

May 2, 2018

VIA E-MAIL

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Planning Manager, Aubrey Rose  
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Commissioner, Clark Manus  
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Re: **DAS Node OAKS-038C (Oakland Case No. PLN17374)**

Dear Chair, Adhi Nagraj; Vice Chair, Jahmese Myres; Commissioner, Jonathan Fearn; Commissioner, Tom Limon; Commissioner, Clark Manus; Commissioner, Amanda Monchamp; Commissioner, Emily Weinstein; Planning Manager, Robert Merkamp and Planning Manager, Aubrey Rose:

My wife and I own the residence located at 11 Drury Lane and I am writing this letter to oppose the proposed monopole at the corner of Drury Road and Besito Avenue. We join in the many objections raised in letters from our neighbors but take this opportunity to address some fundamental legal issues. Title 17 of the Oakland Municipal Code sets forth explicit criteria for the approval of the pending conditional use permit application and an independent set of findings to grant a variance. The applicant simply cannot meet those criteria for either the conditional use permit or variance and you as Planning Commissioners must deny the application.

Initially, I want to direct your attention to Chapter 17.128.080.B.2. which provides that,

“Monopoles should not be sited to create visual clutter or negatively affect specific views.”

My wife and I purchased our home in 2012 after considering dozens of homes. The single factor that led us to buy our home is the view. We have a view that extends from the Dumbarton Bridge to the Richmond San Rafael Bridge and continues to overlook Claremont Canyon. The only impairment to our view is the existing emergency alert speaker.

This proposed project locates an additional pole and antenna very near to the emergency speaker. The standard set forth in 17.128.080.B.2. simply cannot be met. On this point it is important to note a comment in the application: The applicant attempts to meet this standard with a patently false statement. On the form “Additional Design/Review Criteria CUP Findings” at page 3 the applicant states “the panel antennas will not be visible.” That statement is not true. The view from our house, neighboring houses and from Drury Road looks right down over the proposed antenna. The required finding simply cannot be made. The antenna will “create visual clutter” and “negatively impact specific views.” We believe the applicant’s exhibit depicting the proposed tower is misleading. The plans and specifications submitted with the application state that the trees will be “trimmed if necessary.” It is a reasonable conclusion that the trees will be topped to insure better antenna functions and that trimming will exacerbate the adverse visual impacts.

Chapter 17.128.080.B.5. requires that all on-site vegetation be preserved. The applicant simply states on the application that the

“existing vegetation and topography will not be disturbed.”

Again, the application is less than candid and the applicant cannot meet the code requirements. The project requires removal of the current light pole foundation and the installation of what has been described as a 5’ x 5’ x 5’ concrete foundation. Two mature trees are located 33” and 42” from the existing light pole. The heavy construction equipment required to remove the existing foundation and to install the new foundation will certainly damage the roots of the existing trees. The statement that the project will not disturb these trees is conclusory and has no evidentiary support. Attached is a letter from a licensed arborist, which concludes that the trees will likely be compromised by this project. In order to approve this project you must come to the unlikely conclusion that these trees will not be disturbed.

Chapter 17.128.080.A.3. states that every monopole must be set back from adjacent residential lot lines the distance equal to the height of the pole. The applicant admits that it cannot meet this standard. The pole will be at least 35’ tall and will be located 14’ from the closest residential lot line. The applicant has requested a variance from this standard. However, as discussed below, the applicant cannot meet the requirements for a variance.

Also applicable to this application are the general design review standards. Chapter 17.136.050.B.2., requires you to make the following findings or deny the application.

“... the proposed design will be of a quality and character which harmonizes with, and serves to protect the value of private and public investments in the area.”

You have received substantial evidence that the cell tower will have an adverse impact on neighboring property values. Again, the project fails this test and must be denied. The applicant simply cannot establish that the project will “protect the value of private investment” as required by the law.

Finally, I will address the requested variance. You do not have carte blanche power to grant the variance. The code sets out very specific findings that must be met before a variance can be granted. The applicant cannot meet the statutory requirements and therefore, the variance and therefore the application must be denied. Chapter 17.148.050 states that all of the itemized conditions must be met. Keep in mind that the variance request relates to the code provision that prohibits this pole because it is too close to a residential lot line.

Chapter 17.148.050.A.1. requires a finding that, absent the granting of the variance, the applicant shall suffer

“an unnecessary hardship inconsistent with the purposes of the zoning regulations.”

The fundamental question is what the purpose of 17.128.080.A.3. (the zoning regulation) is.

“When a monopole is in a Residential Zone or adjacent to a residential use, it must be setback from the nearest residential lot line a distance at least equal to its height.”

The purpose of 17.128.030.A3 is clear: Provide separation between residential lot lines and cell towers. The “hardship”, denial of the application, is not inconsistent with the purpose of 17.128.010.A.3. It is the application itself which violates the purpose of the regulation and therefore the variance is not permitted.

Chapter 17.148.010.A.4. states a similar required finding.

“That the variance will not constitute a grant of special privilege...inconsistent with the purposes of the zoning regulations.”

Chapter 17.128.080.A.3. quoted above, requires the proposed pole to be at least 35’ from the property line and the proposed variance would place the pole 14’ from the property line. The variance would clearly violate the “purpose” of the ordinance and therefore must be denied.

Chapter 17.14 has a final required finding for the grant of a variance. The standard design review requirements of 17.136.050 must be met. As discussed above, the finding

required by design review section 17.136.050.B.2., (no adverse effect on private investments), cannot be made and therefore, the variance cannot be granted.

In conclusion, you, as Planning Commissioners are entrusted to faithfully implement the zoning regulations. We submit that you cannot make the findings required to approve this application. The fact that the applicant merely claims, sometime falsely, that the antennae will not be visible, that vegetation will not be disturbed or that property values will not be effected, is neither sufficient nor accurate. You must look closely at the facts and the numerous code sections and determine whether you can make the required specific findings. The facts and the law dictate that the application be denied.

Thank you for your discernment.

Respectfully submitted,

MURPHY AUSTIN ADAMS SCHOENFELD LLP



KENT N. CALFEE

KNC/kb  
Enclosure

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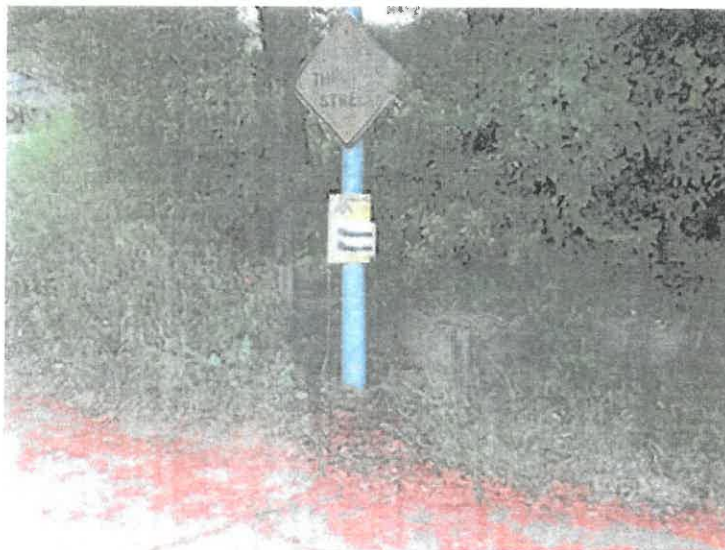
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TREE ASSESSMENT – ACACIA MELANOXYLON (2)  
CONSTRUCTION PROXIMITY  
(Drury Rd at Besito Ave, Berkeley)

**Summary.** An auxiliary cell phone tower installation is proposed at the intersection of Drury Rd and Besito Ave in Berkeley. According to the plans the new tower will excavate around an existing signpost and pour a new [5' x 5'] concrete slab to anchor the new pole. Two Acacia trees directly uphill are directly in the construction area, and will likely be adversely affected by the construction.

**Pic 1.** Build area (Drury Rd./Besito Ave.):



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**Description.** Generally *Acacia melanoxylon* trees are well adapted to the local Berkeley climate, with high disease resistance unless heavily stressed (due to over-pruning or other environmental factors). While the two *Acacia*'s in question might survive the soil disturbance from the proposed construction, earth moving will lessen soil structural integrity, and roots will most likely need to be cut or exposed to air and construction debris. Changes in finished grade and slope will affect runoff and erosion.

**Pic 2.** Trees from uphill (from Drury Rd)



**Environment.** The Acacias are healthy, providing a natural aesthetic and habitat to the surrounding neighborhood. There are no signs of disease. The trees provide environmental services for the benefit and enjoyment of the surrounding community. In addition, certain studies have shown evidence suggesting long-term exposure to RF radiation emitted from cell phones and towers can disrupt biological function (of both trees and animals, including humans). Adverse effects are not always immediately apparent.

**Conclusion.** The proposed cell tower construction project will likely adversely affect two nearby Acacia trees, via soil and root disturbance, as well as additional exposure to RF radiation due to proximity and duration of exposure to the antenna. This added stress, in addition to the construction activity, may lead to accelerated tree decline, soil and/or root failure, and reduce their overall useful life in the urban interface.

Signed,

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