

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

Agenda Date: September 19, 2011
Reviewed by: BP

SUBJECT: Appeal of the Planning and Zoning Commission's Decision to Deny the Application for Design Review and Conditional Use Permit for a Wireless Antenna at 423 San Pablo

REPORT BY: Jeff Bond, Community Development Director

STAFF RECOMMENDATION

That the City Council uphold the decision of the Planning and Zoning Commission and deny the application for Design Review and Conditional Use Permit for a Wireless Antenna at 423 San Pablo. This recommendation is based on the record before the Planning Commission. The staff recommendation may change if the applicant submits additional and sufficient evidence at the Council hearing that no alternative sites or solutions are feasible

BACKGROUND

The applicant requests City approval to allow the removal and replacement of the existing wireless communication antenna enclosures and replacement with four new antenna enclosures on an existing 65-foot high monopole. The existing pole is located at the rear (east) side of the property. Metro PCS also has an array of antennas at the 45 foot height on the same monopole.

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). Thus, the monopole is an existing legal non-conforming facility pursuant to the Wireless Communication Facility provisions of the City's Planning and Zoning Code adopted in 2005. 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 (Section 20.20.100(A)(5)). In this situation, the Metro PCS antennas will remain in operation regardless of the outcome of the Verizon application as they have not applied for any modifications.

Timeline of Events

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.

On November 1, 2010, Councilmember Atkinson made a request that the City Council review the Commission's decision on this matter.

The review was conducted on December 13, 2010, and the City Council voted unanimously to approve a determination that the proposed project was not routine maintenance but instead an upgrade to a nonconforming facility. The council directed that the matter be returned to the Planning & Zoning Commission and staff for a Conditional Use Permit including a full analysis of alternative site considerations that could be feasible. This was a specific requirement of application completeness for a future application. It also is codified in Section 20.20.100(4)(8)(b) of the Municipal Code.

On January 20, 2011, the applicant submitted a new application (Attachment 1). The plans appear to be the same plans evaluated by the City in 2010. Also attached is an exchange of correspondence between the applicant and the City regarding the completeness of the application (Attachment 2).

On July 26, 2011, the Planning and Zoning Commission held a public hearing on the application (staff report Attachment 3 and meeting minutes Attachment 4). On a 3-0 vote, the Commission denied the application based on the following findings:

1. The existing installation is a legal non-conforming facility;
2. The City Council has determined that the proposed upgrade is not maintenance;
3. The proposed installation at 62 feet in height exceeds the development standard of a 48 foot height limit; and

4. The Commission is unable to make the findings of section 20.100.030 regarding the necessity, desirability, and compatibility because the proposal is not consistent with the City ordinances.

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 5).

In 2005, the City adopted Wireless Communications Facilities (Planning and Zoning Code Section 20.20.100, Attachment 6). 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. 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.

Planning and Zoning Code Section 20.20.100F5.a.(3) is critical to this application. This section allows Crown Castle to seek an exception to the height limitation that makes the wireless facility nonconforming if the following finding is made:

“...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 have 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.

DISCUSSION

On August 8, 2011, an appeal was filed of the Commission's decision to deny the application (Attachment 7). 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, making findings for approval and approving conditions of approval
(Resulting in approval of the application).
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).)

Analysis of Key Appeal Issues

Two primary issues were raised in the appeal:

1. Decision unsupported by substantial evidence – The appellant argues that the information presented in the hearing demonstrates that construction of a new site is infeasible to maintain coverage and capacity objectives.

At the public hearing, the applicant provided a PowerPoint presentation (Attachment 8) that looked at sites currently controlled by Verizon or by Crown Castle. The analysis concludes that reducing the height of the pole is not feasible because of conflicts with the Metro PCS antenna lower on the pole. In addition, the analysis concludes that a joint use facility is preferable to construction of a new stand-alone facility.

At no point in the review process has the installation of new technologies, in themselves, been raised as a concern. From staff's perspective, the analysis did not sufficiently address the feasibility of alternative locations within the City of Albany that would be compliant with development standards and serve the required coverage area.

2. Handling of application was flawed – the appellant argues that staff deemed the application complete and then reversed that position during the Planning and Zoning Commission hearing, prejudicing the applicant’s rights to a fair and impartial hearing.

Normally a planning application is not scheduled for a public hearing until the application is determined by staff to be complete. In this case, the requirement of the evaluation of alternatives was stated in writing to the applicant. Based on the response from the applicant, it was clear that the information requested by staff would not be provided and the applicant stated they were prepared to move forward absent the requested analysis. At the request of the applicant, the Planning and Zoning Commission hearing was scheduled with the understanding that City staff continue to believe that such studies are necessary in order to approve the application.

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.

SUSTAINABILITY IMPACT

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

FINANCIAL IMPACT

City staff anticipates that the applicant may pursue legal action if the appeal is denied, in which case the City would incur defense costs.

Attachments

1. Application
2. Correspondence
3. Planning and Zoning Staff Report
4. Planning and Zoning Meeting Minutes
5. Excerpt from Telecommunications Act
6. City of Albany Wireless Communications Facilities Requirements (Planning and Zoning Code Section 20.20.100)
7. Appeal filed August 8, 2011
8. Applicant’s PowerPoint Presentation July 27, 2011