



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: 8/21/12
Placement: Departmental
Estimated Tme: 45 min
Continued Item: No
If Yes, date from:
Vote Required: Majority

TO: Board of Supervisors
FROM: Department Glenn Russell, Ph.D. Director, Planning and Development
Director(s) (805) 568-2085
Contact Info: Alice McCurdy, Deputy Director, Development Review South
(805) 568-2518
SUBJECT: **Hearing for the Goolsby and Goolsby Kay Appeal (Case No. 12APL-00000-00011) of the Montecito Planning Commission Approval of a Verizon Wireless Facility at Montecito Switch Station (Case No. 12CUP-00000-00007), First District**

County Counsel Concurrence

As to form: Yes

Other Concurrence: N/A

Auditor-Controller Concurrence

As to form: N/A

Recommended Actions:

Consider the appeal filed by Mary Goolsby and Martha Goolsby Kay of the Montecito Planning Commission's May 23, 2012 approval of the Verizon Wireless facility at the Montecito Switch Station.

Staff recommends your Board take the following actions:

1. Deny the appeal, Case No. 12APL-00000-00011, thereby upholding the Montecito Planning Commission's approval of the project;
2. Make the required findings for the project, specified in Attachment 2 of this Board Letter, including CEQA findings;
3. Determine the project is exempt from CEQA pursuant to Section 15301 and 15303 of the State Guidelines for the Implementation of the California Environmental Quality Act, as specified in Attachment C of the Montecito Planning Commission Staff Report dated May 4, 2012, included as Attachment 3 of this Board Letter; and
4. Approve de novo the Conditional Use Permit for the proposed telecommunications facility, 12CUP-00000-00007, subject to the conditions, included as Attachment B of the Montecito

Planning Commission Staff Report dated May 4, 2012, included as Attachment 3 of this Board Letter.

Refer back to staff if the Board takes an action other than the recommended action for appropriate findings and conditions.

The project site is located at 512 Santa Angela Lane, in the Montecito area, First Supervisorial District. The applications involve AP Nos. 011-200-015 and -016.

Summary Text:

The project on appeal is an application for a Conditional Use Permit to allow installation and operation of a commercial wireless telecommunications facility, to be located at the existing telephone switch station facility at 512 Santa Angela Lane, in Montecito. Commercial telecommunications facilities are regulated in the Montecito Land Use Development Code (MLUDC) Section 35-444.010. Per the MLUDC, installation of a telecommunications facility on a property that is residentially zoned requires a Major Conditional Use Permit, regardless of its design.

The permit application (12CUP-00000-00011) was received on March 29, 2012, and was deemed complete on April 26, 2012. As a collocated telecommunications facility, the project is subject to a 90 day processing timeframe per the Federal "Shot Clock" Ruling of November 18, 2009. The Conditional Use Permit was heard by the Montecito Planning Commission on May 23, 2012 and was conditionally approved by a 4-0 vote (Commissioner Overall was absent). An appeal of the Montecito Planning Commission's approval was filed on June 4, 2012 by two residents, Mary Goolsby and Martha Goolsby Kay. The grounds for the appeal are detailed in pages 4-7 of their appeal letter dated June 1, 2012 included with their appeal application (included as Attachment 1).

Background:

The appellant's appeal is based upon their stated understanding of the regulations pertaining to the permitting, siting and leasing of telecommunications sites, as well as concerns with the proposed project's radiofrequency emissions. As an introduction to staff's responses and to inform your Board in its decision making, the following information describes the Federal Telecommunications Act limitations on local jurisdictions, information on the significant gaps in coverage and alternative site selection process, radiofrequency emissions, the Federal "Shot Clock" permit processing deadline, a clarification on land leases, and a brief discussion of the proposed project site and existing permit.

Federal Telecommunications Act Limitations

The Federal Telecommunications Act of 1996 amended the Communications Act of 1932 to establish federal regulatory authority over the deployment of telecommunications facilities across the nation. The Federal Act set health and safety emissions thresholds and specifically restricted the regulatory treatment of telecommunications facilities by local agencies (i.e. cities and counties) in that regard.

The Federal Telecommunications Act preempts local authorities from prohibiting any telecommunications service, stating "No State or local statute or regulation, or other State or local legal

requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” (47 U.S.C.A. § 253 (b).)

However, the Federal Telecommunications Act acknowledges that although local authorities may not prohibit telecommunications facilities, their general local zoning authority is preserved “over decisions regarding placement, construction, and modification of personal wireless service facilities,”(47 U.S.C.A. § 332 (c)(7)) within certain limitations.

Although the County can influence siting and design of personal wireless service facilities, there are limitations as to the County’s authority to regulate such facilities. Specifically, the purview of local agencies to apply zoning requirements is limited by the Federal Telecommunications Act as follows:

“LIMITATIONS.--

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof--

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) 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).)

These limitations not only ensure due process for wireless applications but they ensure each carrier’s rights to exercise their FCC licenses and provide full coverage to their network areas. In fact, denying a carrier the ability to provide full coverage may constitute a “prohibition” of wireless services with respect to the Federal Telecommunications Act limitations. In the *MetroPCS Inc. v. City & County of San Francisco* case in 2005, the Ninth Circuit determined that “[A] locality can run afoul of the Telecommunications Act ‘effective prohibition’ clause if it prevents a wire-less provider from closing a ‘significant gap’ in service coverage.” Should a local agency deny a facility, and the applicant (carrier) challenges the denial in court, the applicant must show that they 1) are prevented from filling a significant gap in their own service coverage; and 2) their proposed way to fill that significant gap is the “least intrusive means.” If the applicant makes the above showing, the County, not the carrier, must then

show “[S]ome potentially available and technologically feasible alternative sites;” which “close the gap” in coverage.

Loss of Service

The majority of Verizon Wireless’ current coverage of the Montecito area is provided by their existing facility located on Ortega Hill Road, at the QAD property. This facility is approximately 75 feet tall and was originally permitted in 1989 under 89-CP-048. However this facility is now being decommissioned because the lease has expired. Coverage maps provided by the applicant as part of their permit application demonstrate that the loss of the QAD facility would significantly impact the coverage of the Montecito area. Therefore, Verizon Wireless is proposing to replace that facility with a new facility at the switch station building (owned by Verizon California Inc.) at 512 Santa Angela Lane. Without the proposed project, Verizon Wireless would have a significant gap in service.

Alternative Site Analysis Requirements and Radiofrequency Emissions

The findings required for commercial telecommunications facilities (Montecito LUDC Section 35-444.010.G) include a finding which states “The applicant has demonstrated that the proposed facility design and location is the least intrusive means feasible for the carrier proposing the facility to provide the needed coverage.” Usually, in order to make this finding the County requires the applicant to submit alternatives (designs and locations) considered to ensure that the proposed project is indeed the least intrusive means feasible.

Prior to applying for the permit application, Verizon Wireless conducted its own internal search for sites to locate a facility to replace the QAD facility. The applicant contacted the County to identify where other existing telecommunications facilities are located in Montecito, to see if collocation on a different existing facility would work for their service needs. The only existing telecommunications facilities in Montecito are 1) the Verizon and AT&T facilities at the QAD property (soon to be decommissioned), 2) the Cingular facility on the switch station building at Santa Angela Lane (proposed location), 3) the Sprint monopole on the Sheffield Drive northbound off-ramp of Highway 101, and 4) the Metro PCS utility pole installations that are part of the NextG Distributed Antenna System. The proposed facility at the switch station building would not be visible at all to the public, since the antennas would be entirely concealed existing parapet and the equipment would be hidden behind the perimeter wall. Additions to either the Sheffield Drive or Distributed Antenna System sites would be more visible to the public than the proposed project and may not fill the carrier’s service gap.

Verizon also looked at properties in the Montecito area for the possibility of adding a new site; however each of these alternative candidates were not pursued due to inadequate signal coverage, unwilling property owners, and/or physical constraints (i.e. no room for either the antennas or ground/radio equipment). The sites Verizon considered included: 1) the Montecito Village shopping center, 2) The “Old Firehouse” and 3) Montecito Water District offices. As a result, Verizon proceeded with submitting an application for the proposed project, to collocate at the switch station building.

The proposed facility at the switch station building would be entirely screened from public views and therefore would have no visual impact. Also, the project would be using existing infrastructure.

Additionally, the Federal Telecommunications Act prohibits the County from denying or even delaying¹ action on a project on the basis of perceived health effects, if a project has demonstrated it is in compliance with the FCC regulations. As a part of the permit application, Verizon Wireless provided an emissions report, prepared by Hammett & Edison dated May 2, 2012. The report analyzed the emissions of the existing Cingular facility at the site, the proposed Verizon Wireless facility, and the cumulative emissions of both facilities operating simultaneously. The report concluded that the simultaneous operation of both facilities is projected to be 9.5% of the public exposure limit allowed by federal law, far exceeding the safety standard. Since the proposed project complies with the FCC's radio frequency emissions standards, the County may not regulate the facility on the basis of these emissions.

Federal “Shot Clock” Ruling November 18, 2009

On November 18, 2009, the Federal Communications Commission adopted and released its Declaratory Ruling concerning provisions in 47 U.S.C. Sections 253 and 332(c)(7), regarding state and local review of wireless facility siting applications. This Declaratory Ruling provided direction that affects the County's processing requirements.

The first major part of the Declaratory Ruling defined what is a presumptively “reasonable time” beyond which a local jurisdiction's inaction on a siting application may constitute a prohibited “failure to act” under 47 U.S.C. Section 332(c)(7). The FCC found that a “reasonable period of time” is, presumptively:

- 90 days to process personal wireless service facility siting applications requesting collocations; and
- 150 days to process all other applications.

These timeframes commence upon determination of application completeness. Accordingly, if state or local governments do not act upon applications within those timeframes, then a personal wireless service provider may claim that a prohibited “failure to act” has occurred and personal wireless service providers may seek redress in court within 30 days, as provided in 47 U.S.C. Section 332(c)(7)(B)(v). The state or local government, however, would have the opportunity to rebut the presumption of reasonableness.

The proposed project is considered a “collocated facility,” therefore the 90 day processing timeframe applies to this application. Due to time requirements to process this appeal, the County requested an extension from Verizon of the 90-day timeframe from July 26, 2012 to September 4, 2012.

Private Lease Agreements

Private lease agreements are private legal contracts between a property owner and a lessee. Since private leases are not under the jurisdiction of the County, the County does not regulate or enforce them. In an application where a lessee is requesting a permit for development, the County requires written authorization from the property owner to ensure that the lessee has the legal right to apply for the project under the terms of their lease and that the owner is aware of the permit application. In this case,

¹ Federal Communications Commission WT Docket No. 08-165: Declaratory Ruling (11-18-2009), p. 28

Planning & Development received written authorization from the property owner that Verizon Wireless (the applicant) is authorized to apply for the project and could proceed with the permit application.

Modifications to the Switch Station Conditional Use Permit (65-CP-081)

In 1965 GTE Communications (now Verizon of California Inc.) obtained a Conditional Use Permit (65-CP-081) to allow “Construction and operation of a 9,800 sq. ft. telephone exchange building and allowing side setbacks of 35 feet from centerline on the Santa Angela Lane street side instead of the required 50 feet from the centerline thereof and 2 feet instead of the required 10 feet from the easterly property line.”

The proposed project is not modifying the switch station CUP. The Montecito Land Use and Development Code Section 35-444.010.B requires telecommunications facilities obtain their own CUP. In 2002, the Cingular telecommunications facility on the property was approved under its own CUP, 02CUP-00000-00050. Similarly, the proposed project requires its own CUP. Therefore the proposed project is a request for a new CUP, for the proposed facility only.

Additionally, and importantly, there are no conflicts between the requirements of the switch station CUP and the proposed project. Therefore, the switch station CUP does not require modification because the scope of the project approval is limited to the uses and approvals requested as part of the current CUP application for the Verizon Wireless telecommunications facility (12CUP-00000-00011), not those uses that were approved as part of the switch station facility (65-CP-081) or the Cingular telecommunications facility (02CUP-00000-00050).

Appellant Issues and Staff Responses:

Appellant Issue No. 1: “The decision grants approval of a proposed project that is inconsistent with the Montecito Land Use Development Code sections 6.3.2, 2.11, 22.1 and 2.2.4.”

These number references appear to be the staff report section headings and findings used in the May 23, 2012 Montecito Planning Commission Staff Report and attachments, cited below for clarification.

Section 6.3.2, of the MPC Staff Report (included as Attachment 2) is the analysis for the project’s consistency with the MLUDC zone district requirements for “One Family Residential (R-1).” This discussion references the zone district standards for setbacks and height (found in Section 35.423.050, Table 2-10). Setbacks for Buildings and Structures are as follows: front 50 feet from road centerline and 20 feet from right-of-way; side 10 feet; rear 10 feet. Height Limit: 35 feet and 2 stories.

Finding 2.1.1, in Attachment A – Finding of the MPC Staff Report states, “The site for the proposed project is adequate in terms of location, physical characteristics, shape, and size to accommodate the type of use and level of development proposed.”

Finding 2.2.1, in Attachment A – Finding of the MPC Staff Report states, “The facility will be compatible with the existing and surrounding development in terms of land use and visual qualities.”

Finding 2.2.4, in Attachment A – Finding of the MPC Staff Report states, “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. (a). An exemption to one or more of the required development standards may be granted if the review authority additionally finds that in the specific instance that the granting of the exemption: (1) Would not increase the visibility of the facility or decrease public safety, or (2) Is required due to technical considerations and if the exemption was not granted the area proposed to be served by the facility would otherwise not be served by the carrier proposing the facility, or (3) Would avoid or reduce the potential for environmental impacts.”

Staff Response: The property setbacks were modified from the zone district’s standard requirements for the switch station building with the approval of Conditional Use Permit (CUP) 65-CP-081, allowing side setbacks of 35 feet from centerline on the Santa Angela Lane street side instead of the required 50 feet from the centerline thereof, and 2 feet instead of the required 10 feet from the westerly property line. The proposed project is requesting to locate their equipment shelter at the same setback as was previously approved for the switch station, at 35 feet from the centerline of Santa Angela Lane, directly behind the existing perimeter wall. The perimeter wall has existing mature vegetation that exceeds the height of the wall itself. Locating the shelter against the existing perimeter wall would take advantage of this screening and would make the shelter invisible to the public. Additionally, this location would place the shelter directly behind the existing Cingular shelter, and therefore would hide it from view even from the driveway off Santa Angela Lane. Therefore a modification to the setbacks is appropriate in this instance. Per the MLUDC Section 35.472.060.I.1 the review authority may grant this modification to the setbacks as part of the Conditional Use Permit. This issue was not addressed by the Montecito Planning Commission. Therefore, the findings included in Attachment 2 include the finding supporting the Board’s approval of the setback modification.

The proposed facility does not require any water or sewer service, and would not generate any solid waste, odors or dust. No new gas, electric or telephone utility would be required as they already exist onsite. Public services such as fire and law enforcement would not be required given the automated nature of the facility and restricted public access. Access would be provided by existing paved roads and the onsite parking lot. The project is located in an existing developed area, and would not impose any impacts to biological or archeological resources. The air conditioning units and backup generator that would be used at the facility would comply with the County’s noise thresholds, per the equipment specifications provided by the applicant. In terms of potential aesthetic impacts, the facility would not be visible to the public. The proposed antennas would be screened by the existing radio-frequency transparent parapet and would therefore result in no visible change to the existing building. Additionally, the proposed equipment shelter would be located inside the property (next to Cingular’s equipment shelter) and would also be screened from public views by the existing perimeter wall and mature vegetation. Therefore, the site for the proposed project is adequate in terms of location, physical characteristics, shape, and size to accommodate the project; the project is compatible with the surrounding development in terms of land uses and visual qualities.

In addition to compliance with zone district standards and land use compatibility, all telecommunications facilities are subject to the development standards in Sections 35.444.010.D.1, 35.444.010.D.2 and 35.444.010.D3 of the Montecito LUDC. These development standards are specific to telecommunications facilities, and include requirements such as ensuring the general public is safely excluded from the facility, using existing parking for facility maintenance needs when available,

ensuring visible surfaces are non-reflective, limiting the use of generators to emergency backup purposes, etc. Among these development standards is a requirement that new telecommunications facilities collocate with existing facilities if feasible (35.444.010.D.2.c). As discussed in Section 6.3.1 of the Montecito Planning Commission Staff Report dated May 4, 2012 (provided as Attachment 2) the proposed project complies with this and all the other development standards, without need of any exemptions to the development standards.

Appellant Issue No. 2: “The Additional Findings of 35.474C.7 cannot reasonably be made to grant approval of this proposed project.”

As stated in the appellants’ letter, the reference to “Additional Findings 35.474C.7” is from Ordinance Amendment 4461, amended on 5/7/02. This section of the ordinance has since been replaced by Ordinance Amendment 4788 (11ORD-00000-00006) on 5/17/11. The additional findings required for all telecommunications facilities are now in MLUDC Section 35.444.010.G.

Staff Response:

The Additional Findings were addressed in Attachment A of the MPC Staff Report dated May 4, 2012 (Attachment 2 of this Board Letter), under header 2.2 “Commercial Telecommunication Facility Findings (Sec. 35.444.010.G),” incorporated herein by reference.

Appellant Issue No. 3: “The RF Emissions and Compliance Report by Hammett & Edison, Inc. is incomplete and inadequate as a basis for the Montecito Planning Commission to make required findings. It should be revised.”

The Federal Communications Commission (FCC) regulates radio frequency (RF) emissions of telecommunications facilities. The FCC has set exposure limits for the various types of wireless services and frequencies at which they operate. “These limits apply for continuous exposures and are intended to provide a prudent margin of safety for all persons, regardless of age, gender, size, or health.”² According to the FCC,

“These limits have been endorsed by federal health and safety agencies such as the Environmental Protection Agency and the Food and Drug Administration. The FCC’s rules have been upheld by a Federal Court of Appeals. As discussed below, most facilities create maximum exposures that are only a small fraction of the limits. Moreover, the limits themselves are many times below levels that are generally accepted as having the potential to cause adverse health effects.”³

The County required Verizon Wireless to submit a report as part of their permit application that assessed the proposed project’s emissions and compliance with applicable safety limits. A report was prepared by Hammett & Edison, dated May 2, 2012, and is included as Attachment 5 to this Board letter. The report measured the existing emissions (by the Cingular Wireless facility), projected what the proposed

² Hammett & Edison report dated May 2, 2012, p. 1.

³ Federal Communications Commission “Local Government Official’s Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures and Practical Guidance” dated June 2, 2000, p.1.

emissions of the Verizon Wireless facility would be, and then projected what the cumulative emissions of both facilities operating simultaneously would be. The report concluded that the proposed facility, in conjunction with the Cingular facility, would operate well below the applicable FCC safety limits (the maximum calculated emissions level being 9.5% of the Maximum Permissible Exposure limit). Therefore the project was found to comply with the FCC requirements and the required findings for approval of the project.

Appellant Issue No. 4: “The proposed project does not meet provisions of E-M-1.1 and is inconsistent with this provision based on inadequate setbacks as required by the County’s Zoning Ordinance and E-M-1.1.

Policy E-M-1.1, in the Montecito Community Plan states, “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.”

Staff Response:

The purview of local agencies to apply zoning requirements to telecommunications facilities is limited by the Federal Telecommunications Act which expressly states, “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 [Federal Communication] Commission's regulations concerning such emissions” (47 U.S.C.A. § 332 (c)(7)(B)(iv). Therefore, the Montecito Land Use Development Code and Montecito Community Plan cannot restrict the siting of telecommunications facilities, including establishing additional setbacks or buffer zones, based on a perceived health effects provided the project complies with the FCC standards. As discussed above, the emissions report prepared by Hammett & Edison assessed the project’s projected emissions and concluded that the proposed facility would comply with all applicable FCC standards for public exposure at its current location. Since the FCC standard would be met, the setback is adequate to meet the Montecito Community Plan policy. Therefore, no additional setbacks are necessary per the FCC, nor can they be required by local jurisdictions.

Performance Measure:

N/A

Fiscal and Facilities Impacts:

Budgeted: Yes

Fiscal Analysis:

The costs for processing appeals are provided through a fixed appeal fee and funds in P&D’s adopted budget. In regards to this appeal, the appellant paid an appeal fee of \$643.00. The total staff time for processing this appeal is estimated to be approximately 50 hours, or \$9,100. These funds are budgeted in

the Permitting and Compliance Program of the Development Review South Division, as shown on page D-138 of the adopted 2012-2014 fiscal year budget.

Special Instructions:

None.

Attachments:

- 1) Appeal Application* (12APL-00000-00011)
- 2) Findings
- 3) Montecito Planning Commission Staff Report dated May 4, 2012
- 4) Montecito Planning Commission Action Letter dated May 29, 2012
- 5) Hammett & Edison Radiofrequency Emissions Report dated May 2, 2012
- 6) Coverage Maps of Existing and Proposed Verizon Service
- 7) Land Owner Authorization Letter dated April 20, 2012

*Note: A corrected version of the appeal letter was provided subsequent to the appeal submittal

Authored by:

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cc:

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