



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: 8/3/10
Placement: Departmental Letter
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
Ben Shell
SUBJECT: NextG Cellular Antenna ESB18 Appeal
10APL-00000-00009; Right-of-Way of San Leandro Lane

County Counsel Concurrence

As to form: Yes

Other Concurrence: N/A

As to form: N/A

Auditor-Controller Concurrence

As to form: N/A

Recommended Actions:

That the Board of Supervisors consider the Shefflin appeal (Case No. 10APL-00000-00009) of the Montecito Planning Commission's February 24, 2010 approval of the NextG Cellular Antenna ESB18 permit, Case No. 09CDH-00000-00030 located in the public right of way of San Leandro Lane (adjacent to APN 007-300-006) in Montecito, First Supervisorial District, and take the following actions:

1. Uphold the appeal, Case No. 10APL-00000-00009, thereby overturning the Montecito Planning Commission's approval of 09CDH-00000-00030;
2. Make the required findings for denial of the project, included in Attachment A of this Board Letter;
3. Determine the project is exempt from CEQA pursuant to CEQA Guidelines Section 15270; and
4. Deny the project, 09CDH-00000-00030.

Summary Text:

NextG's application for 09CDH-00000-00030 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 Coastal Development Permit to allow construction and use of an unmanned, telecommunications facility under provisions of County Code zoning requirements for property zoned 2-E-1. The unmanned wireless facility would include one 26-inch whip omni antenna and an equipment box measuring 32"x6"x6".

The antenna is omnidirectional, mounted along with the equipment box on an existing metal pole in the public right of way.

The proposed project is located in the Coastal Commission Appeals Jurisdiction, and therefore required a public hearing under the jurisdiction of the Zoning Administrator. In the Montecito area, the Montecito Planning Commission acts as the Zoning Administrator. The Montecito Planning Commission approved the permit application on February 24, 2010. An appeal of this decision was timely filed by Joanne Shefflin, on March 4, 2010.

The attached letter from County's contracted telecommunications consultant, Attachment B, addresses the functionality of Distributed Antenna Systems, like the one proposed here by Next G. The letter states that:

- DAS nodes are not physically or electrically interconnected with other DAS nodes in a manner that would prevent one node from operating in the absence of any other; and
- Even if NextG were not permitted to install all of the DAS nodes that it has proposed, the remaining nodes and its fiber optic network would still function.

Background:

This concerns a neighbor appeal of NextG's application for a cellular antenna at the San Leandro Lane right of way. Clerk of the Board received a package of materials on March 4, 2010, concerning Montecito Planning Commission's approval on February 24, 2010 of a Coastal Development Permit. Essentially, the package was a pen-and-ink markup of an earlier appeal to the Montecito Planning Commission, concerning different NextG antennas. The pen-and-ink changes to the earlier appeal included accurately listing the address, NextG antenna designation and CDH case number from MPC's action on February 24th. Through a separate letter, the attorney who submitted the earlier appeal to MPC stated that the March 4th appeal was "an unauthorized, incomplete, careless 'doctoring' of an appeal package" that her firm had submitted for a client in a different NextG matter. Correspondence from Ms. Joanne Shefflin, who also was one of the appellants in the earlier appeals, stated that she submitted the March 4th appeal.

Section 35-182.2.D of County's Coastal Zoning Ordinance provides that the Planning & Development Director "may" reject an appeal that:

- Was not submitted by an applicant or an aggrieved party;
- Was not timely submitted; or
- Does not comply with the required contents of an appeal from Section 35-182.2.C.

That same section also states that the Director's decision about accepting an appeal is final and not subject to appeal. The Director decided to accept the appeal.

GROUND'S FOR APPEAL

The grounds for appeal are specified in Section III of the appellants' letter and are summarized in subsections A – F below. Please see Attachment C for a complete copy of the appeal application and letter, dated February 26, 2010.

A. "The Facilities Approved by this Permit Do Not Merit Approval under the County's Commercial Telecommunications Facilities Ordinance"

The appellants contend that "P&D abused its discretion in processing each of the individual permit applications as Tier 1 projects requiring only Director level review (or Zoning Administrator in the Coastal Commission Appeal Jurisdiction) when, viewed as a Distributed Antenna System in which all of the facilities are inter-dependent, they clearly require a higher level of review under the Coastal Zoning Ordinance, Article II, and the California Environmental Quality Act (CEQA)." The appellants also contend that P&D did not make the required Coastal Development Permit findings (Article II, Sec. 35-169.5) nor the additional required findings for telecommunications facilities (Article II, Sec. 35-144F.7) necessary to approve said permit.

Staff agrees that the "project" under CEQA includes all of the components of the Distributed Antenna System (DAS) network across the South Coast. Consistent with this, the entirety of the network was reviewed as a whole project under CEQA by the California Public Utilities Commission (CPUC), who assumed the lead agency status for purposes of CEQA. On July 20, 2009, the CPUC found the entirety of the "project" exempt under Guidelines sections 15061(b)(3), 15301(b), 15301(c), 15302(c), and 15304(f), including all antenna installations, equipment installations, aerial cabling and trenching for the network throughout the South Coast of Santa Barbara County (including the cities of Goleta, Santa Barbara, and Carpinteria).

With respect to processing, all networks – macrocell as well as DAS – require multiple antennas to provide licensed coverage; in all cases, the County considers applications for individual sites. Section 35-144.F.3.b.1 of Article II specifically allows for "small facilities" mounted on existing utility poles, such as the antennas proposed as part of this DAS, to be permitted under Tier 1. This tier was specifically created to encourage such installations, since they are small in nature, utilize existing infrastructure and therefore have minimal, if any, potential for environmental impacts (personal communication, County P&D planner Noel Langle October 10, 2009).

The appellant also contends that the project does not meet the additional findings required for all telecommunications facilities in Section 35-144F.7. The project was indeed reviewed for compliance with these findings and was originally approved under the basis that since the equipment met the "very small facility" size and design standards and proposed to utilize existing infrastructure in the community rather than add additional structures, that the facility was "compatible with the existing infrastructure," was "designed to minimize its visibility," was "designed to blend with the surrounding development" and did not require undergrounding of the equipment. This evaluation was made based on the clear comparison to other facilities of this nature which typically require larger antennas, the erection of new support structures and equipment buildings. However, the appellant contends, and is supported by other members of the Montecito community, that the proposed design does not sufficiently minimize visibility of the facility or successfully blend with the semi-rural residential character of the Montecito area.

The facility would consist of both an antenna, attached to an arm off of the side of the pole at a height of 29' 6" and an equipment box mounted with a bracket at a base height of 9'. Aside from painting the equipment, the facility would not be camouflaged and would therefore be in plain sight of roadway users and immediately adjacent residences. As demonstrated in the NextG equipment currently installed throughout the community, the equipment is readily visible despite meeting the "very small facility" standards because the equipment box is clustered with small mounting components that clutter the pole. See Attachment D for photos of existing NextG equipment examples. Similar telecommunications facility designs in the County that have mounted their cellular antennas on utility poles have undergrounded their support equipment in a vault proving that the technology is available and feasible. Undergrounding the support equipment leaves the antenna as the only visible feature of the facility, thus significantly reducing the facility's prominence along the street. See Attachment E for photographs of an example of an existing AT&T facility at the intersection of Los Positas and Cliff Drive, permitted by Santa Barbara County. While this AT&T site is considered a "microcell" facility and not part of a DAS, regardless the antennas are mounted on a pole in a public right of way and the associated equipment is concealed in an underground vault. The County's contracted telecommunications expert, Jonathan Kramer, confirmed that undergrounding equipment as AT&T did is technically feasible for different carriers, including NextG. In fact, Mr. Kramer informed P&D staff that NextG has previously undergrounded their equipment for an existing DAS site in Rolling Hills Estates, California (see Attachment B for Mr. Kramer's letter). Finally, as shown in photographs attached to Mr. Kramer's letter, alternative streamlined antenna designs also exist and the aesthetics of a facility are also greatly improved by undergrounding the fiber optic cable.

Since the design as proposed does not sufficiently blend the facility into the character of the area and additional measures could have been taken to reduce the visibility of the facility (i.e. undergrounding the equipment box, using a more streamlined antenna and /or undergrounding the fiber optic cable) the project does not meet the required findings, and denial findings have been prepared and included in Attachment A.

B. "Health Risks Associated with Electromagnetic Frequency Exposures Are A Legitimate Community Concern"

The appellants contend that "P&D abused its discretion when it approved the subject permit without adequate regard for the aesthetic and safety impacts resulting from the placement of facilities in the proposed project, which are well within the County's authority to regulate" noting that the Telecommunications Act "preserves local zoning authority over the decisions regarding the placement, construction and modification of personal wireless service device facilities."

The Telecommunications Act does indeed preserve local authority over placement, construction and modification of such facilities; however it does so with specific limitations, namely, the limitation that "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." (47 U.S.C.A. § 332 (c)(7)(B)iv.) However, as stated, local agencies can ensure that a facility complies with the FCC's regulations. On that basis, the County required NextG to submit a report as part of the permit application, assessing the

proposed project's emissions and compliance with applicable safety limits which confirmed that the proposed facility would operate well below the applicable FCC safety limits (specifically at 0.3% of the Maximum Permissible Exposure limit at 26 ft. from the antenna). Therefore, the County cannot regulate on this basis.

C. "The County's Police Power Includes Regulations of Land Uses Based upon Aesthetic Impacts"

All telecommunications facility projects are reviewed for visual impacts and compliance with the County's telecommunications design and siting requirements. The County's preferences in regards to both design and siting of telecommunications facilities are thoroughly laid out in the "development standards" for telecommunications facilities, found in Sections 35-144F.4.1, 35-144F.4.2 and 35-144F.4.3. These development standards apply to all telecommunications facilities, including Tiers 1-4. Exceptions to these standards may only be made for development standards in Sections 35-144F.4.2 and 35-144F.4.3:

"...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."

Exemption from one or more development standards in Section 35-144F.4.3 requires the approval of a Conditional Use Permit.

To ensure compliance with these development standards, the review authority must also make the additional finding specified in Section 35-144F.7.4 explicitly requiring the review authority to find that *"The facility complies with all required development standards unless granted a specific exemption by the review authority as provided in Subsection D. (Additional development standards for telecommunication facilities) above."* This additional finding is one of numerous additional findings required for all telecommunications facilities listed in Section 35-144F.7.

County's land use codes provide that Telecommunication facilities shall comply with numerous development standards. (County Land Use & Development Code § 35.44.010.D, Montecito Land Use & Development Code §35.444.010.D. and Coastal Zoning Ordinance §35-144F.4.) and that approval of applications to develop telecommunications facilities requires numerous findings in addition to those generally required for Land Use Permits and Coastal Development Permits. (County Land Use & Development Code § 35.44.010.G; Montecito Land Use & Development Code §35.444.010.G and Coastal Zoning Ordinance §35-144F.7.) Should any project lack the ability to meet these development standards or any of the required findings, including those generally required for Land Use Permits and Coastal Development Permits, the review authority may deny the project.

The subject project, constituting one 26-inch whip antenna and one 32"x6"x6" utility box, both painted gray to blend with the metal utility pole, was determined by P&D to not have a significant visual impact as it meets the "small facility" criteria, 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. Therefore the project was approved on the basis that it was not considered to be minimally visible. But as stated in Section A above, additional measures could be taken to improve the aesthetics of the facility: the equipment could be placed underground, a more streamlined antenna design could be used and the fiber optic cabling could be trenched. Such design modifications are feasible and would reduce the visibility of the facility and greatly improve the aesthetics of the project and thus the semi-rural character of San Leandro Lane. Without these measures, the proposed project this design does not “blend into the environment to the greatest extent feasible” and is not consistent with the goals of the Montecito Community Plan and therefore the required findings cannot be made.

D. “Approval of the Permit is Contrary to the Montecito Community’s Goals and Undermines the Character of the Community”

The appellants contend that the proposed project is so “unsightly” and “aesthetically unacceptable” that the project “contradicts...community goals, and undermines the community’s effort to preserve its semi-rural character.” Therefore the appellants hold that P&D could not make the required findings for approval of the permit, namely those relating to compatibility with the character of the area, as well as requirements to underground support facilities. Although P&D approved the permit on the basis that the facility design was acceptable to meet these community goals, the assessment of aesthetics is a discretionary determination. As discussed previously, the aesthetics of the facility could be improved by undergrounding the equipment and fiber optic cable and using a more streamlined antenna design. Such design modifications would support the community’s interest in maintaining its semi-rural residential character.

“Pole-Mounted Equipment Conflicts with the Community’s Goal of Undergrounding Utilities”

While the County encourages undergrounding of utility poles, it does not have authoritative discretion over long term plans for utility poles. The proposed project requires authorization by the utility pole owners, the Southern California Joint Pole Committee (JPC),¹ to locate the equipment on the specified pole. The JPC has discretion over which poles are available candidates for equipment collocation and considers the physical capacity, the technological compatibility, and future development intentions (undergrounding) for each pole. The JPC issued authorization for NextG to pursue development permits to locate their equipment on the specific pole. However, the subject permit does not prohibit the pole owners from future undergrounding plans. Rather, the County’s telecommunications ordinance considers this possibility, stating “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.” (Article II, Sec. 35-144F.3.1.b.2).

“Both the Land Use Development Code and the Montecito Community Plan Call for Adequate Setbacks between Habitable Structures and Telecommunications Facilities”

The 1992 Montecito Community Plan, “Electromagnetic” Section includes Goal E-M-1: to “Protect citizens from elevated electromagnetic fields until the potential risk from EMF exposure can be

¹ “The Joint Pole Committee is made up of a group of member representatives of utilities and municipalities in Southern California who hold joint equity interest in utility poles. Established by telephone, electricity and railroad companies, the Committee has existed since October 10, 1906. It was formed as a result of the need to limit the number of poles in the field and to create a uniform procedure for recording ownership of poles.” (<http://www.scjpc.org/>)

determined.” This goal is followed by Policy E-M-1.1 which states that “In reviewing permits for EMF sensitive uses (e.g., residential, schools, etc.), RMD shall require an adequate building setback from EMF-generating sources to minimize exposure hazards.” However, per the 1996 Telecommunications Act limitations, the County is restricted from regulating “on the basis of health affects to the extent that the proposed facility is shown to comply with the Commission’s regulations concerning such emissions.” (47 U.S.C.A. § 332 (c)(7)(B)(iv).)

For all telecommunications facilities, emissions reports are required to predict the emissions of the particular facility’s equipment and recommend whether additional setbacks or fencing requirements are needed to comply with the FCC’s health and safety standards for public exposure. A report by Jerrold Bushberg, Ph.D., dated April 29, 2009, was submitted for the proposed project that concludes that the facility operates well below the FCC’s health and safety standards, therefore no additional setbacks are required for the proposed facility. The report notes that at a distance of 26 feet from the antenna (i.e., at essentially ground level), the facility emits at 0.3% of the FCC Maximum Permissible Exposure level.

The appellants also raise the issue of setback requirements in the telecommunications ordinance. Although most of the County permitting Tiers require setbacks from residentially zoned properties, the ordinance doesn’t preclude facilities from being located within those setbacks or even being located on a residential parcel itself; rather, if a facility is located in those setbacks or on a residentially zoned parcel, then a Tier 4 permit is required, and the review authority must be able to make the finding that “the area proposed to be served by the telecommunications facility would otherwise not be served by the carrier proposing the facility.” The only exception to this requirement is for Tier 1 “small facilities” (the subject permit) which can be located in all zone districts, including residential, without the additional setback requirements (Article II, Sec. 35-144F.3.1).

E. “Impacts of the Permit Will Be Compounded by Connection to NextG’s System and by Anticipated Co-Location”

In this section the appellants argue “P&D abused its discretion in not considering the impacts of the project as a whole, including its potential cumulative impacts, particularly since the approval of one antenna facilitates the creation of the Distributed Antenna System and this reasonably foreseeable consequence must be assessed.” As discussed in subsection “A” above, the project was considered as a “whole” under CEQA and was found to be categorically exempt by the CPUC on July 20, 2009. In the event additional antennas are proposed to be connected to the NextG network in the future, additional permits and CEQA review would be required at that time. Furthermore, the County Telecommunications Ordinance states that “no more than two antennas shall be located on a single utility pole or similar structure unless it is determined that there will not be a negative visual impact.” (Sec. 35-144F.3.1.b.2)

F. “P&D Issued the Permit Based Upon Inadequate, Incomplete or Unreliable Data”

“P&D Based its Permit Decision on Inadequate Information Concerning Project Alternatives”

The appellants contend that “NextG’s permit applications provide no substantive alternative site analysis” and that “P&D did not require NextG to justify its facility location on any scientific basis, particularly ‘gap of service.’”

The appellant is correct in that an alternative site analysis was not required because staff initially found that the proposed project complied with all applicable ordinance standards and so was approvable, therefore a demonstration of alternative sites was not warranted.

The appellant also contends that "P&D did not require NextG to justify its facility location on any scientific basis, particularly 'gap of service.'" However, as part of the project application, NextG provided the County with a network-wide coverage map. The map demonstrated the potential coverage provided by the NextG network with all of the NextG sites in the County's jurisdiction simultaneously activated, thus representing the intended extent of the entire DAS network coverage. Moreover, Metro PCS, the carrier that will be providing the cellular service through the NextG network, is new to Santa Barbara County, and does not have existing permitted sites in the County's jurisdiction in the areas in which the DAS sites were proposed, and therefore it was reasonable to conclude that absent the DAS, Metro PCS would have had no coverage.² But it is true that without site-specific information showing all Metro PCS coverage in the area, a determination of "gap in service" cannot be made.

However, the County's land use codes do not require applicants to demonstrate that they are filling a "significant gap" in wireless coverage through the "least intrusive means." Rather, this "significant gap" analysis is part of a federal limit on County's zoning authority over personal wireless service facilities. (47 USC § 332(c)(7).) The proposed denial is based solely on applicable state and local law, and not on the Applicant's failure to demonstrate a "significant gap" in coverage.

"P&D Has Not Established that the Proposed Location May Be Used Legally as Proposed"

The proposed facility would be mounted on an existing utility pole, in the public right of way. The pole was legally erected and therefore continues to be a legal use. NextG was deemed a "public utility" by the California Public Utilities Commission on January 30, 2003 and therefore has legal access to the utility pole.

"P&D Acted upon Information Inadequate to Establish Compliance with Federal Communications Commission Regulations"

As discussed previously, consistent with Article II, Sec. 35-144F.5.1.a, NextG submitted a radiofrequency emissions report that predicts the proposed project's consistency with FCC standards based on modeling methods. This report concluded that the facility would not only comply with FCC limits, but would operate at 0.3% of the applicable Maximum Permissible Exposure standards. FCC's guidelines specifically note that "Where a site contains only one antenna array, the maximum exposure at any point in the horizontal plane can be predicted by calculations."³ Therefore, additional measurements were not required. The report was written by a qualified third party engineer, Jerrold Bushberg, Ph.D., and raised no concerns warranting peer review.

² Although Santa Barbara County does not have any permits for Metro PCS facilities in the South County, it is unknown whether there are existing Metro PCS sites in adjacent jurisdictions such as City of Santa Barbara, Goleta, or Carpinteria, or in areas outside of local jurisdiction such as National Forest Lands.

³ Kennard, William E., et al. "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance," June 2, 2000, p. 1.

The field of radiofrequency analysis and FCC emissions compliance is limited in resources. The technicians who work in this field are either in the industry or provide consulting services for the industry. When the County initially implemented its telecommunications ordinance, all carriers submitted emissions reports prepared by their own companies. However, since 2005, the County of Santa Barbara began requiring that the report be prepared by a qualified third party, meaning a hired third party not directly employed by the company. This change was made to ensure that the radiofrequency engineers designing the site were not the same ones preparing reports for emissions compliance. In the event that these reports were unclear, poorly written, or raised concern, the County required the report to be peer reviewed by a different radiofrequency engineer. Mr. Bushberg has acted in the capacity of the County's peer reviewer in a number of cases. He has not, and would not have been asked to review a report he himself had written. It is standard practice for the County to accept the conclusions of reports prepared by the experts in the field, regardless of whether those experts were hired directly by the applicant, barring staff level review raising questions requiring expert review. Many consultants have acted in the capacity of the County's peer review on one project and an applicant's expert on another not unlike Bushberg.

“P&D Has Not Addressed Critical Issues Raised by the Board of Supervisors”

The Board of Supervisor Hearings on October 20, 2009 and December 1, 2009 were informational briefings in which no action was taken by the Board. Consistent with the Board's direction on December 1, 2009, staff returned to the Board of Supervisors on January 19, 2010 and presented a proposed work plan for a possible Telecommunications Ordinance update. P&D is working on an ordinance amendment as part of its 2010-2011 work plan.

CONCLUSION

The Montecito Community area is distinguished by its low intensity development and semi-rural character. With small meandering roads, lined with mature foliage, absent of sidewalks, curbs or gutters, and minimal lighting and utility infrastructure, the roadways largely contribute to the semi-rural character of the area. In fact, the Montecito Community Plan Goal LU-M-2 requires the County to “Preserve roads at important aesthetic elements that help to define the semi-rural character of the community” and “Strive to ensure that all development along roads is designed in a manner that does not impinge upon the character of the roadway.” Therefore, development immediately along the road corridors should be minimized to the extent feasible to maintain the existing character of the area. As discussed above, telecommunications facilities can minimize their presence along road corridors by undergrounding the support equipment as well as the fiber optic cabling and employing a more streamlined antenna design. Because the NextG facility under appeal does not propose undergrounding of the equipment or fiber optic cable or use of a streamlined antenna design, this design does not “blend into the environment to the greatest extent feasible” and is not consistent with the goals of the Montecito Community Plan. Findings for denial to support this conclusion are included in Attachment A.

Fiscal Analysis:

The costs for processing appeals in the Coastal Commission Appeal Jurisdiction are entirely borne by Planning and Development. The total estimated cost to process this appeal is approximately \$4,186.00 (23 staff hours). These funds are budgeted in the Permitting and Compliance Program of the

Development Review South Division, as shown on page D-330 of the adopted 2010/2011 fiscal year budget.

Staffing Impacts:

None.

Special Instructions:

The Clerk of the Board shall publish a legal notice at least 10 days prior to the hearing on August 3, 2010. The notice shall appear in the Santa Barbara Daily Sound. The Clerk of the Board shall fulfill the noticing requirements. Mailing labels for the mailed notice are attached. A minute order and a copy of the notice and proof of publication shall be returned to Planning and Development, attention David Villalobos.

Attachments:

- A) Findings
- B) Mr. Jonathan Kramer Letter, dated July 16, 2010
- C) Appeal Application and Letter, dated February 26, 2010
- D) Existing NextG DAS Facility Photos
- E) Existing AT&T Right-of-Way Facility Photos

Authored by: Megan Lowery, Planner II

cc: Anne Almy, Planning Supervisor

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