



BOARD OF SUPERVISORS
AGENDA LETTER

Agenda Number:

Clerk of the Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101
(805) 568-2240

Department Name: Planning &
Development
Department No.: 053
For Agenda Of: March 16, 2010
Placement: Departmental
Estimated Tme: 0.4 hours
Continued Item: No
If Yes, date from:
Vote Required: Majority

TO: Board of Supervisors

FROM: Department Glenn Russell Ph.D., Director, 568-2085
Director Planning and Development
Contact Info: Dave Ward, Deputy Director, 568-2520
Development Review Division-South County

SUBJECT: NextG Cellular Antenna ESB14 Appeal

County Counsel Concurrence

As to form: Yes

Auditor-Controller Concurrence

As to form: N/A

Other Concurrence:

As to form: N/A

Recommended Actions:

That the Board of Supervisors to consider the NextG appeal of the Montecito Planning Commission's January 27, 2010 denial of the NextG Cellular Antenna ESB14 permit, Case No. 09LUP-00000-00319 located in the public right of way of Olive Mill Road (adjacent to APN 009-130-015) in Montecito, First Supervisorial District, and take the following actions:

1. Uphold the appeal, Case No. 10APL-00000-00006, thereby overturning the Montecito Planning Commission's denial of 09LUP-00000-00319;
2. Make the required findings for approval of Case No. 09LUP-00000-00319, included in Attachment A of this Board Letter;
3. Accept the Notice of Exemption to CEQA prepared and adopted by the Public Utilities Commission, the lead agency, on July 20, 2009, as adequate pursuant to sections 15061(b)(3), 15301(b), 15301(c), 15302(c) and 15304(f) of the CEQA Guidelines included as Attachment C of the Montecito Planning Commission Staff Report dated January 8, 2010, (included as Attachment 2 to the set hearing Board Letter dated March 2, 2010); and

4. Grant *de novo* approval of Case No. 09LUP-00000-00319, subject to the conditions of approval, in Attachment B of the Montecito Planning Commission Staff Report dated January 8, 2010 as amended by the Errata Memo dated January 27, 2010, (included as Attachment 2 to the set hearing Board Letter dated March 2, 2010).

Refer back to staff for additional analysis (significant gap analysis and identification of alternative sites) if the Board of Supervisors takes other than the recommended action.

Summary Text:

History of Project on Appeal

NextG's application for 09LUP-00000-00319 was submitted on August 5, 2009. The project is a request by the agent, Sharon James, for the applicant, NextG Networks of California, Inc., for a Land Use Permit to allow construction and use of an unmanned, telecommunications facility under the provisions of County Code zoning requirements on property zoned 2-E-1. The unmanned wireless facility would include one 26-inch whip omni antenna. The antenna is omnidirectional and would be mounted on an existing wood pole in the public right of way.

Planning & Development staff approved the permit application on December 4, 2009. An appeal by Susan Basham, on behalf of the appellant group, was timely filed on December 14, 2009. Staff brought the appeal case (09APL-00000-00038) before the Montecito Planning Commission on January 27, 2010.

At the January 27, 2010 hearing, the Montecito Planning Commission upheld Ms. Basham's appeal, and denied the project on the basis that the Land Use Permit Finding requiring that, "The proposed development conforms: (1) to the applicable provisions of the Comprehensive Plan including the Montecito Community Plan; and (2) with the applicable provisions of this Development Code or falls within the limited exception allowed in compliance with Chapter 35.491 (Nonconforming Uses, Structures, and Lots)" could not be made. The Commission made this finding for denial "*based on lack of evidence that there was a thorough and complete review of the aesthetics and of the other information that should have been considered, and that this project was viewed as Tier 1 project when evidence would support that this should have been considered as a network, or a system as a whole.*"¹ An appeal of the Montecito Planning Commission's decision was timely filed by Patrick Ryan, on behalf of NextG Networks, on February 5, 2010 (see letter in Attachment 1 of set hearing Board Letter dated March 2, 2010). The appeal issues raised by Mr. Ryan will be discussed further below under "Analysis of Appeal Issues."

Background:

Permit Processing Tiers: Ordinance History

The County of Santa Barbara first adopted specific permitting regulations for wireless telecommunications facilities in 1997. The following quote from a March 26, 2002 Board Agenda Letter for a later amendment summarizes the purposes of the original ordinances.

¹ Montecito Planning Commission Action Letter, dated February 2, 2010, included as Attachment 3 to the set hearing Board Letter dated March 2, 2010.

*"On June 24, 1997, the Board of Supervisors adopted amendments to the Article II, III and IV zoning ordinances that established new permit procedures aimed at streamlining the process for permitting "cellular" or wireless telecommunications facilities. These amendments were intended to 1) bring the County's ordinances up to date with the technological advances in the wireless communication industry, 2) shift permit requirements for certain small scale wireless facilities from a Major or Minor Conditional Use Permit to a lesser permit (e.g., a Director-approved permit) where certain development criteria are met, and 3) to provide regulatory consistency for telecommunication facilities amongst the three zoning ordinances."*²

These ordinance amendments were processed as 95-OA-008 (Article II), 95-OA-009 (Article III) and 95-OA-010 (Article IV). Each ordinance generally reflected the same requirements and provided a four-tiered permitting system requiring different permit processes and compliance with development standards, depending on the type of facility proposed.

*"The theory behind this approach was that the review process for minor projects would be minimized while still providing a higher level of review of larger projects. That is, as the size and complexity of the facility and potential for environmental impacts or policy inconsistencies increased, the decision-making body shifted upward (e.g., from the Director to the Zoning Administrator, or from Zoning Administrator to the Planning Commission). In practice, however, due to the specificity of the facility definitions (microcell versus macrocell), and the constantly changing technology, the regulations actually operate to require that some projects be processed at a higher level jurisdiction even though they are fairly minor in nature."*³

In 2002, under ordinance amendments 01-OA-05 (Article II), 01-OA-06 (Article III), and 01-OA-07 (Article IV), the County adopted revisions to the telecommunications ordinance that shifted the decision maker authority for facilities located in residential zone districts. The original regulations allowed telecommunications facilities in residential zones to be processed as applications under the jurisdiction of the Director of Planning and Development (Development Plan) or the Zoning Administrator (Minor Conditional Use Permit). However, the changes adopted in 2002 placed *"all applications for telecommunication facilities proposed to be located in residential zones (except for very low power facilities⁴) under the jurisdiction of the Planning Commission (Major Conditional Use Permit),"* and included a requirement *"that the Planning Commission, in order to approve such a Conditional Use Permit, must find that that the area proposed to be served by the facility would otherwise not be served if the facility were not allowed to be constructed."*⁵ This change was made to ensure the highest level of protection for projects located in or adjacent to residential areas.

However, the adopted changes in 01-OA-05, -06, and -07 specifically provided an exception for "very low power" (VLP) facilities. As opposed to all other facility designs, the ordinance amendments allowed for *"the placement of VLP (less than 10 watts) facilities on existing utility poles located within*

² Santa Barbara County Board Agenda Letter, "Hearing to consider zoning ordinance text amendments regarding the permitting of commercial and non-commercial telecommunication facilities: Case No. 01-OA-005 (Article II Coastal Zoning Ordinance); Case No. 01-OA-006 (Article III Inland Zoning Ordinance); 01-OA-007 (Article IV Montecito Zoning Ordinance)" Attachment A "Analysis, March 26, 2002."

³ Santa Barbara County Board Agenda Letter, March 26, 2002.

⁴ Current terminology for very low power facilities (VLP) is very small facilities (VSF)

⁵ Santa Barbara County Board Agenda Letter, March 26, 2002.

road rights-of way in all zone districts including residential."⁶ VLP facilities were identified as Tier 1 projects, requiring either a Land Use Permit or Coastal Development Permit approved by Planning & Development staff under the authority of the Director.

All telecommunications licenses are effectuated through development of a network of facilities. The staff report considered by the Board in support of 01-OA-05, -06 and -07, noted that "*These [VLP] facilities would typically be part of a neighborhood-based service (where there is a larger transceiver located in the vicinity) providing Internet access, etc.*" This notation acknowledges that these VLP facilities are a part of a larger network, in which a "hub" site that feeds into the network is placed at a separate location from the individual sites.

In 2007, the reference to "very low power" (VLP) facilities was changed to "very small facilities" in ordinance amendments 07ORD-00000-00003 and -00004 which replaced Article III and IV with the County and Montecito Land Use Development Codes, but the intent and development standards remained unchanged.

Tier 4 projects, originally established in 1997 under ordinance amendments 95-OA-008, -009, and -010, require a Major Conditional Use Permit under the jurisdiction of the Planning Commission. Commercial telecommunication facilities may be permitted as a Tier 4 commercial facility when they are not in compliance with the development standards for Tiers 1-3 but do comply with Tier 4 development standards.⁷ As discussed above, this includes telecommunications facilities in residential zone districts, with the exception of "very small facilities" (previously known as VLP facilities). In essence, the Tier 4 category is a "catch all" for only those projects that otherwise do not comply with the development standards for Tiers 1-3. Projects that do comply with development standards for Tiers 1-3 are processed accordingly.

Analysis of Appeal Issues

Mr. Ryan, on behalf of NextG Networks, filed an appeal of the Montecito Planning Commission's action to deny the permit on the basis of inappropriate permit processing under Tier 1. The appeal application included a detailed letter by Mr. Ryan dated February 5, 2010 contending that the permit should be approved (included as Attachment 1 to the set hearing Board Letter dated March 2, 2010). Staff has summarized the following key points, from the appeal letter:

- "*P&D correctly determined [in the initial approval of the permits] that each of NextG's proposed nodes comply with the Tier 1 standard, and are permitted facilities subject only to Land Use and Coastal Development Permits. The Commission made no findings to the contrary and was presented with no evidence to the contrary, thus it abused its discretion and acted contrary to law in deciding that the seven Land Use and Coastal Development Permits were not appropriately classified as Tier 1 projects.*"
- "*NextG's proposed facilities are all in compliance with the development standards established by MUDC § 35.444.010.D.3 and CZO § 35-144F.4.3" and that "NextG has satisfied all relevant requirements under the California Environmental Quality Act."*

⁶ Santa Barbara County Board Agenda Letter, March 26, 2002.

⁷ MLUDC Section 35.444.010.C.4; Article II Section 35.144F.3.4

- *“The plain language of the Code makes clear that Tier 4 is not the applicable standard for the wireless telecommunications facilities that may be permitted under any other processing tier. Because NextG’s Nodes fall squarely within the definition of Tier 1, they cannot be Tier 4.”*

Staff recommended (as detailed in the Montecito Planning Commission Staff Report dated January 8, 2010, included as Attachment 2 to the set hearing Board Letter dated March 2, 2010), that the proposed project complied with all applicable County policies, development standards and CEQA requirements. Additionally, staff put forth that the proposed project complies with both the intent of the Tier 1 very small facilities design and specific Tier 1 requirements. As discussed above, individual “very small facilities” processed under the Tier 1 category are explicitly presumed by Ordinance to be a part of a larger network. Tier 1 development standards specifically allow for the processing of individual antenna sites comprising a small antenna and equipment box (node) mounted on an existing utility pole. Therefore, staff represented that the project was appropriately assessed under a Tier 1 permit despite the fact that the facility is a part of a larger network. The approach of permitting individual nodes is also consistent with the telecommunications ordinance approach to all other facilities, where each antenna site (including support structure and equipment) is assessed on an individual basis, regardless that each facility works in conjunction with the carrier’s larger wireless network.

Denial Based on Aesthetics

Although the Montecito Planning Commission’s denial was primarily focused on procedure, their finding for denial mentioned a “lack of evidence that there was a thorough and complete review of the aesthetics.” Current case law dictates that there are specific steps involved in denying a project based on aesthetics. A local agency can deny a wireless communications facility permit application for aesthetic reasons if the agency can show both: 1) substantial evidence supports its decision; and 2) the denial is not an “effective prohibition” on providing wireless service.⁸ Should a local agency deny a facility on aesthetics, and the applicant (carrier) challenges the denial, the applicant must show that: 1) they are prevented from filling a significant gap in their own service coverage; and 2) their proposed way to fill that significant gap is the “least intrusive means.”⁹ If the applicant makes the above showing, the County, not the carrier, must then show “[S]ome potentially available and technologically feasible alternative site” which can “close the gap” in coverage.¹⁰ Patrick Ryan’s February 5, 2010 letter did not provide any additional challenge or analysis regarding how NextG is prevented from filling a significant coverage gap.

Staff Recommendations

The project on appeal constitutes one 26-inch whip antenna and one 6”x6”x32” utility box, both painted brown to blend with the utility pole, and fits squarely under the Tier 1 process. The facility would not be substantially visible as it is mounted on an existing utility pole and does not require the construction of a new freestanding support structure or the addition of large equipment components. The utility box is the smallest in today’s industry, less than one cubic square foot in size, and therefore would not

⁸ *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 725 (9th Cir. 2009).

⁹ *Sprint Telephony PCS, LP v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008).

¹⁰ *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 998-999 (9th Cir. 2009).

protrude visually in an intrusive way. By using existing infrastructure, the facility does not introduce any additional vertical elements to the area and is maintaining the existing character of the area. Therefore staff recommends your Board uphold the appeal and approve the permit as outlined in the recommended actions of page 1 on this report.

Performance Measure:

N/A

Fiscal and Facilities Impacts:

Budgeted: Yes

Fiscal Analysis:

The costs for processing appeals are partially offset through payment of a fixed appeal fee of \$643 (\$500 of which covers P&D costs). The total estimated cost to process this appeal is approximately \$1,820.00 (10 staff hours). These funds are budgeted in the Permitting and Compliance Program of the Development Review South Division, as shown on page D-301 of the adopted 2009/2010 fiscal year budget.

Staffing Impacts:

None.

Special Instructions:

None.

Attachments:

A) Findings

Authored by:

Megan Lowery, Planner II

cc:

Anne Almy, Planning Supervisor

ATTACHMENT A: FINDINGS

1.0 CEQA

1.1 CEQA Guidelines Exemption Findings

- 1.1.1** The proposed project was found to be exempt from environmental review pursuant to Sections 15061(b)(3), 15301(b), 15301(c), 15302(c), and 15304(f) of the Guidelines for Implementation of the California Environmental Quality Act (CEQA) by the California Public Utilities Commission (CPUC). Please see the Notice of Exemption, prepared by the CPUC on July 20, 2009 included in Attachment C of the staff report to the Montecito Planning Commission dated January 8, 2010 (included as Attachment 2 to the set hearing Board Letter dated March 2, 2010).

2.0 MONTECITO LAND USE DEVELOPMENT CODE

2.1 Land Use Permit Findings (Sec. 35.472.110)

- 2.1.1** *The proposed development conforms: (1) To the applicable provisions of the Comprehensive Plan including the Montecito Community Plan; and (2) With the applicable provisions of this Development Code or falls within the limited exception allowed in compliance with Chapter 35.491 (Nonconforming Uses, Structures, and Lots).*

As discussed in Sections 6.2 and 6.3 of the staff report to the Montecito Planning Commission dated January 8, 2010 (included as Attachment 2 to the set hearing Board Letter dated March 2, 2010), and incorporated herein by reference, the project would be in conformance with all applicable provisions of the Montecito Land Use & Development Code, the Comprehensive Plan and the Montecito Community Plan. Therefore this finding can be made.

- 2.1.2** *The proposed development is located on a legally created lot.*

The proposed project is located within the public right-of-way, on an existing utility pole, therefore this finding does not apply.

- 2.1.3** *The subject property is in compliance with all laws, regulations, and rules pertaining to uses, subdivisions, setbacks, and any other applicable provisions of this Development Code, and any applicable zoning violation enforcement and processing fees have been paid. This Subsection shall not be interpreted to impose new requirements on legal nonconforming uses and structures in compliance with Chapter 35.491 (Nonconforming Uses, Structures, and Lots).*

The utility pole upon which the facility would be mounted was legally erected and does not constitute a zoning violation. Therefore this finding can be made.

2.2 Commercial Telecommunication Facility Findings (Sec. 35.444.010.G)

2.2.1 *The facility will be compatible with the existing and surrounding development in terms of land use and visual qualities.*

As discussed in Sections 4.0, 6.2 and 6.3 of the staff report to the Montecito Planning Commission dated January 8, 2010 (included as Attachment 2 to the set hearing Board Letter dated March 2, 2010), and incorporated herein by reference, the facility is designed to retain the visual character of the area by utilizing the existing utility pole and utilizing equipment that conforms to the Tier 1 "very small facilities" requirements. Moreover, the equipment box is slimmer than the utility pole and extrudes no further than 6" from the pole; it is largely camouflaged and no more obtrusive than other utility boxes on utility poles. Furthermore, the antennas would be painted brown to blend with the pole. Therefore the proposed project preserves the existing streetscape character of the area and this finding can be made.

2.2.2 *The facility is located to minimize its visibility from public view.*

The facility is designed to blend with the utility infrastructure and therefore minimize its appearance as a telecommunications facility. Therefore this finding can be made.

2.2.3 *The facility is designed to blend into the surrounding environment to the greatest extent feasible.*

As discussed in Sections 4.0, 6.2 and 6.3 of the staff report to the Montecito Planning Commission dated January 8, 2010 (included as Attachment 2 to the set hearing Board Letter dated March 2, 2010), and incorporated herein by reference, collocating on the existing utility infrastructure blends the facility with the existing visual character of the area. Therefore this finding can be made.

2.2.4 *The facility complies with all required development standards unless granted a specific exemption by the review authority as provided in Subsection D.*

Exemption provision Section 35.444.010.D.2 states that an exemption may only be granted if the review authority finds, after receipt of sufficient evidence, that failure to adhere to the standard in the specific instance either will not increase the visibility of the facility or decrease public safety, or it is required due to technical considerations that if the exemption were not granted the area proposed to be served by the facility would otherwise not be served by the carrier proposing the facility, or it would avoid or reduce the potential for environmental impacts.

As analyzed in Sections 4.0, 6.2 and 6.3 of the staff report to the Montecito Planning Commission dated January 8, 2010 (included as Attachment 2 to the set hearing Board Letter dated March 2, 2010), and incorporated herein by reference, the proposed project complies with all required development standards of the telecommunication ordinance, with the exception of Development standard 2d which requires support facilities (i.e. cabinets and shelters) be undergrounded if feasible. Because the cabinet for this particular facility is small, and is mounted on an existing utility pole (similar to common transformer boxes), undergrounding the cabinet would not significantly decrease the visibility of the facility. Furthermore, the additional grading and increased project footprint of an undergrounded equipment box at this location would increase the potential for environmental impacts, more than the proposed

project. Therefore, the proposed design qualifies for an exemption from the Telecommunications Development Standard 2d and this finding can be made.

2.2.5 *The applicant has demonstrated that the facility shall be operated within the frequency range allowed by the Federal Communications Commission and complies with all other applicable safety standards.*

The applicant submitted a projected emission report by Jerrold Bushberg, Ph.D., dated April 29, 2009, as a part of the project application for 09LUP-00000-00319.¹¹ The report concludes that RF exposure from the proposed telecommunications facility would be less than 0.3% of the applicable FCC public exposure limit at ground level (approximately 26 feet) and therefore the facility is well within the FCC's health and safety limits. Therefore this finding can be made.

2.3 Infrastructure Services, Utilities and Related Facilities (Sec. 35.430.100)

2.3.1 *Approval of a Coastal Development Permit (Section 35.472.050) or a Land Use Permit (Section 35.472.110) or Zoning Clearance (Section 35.472.190) shall require that the review authority first find, based on information provided by environmental documents, staff analysis, and the applicant, that adequate public or private services and resources (e.g., water, sewer, roads) are available to serve the proposed development.*

The proposed project consists of an unmanned wireless telecommunications facility. Construction and operation of the proposed facility would not require any water or sewer services. The facility would be mounted on an existing operational utility pole in the public right of way along San Leandro Lane, to which access will be provided. Therefore this finding can be made.

¹¹ On file with P&D and available upon request.