

**CITY OF ALBANY
CITY COUNCIL AGENDA
STAFF REPORT**

Agenda Date: 12/13/2010
Reviewed by: BP

**SUBJECT: Appeal of Planning and Zoning Commission Decision Regarding
Wireless Antenna at 1100 Eastshore Avenue.**

REPORT BY: Jeff Bond, Planning Manager

PLANNING AND ZONING COMMISSION ACTION

Denial of the conditional use permit and design review applications based on the findings that the wireless communications facility use is not allowed in the Waterfront district and the proposed work is an expansion of facilities, not routine maintenance.

STAFF RECOMMENDATION

In the alternative, reverse the action of the Planning and Zoning Commission and find that wireless facility located at 1100 Eastshore Avenue is a permitted use in the Waterfront district at this specific location, and grant a conditional use permit for the proposed modifications to the existing facility.

BACKGROUND

The applicant requests City approval to allow the replacement of six existing cell phone antennas with nine new antennas and a microwave dish on an existing racetrack observation tower at Golden Gate Fields. The tower is located at the northwest corner of the racetrack.

On June 22, 2010, the Commission reviewed the application and concurred with the staff recommendation at the time that approval of a use permit is not allowed under current provisions of the Planning and Zoning Code because antennas in the Waterfront zoning district are not directly addressed by the City's Wireless Facilities Ordinance. At the meeting, action on the application was continued in order to consider whether an amendment to the zoning ordinance to expressly permit wireless antennas in the Waterfront district might be an appropriate course of action. Subsequently, the applicant raised objections to the delay related to a Code amendment. In addition, concerns were raised with respect to the voter approval requirements of Measure C, which do not allow a change in use without approval of a ballot measure by the voters.

On October 26, 2010, the Commission reviewed the application for a second time (Staff report and minutes Attachment 1 and 2). The Commission concluded that the proposed work was not maintenance and were concerned about setting a precedent. The Commission denied the applications on a 3-0 vote based on the findings that the use is not allowed in the Waterfront district and the proposed work is not maintenance but an expansion.

DISCUSSION OF REVIEW PROCESS

On October 29, 2010, an appeal was filed of the Commission's decision on this application (Attachment 3). In acting on the appeal, the City Council may:

1. Affirm the decision of the Planning and Zoning Commission
(Resulting in denial of the application.)
2. Affirm the decision of the Planning and Zoning Commission with modifications
(Resulting in denial of the application incorporating additional findings or direction to staff.)
3. Reverse the action of the Planning and Zoning Commission, find that wireless facility located at 1100 Eastshore Avenue is a permitted use in the Waterfront district at this specific location and grant a conditional use permit for the proposed modifications to the existing facility.
4. Return the matter to the Planning and Zoning Commission
(Typically, with direction from the Council on key issues and direction on whether or not the Council wishes to review the application at a future meeting.)
5. Take no action.
(Resulting in approval of the action taken by the Commission (e.g., denial of the application.)

OVERVIEW OF REGULATORY FRAMEWORK

Pursuant to the Telecommunications Act of 1996, the Federal Communications Commission (FCC) is the primary regulator of wireless communications, including the design and operation of equipment. In addition, the FCC has adopted radio frequency exposure emissions regulations. Because of Federal law, the City is not allowed to regulate wireless facilities based on radio frequency emissions. The Telecommunications Act of 1996, however, preserves the City's zoning power to regulate the placement of wireless telecommunications facilities, subject to certain limitations (Excerpt from the Telecommunications Act Attachment 4).

In 2005, the City adopted Wireless Communications Facilities (Planning and Zoning Code Section 20.20.100, Attachment 5). The city's regulations are focused on the location and design of antennas. The key features of the regulations include:

- Allowing wireless facilities in the SPC (San Pablo Avenue), SC (Solano Commercial), and CMX (Commercial Mixed-Use) zoning districts.
- Prohibiting wireless facilities in any residential zone.
- Establishing development standards, operation and maintenance standards, and specifying application submittal requirements.
- Requiring a maintenance and facility removal agreement.
- Allowing the City to conduct studies to ensure compliance of with City and FCC standards.

Overall, the City must balance both the provisions of the Municipal Code and the provisions of Federal law. The implementation of local government ordinances is becoming increasingly contentious and litigation between carriers and municipalities is not uncommon. In particular, the City should take care to make sure that its regulations do not discriminate between types of wireless communications technology or carriers and that significant gaps in coverage do not occur because of City actions.

ANALYSIS OF POLICY ALTERNATIVES

Since the Planning Commission hearing, staff has further considered whether the wireless facility located at the Golden Gate Fields Racetrack could be considered as a permitted use at this specific location based on its history. Measure C became effective on January 1, 1990. It requires voter approval of certain specified land use and zoning actions that authorize any land use not authorized by the zoning ordinance for the Waterfront district as of the effective date of Measure C. On the effective date of Measure C, utility uses were permitted in the Waterfront district. The subject wireless facility was approved as a permitted utility use in 1993 as the City did not have any regulations directly addressing the installation of wireless facilities at that time.

When the Wireless Communication Facilities Ordinance (the “Wireless Ordinance”) was adopted in 2002, it prohibited wireless facilities in any residential zone subject to very limited exceptions. The ordinance did not prohibit wireless facilities in any other zone of the City. In addition, it expressly permitted wireless facilities in the CMX, SPC, SC and PF zones. The ordinance did not address the location of wireless facilities in the Waterfront zone or more particularly the subject wireless facility at the racetrack, which was a lawful, permitted use at the time the Wireless Ordinance, was adopted. Staff is not aware of anything in the record indicating that the subject wireless facility was intended to be made a nonconforming use.

Therefore, staff believes that the Council could make an interpretation of the Zoning Ordinance and find that the existing wireless facility located at 1100 Eastshore Avenue is a permitted use. This determination would be based on the conclusion that the Wireless Ordinance did not intend to render this facility a nonconforming use. To date, the public testimony regarding this existing site is that it is an appropriate location for a wireless facility. Under this approach, staff recommends that the Council make it clear that only the wireless facility located at 1100 Eastshore Avenue is permitted in the Waterfront district. This facility is separated from any residential uses by the I-80 Freeway and its location in a

large commercial development is consistent with the purposes and intent of the Wireless Ordinance.

If the City Council determines that the subject wireless facility is a permitted use in the Waterfront district, the modifications to the facility proposed by Verizon requires the approval of a conditional use permit. Draft findings and conditions of approach are attached (Attachment 6 and 7).

If the City Council determines that the subject wireless facility is not permitted in the Waterfront district and that the modifications proposed by Verizon are not routine maintenance, then the Planning and Zoning Commission decision should be upheld and the application by Verizon should be denied. If this action is taken, staff recommends that the Council direct staff to return to the Council at its next meeting with written denial findings for adoption by the Council. Under this alternative, the decision of the Council would not be final until the findings are adopted.

Other Follow-up Actions

In the event that the Council interprets the Zoning Ordinance to permit the subject wireless facility in the Waterfront district, the staff recommends that the Council direct staff to prepare an ordinance amending the Wireless Ordinance to make it clear that the wireless facility located at 1100 Eastshore Avenue is a permitted use under the Wireless Ordinance but only at that specific location.

In addition, the City's Wireless regulations call for establishment of a monitoring program for all wireless communications facilities. This is a work initiative that staff has been aware of, but have not had the opportunity to implement. If the application is ultimately approved, as a condition of approval, staff would recommend that Verizon make a commitment to cooperate in good faith to participate in the monitoring program.

SUSTAINABILITY IMPACT

A decision on this application does not have a substantive impact on the City's major sustainability objectives.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Staff has determined that the proposed project is categorically exempt from the requirements of CEQA per Section 15303, "New Construction or Conversion of Small Structures" of the CEQA Guidelines, which exempts small additions.

FINANCIAL IMPACT

The applicant is responsible for costs associated with processing their application.

CONCLUSION

The basis for the staff recommendation is that the wireless facility existing at 1100 Eastshore Avenue is an appropriate location for a wireless facility as it is separated from any residential uses by the I-80 Freeway and that its placement in a large commercial development is consistent with the purposes and intent of the City's Wireless Ordinance.

ATTACHMENTS:

1. Planning & Zoning Commission staff report, 10/26/10
2. Excerpt Planning & Zoning Commission minutes, 10/26/10
3. Appeal
4. Federal Telecommunications Act, Subsection 332(c)(7)
5. Albany Municipal Code – Wireless Communication Facilities
6. Findings for Design Review approval
7. Community Development Department Conditions of Approval