

NextG Networks

EMPOWERING NEXT GENERATION WIRELESS NETWORKS

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February 5, 2010
COUNTY OF SANTA BARBARA
CLERK OF THE
BOARD OF SUPERVISORS
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VIA FEDERAL EXPRESS

COUNTY OF SANTA BARBARA
Chair Joseph Centeno
and Members of the Board of Supervisors
105 East Anapamu Street
Santa Barbara, CA 93101

re: Appeal of the Denial of NextG's Coastal Development and Land Use Permits

Dear Chair Centeno and Supervisors:

Pursuant to Section 35.492.050 of the Montecito Land Use and Development Code ("MLUDC"), and in connection with the Santa Barbara County Appeal Applications attached hereto, Appellant NextG Networks of California, Inc. ("NextG") hereby appeals the decision of the Montecito Planning Commission (the "Commission") reversing the approval by the County Planning and Development Department ("P&D") of Land Use Permits No. 09LUP-00000-00317, 09LUP-00000-00319, 09LUP-00000-00381, and Coastal Development Permit Nos. 09CDP-00000-00052, 09CDP-00000-00053, 09CDP-00000-00055, 09CDP-00000-00056.¹

The seven applications at issue here are for the installation of "very small" (as defined by the County's code) wireless telecommunications antennas and associated equipment on existing utility poles in the public rights of way. Specifically, at issue are omnidirectional stick antennas that are approximately one inch in diameter (essentially like a broom stick) and 26 inches tall. Likewise, NextG's associated equipment boxes are only 33" long, 6" wide and 6" deep. Both the equipment and antennas will be painted brown to blend with the existing utility poles. NextG's antennas and equipment are in fact smaller and less intrusive than many other utility and communications attachments to the

¹ The Land Use Permits are subject to the requirements and specifications set forth in the MLUDC, while the Coastal Development Permits are subject to the requirements and specifications set forth in the Santa Barbara Coastal Zoning Ordinance, Article II of Chapter 35 of the Santa Barbara County Code (the "CZO"). However, the MLUDC requirements for Land Use Permits are substantively identical to the CZO requirements for Coastal Development Permits.

same and surrounding utility poles. As demonstrated by the photographs that accompany NextG's initial application (attached here), NextG's facilities present an extremely low visual impact, blending into the already existing utility right of way facilities. In many cases, the facilities are much smaller than other equipment installed on utility poles, such as transformers, junction boxes, and other equipment installed by other public utilities.

Indeed, the County has already determined that facilities precisely like NextG's are, by the County's own tiering and preference system, the least intrusive means of closing gaps in wireless coverage. As discussed below, the County has adopted Code provisions that recognize that facilities that are the size of NextG's, installed on utility poles in the public right of way, are most favored options for installing wireless telecommunications facilities because they will have no adverse impact. Having reached that conclusion and created a process to promote the deployment of such facilities, the County cannot now deny NextG's applications.

As demonstrated below, the Commission erred in holding that NextG's applications must be processed and scrutinized as "Tier 4" facilities requiring a Major Conditional Use Permit. Under the plain language of the MLUDC and CZO, NextG's facilities were properly processed and granted as Tier 1 facilities. Accordingly, the Commission's decision must be reversed and the P&D's permits affirmed.

Background

In December of 2009 and early January of 2010, P&D issued its notice and intent to approve a number of NextG applications for Land Use Permits and Coastal Development Permits.² By letters to the Commission, a group of eight individuals and the Montecito Association (collectively the "Association") appealed P&D's approval of the seven permits identified above.³ By letter dated January 19, 2010, NextG responded to these appeal letters in support of P&D's approvals, to which the Association responded by letter dated January 25, 2010.

At its meeting on January 27, 2010, the Commission granted the Association's appeal, overruling P&D's approval of the seven Land Use and Coastal Development Permits. The Commission, without any formal findings, determined that NextG's applications to install these seven nodes in Montecito should have been considered

² P&D approved permits 09LUP-00000-00317, 09LUP-00000-00319, 09CDP-00000-00052, 09CDP-00000-00053, 09CDP-00000-00055, and 09CDP-00000-00056 on December 4, 2009 and approved permit 09LUP-00000-00381 on January 6, 2010.

³ While the seven permits were each appealed by separate letter, each appeal letter is substantively identical. Thus, NextG responded to the seven appeals collectively, and the Commission addressed the seven appeals collectively.

collectively as a Tier 4 installation under the MLUDC and the CZO, rather than the Tier-1 classification P&D used in processing and approving the individual applications. It is NextG's understanding that the Commission did not find fault in the P&D substantive decision to grant if Tier 1 applies.

The Commission's Decision Is Inconsistent With Law

NextG's Facilities Must Be Granted As Tier 1 Facilities

The Commission, just like P&D and this Board, is bound by all applicable federal, state and local laws, including in particular the MLUDC and the CZO. The Commission's decision to overturn P&D's well-considered and well-founded approval constitutes an abuse of discretion because it is not supported by the evidence and is inconsistent with the clear language and authorization in both the MLUDC and the CZO. Put plainly, the Commission's decision violates both the MLUDC and the CZO.

The MLUDC and the CZO set forth standards and processes by which wireless telecommunications facilities may be permitted within Montecito and Coastal Zones, respectively. The purpose of these standards and processes is to promote the orderly development of commercial telecommunications facilities and ensure compatibility with surrounding land uses. MLUDC § 35.444.010.A; CZO § 35-144F.1. Specifically, MLUDC § 35.444.0010.C. and CZO § 35-144F.3 establish what types and sizes of commercial telecommunications facilities are compatible with surrounding land uses, and set forth processing requirements to permit those facilities.⁴

The seven permits at issue here would authorize seven distinct "node" installations on existing utility poles in Montecito within Santa Barbara County. Each node consists of a singular omnidirectional "whip" (or stick) antenna that is approximately twenty-four inches long and one inch in diameter and equipment that is approximately thirty-three inches long, six inches wide, and six inches deep, both of which will be attached to an existing utility pole in the public right of way.⁵ These nodes, along with associated fiber optic lines, will enable NextG to provide telecommunications services, specifically RF transport services, to licensed wireless telecommunications providers and other large

⁴ While the MLUDC § 35.444.010.C. and CZO § 35-144F.3. are not precisely identical, they are substantively the same with respect to the four tiers of processing requirements applicable to commercial telecommunications facilities, and were treated as such by the Commission and all parties to this proceeding.

⁵ At the Commission's meeting, several residents mistakenly asserted that NextG is proposing to install five (5) antennas on each pole. This is a misstatement and is not what NextG has asked to permit, which is just *one* antenna, as described.

users of telecommunications services within and around Santa Barbara, including in Montecito.⁶

Accordingly, NextG's seven nodes at issue here fall under the definitions of "Telecommunications Facility" and "Wireless Telecommunications Facility" set forth in both the MLUDC and the CZO,⁷ and thus are subject to the permit requirements, and siting and development standards established in the MLUDC and the CZO.

MLUDC § 35.444.010.C and CZO § 35-144F.3 outline a multi-level, tiered system for considering and permitting commercial telecommunications facilities. As the size and intrusiveness of the proposed facilities increase, so too does the applicable tier, applying progressively more stringent siting restrictions and approval requirements. For example Tier 1 projects require only ministerial approval of a Land Use or Coastal Development Permit, while Tier 4 projects require a Major Conditional Use Permit, approval of which requires a more extensive application process and public hearings. MLUDC § 35.44.010, Table 4-10; CZO § 35-144F.3.1 & 35-144F.3.4.

⁶ Consistent with the County's permitting practice and permitting exemptions, the fiber-optic lines have, for the most part, already been installed through the Community, and are not subject to any appeal.

⁷ MLUDC Section 35.500.010 and CZO Section 35-58 define "Telecommunications Facility" as:

A facility that transmits or receives electromagnetic signals for communication purposes including data transfer. It includes antennas, microwave dishes, horns, and other types of equipment for the transmission or reception of such signals; telecommunication towers or similar structures supporting said equipment; equipment buildings; parking areas; and other accessory development. It does not include facilities staffed with other than occasional maintenance and installation personnel or broadcast studios.

Likewise, MLUDC Section 35.500.010 and CZO Section 35-58 define "Wireless Telecommunications Facility" as:

A commercial facility that transmits and/or receives radio communication signals through the air for cellular, personal communication services, pagers, and/or similar services. The facility may include: antennas, radio transmitters, equipment shelter or cabinet, air vents, antenna support structure, air conditioning units, fire suppression systems, and emergency back-up generators including fuel storage.

Under the MLUDC and CZO, commercial telecommunications facilities, like each of NextG's proposed nodes, are permitted in all zones as Tier 1 commercial facilities, requiring only a ministerial grant of a Land Use or Coastal Development Permit if they are wireless telecommunications facilities that comply with the following:

(1) Antennas shall be limited to panel antennas or omnidirectional antennas. Antennas and associated equipment shall not exceed a combined volume of one cubic foot.

(2) The antenna shall be mounted on either an existing operational public utility pole or similar support structure (e.g., streetlight standard) that is not being considered for removal, as determined by the Director, or the roof of an existing structure. More than two antennas shall not be located on a single utility pole or similar structure unless it is determined that there will not be a negative visual impact. If at a later date the utility poles are proposed for removal as part of the undergrounding of the utility lines, the permit for the facilities shall be null and void.

(3) The highest point of the antenna either does not exceed the height of the existing utility pole or similar support structure that it is mounted on, or in the case of an omnidirectional antenna, the highest point of the antenna is no higher than 40 inches above the height of the structure at the location where it is mounted.

MLUDC § 35.444.010.C.1; CZO § 35-144F.3.1.b.

There is no dispute in this case that NextG's nodes consist of a single omnidirectional antenna and associated equipment that are approximately 1,212 cubic inches - or approximately 500 cubic inches less than one cubic foot. Each node includes only one antenna, and is to be mounted on an existing operational public utility pole, that based upon P&D's original approval is not being considered for removal. Each antenna will be attached to the pole in such a fashion that it does not extend beyond the top of the pole - indeed even if it did extend beyond the top of the pole the antenna wouldn't be long enough to extend more than 40 inches above the pole. Clearly, P&D correctly determined 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.

The Commission's decision indicated that these seven node installations in Montecito should be treated not as individual installations under the Tier 1 process, but collectively as a group under the Tier 4 framework. The MLUDC and CZO⁸ establish that the Tier 4 permitting standards are applicable to:

a. Wireless telecommunication facilities *that may not be permitted in compliance with [any other processing standard or tier]* but do comply with the following development standards...

(1) The height of the antenna and associated antenna support structures shall not exceed 75 feet.

(2) The base of a new freestanding antenna support structure shall be set back from a lot with a residential zone designation a distance equal to five times the height of the antenna and antenna support structure, or 300 feet, whichever is greater.

(3) If the facility is proposed to be located on a lot with a residential zone designation as identified in Section 35.404.020 (Zoning Map and Zones) [Section 35-52 is referenced in the CZO], or on a lot with a Recreation (REC) zone designation, or does not comply with Subsection 4.a.(2) above, the Montecito Commission, in order to approve a Conditional Use Permit, shall also find that the area proposed to be served by the telecommunications facility would otherwise not be served by the carrier proposing the facility.

b. Other telecommunication facilities as follows are allowed in nonresidential zones as identified in Section 35.404.020 (Zoning Map and Zones) [Section 35-52 is referenced in the CZO]:

(1) Facilities that are subject to regulation by the Federal Communications Commission or the California Public Utilities (e.g., AM/FM radio stations, television stations). Such facilities may include: equipment shelters, antennas, antenna support structures, and other appurtenant equipment related to communication facilities for the transmission or reception of radio, television, and communication signals.

⁸ Naturally, MLUDC § 35.444.010.C.4 and CZO § 35-144F.3.4 contain different internal references as indicated by the bracketed section of the quote. However, again, the substantive requirements are identical.

(2) Other commercial telecommunication facilities that exceed 50 feet in height.

These do not include wireless telecommunication facilities that are subject to the provisions of C.4.a. above [§ 35-144F.4.a is referenced in the CZO], or amateur radio facilities that are subject to the provisions of Section 35.444.020 (Noncommercial Telecommunication Facilities) [§ 35-144G is referenced in the CZO].

MLUDC § 35.444.010.C.4; CZO § 35-144F.3.4 (emphasis added). The plain language of the Code makes clear that Tier 4 is not the applicable standard for wireless telecommunication 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.

Upon deeper investigation into the Tier 4 standard, it is clear that the description of facilities to which Tier 4 processing applies does not remotely resemble NextG's proposed nodes. Tier 4 clearly contemplates large, freestanding structures like traditional cell towers or monopoles. NextG's small omnidirectional antennas and equipment attached to existing public utility poles in the public rights-of-way are nothing like the larger freestanding support structures Tier 4 encompasses. Based on the language and specifications in the MLUDC and CZO for Tier 4 permitting, it is nonsensical to even attempt to apply Tier 4 standards to the collective facilities in question.

The Commission's determination that Tier 4 is the appropriate standard for the seven node sites at issue is illogical and indefensible based on NextG's equipment specifications, which are undisputed, and the plain language of the MLUDC and CZO. Nothing in MLUDC § 35.444.010 or CZO § 35-144F, contemplates treating multiple interconnected installations under a collective permitting process, nor do the MLUDC or CZO grant the Commission the authority to make such a decision. As explained above, each individual node clearly meets the Tier 1 standard for approval.

Moreover, when NextG first approached P&D about its project in early 2009, the various permitting processes under the MLUDC and CZO were discussed. The requirements of the two codes were considered and P&D determined that under the requirements of the MLUDC and the CZO each individual installation would require a permit, but that the network as a whole was governed by Section 7901 of the California Public Utilities Code and Sections 253 and 332 of the Federal Telecommunications Act (47 U.S.C. § 253; 47 U.S.C. § 332). The Commission's decision ignores local, state, and federal laws governing NextG's network, and these seven applications in particular.

The Commission's decision went even further outside its authority under the MLUDC or CZO and declared that not only should the seven appealed applications before it be considered under the Tier 4 framework, but so too should NextG's entire network. Of course only the seven appealed applications were before the Commission for

consideration. ~~Any other permit approvals~~ NextG has received from P&D that were not appealed within 10 days of approval are final and not subject to the Commission's review. MLUDC § 35.492; CZO § 35-182. Regardless, as explained above, treatment of any of NextG's applications to install its nodes as Tier 4 facilities rather than Tier 1 facilities is inappropriate, illogical, and inconsistent with the laws the Commission was bound to uphold.

NextG's Facilities Meet All Other Applicable Tier 1 Requirements

As explained above, NextG's node facilities comply with and should be considered under the Tier 1 standard. Moreover, as the P&D staff correctly found, NextG's facilities also meet all the other development standards applicable to "Commercial Telecommunications Facilities" as outlined in MLUDC § 35.444.010.D and CZO § 35-144.F.4.

The proposed node facilities are all to be located on existing, operating public utility poles. As a consequence, NextG's proposed nodes need not comply with any setback requirements. *See* MLUDC § 35.444.011.D.1.a; CZO § 35.144F.4.1.a. Also by virtue of their being attached to existing utility poles, and not extending past the top of any poles to which they are attached, NextG's facilities will comply with all zoning height requirements and will be installed at a height above the reach of the general public, and thus in compliance with MLUDC § 35.444.010.D.1.b, c, & d and CZO § 144F.4.1.b.

Similarly, because NextG's facilities will be attached to existing utility poles, no new structures will be constructed that would require any ground disturbing activity. Therefore, the nodes will not disturb existing vegetation, environmentally sensitive areas, or prime agricultural soils, in compliance with MLUDC § 35.444.010.D.1.1 & D.2.b, e, & f and CZO § 35-144F.4.1.j & 4.2.d & e.

None of the facilities at issue here are located in or on a designated historical landmark, and thus are in compliance with MLUDC § 35.444.010.D.1.e and CZO § 144F.4.1.c. NextG submitted a radiofrequency emissions report with its applications. The report, by Jerrold Bushberg, Ph.D. dated April 29, 2009 establishes that the proposed facilities would meet the FCC's emissions requirements, as required by MLUDC § 35.444.010.D.1.f. and CZO § 35-144F.4.1.d. Each of the proposed facilities are to be located in the public rights-of-way, thus in compliance with MLUDC § 35.444.010.D.1.g. and CZO § 35-144F.4.1.e, there are already roads available to access the facilities, and any temporary parking necessary will be provided by existing public parking in the surrounding areas. NextG's facilities do not include any lights or lighting, therefore they comply with MLUDC § 35.444.010.D.1.h and CZO § 35-144F.4.1.f. None of the proposed facilities are located within an airport safety zone. MLUDC § 35.444.010.D.1.i; CZO § 35-144F.4.1.g. Each of NextG's nodes are proposed to be painted with non-reflective brown paint to match the poles to which they are attached. *See* MLUDC § 35.444.010.D.1.j & k; CZO § 35-

144F.4.1.h & i. NextG's nodes will all derive their electric power from Southern California Edison on the utility poles to which they are attached. NextG does not propose any new utility conduits or back-up generators to supply power to its facilities in compliance with MLUDC § 35.444.010.D.2.a and CZO § 35-144F.4.2.a.

NextG's proposed node facilities are exempt from the requirements of MLUDC § 35.444.010.D.2.d and CZO § 35-144F.4.2.c. NextG's proposed facilities do not include any "support facilities" identified by those sections. Those provisions refer to large intrusive and cumbersome support facilities such as vaults, equipment rooms, utilities, equipment enclosures. See MLUDC § 35.444.010.D.2.d; CZO § 35-144F.4.2.c. NextG's facilities consist of an antenna and its associated equipment which, under Tier 1, are classified as "very small facilities" with a total volume of approximately 1,212 cubic inches - or approximately 500 cubic inches less than the one cubic foot of antenna and associated equipment allowed under Tier 1. See MLUDC § 35.444.010.C.1.a.1; CZO § 35-144F.3.1.b.1. Furthermore, not undergrounding NextG's proposed facilities eliminates the potential for harmful ground disturbing activities since all of NextG's facilities may be attached to and blend in with operational utility poles. Moreover even if MLUDC § 35.444.010.D.2.d and CZO § 35-144F.4.2.c were somehow applicable to NextG's proposed nodes, it is obviously not technically feasible to underground NextG's antenna and still provide service. Therefore, any such requirement would effectively prohibit NextG's deployment of its telecommunications facilities in violation of Sections 253 and 332 of the Telecommunications Act of 1996. 47 U.S.C. §§ 253 & 332(c)(7).

NextG's proposed facilities are all in compliance with the development standards established by MLUDC § 35.444.010.D.3 and CZO § 35-144F.4.3. Specifically, the singular whip antenna that is approximately 24 inches long and its associated facilities which are similarly small in stature are designed to blend in with their surrounding environment and be minimally visible. Indeed, they are to be mounted on existing, occupied public utility poles that are amongst surrounding trees and the surrounding developments, including other existing on pole utility boxes, cables, and transformers. Additionally, the facilities will be painted brown to blend in with the pole to which each is attached and because they are narrower than the poles themselves will not extend past the profile of the pole. All of these precautions ensure that the facilities will be minimally visually intrusive and in compliance with MLUDC § 35.444.010.D.3 and CZO § 35-144F.4.3.

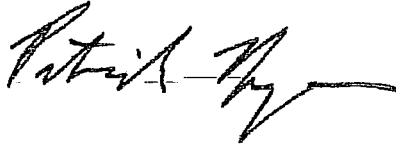
Finally, NextG has satisfied all relevant requirements under the California Environmental Quality Act ("CEQA"). The California Public Utilities Commission ("CPUC") is the only entity with broad discretionary decision-making authority over NextG's proposed services, facilities and construction through the state, and as such, is the lead agency. Cal. Code Regs. tit. 14, § 1505(b). As lead agency, the CPUC's CEQA determinations are "final and conclusive," except under certain exceptional circumstances, and binding on all parties. *Id.*, §§ 15050, 15162. The CPUC published a Notice of Exemption through the CEQA clearinghouse, and no party has challenged it. A copy of

the Notice to Proceed that was issued by the CPUC on July 14, 2009, as well as the Notice of Exemption that was published by the CPUC, is attached.

Conclusion

The Commission's decision to require that the subject permit applications be considered Tier 4 installations finds no support either in evidence presented to the Commission, and to this Board, or in the plain language of the MLUDC or the CZO. Accordingly, the Board should overturn the Commission's decision, find that under both the MLUDC and the CZO each of these permit applications qualify as Tier 1 installations, and reinstate P&D's approval of each of the seven permits at issue.

Very truly yours,



Patrick S. Ryan
*Vice President of Government Relations
& Regulatory Affairs*

Enclosures

1. Original Application Package
2. Staff Report for the Appeal of NextG Networks Cellular Antenna
3. Application Forms for Appeal (one form for each of the seven appeals)
4. Appeal fee
5. CPUC Notice to Proceed
6. CPUC Notice of Exemption