

Attachment L

Appellant's Letter  
Dated March 18, 2013

California-American Water Company  
PLN120817

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OUR FILE NO. 5921.01

March 18, 2013

VIA ELECTRONIC MAIL & HAND DELIVERY

Clerk to the Board of Supervisors  
Monterey County Board of Supervisors  
168 West Alisal Street  
Salinas, California 93901

**RE: Appeal of California-American Water Company; PLN120817  
10 Oak Meadow Lane, Carmel Valley, CA  
APN: 187-131-025**

Honorable Supervisors:

This office represents the appellant, Ms. Constance Murray. Ms. Murray is the owner of the property located at 10 Oak Meadow Lane, Carmel Valley, California, Assessor's Parcel Number 187-131-025. The California American Water Company ("Cal Am") application is for after the fact authorization for a wireless communication antenna in an easement on Ms. Murray's land. Facts and concepts relevant to this application include:

1. Cal Am installed a monopole antenna without permits on a water tank within an existing Water Tank Easement over Constance Murray's residential property.
  - a. The antenna transmits low power signals.
2. County inspection occurred in March 2011, followed by a compliance order against Ms. Murray as the fee title owner of the lot.
  - a. County determined that the owner of the fee interest is the one responsible for any violations.



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3. Cal Am let Ms. Murray bear the weight of the County enforcement action against her for a year and a half until she filed litigation against Cal Am on October 5, 2012.

a. Cal Am responded by compelling the addition of Monterey County to the lawsuit by demurrer.

4. All three parties are now in litigation attempting to resolve these pending claims in Case M120057:

- The proposed tank and the installation of the monopole antenna exceed the scope of the Water Tank Easement.
- The installation of the monopole antenna in the Water Tank Easement violates the restrictions of the Scenic Easement burdening the Water Tank Easement area.
- Defendant Cal Am should have been issued the Compliance Order not Plaintiff.
- The installation of the monopole antenna violates the terms of the CC&R's that govern the installation of antennas within the subdivision and within the Water Tank Easement area, and thus, must be removed. No facility taller than 10 feet (10') can be visible on this parcel from Los Laureles Grade. All twenty feet (20') of this antenna is visible.

5. During the pendency of the lawsuit, with these legal issues in the Court's jurisdiction, Cal Am applied to the County for after-the-fact Design Approval of the illegal improvements.

a. Cal Am applied WITHOUT NOTIFYING THE PROPERTY OWNER, whom it knew County was holding responsible.

6. County accepted the application on grounds that the holder of the easement interest has the right to make improvements within the easement without notice to or consent of the owner, but at the same time County asserts the holder of the fee interest is responsible for any violations by the easement holder.

a. County never informed the property owner of the application until after the approval occurred.

b. Even if not giving the fee owner notice had been technically compliant, under the circumstances where the County was prosecuting the violation against the owner, it was wrong.



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7. Cal Am's attempt to obtain a Design Approval that depends upon rights which are being actively litigated is, at best, premature. At worst, it is an end run around the Court's jurisdiction intended to improperly influence the outcome of the litigation. The County should not become complicit in this process.

8. County should be guided by the concept behind General Plan Policy C-3.6, which states: *Proof of access shall be required as part of any development application when the proposed use is not identified in the provisions of the applicable agreement.*

a. Here, the proposed monopole antennae use is not specified in the Water Tank Easement. Whether the pole is allowed by the easement (and other instruments such as the Scenic Easement and CC&R's) is the subject of active litigation to which the County is a party. It is premature for the County to issue an approval dependent upon this actively disputed right. This hearing should be taken off calendar until after the Court has ruled on the open legal issues.

### **The Decision Is Not Supported By Finding No. 1**

The project which is the subject of the application is a wireless communications facility as defined in Title 21, Section 21.64.310.F.18, because the project includes an antenna "for the transmission and reception of low-power signals".<sup>1</sup> All such wireless communications facilities are subject to discretionary permit requirements. Section 21.64.310.C4.

This antenna does not come within any of the wireless communications facilities exemptions specified in 21.64.310.D. Specifically, although it is a "ground mounted antenna", it far exceeds the ten foot (10') height limit of the exemption for such antennas from the regulations of Chapter 21.64.310.

Such facilities are further subject to regulations specified in section 21.64.310.C.1-8. There are no findings proposed in the staff report or record of consistency with Title 21, section 21.64.310 in general, or of consistency with the regulations of Sections 21.64.310.C.1-8 or Sections 21.64.310.H.1-3 (i.e., "Site Location", "Design Review Criteria" and "Requirements for Application Submittal for the Development of Wireless Communication Facilities") in particular. Consequently, Finding No. 1 does not support the proposed Resolution.

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<sup>1</sup> This particular antenna is a commercial wireless communications facility as defined in section 21.64.310.F.19, because it is "operated primarily for a business purpose". But even if it were a "non-commercial" facility, that fact would not change any of appellant's arguments herein.





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### **Finding No. 1 Is Not Supported By The Evidence**

Finding No. 1, that the design approval complies with applicable procedural requirements, is not supported by the evidence.

Evidence Item a), that the applicant applied for a Design Review Approval is inadequate as a matter of law, because the project requires a discretionary permit under Section 21.64.310.C and a use permit under Section 21.14.050.AA.

Evidence Item b), that the application did not warrant referral to the LUAC because the project is not subject to review by the zoning administrator or planning commission, is legally incorrect. The appropriate authority to approve a new wireless communications facility such as this project is the Planning Commission. Section 21.64.310.I. Under no circumstances may the Planning Director approve this project, because it is a new facility, and not an addition or amendment to an existing, approved telecommunications facility.

### **Finding No. 2 Does Not Support the Recommended Approval And Finding No. 2 Is Not Supported By The Evidence**

The Finding that the Project, as condition, is consistent with the applicable plans and policies which designate this area as appropriate for development is not supported by the evidence.

Evidence Item a), that the project was reviewed for consistency with the regulations in Title 21 is not supported by the evidence, because there has been no review of consistency with Section 21.64.310 governing wireless communications facilities.

Evidence Item b), that the antenna project is allowed land-use for this site, subject to Design Approval, is incorrect. The proposed antenna is a "wireless communications facility" pursuant to Section 21.604.310. As such, it requires a use permit in each case under Section 21.14.050.AA.

Evidence Item d) is insufficient, as it does not address regulation 21.64.310.C.4, among others. 21.604.310.C.4 requires that the project "...shall be sited in the least visually obtrusive location possible. Appropriate mitigation measures shall be applied in instances where the facility is visible from a public viewing area." There is no finding or evidence that the subject antenna is "sited in the least visually obtrusive location possible." Nor have any mitigation measures been proposed, notwithstanding the fact that the entire twenty foot (20') height of the antenna is visible from the public viewing area of Laureles Grade Road.

The citation in Evidence Item e) to the visual standard in section 21.06.1275 is inadequate. A further finding supported by substantial evidence of consistency with 21.64.310 C.4 is necessary and missing.



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Evidence Item f) that the proposed project is consistent with the neighborhood character, because there is "an identical antenna located approximately 1/8th of a mile from the subject antenna that serves the same purpose", is inadequate. The other antenna is in a vastly different location, not visible to surrounding residences and less visible from public viewing areas. The applicable regulatory standard is not whether there are antennae serving the same purpose somewhere in the vicinity. The legal standard under Section 21.64.310.C.4 whether this antenna is "sited in the least visibly obtrusive area". The other antenna is in a vastly different location, not visible to surrounding residences or from public viewing areas. It is part of the same water system, but is less visually obtrusive. By definition, the subject antenna, which is visible from surrounding residences and from public viewing areas, cannot meet this standard.

Even if the erroneous standard of review was applicable, the staff analysis is incomplete, because there is no attempt to analyze the visual effect of the subject antenna compared to the other antenna. The analysis is limited solely to determining that the purposes of the two antennae are the same. In fact, the other antenna has little or no effect on the neighborhood character, while the subject antenna has a significant effect on the neighborhood character and public viewsheds. Consequently, there is no basis for a determination that the subject antenna is consistent with the neighborhood character.

Despite the antenna being 100 percent (100%) visible from a designated scenic corridor and public view area, there is no evidence of consistency with Section 21.64.310.C.4, and in fact, the required mitigation measures have not been applied.

### **Finding No. 3 Is Not Supported By The Evidence**

Finding No. 3 that the site is physically suitable for the use proposed is not supported by the evidence.

First, Evidence Item a), that there's been no indication that the site is not suitable for the proposed development, is contradicted by the testimony in this letter.

Evidence Item c), that site suitability is demonstrated by the "application, project plans and related support materials submitted by the project applicant", is incorrect. First, the application states, with no evidence to support it, that the proposed location for the antenna is the only possible location for the antenna. This assertion is clearly contradicted by the location of another antenna serving the same purpose within 1/8th of a mile, as noted by the staff report. There is nothing in the applicant's materials to demonstrate that the subject water tank could not be connected to the other antenna 1/8th of a mile up the hill by some means, such as a wire in a conduit running along the road.



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Evidence Item d), that the site is physically suitable for the antenna because it is located within a Water Tank Easement, is insufficient under the circumstances, where the legal right to erect the antenna with the easement is subject to an ongoing legal proceeding in the Superior Court. The very fact that the issue is being litigated precludes the County from making a factual finding supported by substantial evidence that the easement allows the antenna.

#### **Finding No. 4 Does Not Support The Proposed Decision**

Finding No. 4, that “the approval of this permit will correct the violations and bring the property into compliance”, is legally incorrect and does not support the decision. The proposed approval is merely a Design Approval, whereas a discretionary use permit is required by Sections 21.64.310.C and 21.14.050.AA to approve the antenna and cure the violation. Additionally, the appropriate authority to approve a new wireless communications facility such as this project is the Planning Commission. See Section 21.64.310.I.

#### **Finding No. 4 Is Not Supported By The Evidence**

Evidence Item c). that the approval “corrects an existing violation” and “the permit will bring the property into compliance....”, is legally incorrect and does not support the decision. The proposed permit is merely a Design Approval, whereas a discretionary use permit is required by Sections 21.64.310.C and 21.14.050.AA to approve the antenna and cure the violation. Additionally, the appropriate authority to approve a new wireless communications facility such as this project is the Planning Commission. See Section 21.64.310.I.

#### **Finding No. 5 Is Not Supported By The Evidence**

Finding No. 5 of CEQA categorical exemption is not supported by Evidence Item a), that the Design Approval authorizes “the antenna that already exists on site and does not change or expand the use on site”. The evidence is legally incorrect and flawed, because it wrongfully assumes that: 1) an illegal improvement should be considered part of the existing environment; and 2) it does not change or expand the use on site. In fact, the antenna is a wireless communications facility that is not an approved use on the site and thus constitutes an expansion of use on the site. This conclusion is further supported by the fact that the new use is subject to Chapter 21.64.310, whereas the existing water tank use is not.

#### **Finding No. 7 Is Not Supported By The Evidence**

##### **Contention #1**

Staff recommends that your board make Finding No. 7 concerning Contention #1 based upon the alleged grounds that:



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1) Cal Am is the appropriate applicant because the project concerns a structure within an easement, Cal Am is the owner of the easement and the easement is the property interest at issue in the application.

a. This evidence is not substantial, being contradicted by County's own determination in the Notice of Violation, that the owner of the fee interest, rather than the holder of the easement interest, is responsible for permitting and violations on the subject parcel.

2) The Planning Department may rely upon Cal Am's attestation that it has the authority to make the application.

a. County may not in good faith rely upon an attestation by Cal Am that it has the authority to apply for this permit when that right is at issue in pending litigation in Case M120057, and the County is presently holding the fee owner responsible for the violation.

#### Contention #2

There is no dispute that this twenty foot (20') tall antenna is located within a Scenic Easement. The alleged evidence regarding Contention #2 is that the antenna is an appurtenance to the existing water tank for the purpose of coming within the "utilities" exception of the Scenic Easement. This evidence is not substantial, because it constitutes a legal conclusion about an open legal issue that is the subject of the pending litigation in Case M120057. The plaintiff's assertion that the antenna is precluded by the Scenic Easement is a disputed legal issue. Until the Court rules, the County cannot make this legal determination as evidence in support of Finding No. 7.

#### Contention #4

The staff report concedes that the purposes of the Design Control District (Section 21.44) include "to assure the visual integrity of certain developments *without imposing undue restrictions on private property.*" Nevertheless, the evidence recommended by staff fails to address the question whether the proposed location for the monopole imposes an undue restriction of the private property interest of the fee owner or other homeowner association members. There is simply no evidence presented on this question of private burdens, substantial or otherwise. Only public viewshed impacts and neighborhood character are assessed, and they are assessed under the wrong regulatory standard. On the other hand, the photograph in the staff report reveals a twenty foot (20') tall, unscreened monopole that is a visual blight upon the owner's lot. The burden of this improvement designed to benefit the entire water system and all of its members falls disproportionately and unnecessarily on one owner.





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The assertion that neighborhood character will not be adversely affected is similarly unsupported by substantial evidence. The only evidence offered is that an identical antenna *servicing the same purpose exists* somewhere to the south at an unspecified location. There is no analysis of the siting and visibility of that antenna relative to the proposed antenna. It cannot be determined whether staff concluded that the other antenna has already deteriorated the neighborhood character so that this proposal is in keeping with the existing blight, or that the other antenna is situated in such a way as to not be publicly visible or not to unduly burden private property rights. Nor is there any analysis of alternative locations. There is no evidence cited in the report to support the applicant's assertion in the Design Approval Request form that this is the "only location able to provide said communication". Staff should evaluate the feasibility of connecting the water tank to the antenna at the site 1/8th mile away.

Contention #5

Staff cites as evidence in support of its finding that Cal Am can apply for the application in its sole capacity as easement holder, the fact that Cal Am is the easement holder. This is a completely circular statement which has no evidentiary value. Moreover, the staff assertion of Cal Am authority is contradicted by County's own determination, in the Notice of Violation, that the owner of the fee interest (rather than the holder of the easement interest) is responsible for permitting and violations on the subject parcel. Such contradictory conclusions are arbitrary and capricious, and will not support approval of this application. Finally it is inappropriate for staff to draw legal conclusions concerning matters pending before the Court.

Conclusion

Since all of the above described data and analytics are absent, the evidence is insubstantial and the Findings do not support the proposed action. This Board should direct staff to revise the staff report and bring the application to the Planning Commission.

Respectfully submitted,

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By: 

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