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**RESOLUTION NO. 2011-56**

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ALBANY  
DENYING THE APPEAL FILED BY CROWN CASTLE ON BEHALF OF  
VERIZON WIRELESS AND DENYING THE APPLICATION FOR A  
CONDITIONAL USE PERMIT AND DESIGN REVIEW TO MODIFY A  
NONCONFORMING WIRELESS FACILITY LOCATED AT 423 SAN  
PABLO AVENUE AND MAKING WRITTEN FINDINGS IN SUPPORT  
THEREOF**

**WHEREAS**, on June 22, 2009 Crown Castle on behalf of Verizon Wireless (the “applicant”) submitted an application for a conditional use permit to increase the number of antenna enclosures from four to six enclosures with ancillary improvements on an existing nonconforming wireless communication facility (the nonconforming wireless facility”) located at 423 San Pablo Avenue (the “prior application”). The existing wireless facility is nonconforming with respect to the height limits of the Planning and Zoning Code which imposes a 48 foot maximum height limit. The existing wireless facility consists of a 65 foot tall monopole with the Verizon antennas located at a height of 59 feet on the pole;

**WHEREAS**, during the time that the prior application was pending before the Planning and Zoning Commission, the City’s building inspector observed that new antennas were being installed on the nonconforming wireless facility without any City approval or permits and issued a stop work order;

**WHEREAS**, on October 14, 2010, the applicant submitted revised plans that reduced the number of antenna enclosures from four to six. However, the number of antennas within the four enclosures still increased from four to six antennas and the new equipment proposed by the prior application deployed an entirely new wireless network (called Long Term Evolution, or “LTE”) that provides high speed data communications as part of a 4G network;

**WHEREAS**, on October 26, 2010, the Planning and Zoning Commission reviewed the revised prior application and determined that the proposal consisted of routine maintenance not requiring a conditional use permit. At the Commission hearing, the applicant withdrew the prior application;

**WHEREAS**, on November 1, 2010, pursuant to Municipal Code Section 20.100.080.c.2.b, Councilmember Atkinson made a request that the City Council review the Commission’s determination that the proposal consisted of routine maintenance. All references in this Resolution to section numbers are to sections of the Albany Municipal Code unless other specified;

**WHEREAS**, the City Council conducted its review of the Planning and Zoning Commission determination on December 13, 2010. The Council voted

1 unanimously that the proposed project was not routine maintenance but instead an  
2 upgrade to the nonconforming wireless facility. The Council directed that the matter  
3 be returned to the Planning and Zoning Commission after a new application was filed  
4 by the applicant and that the staff and Commission review include a full analysis of  
5 feasible alternative sites that would conform to all Code requirements;  
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8         **WHEREAS**, on January 20, 2011, the applicant submitted a new application  
9 (the “application”) which substantially reflected the revised plans submitted to the  
10 City in October 2010. The application did not include an alternative sites analysis as  
11 directed by the Council and staff determined that the application was not complete.  
12 Correspondence ensued between the applicant and the City on the completeness of  
13 the application and the applicant threatened to sue the City if the application was not  
14 accepted as complete and submitted to the Planning and Zoning Commission for  
15 review;  
16

17         **WHEREAS**, on June 21, 2011, the City accepted the application as complete  
18 in order to avoid litigation and due to the fact that it was clear that the applicant  
19 would continue to refuse to submit the additional information demanded by the City  
20 staff. In a letter from Community Development Director Jeff Bond, dated June 21,  
21 2011, the applicant was informed that in accepting the application as complete the  
22 City was not waiving its right to require more information from the applicant,  
23 including the right of the Commission or Council to require the preparation of  
24 alternative site studies before making a decision on the application. At this time, a  
25 Tolling Agreement was entered into by the applicant and the City clarifying the time  
26 period in which the City was required to take action on the application in accordance  
27 with the Federal Communications Commission “Shot Clock” declaratory ruling;  
28

29         **WHEREAS**, on July 26, 2011, the Planning and Zoning Commission held a  
30 public hearing on the application. The Commission voted to deny the application on  
31 the basis that the existing facility is nonconforming, that the modification to the  
32 facility is not merely maintenance of an existing facility at an existing wireless site,  
33 and that the proposed modification is not consistent with City ordinances. The  
34 Commission also determined that a sufficient alternative solutions analysis was not  
35 provided by the applicant;  
36

37         **WHEREAS**, on September 19, 2011, the City Council held a de novo public  
38 hearing on the appeal filed by the applicant from the Planning and Zoning  
39 Commission hearing. After hearing from the applicant and members of the public,  
40 the Council directed that the hearing be continued in order that an independent review  
41 of the application can be conducted by a qualified technical expert hired by the City  
42 and that the written documentation upon which the Verizon engineer’s opinions are  
43 based be provided to the City. Section 20.20.100.F.4.b.1 and b.2 authorize the City  
44 to require an independent review of a wireless facility application and to require an  
45 alternative sites or solutions analysis. The applicant consented to the continuance of

1 the hearing and the Tolling Agreement between the applicant and the City was  
2 extended to November 9, 2011;

3  
4 **WHEREAS**, the City retained Jonathan Kramer, a well-known and qualified  
5 telecommunications and radio frequency expert, to perform an independent review of  
6 the application. Mr. Kramer requested additional information from the applicant in  
7 order to better understand the scope of the proposed project; to determine whether an  
8 exception is warranted pursuant to Section 20.20.100.F.5.a.3; and to evaluate whether  
9 alternative solutions that conform to the City’s zoning requirements are feasible. The  
10 applicant failed to provide most of the information requested by Mr. Kramer and  
11 failed to provide the supporting data and documentation for the opinions offered by  
12 Verizon’s engineer at the September 19, 2011 public hearing; and

13  
14 **WHEREAS**, on November 7, 2011, the City Council held the continued  
15 public hearing on the appeal and application. The Council received an updated staff  
16 report and the report prepared by Mr. Kramer and heard additional testimony by the  
17 applicant and members of the public.

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20 **NOW, THEREFORE, BE IT RESOLVED**, by the City Council of the City  
21 of Albany, as follows:

22  
23 1. The City Council hereby denies the appeal filed by Crown Castle on behalf of  
24 Verizon Wireless, and denies the application for a Conditional Use Permit and Design  
25 Review for the modification of an existing nonconforming wireless facility located at  
26 423 San Pablo Avenue (the “subject property”), based upon the findings set forth in  
27 Sections 4, 5 and 6 of this Resolution.

28  
29 2. The City Council hereby relies upon, incorporates and adopts the facts set  
30 forth in this Resolution, including without limitation the recitals, and finds that those  
31 facts and recitals are true and correct. The City Council has considered the staff  
32 reports and responses by staff to questions, the written report by Jonathan L. Kramer,  
33 dated November 2, 2011, and his oral testimony and responses to questions at the  
34 public hearing, the presentation and written materials provided by the applicant and  
35 all other testimony and information provided during the public hearing before the  
36 City Council.

37  
38 3. The City Council hereby finds that this project is exempt from CEQA  
39 pursuant to CEQA Guidelines Section 15270(a), which exempts projects that are  
40 denied by the public agency.

41  
42 4. The City Council affirms its previous determination that the application does  
43 not propose routine maintenance of the nonconforming wireless facility, but instead  
44 proposes a significant modification and upgrade to the existing facility requiring the  
45 approval of a conditional use permit and design review pursuant to Section  
46 20.20.100.F. The application proposes an altogether new deployment of wireless

1 service from the existing facility, increases the number of antennas from four to six,  
2 changes the antenna type and model, degrades the visual appearance of the project  
3 site which is visible and dominating above the nearby structures and is plainly visible  
4 from the City's north-south arterial roadway, and results in an intensified use of an  
5 existing nonconforming structure that exceeds the Planning and Zoning Code height  
6 limit by 17 feet.

7  
8 5. The City Council makes the following findings pursuant to Section  
9 20.20.100.F.5 related to the requested conditional use permit:

- 10  
11 a. The proposed project at the wireless facility is not designed to protect the  
12 visual quality of the City. The existing facility exceeds the City's height  
13 limit by 17 feet. Photographs of the subject property in the administrative  
14 record demonstrate that the existing facility far exceeds the height of the  
15 adjacent commercial and residential buildings in a visually dominating  
16 manner and is unsightly and out of character with the surrounding area.  
17 The proposed modification adds at least eight new coaxial and other types  
18 of cables to the facility that will add to the visual clutter of the existing  
19 pole. The project plans submitted by the applicant are internally  
20 inconsistent. The antenna enclosures will use bottom connectors and  
21 cables that are much more visible than rear mounted connectors and  
22 cables. Due to the proposed deployment of an entirely new radio service  
23 proposed in the application, it is anticipated that additional equipment not  
24 shown in the project plans will need to be added to the pole to provide the  
25 new services proposed by the application.  
26
- 27 b. All applicable development standards required by the City Code have not  
28 been met by the application. The current development standards at  
29 Section 20.20.100.E.2.h and 4.b impose a 48 foot height limit on a  
30 wireless facility located on the subject property. The existing monopole is  
31 65 feet in height with the Verizon antenna enclosures located on the pole  
32 at a height of 59 feet. The violation of the City's height limit requires a  
33 denial of the application unless an exception is granted by the City  
34 Council pursuant to the requirements in Section 20.20.100.F.5.a.3.  
35 Further, the proposed project will extend the life of a nonconforming  
36 structure contrary to the purposes and requirements of Section 20.44.030.  
37
- 38 c. Section 20.20.100.F.5.a.3 sets forth the finding that must be made to grant  
39 an exception to a development standard. The Council must find that  
40 "[s]trict compliance would not provide for adequate radio-frequency  
41 signal reception and that no other alternative solutions which would meet  
42 the development standards are feasible." The applicant has the burden of  
43 proof to show that this finding can be made, and why it should be made.  
44 Not only has the applicant failed to demonstrate that this finding is met,  
45 but the report by Mr. Kramer and other evidence in the record  
46 demonstrates that a sufficient alternative solutions analysis has not been

1 completed that would enable the Council to make the required  
2 determination that no other alternative solutions which would meet the  
3 development standards (including the height limit) are feasible. The  
4 findings and conclusions described in Mr. Kramer's report, dated  
5 November 2, 2011 are hereby adopted and incorporated into these findings  
6 of the City Council. The Council further finds:

- 7
- 8 i. The applicant has refused and failed to provide the data and  
9 other documentation supporting the opinions offered by  
10 Verizon's engineer Mr. Stefano Iachella as requested by the  
11 City Council at its September 19, 2011 hearing on the  
12 application. It is not possible to evaluate the accuracy of  
13 the opinions expressed by Mr. Iachella without knowing  
14 the data and documentation upon which his opinions are  
15 based.
- 16
- 17 ii. The applicant failed to provide signal coverage maps based  
18 on individualized coverage studies for each of the seven  
19 alternative sites identified by the applicant. Instead, the  
20 applicant simply used the coverage study it prepared for the  
21 subject property and applied it to the alternative sites. This  
22 approach fails to take into account the different topography,  
23 elevation, and surrounding development and natural  
24 features of each site that will affect signal coverage from a  
25 particular site.
- 26
- 27 iii. The applicant failed to consider or evaluate the signal  
28 coverage that would result from maintaining the existing  
29 facility in an "as is" condition on the subject property and  
30 installing a new wireless facility that conforms to all  
31 development standards on an alternative site.
- 32
- 33 d. The modification of the existing nonconforming wireless facility is not  
34 necessary for the provision of wireless communications services to Albany  
35 residents and businesses or other persons traveling in or about the City.  
36 The existing facility currently is providing wireless services to area of the  
37 City shown on the coverage map for the subject property provided by the  
38 applicant. The denial of the application will not affect in any manner this  
39 existing service and coverage. As described above, the applicant has  
40 failed to show why it cannot provide the new services it proposes to  
41 provide from one or more alternative sites in the City or adjacent  
42 communities in a manner that complies with all development standards,  
43 including but not limited to the height limitation.
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45 6. The City Council makes the following findings pursuant to Section  
46 20.100.050.E related to the requested Design Review:

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- a. The proposed project does not conform to the applicable provisions of the Planning and Zoning Code as the proposed modification to an existing nonconforming wireless facility violates the height limitation imposed by Section 20.20.100.E.2.h and 4.b. The proposed project also violates the nonconforming structure requirements of Section 20.44.030 as the proposed project does not constitute maintenance for the reasons stated in Section 4 of this Resolution.
  
- b. Approval of the project is not consistent with the purpose and intent of Design Review and is not in the interest of the public health, safety and general welfare. The existing facility exceeds the City’s height limit by 17 feet. Photographs of the subject site presented at the hearing demonstrate that the existing facility far exceeds the height of the adjacent commercial and residential buildings in a visually dominating manner and is unsightly and out of character with the surrounding area. The application adds eight new coaxial cables to the facility that will add to the visual clutter of the existing pole. The antenna enclosures will use bottom connectors that require substantially more visible antenna cables as compared with rear mounted connectors. Due to the significant service upgrade proposed by the application, it is anticipated that additional equipment will need to be added to the pole to provide the new advanced services proposed by the application. Further, the proposed modification and upgrade to the existing nonconforming wireless facility will improve, upgrade and extend the life of a nonconforming structure contrary to the purposes and requirements of Section 20.44.030. The proposed modification and upgrade also is contrary to general planning and zoning principles under California law that encourage the replacement of nonconforming structures with new development that will conform to current Code requirements.

7. This Resolution shall take effect immediately upon its adoption.

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I HEREBY CERTIFY that the foregoing Decision was duly adopted by the City Council of the City of Albany at a public meeting of said City Council held on the 7<sup>th</sup> day of November, 2011, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

\_\_\_\_\_  
FARID JAVANDEL  
MAYOR

ATTEST: \_\_\_\_\_

City Clerk

APPROVED AS TO FORM: \_\_\_\_\_

Robert Zweben  
City Attorney