

CONSENT CALENDER  
December 11, 2007

To : Honorable Mayor and Members of the City Council

From: Councilmembers Dona Spring, Linda Maio, Max Anderson and Mayor Tom Bates

Subject: Measuring Electromagnetic field (EMF) Levels; Revisions to Wireless Telecommunications Ordinance

Recommendation:

Request the City Manager:

- 1) Immediately arrange for expert measurement of EMF, including RF radiation, levels at and around UC Storage and the French Hotel, and
- 2) Provide the Council data on the current radiation levels with places, dates and times of collection, and
- 3) Offer a schedule for subsequent testing and reports to Council, and
- 4) Refer to the City Manager possible revisions to the Wireless Telecommunications Ordinance (Chapter 23C.17 of the Berkeley Municipal Code).

Financial Implications:

Unknown.

Background:

The City recently approved installation of more antennae on Shattuck Avenue on the UC Storage Building and on the French Hotel. Widespread concern with the possible health effects of radiation make it prudent for the City to begin to collect data, in order to ensure that these facilities will be in compliance with applicable FCC regulations governing electromagnetic radiation.

Before newly approved antennae are installed on the UC Storage facility or the French Hotel, we need to know the current EMF and RF levels. It is necessary to have measurements quickly as the installations are imminent. A professional who has the proper equipment and is trained in measuring EMF and RF needs to take the measurements . The results should be brought to Council as soon as possible

Since radiation may extend far beyond the immediate locale of the installation, the City may wish to consider testing other areas of the City on a regular basis. The areas of concentration of antennae is a matter of possible concern.

Contact person: Dona Spring 981-7140

Attachment

- 1: Background information submitted by Michael Barglow

## **Agenda item for Dec. 11, City Council meeting**

Berkeley neighborhood Antenna-Free Union (BNAFU), which now represents residents from several Berkeley neighborhoods, wishes to place "Cell antennas on U.C. Storage" on the agenda for the December 11 meeting.

At the public hearing of October 23, BNAFU raised several issues that the Council never dealt with. We ask that these issues be addressed immediately before building permits be issued.

**1. Radiation measurements:** We asked the Council to insure that accurate RF radiation measurements be taken before and after the antennas go in. We also ask that these measurements be taken by a certified independent company or individual, not dependent on the telecom industry for employment. We would also like to have one or two of us neighbors present while the measurements are taking place.

**2. Antenna collocation:** We asked for assurances that future antennas would not be located at 2721 Shattuck. Linda Maio asked staff to confirm that more antennas could only be collated at the same site with Council approval. We never received confirmation of this fact. We asked that Patrick Kennedy, owner of the property, sign a document binding him and any future tenant to limiting the number of antennas to those agreed upon in the current application. Originally this application asked for 18 antennas.

**3. Number of antennas:** We have asked on several occasions to know how many antennas are at each Berkeley location and which company operates them. We have yet to receive this information.

**4. Need for a moratorium:** Berkeley needs a moratorium on all current and future cell antenna applications so that the legality of our antenna ordinance can be carefully examined. It was declared illegal by Verizon Wireless in its recent lawsuit in Oakland Federal Court against the City. Do these companies have information that our city attorney and city staff overlooked or ignored. We need to find out.

We also ask that the Council impose a moratorium on the U.C. Storage application it just approved. The worst that can happen is that Verizon will continue its present suit with an extended period for the City to reply.

The rationale behind a Council decision can be that since we do not have an acceptable ordinance, in the eyes of Verizon attorneys, we need the time to revise it so that it comes up to Verizon's standards. After all, we don't want to grant Verizon's application based on a faulty ordinance. That might tarnish

Verizon's legal team's reputation for trying to maintain appropriate laws regarding their taking care of community needs. Remember that Verizon developed its lawsuit to eliminate our ordinance because in the opinion of its legal experts, our ordinance is illegal. So if we correct the ordinance, perhaps Verizon's application might be deemed in contradiction to our now legal ordinance.

It can be argued that the intention of the Telecommunications Act (TCA) was not to support local control over antenna placement. It is possible that the TCA was created under the illusion that citizens would be able to decide what they need in their local communities in the same way that communities can set limits on how many liquor stores they allow.

As has already been mentioned, our ordinance was one of the bases upon which Verizon sued the City. In public testimony on Nov. 7, Mayor Bates said that we had made big mistakes in drafting the ordinance. Bates said,

"We need to back up and strengthen our ordinance. Our ordinance is terrible and the way we have handled this has been awful."

Council Member Capitelli said, "The real question is: How can we gain more local control over the [cell antenna] installations in our community. I think we need to focus our energy on gaining greater control of cell phone tower locations."

Council member Maio asked, "How do we position ourselves best in a situation where it is very inequitable for all of us?"

**The City Council can still ask Patrick Kennedy to try to break his contract with Verizon and Nextel. This has been done on several occasions with no legal consequences to the property owners that have taken these actions (See attachment).**

The Council should agree to revise the current ordinance governing the installation of antennas to conform to current court rulings on the matter, so that in the future our ordinance stands up to legal scrutiny. The City cannot make good decisions regarding antenna placement without a viable, workable ordinance. More specifically,

A. The ordinance now encourages collocation, with no distinction between residential, non-residential, and commercial areas. This fact suggests that Verizon and other telecoms can put even more antennas up at 2721 Shattuck regardless of its impact on residents, and regardless of whether we need them in this part of town. As every neutral, open-minded party who has looked at the

evidence knows, we in South Berkeley DO NOT need the antennas that are now being forced down our throats.

B. The definition of residential neighborhood has to be more strictly interpreted. Under the current definition, residential areas, like ours, will have all the proposed and now permitted antennas pointed right at them. What use is an ordinance that allows that?

San Francisco currently has antenna laws directly embedded in their zoning codes. San Francisco's antenna laws have not been legally challenged. In fact they have been successfully defended recently by its deputy attorney, Bill Sanders, in a case (Metro PC vs San Francisco). very similar to ours, having to do with need for antennas and least intrusive means.

## **5. Need for a New Legal Team under a new City Attorney**

We asked in our legal presentation to the Council before the October 23 Public hearing and during the hearing that the City consult with Bill Sanders in order to find an attorney who believed we had a case. We specifically told the City staff and the Council that I nor anyone in our group, BNAFU, had recommended Bill Martitorena. In fact we pointed out that Mr. Martitorena had, in fact, represented Verizon in the past, and that we did not recommend him. Yet, Manuella Albuquerque continues to claim that I recommended Mr. Martitorena, whom I do not know at all.

On the other hand, we need to ask the Council whether its legal staff contacted Bill Sanders, whom I did recommend, and asked for his legal opinion. If not, why not?

It appears that both the City's attorney and her assistant have been determined to discount any other view of this legal situation other than their own. The outside attorney, Kirk Trost, that Manuela decided to rely on for this case is a public interest attorney who as pointed out, does not have the expertise to analyze telecommunications law, and whether or not Berkeley has a legitimate case.