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BOARD OF SUPERVISORS
JULY 1, 2014
PLANNING & DEVELOPMENT
AGENDA ITEMS: 8 & 9

VIA EMAIL

Chair Steve Lavagnino, and
Members of the Board of Supervisors
County of Santa Barbara
105 East Anapamu Street
Santa Barbara CA 93101

Re: Crown Castle Appeal; 13CUP-00000-00009 & -000010; 14CDG-00000-0002

Dear Chair Lavagnino and Members of the Board:

I write, as counsel for the Montecito Association, and as a life-long resident of Montecito, to urge you to deny the captioned appeal if Crown Castle refuses to voluntarily return to the Montecito Planning Commission ("MPC") for reasonable processing and review of its significant last-minute project changes.

Background

Distilled to its essence, this is the project history: Crown Castle applied for a permit for 29 new antennas on 27 existing and 2 new utility poles in Montecito with all but a minor portion of the supporting equipment to be underground. After discussing the project with County staff, Crown Castle modified its application to include very significant above-ground structures. Of the 29 installation sites, 21 would have, in addition to the new antennas, and a pole-mounted box, a large refrigerator-sized[1] pedestal-mounted electrical box.

No reasonable person can contend that 29 such installations, and the precedent they will set, do not pose significant environmental visual considerations, or that they do not raise legitimate questions regarding compatibility with the Montecito Community Plan and Montecito's defining semi-rural character.

Governmental agencies cannot prohibit telecommunication installations on the grounds of safety from electromagnetic radiation, because the federal government has preempted that regulation. But local agencies retain the authority to regulate the location and aesthetics of telecommunications installations and, indeed, are required under CEQA to consider those impacts. That is appropriate because local communities know their communities best.

[1] The pedestal-mounted units range from 4.5' to 5' in height—almost as tall as a person.

The proposed project—really 29 *separate* projects—is large and complex. Each of the locations is different. The technical issues at each location vary, the aesthetics of each site vary, and the physical challenges (impact on trees, roots, vegetation, sight lines, aesthetics) vary with each site. Necessarily, processing was time-consuming. The MBAR devoted seven separate hearings to the sites, reviewing each one in great detail and providing the applicant comments. Review of the MBAR Minutes makes it clear that the members of the MBAR had very, very significant concerns regarding the visual impacts of the many installations.

It is clear that the MBAR thought they needed to limit their comments to suggestions that would minimize the aesthetic impacts of a project that was not within their purview to disapprove. MBAR expressed numerous concerns regarding the aesthetic and visual impacts of the installations, which led Crown Castle to eliminate two poles and to make a number of relatively minor modifications, such as shifting the exact location of the ground-mounted boxes and specifying the color of those boxes.

The last hearing before MBAR was on February 24, 2014. As with the prior hearings, MBAR primarily confined its comments to suggestions on minimizing visual impacts of the project. But it is by no means the case that they approved it or that they thought it compatible with the Montecito Community Plan. The Minutes of that last hearing include these overriding concerns:

> "2 Proposal represents a visual degradation of community
>
> "3 Not convinced that this is the only solution that is good for Montecito
>
> "4. There needs to be a master plan
>
> "5 Question whether the need justifies the impacts
>
> "6. Not a great solution"

MPC Action

On May 21, 2014, the MPC conducted a single hearing on the project, devoting more than 7 hours to the application. It is critically important to understand that during the MPC hearing, in response to incisive questions from the Commissioners regarding the necessity for all the ground-mounted boxes, key issues came to the surface with respect to which, in all candor, Crown Castle had not previously been fully forthcoming:

1. Directly contrary to the information Crown Castle had presented to the MBAR and that it initially presented to the MPC, the large, refrigerator-sized pedestal-mounted equipment is not actually required at each of the 21 proposed locations. Crown Castle, and representatives of Verizon and So. California Edison were all in attendance. Commissioner Overall, who realized that the refrigerator-sized boxes were required due to amperage requirements of one antenna, asked whether the number of ground-mounted units could be reduced if each one powered more than one antenna. Only then did Crown Castle

acknowledge that there was an alternative that might well be able to reduce the number of ground-mounted boxes, with some tradeoffs on the equipment that would be on the towers. This was critically-important new information only disclosed near the end of the MPC hearing;

2. Although the MBAR had carefully specified how all pedestal-mounted equipment would be painted, to minimize its visual obtrusiveness, it became clear that each of the pedestals would have somewhat garish, yellow warning caution signs that could not be painted over. This was new information not disclosed to the MBAR and only disclosed in the course of the MPC hearing;

3. There is no particular urgency to the application because the proposed additional antennas are not needed to address gaps in current coverage, but rather to address future projected demand[2].

After a lengthy, exhausting hearing, the MPC found itself in a difficult position. For a project with no external time pressure (the equipment is not to address coverage gaps), and for a very complex multi-site installation, the MPC only learned during the course of the hearing that an extremely significant modification might be possible that would dramatically reduce the potential visual impacts of the project. But this new information was only disclosed by Crown Castle *during the hearing*, which means that the modified project that appeared possible had not been reviewed by the MBAR and was one that the MPC had only that hearing to digest.

Faced with this development, the MPC took very reasonable, appropriate action. It asked Crown Castle to agree to a reasonable continuance to allow the MPC and staff to evaluate the proposed significant changes and to obtain public comment.

It is important to emphasize that the MPC was not unreasonably delaying the project or obstructing reasonable processing. If anything, the applicant should be faulted for not disclosing the possibility of such a significant redesign prior to the hearing. After devoting seven hours to the hearing, only to learn of a very significant possible project redesign still lacking detail, it was eminently reasonable for the MPC to seek reasonable time to process the new information. I question whether the Commissioners could have fulfilled their fiduciary duty to have done otherwise.

It is unfortunate that Crown Castle, asserting "shot clock" provisions of federal law (discussed below), declined to allow the MPC its reasonable request and instead appealed to you.

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[2] Crown Castle states in its letter to you that it provided unrebutted testimony that the equipment is needed to address coverage gaps, and that the MPC ignored that testimony. In fact, however, there was contradicting testimony from residents and users of the existing Verizon cell service who testified that the existing coverage is satisfactory.

The project that is before you is yet another alternative from the alternative the MPC began to discuss. According to the Staff report[3], *after* the MPC hearing, Crown Castle has worked with So. California Edison to confirm the acceptability of the "low vaulting" redesign—not the alternative discussed with the MPC—which will allow reduction of the proposed pedestals. To our knowledge, however, Crown Castle has still not disclosed which of the proposed pedestals can be eliminated, or exactly what additional pole-mounted equipment might be required to enable the pedestal reductions.

Crown Castle's appeal therefore presents the Board with a very significant, multi-site project, with obvious aesthetic and visual impacts to the Montecito Community that has not been reviewed by the MBAR or the Montecito Planning Commission, and that even today has extremely important details still not disclosed to the County or the public. Although Crown Castle could easily have agreed to the MPC's reasonable request for a short continuance to process the new information, it has chosen to demand that the Board resolve the issue without the MPC's final consideration.

If there were little at stake, if the last-minutes changes were modest, if Crown Castle could not be faulted for its last-minute revelation that a much less intrusive design might be possible, if there were any real present need—then intervention by the Board, and rejection of the unanimous[4] MPC decision, could more reasonably be justified. <u>But none of those things are true</u>.

<u>MPC Justification</u>

It is as challenging to secure approval for a new project in Santa Barbara as anywhere I know. But the care we devote to regulating land use is what has made our community so desirable. Verizon's many well-to-do customers, who will be using the new facilities, live here precisely because we have so carefully preserved community values.

The County long ago created the MPC to allow Montecito residents greater oversight over the land use matters they know best and that impact them to the greatest extent. Creation of the MPC also significantly reduced the workload of the Board of Supervisors by allowing most matters to be resolved without Board resources.

I believe that as a matter of policy, absent extraordinary circumstances, clear error, exigent need, or extenuating circumstances, the Board of Supervisors should respect and give deference to the decisions of the MPC. Historically, I believe the Board has done exactly that.

In its appeal letter to you, Crown Castle takes pride in the fact that it participated in the MBAR process and in response to MBAR and public concerns made numerous changes. They can

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[3] See Staff report, page 4.

[4] All three MPC Commissioners present at the hearing voted to deny the project if the applicant was unwilling to allow a reasonable continuance.

justifiably take credit for continuing to improve the project. But one must also recognize that the project initially proposed required numerous changes, and that the careful process has in fact effectuated significant improvements. The process (without Board involvement) has been working exactly as it should. The project has continually improved as a direct result of public comment, MBAR guidance, and a thoughtful, careful public process.

No one can credibly contend that a multi-site installation such as proposed does not raise huge, potential, visual and aesthetic impacts, and important questions regarding visual blight, consistency with the Montecito Community Plan, and Montecito's semi-rural character. Only at the last minute, did Crown Castle reveal that it was possible to eliminate (at least) 12 of the 21 pedestal-mounted, refrigerator-sized electrical boxes it had always said were necessary, reducing the number to 9. We cannot know if it is not possible that even more of them could be eliminated, or that there are not other alternatives. Not only was this information only revealed at the last moment, but crucial details are still unknown. Crown Castle has not, to our knowledge, told anyone which of the pole sites would be reconfigured, what additional equipment might then be necessary, or whether the changes themselves might raise new issues that require focus. Crown Castle, which emphasizes how long ago the project was deemed complete, can hardly complain about the County's processing when it only discloses such a dramatic modification at the 11th hour.

The Montecito Association believes that faced with this last minute information, only disclosed during the hearing and unknown to the MBAR, it would have been irresponsible for the Montecito Planning Commission to have approved the project. The Montecito Planning Commission has a fiduciary duty to the public to give thoughtful, careful consideration of all projects. How could it have approved a dramatically-modified project with so little time for thoughtful consideration and when so many new questions were raised by the proposed change?

In light of the new information, a short delay to allow thoughtful processing was eminently reasonable.

It is at best ironic that Crown Castle accuses the MPC of holding "the Project ... hostage to the Commission's hard ball tactics of denial, unless the Applicant gives the Montecito Planning Commission more time to review and rework the Project." In our view, the reverse is true. Threatening what we believe is a bogus shot clock argument (see below), Crown Castle is pressuring the Board to take precipitous action, short-cutting the MPC process that is proving to be extremely effective, under the threat of litigation, all because it is refusing to allow a short extension of time for orderly processing.

Shot Clock

Regulations of the FCC known as the "shot clock" require that local governmental agencies act on applications for new antennas on existing poles (*emphasis added*) be acted on within 90 days[5].

At the hearing below, in light of the last-minute changes, the MPC advised Crown Castle that it reasonably needed more time to consider the implications of the changes, that it did not want to deny the project, but that if Crown Castle refused to voluntarily extend the shot clock deadline, the MPC would have no choice. Now Crown Castle is pressuring the Board with the shot clock threat—an implied threat of litigation.

But the shot clock is a bogus issue.

First, there is at least a legitimate question if the shot clock rule even applies, because the proposed projects include much more than pole-mounted equipment. The project includes multiple large, obtrusive, ground-mounted installations that may not be contemplated by the simple pole-addition provisions of the shot clock rule. And the original project included two new poles to which the 90-day rule is inapplicable;

Second, even if applicable, and even if the deadline is not met, the shot clock rules are by no means absolute. Where a governmental agency can demonstrate that it had reasonable grounds to require additional processing time, additional processing time is allowed. There is no doubt that additional time would be allowed in this case;

Third, and this is dispositive, the only requirement of the shot clock is that the County act, and it has acted. Because Crown Castle declined to extend the deadline, he MPC denied the application. The County has acted. The shot clock rule is satisfied.

We believe that Crown Castle is holding the shot clock argument over the County's head, to pressure it into acting hastily. The Board should not be so misused.

Staff Position

The Montecito Association considers it very unfortunate that County Staff is not supporting the decision of the MPC, and does not believe that there is an adequate basis for that lack of support. But key aspects of the Staff's report are critically important.

First, Staff disagrees with and rejects the applicant's statement that Crown Castle was denied a fair and impartial hearing. Specifically, Staff states:

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[5] We attach a lay article discussing the shot clock regulation, on which we have highlighted key provisions.

> "Staff does not agree with this appeal issue. The MPC followed their hearing procedures, first hearing from staff, then the applicant, and then the public. The MPC carefully reviewed the proposed project and discussed each node individually. The applicant was provided an opportunity to address the MPC several times during the Commission's deliberation. The MPC decision was supported by substantial evidence. The hearing and resulting discussion was fair and impartial." (*Emphasis added.*)

Second, Staff rejects Crown Castle's contention that the MPC lacked the authority to deny the project, that it disregarded Staff's analysis and findings, or that the conduct of individual Commissioners was somehow inappropriate. Of course, Staff itself has no authority to make findings. It assists the MPC by *drafting* findings that would support a project. If the MPC, after taking evidence and considering the facts, finds that it cannot support the *draft* findings, staff, as it should, revises the draft to articulate the actual determinations of fact the MPC has made. Staff states, correctly,

> "[T]he MPC has the authority to approve, deny, or conditionally approve the project on the basis of its own analysis and findings. At the May 21, 2014 hearing, staff presented the project, followed by the applicant's presentation, and then public testimony. In this instance, after consideration of the presentations and public testimony including several opportunities for the applicant to address the Commission and after a node-by-node review of the project, the MPC had concerns about the aesthetics of the facilities as there were proposed, and voted to deny the project. This decision is fully within the authority of the MPC and was supported by substantial evidence." (*Emphasis added.*)

Staff is within its rights, of course, to take a position different from the MPC. We believe that it should do so only under unusual circumstances and when there is a compelling need to do so. There are no such circumstances and no such need. It is clear that the substantially-revised project not only has been significantly modified and clarified since the MPC hearing, but that significant unknowns remain, and that none of this new information has been reviewed by the Montecito Planning Commission, let alone been subject to public comment.

You should note that at the MPC hearing, Crown Castle questioned whether the PUC would approve additional changes. But, as Staff notes, "[g]iven the denial of the project, SCE was amenable to allowing an alternative power design that would reduce the number of power pedestals from the overall network ...." This shows that in fact, the process was working, and exactly as it should. As a result of concerns, questions, and public input, the project has steadily improved. It is only because the MPC raised its concerns that Crown Castle got So. California Edison to approve additional changes.

With all respect, we believe that Staff should be supporting a thorough public process—a public process that is steadily improving the project and working very well.

Conclusion

I remember well, before the Montecito Planning Commission was formed, that Board of Supervisors' afternoons were frequently fully consumed with Montecito Planning & Development issues. The hard work taken on by the MPC has immeasurably increased the attention that can be devoted to these planning issues, and reduced the time and commitment that was previously demanded of the Board. Should the Board grant the appeal, it will be undercutting the MPC, inviting applicants to shortcut the process that is working well, and significantly, and unnecessarily, increasing its workload.

We believe the integrity of the planning process, the importance of preserving the authority of the MPC, the merits themselves, and the great benefit to the Board of allowing issues such as this to be processed without Board resources, all argue strongly for upholding the decision of the MPC and denying the appeal.

That said, the Montecito Association and the MPC both want to work with Crown Castle to finalize a project that is thoughtful, carefully designed, and that minimizes visual and aesthetic concerns. We believe that we are very close to an approval project. We ask you to urge Crown Castle to voluntarily return to the MPC to allow the project, with its last-minute major modifications, to be processed in an orderly manner.

The Montecito Association firmly believes that Crown Castle will be best served by allowing the MPC to do its work. If, after a due process, Crown Castle feels that it has not been able to achieve an appropriate final action, it always retains the right to appeal to the Board.

It is Crown Castle, not the MPC that has cut this process short. The action of the MPC was eminently reasonable, and in our view, necessary.

The Montecito Association respectfully, but strongly urges the Board to deny the appeal if Crown Castle is unwilling to return to allow the MPC to do its work.

Sincerely,

Derek A. Westen
Attorney at Law

cc. Ted Urschel, President Montecito Association
Victoria Greene, Executive Director Montecito Association
Commissioners of the Montecito Planning Commission

FCC "Shot Clock" Presumptions for Wireless Tower Permitting Upheld

Cellular tower builders and wireless companies can breathe a sigh of relief: the "shot clock" presumptions imposed by the FCC on local government permitting processes have been upheld by the U.S. Court of Appeals for the Fifth Circuit. As a result, those presumptions – *i.e.*, that state and local officials should ordinarily take no more than 90 days to act on wireless "collocation" applications and 150 days to act on all other wireless siting applications – remain in effect. But in affirming the Commission's judgment in the face of challenges brought by two Texas communities, the Fifth Circuit acknowledged that local governments may still be able to rebut the presumptions – and, thus, drag out the permitting process – in individual cases.

As far as the FCC was concerned, "reasonable" here meant that local governments should be expected to take no more than 90 days to act on collocation requests and 150 days to act on all other requests. In this context, "collocation requests" involve modifications to already existing wireless facilities, including addition of an antenna to an existing tower as long as the change doesn't involve a "substantial increase in the size of the tower".

So the pressure is on for localities to act on wireless siting proposals: if they don't meet the Commission-imposed time limits, the siting proponents have a prima facie argument that the locality is in violation of the Communications Act. That immediately puts the locality on the defensive (although, since the "shot clock" time frames are just presumptions, the local governments do have the opportunity to try to rebut those presumptions).

The Texas municipalities of San Antonio and Arlington challenged the Commission's declaratory order on a number of grounds, both procedural and substantive. The Fifth Circuit had little trouble brushing all the quibbles aside.

Actually, the Court needed brush only Arlington's quibbles aside. In a ruling of key interest to communications law practitioners, the Court dismissed San Antonio's petition. San Antonio, which did *not* seek reconsideration at the Commission, did not file its own request for judicial review until *after* the FCC had disposed of others' petitions for reconsideration. Too late: the Court reasoned that San Antonio's time for seeking review ran from the *original* FCC action date, not the date of FCC action on the reconsideration petitions. Since the action on those petitions simply affirmed the original decision, the FCC's reconsideration action was not a separate and independent event opening a new opportunity for appeal by San Antonio. These procedural niceties keep lawyers awake at night but have the opposite effect on lay readers, so we won't discuss them further here. The net result was that a couple of arguments raised by San Antonio but not by Arlington could be ignored by the Court.

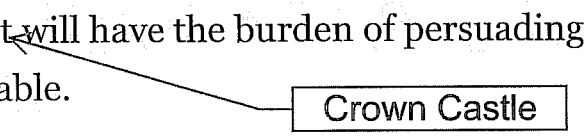
With respect to the nitty-gritty substantive issue in the case – *i.e.*, are the 90 and 150 day limits valid? – the Court concluded that the FCC's judgment was reasonable and entitled to the level of deference courts normally afford agency decisions (at least when the judges can make sense out of the agency's reasoning). Importantly, the Court observed that the FCC's "shot clock" limits are not absolute. That is, failure by a local government to meet those time limits does ***not*** automatically mean that that locality has *per se* violated the 1996 Telecom Act. Rather, it merely means that the burden shifts to the locality to explain its failure to meet the applicable deadline. Such explanations might, in the Court's view, hinge on "extenuating circumstances", or possibly on the wireless applicant's own failure to submit requested information. Alternatively, the local government might note that it was acting diligently in its consideration of an application, that the necessity of complying with applicable environmental regulations occasioned the delay, or that the application was particularly complex in its nature or scope. Essentially, the Court seemed to view the Commission's 90/150-day limits as

guidelines, entitled to deference but not absolutely and irrevocably binding in all circumstances.

To get to that point, the Court made reasonably quick work of a variety of procedural complaints advanced by Arlington. While the Commission's method of dealing with CTIA's initial request may not have conformed precisely with requirements of the Administrative Procedure Act – when it adopted its declaratory order, was the FCC engaging in "rulemaking", "adjudication", or some other activity? – the Court concluded that any FCC deviation from the procedural straight-and-narrow was harmless.

The Court did spend a fair amount of time grappling with Arlington's argument that Congress hadn't given the Commission the authority to put specific limits on the "reasonable period of time" language in the 1996 Telecom Act. Truth be told, the scope of the FCC's authority is not at all clear here, but the Court determined that the statute, and the legislative history underlying it, were ambiguous. Given that ambiguity, the Court concluded that the FCC was entitled to do what it had done below. And, as noted above, the Court was inclined to defer to the Commission's substantive determination.

Where, then, does the Court's decision leave us? Wireless operators and/or tower companies are entitled to assume that, once they have filed all information required by a local jurisdiction, the jurisdiction will act on their siting applications within the applicable 90- or 150-day time period. If the local government drags its feet beyond that time frame, the aggrieved party may seek judicial intervention because of the locality's failure to meet the FCC's presumptive time limits. The threat of such litigation might be enough to cause the local officials to act on the construction proposal – but there's no guarantee of that. As the Fifth Circuit seemed to emphasize, the locality could still cling successfully to a variety of excuses or explanations for its tardiness. In the end, the siting proponent will have the burden of persuading the court that the locality's delay has been unreasonable.



Nevertheless, at least we have a clear starting point with which to mark the approximate outlines of local governmental delay. Ideally, that will prove useful to all concerned.