

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

Agenda Date: July 2, 2012

Reviewed by: BP

SUBJECT: Appeal of Planning and Zoning Commission Decision Denying Planning Application #08-038- Conditional Use Permit & Design Review for a New AT&T Wireless Facility at 1035 San Pablo Avenue

REPORT BY: Anne L. Hersch, AICP, City Planner

PLANNING & ZONING COMMISSION ACTION

Denial of the application for Design Review and Conditional Use Permit for a new roof-mounted wireless facility at 1035 San Pablo Avenue, based on the attached findings.

BACKGROUND

The applicant is seeking City approval to install a new wireless facility at 1035 San Pablo Ave. Currently, AT&T has no facilities in the City of Albany. The nearest locations include El Cerrito Plaza (1.2 miles from the proposed location) and 1255 Eastshore Freeway in Berkeley (approximately 1 mile from the proposed location). The applicant is seeking a Conditional Use Permit and Design Review approval to allow installation of nine (9) new antenna units in three groups on the north, south, and east facing portions of an existing commercial building.

The Planning & Zoning Commission moved to deny the project request at its May 8, 2012 hearing by a 3-1 vote. This project has gone through various design iterations in the past four years. The most recent design proposal presented on May 8, 2012 included a modification to install the antennas on the building, locate supporting equipment in the roof-top penthouse (eliminating a previously unpermitted conversion to habitable space) and reduce roof-top coverage to less than 1 sq. ft. in area. The Planning Commission determined the following findings as part of the application denial:

- The existing roof top coverage exceeds the 10% threshold contained in Section 20.24.080 (B) of the Albany Municipal Code.
 - There is an existing Sprint facility on the roof of the building which occupies 265 sq. ft. of roof-top space and an existing roof-top penthouse which is 432 sq. ft in area. Combined, this results in roof-top coverage of 14.5%.

Rooftop Area	4,786 sq. ft.
(E) Penthouse	432 sq. ft.
(E) Sprint	265 sq. ft.
Total (E)	697 sq. ft.
Percentage Coverage	14.5%

Table 1. Roof-top coverage calculations

- The building itself is legal non-conforming and exceeds the height requirements for the San Pablo Commercial zoning district.
- The project does not comply with Section 20.24.080 (C) as the installation on the south side of the site exceeds the height limit by more than 6’ and is within ten feet of the perimeter of the plate line of the top story.

Timeline of Events

This application request was filed on May 22, 2008. To date, this application request was presented to the Planning & Zoning Commission on several occasions in the past three years. Below is a brief overview of the key dates for this application.

May 22, 2008-AT&T files an application with the City of Albany for a Conditional Use Permit and Design Review for a new roof-mounted wireless facility at 1035 San Pablo Ave.

May 26, 2009- the applicant asked for a continuance of this item at the hearing. Public comment was received and the Commission moved to continue the item to a date uncertain.

October 26, 2010- the application is brought back to the Planning & Zoning Commission. Public comment is received and the Commission moved to continue the item to a date uncertain pending further preparation of an alternatives analysis by AT&T.

October 22, 2011-the applicant submitted new plans and supporting information to the City.

December 15, 2012-the application is deemed complete.

January 10, 2012- a study session is held by the Planning & Zoning Commission. Public comment is received and the Commission directs staff to do the following:

- Staff to walk the roof top and measure the building height and verify the roof-top and penthouse dimensions provided in the plans
- Staff to visit the penthouse and provide a report with photographs of the interior space

- Staff to verify the use and history of the break room/penthouse and determine when it became conditioned space and if it was ever used for mechanical equipment

February 28, 2012-item is scheduled for action by the Planning & Zoning Commission with a recommendation for approval. The Commission determined that the 10% roof-top coverage is exceeded and directs the applicant to modify the site plan in one of two ways:

- Consider relocating equipment into the mechanical equipment room and make findings pursuant to Section 20.20.100 (D) (4) of the Albany Municipal Code.
- Consider reducing equipment height to less than 6 ft. in height pursuant to Section 20.24.080 (C) of the Albany Municipal Code where equipment that is than 6 ft. in height is allowed up to 20% roof coverage.

April 24, 2012-the Commission reviews the revised plan of reduced equipment height. AT&T also indicates that they would be willing to relocate equipment into the mechanical equipment room if the Commission prefers. The Commission determines that the installation will ultimately increase the roof coverage area and violates Section 20.24.080 (B) of the Albany Municipal Code. The Commission continues the matter to a date certain of May 8, 2012 so that staff may craft findings of denial related to roof coverage and non-compliant building height.

May 8, 2012- the Albany Planning & Zoning Commission voted 3-1 to deny the application request for a new wireless facility at 1035 San Pablo Ave.

May 22, 2012- AT&T filed an appeal of the Planning & Zoning Commission's denial decision with the Albany City Clerk for City Council review.

ANALYSIS

Existing Sprint Facility

The existing Sprint facility was installed at 1035 San Pablo Ave. in 1997, well before adoption of the City's Wireless Ordinance. Sprint applied for an Administrative Conditional Use Permit in 2001. Administrative Use Permit 01-056 was approved by the Planning & Zoning Commission on October 21, 2001 and allowed for an additional antenna sector and two new antennas within existing sectors.

Sprint applied for a Conditional Use Permit 05-029 to relocate four (4) existing telecommunications antennas from the northeast façade to the north wall of the equipment shelter on the rooftop of the building. However, no action was ever taken on this application request as it was never deemed complete. The Sprint facility is legal non-conforming as it pre-dates the City's Wireless Communication Facilities Ordinance.

Appeal

On May 22, 2012, an appeal was filed by AT&T Wireless of the Commission's decision to deny the application (Attachment 15). Six issues were identified by AT&T's legal counsel in the appeal letter:

1. ***The Planning & Zoning Commission did not act in accordance with recommendations of staff and outside consultants***

- The Planning & Zoning Commission members have many years of experience and a strong technical grasp of the code. As a result, they independently evaluate applications and the requirements of the code and from time to time and reach different conclusions than staff. The Commission is within its police power in determining that roof coverage threshold is currently in excess of the required 10% and approved findings supporting their interpretation of the Municipal Code. Consultant recommendations were related to the technical aspects of telecommunications, and the consultants themselves were not asked to evaluate the application for compliance with the Albany Municipal Code.

2. ***No less intrusive sites available/ No feasible way to meet coverage objectives –***

- Based on the alternatives analysis submitted by the applicant, there is one other site within their search ring where the landlord is willing to lease to AT&T. The facility at 979 San Pablo Ave. does not have a roof coverage issue and could be suitable for a new wireless facility. While it would not be a co-location, the building is compliant with the development standards contained in the Municipal Code and does not have legal non-conforming status, unlike the site at 1035 San Pablo Ave. In reviewing the coverage maps provided by the applicant as well as their own description of coverage from this location “such a facility would provide satisfactory coverage throughout a majority of the ring similar to the proposed site; however, marginal coverage would still exist in the western portion of the ring.” (P.11 of the Alternatives Analysis-Attachment 11). Based on this language as well as the site characteristics, the building at 979 San Pablo Ave. is less intrusive and available site which would allow AT&T to provide a majority of coverage in their desired search ring.

3. ***Denial is inconsistent with preference for co-location with facilities of other carriers***

- The Zoning Code does indicate a preference for co-location facilities in Section 20.20.100 (E) (2) (a). However, co-location sites must still satisfy the development standards contained in the City's Wireless Communication Facilities Ordinance and Section 20.24.080 (B) of the Albany Municipal Code.

4. *Unreasonably strict interpretation of rooftop coverage requirements*

- The Commission has been consistent across a wide range of application types in requiring new construction to comply with dimensional requirements of the code, even when it is a matter of inches with no significant impact on neighboring properties.

5. *Refusal to consider actual use of the rooftop enclosures*

- A site plan from the original construction documents from 1984 was provided to the Planning & Zoning Commission and shows that the roof-top penthouse was originally intended to be used as a mechanical equipment room. It was clearly designed to house supporting equipment for the building and not be used as habitable space. Additionally, the City is under no obligation to accept a use if it was constructed without permits. In this case, no attempt has been made by the applicant or property owner to legalize this use.

6. *Denial is preempted by Federal law*

- The Federal Telecommunications Act preserves the right for local jurisdictions to establish zoning and land use standards for wireless facilities. The City of Albany retains police power through zoning regulations for the placement, location, and other applicable development standards to regulate wireless facilities.

Through the Commission review process and findings, it has been noted that the building at 1035 San Pablo Ave. is legal non-conforming with regard to building height and roof coverage. Additionally, the existing Sprint facility is legal non-conforming as it pre-dates the City's Wireless Ordinance, violates the setback requirements from residential property, and already exceeds the allowable roof-top coverage.

The appellant notes that there are two fundamental issues with federal regulations and the application request:

- Significant gap in coverage of personal wireless services
- Effective prohibition test whether the proposal is the least intrusive means to fill the coverage gap

It has been acknowledged in each staff report that AT&T does not have any wireless facilities in the City of Albany. However, the alternatives analysis shows that the building at 979 San Pablo Ave. is less intrusive (i.e. no legal non-conforming issues) and available site which would allow AT&T to provide a majority of coverage in their desired search ring and would "provide satisfactory coverage throughout a majority of the ring similar to the proposed site; however, marginal coverage would still exist in the

western portion of the ring.” (P.11 of the Alternatives Analysis-Attachment 11).

Since this would be a new facility and identified as an existing facility, it is not subject to Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012. Section 6409 allows for modifications to existing wireless tower facilities only.

Action by the City Council

Interpretation for Denial

If the City Council chooses to affirm the decision of the Planning and Zoning Commission, it may uphold the findings for denial. The Council may also include additional findings for denial as part of this action. The Commission moved to deny the application request based on the following details:

- The existing roof top coverage exceeds the 10% threshold contained in Section 20.24.080 (B) of the Albany Municipal Code.
- The building itself is legal non-conforming, and exceeds the height requirements for the San Pablo Commercial zoning district.
- The project does not comply with Section 20.24.080 (C) as the installation on the south side of the site exceeds the height limit by more than 6’ and is within ten feet of the perimeter of the plate line of the top story.

Interpretation for Approval

If the City Council were to provide direction to approve the Design Review and Conditional Use Permit request, the item should be continued to a date uncertain so that Section 20.24.080 (B) of the Albany Municipal Code could be amended to increase roof top coverage above the current threshold of 10%. Section 20.24.080 “Height Limits and Exceptions” (B) establishes a roof coverage threshold for ancillary structures. At the present, the aggregate of such structures may not exceed 10%. The threshold was established as part of the Zoning Code update in 2005. Prior this, there were no prescribed roof coverage requirements in the Code. If the Council is inclined, they may direct an increase beyond the current 10% threshold. Fire Code establishes maximum roof coverage for structures at 33%. Should the Council direct an amendment to the Zoning Code, the new roof coverage requirement should not exceed 33% as that is the maximum threshold for fire life safety.

B. General Exceptions. Subject to approval of a use permit, towers, spires, cupolas, chimneys, elevator penthouses, water tanks, monuments, flagpoles, theatre

scenery storage structures, fire towers, and similar structures may be erected to a height not more than ten (10) feet above the height limit prescribed by the regulations for the district in which the site is located, provided that no such structure shall be used for habitable space or advertising purposes, and provided that the aggregate of such structures does not cover more than ten (10%) percent of the roof area of the top floor of the structure to which they are attached. All structures that exceed the height limit shall be subject to design review.

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. Section 704 “Facilities Siting, Radio Frequency Emission Standards” (a) National Wireless Telecommunications Siting Policy- Section 332 (c) (47 U.S.C. 332(c)) (7) (B) Title VII, Section 704 of the Federal Telecommunications Act of 1996 precludes municipalities from making findings of denial based on radio frequency emissions or health concerns. Provision iv specifically prevents a jurisdiction from denying the application request as a result of radio frequency or health concerns. Wireless telecommunications providers and the City are required to adhere to accepted radiofrequency standards as established the Federal Communications Commission (FCC).

In 2005, the City adopted a Wireless Communications Facilities Ordinance (Planning and Zoning Code Section 20.20.100, Attachment 16). 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.

FCC SHOTCLOCK REQUIREMENTS

In 2009, the Federal Communications Commission (FCC) established “Shot Clock” provisions for municipal land use planning authorities to insure timely processing of wireless applications. This decision was the result of CTIA-The Wireless Association, a trade organization representing the wireless industry, petitioning the FCC to limit local review length for application processing. The FCC’s ruling has resulted in a 90 day review limit for collocation applications and 150 day review for siting applications other than collocations. The ruling was recently challenged and upheld in the 5th Circuit Court of Appeals in the case of City of Arlington, Texas vs. The FCC.

This application request was reinitiated on October 21, 2011 when a revised application request was submitted to the City of Albany. This application was then deemed complete and letter of completeness was sent to the applicant on December 15, 2011. This application request was presented as a study session item less than one month later on January 10, 2012. A hearing recommending action was held on February 28, 2012 and the item was continued to a date uncertain by the Planning & Zoning Commission. Modifications to the application have resulted in resetting the time frame provided for City review.

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

AT&T’s legal counsel has indicated through various letters submitted as part of the public record that they have considered pursuing litigation against the City of Albany in federal court. (See Attachments 13, 15 & 16) Staff anticipates that the applicant may pursue legal action if the appeal is denied, in which case the City would incur legal defense costs.

Attachments

1. Analysis of Zoning Compliance
2. Findings of Denial
3. Commission Resolution containing Findings of Denial
4. Alternatives Analysis Matrix
5. Alternatives Analysis Report
6. Propagation Maps (including maps for the alternatives analysis)
7. EMF Report
8. Photo Simulations
9. Revised Project Plans
10. Report From Jonathan Kramer
11. Recent & Older Correspondence
 - a. Correspondence October 2010
 - b. Correspondence ARROW dated 10/26/10
 - c. All Correspondence received for the 1/10/12 P&Z study session
 - d. All Correspondence received 2/24/12

- e. All Correspondence received for the 2/28/12 P&Z hearing and afterwards
- 12. Meeting Minutes Excerpts
 - a. 5/26/09 P&Z hearing
 - b. 10/26/10 P&Z hearing
 - c. 1/10/12 P&Z hearing
 - d. 2/28/12 P&Z hearing
- 13. Letter from AT&T Legal Counsel received 4/18/12
- 14. Letter from AT&T's Legal Counsel Received May 4, 2012
- 15. Appeal Form and Submittal from AT&T
- 16. Section 20.20.100 Wireless Communications Facilities Ordinance
- 17. E-mail from USDA declining the wireless facility siting at their facilities

ATTACHMENT 1 – ANALYSIS OF COMPLIANCE WITH ZONING REQUIREMENTS

20.12 Zoning Districts and Permitted Uses

General Plan: Commercial
Zoning: SPC (San Pablo Commercial)

20.16 Land Use Classifications

Office

Surrounding	North - Commercial	East – Residential
Property Use	South - Commercial	West – Commercial

20.20.080 Secondary Residential Units.

Not applicable.

20.24.020 Table of Site Regulations by District.

Not applicable.

20.24.030 Overlay District Regulations.

Not applicable.

20.24.040 Hillside Residential Regulations.

Not applicable.

20.24.050 Floor-Area-Ratio.

Not applicable.

20.24.060 Setback Areas, Encroachments.

Not applicable.

20.24.070 Setbacks with Daylight Planes.

See Discussion of Key Issues.

20.24.080 Height Limits and Exceptions.

See Draft Findings

20.24.100 Distances between Structures.

Not applicable.

20.24.110 Fences, Landscaping, Screening.

See Draft Findings.

20.24.130 Accessory Buildings.

Not applicable.

20.28 Off-Street Parking Requirement.

Not applicable.

20.40 Housing Provisions

Not applicable.

20.44 Non-conforming Uses, Structures and Lot

Not applicable.

20.48 Removal of Trees

Not applicable.

20.52 Flood Damage Prevention Regulations

Not applicable.

20.58 Art in Public Places Program

Not applicable.

20.100.030 Use Permits.

Not applicable.

20.100.040 Variances.

Not applicable.

20.100.010 Common Permit Procedures.

Public notice of this application was provided on June 22, 2012 in the form of mailed notice to property owners and occupants within a 300-foot radius, and posted in three locations.

20.100.050 Design Review.

See Discussion of Key Issues.

ATTACHMENT 2 – DRAFT FINDINGS OF DENIAL
Findings for Design Review Denial (Per section 20.100.050.E of the AMC)

Required Finding	Explanation
<p>1. <i>The project conforms to the General Plan, any applicable specific plan, applicable design guidelines adopted by the City of Albany, and all applicable provisions of this Chapter.</i></p>	<p>The Commission is unable to make the required findings for approval because the project does not comply with Section 20.24.080 (B) where roof coverage cannot exceed 10%. Currently, the roof-top coverage exceeds the threshold and is 14.5%. This coverage includes existing Sprint equipment facilities and the roof-top penthouse.</p>
<p>2. <i>Approval of project design is consistent with the purpose and intent of this section, which states “designs of projects...will result in improvements that are visually and functionally appropriate to their site conditions and harmonious with their surroundings, including natural landforms and vegetation. Additional purposes of design review include (but are not limited to): that retention and maintenance of existing buildings and landscape features are considered; and that site access and vehicular parking are sufficient.”</i></p>	<p>The Commission is unable to make the required findings for approval because the project as proposed would make the legal non-conforming subject site further non-conforming by increasing the roof coverage area. Additionally, the existing building height is legal non-conforming and is 40 ft. in height.</p>
<p>3. <i>Approval of the project is in the interest of public health, safety and general welfare.</i></p>	<p>The Commission is unable to make the required findings for approval because the Zoning Code is adopted in order to protect and promote public health, safety, peace, comfort, convenience, prosperity, and general welfare. The project as it is proposed fails to comply with Section 20.24.080 (B) of the Albany Municipal Code. By failing to comply with provisions contained in the Zoning Code, the project as proposed does not protect the public health, safety and general welfare of the community.</p>
<p>4. <i>The project is in substantial compliance with applicable general and specific Standards for Review stated in Subsection 20.100.050.D.</i></p>	<p>The Commission is unable to make the required findings for approval because the proposed project is inconsistent with provision (j) “Retention and Maintenance of Buildings.” The project design fails to improve the existing building and would make the building further non-compliant by increasing roof coverage.</p>

Findings for Conditional Use Permit Denial as required by Section 20.100.030.D:

Required Finding	Explanation
<p><i>1. The size, location and intensity of the project are desirable and compatible with the neighborhood and community.</i></p>	<p>The Commission is unable to make the required findings for approval because the size of the project as proposed exceeds the roof-top coverage requirements contained in Section 20.24.080 (B). The project location is proposed to be a legal non-conforming building and roof-top. The intensity of roof coverage would be further increased if the use were to be approved and the project constructed. Due to these inconsistencies, the project is not compatible with the surrounding neighborhood and community.</p>
<p><i>2. The project will not be detrimental to the health, safety, convenience or general welfare of people residing or working in the vicinity, or injurious to property, improvements or potential development in the vicinity, with respect to aspects including but not limited to the following:</i></p> <p><i>a. The nature of the proposed site, including its size and shape,</i></p> <p><i>and</i></p> <p><i>the proposed size, shape and arrangement of structures</i></p> <p><i>b. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading.</i></p> <p><i>c. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor.</i></p> <p><i>d. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs.</i></p>	<p>a. The Commission is unable to make the required findings for approval because the proposed equipment and arrangement of structures would increase the roof-top coverage, which is already fails to comply with provision 20.24.080 (B) where there is a maximum of 10% roof-top coverage.</p> <p>b. N/A</p> <p>c. N/A</p> <p>d. N/A</p>

<p><i>3. That such use or feature as proposed will comply with the applicable provisions of this Chapter and will be consistent with the policies and standards of the General Plan.</i></p>	<p>The Commission is unable to make the required findings for approval because the project as proposed fails to comply with Section 20.24.080 (B) where roof coverage cannot exceed 10%. Currently, the roof-top coverage exceeds the threshold and is 14.5%. This coverage includes existing Sprint equipment facilities and the roof-top penthouse.</p>
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Findings for Denial as required by Section 20.20.100F.5:

Required Finding	<i>Explanation</i>
<p>The establishment or expansion of the facility demonstrates a reasonable attempt to minimize stand-alone facilities, is designed to protect the visual quality of the City, and will not have an undue adverse impact on historic resources, scenic views, or other natural or man-made resources.</p>	<p>The Commission is unable to make the required findings for approval because the establishment of the facility would adversely impact an existing non-conforming building. As proposed, the project would increase the roof-top coverage and fails to comply with the Albany Municipal Code.</p>
<p>All applicable Development Standards in subsection 20.20.100.E. above have been met; or: 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.</p>	<p>The Commission is unable to make the required findings for approval because the Section 20.20.100 (E) (2) (h) specifically cross references compliance with Section 20.24.080 (B) and classifies wireless facilities as ancillary roof-top structures which cannot exceed 10% roof-top coverage.</p>
<p>The placement, construction, or modification of a wireless telecommunications facility in the proposed location is necessary for the provision of wireless communication services to Albany residents and businesses, or their owners, customers, guests, or invitees, or other persons traveling in or about the City.</p>	<p>The Commission is unable to make the required findings for approval because the proposed location is not suitable for the installation of wireless facility as the building and roof top coverage are legal-nonconforming.</p>
<p>Finding for establishment of a satellite dish or parabolic antenna exceeding thirty-nine (39) inches in diameter: A smaller or different antenna cannot feasibly accomplish the provider's technical objectives and that the facility will not be readily visible.</p>	<p>N/A</p>
<p>Findings for the establishment of a wireless communications facility that is not co-located with other existing or proposed facilities or a new freestanding pole or tower (at least one (1) finding required):</p> <ul style="list-style-type: none"> a) Co-location is not feasible; b) Co-location would have more significant adverse effects on views or other environmental consideration; c) Co-location is not permitted by the property owner; 	<p>The project as proposed would be considered a co-location. These provisions are not applicable to the application request.</p>

Required Finding	<i>Explanation</i>
d) Co-location would impair the quality of service to the existing facility; e) Co-location would require existing facilities at the same location to go off-line for a significant period of time; or	