

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
4 T-MOBILE WEST CORPORATION,
5 Plaintiff,
6 v.
7 CITY AND COUNTY OF SAN FRANCISCO,
8 Defendant.

No. C 10-03011 CW
ORDER DENYING
PLAINTIFF'S
MOTION FOR
PARTIAL SUMMARY
JUDGMENT AND
GRANTING
DEFENDANT'S
CROSS-MOTION FOR
PARTIAL SUMMARY
JUDGMENT
(Docket Nos. 29
and 31)

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12 This action arises from Defendant City and County of San
13 Francisco's decision to deny Plaintiff T-Mobile West Corporation's
14 application for a conditional use permit (CUP) for a proposed
15 wireless telecommunications facility at 725 Taraval Street in San
16 Francisco, California. Plaintiff moves for partial summary
17 judgment on its claim that, in violation of the Telecommunications
18 Act of 1996 (TCA), the City did not issue a decision in writing
19 that is supported by substantial evidence. The City opposes
20 Plaintiff's motion and cross-moves for partial summary judgment in
21 its favor on the same issue. The motions were heard on February
22 10, 2011. Having considered the papers submitted by the parties,
23 the Court DENIES T-Mobile's motion for partial summary judgment and
24 GRANTS the City's cross-motion for partial summary judgment.

25 BACKGROUND

26 San Francisco's Planning Code divides the City into various
27 "use districts." S.F. Planning Code § 201. In a Small-Scale
28 Neighborhood Commercial District, or NC-2 District, wireless

1 transmission facilities are considered a "public use" and require a
2 conditional use permit. Id. §§ 709, 711.83 and 790.80. The City
3 Planning Commission is charged with making determinations regarding
4 applications for conditional use permits. Id. § 303(a). Under the
5 Planning Code, the Planning Commission is required to approve an
6 application and authorize a conditional use if, among other things,
7 the "proposed use or feature, at the size and intensity
8 contemplated and at the proposed location, will provide a
9 development that is necessary or desirable for, and compatible
10 with, the neighborhood or the community." Id. § 303(c)(1). A
11 Planning Commission decision regarding a conditional use
12 authorization may be appealed to the City's Board of Supervisors.
13 Id. § 308.1(a).

14 On June 18, 2009, T-Mobile, a telecommunications carrier,
15 applied for a CUP to install a wireless telecommunications facility
16 "consisting of eight panel antennas mounted to the existing
17 elevator penthouse structures" of a four-story, mixed-use building
18 located at 725 Taraval Street, which is located in an NC-2
19 District. AR42-43.¹ On February 25, 2010, following a hearing on
20 the matter, the Planning Commission approved T-Mobile's application
21 and authorized the installation of the facility. The Planning
22 Commission found, among other things, that the facility was
23 "necessary or desirable, and compatible with, the neighborhood or
24 the community." AR190.

25 On March 25, 2010, Robert Carson, a property owner, appealed

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27 ¹ Citations to the Administrative Record are designated
28 "AR__."

1 the Planning Commission's decision to the Board, complaining that
2 the facility was not necessary, not desirable and not compatible
3 with the neighborhood.

4 On May 18, 2010, the Board held a public hearing on Carson's
5 appeal. Carson submitted data, collected on or before February 23,
6 2010 by another resident, on signal strength in the vicinity of 725
7 Taraval. This resident, who was a T-Mobile customer living near
8 the proposed facility site, measured signal strength using "the
9 'field test' mode" on a "T-Mobile Dash phone." AR8. The resident
10 noted that the "Receive Signal Strength Indication" (RSSI)
11 measurement, taken within the resident's home, showed values from
12 thirteen to twenty-two. Id. The resident stated, "A value between
13 12 and 20 is considered average. A value over 20 is exceptional."
14 Id. The resident also stated, "I've had good cellular coverage
15 through T-Mobile from the beginning regardless of the phone I have
16 used. . . . I don't have a problem with dropped calls." Id.
17 Carson also offered additional "RSSI Readings," apparently
18 collected on May 14, 2010 from thirty-seven outdoor locations in
19 the vicinity of 725 Taraval; the RSSI values ranged from ten to
20 thirty-one. Carson also asserted, and T-Mobile did not dispute,
21 that there were at least eight existing T-Mobile facilities within
22 a mile of 725 Taraval. Finally, Carson offered T-Mobile's coverage
23 maps from its website. Those maps, which approximated "anticipated
24 coverage outdoors," represented that T-Mobile had good voice and
25 data coverage in the vicinity of 725 Taraval. AR9-13. Carson
26 briefly testified about this evidence at the Board meeting, arguing
27 that it demonstrated that the facility was not necessary.

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1 At the hearing, T-Mobile responded with data showing that its
2 coverage in the neighborhood "would be greatly improved with this
3 project." Tr. of May 18, 2010 Hrg. 51:9-10. A map showed that
4 coverage in the neighborhood ranged from good to poor.
5 Specifically, in the area south of the proposed site, a signal
6 could be obtained only by "walking on the street." Id. at 50:23.
7 T-Mobile asserted that the "only way to get the accurate picture of
8 the existing signals is to drive the neighborhood using the
9 appropriate software to gauge the signals" and that signal
10 measurement entails "a fairly sophisticated scientific testing
11 process," which requires analysis by engineers. AR50-51. T-Mobile
12 also offered data that, in the vicinity of the proposed site, there
13 were 1,200 dropped calls out of 470,903 total calls. Finally, T-
14 Mobile asserted that it received three complaints from its
15 customers using phones within the neighborhood. Notably, however,
16 the three complaints originated in an area that would not have
17 benefitted from the proposed facility. Compare AR25 with AR27.

18 Several other members of the public objected to the proposed
19 facility. Some raised concerns about the health effects of radio
20 frequency emissions. However, at the beginning of the hearing, a
21 deputy city attorney informed the Board that the TCA prohibits
22 local governments and agencies from disapproving a wireless
23 transmission facility based on such concerns. No member of the
24 public spoke in favor of T-Mobile.

25 In an 11-0 vote, the Board reversed the Planning Commission's
26 decision to approve T-Mobile's CUP application. In relevant part,
27 the written findings of the Board stated,

1 2. The public testimony at the public hearing and
2 the public documentation submitted in support of
3 [Carson's] objections to the decision of the Planning
4 Commission supported [Carson's] position that there is no
5 necessity for the proposed WTS [wireless transmission
6 services] facility . . . because the proposed WTS
7 facility is not necessary to meet [T-Mobile's] present
8 services demands within the geographic service area
9 defined by [T-Mobile].

6 3. The written and oral information provided by
7 [T-Mobile] at the May 18, 2010 public hearing alleged
8 that the proposed WTS facility would: (a) extend and
9 enhance coverage and capacity; (b) support new data
10 services that are available only for applicant's
11 customers that use "smart phones;" and (c) support first
12 responders in case of an emergency. No members of the
13 public appeared in support of the applicant's
14 proposal. . . .

11 4. Notwithstanding the information submitted by
12 [T-Mobile], the written and oral information provide[d]
13 by [Carson] and his supporters at the May 18, 2010 public
14 hearing showed that [T-Mobile] presently had acceptable
15 service in the geographic area of the proposed WTS
16 facility from [T-Mobile's] existing WTS facilities in the
17 vicinity. In particular, [Carson]: (a) submitted a study
18 conducted in the neighborhood showing good coverage;
19 (b) introduced advertising materials from [T-Mobile's]
20 website showing [T-Mobile] has good coverage for voice
21 and data service in the area of the proposed project; and
22 (c) showed that [T-Mobile] has eight existing wireless
23 facilities within a one-mile radius.

18 AR242-43. In its findings, the Board noted that several members of
19 the public expressed concerns over radio frequency emissions
20 generated by the proposed facility. The Board, however, expressly
21 disclaimed any reliance on these concerns.

22 LEGAL STANDARD

23 Summary judgment is properly granted when no genuine and
24 disputed issues of material fact remain, and when, viewing the
25 evidence most favorably to the non-moving party, the movant is
26 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
27 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);

1 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
2 1987).

3 DISCUSSION

4 The Telecommunications Act of 1996 is intended to "encourage
5 the rapid deployment of new telecommunications technologies" while
6 preserving "the authority of State and local governments over
7 zoning and land use matters." Sprint PCS Assets, L.L.C. v. City of
8 Palos Verdes Estates, 583 F.3d 716, 721 (9th Cir. 2009) (citations
9 and internal quotation marks omitted). To this end, the TCA
10 imposes restrictions on localities' control over the installation
11 of wireless telecommunications facilities. Id. One of these
12 limitations "is that '[a]ny decision . . . to deny a request to
13 place, construct, or modify personal wireless service facilities
14 shall be in writing and supported by substantial evidence contained
15 in a written record.'" Id. (quoting 47 U.S.C.
16 § 332(c)(7)(B)(iii)).

17 Although T-Mobile alleges that the City violated the TCA in a
18 number of ways, the parties' current motions pertain only to this
19 limitation. T-Mobile seeks partial summary judgment that the
20 City's written findings did not constitute a "decision in writing"
21 and that, even if they did, they were not supported by substantial
22 evidence. The City seeks partial summary judgment that its
23 determination satisfied the "decision in writing" and substantial
24 evidence requirements of § 332(c)(7)(B)(iii).

25 I. Decision In Writing

26 The "TCA requires local zoning authorities to issue a written
27 decision separate from the written record which contains sufficient
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1 explanation of the reasons for the decision to allow a reviewing
2 court to evaluate the evidence in the record supporting those
3 reasons." MetroPCS, Inc. v. City & Cnty. of S.F., 400 F.3d 715,
4 723 (9th Cir. 2005). Under this standard, it is not sufficient for
5 an authority to stamp the word "DENIED" on a party's application.
6 Id. at 722 (rejecting standard set forth in AT&T Wireless PCS, Inc.
7 v. City Council, 155 F.3d 423 (4th Cir. 1998)). However, this
8 standard does not require localities to "explicate the reasons for
9 their decision and link their conclusions to specific evidence in
10 the written record." MetroPCS, 400 F.3d at 721-22 (rejecting
11 standard set forth in Omnipoint Commc'ns, Inc. v. Planning & Zoning
12 Comm'n, 83 F. Supp. 2d 306 (D. Conn. 2000)).

13 Here, the Board's findings satisfy the "decision in writing"
14 requirement of § 332(c)(7)(B)(iii). The five-page document recites
15 the facts of T-Mobile's application, refers to the May 18, 2010
16 hearing, specifies Carson's and T-Mobile's arguments at the hearing
17 and identifies the evidence submitted by Carson to support his
18 position. The findings further state that the Board's decision was
19 based on the record, which contained the Planning Commission's
20 findings, testimony presented at the public hearing and Carson's
21 and T-Mobile's documentary evidence.

22 Despite this detail, T-Mobile argues that the findings are
23 insufficient because assertions are not paired with citations to
24 evidence and because the findings do not explain why the Board
25 rejected T-Mobile's evidence, even though the Planning Commission
26 accepted it. However, MetroPCS rejected the need to tie
27 conclusions to specific evidence. Further, MetroPCS does not
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1 require a detailed explication of the Board's decision. The
2 findings "contain sufficient explanation to enable judicial
3 evaluation of the evidentiary support for its rationale."
4 MetroPCS, 400 F.3d at 723. Accordingly, they are sufficient.

5 Thus, T-Mobile's motion for partial summary judgment, to the
6 extent that it is based on the "decision in writing" requirement,
7 is denied. The City's cross-motion for partial summary judgment,
8 to the extent that it is based on the same, is granted.

9 II. Substantial Evidence

10 Although the TCA does not define the term "substantial
11 evidence," courts have held "that this language is meant to trigger
12 the traditional standard used for judicial review of agency
13 decisions." MetroPCS, 400 F.3d at 723 (citation and internal
14 quotation marks omitted). Under this deferential standard, courts
15 may not overturn a locality's decision on "'substantial evidence'
16 grounds if that decision is authorized by applicable local
17 regulations and supported by a reasonable amount of evidence (i.e.,
18 more than a 'scintilla' but not necessarily a preponderance)." Id.
19 at 725. In other words, the evidence must constitute a showing
20 "that 'a reasonable mind might accept' as adequate." Id. at 726.
21 Courts must consider the entirety of the written record. Id. at
22 723.

23 As noted above, the San Francisco Planning Code authorizes
24 consideration of a neighborhood's need for a proposed use in
25 evaluating conditional use permit applications. S.F. Planning Code
26 § 303(c)(1); see also MetroPCS, 400 F.3d at 725 (discussing section
27 303(c)(1)). Here, the Board found that the facility was not
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1 necessary because there was already "acceptable service" in the
2 relevant area. AR242. Specifically, the Board pointed to the
3 signal strength data submitted by Carson, T-Mobile's advertising
4 materials showing good coverage for voice and data services in the
5 neighborhood and T-Mobile's existing facilities in the vicinity of
6 725 Taraval. T-Mobile did not dispute the accuracy of Carson's
7 signal strength data or that it had several other facilities close
8 by. The written record also contained a letter from a T-Mobile
9 customer, who did not have a problem with dropped calls and stated
10 that indoor signal strength rated from average to exceptional.
11 Indeed, T-Mobile's own data showed that, in a given two week
12 period, out of 470,903 calls originating within the neighborhood,
13 only 1,198 were dropped, or one-fourth of one percent of the total.
14 The Board also noted that no member of the public supported T-
15 Mobile's application, which suggested a lack of a community need
16 for the facility. And, as noted above, to the extent that T-Mobile
17 received complaints, they originated in an area east of the
18 proposed facility, which would not have benefitted from the
19 installation. In sum, the written record contained evidence that
20 there was an adequate signal in the neighborhood, few calls were
21 dropped, a T-Mobile customer was satisfied and no members of the
22 public expressed support of T-Mobile's application. A reasonable
23 mind would accept this evidence as adequate to support a conclusion
24 that the neighborhood surrounding 725 Taraval did not need the
25 proposed facility.

26 T-Mobile contends that the Board could not reasonably rely on
27 the evidence submitted by Carson because determining the adequacy
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1 of coverage is a "complex engineering issue." T-Mobile Mot. 18.
2 T-Mobile challenges the data submitted by Carson as unscientific
3 and distances itself from its advertising materials. Although it
4 is true that a resident who took signal measurements stated that it
5 was not a scientific test, there was no evidence in the written
6 record directly challenging the accuracy of the data. Indeed, T-
7 Mobile's testimony at the May 18 hearing suggested that its data
8 were more accurate, not that Carson's data were inaccurate. Nor
9 was there evidence in the written record suggesting that T-Mobile's
10 advertising materials misrepresented the signal strength in the
11 neighborhood. While the documents stated that they only
12 approximated outdoor coverage, there was no evidence in the written
13 record suggesting that the Board should have discounted them.

14 T-Mobile also argues that substantial evidence did not support
15 the Board's rejection of the Planning Commission's finding that the
16 proposed facility was "necessary for T-Mobile to provide improved
17 communications and emergency resources." T-Mobile Mot. 20.
18 However, at the May 18 hearing, Carson responded to this argument,
19 noting that, under federal law, a wireless telecommunications
20 provider must transmit all wireless 911 calls, including those
21 handled by another carrier. Tr. of May 18, 2010 Hrg. 60:24-65:2;
22 see also 47 C.F.R. § 20.18(b). There is no evidence that the
23 proposed project was necessary to improve the handling of wireless
24 911 calls in the neighborhood.

25 T-Mobile cites several cases, all of which are
26 distinguishable, not controlling or both. Only a couple of cases
27 bear noting. In T-Mobile Central, LLC v. Unified Government of

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1 Wyandotte County, 546 F.3d 1299 (10th Cir. 2008), the Tenth Circuit
2 held that the locality's decision to deny a permit was not
3 supported by substantial evidence. In particular, the court held
4 that a drive test, which was "intended to measure the level of
5 existing network coverage," was not substantial evidence of the
6 lack of dropped calls in a given area. Id. at 1309. The court
7 also rejected the locality's reliance on an "uncorroborated
8 assertion . . . that T-Mobile's service in the targeted area was
9 'pretty good.'" Id. Here, the City did not make such errors. It
10 did not rely on a metric, intended to measure one characteristic,
11 to measure another parameter. Nor did it rely on uncorroborated
12 assertions.

13 T-Mobile's reliance on AT&T Wireless Services of California,
14 LLC v. City of Carlsbad, 308 F. Supp. 2d 1148 (S.D. Cal. 2003),
15 which predated the Ninth Circuit's decision MetroPCS, is also
16 unavailing. There, the court rejected the city's expert's
17 testimony because his conclusions did not result "from independent
18 research unconnected with" the case and because he failed to
19 provide "any objective criteria by which the court may evaluate his
20 opinion." Id. at 1157. The court also noted that it was not
21 required to "accept as substantial evidence impossible, incredible,
22 unfeasible, or implausible testimony." Id. at 1159 (citation and
23 internal quotation marks omitted). Here, T-Mobile insists that the
24 Court, like the City of Carlsbad court, must play its "gatekeeping"
25 role under Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S.
26 579 (1993); however, neither T-Mobile nor the City has offered
27 expert testimony to which Federal Rule of Evidence 702 applies.

1 Further, unlike the City of Carlsbad, the Board here did not rely
2 on impossible, incredible, infeasible or implausible testimony.

3 Finally, T-Mobile argues that the Board's decision must be
4 overturned because it failed to rebut the Planning Commission's
5 determination. MetroPCS, which also involved the Board's decision
6 to overrule the Planning Commission, does not require this.

7 The Board's decision that T-Mobile's proposed facility was not
8 necessary for the neighborhood is supported by substantial
9 evidence.

10 CONCLUSION

11 For the foregoing reasons, the Court DENIES T-Mobile's motion
12 for partial summary judgment (Docket No. 29) and GRANTS the City's
13 cross-motion for partial summary judgment (Docket No. 31). The
14 Court summarily adjudicates that, with respect to T-Mobile's CUP
15 application, the Board issued a decision in writing that was
16 supported by substantial evidence.

17 IT IS SO ORDERED.

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20 Dated: 2/14/2011



CLAUDIA WILKEN
United States District Judge