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OFFICE OF THE CITY CLERK
OAKLAND

CITY OF OAKLAND
AGENDA REPORT

2010 OCT 28 PM 2: 22

TO: Office of the City Administrator
ATTN: Dan Lindheim
FROM: Community and Economic Development Agency
DATE: November 9, 2010

RE: **Conduct a Public Hearing and Upon Conclusion Adopt a Resolution Denying Appeal #A10224 and Upholding the Decision of the Planning Commission to Deny Case #CM10140 for a 36'-4"-tall Monopole Wireless Telecommunications Facility in the Open Space Zone Section of Public Right-of-Way on Skyline Blvd. North of the Chabot Space and Science Center Street Entrance**

SUMMARY

On August 4, 2010, the Planning Commission denied an application by NextG Networks ("NextG") for a Major Conditional Use Permit for a Monopole Wireless Telecommunications Facility in an Open Space Zone section of public right-of-way on Skyline Boulevard north of the Chabot Space and Science Center street entrance (#CM10140). On August 16, 2010, the applicant NextG timely filed an Appeal of the Planning Commission's decision (#A10224). Staff recommends the City Council deny the Appeal and uphold the Planning Commission's decision to deny the application. This report describes the Appeal and staff's analysis and recommendation. Staff has attached a Resolution to this report.

FISCAL IMPACT

This is an appeal of a Zoning Application; therefore, there is no fiscal impact. Staff time required to process this appeal is cost-covered through the Appeal fees paid by the appellant.

BACKGROUND

Application

On June 3, 2010, NextG submitted a Major Conditional Use Permit application to the Planning and Zoning Department to construct the new Monopole Wireless Telecommunications Facility. The project is to install an approximately 36'-4"-foot tall wooden Monopole Telecommunications Facility with one (1) omnibase antenna. The antenna would be attached to the top of a 35-foot wooden pole. The Monopole would be set back approximately ten-feet from the edge of street pavement. It would also have a utility meter, equipment cabinet and large battery attached

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between 7'-6" and 19'-7" in height. All attachments would be painted to match the color of the wooden pole. The applicant states that the purpose of the project is to improve cellular telephone reception in the area and that other carriers would be eligible to apply to co-locate on or use the services of the pole. The area consists of woodland (predominantly Redwoods and Pines) and a region-serving City facility (Chabot Space and Science Center). Very few man-made structures and no similar facilities exist in the immediate area along Skyline Boulevard north of Joaquin Miller Road. For a more detailed description of this area, see **Attachment D** (Description of Physical Location).

Prior Determination

On March 12, 2010, NextG submitted an incomplete application to CEDA for poles for telecommunications purposes at four sites along Skyline Boulevard. On April 9, 2010 staff sent out a letter and indicated to NextG that the proposed poles were Monopole Wireless Telecommunications Facilities subject to discretionary approvals pursuant to the Planning Code and deemed the applications incomplete. On May 13, 2010 the Zoning Manager issued an administrative interpretation / determination which stated that the erection of these new and independent poles within the public right-of-way intended for Wireless Telecommunications Facilities, as defined, and regulated, by the Oakland Planning Code included the requirement for Conditional Use Permits. (See **Attachment B** for a copy of the zoning manager's determination letter). NextG appealed the determination on the basis that the poles were not Monopoles but rather utility poles and not subject to zoning when located in the public right-of-way. On July 21, 2010 the Planning Commission denied the administrative appeal and upheld the Zoning Manager's determination. A copy of this determination is located at the Planning and Zoning Department located at 250 Frank H. Ogawa Plaza, Suite 2114, Oakland CA 94612. The Planning Commission decision was final and could not be further appealed. The applicant has not challenged the final decision in court.

An application for another site located adjacent to the Roberts Park street entrance was denied and appealed. Application for sites adjacent to Marlborough Terrace and generally adjacent to the Sequoia Bayview trailhead have not yet had Planning Commission hearings.

Application Review and Decision

Beginning on June 22, 2010, staff indicated to the applicant in various correspondence that the required legal findings to support the project could not be made because the proposal is not compatible with the surroundings. Staff explained this is because the site is located in an open space zone consisting of woodlands, essentially lacking man-made structures, including but not limited to utility poles, as well as a region-serving City facility that also attracts visitors for appreciation of the natural environment. Staff then indicated to the applicant that their options were to either withdraw the application and request a refund; revise the proposal by, for example, relocating the facility further from the road to conceal it behind trees and redesigning the facility

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to further conceal it as best as possible; or move forward to the Planning Commission with a staff recommendation of denial.

On July 26, 2010, staff met with the applicant to discuss the application. Staff reiterated its position including its willingness to support a revised proposal for a concealed facility located away from the public right-of-way. The applicant explained it would not revise its proposal by relocating the proposed facility out of the public rights-of-way due to the fact that the company's model strictly consists of construction within public rights-of-way. Staff advised the applicant that the requirement to locate only within the public right-of-way is artificial and self-imposed; however, in the spirit of working with the applicant to arrive at an acceptable project, staff also expressed willingness to consider a stealth facility such as a light standard containing the facility and located within the public right-of-way. The applicant did not express a desire to revise the proposal and at that time did not request additional time and/or a continuance of the Planning Commission hearing date. Instead, the applicant indicated interest to keep moving forward toward a public hearing with the Planning Commission. This was with the full knowledge that staff could not support the original request and the reasons for staff's position.

On August 4, 2010, the Planning Commission denied the application. As previously stated, staff presented the item and recommended denial because required legal findings could not be made to support the proposal. NextG representatives spoke to the Planning Commission regarding the item and requested a continuance to allow additional time to explore design alternatives within the public right-of-way with staff. The Planning Commission did not grant a continuance and denied the item. The Planning Commission, believing there was no acceptable location within the right-of-way, did indicate to the applicant that a new design and location was welcome for consideration as part of a new application.

On August 16, 2010, Next G Networks timely submitted an Appeal of the Planning Commission's decision to the Planning and Zoning Department.

KEY ISSUES AND IMPACTS—ISSUES RAISED ON APPEAL

The Planning Code indicates that for an appeal of a Planning Commission decision on a Conditional Use Permit: *"The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Commission or wherein its decision is not supported by the evidence in the record."* (OMC Sec. 17.134.070). The basis of NextG's appeal of the Planning Commission's denial is that the Oakland Planning Code does not require a Conditional Use Permit for a utility pole and that the applicant was not allowed an opportunity to present a revised proposal. The appeal also indicates that utilities cannot be required to provide screening or be excluded from public right-of-ways, and furthermore, that the denial renders useless preliminary system construction completed in the area.

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The appellant's appeal is included as *Attachment A*. The appellant fails to provide a substantive basis for each of the issues raised as required in the appeal form itself and the Oakland Planning Code. The "supposed" bases for the appeal, as contained in the appeal letter, is shown in bold text below. A staff response follows each point in normal type.

Appellant's Arguments

A) The Planning Commission Decision is Inconsistent with Law

B) Minimization of Visual Impact while Achieving Telecommunications Service Objectives

Issues

1. "NextG had reviewed the OPC, and it does not speak to governing utility infrastructure (including telecommunications, cable, electric or other similar infrastructure) in the public right-of-way." (p. 4)

Staff Response:

The appellant's assertion is not relevant or timely; the Zoning Manager's determination dated May 13, 2010 classified the facility as a Monopole, not a utility pole as the appellant continuously asserts. The Planning Commission upheld the Zoning Manager's determination on Appeal on July 21, 2010, which is a final, non-appealable decision. Appellant has not challenged this determination in court.

For further explanation of this non-appealable issue, see Staff's Response under Section 2 of the July 21, 2010 Staff Report attached hereto as *Attachment C*.

Further, as a stand-alone structure being built to support only telecommunications-related equipment, the structure is not considered a utility pole.

2. "As drafted, the Planning Code contemplates private property and becomes nonsensical when applied to the public right-of-way." (p. 4)

Staff Response:

The appellant's assertion is not relevant or timely; the Zoning Manager's determination dated May 13, 2010, stated that the Oakland Planning Code does apply to public property and the Planning Commission upheld this determination on Appeal on July 21, 2010, which is a final, non-appealable decision. Appellant has not challenged this determination in court.

By way of explanation and without re-opening this issue, as stated in the staff report to the Planning Commission on the applicant's appeal of the Zoning Manager's determination, the

Planning Code applies to both public and private property in accordance with the following section:

Applicability of zoning regulations.

To Which Property Applicable. The zoning regulations shall apply, to the extent permissible under other laws, to all property within the city of Oakland, and to property outside Oakland to the extent provided in subsection B of this section, regardless of whether such property is in *private or public* ownership. (OMC Sec. 17.07.040(A))(emphasis added)

For further explanation of this non-appealable issue, see Staff's Response under Section 1 of the July 21, 2010 Staff Report attached hereto as *Attachment C*.

3. "NextG had reviewed the OPC, and it does not speak to governing utility infrastructure (including telecommunications, cable, electric or other similar infrastructure) in the public right-of-way." (p. 4)

Staff Response:

The City does not prohibit telecommunications facilities in the public rights-of-way. As an example, on May 5, 2010 the Planning Commission approved a Major Conditional Use Permit and Design Review for an AT&T Wireless Telecommunications Facility located within the public right-of-way on Moraga Avenue. Two Major Conditional Use Permit/Design Review applications, one located in the public right-of-way on Moraga Avenue another in the public right-of-way of Shepherd Canyon Road, have been filed by T-Mobile and are pending a public hearing before the Planning Commission.

As stated above, the City has the right to exercise reasonable control as to the time place and manner in which the rights of way are accessed and used. (Pub. Util. Code sec. 7901.1) The Ninth Circuit Court of Appeal has held that the city may consider aesthetics with respect to the siting of wireless facilities. *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F,3d 716, 725 (9th cir. 2009) Here, the Planning Commission denied this particular application for a telecommunications facility in the public right-of-way solely because of aesthetic concerns. The City is open to other design suggestions as well as other locations, but the applicant refused to work with the City in the months leading up to the hearing on the applicant's Major CUP.

4. "Since the City's code does not require CUPs for other users of the public rights-of-way, the City cannot arbitrarily create new criteria just to fit NextG." (p. 4)

Staff Response:

The appellant's assertion is not relevant. The Zoning Manager's determination dated May 13, 2010 classified the facility as a telecommunications facility and the Planning Commission upheld this determination on Appeal on July 21, 2010, which is a final, non-appealable decision.

By way of explanation and without re-opening this issue, the City regulates all companies constructing facilities for purpose of wireless telecommunications in the same manner. As a matter of fact, the Planning Commission often rules on applications for Wireless Telecommunications Facilities, including new facilities located within the public rights-of-way, consistent with their authority granted under the OPC. As an example, on May 5, 2010 the Planning Commission approved a Major Conditional Use Permit and Design Review for an AT&T Wireless Telecommunications Facility located within the public right-of-way on Moraga Avenue. Two Major Conditional Use Permit/Design Review applications, one located in the public right-of-way on Moraga Avenue another in the public right-of-way of Shepherd Canyon Road, have been filed by T-Mobile and are pending a public hearing before the Planning Commission. Neither AT&T nor T-Mobile has challenged the applicability of the Planning Code in relation to these projects. The applicant has failed to demonstrate why they should be treated differently from other wireless telecommunications providers especially since the facilities that they desire to erect are the same or similar to those of other providers.

For further explanation of this non-appealable issue, see Staff's Response under Section 4 of the July 21, 2010 Staff Report attached hereto as *Attachment C*.

5. "The staff report for the above referenced case mischaracterized NextG as acting "for Verizon" and inaccurately referred to NextG's utility pole as a "monopole" and to the public right-of-way as the "lease areas." (p. 5)

Staff Response:

The appeal is for a NextG facility and is being reviewed as such. The appellant's assertion is not relevant or timely; the Zoning Manager's determination dated May 13, 2010 stated that the facility desired to be constructed by the applicant is a Monopole Wireless Telecommunications Facility and the Planning Commission upheld this determination on Appeal on July 21, 2010, which is a final, non-appealable decision. Appellant has not challenged this determination in court.

By way of explanation and without re-opening this issue, the project is for a facility determined to be a Monopole Wireless Telecommunications Facility by the Zoning Manager on May 13, 2010 and was therefore analyzed subject to the Telecommunications Ordinance (OMC Ch. 17.128). NextG appealed this decision to the Planning Commission on July 21, 2010. The

Planning Commission upheld the zoning manager's determination and such decision is final and non-appealable.

6. "By treating NextG like a wireless carrier, which is (sic) it is not, rather than a regulated CLEC with the same rights and responsibilities as the ILEC and other utility entities, the City violated stated and federal law by managing the public rights-of-way in a discriminatory and unequal manner." (p. 5)

Staff Response:

The appellant's assertion is not relevant or timely; the Zoning Manager's determination dated May 13, 2010 stated that this application was subject to the City's Telecommunications Ordinance and the Planning Commission upheld this determination on Appeal on July 21, 2010, which is a final, non-appealable decision. Appellant has not challenged this determination in court.

By way of explanation and without re-opening this issue, NextG's proposal involved a facility to be constructed for the purposes of wireless telecommunications. The project is therefore subject to City regulations regardless of the company type of the applicant.

NextG has not been exempted from local regulation by the California Public Utility Commission. Staff notes that the Public Utilities Code expressly authorizes a local government to "exercise reasonable control as to the time, place and manner in which roads, highways and waterways are accessed. Pub. Util. Code section 7901.1. The City clearly has time, place and manner control over its rights of ways and facilities in its rights of ways. (see *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 725 (9th cir. 2009) *Williams Commc'ns, LLC, v. City of Riverside*, 114 Cal App.4th 642,648 (2003)

The City's Telecommunications Regulations apply to all wireless facilities. Section 17.128.010 provides that "The purpose and intent of these regulations are to provide a uniform and comprehensive set of standards for the development, location, siting and installation of wireless facilities. These regulations are intended to balance the needs of wireless communications providers, the regulatory functions of the City of Oakland, the mandates of State and Federal law and the potential impacts on the community and neighboring property owners in the design and siting of wireless facilities." It is the type of facility rather than the licensing of the company that desires to erect the facility that is determinative. The City's telecom ordinance regulates Monopoles in the right of ways. See Section 8 below.

7. "Leaving aside the mischaracterization of NextG's proposed installation, screening from the public right-of-way should not be required for utility infrastructure in the public right-of-way because it is in the public right-of-way." (p. 5)

Pursuant to the City's Telecommunications regulations and Design Review criteria wireless telecommunications antennas must be screened to a degree commensurate with their location, surroundings, and potential for adverse visual impacts. See 17.128.080(B) (Design Review Criteria for Monopoles).

All wireless telecommunications facilities are held to the standards set forth in the City's ordinance. This regulatory ordinance assures that there is no unreasonable discrimination among providers of functionally equivalent services and facilities.

Also, see criteria for conditional use permits generally under Planning Code Section 17.134.050(A), cited in the August 4, 2010, staff report which states in part, that the location, size, design and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage and density....to harmful effect upon desirable neighborhood character..and to any other impact of the development. The applicant's design proposal is completely incongruous with the location, design and operating characteristics of this open space area, which does not include any similar structures within 500 radial feet of the applicant's proposed location.

Further, Section 17.134.050(B) requires that the location, design, and site planning of the proposed developmentwill be as attractive as the nature of the use and its location and setting warrant. This was not case with appellant's proposal, which did not take into account the surrounding open space and natural environment as described previously.

Please note that in its original findings for denial under Attachment A of its August 4, 2010, staff report, CEDA based one its findings on 17.134.050(F), but erroneously cited it as 17.134.050(E).

This finding cannot be made: the proposal does not conform to the Intent of the Urban Open Space of the General Plan: *"To identify, enhance and maintain land for parks and open space. Its purpose is to maintain and urban park, schoolyard, and garden system which provides open space for outdoor recreation, psychological and physical well-being, and relief from the urban environment."* or to the following Policies of the General Plan's Open Space, Conservation and Recreation (OSCAR) Element:

POLICY OS-10.2: MINIMIZING ADVERSE VISUAL IMPACTS

Encourage site planning for new development which minimizes adverse visual impacts and takes advantages of opportunities for new vistas and scenic enhancement.

POLICY OS-10.4: RETENTION OF CITY-OWNED OPEN SPACE IN SCENIC CORRIDORS

Retain City-owned parcels adjacent to Skyline Boulevard, Shepherd Canyon Road, and other scenic roadways to preserve panoramic views, vegetation, and natural character.

The location is along a natural wooded corridor serving as a gateway to City and regional parks and facilities. The area offers relief for citizen and area residents from the built environment. The relatively unspoiled character of the area should be maintained for the continued enjoyment by residents and to maintain the economic viability of facilities to attract regional visitors.

8. “The Findings of Denial under OPC section 17.128.080(B) also makes it clear that collocation of wireless equipment on existing structures is not feasible in the area requiring coverage because it is “completely lacking such structures.”” (p. 5)

Staff Response:

There are light standards to the south at the intersection of Joaquin Miller Road and Skyline Boulevard and to the north at the Metropolitan Horsemen’s Association building on Skyline Boulevard; there are existing utility poles on Skyline Boulevard north of the Chabot Space and Science Center street entrance.

The applicant has not shown that this is the only location and the only design that will accommodate the applicant’s proposed use or that this proposed use is necessary at this site. As noted in this report, the applicant has been unwilling to investigate alternatives that would provide a less intrusive location that would be consistent with the established City policies, including but not limited to the City’s General Plan and open space policies. The applicant is encouraged to review and investigate and apply for an alternative location that would be consistent with the City’s existing ordinance and policies.

9. “However, this police power must be used reasonably and does not allow municipalities to prohibit access to the public rights-of-way based on visual impact, as the Planning Commission did when it denied NextG’s application.” (p. 6)

The Design Review and Telecommunications chapters of the Planning Code contains criteria indicating projects must not generate excessive visual impacts, which is part of the aesthetic impacts a city can consider when reviewing the siting of telecommunication facilities. Furthermore, as discussed above, cities have clear authority to regulate the public right of way as to time place and manner and may regulate, including denial of applications, based on aesthetic concerns. Aesthetic concerns are fundamental to the visual fabric of an area. *Sprint PCS Assets,*

LLC v. City of Palos Verdes Estates, 583 F.3d 716, 725 (9th cir. 2009) Here, the location proposed is in an important open space area of the city, which has been protected by numerous city policies, as outlined in the staff report to the Planning commission. The proposed facility is not compatible with the natural environment of the area and there are no similar facilities in that area. The design proposed in NextG's CUP application is incompatible with the open space environment. Next G may propose alternative locations or alternative designs that would not have an adverse visual impact on this open space area.

NextG has not shown that the proposed location is the only feasible location for their facility nor that their facility is necessary at this location; Next G has not shown that the City's regulation of the right of way by denying the proposed facility at its proposed location is not reasonable.

Further, the proposal involved unshielded antennas. As an example, the project could be redesigned to utilize shielded antennas attached or mounted inside of a new light standard (light pole).

There are various types of monopoles and antennas that may be used, many of which include shielded antennas. The City has the authority to consider aesthetics with respect to the siting of wireless facilities. Shielding, and co-location on light poles are one of several feasible ways to address aesthetics.

Staff notes that the proposed type of facility can be attached to a light pole and screened by enclosing the antenna in a cylinder that looks like the extension of the light pole. NextG has used this type of installation in other places which removed the need for an additional stand-alone monopole. NextG could also investigate alternative locations where poles are already present and co-locate on existing poles, including light poles, street poles, traffic lights and utility poles.

The ancillary equipment necessary for the antennas can also be screened, including placement underground.

10. "NextG requested it be allowed to work with the Planning Commission and planning staff on a solution in the public right-of-way that minimized adverse visual impact, but this request was denied in favor a complete prohibition of critical telecommunications infrastructure in the public right-of-way." (p. 6)

Staff Response:

As stated earlier the city does not prohibit telecommunications facilities in the public rights of way. NextG has not been willing to apply for an alternative location and design that would meet the requirements of the City's regulations.

As described in the BACKGROUND section of this report, on July 26, 2010 staff met with the applicant to discuss the application. Staff reiterated its position including willingness to support a revised proposal for a concealed facility located out of the public right-of-way. When the applicant explained it would not revise its proposal by relocating the proposed facility out of the public right-of-way due to the fact that the company's model strictly consists of construction within public rights-of-way, staff advised the applicant that the requirement to locate only within the public right-of-way is artificial and self-imposed; however, in the spirit of working with the applicant to arrive at an acceptable project, staff also expressed willingness to consider a stealth facility such as a light standard containing the facility and located within the public right-of-way. The applicant did not express a desire to revise the proposal and at that time did not request additional time and/or a continuance of the Planning Commission hearing date even though CEDA indicated to the applicant that they would be recommending denial of their application based on the design proposal, which did not include any alternatives.

Further, the applicant could also have proposed alternative locations in the right of way that are not located in a open space area of regional significance. The proposed location and design is not compatible with the character of the right of way and the open space area, which does not contain any other large poles such as telephone poles or light standards.

To date, NextG has not been willing to consider alternative locations and designs that would be consistent with the City's regulations (see below).

11. "NextG now respectfully requests City Council accept NextG's proposal to work with the City to find a solution in the public right-of-way that minimized visual impact while also meeting NextG's network coverage objectives in this "dead zone." (p. 6)

Staff Response:

The Applicant has provided alternative proposals with their appeal to replace the proposal that was denied (see *Attachment A*). The changes essentially consist of switching pole material from wood to metal, adding illumination, locating related equipment on the ground as cabinets, and locating the pole closer to the street entrance. Staff and the Planning Commission have not reviewed the new alternatives NextG proposed in their appeal. To do so requires submittal of a new application to the Planning and Zoning Department as previously indicated by the Planning Commission.

The Applicant has not provided any evidence that the proposed area is in fact a "dead zone." Further the applicant has not provided any evidence that the proposed location and design is the only way of addressing the asserted "dead zone." NextG, as the applicant has the burden to show the lack of available and technologically feasible alternatives to address a significant gap in coverage. At this point, they have not met their burden. There is no evidence before the City that the current location is necessary to close a significant gap in coverage. In addition, only

FCC-licensed providers may assert a significant gap in coverage. Since NextG is not itself an FCC-licensed wireless provider, it is at best unclear whether NextG can assert a significant gap in coverage on its own behalf. If an FCC-licensed provider were to approach the City asserting a significant gap in coverage in this area, that provider would have to show both the significant gap and that the proposed site was the least intrusive means to close that significant gap. No such showing has been made.

The City is not opposed to a facility necessary to close a significant gap from an FCC-licensed provider so long as the facility is located and designed in the least intrusive manner available to close this gap. First, the provider would have to provide evidence of a significant gap in coverage. Then the provider would have to show that the proposed facility was the least intrusive means of addressing this gap in coverage. The facility would have to meet the required findings for a Conditional Use Permit and Design Review. This might be achieved with an alternative design and location such as a stealth facility co-located with a new street standard situated adjacent to a park street entrance. If the provider asserts that it cannot close a significant gap in coverage and still meet the requirements of the City's regulations, the provider would have the burden to prove this and the City could then consider the least intrusive means of closing this significant gap.

However, at this time there has been no showing of a significant gap in service from an FCC-licensed provider or that the proposed monopole location and design is the least intrusive way to close this gap.

ENVIRONMENTAL DETERMINATION

As stated in the Planning Commission report, CEQA statutorily exempts projects which are disapproved (Guidelines Section 15270). Therefore, the City Council's action to uphold the Planning Commission's denial of this application, as recommended in this staff report, is exempt from CEQA.

Staff would note that, given the impacts of the regional park and open space area, the aesthetic concerns and the inconsistencies between the proposed project and the General Plan, as set forth in the Planning Commission's staff report and its determination and in this staff report, should the Council determine that this application should be processed as currently proposed, Staff believes that an initial study under CEQA would be required to determine whether the project has potential significant adverse environmental impacts and what type of environmental review under CEQA is required prior to a consideration of approval of the project that is the subject of this appeal. This review has not occurred because of the staff recommendation for denial and the Planning Commission's determination to deny this application. Analysis under CEQA would be required prior to any further processing for any application for telecommunications facilities, as proposed by this appellant or any other applicant.

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SUSTAINABLE OPPORTUNITIES

Economic:

To deny the appeal and disallow construction of a 36'-4" pole might result in the maintained attendance of City and regional visitors paying fees to visit the Chabot Space and Science Center due to the protection of the natural environment sought by open space enthusiasts.

Environmental:

To deny the appeal and disallow construction of the 36'-4" pole would protect the natural environment in an open space zone.

Social:

To deny the appeal and disallow construction of a 36'-4" pole would protect the experience of citizens including children who live in densely-developed areas of Oakland and rely on the City's open space zone for short respites from the urban environment.

DISABILITY AND SENIOR CITIZEN ACCESS

The appeal or proposed construction would not affect access including to disabled or senior citizens.

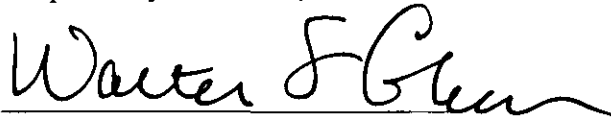
RECOMMENDATION(S) AND RATIONALE

Staff recommends the City Council deny the Appeal and uphold the Planning Commission's decision to deny the application. Staff has attached a Resolution for denial to this report.

ACTION REQUESTED OF THE CITY COUNCIL

Staff requests that the City Council Adopt a Resolution Denying Appeal #A10224 and Upholding the Decision of the Planning Commission to Deny Case #CM10140 for a 36'-4"-tall Monopole Wireless Telecommunications Facility in the Open Space Zone section of Public Right-of-Way on Skyline Blvd. north of the Chabot Space and Science Center street entrance.

Respectfully submitted,



Walter S. Cohen, Director
Community and Economic Development Agency

Reviewed by:
Scott Miller, Zoning Manager
Acting Deputy Director, CEDA

Prepared by:
Aubrey Rose, Planner II
Planning and Zoning Division

FORWARDED TO THE
CITY COUNCIL:



Office of the City Administrator

ATTACHMENTS

- A. Appeal letter by Ms. Natasha Ernst (legal counsel)/NextG Networks of California submitted August 16, 2010 (contains Exhibit 4. Alternative Design Proposals)
- B. Planning Commission staff report dated August 4, 2010
- C. Planning Commission staff report dated July 21, 2010 (Attachments not included – see correspondence appeal/case #A10223)
- D. Description of Physical Location

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ATTACHMENT A

Appeal letter by Ms. Natasha Ernst (legal counsel)/NextG Networks of California submitted August 16, 2010 (contains Exhibit 4. Alternative Design Proposals)



NextG Networks

EMPOWERING NEXT GENERATION
WIRELESS NETWORKS

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August 15, 2010

City of Oakland
Attn: Aubrey Rose
Planning and Zoning Services Division
250 Frank H. Ogawa Plaza, Ste 2114
Oakland, CA 95131

RE: Case File No. CM10140; Skyline Boulevard, public right-of-way adjacent to Chabot Space and Science Center near 10000 Skyline Blvd. (NextG Node No. 29)

Dear Mr. Rose:

Pursuant to City of Oakland Planning Code ("OPC") section 17.134.070, NextG Networks of California, Inc. ("NextG") appeals the Planning Commission decision to deny NextG's major conditional use permit ("CUP") application in the above referenced case. The decision was arbitrary and capricious *first*, because there is no ordinance published within OPC that requires a CUP for a utility pole, and *second*, because even if a CUP could be required, the Planning Commission summarily dismissed the application and issued a denial in spite of NextG's requests to present alternatives.

The application is for placement of a utility pole in a vacant portion of the public right-of-way along Skyline Boulevard. The closest address is the Chabot Space & Science Center at 10000 Skyline Boulevard. The utility pole will bring critical wireless telecommunications services to this area, which is a well-known "dead zone" in the Oakland Hills. Specifically at issue is the applicability of Public Utilities Code section 7901, and the City's concerns about visual impact of the proposed utility pole in the public right-of-way. The Planning Commission's denial was arbitrary and capricious because the Planning Commission refused to consider alternative options that NextG offered that could minimize visual impact in the public right-of-way, and further, the Planning Commission issued a decision over NextG's protests that the Planning Commission has never previously exercised its authority similarly for placements of other utility poles by regulated utility companies, like NextG.

At this point, NextG has already constructed several miles of fiber optic cable underground in the public rights-of-way that are currently inactive because the appurtenant wireless equipment has been denied permits by the City of Oakland ("City") Planning Commission. This substantial investment is at risk until the City determines it will allow all of NextG's telecommunications

infrastructure in the public right-of-way, pursuant to the authorization granted to NextG by the California Public Utility Commission ("CPUC") under Public Utilities Code section 7901 to construct utility infrastructure, such as utility poles, in the public rights-of-way.

At the public hearing, NextG offered to work with the City on a solution to the visual impact with the understanding that the installation be in the public right-of-way. As discussed below, the Planning Commission erred by requiring a major CUP for a utility pole in the public right-of way and then by denying the application because it found the installation could not be screened from the public right-of-way, as required by major CUP criteria.

NextG would like to work with the City on a solution in the public right-of-way in compliance with state and federal law. NextG respectfully requests that the City Council hear NextG's application *de novo* and issue NextG a permit for either the original utility installation design or one of the alternative designs and locations NextG is offering the City. If the City finds that its current planning code does not require approval by the Planning Commission for utility installations in the public right-of-way, then NextG requests that the City Council require the appropriate City department or division grant NextG's permit pursuant to the same process applied to other public utilities.

Background

NextG is a regulated "telephone corporation" with a statewide franchise under California Public Utilities Code section 7901 with the right to construct utility poles in the public right-of-way. NextG is *not* a wireless company and thus has different rights and responsibilities than the wireless carriers, such as Verizon, Sprint, T-Mobile, etc. Through the process required by California Public Utilities Code §1001 *et seq.*, NextG was granted a certificate of public convenience and necessity ("CPCN") by the CPUC, authorizing a statewide franchise under the terms of D 03-01-061 (Jan. 30, 2003). NextG's initial authorization was as a "limited-facilities based provider of telecommunications services," which meant that NextG had no right to install its own poles. In D 07-04-045 (Apr. 12, 2007), the CPUC granted NextG "full-facilities based authority," including the right to install its own utility infrastructure in the public rights-of-ways.

NextG is a wireline telecommunications company with wireless elements to enable it to provide point-to-point radio transport services over fiber optic cable. NextG installed miles of fiber optic cable and approximately twenty-one (21) wireless attachments in the City in its first phase network completed last year. Prior to submitting permits for the second phase of its telecommunications network (also consisting of fiber optic cable and wireless attachments), NextG proactively sought direction from the City Planning and Zoning Division of the Community and Economic Development Agency ("CEDA") regarding the placement of four (4) *new utility poles that would ultimately have wireless attachments in addition to electric and communication wire attachments.* NextG's government relations director Sharon James was advised by the City's staff member, Mr. Eric Angstadt in February 2010, that the process should be Small Project Design Review. Relying on this direction, NextG prepared master applications and submitted them on March 12, 2010, provided as Exhibit 1.

On April 9, 2010, NextG received a letter from the Planning and Zoning Division stating a contrary position to the one taken when Ms. James consulted with Mr. Angstadt, *i.e.*, that NextG's four (4) new utility poles were considered "monopoles" under the City Planning Code because they include a proposed antenna (even though utility poles installed by other utilities, with even larger attachments of transformers, cable boxes, switches, and other apparatus are not "monopoles"). On April 16, 2010, NextG responded to the City's letter and, hoping to illustrate the stark difference between utility infrastructure like NextG's and other utilities (in the right-of-way) and monopoles (large steel structures installed on private property), NextG provided examples of a utility pole with wireless attachments versus a "monopole" in its letter, attached with all the correspondence between NextG and the City as Exhibit 2. On April 19, 2010, NextG met with the City for further discussion, and the City requested more information regarding NextG's regulatory status and analysis of the City's Planning Code, which was provided on April 29, 2010. On May 13, 2010, the City restated its position from April 9, 2010 that NextG's utility poles are "monopoles" requiring major CUP permits and made a general reference to the telecommunications section 17.128.

NextG filed a major CUP application for the above referenced site. At the same time, NextG appealed the administrative determination on May 24, 2010 and appeared before the Planning Commission on July 21, 2010. NextG argued that its status as a regulated utility under Public Utilities Code section 7901 allowed it to set utility poles in the public right-of-way because it is a utility company, *not a wireless company*. NextG pointed to OPC section 17.11.140, which defines essential service activities to include "telephone distribution lines and poles." The Planning Commission upheld the administrative determination, and NextG did not bring a further challenge.

Prior to the Planning Commission meeting on August 4, 2010, NextG met with staff in order to determine what could be done in order to obtain a staff recommendation of approval of the application, but no resolution could be reached because of staff's insistence that NextG locate its utility pole *outside* of the public right-of-way, in spite of California Public Utilities Code section 7901, which is a specific grant to place utility poles *within* the public right-of-way. As the California Court of Appeals has clearly held, "telephone companies have the right to use the public highways to install their facilities." *Williams Communications, LLC v. City of Riverside*, 114 Cal.App.4th 642 (2003).

On August 4, 2010, NextG appeared before the Planning Commission in support of the above referenced application. NextG explained that there appeared to be confusion regarding NextG's regulatory status and emphasized that it is not a wireless carrier, but rather a regulated utility company with different rights and responsibilities than wireless carriers, particularly the right to set utility poles in the public right-of-way. The Planning Commission denied NextG's application.

For the following reasons, the Planning Commission's decision is in error, an abuse of its discretion, and unsupported by substantial evidence, and therefore, should be reversed by the City Council.

The Planning Commission's Decision is Inconsistent with Law

The Planning Commission, just like City Council, is bound by all applicable federal, state and local laws, including in particular California Public Utilities Code section 7901, which states:

Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

Put plainly, the Planning Commission's denial of NextG constructing a pole in the public right-of-way for telecommunications services violates section 7901 of California's Public Utilities Code as well as the federal Telecommunications Act of 1996, specifically section 253.

NextG does not dispute that the City has jurisdiction over and the responsibility to manage the public rights-of-way; however, state law and federal law require municipalities treat both competitive local exchange carriers ("CLEC") like NextG and incumbent local exchange carriers ("ILEC") like AT&T in an equal and nondiscriminatory manner. *See TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 79–80 (2nd Cir. 2002) (the City of White Plains, New York ran afoul of the law when it treated the ILEC differently than a CLEC). Public Utilities Code section 7901.1(b) states that the control exercised by municipalities over access to the public rights-of-way "be reasonable" and "at a minimum, be applied to all entities in an equivalent manner." Section 253(c) of the Telecommunications Act requires cities to manage "use of public rights-of-way on a nondiscriminatory basis."

NextG had reviewed the OPC, and it does not speak to governing utility infrastructure (including telecommunications, cable, electric or other similar infrastructure) in the public right-of-way. As drafted, the Planning Code contemplates *private* property and becomes nonsensical when applied to the public right-of-way. By way of example, OPC section 17.11.060 states that a minor CUP is required for "[e]lectric, gas, and telephone distribution lines and poles" in the Open Space Zone. Yet, if the City were to apply this requirement to the public rights-of-way (which it never has), there would be direct conflict with section 17.11.140, which exempts essential services (presumably when in the public right-of-way). In point of fact, there are hundreds of utility poles in the public rights-of-way in the Open Space Zone throughout Oakland, none of which went through the Planning & Zoning Division. This demonstrates not only that the Planning Code does not literally apply (as it is written) to the public rights-of-way, but also that the Planning Code does not (as it is applied) carry over to the public right-of-way.

The City would not require the ILEC to get a major CUP to set a new utility pole in the public right-of-way because, as staff accurately pointed out in its staff report to Case No. A10129, OPC Section 17.11.140 exempts "telephone distribution lines and poles" in the public rights-of-way. Since the City's code does not require CUPs for other users of the public rights-of-way, the City cannot arbitrarily create new criteria just to fit NextG. Indeed, federal courts have held that a local government cannot "arbitrarily invent new criteria" and new processes that do not "go to

any of the criteria set out in the Zoning Code.” *T-Mobile vs. Wyandotte County*, 546 F.3d 1299 (10th Cir. 2008), *citing Virginia Metronet, Inc. v. Bd. of Supervisors of James City County, Va.*, 984 F.Supp. 966, 974 n. 14 (E.D.Va.1998); *also see New Par v. City of Saginaw*, 301 F.3d 390, 398 (6th Cir.2002), *Town of Amherst, N.H. v. Omnipoint Commc’ns Enters., Inc.*, 173 F.3d 9, 14 (1st Cir.1999). Therefore, the City’s application of the Planning Code to the public right-of-way is in error.

The staff report for the above referenced case mischaracterized NextG as acting “for Verizon” and inaccurately referred to NextG’s utility pole as a “monopole” and to the public right-of-way as the “lease area.” Treating the public right-of-way as private property loses site of the public rights-of-way as the traditional utility corridor for utility infrastructure, in line with NextG’s request to place a utility pole in it. By treating NextG like a wireless carrier, which is it is not, rather than a regulated CLEC with the same rights and responsibilities as the ILEC and other utility entities, the City violated state and federal law by managing the public rights-of-way in a discriminatory and unequal manner.

In addition, the City’s management of the public rights-of-way may not “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a). To the extent NextG’s telecommunications infrastructure serves wireless communications, the City also must comply with section 332(c)(7)(B)(i)(II), which states that municipalities, “shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”

The Findings for Denial adopted by the Planning Commission found that NextG’s installation “would not be compatible with the surrounding open space/region-serving park area, would contain unsightly attached equipment, and would be excessively tall and bulky in comparison to the minimal examples of man-made structures found in the area.” Oakland City Planning Commission Staff Report, Case File Number CM10-140, 6 (August 4, 2010) (attached as Exhibit 3).¹ Prior to and during the Planning Commission meeting, planning staff repeatedly stated that it would only recommend an application if it were outside of the public right-of-way, and thus screened from the public view. This option is not feasible because NextG is a utility, and like other utilities, operates in the utility corridor—the public right-of-way.

The Findings of Denial under OCP section 17.128.080(B) also makes is clear that collocation of wireless equipment on existing structures is not feasible in the area requiring coverage because it is “completely lacking such structures.” NextG has already installed miles of fiber optic cable underground, but the appurtenant wireless equipment must be above ground with an antenna located at adequate height to meet coverage objectives, namely providing seamless coverage to vehicular traffic so that “drop calls” are avoided in this notorious dead-zone. Michael Libbey, *Verizon Improves Cell Coverage in Some Oakland Hills Areas, but Not Others*, Oakland Hills Examiner (June 20, 2009), available at: <http://www.examiner.com/hills-in-oakland/verizon-improves-cell-coverage-some-oakland-hills-areas-but-not-others> (last visited Aug. 15, 2010)

¹ Oakland City Planning Commission Staff Report, Case File Number CM10-140 (August 4, 2010) contains an incomplete Attachment A: Findings for Denial. At the time of this filing, page 7 was still not available, and NextG reserves the right to address any findings on that page during the appeal process.

(Michael Libbey wrote a series of articles came out in 2009 documenting the lack of cell phone coverage in the Oakland Hills.)

NextG repeatedly explained that it is a regulated utility company with the right to construct utility infrastructure in the public right-of-way, and while it would like to work with staff on a design that it would consider “more compatible” with the surrounding area, all installations had to be in the public right-of-way, pursuant to NextG’s authority under state and federal law. NextG requested the Planning Commission instruct staff to work with NextG on a solution in the public right-of-way. The Planning Commission rejected NextG’s application and request to find a workable solution, which effectively prohibits NextG from providing telecommunications services in this area of the Oakland Hills, in violation of state and federal laws.

Minimization of Visual Impact while Achieving Telecommunications Service Objectives

NextG understands the City’s goal of permitting utility infrastructure that minimizes the visual impact on the surrounding area. Recent case law acknowledged that aesthetics may be considered when determining “when, where and how telecommunications service providers gain entry to the public rights-of-way.” *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F.3d 716, 725 (9th Cir. 2009). However, this police power must be used reasonably and does not allow municipalities to prohibit access to the public rights-of-way based on visual impact, as the Planning Commission did when it denied NextG’s application.

The court states that “a company can ‘access’ a city’s rights-of-way in both aesthetically benign and aesthetically offensive ways. It is certainly within a city’s authority to permit the former and not the later.” *Id.* Again, by denying NextG’s application completely and refusing to consider *any* construction in the public right-of-way, the Planning Commission violated Public Utility Code section 7901.1 and abused its discretion of what constitutes “visual impact” under the Oakland Comprehensive Plan, Policy OS-10-2. The Finding for Denial recognize that Policy OS-10-2 encourages “site planning for new development that minimizes adverse visual impact.” Minimal adverse impact acknowledges that some impact will be made. NextG requested it be allowed to work with the Planning Commission and planning staff on a solution in the public right-of-way that minimized adverse visual impact, but this request was denied in favor a complete prohibition of critical telecommunications infrastructure in the public right-of-way. During the Planning Commission, planning staff also mentioned that it did not have the resources to continue working with NextG to find an acceptable solution, which is not in the Findings of Denial or an acceptable reason for recommending denial.

NextG now respectfully requests City Council accept NextG’s proposal to work with the City to find a solution in the public right-of-way that minimized visual impact while also meeting NextG’s network coverage objectives in this “dead zone.” This section of Skyline Boulevard is very dark and winding and lacks streetlights. NextG would like to work with the City to find an alternative design or location along the ROW, such as a streetlight in the public right-of-way near one of the entrances to park facilities.

For the City’s consideration, NextG is attaching as Exhibit 4 a number of photo simulations showing various types of structure near the entrance to the Chabot Space & Science Center.

Mr. Rose

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NextG has designed a pole that matches the existing poles lining the drive-way of the Chabot Space & Science Center and presented several options to the City for consideration, such as a light standard, a banner-pole, or a light standard with a banner attachment. In all cases, the antennas are attached discretely at the top of the structure, and the equipment is placed aesthetically in nearby ground furniture. NextG hopes that the City finds one of these to be an "aesthetically benign" solution. If not, NextG is willing to continue working with the City to modify the design further.

NextG has also determined that this location will enable it to meet its telecommunications service objective of providing seamless coverage to Skyline Boulevard. A common customer complaint is the "dropped call" experienced when a roadway lacks coverage, which is the situation on Skyline Boulevard in this area. People demand seamless cellphone services always, but particularly in an emergency situation. Some recent high profile incidents where the lack of cell phone coverage compromised people's safety prompted Senator Kerry to reprimand a national wireless provider for inadequate coverage. Matt Pilon, *Sen. Kerry Calls for Better Phone Service*, Amherst Bulletin, available at: <http://www.amherstbulletin.com/story/id/177160/> (last visited Aug. 15, 2010).

It is not hard to imagine a similar safety risk along this portion of Skyline Boulevard, which is a dark, winding road without streetlights or other lighting structures. In addition to the lack of vehicular coverage, hikers lost or injured in the woods similarly lack the ability to call for help. Communication is vital everywhere, but particularly in our wildfire and earthquake-prone region. This installation comes equipped with a battery backup unit, enabling communication services to continue even with a power outage. Wireless communications, with its GPS capabilities, provide a link that often means the difference between life and death.

Conclusion

For the reasons stated above, NextG respectfully requests that the City Council hear NextG's application *de novo* and issue NextG a permit for either the original utility installation design or one of the alternative designs and locations NextG is offering the City. If the City finds that its current planning code does not require approval by the Planning Commission for utility installations in the public right-of-way, then NextG requests that the City Council require the appropriate City department or division grant NextG's permit pursuant to the same process applied to other public utilities.

NextG looks forward to working with the City Council, the Planning Commission and planning staff on a successful resolution of this issue.

Best regards,



Natasha Ernst

Government & Utility Counsel

Mr. Rose

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Enclosures:

Application Form for Appeal

Appeal fee (\$1,352.91)

Exhibit 1. Original Application for Small Project Design Review

Exhibit 2. Correspondence between NextG and the City

Exhibit 3. Staff Report with the Major CUP Application Package

Exhibit 4. Alternative Design Proposals

Exhibit 4: Alternative Design Proposals

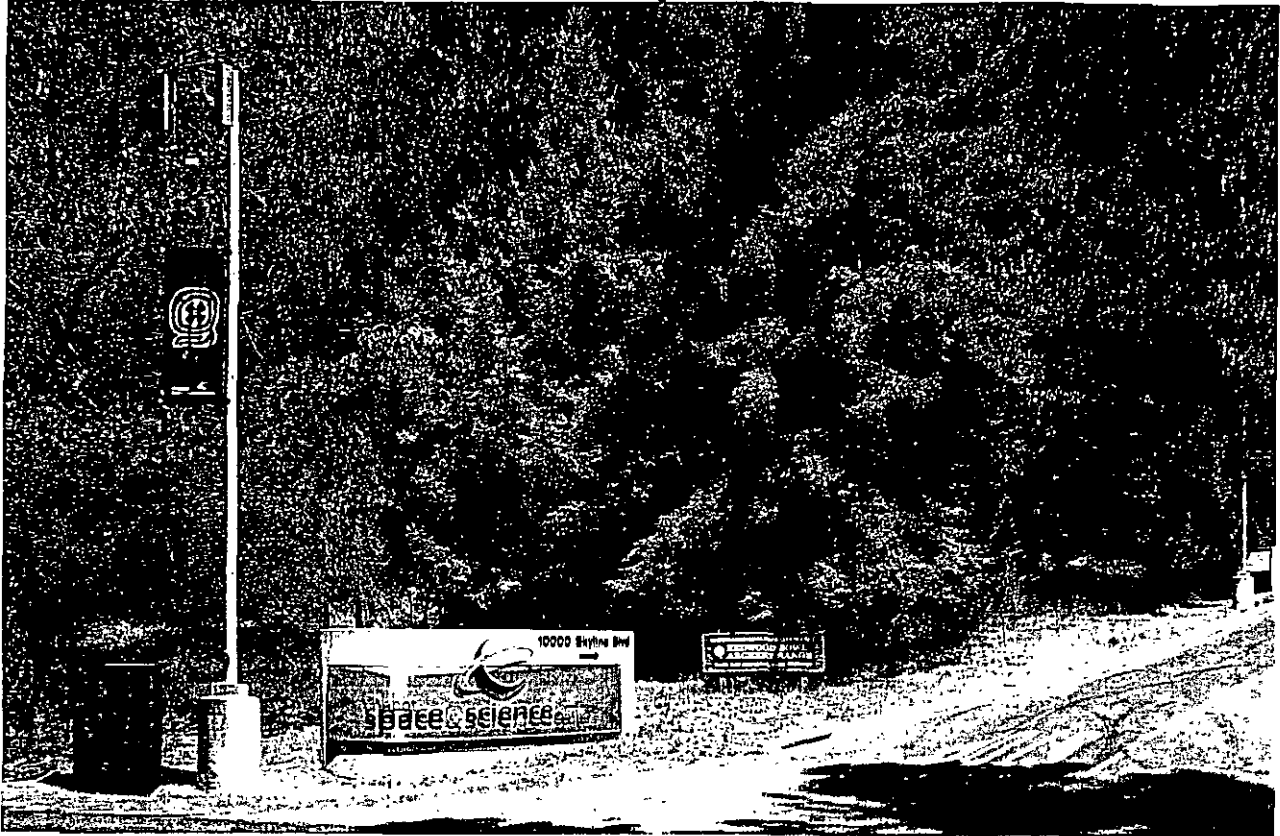
Current View



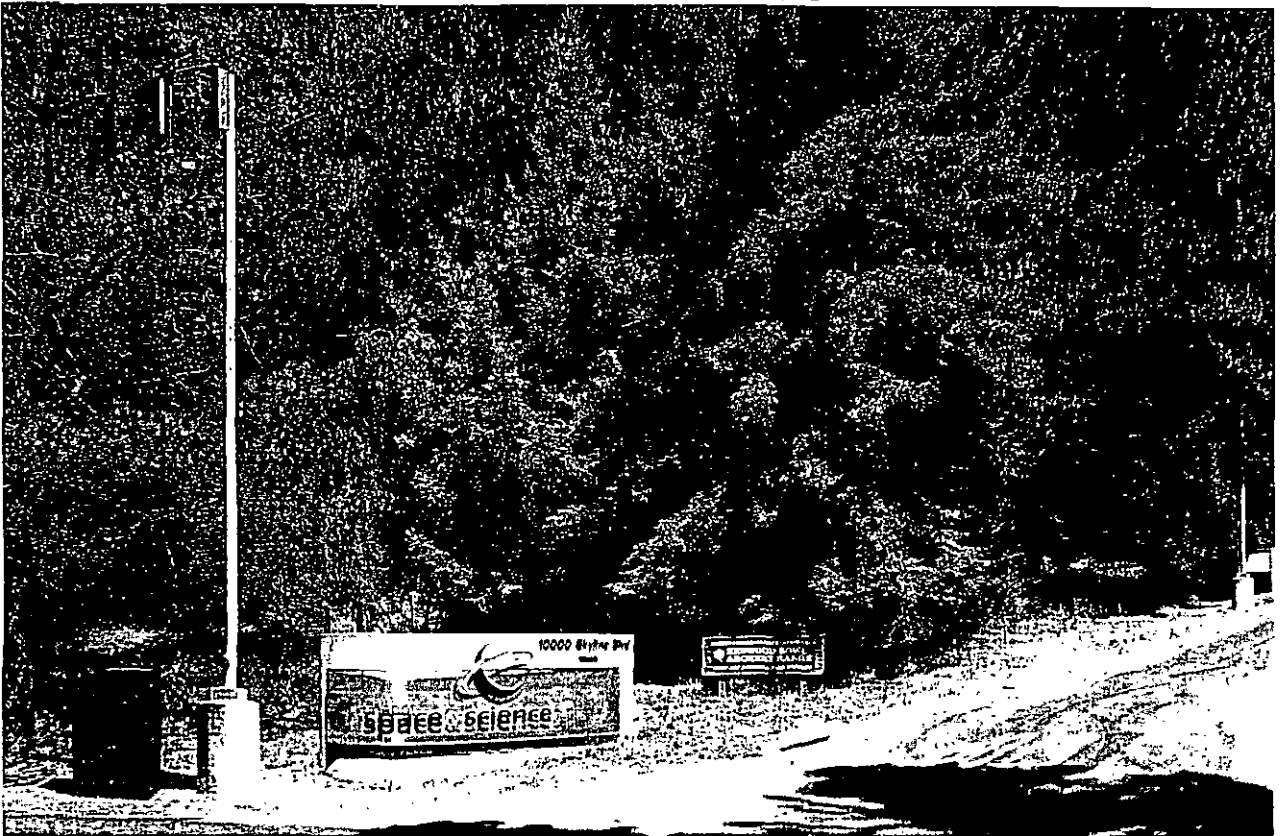
Steel Pole with Lighting Attachment & Banner Hanger and Ground Furniture



Steel Pole with Banner Hanger and Ground Furniture



Steel Pole with Ground Furniture



ATTACHMENT B

Planning Commission staff report dated August 4, 2010

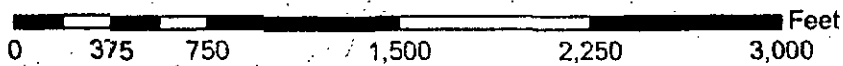
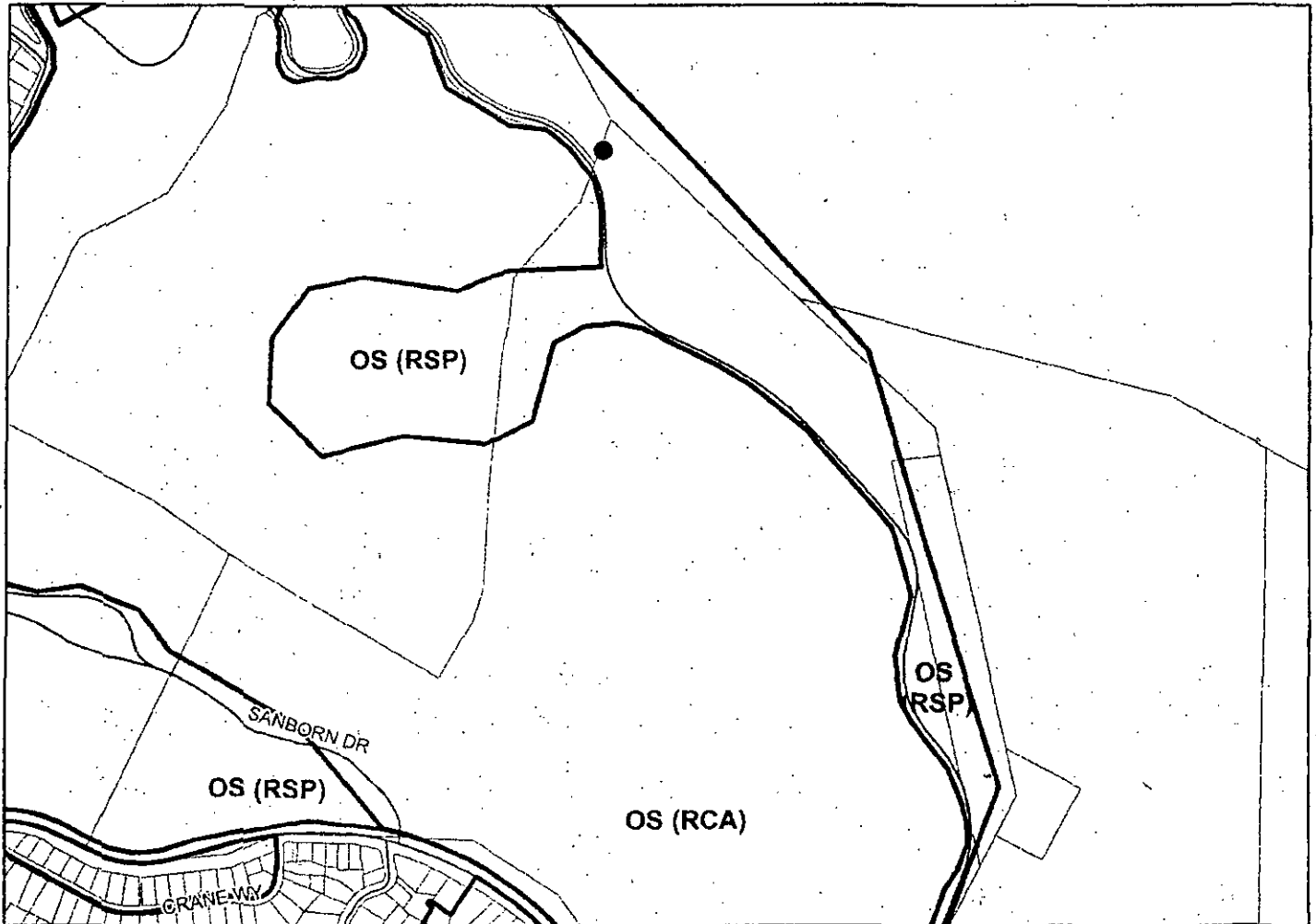
Location:	Skyline Boulevard (north of Chabot Space & Science Center street entrance)
Assessor's Parcel Number:	None
Proposal:	To install a 36'-4"-tall Monopole Telecommunications Facility in the public right-of-way along Skyline Boulevard.
Applicant/Phone Number:	Sharon James / NextG (for Verizon) (408) 426-6629
Owner:	City of Oakland
Planning Permits Required:	Major Conditional Use Permit with 2 sets of additional findings to allow a Monopole Telecommunications Facility in the OS Zone (OMC Sec. 17.11.080, 128.080(C), 134.020(A)(3)(f))
General Plan:	Urban Open Space
Zoning:	OS (RSP) Open Space (Region-Serving Park) Zone
Environmental Determination:	Exempt, Section 15270 of the State CEQA Guidelines: Projects Which Are Disapproved
Historic Status:	No Historic Status (vacant portion of public right-of-way)
Service Delivery District:	IV – San Antonio/Fruitvale
City Council District:	4 – Quan
Date Filed:	June 3, 2010
Staff Recommendation:	To deny the application
Finality of Decision:	<i>Appealable to City Council within 10 days</i>
For Further Information:	Contact case planner Aubrey Rose, Planner II at (510) 238-2071 or arose@oaklandnet.com

SUMMARY

The applicant Sharon James of NextG (for Verizon) requests Planning Commission approval of a Major Conditional Use Permit with two (2) sets of additional findings to install a 36'-4"-tall Monopole Telecommunications Facility in the public right-of-way. The request requires Planning Commission review, pursuant to the Planning Code, because the proposed project involving a Monopole in an Open Space Zone.

Staff recommends denial of the requested permits, subject to Findings for Denial (Attachment A).

CITY OF OAKLAND PLANNING COMMISSION



Case File: CM10-140
Applicant: Sharon James/NextG
Address: Skyline Blvd, North side of street
(adjacent of Chabot Space &
Science Center street entrance)
Zone: OS (RSP)

PROPERTY DESCRIPTION

The property is an unpaved portion of City public right-of-way situated alongside a two-way section of Skyline Boulevard without sidewalks. The site is adjacent to the street entrance to the Chabot Space and Science Center, indicated by signage. To the rear of the site is a grassy hillside with two retaining walls. Both sides of the street are lined by trees. South of the entrance to the center are a cabin (Metropolitan Horseman's Association office) along Skyline Boulevard and a City parking lot set back on the east side of the street. The closest structures similar in height are a lighting standard at the cabin serving a crosswalk located approximately 500-radial-feet to the south, and newer lighting standards along an access road at the north side of the Chabot Center and wooden telephone poles with power lines crossing the street further north along Skyline Boulevard located approximately 500-radial-feet to the north. There are no structures directly along the public right-of-way close to the height of the proposed poles in proximity to the proposed site.

PROJECT DESCRIPTION

The project is to install an approximately 36'-4"-foot tall wooden Monopole Telecommunications Facility with one (1) omnibase antenna. The antenna would be attached to the top of a 35-foot wooden pole. The lease area would measure a few square feet in area and the Monopole would be set back approximately ten-feet from the edge of street pavement. The Monopole would also have a utility meter, equipment cabinet (24" tall x 36" wide x 14" deep) and large battery (33" tall x 6" wide x 6" deep) attached between 7'-6" and 19'-7" in height, respectively. All attachments will be painted to match the color of the wooden pole. The purpose of the project is to improve cellular telephone reception in the area. Other carriers would be eligible to apply to co-locate on or use the services of the Monopole.

GENERAL PLAN ANALYSIS

The proposed project site is located in an Urban Open Space of the General Plan's Land Use & Transportation Element (LUTE). The Intent of the area is: *"To identify, enhance and maintain land for parks and open space. Its purpose is to maintain and urban park, schoolyard, and garden system which provides open space for outdoor recreation, psychological and physical well-being, and relief from the urban environment."* The site is located in a Maintain and Enhance area of the LUTE. The proposal does not conform to the LUTE or to the following Policies of the General Plan's Open Space, Conservation and Recreation (OSCAR) Element:

POLICY OS-10.2: MINIMIZING ADVERSE VISUAL IMPACTS

Encourage site planning for new development which minimizes adverse visual impacts and takes advantages of opportunities for new vistas and scenic enhancement.

POLICY OS-10.4: RETENTION OF CITY-OWNED OPEN SPACE IN SCENIC CORRIDORS

Retain City-owned parcels adjacent to Skyline Boulevard, Shepherd Canyon Road, and other scenic roadways to preserve panoramic views, vegetation, and natural character.

The proposal is not in conformance with the General Plan. The location is along a natural wooded corridor adjacent to a major City facility. The area offers relief for citizen and area residents from the built environment and the City facility is a regional attraction.

ZONING ANALYSIS

The proposed project site is located within the OS (RSP) Open Space (Region-Serving Park) Zone. The Intent of the OS (RSP) Zone is: *"to create, preserve, and enhance land for permanent open space to meet the active and passive recreational needs of Oakland residents and to promote park uses which are compatible with surrounding land uses and the city's natural environment. The zone is typically appropriate in areas of public open space only."* The proposal is not consistent with the Intent of the Zoning District or with the following Purposes of the Zoning regulations:

"To especially protect and improve the appearance and orderliness of major trafficways and transit lines and views therefrom, thereby increasing the enjoyment of travel, reducing traffic hazards, and enhancing the image of Oakland derived by residents, businesspeople, commuters, visitors, and potential investors;

To protect the very substantial public investment in, and the character and dignity of, public buildings, open spaces, thoroughfares, and rapid transit lines" (OMC Sec. 17.07.030(L, M))

The proposal is also not consistent with the following development standard for Monopoles:

The equipment shelter or cabinet must be concealed from public view or made compatible with the architecture of the surrounding structures or placed underground. (OMC Sec. 17.128.080(A)(2))

In conclusion, the proposal is inconsistent with the Planning Code and findings required to approve the project cannot be made (Attachment A – Findings for Denial). The proposed structure would not preserve open space and would not be compatible with the minimal built environment and prevailing natural environment in the area. Lastly, the proposed structure is not complementary to the Chabot Space and Science Center.

ENVIRONMENTAL DETERMINATION

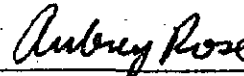
The California Environmental Quality Act (CEQA) Guidelines statutorily exempt projects which are disapproved (Section 15270) and the proposal is therefore not subject to further Environmental Review.

KEY ISSUES AND IMPACTS

The applicant has submitted a Site Design Alternatives Analysis as required for a facility lacking concealment. The Analysis indicates no preferred sites containing buildings for attachment located within the area. Staff finds the Analysis to hold merit, especially since the Analysis is generally meant to apply to facilities that are smaller than a Monopole and can be attached to a building. However, the proposal would create adverse impacts to a wooded corridor serving as a gateway to a region-serving City facility located in a park/open space area, and due to lack of concealment, would be completely incompatible with the surrounding natural environment. Staff is not opposed to the use; however, due to lack of concealment, the facility would be incompatible with the surrounding natural environment. Therefore, staff recommends the Planning Commission deny the requested Major Conditional Use Permit and two (2) sets of additional findings for a Monopole Telecommunications Facility in the Open Space Zone, as described in the attached findings (Attachment A – Findings for Denial).

- RECOMMENDATIONS:**
1. Affirm staff's environmental determination.
 2. Deny the Major Conditional Use Permit and two (2) sets of additional findings.

Prepared by:



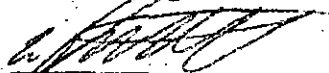
AUBREY ROSE
Planner II

Approved by:



SCOTT MILLER
Zoning Manager

Approved for forwarding to the
City Planning Commission:



ERIC ANGSTADT
Deputy Director
Community and Economic Development Agency

ATTACHMENTS:

- A. Findings for Denial
- B. Plans with Photo-Simulations
- C. Network diagram (general)
- D. Site Design Alternatives Analysis

Attachment A: Findings for Denial

This proposal does not meet the required findings under General Use Permit Criteria (OMC Sec. 17.134.050), Conditional Use Permit Criteria for Monopoles (OMC Sec. 17.128.080(C)), and Design Review for Monopoles (OMC Sec. 17.128.080(B)), as set forth below. Required findings that cannot be made are shown in bold type; explanations as to why these findings cannot be made are in normal type.

SECTION 17.134.050 – GENERAL USE PERMIT CRITERIA:

A. That the location, size, design, and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; and to any other relevant impact of the development.

This finding cannot be made: the proposed Monopole would not be compatible with the surrounding open space/region-serving park area, would contain unsightly attached equipment, and would be excessively tall and bulky in comparison to the minimal examples of man-made structures found in the area. The design of the tall pole with attached equipment along a scenic stretch of Skyline Boulevard that is unencumbered by similar man-made structures (including power poles and light standards) will adversely affect the neighborhood character. Manmade objects in the vicinity are essentially limited to necessary No Parking signs, a trail fence, and a regional park sign, which are much smaller than the proposed 41' - 5" - tall Monopole.

E. That the proposal conforms in all significant respects with the Oakland Comprehensive Plan and with any other applicable plan or development control map which has been adopted by the City Council.

This finding cannot be made: the proposal does not conform to the Intent of the Urban Open Space of the General Plan: *"To identify, enhance and maintain land for parks and open space. Its purpose is to maintain and urban park, schoolyard, and garden system which provides open space for outdoor recreation, psychological and physical well-being, and relief from the urban environment."* or to the following Policies of the General Plan's Open Space, Conservation and Recreation (OSCAR) Element:

POLICY OS-10.2: MINIMIZING ADVERSE VISUAL IMPACTS

Encourage site planning for new development which minimizes adverse visual impacts and takes advantages of opportunities for new vistas and scenic enhancement.

POLICY OS-10.4: RETENTION OF CITY-OWNED OPEN SPACE IN SCENIC CORRIDORS

Retain City-owned parcels adjacent to Skyline Boulevard, Shepherd Canyon Road, and other scenic roadways to preserve panoramic views, vegetation, and natural character.

The location is along a natural wooded corridor serving as a gateway to a region-serving City facility. The relatively unspoiled character of the area should be maintained for the continued enjoyment by residents and to maintain the economic viability of facilities to attract regional visitors.

SECTION 17.128.080(C) – CONDITIONAL USE PERMIT CRITERIA FOR MONOPOLES.

1. The project must meet the special design review criteria listed in subsection B of this section.

Attachment A: Findings for Denial

This proposal does not meet the required findings under General Use Permit Criteria (OMC Sec. 17.134.050), Conditional Use Permit Criteria for Monopoles (OMC Sec. 17.128.080(C)), and Design Review for Monopoles (OMC Sec. 17.128.080(B)), as set forth below. Required findings that cannot be made are shown in bold type; explanations as to why these findings cannot be made are in normal type.

SECTION 17.134.050 – GENERAL USE PERMIT CRITERIA:

A. That the location, size, design, and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; and to any other relevant impact of the development.

This finding cannot be made: the proposed Monopole would not be compatible with the surrounding open space/region-serving park area, would contain unsightly attached equipment, and would be excessively tall and bulky in comparison to the minimal examples of man-made structures found in the area. The design of the tall pole with attached equipment along a scenic stretch of Skyline Boulevard that is unencumbered by similar man-made structures (including power poles and light standards) will adversely affect the neighborhood character. Manmade objects in the vicinity are essentially limited to necessary No Parking signs, a trail fence, and a regional park sign, which are much smaller than the proposed 41'-5"-tall Monopole.

E. That the proposal conforms in all significant respects with the Oakland Comprehensive Plan and with any other applicable plan or development control map which has been adopted by the City Council.

This finding cannot be made: the proposal does not conform to the Intent of the Urban Open Space of the General Plan: *"To identify, enhance and maintain land for parks and open space. Its purpose is to maintain and urban park, schoolyard, and garden system which provides open space for outdoor recreation, psychological and physical well-being, and relief from the urban environment."* or to the following Policies of the General Plan's Open Space, Conservation and Recreation (OSCAR) Element:

POLICY OS-10.2: MINIMIZING ADVERSE VISUAL IMPACTS

Encourage site planning for new development which minimizes adverse visual impacts and takes advantages of opportunities for new vistas and scenic enhancement.

POLICY OS-10.4: RETENTION OF CITY-OWNED OPEN SPACE IN SCENIC CORRIDORS

Retain City-owned parcels adjacent to Skyline Boulevard, Shepherd Canyon Road, and other scenic roadways to preserve panoramic views, vegetation, and natural character.

The location is along a natural wooded corridor serving as a gateway to a region-serving City facility. The relatively unspoiled character of the area should be maintained for the continued enjoyment by residents and to maintain the economic viability of facilities to attract regional visitors.

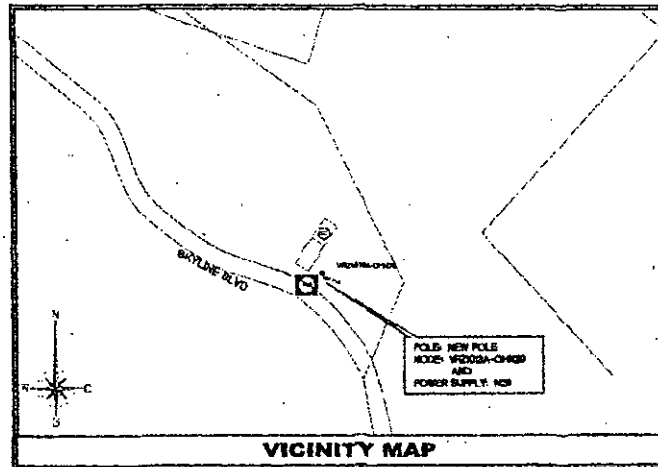
SECTION 17.128.080(C) – CONDITIONAL USE PERMIT CRITERIA FOR MONOPOLES.

1. The project must meet the special design review criteria listed in subsection B of this section.

relatively bulky as it would contain equipment and the area does not contain any other large poles such as light standards, telephone or power poles, or telecommunications facilities such as monopoles.



NextG Networks Inc.
OAKLAND HILLS
VRZ1013A-OHN29
9950 SKYLINE BLVD.
OAKLAND, CA. 94619



VICINITY MAP

ALL WORK AND MATERIALS SHALL BE PROVIDED AND INSTALLED IN ACCORDANCE WITH THE LATEST EDITION OF THE FOLLOWING CODES AS ADOPTED BY THE LOCAL GOVERNING AUTHORITIES. NOTHING IN THESE STANDARDS IS TO BE CONSTRUED TO LIMIT ANYONE FROM COMPLYING WITH ANY OTHER GOVERNING CODES.

1. WIRE GUARDING CODE	5. SAFE CLEARANCE CODE
2. STATE RECORDING CODE	6. POWER QUALITY CODE
3. STANDARD-307-3 LEFT LANE	7. LOCAL RECORDING CODE
4. STATE RECORDING CODE	8. UTILITY CLEARANCE

CODE COMPLIANCE

PROPERTY INFORMATION

CUSTOMER:	ACORE
PROJECT:	SKYLINE HILLS
MODEL:	VRZ1013A-OHN29
VERSION:	03/21/10
DATE:	03/21/10
STREET ADDRESS:	9950 SKYLINE BLVD.
CITY, STATE:	OAKLAND, CA 94619
POLE:	NEW POLE
POLE TYPE:	WOOD POLE
POLE HEIGHT:	28'-4"
UTILITY TYPE:	CO-AXIAL CABLE
UTILITY FOR ANTENNA:	N/A
POLE TO POLE:	NEAREST AT 100'
POLE HEIGHT:	STREET ADDRESS
POLE OWNER:	N/A
POLE LOCATION & DESCRIPTION:	SEE WEST SIDE

PROJECT SUMMARY

THE ABOVE DETAILS OF THE PROPOSED WORK SHALL BE PROVIDED TO THE LOCAL GOVERNING AUTHORITY FOR REVIEW AND APPROVAL PRIOR TO THE START OF CONSTRUCTION. THE LOCAL GOVERNING AUTHORITY SHALL BE NOTIFIED IN WRITING OF ANY CHANGES TO THE ABOVE DETAILS PRIOR TO THE START OF CONSTRUCTION.

PROJECT DESCRIPTION

INSTALL 1 NEW POLE WITH 1 NEW CO-AXIAL CABLE AND 1 NEW ANTENNA AND ALL RELATED EQUIPMENT. PROVIDE 10' CLEARANCE FROM ALL UTILITIES AND OBSTACLES. PROVIDE 10' CLEARANCE FROM ALL UTILITIES AND OBSTACLES. PROVIDE 10' CLEARANCE FROM ALL UTILITIES AND OBSTACLES.

PROJECT SCOPE

Call Before you Dig!

Know what's below.
 Call before you dig.
 Call 811 Before you Dig!

QTY	DESCRIPTION	NO.
1	WIRE SHEET	3
2	WIRE POLE / REPAIR POLE DAMAGED POLES	0
3	SYSTEM OVERHAUL	0
4	UTILITY POLE EQUIPMENT TYPICAL	0
		0
		0
		0

SHEET INDEX

DO NOT SCALE DRAWINGS

CONTRACTOR SHALL VERIFY ALL PLEAS AND EXISTING CONDITIONS AND CONDITIONS OF THE JOB BEFORE ANY WORK SHALL BE PERFORMED. NOTIFY THE CONTRACTOR OF ANY DISCREPANCIES BEFORE PROCEEDING WITH THE WORK OR BE RESPONSIBLE FOR THE SAME.

GENERAL CONTRACTOR NOTES

NextG Networks Inc.
 10000 Skyline Blvd.
 Oakland, CA 94619

PROJECT INFORMATION

PROJECT NAME:
 OAKLAND HILLS

CURRENT ISSUE DATE:
 2/25/10

PERMIT SUBMISSION:

REV. DATE: DESCRIPTION:

PLANS PREPARED BY:
 HP COMMUNICATIONS INC.
 1841 Townsend Cir. #4
 Fremont, CA 94538
 PHONE (510) 471-1811

PLANS APPROVED BY:

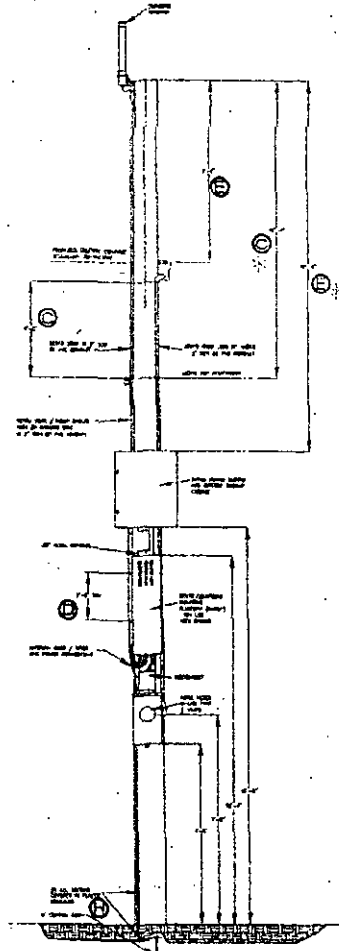
 NextG Networks Inc.

REP.:

COMMENTS:

PROJECT TITLE:
 OAKLAND HILLS PROJECT
 POLE PROFILE VRZ1013A-OHN29

SHEET NUMBER: **1** OF 4



MAKE READY
 QUARTER STEP POLE ACCORDING TO OHSB STANDARDS

NEW CONSTRUCTION
 NEXTG TO INSTALL SHROUD KIT SHOOT @ 11'-5" AGL

NEXTG TO PLACE NEW METAL POLE AND TRANSFER ALL SIGNAGE

NOTES:
 TOP OF POLE: 35'-0"
 PROPOSED SECONDARY H.O.A: 27'-5"
 ANTENNA KIT H.O.A: 25'-0"
 RAD CENTER OF ANTENNA: 38'-4"
 PROPOSED NEXTG H.O.A: 22'-0"

ANTENNA TYPE: 2.9' X 31.9' ARC #RELEDS (UNIBASE ANTENNAS)

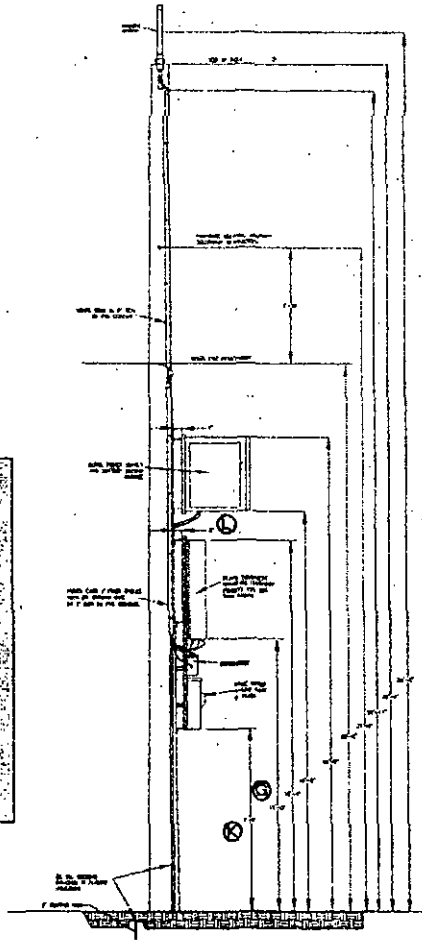
ANTENNA OUTPUT DOES NOT EXCEED GENERAL POPULATION EXPOSURE LIMITS.

RF EMISSION PLACARDS / SIGNAGE MEETING THE FCC REQUIREMENTS SHALL BE IN A LOCATION VISIBLE FROM CLIMBING SPACE AND BE AFFIXED TO THE POLE NO LOWER THAN 9'-0" ABOVE GROUND LINE & NO HIGHER THAN 3'-0" BELOW THE ANTENNA.

PLACARDS / SIGNAGE ARE UV RESISTANT AND SHALL BE ATTACHED TO THE POLE WITH GALVANIZED NAILS OR GALVANIZED SCREWS.

- ① 48" MIN. CLEARANCE BETWEEN SECONDARY POWER AND LOWEST POINT OF ANTENNA ASSEMBLY
- ② 12" MIN. CLEARANCE BETWEEN RISER POLE TOP EXTENSION AS PER DETAIL DWG. 100-117
- ③ 48" MIN. CLEARANCE REQ'D. UNLESS SPECIFIED
- ④ 24" SPACING MAX.
- ⑤ 22" MIN. TO SECONDARY LEVEL
- ⑥ 12" MIN. SPACING FOR GOLF TO CURB
- ⑦ 10" MIN. (MAY BE REDUCED TO 6" WHEN NOT EXPOSED TO TOPFEET)
- ⑧ GROUND INSTALLED BY COMM COMPANY (INCLUDES IF COPPER ROPE)
- ⑨ NOT APPLICABLE
- ⑩ 24" MIN. FROM CENTER OF POLE
- ⑪ 48" MIN. CLEARANCE REQ'D.
- ⑫ 12" MIN. TO 2" MAX. HOIST
- ⑬ 4" MIN. CLEARANCE BETWEEN EQUIPMENT AND POLE

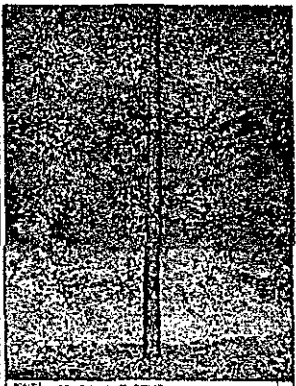
UTILITY POLE DETAIL POLE# NEW POLE LOOKING WEST A



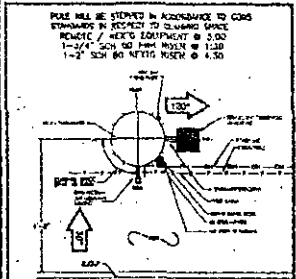
NEXTG TO PLACE NEW CL4 40' POLE

UTILITY POLE DETAIL POLE# NEW POLE LOOKING NORTH B

UTILITY NODE / REPEATER POLE EQUIPMENT PROFILES



POLE# NEW POLE



POLE# NEW POLE RISER POLE DETAIL

Call Before you Dig!

Know what's below. Call 811 Before you Dig.

NextG Networks Inc.
 174 WOOD AVE.
 SAN JOSE, CALIFORNIA 95128
 PHONE: (415) 944-5800

PROJECT INFORMATION

PROJECT NAME: OAKLAND HILLS PROJECT

CURRENT ISSUE DATE: 2/25/10

PROJECT SUBMISSION DATE:

REV. NO. DATE DESCRIPTION:

PLANS PREPARED BY: HP COMMUNICATIONS INC.

12841 Sherman Ave. #6
 Oakland, CA 94611
 PHONE: (510) 471-1800

PLANS APPROVED BY:

NextG Networks Inc.

REP:

COMMENTS:

SHEET TITLE: NEXTG NETWORKS OAKLAND HILLS PROJECT POLE PROFILE VRE1008A-0000

SHEET NUMBER: 2 OF 4

8 NESC Networks Inc.
 700 West 10th St.
 Suite 200
 Minneapolis, MN 55408

3 3 OF 4

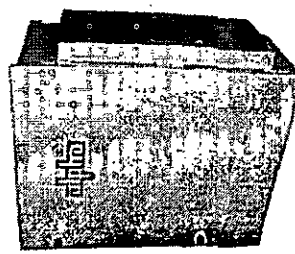
PROJECT INFORMATION
 PROJECT NO. 225/10
 SHEET NO. 3 OF 4

PREPARED BY
 HP COMMUNICATIONS INC.
 1241 Howard Ave.
 Suite 100
 Minneapolis, MN 55408

NESC NETWORKS
 700 WEST 10TH ST.
 SUITE 200
 MINNEAPOLIS, MN 55408

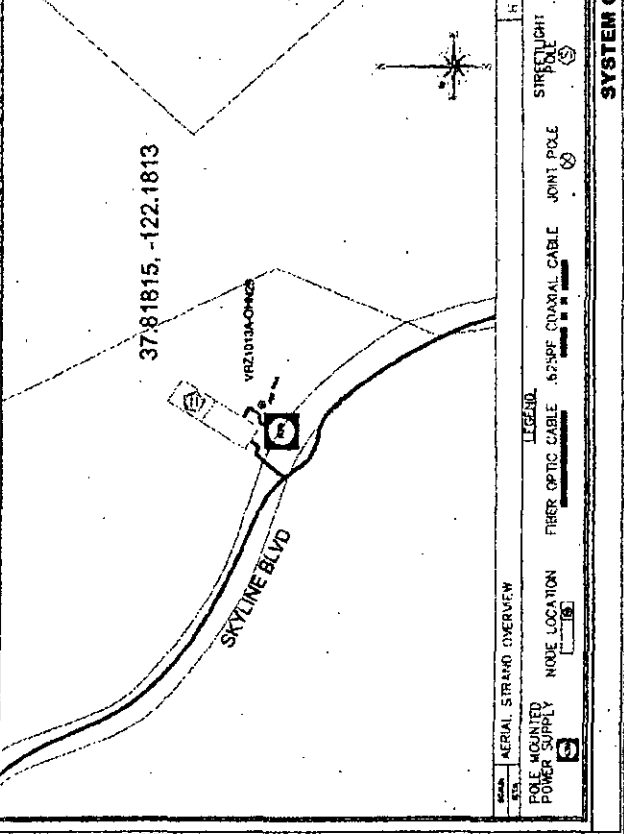
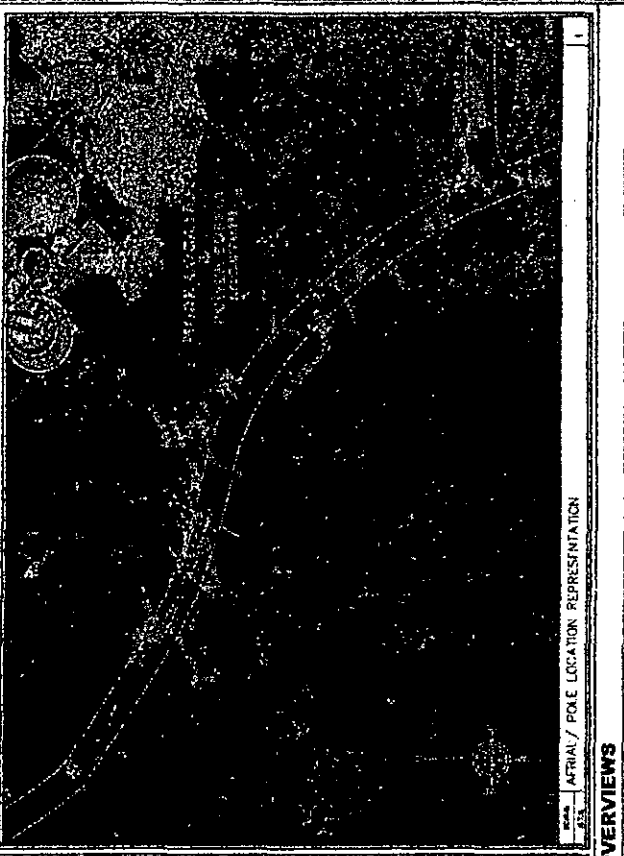
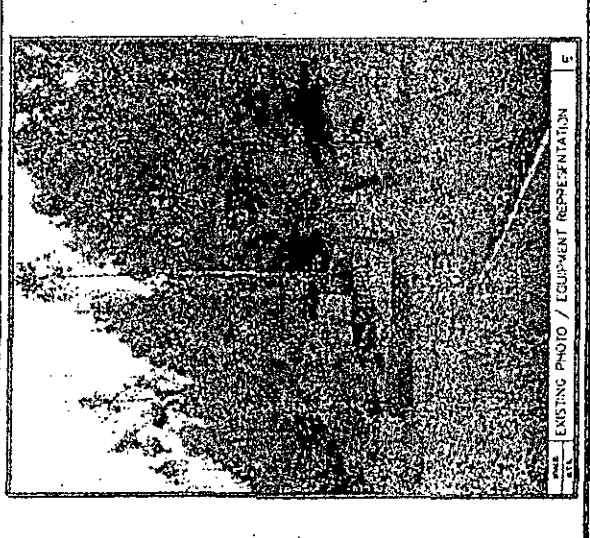
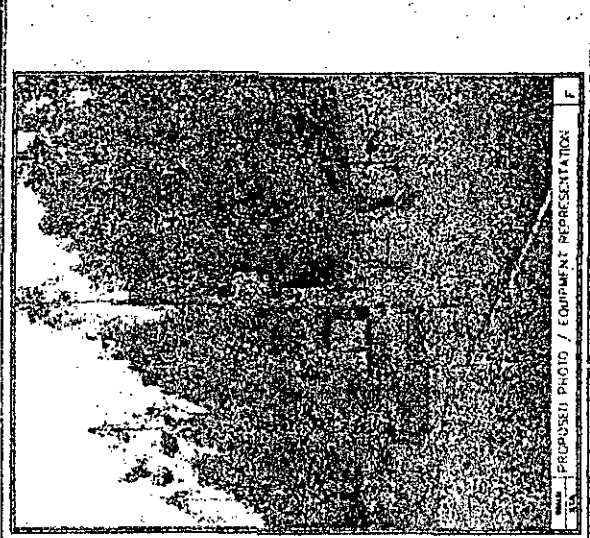
C

POWER SUPPLY ENCLOSURE




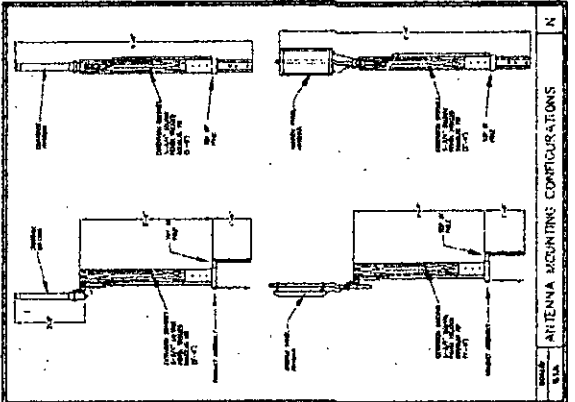
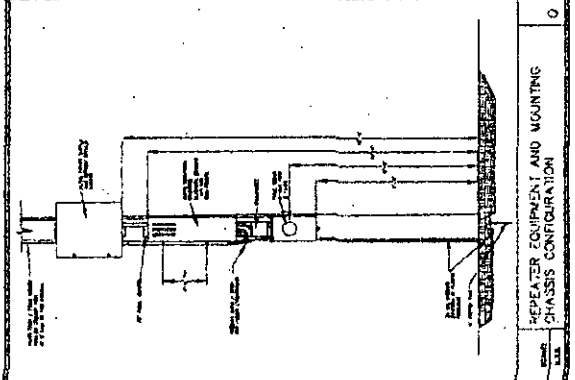
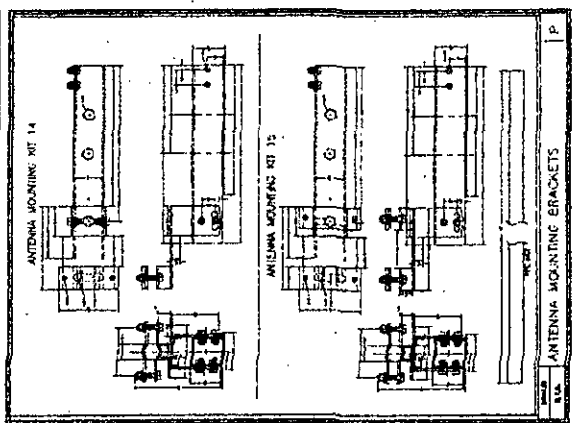
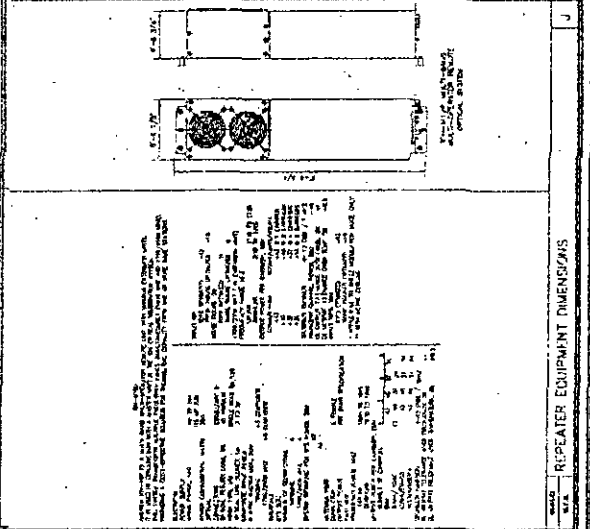
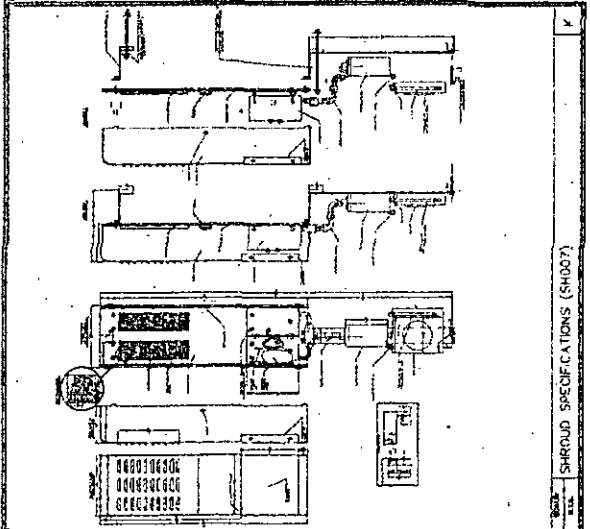
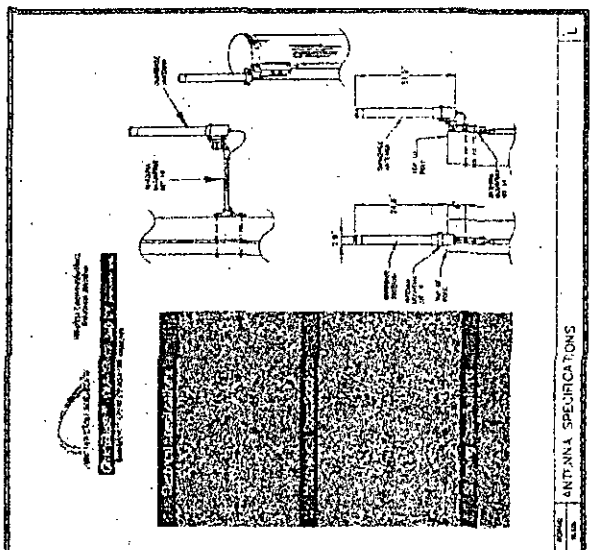
DESCRIPTION	4 Battery	4 Battery
WCS (in feet)	3.0000	3.0000
HOIST WEIGHT	37.000	37.000
WIND UPLIFT	13.2500	13.2500
FRISK		

Notes:
 1. Enclosure shall be installed on a concrete pad.
 2. Enclosure shall be installed on a concrete pad.
 3. Enclosure shall be installed on a concrete pad.
 4. Enclosure shall be installed on a concrete pad.

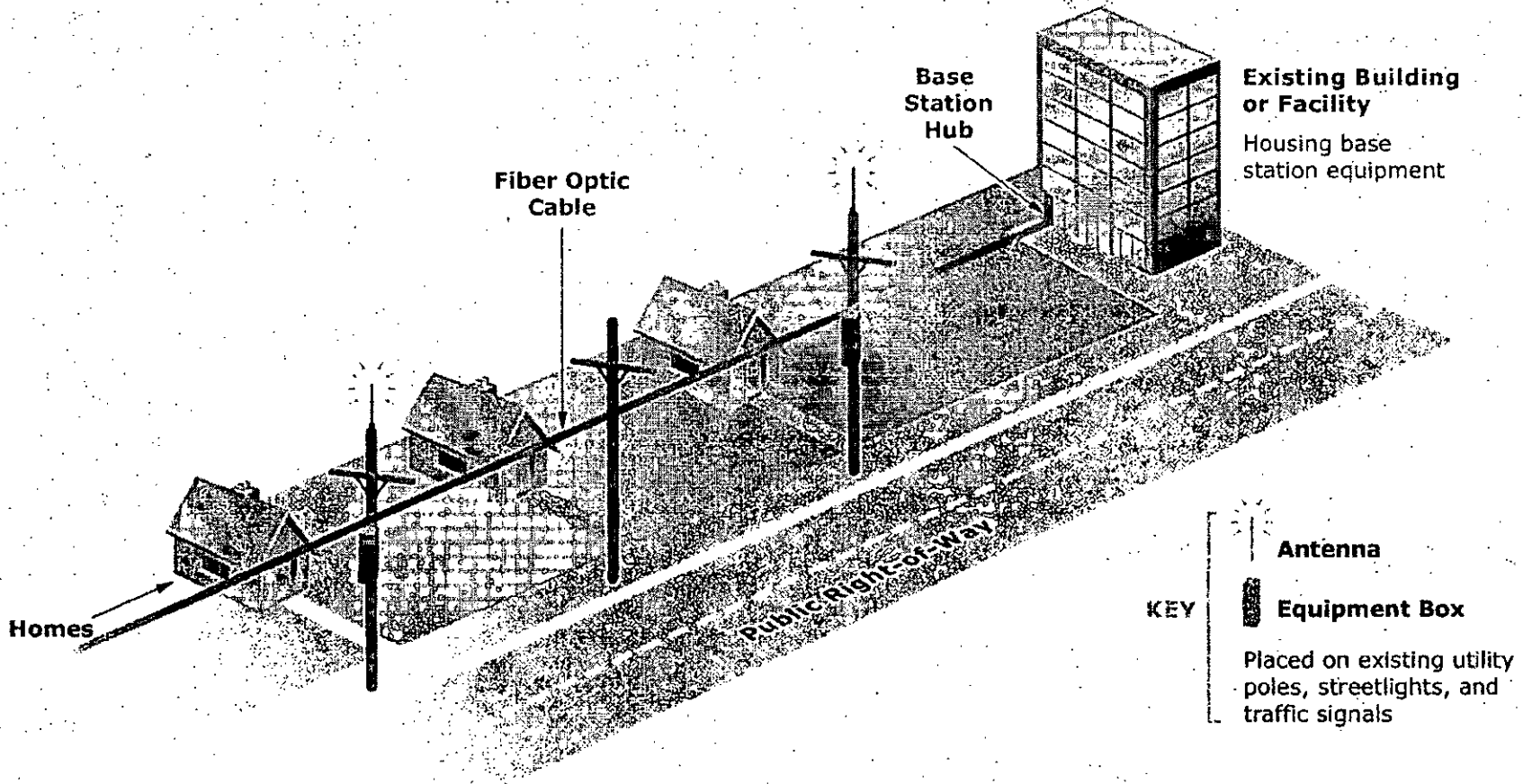


SYSTEM OVERVIEWS

 ASIAC Technology Inc. 2000 W. 10th Ave. #100 Aurora, CO 80012	PROJECT INFORMATION PROJECT NO. 2725/10 DATE 2/25/10	DRAWING NO. 4 OF 4
PREPARED BY HP COMMUNICATIONS INC. 12000 E. 16th Ave. Denver, CO 80202	CHECKED BY NATEG NETWORKS INC. 12000 E. 16th Ave. Denver, CO 80202	SHEET TITLE REPEATER EQUIPMENT AND MOUNTING CHASSIS CONFIGURATION



UTILITY POLE EQUIPMENT TYPICALS



Alternative Analysis

Project Address: **Public Right-of-way at approximately 9950 Skyline Boulevard**

From the Oakland City Municipal Code 17.128.120, NextG reviewed each of the criteria listed for alternative analysis.

New wireless facilities shall generally be designed in the following order of preference:

A. Building or structure mounted antennas completely concealed from view.

- Not Applicable. The NextG design proposes to install a new wood utility pole in the Public right-of-way and does not propose to attach to buildings. The wood pole can not be concealed from view.

B. Building or structure mounted antennas set back from roof edge, not visible from public right-of way.

- Not Applicable. The NextG design does not include roof tops and utilizes the public right-of-way almost exclusively.

C. Building or structure mounted antennas below roof line (façade mount, pole mount) visible from public right-of-way, painted to match existing structure.

- Not Applicable. The NextG design does not include buildings or structures in its deployment.

D. Building or structure mounted antennas above roof line visible from public right-of-way.

- Not Applicable. The NextG design does not include buildings or structures in its deployment.

E. Monopoles.

- We need to install a new wood utility pole. City of Oakland Planning defines our installation a Monopole, however, there are none in the PROW where we need coverage and the traditional "monopole" does not fit our business model which only allows for attachment to utility poles.

F. Towers.

- We need to install a new wood utility pole. Our proposed design is defined as a "monopole" by the City of Oakland Planning department. NextG's business model only allows for attachment to utility poles in the PROW. There are no Towers that fit our business model or are in the PROW.

ATTACHMENT C

Planning Commission staff report dated July 21, 2010 (Attachments not included – see corresponding Appeal # A10223)

Case File Number: A10129

July 21, 2010

Locations:	<p>Public Right-of-way at approximately 7294 Marlboro Terrace/4949 Grizzly Peak Boulevard</p> <p>Public Right-of-way at approximately 9950 Skyline Boulevard</p> <p>Public Right-of-way at approximately 10648 Skyline Boulevard</p> <p>Public Right-of-way at approximately 10000 Skyline Boulevard</p>
Proposal:	<p>Appcal of the Zoning Manager's interpretation/determination that the proposed poles, to be located within the public right-of-way, are Monopole Telecommunication Facilities and are subject to the Planning Code.</p>
Appellant:	NextG Networks
Owner:	City of Oakland
Planning Permits Required:	Major Conditional Use Permits (CUP) to erect Telecommunication Monopole Facilities within the R-30, Singe-family Residential Zone and the Open Space Zone. The site located at the corner of Marlboro Terrace and Grizzly Peak Boulevard, zoned R-30, will require Design Review, in addition to a major CUP.
General Plan:	Skyline Boulevard: Open Space Marlboro Tr / Grizzly Peak Blvd: Hillside Residential
Zoning:	Skyline Boulevard: OS Marlboro Tr / Grizzly Peak Blvd: R-30 / S-10 / S-11
Service Delivery District:	Skyline Boulevard: IV Marlboro Tr / Grizzly Peak Blvd: II
City Council District:	Skyline Boulevard: 4 Marlboro Tr / Grizzly Peak Blvd: 1
Action to be Taken:	Uphold Zoning Manager's Decision and deny the appeal.
Finality of Decision:	Final
For further information:	Contact case planner Leigh McCullen at 510-238-4977 or lmccullen@oaklandnet.com .

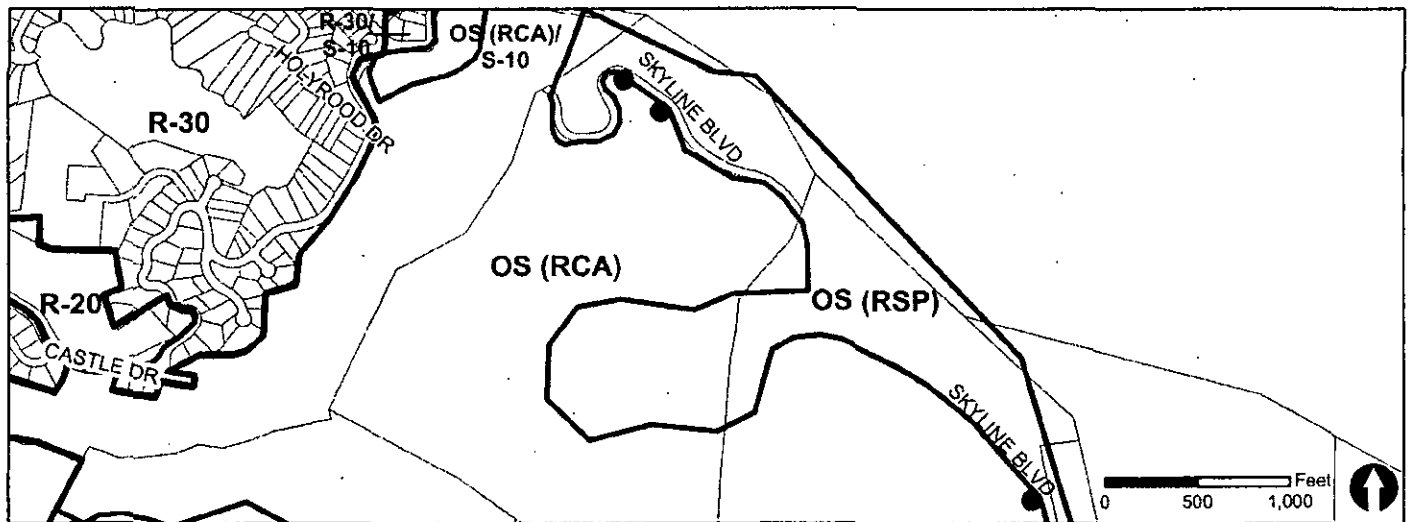
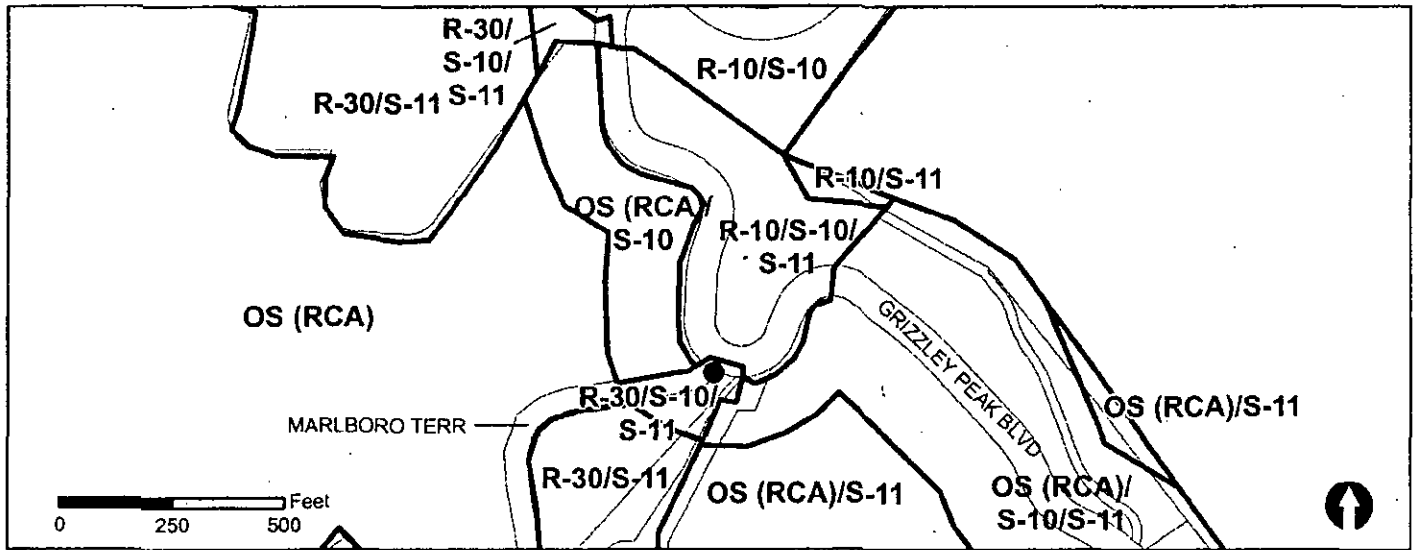
SUMMARY

The Zoning Manager has determined that the erection of these new and independent poles within the public right-of-way intended for Wireless Telecommunications purposes are considered Monopole Wireless Telecommunications Facilities, as defined, and regulated, by the Oakland Planning Code including the requirement for Conditional Use Permits. This determination has been appealed by NextG Networks. The appeal is the subject of this report.

BACKGROUND

On March 12, 2010, the City of Oakland Zoning Division received from the appellant four (4) incomplete basic applications for the above four (4) referenced sites. Application fees were not paid at that time. These applications would provide for the erection of four (4) 40(+)-foot wooden poles, with attached wireless telecommunications antenna and equipment, within the public right-of-way. On April 9, 2010 staff sent an incomplete letter for these applications. The incomplete letter states that the poles qualify as Wireless Telecommunication Monopoles and subject to the Oakland Planning Code (OPC).

CITY OF OAKLAND PLANNING COMMISSION



Case File: A10-129
Appellant: NextG Networks c/o Natasha Ernst
Address: Public Right-of-ways at approximately:
7294 Marlboro Tr/4949 Grizzley Peak Blvd;
9950, 10000 & 10648 Skyline Blvd
Zone: Skyline Blvd: OS; Marlboro Tr/
Grizzley Peak: R-30/S-10/S-11

NextG Networks, the appellant, alleges that its wireless telecommunications operations fall under the exclusive jurisdiction of the California Public Utilities Commission (CPUC) and is not subject to local land use controls because they would be located within the public right-of-way and are utilities. They have not provided evidence to support this claim. Staff does not dispute that NextG Networks is a "Telephone Corporation" defined by California Public Utilities Code (PUC) and has obtained, as required by the PUC, a Certificate of Public Necessity and Convenience (CPNC) from the CPUC. However, the appellant has failed to provide evidence to substantiate their claim that their CPNC overrides local land use controls.

All Telephone Corporations, as defined by the PUC, with very limited exceptions, are required to obtain a CPNC. Verizon, T-Mobile, AT&T Wireless, Clearwire and many other telecommunication providers all have a CPNC but still submit to local land use authority. As a matter of fact, the Planning Commission often rules on applications for Wireless Telecommunications Facilities, including new facilities located within the public rights-of-way, consistent with their authority granted under the OPC. As an example, on May 5, 2010 the Planning Commission approved a Major Conditional Use Permit and Design Review for an AT&T Wireless Telecommunications Facility located within the public right-of-way on Moraga Avenue. Two Major Conditional Use Permit/Design Review applications, one located in the public right-of-way on Moraga Avenue another in the public right-of-way of Shepherd Canyon Road, have been filed by T-Mobile and are pending a public hearing before the Planning Commission. Neither AT&T nor T-Mobile has challenged the applicability of the Planning Code in relation to these projects. The applicant has failed to demonstrate why they should be treated differently from other wireless telecommunications providers.

ZONING ANALYSIS

The OPC defines Wireless Telecommunications Facilities to include attachment of antennas to buildings and similar facilities, the construction of support structures, and the provision of equipment associated with transmitting and receiving of radio frequencies. Consistent with this definition, NextG provides radiofrequency transport services for wireless carriers and constructs transport networks consisting of a central switch-like hub and a system of fiber optic cables, remote nodes, and small antennae attached to poles and other structures. The OPC defines Wireless Telecommunications Monopoles as a monopolar structure erected on the ground, terminating in one or more connecting appurtenances (OPC Section 17.11.900.). A review of NextG's elevations and photo simulations (**Attachment A**) would clearly demonstrate that the proposed poles meet this definition. Given the characteristics and intended use of NextG's proposed facilities the Zoning Manager determined that they are Monopole Wireless Telecommunications Facilities.

OPC Section 17.07.040 states that the 'zoning regulations shall apply, to the extent permissible under other laws, to all property within the City of Oakland....regardless of whether such property is in private or public ownership'. The scope and applicability of the Planning Code clearly includes public right-of-ways. Subsection C of this section further states that 'Whenever any provision of the zoning regulations and any other provision of law, whether set forth in this code, in the Oakland Building Code or Oakland Housing Code, or in any other law, ordinance, or resolution of any kind, impose overlapping or contradictory regulations, or contain restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards shall control, except as otherwise expressly provided in the zoning regulations.'

The four proposed NextG sites located along Skyline Boulevard are near Chabot Observatory and in the Open Space Zone. Major Conditional Use Permits are required to erect Wireless Telecommunications Monopoles in the Open Space Zone (OPC Section 17.11.090). The site located on Marlboro Terrace is zoned R-30, Detached Unit Residential, S-10 Scenic Route Combining Zone and S-11 Site Development and Design Review Combining Zone. A major Conditional Use Permit, with Design Review, is required to

erect a Wireless Telecommunications Monopole in the R-30 Zone (OPC 17.16.070, 17.16.030 and 17.134.020(e)).

BASIS FOR THE APPEAL

On May 13, 2010 the Zoning Manager issued an administrative interpretation / determination which stated that the erection of these new and independent poles within the public right-of-way intended for Wireless Telecommunications purposes are considered Monopole Wireless Telecommunications Facilities, as defined, and regulated, by the Oakland Planning Code including the requirement for Conditional Use Permits. Pursuant to OPC Section 17.132.020, NextG Networks filed an appeal of the Zoning Manager's interpretation / determination (see **Attachment B**, Appeal request and supporting documentation).

The following discussion combines related appeal issues where appropriate for efficiency and clarity of the report. Each key point of the appeal is summarized in underlined italics with Staff's responses to each point immediately following in regular text.

1. The City erred by applying the Planning Code to the Public Rights-of-Way

Staff Response

OPC Section 17.07.040 states that the 'zoning regulations shall apply, to the extent permissible under other laws, to **all property** within the city of Oakland...regardless of whether such property is in private or **public ownership**' (emphasis added). It is clear from this Section that the scope and applicability of the Planning Code includes public right-of-ways, which are lands under public ownership. Subsection C of this section further states that 'Whenever any provision of the zoning regulations and any other provision of law, whether set forth in this code, in the Oakland Building Code or Oakland Housing Code, or in any other law, ordinance, or resolution of any kind, impose overlapping or contradictory regulations, or contain restrictions covering any of the same subject matter, that provision which is more restrictive or imposes higher standards shall control, except as otherwise expressly provided in the zoning regulations. The Planning Code is more restrictive regarding this matter, therefore it governs. Separate permits, such as excavation, building and encroachment permits may be required by other agencies.

NextG admits in their appeal that should they propose their telecommunications infrastructure on private property then the construction would fall squarely under the Planning Code. As evidenced in the preceding paragraph, the Planning Code applies to all property within the City of Oakland, including public rights-of-way. And as detailed above, other Wireless Telecommunication Facility providers have obtained local land use approvals in the public right of way pursuant to OPC 17.128. Therefore, NextG's proposed telecommunications infrastructure falls squarely under the Planning Code.

NextG generally alleges that construction in the public rights-of-way is governed exclusively by the Building Services Division of CEDA which issues encroachment and excavation permits for the placement of improvements in the public rights-of-way. The appellant fails to cite a specific Code or Ordinance to substantiate this claim. Many projects within the City of Oakland require the issuance of permits from multiple agencies, including Planning and Building. Indeed, NextG will be required to obtain all necessary encroachment, excavation and/or building permits required by the Building Services Division, if Major Conditional Use Permits are approved for the proposed facilities.

The appellant generally alleges that the OPC does not mention or regulate any type of utility infrastructure in the public right-of-way. The OPC does regulate utilities as Essential Service

Civic Activities, includes those in the public rights-of-way (as discussed above the OPC regulates all land within the City of Oakland). OPC Section 17.11.140 defines Essential Service Civic Activities to include the maintenance and operation of the following installations:

A. Electric, gas, and telephone distribution lines and poles, and water, storm drainage, and sewer lines, with incidental appurtenances thereto, but excluding electric transmission lines;

H. Telecommunication activities include the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Essential Service Activities are permitted by right in each of the zoning districts contained in the OPC. The OPC sets forth additional regulations for Telecommunications *Facilities*, defined in the OPC to include attachment of antennas to buildings and similar facilities, the construction of support structures, and the provision of equipment associated with transmitting and receiving of radio frequencies. Staff has determined that the appellant's facilities, including the proposed support structures or poles, antennas and equipment intended to transmit and receive radio frequencies, are considered Telecommunications *Facilities*. See the Zoning Analysis section of this report for the permits required by the OPC for the appellant's proposed Telecommunication Facilities.

2. The City inaccurately determined that a Utility Pole is a Monopole.

Staff Response

The OPC defines Wireless Telecommunications Facilities to include attachment of antennas to buildings and similar facilities, the construction of support structures, and the provision of equipment associated with transmitting and receiving of radio frequencies. Consistent with this definition, NextG provides radiofrequency transport services for wireless carriers and constructs transport networks consisting of a central switch-like hub and a system of fiber optic cables, remote nodes, and small antennae attached to poles and other structures. The OPC defines Wireless Telecommunications Monopoles as a monopolar structure erected on the ground, terminating in one or more connecting appurtenances (OPC Section 17.11.900). The poles proposed by NextG are monopolar (**Attachment A**) and are intended to transmit radio frequencies. Given the characteristics of NextG's proposed facilities, as described above, the Zoning Manager determined that they are Monopole Wireless Telecommunications Facilities.

The appellant argues that their facilities are differentiated from monopoles because monopoles are made out of steel with large concrete foundations and connected to equipment cabinets by coaxial cable where their poles are wooden, set into the ground and outfitted with fiber cable or electric power connections. The definition for Monopole contained in the OPC is sufficiently broad to cover any type of monopolar structure, whether it is a steel pole, a wood pole or some other material. Further, the OPC does not discuss the type of foundation or the type of power supply required to fall within the Monopole category. The appellant's wooden poles, intended for wireless telecommunications purposes, clearly meet the definition of a Monopole.

The appellant suggests that their poles *could* support traditional wireline and power attachments. Staff would point out that wireline and power attachments would be permitted by right as Essential Service Activities on the proposed poles and in any zoning district. However, the proposed poles are being erected for Wireless Telecommunications purposes, not for wireline or power attachments.

The appellant has indicated that they intend to register the poles with the Northern California Joint Pole Association (NCJPA). Registration with the NCJPA does not guarantee that another utility will co-locate on these poles. Co-location by a typical Oakland utility is unlikely at the Grizzly Peak/Marlboro Terrace site given that this is an underground utility district and traditional wireline and power companies have already placed their cables and equipment underground. Further, co-location is unlikely along the section of Skyline Boulevard where three poles are proposed because this area is surrounded by parks and open space areas that do not require these utilities, nor do any utility poles exist in the immediate area. Essentially, there are not any other utility poles in these areas because they are not required by other utility providers.

3. *Even if the Planning Code governs, the City erred in its application*

Staff Response

The appellant generally alleges that if the OPC applies, Minor Conditional Use Permits would be required for Monopoles in the Open Space Zone. OPC Section 17.11.090 clearly indicates that Monopole Telecommunications Facilities require a Major Conditional Use Permit in the Open Space Zone (**Attachment C**). Staff did not err in this regard.

4. *The City seems to be abusing its discretion by treating NextG in a Discriminatory Manner.*

Staff Response

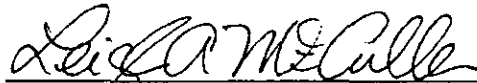
The City is merely treating NextG in the same fashion, and consistent with the authority granted under the OPC, as any other Wireless Telecommunications provider. For example, Verizon, T-Mobile, AT&T Wireless, Clearwire and many other telecommunications providers all have a CPNC but still submit to local land use authority. As a matter of fact, the Planning Commission often rules on applications for Wireless Telecommunications Facilities, includes new facilities located within the public rights-of-way, consistent with their authority granted under the OPC. For example, on May 5, 2010 the Planning Commission approved a Major Conditional Use Permit/Design Review application for an AT&T Wireless Telecommunications Facility located within the public right-of-way on Moraga Avenue. Two Major Conditional Use Permit/Design Review applications, one located in the public right-of-way on Moraga Avenue another in the public right-of-way of Shepherd Canyon Road, have been filed by T-Mobile and are pending a public hearing before the Planning Commission. Neither AT&T nor T-Mobile has challenged the applicability of the Planning Code in relation to these projects. The applicant has failed to demonstrate why they should be treated differently from other wireless telecommunications providers.

CONCLUSION

The appellant has not provided sufficient evidence to substantiate their allegations. The Zoning Manager, after thorough review of the projects, found that the proposed projects are Monopole Wireless Telecommunications Facilities subject to the Oakland Planning Code.

RECOMMENDATIONS: 1. Deny the Appeal and uphold the Zoning Administrator's determination.

Prepared by:



Leigh A. McCullen
Planner III

Approved by:



Scott Miller
Zoning Manager

Forwarded to the Planning Commission by:



Eric Angstadt
Deputy Director, Community and Economic Development Agency

ATTACHMENTS:

- A. Elevations and Photo Simulations of proposed poles
- B. Appeal request and supporting documentation
- C. OPC Section 17.11.090

ATTACHMENT D

Description of Physical Location

ATTACHMENT D: DESCRIPTION OF PHYSICAL LOCATION

The property is an unpaved portion of City public right-of-way situated alongside a two-way section of Skyline Boulevard without sidewalks. The site is adjacent to the street entrance to the Chabot Space and Science Center, indicated by signage. To the rear of the site is a grassy hillside with two retaining walls. Both sides of the street are lined by trees. South of the entrance to the center are a cabin (Metropolitan Horseman's Association office) along Skyline Boulevard and a City parking lot set back on the east side of the street. The closest structures similar in height are a lighting standard at the cabin serving a crosswalk located approximately 500-radial-feet to the south, and newer lighting standards along an access road at the north side of the Chabot Center and wooden telephone poles with power lines crossing the street further north along Skyline Boulevard located approximately 500-radial-feet to the north. There are no structures directly along the public right-of-way close to the height of the proposed poles in proximity to the proposed site.

2010 OCT 28 PM 2: 22


DEPUTY CITY ATTORNEY

OAKLAND CITY COUNCIL

RESOLUTION NO. _____ C.M.S.

A RESOLUTION DENYING APPEAL #A10224 AND UPHOLDING THE DECISION OF THE PLANNING COMMISSION TO DENY CASE #CM10140 FOR A 36'-4"-TALL MONOPOLE WIRELESS TELECOMMUNICATIONS FACILITY IN THE OPEN SPACE ZONE SECTION OF PUBLIC RIGHT-OF-WAY ON SKYLINE BLVD. NORTH OF THE CHABOT SPACE AND SCIENCE CENTER STREET ENTRANCE.

WHEREAS, on March 12, 2010, the applicant Ms. Sharon James/NextG Networks, submitted a proposal for four sites including a 36'-4"-tall wooden pole with one antenna attached for wireless telecommunications purposes in the open space zone section of public right-of-way on Skyline Boulevard north of the Chabot Space and Science Center street entrance; and

WHEREAS, on April 9, 2010, Planning and Zoning Department staff sent the applicant a letter indicating the application was incomplete and that the proposal constituted Monopole Wireless Telecommunications Facilities requiring four separate Major Conditional Use Permits; and

WHEREAS, on May 13, 2010, the Zoning Manager issued a formal administrative determination that interpreted the Planning Code to classify the proposed pole's facility type as Monopole Wireless Telecommunications Facility requiring a Major Conditional Use Permit; and

WHEREAS, on May 24, 2010 Ms. Natasha Ernst/NextG Networks filed an administrative appeal of the Zoning Manager's Determination; and

WHEREAS, on July 21, 2010, the Planning Commission upheld the Zoning Administrator's determination dated May 13, 2010 which classified the facility as a Monopole and determined that the Monopole was subject to the Telecommunications Regulations and required a Major Conditional Use Permit, and this decision is final and non-appealable; and

WHEREAS, on June 3, 2010, notwithstanding the fact that NextG's appeal on the Zoning Administrator's decision was pending, the applicant Ms. Sharon James/NextG Networks, re-submitted an individual application for a Major Conditional Use Permit with two sets of additional findings (Conditional Use Permit for Monopole; Design Review for Monopole)

to construct a 36'-4"-tall pole with one antenna in the open space zone section of public right-of-way on Skyline Boulevard north of the Chabot Space and Science Center street entrance as case # CM10140 (Project); and

WHEREAS, on July 26, 2010, staff advised the applicant that required legal findings could not be made to support the project and other options might be considered which the applicant declined to pursue; and

WHEREAS, on August 4, 2010 a duly noticed public hearing was held before the City Planning Commission for the Project; and

WHEREAS, on August 4, 2010, the Planning Commission independently reviewed, considered and determined that the Project is statutorily exempt from the environmental review requirements of the California Environmental Quality Act ("CEQA") pursuant to section 15270 of the State CEQA Guidelines because the project was disapproved; and

WHEREAS, on August 4, 2010, the Planning Commission denied the application for case # CM10140 and advised the applicant they are encouraged to submit a revised proposal as a new application; and

WHEREAS, on August 16, 2010 Ms. Natasha Ernst/NextG Networks timely filed an appeal of the Planning Commission's decision to deny the Project; and

WHEREAS, after giving due notice to the Appellants, the Applicant, all interested parties, and the public, the Appeal came before the City Council in a duly noticed public hearing on November 9, 2010; and

WHEREAS, the Appellants and all other interested parties were given the opportunity to participate in the public hearing by submittal of oral and written comments; and

WHEREAS, the public hearing on the Appeal was closed by the City Council on November 9, 2010; now, therefore, be it

RESOLVED: The City Council independently finds and determines that this Resolution complies with CEQA, as the Project is statutorily exempt from CEQA pursuant to CEQA Guideline Section 15270 "Projects Which Are Disapproved" of the State CEQA Guidelines. The Environmental Review Officer is directed to cause to be filed a Notice of Exemption with the appropriate agencies; and be it

FURTHER RESOLVED: That the City Council, having independently heard, considered, and weighed all the evidence in the record presented on behalf of all parties and being fully informed of the Application, the Planning Commission's decision, and the Appeal, finds that the Appellant has **not** shown, by reliance on evidence in the record, that the Planning Commission's decision was made in error, that there was an abuse of discretion by the Commission, or that the Commission's decision was not supported by substantial evidence in the record. This decision is based, in part, on the November 9, 2010, City Council Agenda Report and the August 4, 2010, Planning Commission Report, which are hereby incorporated by reference as if fully set forth

herein and on the reports and testimony provided at the hearing. Accordingly, the Appeal is denied, the Planning Commission's decision to deny a 36'-4"-tall Monopole Wireless Telecommunications Facility with one antenna in the open space zone section of public right-of-way on Skyline Boulevard north of the Chabot Space and Science Center street entrance, is upheld, subject to the findings for denial adopted by the Planning Commission, each of which is hereby separately and independently adopted by this Council in full, as may be amended here; and be it

FURTHER RESOLVED: That, in support of the City Council's decision to deny the Project, the City Council affirms and adopts as its findings and determinations (i) the November 9, 2010, City Council Agenda Report, attached to the report as Attachment "A" [including without limitation the discussion, findings and conclusions (each of which is hereby separately and independently adopted by this Council in full)], and (ii) the August 4, 2010 Denied City Planning Commission Staff Report [including without limitation the discussion, findings and conclusions (each of which is hereby separately and independently adopted by this Council in full)], attached to the report as Attachment "B," except where otherwise expressly stated in this Resolution; and be it

FURTHER RESOLVED: That the record before this Council relating to this Project application and appeal includes, without limitation, the following:

1. the Project application, including all accompanying maps and papers;
2. all plans submitted by the Applicant and their representatives;
3. all final staff reports, decision letters and other documentation and information produced by or on behalf of the City.
4. all oral and written evidence received by the City staff, Planning Commission and City Council before and during the public hearings on the application and appeal;
5. all matters of common knowledge and all official enactments and acts of the City, such as (a) the General Plan and the General Plan Conformity Guidelines; (b) Oakland Municipal Code, including, without limitation, the Oakland real estate regulations, Oakland Fire Code; (c) Oakland Planning Code; (d) other applicable City policies and regulations; and, (e) all applicable state and federal laws, rules and regulations; and be it

FURTHER RESOLVED: That the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the City Council's decision is based are respectively: (a) Community & Economic Development Agency, Planning & Zoning Division, 250 Frank H. Ogawa Plaza, Suite 3315, Oakland, CA.; and (b) Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1st floor, Oakland, CA; and be it

FURTHER RESOLVED: That the recitals contained in this resolution are true and correct and are an integral part of the City Council's decision.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 2010

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, QUAN, REID, AND PRESIDENT BRUNNER

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____
LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

LEGAL NOTICE:

ANY PARTY SEEKING TO CHALLENGE THIS FINAL DECISION IN COURT MUST DO SO WITHIN NINETY (90) DAYS OF THE DATE OF THE ANNOUNCEMENT OF THIS DECISION, PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1094.6, UNLESS A SHORTER PERIOD APPLIES.