RESOLUTION NO. 2011-56

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ALBANY
DENYING THE APPEAL FILED BY CROWN CASTLE ON BEHALF OF
VERIZON WIRELESS AND DENYING THE APPLICATION FOR A
CONDITIONAL USE PERMIT AND DESIGN REVIEW TO MODIFY A
NONCONFORMING WIRELESS FACILITY LOCATED AT 423 SAN
PABLO AVENUE AND MAKING WRITTEN FINDINGS IN SUPPORT
THEREOF

WHEREAS, on June 22, 2009 Crown Castle on behalf of Verizon Wireless
(the “applicant”) submitted an application for a conditional use permit to increase the
number of antenna enclosures from four to six enclosures with ancillary
improvements on an existing nonconforming wireless communication facility (the
nonconforming wireless facility”) located at 423 San Pablo Avenue (the “prior
application”). The existing wireless facility is nonconforming with respect to the
height limits of the Planning and Zoning Code which imposes a 48 foot maximum
height limit. The existing wireless facility consists of a 65 foot tall monopole with
the Verizon antennas located at a height of 59 feet on the pole;

WHEREAS, during the time that the prior application was pending before the
Planning and Zoning Commission, the City’s building inspector observed that new
antennas were being installed on the nonconforming wireless facility without any
City approval or permits and issued a stop work order;

WHEREAS, on October 14, 2010, the applicant submitted revised plans that
reduced the number of antenna enclosures from four to six. However, the number of
antennas within the four enclosures still increased from four to six antennas and the
new equipment proposed by the prior application deployed an entirely new wireless
network (called Long Term Evolution, or “LTE”) that provides high speed data
communications as part of a 4G network;

WHEREAS, on October 26, 2010, the Planning and Zoning Commission
reviewed the revised prior application and determined that the proposal consisted of
routine maintenance not requiring a conditional use permit. At the Commission
hearing, the applicant withdrew the prior application;

WHEREAS, on November 1, 2010, pursuant to Municipal Code Section
20.100.080.c.2.b, Councilmember Atkinson made a request that the City Council
review the Commission’s determination that the proposal consisted of routine
maintenance. All references in this Resolution to section numbers are to sections of
the Albany Municipal Code unless other specified;

WHEREAS, the City Council conducted its review of the Planning and
Zoning Commission determination on December 13, 2010. The Council voted
unanimously that the proposed project was not routine maintenance but instead an
upgrade to the nonconforming wireless facility. The Council directed that the matter
be returned to the Planning and Zoning Commission after a new application was filed
by the applicant and that the staff and Commission review include a full analysis of
feasible alternative sites that would conform to all Code requirements;

WHEREAS, on January 20, 2011, the applicant submitted a new application
(the “application”) which substantially reflected the revised plans submitted to the
City in October 2010. The application did not include an alternative sites analysis as
directed by the Council and staff determined that the application was not complete.
Correspondence ensured between the applicant and the City on the completeness of
the application and the applicant threatened to sue the City if the application was not
accepted as complete and submitted to the Planning and Zoning Commission for
review;

WHEREAS, on June 21, 2011, the City accepted the application as complete
in order to avoid litigation and due to the fact that it was clear that the applicant
would continue to refuse to submit the additional information demanded by the City
staff. In a letter from Community Development Director Jeff Bond, dated June 21,
2011, the applicant was informed that in accepting the application as complete the
City was not waiving its right to require more information from the applicant,
including the right of the Commission or Council to require the preparation of
alternative site studies before making a decision on the application. At this time, a
Tolling Agreement was entered into by the applicant and the City clarifying the time
period in which the City was required to take action on the application in accordance
with the Federal Communications Commission “Shot Clock” declaratory ruling;

WHEREAS, on July 26, 2011, the Planning and Zoning Commission held a
public hearing on the application. The Commission voted to deny the application on
the basis that the existing facility is nonconforming, that the modification to the
facility is not merely maintenance of an existing facility at an existing wireless site,
and that the proposed modification is not consistent with City ordinances. The
Commission also determined that a sufficient alternative solutions analysis was not
provided by the applicant;

WHEREAS, on September 19, 2011, the City Council held a de novo public
hearing on the appeal filed by the applicant from the Planning and Zoning
Commission hearing. After hearing from the applicant and members of the public,
the Council directed that the hearing be continued in order that an independent review
of the application can be conducted by a qualified technical expert hired by the City
and that the written documentation upon which the Verizon engineer’s opinions are
based be provided to the City. Section 20.20.100.F.4.b.1 and b.2 authorize the City
to require an independent review of a wireless facility application and to require an
alternative sites or solutions analysis. The applicant consented to the continuance of
the hearing and the Tolling Agreement between the applicant and the City was
extended to November 9, 2011;

WHEREAS, the City retained Jonathan Kramer, a well-known and qualified
telecommunications and radio frequency expert, to perform an independent review of
the application. Mr. Kramer requested additional information from the applicant in
order to better understand the scope of the proposed project; to determine whether an
exception is warranted pursuant to Section 20.20.100.F.5.a.3; and to evaluate whether
alternative solutions that conform to the City’s zoning requirements are feasible. The
applicant failed to provide most of the information requested by Mr. Kramer and
failed to provide the supporting data and documentation for the opinions offered by
Verizon’s engineer at the September 19, 2011 public hearing; and

WHEREAS, on November 7, 2011, the City Council held the continued
public hearing on the appeal and application. The Council received an updated staff
report and the report prepared by Mr. Kramer and heard additional testimony by the
applicant and members of the public.

NOW, THEREFORE, BE IT RESOLVED, by the City Council of the City
of Albany, as follows:

1. The City Council hereby denies the appeal filed by Crown Castle on behalf of
Verizon Wireless, and denies the application for a Conditional Use Permit and Design
Review for the modification of an existing nonconforming wireless facility located at
423 San Pablo Avenue (the “subject property”), based upon the findings set forth in
Sections 4, 5 and 6 of this Resolution.

2. The City Council hereby relies upon, incorporates and adopts the facts set
forth in this Resolution, including without limitation the recitals, and finds that those
facts and recitals are true and correct. The City Council has considered the staff
reports and responses by staff to questions, the written report by Jonathan L. Kramer,
dated November 2, 2011, and his oral testimony and responses to questions at the
public hearing, the presentation and written materials provided by the applicant and
all other testimony and information provided during the public hearing before the
City Council.

3. The City Council hereby finds that this project is exempt from CEQA
pursuant to CEQA Guidelines Section 15270(a), which exempts projects that are
denied by the public agency.

4. The City Council affirms its previous determination that the application does
not propose routine maintenance of the nonconforming wireless facility, but instead
proposes a significant modification and upgrade to the existing facility requiring the
approval of a conditional use permit and design review pursuant to Section
20.20.100.F. The application proposes an altogether new deployment of wireless
service from the existing facility, increases the number of antennas from four to six, changes the antenna type and model, degrades the visual appearance of the project site which is visible and dominating above the nearby structures and is plainly visible from the City’s north-south arterial roadway, and results in an intensified use of an existing nonconforming structure that exceeds the Planning and Zoning Code height limit by 17 feet.

5. The City Council makes the following findings pursuant to Section 20.20.100.F.5 related to the requested conditional use permit:

a. The proposed project at the wireless facility is not designed to protect the visual quality of the City. The existing facility exceeds the City’s height limit by 17 feet. Photographs of the subject property in the administrative record demonstrate that the existing facility far exceeds the height of the adjacent commercial and residential buildings in a visually dominating manner and is unsightly and out of character with the surrounding area. The proposed modification adds at least eight new coaxial and other types of cables to the facility that will add to the visual clutter of the existing pole. The project plans submitted by the applicant are internally inconsistent. The antenna enclosures will use bottom connectors and cables that are much more visible than rear mounted connectors and cables. Due to the proposed deployment of an entirely new radio service proposed in the application, it is anticipated that additional equipment not shown in the project plans will need to be added to the pole to provide the new services proposed by the application.

b. All applicable development standards required by the City Code have not been met by the application. The current development standards at Section 20.20.100.E.2.h and 4.b impose a 48 foot height limit on a wireless facility located on the subject property. The existing monopole is 65 feet in height with the Verizon antenna enclosures located on the pole at a height of 59 feet. The violation of the City’s height limit requires a denial of the application unless an exception is granted by the City Council pursuant to the requirements in Section 20.20.100.F.5.a.3. Further, the proposed project will extend the life of a nonconforming structure contrary to the purposes and requirements of Section 20.44.030.

c. Section 20.20.100.F.5.a.3 sets forth the finding that must be made to grant an exception to a development standard. The Council must find that “[s]trict compliance would not provide for adequate radio-frequency signal reception and that no other alternative solutions which would meet the development standards are feasible.” The applicant has the burden of proof to show that this finding can be made, and why it should be made. Not only has the applicant failed to demonstrate that this finding is met, but the report by Mr. Kramer and other evidence in the record demonstrates that a sufficient alternative solutions analysis has not been
completed that would enable the Council to make the required
determination that no other alternative solutions which would meet the
development standards (including the height limit) are feasible. The
findings and conclusions described in Mr. Kramer’s report, dated
November 2, 2011, as clarified by Mr. Kramer during the hearing, are
hereby adopted and incorporated into these findings of the City Council.
The Council further finds:

i. The applicant has refused and failed to provide the data and
other documentation supporting the opinions offered by
Verizon’s engineer Mr. Stefano Iachella as requested by the
City Council at its September 19, 2011 hearing on the
application. It is not possible to evaluate the accuracy of
the opinions expressed by Mr. Iachella without knowing
the data and documentation upon which his opinions are
based.

ii. The applicant failed to provide signal coverage maps based
on individualized coverage studies for each of the seven
alternative sites identified by the applicant. Instead, the
applicant simply used the coverage study it prepared for the
subject property and applied it to the alternative sites. This
approach fails to take into account the different topography,
elevation, and surrounding development and natural
features of each site that will affect signal coverage from a
particular site.

iii. The applicant failed to consider or evaluate the signal
coverage that would result from maintaining the existing
facility in an “as is” condition on the subject property and
installing a new wireless facility that conforms to all
development standards on an alternative site.

d. The modification of the existing nonconforming wireless facility is not
necessary for the provision of wireless communications services to Albany
residents and businesses or other persons traveling in or about the City.
The existing facility currently is providing wireless services to the area of
the City shown on the coverage map for the subject property provided by
the applicant. The denial of the application will not affect in any manner
this existing service and coverage. As described above, the applicant has
failed to show why it cannot provide the new services it proposes to
provide from one or more alternative sites in the City or adjacent
communities in a manner that complies with all development standards,
including but not limited to the height limitation.
6. The City Council makes the following findings pursuant to Section 20.100.050.E related to the requested Design Review:

   a. The proposed project does not conform to the applicable provisions of the Planning and Zoning Code as the proposed modification to an existing nonconforming wireless facility violates the height limitation imposed by Section 20.20.100.E.2.h and 4.b. The proposed project also violates the nonconforming structure requirements of Section 20.44.030 as the proposed project does not constitute maintenance for the reasons stated in Section 4 of this Resolution.

   b. Approval of the project is not consistent with the purpose and intent of Design Review and is not in the interest of the public health, safety and general welfare. The existing facility exceeds the City’s height limit by 17 feet. Photographs of the subject site presented at the hearing demonstrate that the existing facility far exceeds the height of the adjacent commercial and residential buildings in a visually dominating manner and is unsightly and out of character with the surrounding area. The application adds eight new coaxial cables to the facility that will add to the visual clutter of the existing pole. The antenna enclosures will use bottom connectors that require substantially more visible antenna cables as compared with rear mounted connectors. Due to the significant service upgrade proposed by the application, it is anticipated that additional equipment will need to be added to the pole to provide the new advanced services proposed by the application. Further, the proposed modification and upgrade to the existing nonconforming wireless facility will improve, upgrade and extend the life of a nonconforming structure contrary to the purposes and requirements of Section 20.44.030. The proposed modification and upgrade also is contrary to general planning and zoning principles under California law that encourage the replacement of nonconforming structures with new development that will conform to current Code requirements.

7. This Resolution shall take effect immediately upon its adoption.
I HEREBY CERTIFY that the foregoing Decision was duly adopted by the City Council of the City of Albany at a public meeting of said City Council held on the 7th day of November, 2011, by the following vote:

AYES: Council Member Atkinson, Lieber, Thomsen, Wile & Mayor Javandel

NOES:

ABSENT:

ABSTAIN:

[Signature]

FARID JAVANDEL
MAYOR

ATTEST: [Signature]

City Clerk

APPROVED AS TO FORM: [Signature]

Robert Zweben
City Attorney
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PASSED AND APPROVED BY THE COUNCIL OF THE CITY OF ALBANY,

this 7th day of November, 2011, by the following votes:

AYES: Council Members Atkinson, Lieber, Thomsen, Wile and Mayor Javandel

NOES:

ABSENT:

WITNESS MY HAND AND THE SEAL OF THE CITY OF ALBANY, this

8th Day of November, 2011.

/Eileen Harrington/

Eileen Harrington
DEPUTY CITY CLERK

The City of Albany is dedicated to maintaining its small town ambience, responding to the needs of a diverse community, and providing a safe, healthy and sustainable environment.