

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

Agenda Date: 12/13/2010

Reviewed by: _____

SUBJECT: Call for Review of the Planning & Zoning Commission Action on Replacement of Four Existing Wireless Communication Antennas Enclosures with New Antenna Enclosures Located on an Existing Monopole at 423 San Pablo Avenue.

REPORT BY: Jeff Bond, Planning Manager

PLANNING AND ZONING COMMISSION ACTION

Authorize staff to approve ministerial permits associated with the replacement of the antennas as a maintenance activity.

STAFF RECOMMENDATION

In the alternative, make a determination that the application is an upgrade in facilities, and return the matter to the Planning and Zoning Commission for a Conditional Use Permit, including a full analysis of whether alternative solutions are feasible (Alternative 2 below).

BACKGROUND

The applicant requests City approval to allow the removal of four existing wireless communication antenna enclosures located on an existing 65-foot high monopole and replacement with new antenna enclosures. The existing pole is located at the rear (east) side of the property.

The existing monopole is 65-feet in height. Under current codes, the maximum height of a monopole is 48 feet (ten feet greater than maximum building height allowed in the zoning district). Among the objectives of the City's Planning and Zoning Code is not to extend the life of legal non-conforming structures.

The existing monopole features two sets of antennas. The first set, located at 45 feet above grade, serves Metro PCS. The second set, at 59 feet, serve the applicant. The City's Code requires that new wireless communication facilities shall be co-located with existing facilities and with other planned new facilities whenever feasible and aesthetically desirable to minimize overall visual impact. In this situation, due to the Metro PCS antennas, the facility will remain in operation regardless of the outcome of the Verizon application.

An application for a conditional use permit was originally submitted on June 22, 2009 and reviewed by the Commission on April 27, 2010. At that time, the proposal was to increase the number of antenna enclosures from four to six. The Commission expressed concern that the proposed project was an expansion of a legal non-conforming use, and continued the item to its May 25, 2010 in order to allow time for the applicant to provide additional information.

The May 25, 2010 hearing date was continued to June 22, 2010, and then subsequently to a future undetermined date because the information requested by the Commission had not been received. On September 24, 2010, the City's building inspector observed new antennas being installed without City approval, and issued a stop work order.

On October 14, 2010, the applicant submitted revised plans that reflect the installation of four antenna enclosures rather than six. On October 26, 2010, the Planning and Zoning Commission reviewed the revised application. The Commission noted that the proposal was similar to maintenance and did not require formal Commission action, and thus voted 3-0 to authorize staff to approve the installation of the antennas as a ministerial action. In the course of the meeting, the applicant withdrew the application for the use permit (Commission staff report and meeting minutes Attachment 1 and 2).

DISCUSSION OF REVIEW PROCESS

On November 1, 2010, Councilmember Atkinson made a request that the City Council review the Commission's decision on this matter. Section 20.100.080 of the Planning and Zoning Code states:

A member of the City Council may call up any action of the Planning and Zoning Commission for review one time per calendar year without being considered an aggrieved person. If a Council member requests review, there should be a presumption applied that the reason for the review is that the action has significant and material effects on the quality of life within the City of Albany. No inference of bias shall be made or implied due to such a request for review being filed by a Council member. The appeal fees shall be waived to a maximum of one request for review per council member, per calendar year.

In acting on a review, the City Council may:

- a. Affirm the decision of the Planning and Zoning Commission
(Resulting in authorizing staff to issue ministerial construction-related permits as approved by the Commission.)
- b. Affirm the decision of the Planning and Zoning Commission with modifications
(Resulting in authorizing staff to issue ministerial construction-related permits, incorporating additional modifications approved by the Council.)

- c. Reverse the action of the Planning and Zoning Commission
(Resulting in requiring the applicant to seek a conditional use permit.)
- d. 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.)
- e. Take no action.
(Resulting in approval of the action taken by the Commission.)

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 powers with respect to the local regulation of the placement of wireless telecommunications facilities, subject to certain limitations (Excerpt from the Telecommunications Act Attachment 3).

In 2005, the City adopted Wireless Communications Facilities (Planning and Zoning Code Section 20.20.100, Attachment 4). 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.
- 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 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 has occurred in a number of communities throughout the country. 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

In the evaluation of this call for review, the key issue is whether the replacement of four existing antenna enclosures with four similar looking, but technologically updated antenna enclosures, triggers a need for a new conditional use permit. Further, if a conditional use

permit is triggered, is there a basis for granting an exception to the City's height requirements. The alternative approach is to consider the proposal to be routine maintenance that is most appropriately addressed with a ministerial building permit. The attorney for Crown Castle, the owner of the subject pole, contends that the replacement of the four antenna enclosures constitutes routine maintenance and that a City denial of the upgrade of the antenna enclosures improperly regulates the technology employed by Verizon in violation of federal law. His letter is attached (Attachment 5).

The following analysis summarizes the City Council's alternatives:

Alternative 1 – Reverse Decision of Planning and Zoning Commission

Concluding the replacement of the antenna is not maintenance would lead to a reversal of the action of the Planning and Zoning Commission, which could ultimately result in a denial of the application to replace the antennas. Planning and Zoning Code Section 20.20.100 F.1. ("Section F.1") provides guidance in evaluating whether or not work is related to maintenance. In particular, the Code states:

“. . . all wireless communication facilities, and facility modifications that involve any change in the specifications or conditions stipulated in the approved use permit, including but not limited to, changes in power input or output, number of antennas, antenna type or model, number of channels per antenna above the maximum specified in a use permit, repositioning of antennas, increase in proposed dimensions of tower or support structure, or any other facility upgrades, shall be subject to . . . [planning review]”

The proposed change in antennas does include changes in power input, power output, number of antennas, antenna type/model, and number of channels per antenna. (The original approval, which predates the current requirements, did not specify limits on these criteria.) In many other land use planning contexts, the evaluation of this alternative would be based solely on the requirements of the Municipal Code, and denial of the application would be straightforward. State planning law in California is clear that cities have broad discretion to prevent the enlargement or upgrade of nonconforming structures in order to eliminate the nonconforming structure over time. In this situation, however, there is a disputed question as to whether federal law limits the City's authority to prohibit the replacement of existing antenna enclosures with enclosures of substantially the same size that upgrade the capacity of the antennas and prolong the life of the nonconforming pole.

Alternative 2 - Return the Matter to the Planning and Zoning Commission

As a refinement to Alternative 1, if a determination is made that the proposed work is not maintenance per Section "F.1", the next step in the process for this alternative would be for the applicant to submit a new application for a conditional use permit for the replacement of the four antenna enclosures and return to the Planning and Zoning Commission.

In filing its application for a conditional use permit, Section 20.20.100F5.a.(3) allows Crown Castle to seek an exception to the height limitation that makes the wireless facility nonconforming. This section states:

“...Finding for an exception to the Development Standards: Strict compliance would not provide for adequate radio frequency signal reception and that no other alternative solutions which would meet the Development Standards are feasible.”

The applicant would have the burden of proving that they grounds for an exception. This process would require a study to evaluate whether alternatives exist to the upgrade of the nonconforming facility that would allow Verizon to obtain adequate radio frequency signal reception.

Alternative 3 – Uphold the Decision of the Planning and Zoning Commission

The Planning and Zoning Commission, in their evaluation of this application, concluded that the proposed changes were routine in nature. In terms of placement and design, the appearance of the facility will not change. In addition, the applicant has offered to reduce the length of the support brackets, bringing the antenna enclosures in closer to the pole. Although it does not change the height, which is the primary area of non-conformity, changing the brackets would be a modest aesthetic improvement.

It is not unusual for legal non-conforming commercial land uses to make changes to their facilities that have the practical effect of extending the life of a non-conformity. In recognition of this, Planning and Zoning Code Section 20.20.100 I.3 (section “I.3”) states:

*“All equipment and improvements associated with a wireless communications facility permitted as of the date of passage of this Chapter shall be allowed to continue as they presently exist, but will be considered legal nonconforming uses insofar as they do not comply with standards stated in this subsection. **Routine maintenance shall be permitted on existing, operational equipment and facilities.** However, new construction, other than routine maintenance on existing towers, antennas, buildings, or other facilities shall comply with the requirements of this Chapter.”*

If the proposed change in antenna enclosures is considered routine maintenance, the only action required will be the issuance of building permits by staff. If approved in this manner, the City retains the ability to evaluate the integrity of the existing pole and monitor the installation for compliance with various local and FCC standards.

Other Follow-up Actions

Regardless of the action taken on the application, staff recommends that in the near future the Council consider refining its ordinance and procedures to recognize rapid technological change and provide a constructive way to address the issue of ultimate removal of non-conforming uses and structures. Crown Castle has noted that they have a long-term lease for the facility, and that the life of the lease extends numerous years beyond the expected

life of the equipment presently proposed to be installed. Thus, this issue is likely to come up again at this 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, staff would recommend, as a condition of approval, 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 any applications.

ATTACHMENTS:

1. Planning & Zoning Commission staff report 10/26/10
2. Planning & Zoning Commission minutes 10/26/10
3. Federal Telecommunications Act excerpt Subsection 332c(7)
4. Albany Municipal Code – Wireless Communications Facilities
5. Correspondence from applicant legal counsel, Shustak Frost & Partners, 11/15/10
6. Communications from public