

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

Agenda Date: November 21, 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, based on the attached findings.

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 Verizon. 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 reflected 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 voluntarily 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 authorized by 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). Due to the applicant's refusal to provide the alternative site analysis requested by the Council and demanded by staff and the applicant's threat of litigation over the permitted time period for City review under the FCC rules, staff accepted the application but warned the applicant that the City was not waiving its right to require more information from the applicant, including the right of the Commission or Council to require alternative site studies. Concurrently with the acceptance of the application for processing, the applicant and the City entered into a Tolling Agreement on the time period required by the FCC rules for acting on the application. This Tolling Agreement has been extended by mutual agreement of the parties to November 9, 2011.

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 and a sufficient alternative solutions analysis was not submitted by the applicant.

On September 19, 2011, the City Council held a public hearing on the appeal. The applicant presented a PowerPoint presentation on the project showing the alternative solutions analysis. The applicant's presentation indicated that no other alternative solution is feasible and that their application is maintenance of a legal non-conforming site. Following the public hearing, members of the City Council discussed the application and approved a motion to 1) postpone action until the next meeting pending an independent review by a City selected technical advisor; 2) ask for written documentations of the actual alternative analysis conducted by the applicant (staff report Attachment 5 and meeting minutes Attachment 6). With the consent of the applicant, the consideration of the appeal has been continued to this meeting.

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 7).

In 2005, the City adopted Wireless Communications Facilities (Planning and Zoning Code Section 20.20.100, Attachment 8). 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 common. 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 on the Commission’s decision to deny the application (Attachment 9). 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 Planning and Zoning Commission public hearing, the applicant provided a PowerPoint presentation (Attachment 10) 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 the City Council meeting, additional alternative analysis was presented by the applicant (Attachment 11). There was no supporting technical information provided as part of the presentation.

Following the City Council’s hearing, staff retained the services of Jonathan Kramer to review the new analysis. Through the City’s’ legal counsel, an information request was submitted to Crown Castle on September 22, 2011 seeking information on the frequencies and signal level of coverage (e.g., signal strength) illustrated in coverage maps (Attachment 12).

The applicant filed a brief response to the questions that failed to provide most of the information requested, as indicated in correspondence dated October 3, 2011 from Stefano Iachella (Attachment 13) and correspondence dated October 5, 2011 from Joseph Parker (Attachment 14). Verizon failed to provide the supporting documentation for Mr. Iachella's conclusions. Based on information available in the record, the attached report was prepared by Mr. Kramer (Attachment 15). The report provides an analysis of the proposed installation and the inadequacy of the Verizon analysis of alternative sites.

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. Further, the applicant threatened litigation if the City did not proceed forward with setting a hearing on the application before the Commission. 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. The applicant also was advised that the City was not waiving the right of the Commission or Council to require alternative site studies.

In addition to information provided by the applicant, attached is correspondence received from the public (Attachment 16). In summary, correspondence received to date expresses concern about the application.

Action by the City Council

In acting on the appeal, the City Council may:

1. Affirm the decision of the Planning and Zoning Commission, based on the attached findings for denial.
(Resulting in denial of the application.)

2. Reverse the action of the Planning and Zoning Commission, making findings for approval and approving conditions of approval.
(Resulting in approval of the application.)

3. 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.)
4. Take no action.
(Resulting in approval of the action taken by the Commission (e.g., denial of the application.)

Based on information in the record at the time of preparation of this staff report, utilizing the independent professional analysis, staff and legal counsel has prepared the attached findings for denial (Attachment 17). In summary, the basis for denial is that the applicant has failed to meet its burden of proof under Section 20.20.100F.5.a(3) that strict compliance with the height requirements of the Development standards would not provide for adequate radio frequency signal reception and that no other alternative solutions that would meet the Development Standards are feasible. In addition, the proposed replacement of the four antenna enclosures with new and additional equipment will add to the visual unsightliness of the existing facility.

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. City Council Staff Report
6. City Council Meeting Minutes
7. Excerpt from Telecommunications Act
8. City of Albany Wireless Communications Facilities Requirements (Planning and Zoning Code Section 20.20.100)
9. Appeal filed August 8, 2011

10. Applicant's PowerPoint Presentation July 27, 2011
11. Applicant's PowerPoint Presentation September 19, 2011
12. September 22, 2011 Information Request
13. October 3, 2011 Correspondence from Stefano Iachella
14. October 5, 2011 Correspondence from Joseph Parker
15. Kramer.Firm.Inc Independent Report November 2, 2011
16. Correspondence from the public
17. Draft findings for denial