the placement, construction and modification of WCF shall not unreasonably discriminate between providers of functionally equivalent services.

A city unreasonably discriminates if it treats facilities that are "similarly situated" in terms of the "structure, placement or cumulative impact" differently. (*Metro PCS*, 400 F.3d at 727.) This analysis is intensely factual and requires a detailed comparison between the subject project and competitors' projects within the area.

However, courts almost universally consider discrimination based on "traditional bases of zoning regulation" such as "preserving the character of the neighborhood and avoiding aesthetic blight" reasonable and thus permissible. (*Id.*)

The legislative history of the TCA provides that the "reasonableness standard" was intended to provide cities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the fact that a city grants a permit in a commercial district, does not require it to grant a permit for a competitor's 50-foot tower in a residential district. (*Id. citing* H.R. Conf. Rep. No. 104-458, at 208 (1996).)

6. Decision May Not Prohibit or Have the Effect of Prohibiting the Provision of Personal Wireless Services

A regulation prohibits or has the effect of prohibiting the provision of personal wireless services if it: (1) bans the provision of telecommunication services outright or (2) has actually effectively prohibited the provision of such services, e.g., by imposing restrictions that amount to ban. (*Sprint II*, 543 F.3d at 579; *Metro PCS*, 400 F.3d at 730-31.) The mere fact that the

regulations could potentially allow the locality to prohibit the provision of telecommunications services is insufficient. (*Sprint II*, 543 F.3d at 579.⁹)

A regulation results in an “effective prohibition” of personal services if it prevents a wireless services provider from closing a “significant gap” in service coverage. (*Metro PCS*, 400 F.3d at 731.) A significant gap in service exists whenever a provider is prevented from filling a significant gap in its own¹⁰ service coverage. (*Id.* at 733.) There is no bright-line rule regarding when a coverage gap is “significant,” the determination is based on a fact specific analysis. (*Id.*; *City of Palos Verdes Estates*, 583 F.3d at 727.) However, the Ninth Circuit has commented that in order for the gap to be “legally significant” its closure needs to be tantamount to a prohibition on telecommunications service. (*Id.*)

Some factors considered by district courts in other circuits in assessing the significance of alleged gaps include: whether the gap affected significant commuter highway or railway; the “nature and character of that area or the number of potential users in that area who may be affected by the alleged lack of service”; whether facilities were needed to improve weak signals or to fill a complete void in coverage; whether the gap covered well-traveled roads on which customers lack roaming capabilities; the results of “drive tests”; whether the gap affects commercial district; and whether the gap poses a public safety risk.¹¹

To support the contention that a site is necessary to close a coverage gap, the provider’s application should show how the proposed WCF would close the gap, supported by data showing the coverage afforded by other sites. The city can then investigate and determine whether the provider’s representations are sound and persuasive. If it concludes they are not, the provider must be given an opportunity to reply to the locality’s challenges. (*City of Anacortes*, 572 F.3d at 999.)

Once the provider has demonstrated the requisite gap exists, the provider must show that the manner in which it proposes to fill the significant gap in service is the “least intrusive on the values that the denial sought to serve.” (*Metro PCS*, 400 F.3d at 734.) To do so the provider must demonstrate that it has made a good faith effort to identify and evaluate less intrusive alternatives, e.g., its permit application should show that it has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc. (*City of Anacortes*, 572 F.3d at 996, fn. 10.)

Although the city is not compelled to accept the provider’s representations, in order to reject them, it must show that there are some potentially available and technologically feasible alternatives, and the provider must have an opportunity to dispute the availability and feasibility of the alternatives favored by the locality. (*Id.* at 999.)

In *City of Anacortes*, the City of Anacortes denied T-Mobile USA, Inc.’s application to erect a 116-foot monopole antenna on the property of a church located in a residential neighborhood. T-Mobile, cognizant of the “least intrusive means” standard, submitted a detailed

⁹ Examples of regulations that “effectively prohibit the provision of service” include, e.g., an ordinance requiring that all facilities be underground when, to operate, wireless facilities must be above ground, or, an ordinance mandating that no wireless facilities be located within one mile of a road, where, because of the number and location of roads, the rule constituted an effective prohibition. (*Sprint II*, 543 F.3d at 580.)

¹⁰ The availability of wireless service from other providers in the area is irrelevant for purposes of this analysis. (*City of Palos Verdes Estates*, 583 F.3d at 726, fn 8.)

¹¹ *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus* (3d Cir. 1999) 197 F.3d 64, 70 fn.2; *Voice Stream PCS I, LLC v. City of Hillsboro* (D. Or. 2004) 301 F. Supp. 2d 1251, 1261; *Nextel Partners, Inc. v. Town of Amherst* (W.D.N.Y. 2003) 251 F. Supp. 2d 1187, 1196; *Am. Cellular Network Co., LLC v. Upper Dublin Twp.* (E.D. Pa. 2002) 203 F. Supp. 2d 383, 390-391; *Sprint Spectrum, L.P. v. Town of Owquait* (D. Me. 2001) 175 F. Supp. 2d 77, 90.

permit application that included an analysis of eighteen alternative sites. The city nonetheless denied the permit, concluding that the “church site” was not the least intrusive means of closing the gap. However, the court disagreed, concluding that the city’s alleged “available alternatives” were too speculative to be “potentially available and technically feasible alternatives” within the meaning of the TCA.

The city identified several public school sites as alternatives. Although the school district had already rejected T-Mobile’s proposal to locate there, the planning commission argued that these sites were still technically feasible because the school district would likely change its mind if T-Mobile offered additional compensation. The court rejected this contention as too speculative and deferred to T-Mobile’s experience in other cities: “T-Mobile presented testimony to the Planning Commission that it had approached thousands of school boards about locating WCFs on their properties, and that where there is opposition in the community to the construction of a WCF, such opposition is likely to be intensified if the proposed location of the WCF is on school property.” (*Id.* at 998, fn. 12.)

B. CEQA and NEPA

The construction of WCFs are subject to environmental review under both federal and state law. All antenna structures must comply with NEPA. Smaller WCFs may be categorically exempt from CEQA pursuant to Guidelines § 15303. As explained above, cities may not regulate sitings based on RF emissions to the extent that the facilities comply with FCC standards. However, this does not relieve a city from the obligation to study any significant environmental effects caused by RF emissions.

Note also that larger antenna towers can affect bird flyways and otherwise result in the killing of birds, including endangered species. Accordingly, tower siting may require analysis of federal and state species protection statutes.

C. Government Code Sections 65850.6 and 65964

The state legislature enacted SB 1627 in 2006, which is codified as Government Code Sections 65850.6 and 65964. Section 65850.6 principally deals with collocations. The law removes discretionary authority for wireless telecommunications land use permits - but only over those wireless telecommunications facilities mounted to existing towers or structures (referred to as “collocation facilities”¹²). Section 65850.6 does not remove the City’s discretionary authority to review and permit wireless telecommunications towers or structures that will include future collocation facilities (referred to as “wireless telecommunications collocation facilities”¹³). Section 65964 applies more broadly to all wireless telecommunications facilities and limits cities’ ability to impose conditions of approval on these projects.

Original Discretionary Permit For Wireless Telecommunication Collocation Facilities: Section 65850.6 permits cities to require a discretionary permit (such as a conditional use permit) for a wireless telecommunication collocation facility if the city holds a public hearing and provides notice pursuant to Government Code Section 65091. In addition to being subject to a

¹² “Collocation facility” means the placement or installation of wireless facilities, including antennas, and related equipment, on, or immediately adjacent to, a wireless telecommunications collocation facility. (Gov. Code, § 65850.6(d).)

¹³ “Wireless telecommunications collocation facility” means a wireless telecommunications facility that includes collocation facilities. (Gov. Code, § 65850.6(d).)

discretionary permit, the wireless telecommunication collocation facility would have to comply with all of the following:

- City requirements that specify the types of wireless telecommunications facilities that are allowed to include a collocation facility;
- City requirements that specify the types of wireless telecommunications facilities that are allowed to include certain types of collocation facilities;
- Height, location, bulk, and size of the wireless telecommunication collocation facility;
- Percentage of wireless telecommunications collocation facility that may be occupied by collocation facilities;
- Aesthetic and design requirements for wireless telecommunications collocation facilities.
- City requirements for a proposed collocation facility;
- Compliance with state and local requirements, including the general plan, any applicable community plan or specific plan, and zoning ordinance;
- Compliance with CEQA through certification of an EIR, or adoption of a negative declaration or mitigated negative declaration.

Subsequent Review of Collocation Facilities: Upon approval of a wireless telecommunication collocation facility, cities are precluded from requiring discretionary permits for any subsequent collocation facility on the approved wireless telecommunication collocation facility if the following requirements are met:

- The collocation facility is consistent with the requirements for wireless telecommunications collocation facilities listed above (e.g., proposed collocation facility meets the City's requirements for height, location, bulk, size, etc., the requirements of any proposed collocation facility found in the original approval, the proposed collocation facility is located on the type of wireless telecommunications collocation facilities that is allowed to include a collocation facility.)
- The wireless telecommunications collocation facility on which the collocation facility is proposed was subject to a discretionary permit by the city and an EIR was certified, or a negative declaration or mitigated negative declaration was adopted for the wireless telecommunications collocation facility in compliance with CEQA.

Section 65964: Government Code section 65964 prevents cities from, "as a condition of approval for an application for a permit for construction or reconstruction" of a "wireless telecommunications facility".¹⁴

- Requiring an escrow deposit for removal of a wireless telecommunications facility or any component. However, a performance bond or other surety or another form of security may be required, so long as the amount of the bond security is rationally related to the cost of

¹⁴ This is defined as "equipment and network components such as towers, utility poles, transmitters, base stations, and emergency power systems that are integral to providing wireless telecommunications services." (Gov. Code, § 65850.6.)

removal. In establishing the amount of the security, the city must take into consideration information provided by the applicant regarding the cost of removal.

- Unreasonably limiting the duration of any permit for a wireless telecommunications facility. Limits of less than ten years are presumed to be unreasonable absent public safety reasons or substantial land use reasons. However, cities may establish a build-out period for a site.
- Requiring that all wireless telecommunications facilities be limited to sites owned by particular parties (i.e., requiring facilities be built on city property).

D. Public Utilities Code Sections 7901 and 7901.1

Given the development of distributed antenna systems (“DAS”) and small cells, wireless carriers have sought to increase WCF deployment within the public right-of-way under Public Utilities Code sections 7901 and 7901.1. Section 7901 allows telephone companies to place “poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines” in the rights of way. Section 7901.1 provides that “municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed, “and provides that, at a minimum, the control shall “be applied to all entities in an equivalent manner.” The definition of “telephone company” is very broad, and a mobile telecommunications company that obtains a certificate of public convenience and necessity (“CPCN”) from the California Public Utilities Commission (“CPUC”) likely has access to the right-of-way subject to section 7901.1. (See *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566.)

Section 6409(a)

Congress, as part of the Middle Class Tax Relief and Job Creation Act of 2012 enacted Section 6409(a),¹⁵ which states as follows:

(1) IN GENERAL.—Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) ELIGIBLE FACILITIES REQUEST.—For purposes of this subsection, the term “eligible facilities request” means any request for modification of an existing wireless tower or base station that involves—(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment.

“Wireless tower,” “base station,” “modification,” and “substantially change” are not defined in Section 6409(a).

¹⁵ This is now codified at 47 U.S.C. § 1455(a).

In light of the statutory silence, the FCC first released non-binding guidance in 2013 to help define these terms.¹⁶ This guidance took a very broad view of what types of collocations and other modifications qualified, including allowing towers to increase by at least twenty feet. In September 2013, the FCC moved to adopt binding rules interpreting Section 6409(a). These proposed rules were very similar to the non-binding guidance.

FCC Regulations Implementing Section 6409(a)

In a Report and Order (“Wireless Infrastructure Order” or “Order”) released October 21, 2014, FCC 14-153, the FCC interpreted and implemented the “collocation” provisions of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012.¹⁷ An explanation of the Order is below.¹⁸

A. Definition of Terms in Section 6409(a)

Given the lack of statutory definitions or guidance in Section 6409(a), the FCC first determined how broadly Section 6409(a) applied and then provided definitions for many of the statutory terms.¹⁹

1. Scope of Covered Services

The FCC determined that Section 6409(a) applies to facilities used in connection with “any Commission-authorized wireless communications service.”²⁰ This includes broadcast facilities. The Commission rejected local governments’ view that the statute is best read to apply only to personal wireless service and public-safety communications.²¹

The FCC’s determination will ensure that Section 6409(a) and the Commission’s rules apply broadly. Providers will be able to use Section 6409(a) to modify a facility regardless of the service it provides. This differs from 47 U.S.C. § 332(c)(7), which applies only to “personal wireless service” facilities.

2. Transmission Equipment

The FCC defines “transmission equipment” broadly as equipment that facilitates transmission of any Commission-authorized wireless service.²² It includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply.

3. Existing Wireless Tower or Base Station

The FCC defines “tower” narrowly as “[a]ny structure built for the sole or primary purpose” of supporting any Commission-licensed or authorized antennas and their associated

¹⁶ *Wireless Telecommunications Bureau Offers Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012*, DA 12-2047 (Jan. 25, 2013).

¹⁷ The Order also adopted new or modified rules for environmental and historic preservation review of small wireless facilities, including DAS and codified an exception to advance notice of the placement of temporary towers under the Antenna Structure Regulation (“ASR”) requirements. These changes are outside the scope of this paper. As discussed above, the Order also clarified some provisions of the Shot Clock.

¹⁸ The Order is available at <http://www.fcc.gov/document/wireless-infrastructure-report-and-order>. The regulations are located at 47 C.F.R. § 1.40001. The bulk of the regulations became effective on April 8th. However, §§ 1.40001(c)(3)(i), 1.40001(c)(3)(iii), 1.140001(c)(4) and 17.4(c)(1)(vii) will not be effective until approved by the Office of Management and Budget (OMB).

¹⁹ Order ¶145.

²⁰ Order ¶146.

²¹ Order ¶¶148-154.

²² Order ¶160.

facilities.²³ It defines “base station” broadly to include not only the equipment that communicates with user equipment (regardless of the technological configuration, and encompassing DAS and small cells), but also the “structure” that supports or houses that equipment.²⁴ The FCC clarified, however, that a structure would qualify as an existing “base station” only if at the time of the application, the structure already supports or houses communications equipment.²⁵ Other structures that do not host communications equipment are not “base stations.” The FCC also clarified that to qualify as a “base station,” the facility must have been “approved under the applicable zoning or siting process” or have “received another form of affirmative State or local regulatory approval,” such as an authorization from the CPUC.²⁶ This is a very broad definition and would include the light pole, building or other structure that currently houses communications equipment as long as it received the applicable regulatory approvals, even if those approvals did not anticipate future collocation.

4. Collocation, Replacement, Removal, Modification

The FCC then addressed what modifications Section 6409(a) permits a provider to make to a “wireless tower” or “base station.”²⁷ The Commission ruled that “collocation” includes the *first* placement of transmission equipment on a “wireless tower” or “base station.”²⁸ This differs from local governments’ view that “collocation” occurs only if the tower or base station already hosts other equipment with which the new equipment would be *co*-located.²⁹ (This is effectively the result of modifications to “base stations,” but that is not because of the “collocation” definition but because the FCC defined “base station” to include only those structures that already host wireless equipment.) The FCC also found that if the collocation, replacement, or removal of transmission equipment makes structural enhancements to (i.e., “hardening” of) the wireless tower or base station “necessary,” Section 6409(a) applies to that hardening activity.³⁰ The Commission ruled that Section 6409(a) does not permit a provider to replace the structure on which the equipment is located.³¹

5. Substantial Change and Other Conditions and Limitations

The FCC then turned to defining “substantially change the physical dimensions” of a tower or base station.³² The Commission adopted an “objective standard.” Under its rule, a modification substantially changes the physical dimensions of a wireless tower or base station if it meets any of the following criteria:³³

(i) Height

(i) for towers other than towers in the public rights-of-way:

a. it increases the height of the tower by:

i. more than 10% or

²³ Order ¶166.

²⁴ Order ¶170; 47 C.F.R. § 1.40001(b)(1).

²⁵ Order ¶¶172-174; 47 C.F.R. § 1.40001(b)(1)(iii).

²⁶ Order ¶174.

²⁷ Order ¶176.

²⁸ Order ¶176; 47 C.F.R. § 1.40001(b)(2).

²⁹ *Id.*

³⁰ Order ¶180.

³¹ Order ¶181.

³² Order ¶182.

³³ Order ¶188; 47 C.F.R. § 1.40001(b)(7).

- ii. the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater;
- (ii) for other eligible support structures:
 - a. it increases the height of the structure by:
 - i. more than 10% or
 - ii. more than **10 feet**, whichever is greater.³⁴

(ii) Width

- (i) for towers other than towers in the public rights-of-way:
 - a. it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower
 - i. more than **20 feet**, or
 - ii. more than the width of the tower structure at the level of the appurtenance, whichever is greater;
- (ii) for other eligible support structures:
 - a. it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than **6 feet**;

(iii) Equipment Cabinets

- (i) for any eligible support structure:
 - a. it involves installation of more than the standard number of new equipment cabinets for the technology involved, but **not to exceed four cabinets**; or,
- (ii) for towers in the public rights-of-way and base stations,
 - a. it involves installation of **any new equipment cabinets** on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

(iv) Excavation/Deployment Beyond Site

- (i) it entails “any excavation or deployment outside the current site.”
 - a. The Commission defines “site” as:
 - i. For towers other than towers in the public rights-of-way,

³⁴ Changes in height are measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.

1. the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and,
- ii. for other eligible support structures,
 1. further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.

(v) Concealment Elements

A modification is a substantial change if it would “defeat the concealment elements of” the wireless tower or base station.

(vi) Other Conditions on the Wireless Tower or Base Station

A modification is also a substantial change if it does not comply with conditions—other than those conditions related to height, width, equipment cabinets, excavation/deployment, or concealment elements—associated with the siting approval of the construction or modification of the eligible support structure or base station equipment.

The FCC also ruled that facility modification remains subject to “building codes and other non-discretionary structural and safety codes.”³⁵ Specifically, local governments may require a covered request “to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety.”³⁶

B. Application Review Process, Including Timeframe for Review

The FCC ruled that a local government may require a party seeking approval under Section 6409(a) to submit an application so that the local government can determine whether its request is covered by the statute.³⁷ The FCC clarified, however, that a local government may require only that documentation that is reasonably related to determining whether the request falls under the statute. A local government may not require documentation “proving the need for the proposed modification or presenting the business case for it.”³⁸

The FCC established that a local government must act on a Section 6409(a) request within sixty days.³⁹ That period may be tolled by the parties’ agreement or if the local government notifies the applicant within thirty days that specific information in the application is incomplete.⁴⁰ After the applicant makes a supplemental filing, the local government then has an additional ten days to notify the applicant that the application remains incomplete because the specific information that the local government had identified remains incomplete (the local government may not toll the sixty-day clock by notifying the applicant of other missing

³⁵ Order ¶202.

³⁶ *Id.*

³⁷ Order ¶211.

³⁸ Order ¶214.

³⁹ Order ¶216; 47 C.F.R. § 1.40001(c)(2).

⁴⁰ Order ¶217; 47 C.F.R. § 1.40001(c)(3).

information).⁴¹ The FCC also clarified that its sixty-day clock runs regardless of local moratoria.⁴²

C. Remedies

The FCC determined that because Section 6409(a) states that a local government “may not deny, and shall approve” a qualifying request, a local government must act either to approve or deny an application within the sixty-day period.⁴³ If the local government fails to take any action during that period, the request is deemed granted at the time the applicant notifies the local government of the deemed grant in writing. The FCC explains that a local government may challenge a deemed grant in court “when it believes the underlying application did not meet the criteria in Section 6409(a) for mandatory approval, would not comply with applicable building codes or other non-discretionary structural and safety codes, or for other reasons is not appropriately ‘deemed granted.’”⁴⁴ The FCC indicates that it will not be involved in adjudicating disputes.⁴⁵

D. Non-Application to States or Municipalities in Their Proprietary Capacities

The FCC explained that Section 6409(a) and its rules do not apply when local governments act in a proprietary capacity, e.g., when they enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property.⁴⁶ The FCC also declined to determine whether ordinances that express a preference for siting facilities on municipal property are invalid.⁴⁷

E. Cities’ Responses

Cities should consider how to implement Section 6409(a) within their jurisdictions. In part, this will require reviewing the city’s land use and zoning regulations for WCF to ensure that they are consistent with federal law. Similarly, cities should consider how to process Section 6409(a) collocations and applications for new towers and base stations under CEQA. Lastly, because Section 6409(a) did not affect cities’ proprietary rights, cities should ensure that they do not unwittingly forfeit any review over Section 6409(a) applications when they own or lease the property.

1. Reviewing and Updating WCF Regulations

The Order substantially interferes with traditional local land use controls, and all cities should consider the effect of the Order on their WCF regulations. For example, if existing zoning ordinances permit telecommunications towers up to one hundred feet in a zone, the Order now allows all existing towers to add an additional ten feet. Similarly, if a city’s ordinance allows DAS providers to install ground-based equipment within the right-of-way, the Order allows expansion of those cabinets by up to ten percent in height or overall volume.

⁴¹ Order ¶218; 47 C.F.R. § 1.40001(c)(3).

⁴² Order ¶219; 47 C.F.R. § 1.40001(c)(3).

⁴³ Order ¶227; 47 C.F.R. § 1.40001(c)(4).

⁴⁴ Order ¶231.

⁴⁵ Order ¶234; 47 C.F.R. § 1.40001(c)(5).

⁴⁶ Order ¶239.

⁴⁷ Order ¶244. Of course, these types of ordinances are still subject to California restrictions on preferences under Government Code section 65964.

In addition, the FCC rejected the argument that any modification of an existing wireless tower or base station that has “legal, non-conforming” status should be considered a “substantial change.” So, proposed modification of a legal, non-conforming structure is subject to the same “substantial change” analysis as other structures. As such, any existing prohibition on expanding or modifying a non-conforming tower is no longer valid.

Based on this, cities should, at the very least, review their existing ordinance and ensure that they process 6409(a) applications pursuant to the requirements set forth in the Order. In addition, cities may wish to modify their ordinances to incorporate the Order. There are two ways to do this. First, cities can adopt a short section noting that qualifying applications will be processed pursuant to the requirements of Section 6409(a) and the Order. Second, cities can substantively incorporate the Order into their codes. The one issue to note with this approach is that cities should carefully draft their codes to ensure that they are not creating new local rights for carriers in the event that the Order is revised, repealed or invalidated.⁴⁸ In addition, drafters should ensure that the burden of asserting rights under Section 6409(a) are on the applicant so that staffers can review the application to ensure it qualifies.

2. CEQA Review Under 6409(a)

Cities should also consider what CEQA review will be required for new towers and base stations and for 6409(a) applications. As CEQA requires agencies to consider the “whole of the action,”⁴⁹ environmental review of any new towers or base stations cannot be limited to the proposed proportions of the facility. Rather, agencies should evaluate the facility, assuming it will be increased to the extent permitted by Section 6409(a). Cities that take this approach should ensure that they receive sufficient information from applicants to undertake this review. Under the Shot Clock, cities only have ten days to request additional information.

For Section 6409(a) applications, cities should determine whether and what CEQA review is required. In most cases, 6409(a) applications will not be subject to CEQA as ministerial actions (assuming the local ordinance make permit issuance ministerial) or may be categorically exempt from CEQA.⁵⁰ In the event that a 6409(a) application requires CEQA review, cities should be cognizant of the Shot Clock. Unless the applicant agrees to an extension, review must be completed within sixty days or the application will be deemed granted.

3. Utilize Proprietary Rights to the Extent Possible

Lastly, cities should ensure that they retain and utilize their proprietary rights to the extent possible. The Order expressly declined to restrict local agencies’ authority over their own property. Based on this, cities are not required to approve modifications subject to Section 6409(a) on towers and base stations located on city property. The one potential exception to this is locations within the right-of-way. As discussed above, carriers with a CPUC-issued CPCN are likely entitled to access the right-of-way under Public Utilities Code sections 7901 and 7901.1.

For locations outside of the right-of-way, cities should review the applicable lease or license when they receive a request for a Section 6409(a) collocation. Unless the requested modification is within the scope of the carrier’s rights under the agreement, the city could deny

⁴⁸ As noted above, a coalition of cities are currently challenging the Order in federal court.

⁴⁹ See 14 CCR § 15378.

⁵⁰ See, e.g., 14 CCR § 15301.

the request or condition its approval on the payment of additional rent or other concessions. City attorneys should ensure that staff members that regularly negotiate telecommunications license and similar agreements are aware of the city's proprietary rights and do not agree to a Section 6409(a) modification on the mistaken belief that cities do not have discretion to deny or condition the change.⁵¹

Conclusion

Section 6409(a) and the Order are the latest federal effort to encourage WCF deployment through restricting land use authority. However, in many ways, the Order is the most substantial interference to date. The Order creates an entire class of WCFs that are largely exempt from local discretionary authority. As such, cities should consider the impact and effect of the Order on their existing and future WCF ordinances.

⁵¹ In the authors' experience, some carriers have been known to overstate the scope of Section 6409(a) and similar restrictions on local authority over WCFs.

Wireless Facility Siting: Section 6409(a) Checklist

Note: Use of this checklist is voluntary. It is meant to provide a framework for those jurisdictions needing assistance in complying with Federal timeframes to act on Eligible Facilities Requests for modifications to existing wireless towers or base stations that do not substantially change the physical dimensions of such towers or base stations. This document is not intended to provide legal guidance; jurisdictions are encouraged to consult an attorney on legal matters.

Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, 47 U.S.C. § 1455(a), reads in pertinent part:

"...a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station." (emphasis added).

Initial Application Review

- A jurisdiction should contemplate three types of wireless facility applications:
 - o Collocation or modification that is not a substantial change ("Eligible Facilities Request");
 - o Collocation or modification that is a substantial change; OR
 - o New facility
- If the application is for a collocation or modification, the documentation provided by the applicant must state whether the collocation or modification is a substantial change. – See Appendix A for definition of "substantial change."
 - o Note: The FCC has clarified that "collocation" includes the first placement of transmission equipment on a wireless tower or base station.¹
- Appropriate application fee should be in place, if applicable.
- Check application for completeness
 - o Note: Must notify applicant in writing of incomplete application **within 30 days** of submission. This tolls the clock (i.e. stops 60 day deadline from running) provided it identifies the specific material missing from the application and cites the basis for requiring the submission of such material. Once applicant submits supplemental materials, the clock again may be tolled if the state or local government notifies applicant in writing **within 10 days** that supplemental submission is also incomplete. If the application is deemed incomplete, the written notice must specify the missing information and the code, provision, ordinance, application instruction or other publically-stated procedures that requires the information.

¹ See 2014 Infrastructure Order ¶ 179.

Site/Attachment Information

- Summary of site location (address) and ownership of structure to which collocation or modification applies
 - o Examine: Ownership of support structure, dimensions of support structure prior to collocation (to measure whether collocation or modification would constitute a "substantial change")
 - o Property boundaries, setbacks, elevation and dimensions of collocation or modification project
- Summary and scope of work to be completed on site
- Changes to current site
 - o Examine: Will collocation or modification defeat the effect of existing concealment elements? Concealment elements include, but are not limited to, artificial tree branches or painting to match a supporting façade.²

Equipment Specifications

- Equipment type
- Equipment specifications (Example: dimensions and weight)
- Installation status: E.g., removing, updating, collocating
- Equipment mount type
- FCC antenna structure registration number (if applicable)
- Will collocation equipment require lighting?

Compliance with Federal, State and Local Ordinances and Codes

- Conformance with local zoning and building and safety codes should be reviewed by the jurisdiction's building or planning department
 - o Examine: E.g., setback requirements, electrical power safety, wind resistance safety
 - o Ensure that facility was lawfully constructed
- Post-installation maintenance schedule
- Any required certifications
 - o Example: Applicant will comply with all applicable federal, state, and local building codes supported by structural analysis

Legal

- Ensure jurisdiction's applicable insurance/surety bond/other financial requirements are satisfied for installation

Contact Information

- Primary and secondary contact information for wireless facility project coordinators (local government and industry)

² See 2014 Infrastructure Order ¶ 200.

- Emergency contact information in case of tower/collocation disruption

Timeframe³

- Within 60 days of the application filing, accounting for tolling, a state or local government shall approve the application if covered by Section 6409(a).
- Tolling period may commence by (1) mutual agreement, or (2) upon written notice to applicant that application is incomplete within the first 30 days following an application submission, as long as notice identifies the missing information, as well as the code provision, ordinance, or application instruction that requires the submission of the information.
- Local jurisdictions have 10 days to notify the applicant that the supplemental submission (after notification of incomplete application) did not provide the information identified in the original notice that specified the missing information.
- The failure to approve an application within the time for action will result in a deemed grant of the application.
 - o A state or local authority may challenge an applicant's written assertion of a deemed grant in any court of competent jurisdiction when it believes the underlying application did not meet the criteria in Section 6409(a) for mandatory approval, would not comply with applicable building codes or other non-discretionary structural and safety codes, or for other reasons is not appropriately "deemed granted."

³ The rule implementing the 2014 Infrastructure Order, 47 CFR § 1.40001 ("Wireless Facilities Modifications") becomes effective April 8, 2015; however, §§ 1.40001(c)(3)(i), 1.40001(c)(3)(iii), and 1.140001(c)(4) (reproduced below), which have new information collection requirements, will not be effective until approved by the Office of Management and Budget (OMB). The FCC will publish a document in the Federal Register announcing OMB approval and the relevant effective date.

47 CFR 1.40001(c)(3)(i)—To toll the 60-day review timeframe on grounds that an application is incomplete, the reviewing State or local government must provide written notice to the applicant within 30 days of receipt of the application, clearly and specifically delineating all missing documents or information. Such delineated information is limited to documents or information meeting the standard under paragraph (c)(1) of Section 1.140001.

47 CFR 1.140001(c)(3)(iii)—Following a supplemental submission from the applicant, the State or local government will have 10 days to notify the applicant in writing if the supplemental submission did not provide the information identified in the State or local government's original notice delineating missing information. The timeframe for review is tolled in the case of second or subsequent notices of incompleteness pursuant to the procedures identified in paragraph (c)(3). Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.

47 CFR 1.140001(c)(4)—If a request is deemed granted because of a failure to timely approve or deny the request, the deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.

APPENDIX A

How does the FCC define “substantial change”?

The FCC has determined that a modification substantially changes the physical dimension of a wireless tower or base station if it meets ANY of the following criteria:

- ❖ Towers outside public rights of way⁴
 - Increases height by more than 20 feet or 10 percent, whichever is greater;
 - Protrudes from edge of tower more than 20 feet or more than the width of the tower structure at the level of the appurtenance, whichever is greater;
- ❖ Towers in public rights of way and for all base stations
 - Increases height of tower or base station by more than 10 percent or 10 feet, whichever is greater;
 - Protrudes from the edge of the structure more than 6 feet;
- ❖ Involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets;
- ❖ Entails any excavation or deployment outside the current site of the tower or base station;
- ❖ Would defeat existing concealment elements of the tower or base station; or
- ❖ Does not comply with conditions associated with the prior approval of the tower or base station unless non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding “substantial change” thresholds.

⁴ Section 6409(a) applies only to state and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities, e.g., as owners of support structures or real property. *See* 2014 Infrastructure Order ¶ 239.

APPENDIX B

Application Elements that May Voluntarily be Adopted by Local Jurisdictions

A jurisdiction should review whether existing application processes meet the requirements of the FCC's 2014 Infrastructure Order. A jurisdiction may consider including the following elements in its application form for an Eligible Facilities Request:

1. Applicant's certification that they have the legal authority to collocate/modify support structure which may include approvals from the jurisdiction authorizing the initial placement of transmission equipment on the tower or other structure.
2. The identity of the owner of the parcel.
3. Detailed site plan. Except where the facility will be located entirely within an existing structure or an existing building, a detailed site plan should show:
 - (a) Existing and proposed improvements. The location and dimensions of the existing facility and the maximum height above ground of the facility (also identified in height above sea level).
 - (b) Elevation. The benchmarks and datum used for elevations.
 - (c) Design. The design of the facility, including the specific type of support structure and the design, type, location, size, height and configuration of applicant's existing and proposed antennas and other equipment. The method(s) by which the antennas will be attached to the mounting structure should be depicted.
 - (d) All existing setbacks.
 - (e) Location of accessways. The location of all existing accessways and the location and design of all proposed accessways.

a

§ 1.40001 Wireless Facility Modifications

(a) *Purpose.* These rules implement § 6409 of the Spectrum Act (codified at 47 U.S.C. 1455), which requires a State or local government to approve any eligible facilities request for a modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station.

(b) *Definitions.* Terms used in this section have the following meanings.

(1) *Base Station.* A structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in this subpart or any equipment associated with a tower.

(i) The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

(ii) The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).

(iii) The term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment described in paragraphs (b)(1)(i)-(ii) of this section that has been

reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.

(iv) The term does not include any structure that, at the time the relevant application is filed with the State or local government under this section, does not support or house equipment described in paragraphs (b)(1)(i)-(ii) of this section.

(2) **Collocation.** The mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

✓ (3) **Eligible Facilities Request.** Any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving:

- (i) collocation of new transmission equipment;
- (ii) removal of transmission equipment; or
- (iii) replacement of transmission equipment.

(4) **Eligible Support Structure.** Any tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with the State or local government under this section.

(5) **Existing.** A constructed tower or base station is existing for purposes of this section if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition.

(6) **Site.** For towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground.

~~(7) Substantial Change~~ A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

(i) for towers other than towers in the public rights-of-way, it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater;

(A) Changes in height should be measured from the original support structure in cases where deployments are or will be separated horizontally, such as on buildings' rooftops; in other circumstances, changes in height should be measured from the dimensions of the tower or base station, inclusive of originally approved appurtenances and any modifications that were approved prior to the passage of the Spectrum Act.

(ii) for towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet;

(iii) for any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or, for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure;

(iv) it entails any excavation or deployment outside the current site;

- (v) it would defeat the concealment elements of the eligible support structure; or
- (vi) it does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.40001(b)(7)(i)-(iv).

~~(8) Transmission Equipment:~~ Equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

~~(9) Tower:~~ Any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

(c) *Review of Applications.* A State or local government may not deny and shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure.

(1) *Documentation Requirement for Review.* When an applicant asserts in writing that a request for modification is covered by this section, ~~a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request meets the requirements of this section.~~ A State or local government may not ~~require an applicant to submit any other documentation, including but not limited to documentation intended to illustrate the need for such wireless facilities or to justify the business decision to modify such wireless facilities.~~

(2) *Timeframe for Review.* Within 60 days of the date on which an applicant submits a request seeking approval under this section, the State or local government shall approve the application unless it determines that the application is not covered by this section.

(3) *Tolling of the Timeframe for Review.* The 60-day period begins to run when the application is filed, and may be tolled only by mutual agreement or in cases where the reviewing State or local government determines that the application is incomplete. The timeframe for review is not tolled by a moratorium on the review of applications.

(i) To toll the timeframe for incompleteness, the reviewing State or local government must provide written notice to the applicant within 30 days of receipt of the application, clearly and specifically delineating all missing documents or information. Such delineated information is limited to documents or information meeting the standard under paragraph (c)(1) of this section.

(ii) The timeframe for review begins running again when the applicant makes a supplemental submission in response to the State or local government's notice of incompleteness.

(iii) Following a supplemental submission, the State or local government will have 10 days to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information. The timeframe is tolled in the case of second or subsequent notices pursuant to the procedures identified in this paragraph (c)(3). Second or subsequent notices of incompleteness may not specify missing documents or information that were not delineated in the original notice of incompleteness.

(4) *Failure to Act.* In the event the reviewing State or local government fails to approve or deny a request seeking approval under this section within the timeframe for review (accounting for any tolling), the request shall be deemed granted. The deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.

(5) *Remedies* Applicants and reviewing authorities may bring claims related to Section 6409(a) to any court of competent jurisdiction.

PART 17 – CONSTRUCTION, MARKING, AND LIGHTING OF ANTENNA STRUCTURES

5. The authority citation for Part 17 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply secs. 301, 309, 48 Stat. 1081, 1085 as amended; 47 U.S.C. 301, 309.

6. Section 17.4 is amended by revising paragraphs (c)(1)(v) and (c)(1)(vi), and adding paragraph (c)(1)(vii) to read as follows:

§ 17.4 Antenna structure registration.

* * * * *

(c) * * *

(1) * * *

* * * * *

(v) For any other change that does not alter the physical structure, lighting, or geographic location of an existing structure;

(vi) For construction, modification, or replacement of an antenna structure on Federal land where another Federal agency has assumed responsibility for evaluating the potentially significant environmental effect of the proposed antenna structure on the quality of the human environment and for invoking any required environmental impact statement process, or for any other structure where another Federal agency has assumed such responsibilities pursuant to a written agreement with the Commission (*see* §1.1311(e) of this chapter); or

(vii) For the construction or deployment of an antenna structure that will (A) be in place for no more than 60 days, (B) requires notice of construction to the FAA, (C) does not require marking or lighting under FAA regulations, (D) will be less than 200 feet in height above ground level, and (E) will either involve no excavation or involve