



COUNTY OF SANTA BARBARA

Planning and Development

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Appeal to the Board of Supervisors or Planning Commission (County of Montecito)

2010 MAR -4 PM 2:49
COUNTY OF SANTA BARBARA
CLERK OF THE BOARD OF SUPERVISORS

APPEAL TO THE BOARD OF SUPERVISORS OR PLANNING COMMISSION (APL) on the
 (assistance, revocation) or modification of:

- All Discretionary projects heard by one of the Planning Commissions
- Board of Architectural Review decisions
- Coastal Development Permit decisions
- Land Use Permit decisions
- Planning & Development Director's decisions
- Zoning Administrator's decisions

THIS PACKAGE CONTAINS _____

- ✓ APPLICATION FORM
- ✓ SUBMITTAL REQUIREMENTS

AND, IF ✓'D, ALSO CONTAINS _____

South County Office 123 E. Anapamu Street Santa Barbara, CA 93101 Phone: (805) 568-2000 Fax: (805) 568-2030	Energy Division 123 E. Anapamu Street Santa Barbara, CA 93101 Phone: (805) 568-2040 Fax: (805) 568-2522	North County Office 624 W. Foster Road, Suite C Santa Maria, CA 93455 Phone: (805) 934-6250 Fax: (805) 934-6258	Clerk of the Board 105 E. Anapamu Street Santa Barbara, CA 93101 Phone: (805) 568-2240 Fax: (805) 568-2249
Website: www.sbcountyplanning.org			

SUBMITTAL REQUIREMENTS

- X 8 Copies of the attached application.

- X 8 Copies of a written explanation of the appeal including:
 - If you are not the applicant, an explanation of how you are an “**aggrieved party**” (“Any person who in person, or through a representative, appeared at a public hearing in connection with the decision or action appealed, or who, by the other nature of his concerns or who for good cause was unable to do either.”);
 - A clear, complete and concise statement of the **reasons or grounds for appeal**:
 - Why the decision or determination is consistent with the provisions and purposes of the County’s Zoning Ordinances or other applicable law; or
 - There was error or abuse of discretion;
 - The decision is not supported by the evidence presented for consideration;
 - There was a lack of a fair and impartial hearing; or
 - There is significant new evidence relevant to the decision which could not have been presented at the time the decision was made.

- X 1 Check payable to Planning & Development.

✓
✓ Note: There are additional requirements for certain appeals including:

- a. **Appeals regarding a previously approved discretionary permit** – If the approval of a Land use permit required by a previously approved discretionary permit is appealed, the applicant shall identify: 1) How the Land Use Permit is inconsistent with the previously approved discretionary permit; 2) How the discretionary permit’s conditions of approval that are required to be completed prior to the approval of a Land Use Permit have not been completed; 3) How the approval is inconsistent with Section 35.106 (Noticing).

- b. **Appeals regarding Residential Second Units (RSUs)** – The grounds for an appeal of the approval of a Land Use Permit for a RSU in compliance with Section 35.42.230 (Residential Second Units) shall be limited to whether the approved project is in compliance with development standards for RSUs provided in Section 35.42.230.F (Development Standards).

- A clear, complete and concise statement of the reasons why the decision or determination is inconsistent with the provisions and purposes of the County's Zoning Ordinances or other applicable law; and
- Grounds shall be specifically stated if it is claimed that there was error or abuse of discretion, or lack of a fair and impartial hearing, or that the decision is not supported by the evidence presented for consideration, or that there is significant new evidence relevant to the decision which could not have been presented at the time the decision was made.

See attached appeal letter

Specific conditions imposed which I wish to appeal are (if applicable):

- a.

- b.

- c.

- d.

Please include any other information you feel is relevant to this application.

CERTIFICATION OF ACCURACY AND COMPLETENESS Signatures must be completed for each line. If one or more of the parties are the same, please re-sign the applicable line.

Applicant's signature authorizes County staff to enter the property described above for the purposes of inspection.

I hereby declare under penalty of perjury that the information contained in this application and all attached materials are correct, true and complete. I acknowledge and agree that the County of Santa Barbara is relying on the accuracy of this information and my representations in order to process this application and that any permits issued by the County may be rescinded if it is determined that the information and materials submitted are not true and correct. I further acknowledge that I may be liable for any costs associated with rescission of such permits.

Price, Postel & Parma LLP by Susan M. Basham Susan M. Basham 12/14/09

Print name and sign - Firm Date

Susan M. Basham, Attorney for Appellants Susan M. Basham 12/14/09

Print name and sign - Preparer of this form Date

Print name and sign - Applicant Date

Print name and sign - Agent Date

Print name and sign - Landowner Date

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CERTIFICATION OF ACCURACY AND COMPLETENESS Signatures must be completed for each line. If one or more of the parties are the same, please re-sign the applicable line.

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Print name and sign - Firm _____ Date _____

Print name and sign - Preparer of this form _____ Date _____

John A. Povera [Signature] 12-14-09

Print name and sign - Applicant _____ Date _____

Sharon Tomson [Signature]

Print name and sign - Agent _____ Date _____

Carla Tomson [Signature]

Print name and sign - Landowner _____ Date _____

David Theurer [Signature] 12/14/2009

Linda Johnston [Signature] 12-14-2009

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Joanne Shefflin Joanne Shefflin 12/14/09

Cynthia Feinberg Cynthia Feinberg 12/14/09

TED SIMMONS [Signature] 12/14/09

KELLY SIMMONS [Signature] 12/14/09

Peter VAN DENBROEK Peter van den Broek 12/19/09

→ FOR THE MONTELEITO ASSOC.

APPELLANTS
09CDP-00000-00055

<u>Name</u>	<u>Montecito Address</u>
Lead Appellant:	
John Abraham Powell	425 Lemon Grove Lane
Co-Appellants:	
Cindy Feinberg	1350 Arroyico Lane
Joanne Shefflin	995 Lilac Drive
Kelly and Ted Simmons	1545 Ramona Lane
Carla and Shaun Tomson	214 Middle Road
Linda Johnston and David Theurer	374 Miramonte Drive
Montecito Association	1469 East Valley Road



PLANNING & DEVELOPMENT
APPEAL FORM

SITE ADDRESS: Public right of way on San Leandro Ln, Montecito
ASSESSOR PARCEL NUMBER: adjacent to APN # 007 530 035
PARCEL SIZE (acres/sq.ft.): Gross n.a. Net n.a.
COMPREHENSIVE/COASTAL PLAN DESIGNATION: _____ ZONING: 20-R-1
Are there previous permits/applications? no yes numbers: _____
(include permit# & lot # if tract)
Are there previous environmental (CEQA) documents? no yes numbers: _____

1. Appellant: See attached list Phone: _____ FAX: _____
Mailing Address: _____ E-mail: _____
Street City State Zip

2. ~~Owner~~ NextG Networks of California, Inc. Phone: (805) 683-4326 FAX: _____
Mailing Address: 5720 Thornwood Drive, Goleta, CA 93117 E-mail: _____
Street City State Zip

3. Agent: _____ Phone: _____ FAX: _____
Mailing Address: _____ E-mail: _____
Street City State Zip

4. Attorney: Susan M. Basham Phone: (805) 962-0011 FAX: (805) 965-3978
Price, Postel & Parma LLP
Mailing Address: 200 E. Carrillo St., #400, Santa Barbara, CA E-mail: smb@ppplaw.com
Street City State Zip 93101

10APL-00000-00009

COUNTY USE ONLY

Case **10APL-00000-00009**
Super NEXTG CELLULAR ANTENNA #ESB18:APPEA
Appli SAN LEANDRO LN 3/4/10
Proje
Zoniz SANTA BARBARA 111-111-111

Companion Case Number: _____
Submittal Date: _____
Receipt Number: _____
Accepted for Processing _____
Comp. Plan Designation _____

COUNTY OF SANTA BARBARA APPEAL TO THE :

BOARD OF SUPERVISORS

PLANNING COMMISSION: COUNTY MONTECITO

RECEIVED

DEC 14 2009

RE: Project Title NextG Networks Cellular Antenna #ESB18

Case No. 09 CDH - 00000 - 00030

Date of Action Feb. 24, 2010

S.B. COUNTY
PLANNING & DEVELOPMENT

I hereby appeal the approval approval w/conditions denial of the:

Board of Architectural Review – Which Board? _____

Coastal Development Permit decision

Land Use Permit decision

Planning Commission decision – Which Commission? _____

Planning & Development Director decision

Zoning Administrator decision

Is the appellant the applicant or an aggrieved party?

Applicant

Aggrieved party – if you are not the applicant, provide an explanation of how you are and "aggrieved party" as defined on page two of this appeal form:

See attached appeal letter

Reason of grounds for the appeal – Write the reason for the appeal below or submit 8 copies of your appeal letter that addresses the appeal requirements listed on page two of this appeal form:

PRICE, POSTEL & PARMA LLP

JAMES H. HURLEY, JR.
J. TERRY SCHWARTZ
DAVID W. VAN HORNE
PETER D. SLAUGHTER
DOUGLAS D. ROSSI
ERIC P. HVOLBØLL
CRAIG A. PARTON
CLYDE E. WULLBRANDT
KENNETH J. PONTIFEX
CHRISTOPHER E. HASKELL
TIMOTHY E. METZINGER
TODD A. AMSPOKER
MARK S. MANION
MELISSA J. FASSETT
IAN M. FISHER
SHEREEF MOHARRAM
SAM ZODEH
KRISTEN M.R. BLABEY
LESLEY E. CUNNINGHAM
DARRYL C. HOTTINGER

COUNSELLORS AT LAW
200 EAST CARRILLO STREET, SUITE 400
SANTA BARBARA, CALIFORNIA
93101-2190

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OF COUNSEL
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RETIRED PARTNERS
GERALD S. THEDE
DAVID K. HUGHES

OUR FILE NUMBER
22124.1

February 26, 2010

Chair Michael Phillips
and Members of the Montecito Planning Commission
County of Santa Barbara
123 East Anapamu Street
Santa Barbara, CA 93101

Re: Appeal of 09CDH-00000-00030
NextG Networks Cellular Antenna #ESB18
San Leandro Ln, adjacent to APN 007 530 - 035

Dear Chair Phillips and Commissioners:

Appellants John Abraham Powell, Carla and Shaun Tomson, Joanne Shefflin, Ted and Kelly Simmons, Cindy Feinberg, Linda Johnston and David Theurer, and the Montecito Association have asked us to assist them in preparing their appeal of the above-captioned Coastal Development Permit for one of the 39 telecommunications facilities applications submitted by NextG Networks of California, Inc. ("NextG" or "Applicant").

On February 24, the Planning and Development Department ("P&D") issued its notice and intent to approve Coastal Development Permit No. 09CDH-00000-00030, with an appeal period ending March 8, 2010. Appellants are filing this appeal within the requisite appeal period.

This letter is intended to provide the framework for the appeal and to identify the grounds for appeal in summary fashion. Appellants expect to provide additional information and fully-developed arguments in support of their appeal prior to the Commission's hearing on this appeal, and they reserve their right to do so.

I. Project on Appeal

NextG has proposed the construction and use of an unmanned wireless telecommunications facility within the public right of way in an area zoned for residential use. It

intends to attach its facilities to an existing wooden utility pole located in the public right of way adjacent to privately-owned real property identified by the County Assessor as APN 007-530-035, also identified as San Leandro Ln, Montecito. The proposed facilities to be mounted on the pole include one 26-inch whip omnidirectional antenna and an equipment box measuring 32" x 6" x 5" (inexplicably not described specifically in the approved project description). The antenna would have a range of approximately 1500 to 2000 feet in each direction.

While the pending permit indicates "none" where asked to identify "associated case numbers," this pending permit is part of a larger package of "Tier 1" permit applications from NextG, through which it intends to install a "Distributed Antenna System" throughout the south coast areas of Santa Barbara County. The permit at issue here is one of 39 proposed for the South County, with 13 proposed for Montecito. NextG has identified Metro PCS as the carrier that would use these facilities to provide wireless service. In addition, NextG's plans include installation of fiber-optic cabling to connect all of the antennas. With the exception of cabling requiring trenching in coastal zone areas, the placement of cable is exempt from zoning permits. Installation of aerial cabling requires no permits, and installation of underground cable will require only road encroachment permits. This cabling is designed to support up to five carriers, each of which presumably would seek to co-locate its antennas on the same poles included in the NextG network of facilities, including the pole at issue in this particular permit.

In addition to the permit at issue here, Appellants expect to appeal P&D's decisions to approve some of these additional facilities where the proposed locations are similarly in conflict with the community's goals and with the interests of its citizens.

II. Appellants Have Standing As Aggrieved Persons

Appellants are all aggrieved persons adversely affected by P&D's decision within the meaning of County Code Chapter 35 Article II section 35-58, which defines an "aggrieved person" as "[a]ny person who, in person or through a representative, appeared at a public hearing of the local government in connection with the decision or action appealed, or who, by other appropriate means prior to a hearing, informed the local government of the nature of his concerns or who for good cause was unable to do either." The permit here appealed was issued administratively; therefore none of the appellants had an opportunity to attend a public hearing concerning the specific action. However, appellants have participated in several hearings before the Board of Supervisors that were characterized by P&D as informational briefings related to the NextG Distributed Antenna System and numerous pending NextG applications, including the application for the permit at issue here. These hearings were prompted by members of the community, including some of the appellants, who expressed concern regarding the NextG projects during the public comment period at the Board's October 6, 2009 hearing, requesting

that the Board impose a moratorium on the processing of applications for additional facilities to allow time for research and review of standards for approval of such facilities. As a result, the Board requested Staff briefings on the permitting framework for such applications and considered public testimony on October 20, 2009 and December 1, 2009.

The individual appellants, including lead appellant John Abraham Powell, have sent letters to the County expressing their opposition to the NextG network proposal and have attended one or more Board of Supervisors meetings related to the NextG permits. The Montecito Association has expressed its views in writing and its representatives have attended the Board of Supervisors meetings. Appellant Cindy Feinberg, in addition, has expressed her opposition publicly through local media including the Montecito Journal, the Independent, and KEYT News. Many of the appellants have called or emailed P&D staff with their concerns.

In summary, all of the appellants have appeared at a public hearing focused on this matter or otherwise have made their concerns known to P&D during the time when P&D was processing the permit application.

III. Grounds for Appeal

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

Article II of Chapter 35 of the County Code ("Article II") governs development in the Coastal Zone. Section 35-144F establishes standards for the siting and development of commercial telecommunication facilities to "promote their orderly development and ensure that they are compatible with surrounding land uses in order to protect the public safety and visual resources." Specifically, like the "tiering" of review under the Land Use and Development Code applicable outside the Coastal Zone, Section 35-144F.3 establishes different processing requirements for wireless facilities depending upon their proposed location type and location. An individual omnidirectional antenna installation on an existing operational utility pole is subject to Coastal Development Permit standards under Section 35-169. While the processing requirements for such projects are limited, Article II also includes in Section 35-144F.4 more demanding development standards applicable to all telecommunication facilities. Appellants contend that certain of these development standards have not been met and that the permit was approved in error.

Except for those small facilities that qualify for Coastal Development Permits, all wireless facilities proposed to be located in any residential zone require a Major Conditional Use Permit under the jurisdiction of the Planning Commission. Appellants contend that P&D abused

its discretion in processing each of the individual permit applications as a Tier 1 project requiring only “ministerial” review 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 Article II and the California Environmental Quality Act (“CEQA”).¹

In issuing a Coastal Development Permit for a telecommunications facility, the review authority must make certain required findings, including the finding that the proposed development will conform to the applicable provisions of the County’s Comprehensive General Plan, which includes the Coastal Land Use Plan and the Montecito Community Plan. (Article II § 35-169.6) Appellants contend that P&D did not make this or other required findings and could not have made these findings, as discussed within this letter.

Moreover, Section 35-144F.7 requires that the review authority must make certain additional required findings in the issuance of any permit for telecommunications facilities, including Coastal Development Permits. These include the following:

1. The facility will be compatible with the existing and surrounding development in terms of land use and visual qualities.
2. The facility is located to minimize its visibility from public view.
3. The facility is designed to blend into the surrounding environment to the greatest extent feasible.
4. The facility complies with all required development standards unless granted a specific exemption by the review authority as provided in Section 35-144F.4.
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.

P&D has made none of these findings in the permit at issue and, as Appellants will show, cannot make these findings based upon the facts and evidence readily available concerning this project. Accordingly, Appellants contend that the decision to issue the permit was inconsistent

¹ In a letter dated October 26, 2009, NextG has asserted that the California Public Utilities Commission is the “lead agency” under CEQA and “the only entity with broad discretionary decision-making authority over NextG’s proposed services, facilities, and construction throughout the state.” Appellants contend that the County of Santa Barbara has a responsibility under CEQA as a responsible agency if not as a lead agency and is responsible for assessing the environmental impacts of the proposed project within its own jurisdiction.

with the provisions and purposes of the County's Zoning Ordinances and other applicable law and was not supported by the evidence presented for consideration. They maintain that P&D abused its discretion and acted in error in issuing the permit.

B. Health Risks Associated with Electromagnetic Frequency Exposures Area
Legitimate Community Concern

As Appellants have stated in the Board of Supervisors hearings and in their written communications, they are extremely concerned about the health risks of exposure to electromagnetic frequencies ("EMF") associated with wireless communications, particularly where NextG proposes to add substantially to existing and presently unavoidable exposures all around us. Their concerns have not been addressed in Condition 8 of the Conditions of Approval associated with this permit, which requires compliance with Federal Communications Commission exposure limitations. The federal standards have not been updated to reflect the most recent scientific knowledge, which was presented to the Board of Supervisors during its several hearings, and the federal standards provide inadequate protection against health risks as they are understood today.

The Board of Supervisors has expressed the same concerns in its Resolution 09-339, approved on November 10, 2009, where the Board objected to lobbying efforts by the Cellular Telecommunications Industry of America to have the Federal Communications Commission impose even greater restrictions on a local government's authority to undertake meaningful review of all aspects of telecommunications projects. Instead, the Board urged repeal of the sections of the 1996 Telecommunications Act that pre-empt local control and prevent local governments from considering health effects. At the same time, the Board authorized the County's legislative advocates "to actively seek and support state legislation that would give local governments greater flexibility to regulate the placement of cellular facilities within the road right of way."

Appellants join the Board of Supervisors in their frustration with constraints under the 1996 Telecommunications Act of 1996. However, they recognize that the Telecommunications Act does not prevent the County from denying applications on other grounds. Specifically, the Act preserves local zoning authority over decisions regarding the placement, construction, and modification of personal wireless service facilities as long as regulation does not have the effect of prohibiting the provision of personal wireless services. (47 USC §§ 253(b), 332(c)(7).) 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.

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

The California Constitution, Article XI section 7, establishes the County's authority to "make and enforce within its limits all local, police, and other ordinances and regulations not in conflict with general laws." This constitutional police power is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people. Under California law, a local government's exercise of police power is valid if its restrictions bear a reasonable relation to the general welfare. *City of Los Angeles v. County of Kern* (C.D.Cal. 2006) 462 F.Supp.2d 1105. One California court has described the police power as follows:

[P]olice power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.

(*Richeson v. Helal* (2007) 158 Cal.App.4th 268.)

Certainly consideration of the impacts of new technologies such as the network proposed by NextG is amenable to the exercise of the County's authority as it keeps pace with both the growth of knowledge and the need for expansion to meet conditions of modern life. Certainly, too, the "belief in the popular mind" concerning the NextG Distributed Antenna System is that the County should exercise its authority in the interest of the public health, safety and welfare.

Both state and federal courts have determined that regulation to protect aesthetic interests is within the exercise of the police power. In *Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490, the United States Supreme Court determined that even if the only interest implicated in the selected location is aesthetic, that aesthetic concern is a legitimate and significant governmental interest. In *Echevarrieta v. City of Rancho Palos Verdes* (2001) 86 Cal.App.4th 472, the California Court of Appeal concluded that the exercise of governmental authority for aesthetic purposes is clearly a legitimate exercise of traditional police power. The *Echevarrieta* Court agreed with the trial court in that case that "[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic, [and] monetary." (*Echevarrieta*, 86 Cal.App.4th at p. 478.)

The regulation of visual blight as an aesthetic concern is certainly within the County's authority. For example, in *Crown Motors v. City of Redding* (1991) 232 Cal.App.3d 173, the Court of Appeal concluded that the power of government to advance the quality of life in the

community included eliminating the visual blight created by two proposed reader boards. (*Crown Motors*, 232 Cal.App.3d at pp. 178-179.) The court reasoned that the governmental interest in attempting to preserve “the quality of urban life” is one that must be accorded high respect.

The *Crown Motors* Court went a step farther in determining that the aesthetic condition of a community is related to public health. The court reasoned that the term “public health” must be interpreted according to the circumstances in which it is used. It “takes on new definitions when new conditions arise, but generally speaking, it means the wholesome condition of the community at large.” (*Crown Motors*, supra 233 Cal.App.3d at p. 178 [quoting *Chisholm v. California Jockey Club* (1958) 164 Cal.App.2d 367, 369].)

The “wholesome condition” of the Montecito community is at the heart of this appeal because that is what this NextG permit jeopardizes. The NextG facilities will create a visual blight on a well-traveled thoroughfare where they will be seen daily by many Montecito residents, all of whom chose to live in the community because of its semi-rural character. By impacting the quality of life in the community, NextG’s numerous antennas and equipment boxes may also impact the mental and spiritual well-being of some residents. They certainly will create a visual distraction for drivers, raising traffic and safety concerns on the community’s roads, particularly in the vicinity of schools. Whip antennas and equipment boxes mounted on poles throughout the community conflict with the aesthetics of the community and cannot possibly be in concert with the public health and safety.

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

To approve this permit, P&D must find that the proposed facility will be compatible with the existing and surrounding development in terms of land use and visual qualities. P&D also must find that the facility is located to minimize its visibility from public view and that it is designed to blend into the surrounding environment to the greatest extent feasible. (Article II § 35-144F.7.) P&D has not made these findings and cannot make such findings.

When members of the Montecito community prepared the Montecito Community Plan in 1992, they stated as an over-arching goal the preservation of a semi-rural residential quality of life, and they identified the features of the community that establish its character, including the presence of narrow winding roads and the absence of urbanizing features. The Montecito Community Plan is integral to the County’s Comprehensive General Plan, and its policies must be considered in the review of any permit for the Montecito planning area.

Aesthetic considerations and preservation of the character of the community are paramount throughout the Community Plan as well as the Montecito Architectural Guidelines and Development Standards. The Community Plan includes Goal LU-M-2:

Preserve Roads As Important Aesthetic Elements That Help to Define the Semi-Rural Character of the Community. Strive To Ensure That all Development Along Roads Is Designed In A Manner That Does Not Impinge Upon the Character of the Roadway.

The Guidelines state as goals: "To maintain the semi-rural character of the roads and lanes" and "To preserve, protect and enhance the existing semi-rural environment of Montecito." Accordingly, when reviewing a proposed new residential development, the Board of Architectural Review must find, among other things, that there is "a harmonious relationship with existing developments in the surrounding neighborhood."

The installation of pole-mounted antennas, equipment boxes and a cable network along narrow, winding roadways throughout the community contradicts these stated community goals and undermines the community's effort to preserve its semi-rural character. Appellants contend that P&D abused its discretion when it failed to consider these goals in approving the permit.

Moreover, under Section 35-144F.4(2) of Article II, all commercial telecommunications facilities must meet particular development standards, among which is the following:

- c. Support facilities (e.g., vaults, equipment rooms, utilities, equipment enclosures) shall be located underground, if feasible, if they would otherwise be visible from public viewing areas (e.g., public road, trails, recreational areas).

The review authority may grant an exemption only if it "finds, after receipt of sufficient evidence, that failure to adhere to the standard in the specific instance (a) will not increase the visibility of the facility, and will not decrease public safety, and will not result in greater impact to coastal resources, including but not limited to sensitive habitat, coastal waters, and public access; or (b) is required due to technical considerations such 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 (c) would avoid or reduce the potential for environmental impact, and will not increase the visibility of the facility, and will not decrease public safety, and will not result in greater impact to coastal resources, including but not limited to sensitive habitat, coastal waters, and public access."

The facilities in question include a 26 inch whip antenna and an unsightly equipment box that will hang on the utility pole, fully visible from a public road and adjacent areas. The

location is likely visible from homes, pedestrians and others on this a highly-trafficked area. The proposed antenna by itself is visually intrusive, and the equipment box makes it completely unacceptable aesthetically. Under Section 35-144F.4(2)(c), these facilities should be located underground because they are visible from public viewing areas. Clearly NextG wants to install its facilities exactly as it has proposed, but to Appellants' knowledge, NextG has not provided information sufficient for P&D to conclude that there are no possible alternatives.

P&D is required to make a finding that the facility "complies with all required development standards unless granted a specific exemption by the decision-maker as provided in Section 35-144F.4." The permit at issue includes no grant of an exemption from this requirement, nor would it qualify for such an exemption based upon the criteria provided in the ordinance. Accordingly, Appellants content that P&D abused its discretion by issuing a permit for facilities that do not comply with this development standard.

1. Pole-Mounted Equipment Conflicts with the Community's Goal of Undergrounding Utilities

Recognizing the aesthetic aspects of the community's character, Appellant Montecito Association recently adopted an Overhead Utility Policy, which states the following:

The Montecito Association affirms its long-term support for the elimination of overhead utilities. This is consistent with our long-standing support of the Montecito Community Plan goals to sustain and enhance the exceptional beauty and semi-rural character of the Montecito community as well as to maintain property values and a high quality living environment.

Indeed, undergrounding of utilities has been a priority in the Montecito Community for many years. In 1968 the Board of Supervisors approved an undergrounding district at the intersection of East Valley and San Ysidro Roads (Resolution No. 68-486), and in 1986 the Board of Supervisors approved a Rule 20A district on San Ysidro Road (Resolution 86-151). The Board also has approved a district along East Valley Road between Hot Springs Road and Santa Angela Lane, (Resolution 05-102), for which construction has not yet begun. Considering that the NextG facilities are part of a network of interdependent antennas, it makes little sense to approve the installation of antennas on any poles that are likely to be proposed for removal as part of undergrounding projects in the future.

Notably, Article II section 35-144F.3(b)(2) states: "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.” This provision provides little comfort to Appellants, since it is highly unlikely that NextG would accept an automatic nullification of a permit on which it has relied for an installation that it may claim is integral to its network.

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

In 1992 wireless communications were in their infancy. Even so, the Montecito Community Plan included as Goal E-M-1 the protection of citizens from elevated electromagnetic fields until the potential risk from EMF exposure can be determined. The Plan recognized the County’s authority to protect the community from this potential hazard by requiring “adequate building setbacks from EMF-generating sources to minimize exposure to this hazard.”

As it has turned out, the EMF hazard remains a concern and building setbacks have taken on broader significance as telecommunications systems have changed. With antennas and large equipment boxes mounted on numerous poles throughout the community, setbacks from buildings are important so as not to block the views or otherwise compromise the enjoyment of adjacent private property, consistent with the Community Plan’s goals.

Similarly, as the County has updated its Commercial Telecommunications Facilities ordinances, it has included as a requirement that in a residential zone, the base of any new freestanding antenna support structure shall be set back from adjacent residential property “a distance equal to five times the height of the antenna and antenna support structure, or a minimum of 300 feet, whichever is greater.” While Article II section 35-144F.4(1)(a) includes an exception from setback requirements for antennas installed on existing public utility poles, the exception contradicts the basic premise of setbacks – that two uses are either fundamentally incompatible or are made so by proximity to each other.

Aesthetically an antenna and equipment box mounted on an existing pole may be as intrusive visually as a new freestanding antenna support system. The appellants who live near the permit at issue here certainly find the prospect of looking at them every day a visual intrusion on their area.

Once telecommunications facilities are installed, the future use of the adjacent property is compromised. Regardless of whether the Telecommunications Act recognizes health risks as a legitimate basis for denying a project, people in the community generally are aware that scientists have raised substantial exposure concerns and they do not want to live close to

antennas when proximity can be avoided. The installation of an antenna next to a residential property effectively limits the property owner's opportunity to expand or remodel his residence in the area closest to the antenna.

For these same reasons, the presence of any telecommunications equipment close to residential uses may jeopardize the long-term value of the adjacent residential properties. Appellants are aware of other situations in the community where properties have lost substantial value after the installation of nearby telecommunications equipment.

In short, approving any pole mounted facilities is contrary to County policies and a step backward from the 1992 Montecito Community Plan. Appellants contend that P&D abused its discretion in permitting the installation of any NextG antennas on poles where the requisite setback from existing structures cannot be achieved, thereby compromising the interests of private residential property owners.

E. Impacts of this Permit Will Be Compounded by Connection to NextG's System and by Anticipated Co-Location

This permit cannot be viewed as though it approves a single whip antenna and single equipment box on a single pole. As objectionable as these facilities are in their own right, they must be seen as enabling something far more damaging to the community: an interdependent network of similar installations that together will create a Distributed Antenna System, causing an immeasurable change in the community's character. NextG has proposed 39 pole locations today, and its Distributed Antenna System, if approved, will pave the way for up to five antennas on each pole, including the pole at issue in this permit.

As discussed throughout this letter, Appellants object to P&D's decision to consider each of the proposed antennas as a single antenna requiring only ministerial review under Article II section 144F.3(1). P&D explained to the Board of Supervisors in its December 1, 2009 Agenda Letter that the theory behind a tiered approach is that "as the size and complexity of the facility and potential for environmental impacts or policy inconsistencies increased, the decision-making body shift[s] upward." Under this theory, the NextG permit applications and the entire Distributed Antenna System should have been viewed as one project subject to higher scrutiny.

Moreover, in accepting each of NextG's multiple applications as a single antenna permit application, P&D concluded that only a "ministerial" permit is required and therefore apparently concluded that, apart from NextG's contentions concerning the California Public Utilities Commission as the "lead agency," that each such "ministerial" project is exempt from review under the CEQA. To the extent that the California Public Utilities Commission is responsible for

certain environmental review, Appellants have seen no evidence of the Commission's review or any evidence that the County was given notice and the opportunity to comment on an environmental document. Appellants contend that 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. They maintain that P&D should have conducted this level of review not solely because of CEQA but also because the project requires a higher level of scrutiny under Article II.

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

1. P&D Based its Permit Decision on Inadequate Information Concerning Project Alternatives

NextG's permit applications provide no substantive alternative site analysis as is required before an application may be deemed complete. Instead, NextG asserts in its applications that it has selected its pole locations "based on their network efficiency allowing the least number of equipment installations as well as structural integrity and constructability." The presumptions in this "analysis" pre-determine the conclusion. NextG proposes a particular kind of network – a Distributed Antenna System – in which the maximum separation between its antennas is determined by design and environmental factors. To Appellants' knowledge, P&D did not require NextG to justify its facility location on any scientific basis, particularly "gap of service."

But for the fact that NextG wants to install this particular type of system, other options would be available. Even accepting the practical limitations of this type of system, alternative locations and configurations certainly are available within the Montecito community. Such alternatives might have been pursued as a result of a thorough peer review. They certainly would have been reviewed in a CEQA analysis, which requires consideration of project alternatives, including the "no project" alternative. However, P&D did not avail itself of either source of information and relied on insufficient information from the applicant. Appellants contend that P&D abused its discretion in not fully exploring project alternatives, including but not limited to alternative locations for the facilities at issue in this permit.

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

Article II section 35-169.6 states, among the required findings for issuance of a Coastal Development Permit, that the proposed development must be "located on a legally created lot" and that the subject property is "in compliance with all laws, regulations, and rules pertaining to

zoning uses, subdivisions, setbacks, and other applicable provisions of this Article.” P&D has not made either required finding in the subject permit and, to Appellants’ knowledge, no analysis has been completed that would warrant such a finding.

Among other things, P&D has not addressed the specific limitations on use of the utility easements where the poles are located. Each of the poles proposed for location of NextG facilities, including the pole at issue in this appeal, is located in a public right of way and is owned or maintained by another utility. Appellants do not yet know the specifics of the easement affected by the permit at issue. However, they have seen no evidence that P&D has considered those specifics in approving this permit. For example, the right of way may exist under an easement granted by an adjacent property owner who continues to own the fee in the land, and the use of the easement may be restricted in a way that would prevent the County from extending rights to a particular user.

In addition, the pole may be owned by Southern California Edison or another utility that has the authority to limit NextG’s use. In its December 1, 2009 Agenda Letter, P&D explained to the Board of Supervisors that the County’s franchise agreement with Southern California Edison provides: “Except in those cases where Grantee (SCE) is required by State or Federal law to provide access to its Facilities, use of Grantee’s Facilities for any purpose other than the uses permitted by this ordinance shall require notice and consent by County.” P&D also explained that the California Public Utilities Commission requires electrical utilities to allow pole access to telecommunications providers possessing a Certificate of Public Convenience and Necessity from the Commission. However, P&D did not state whether NextG has such a Certificate, and Appellants are not aware of one.

In the absence of information establishing the legal status of the location and NextG’s right to occupy it, P&D cannot make the required findings. Appellants contend that P&D abused its discretion in issuing the permit without adequate foundation.

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

In its October 20, 2009 Agenda Letter, P&D stated that it had asked NextG to provide “site-specific cumulative emissions tests in order to be able to affirmatively make the finding of the installation’s compliance with FCC’s emissions thresholds. Upon receipt of the site specific radio frequency emissions tests, the County will have the reports peer reviewed for accuracy; following, decisions on these LUP, CDP and CDH permit applications will be rendered.” Appellants have been unable to obtain any information that would indicate completion of the reports.

Moreover, Appellants are aware that P&D selected for its peer review expert a Mr. Bushberg who has worked extensively for major telecommunications carriers throughout the state, including but not limited to NextG. The county maintains a list of accepted consultants in various fields and, to Appellants' knowledge, Mr. Bushberg is not among them. Clearly Mr. Bushberg had a conflict of interest if asked to provide an unbiased peer review of reports prepared by or on behalf of his current or potential future client. It is Appellants' understanding that this type of conflict of interest is not tolerated by P&D for consultants in other disciplines. To the extent that he may have provided any peer review of the subject permit, his review cannot be relied upon.

To approve this permit, P&D must make the required finding that "[t]he applicant has demonstrated that the facility shall be operated within the frequency range allowed by the Federal Communications Commission and complies with all of the applicable safety standards." To Appellants' knowledge, P&D did not receive reports and/or did not complete the peer review of this project and therefore cannot make this finding. Under these circumstances, P&D abused its discretion and issued the permit in error.

4. P&D Has Not Addressed Critical Issues Raised by the Board of Supervisors

On October 20, 2009, after hearing public testimony, the Board of Supervisors voted to direct staff to explore, among other things, the "role of CEQA in the regulatory/permitting process, relocation of existing sites, issues related to third-party/peer review, conflict of interest/revolving door policies and laws, . . . [and] cumulative impacts of such facilities." The December 1, 2009 Agenda Letter did not address these concerns in any detail and Appellants do not believe that Staff's oral report expanded the response significantly.

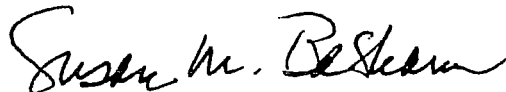
Appellants understand that part of the Board's focus was the proposed moratorium on the processing of new permit applications, but the 39 NextG applications were pending and the information requested by the Board was as relevant to the substantive consideration of those permits as to the prospect of a moratorium ordinance. Had P&D presented an explanation of each of these areas of concern, it is possible that the processing of the permits would have been done with greater "transparency," as the Board suggested, and with greater attention to the matters that have resulted in flawed permits.

* * * * *

Chair Michael Phillips
and Members of the Montecito Planning Commission
December 14, 2009
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In summary, Appellants have concluded that P&D issued the permit in error because the NextG network, and the subject permit in particular, did not receive the full and complete review that state and County law and community policies require. Required findings were not made and, on the facts, cannot be made. Accordingly, P&D should have denied the permit. Appellants are continuing to investigate their concerns and remain open to considering additional information. We look forward to presenting their appeal in greater detail for your consideration at hearing.

Very truly yours,



Susan M. Basham
for PRICE, POSTEL & PARMA LLP

SMB:lkh
Enclosure

cc: Appellants (see appeal list)