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CF 09-2645/CEQA

2 messages

Chris Spitz <ppfriends3@hotmail.com>

Fri, Apr 16, 2010 at 4:07 PM

To: Edward Jordan <Ted.Jordan@lacity.org>

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Pacific Palisades Residents Association

P.O. Box 617

Pacific Palisades, CA 90272

Re CF 09-2645/CEQA

Dear Mr. Jordan:

In regard to the applicability of CEQA to the AGF Ordinance and PROW cell site/antenna installations, PPRA calls your attention to the following:

AGF Ordinance

We have not reviewed all archives related to the AGF Ordinance; however, there is no indication in the ordinance itself nor in documents available to the public online (in Council File 99-1593) that an environmental review under CEQA was ever undertaken in connection with the statute's enactment. In contrast, the new Glendale wireless facilities ordinance as well as the proposed San Francisco PROW ordinance each affirms that an environmental review took place; such a review is or may be required whenever revision of legislation may lead to indirect impacts on the environment.

The lack of a CEQA review in connection with enactment of the AGF ordinance (if in fact one did not occur) in our opinion may subject the Ordinance/the City to legal challenge.

Utility pole cell site/antenna installations in the PROW

As you know, the City deems "utility poles" (as defined in the AGF Ordinance) to be exempt from regulation, yet specifically excludes both "antennas" and "monopoles" from the definition of utility pole:

"Utility Pole: *A utility pole is defined as any pole which is used to support power, telephone, or other*

suspended telecommunications wires, and **shall not include monopoles or antennas**" (emphasis added).

Despite this provision, if a new cell site/antenna installation is affixed to what is regarded as an exempt utility pole, that is the end of the City's inquiry and the antenna installation is also treated as exempt (unlike monopole antenna installations -- see discussion below).

PPRA believes that by failing to subject *new, initial antenna installations* (whether on existing or replacement utility poles or other structures in the PROW) to *any* permitting process or environmental reviews, the City may be violating:

- **its own statutes** -- which, by excluding antennas and monopoles from the definition of exempt utility poles, *arguably* subject antennas (as well as monopoles) to regulation either under the AGF Ordinance (applicable ostensibly to cabinets or similar "structures" in the PROW, but with no specific standards for either antennas or monopoles) *or* under the broader WTF Ordinance/CUP process (applicable to antennas and monopoles on private and other property -- as Jack Allen argues in his report on file in CF 09-2645); and/or
- **Government Code section 65850.6** -- which prohibits discretionary permits for "collocation" of additional cell site/antenna facilities *if the initial facility received a discretionary permit and had undergone an environmental review*. The section contemplates or appears to require aesthetic and environmental reviews under CEQA for *initial cell site/antenna installations/"base" facilities* (i.e., what some experts have referred to as employment of "the full slate of discretionary and land use powers over collocation base stations"; see information in PPRA's email messages of 2/09/10 and 2/06/10).

Consistent with Government Code section 65850.6, the new Glendale ordinance appears to regulate initial utility pole cell site/antenna installations in the PROW.

We reiterate the following points made in our Summary of 1/06/10 (attached):

- The Joint Pole Agreement (JPA) is strictly an administrative agreement; as such, it does not impede appropriate local regulation of new utility pole installations in the PROW (a conclusion apparently shared by the city of Glendale, a member of the JPA);
- It is the PUC's express goal to ensure that CEQA reviews take place in connection with all cell site construction, pursuant to General Order 159A;
- Neither technical PUC rules as to pole equipment, state laws governing PROWs (which allow local regulation of "time, place and manner" of use), nor federal Telecom Act provisions (as interpreted under recent case decisions), are impediments to appropriate local regulation/environmental review of initial cell site/antenna installations in the PROW.

The lack of a CEQA review (or any permitting requirements at all) for initial cell site/antenna installations on utility poles in the PROW in our opinion may subject the City to legal challenge.

Monopole cell site/antenna installations in the PROW

All monopole cell site installations supporting wireless antennas in the PROW should be subject to environmental review under CEQA on the same basis as utility pole cell site/antenna installations.

Moreover, the City (BOE) currently issues AGF permits for monopoles in the PROW under the AGF Ordinance application process; in doing so BOE officials must determine whether to grant a variance from the statute's sole height limitation of 5 1/2 feet for cabinet installations (most monopoles are between 25-60 feet high, or *5x-11x higher than allowed* under the AGF Ordinance). Because the decision on whether to grant such a variance is a *discretionary action*, an environmental review under CEQA is or may be required -- but to our knowledge is not undertaken in connection with decisions on variances for monopoles in the PROW.

The lack of a CEQA review for monopole cell site/antenna installations in the PROW in our opinion may subject the City to legal challenge.

In a related matter, for informational purposes only, we note a complaint recently filed by the City of Davis (in a proceeding before the PUC) urging a CEQA review by the PUC of a wireless facility project proposed by NewPath Networks (much of which involves installation of poles or other structures to support antennas in residential areas with no overhead utilities). <http://docs.cpuc.ca.gov/EFILE/C/115307.htm>

In light of the increasing number of attempted cell site/antenna installations in residential areas of Los Angeles (including in historic districts, scenic corridors and neighborhoods without overhead utilities) -- a trend confirmed by telecom providers, who claim (as does the FCC) that exploding wireless data/smartphone useage requires the rapid deployment of *more and more antennas in new locations* -- it is imperative that the City act sooner rather than later to bring its regulations in line with current law for the protection of residents, including appropriate provisions for environmental reviews under CEQA.

Again, we urge that you complete your report at the earliest opportunity and that this important matter be taken up by City Council without delay.

Sincerely,

Christina Spitz
Vice-President, PPRA

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 **Summary of Cell Tower Regulation,Proliferation.doc**
73K

Chris Spitz <ppfriends3@hotmail.com>
To: adam.lid@lacity.org

Fri, Apr 23, 2010 at 9:18 AM

Re: **CF 09-2645**

Dear Mr. Lid:

Please file the **message below** plus **attachment** in the above-referenced file. Thank you.

Sincerely,
Christina Spitz
PPRA

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CC: adam.lid@lacity.org; councilman.rosendahl@lacity.org; janice.hahn@lacity.org; councilmember.garcetti@lacity.org; paul.koretz@lacity.org; councilmember.huizar@lacity.org; councilmember.smith@lacity.org; councilmember.alarcon@lacity.org; councilmember.labonge@lacity.org; ctrutanich@lacity.org; cynthia.ruiz@lacity.org; paula.daniels@lacity.org; julie.gutman@lacity.org; andrea.alarcon@lacity.org; valerie.shaw@lacity.org; david.berger@lacity.org; jane.usher@lacity.org; norman.kulla@lacity.org; whitney.blumenfeld@lacity.org; jessyca.avalos@lacity.org; frank.hong@lacity.org; chris.koontz@lacity.org; jay.greenstein@lacity.org; kelli.bernard@lacity.org; renee.weitzer@lacity.org;

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Subject: CF 09-2645/CEQA

Date: Fri, 16 Apr 2010 15:07:18 -0700

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73K

Pacific Palisades Residents Association

P.O. Box 617

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1/06/10

Summary of Cell Tower Regulation/Proliferation

1. There is no local, independent regulation of utility pole cell site installations.

- PPRA is unaware of any local permitting process for utility pole cell site installations in public rights of way (PROWs) in Los Angeles; no officials have informed us of any such process when we have sought information as to how and why such installations are allowed to occur without notice; instead, we have repeatedly been told that the Joint Pole Agreement (JPA) allegedly controls or is the purported "authority" under which such installations are allowed.
- The above-ground facility (AGF) ordinance expressly *exempts utility poles* (i.e., poles which support overhead lines or wires) on the basis that their installation is supposedly regulated instead by the JPA or another authority (Muni. Code sec. 62.03.2.IX.C) -- a conclusion that is not shared by DWP or the Southern California Joint Pole Committee (SCJPC; see below).
- Excavation permits are not required for pole installations in sidewalk areas (sec. 62.02(a)); the City does not require prior notice if an excavation extends less than 100 square feet (sec. 62.04(b)); and although the work is nominally supposed to be performed in accordance with statutory requirements, there is no provision for a compliance review (secs. 62.02 and 62.04).
- It is unclear whether or to what extent discretionary "collocation" permits are required in cases of utility pole cell site installations (Gov. Code sec. 65850.6); to our knowledge the City does not engage in CEQA reviews or impose any location, height, design or aesthetic limitations on new or replacement pole installations in PROWs, as contemplated by sec. 65850.6.
- DWP confirmed to LANNC members in December 2009 that there is in fact *no independent regulation of utility pole cell site installations*.
- According to DWP officials, telecom companies who are JPA members are entitled to install utility poles *of any height anywhere they wish* in PROWs to support cellular equipment; DWP officials have seen unregulated pole installations as high as 110 ft.; no wind-resistance analyses or other safety tests (as far as we can tell) are conducted; and the location and total number is unknown because *DWP does not keep records of these installations* (some of which do not even involve DWP poles, lines or equipment).
- DWP officials "defer to the City Attorney" for an explanation of the basis for these conclusions and/or practices.

2. The JPA does not regulate utility pole cell site installations.

- DWP admits that the JPA is not regulatory in nature; at the recent LANCC presentation, DWP officials acknowledged that the JPA is *not* a regulatory document.

- The term "Joint Pole Authority" is a misleading misnomer often used by City officials.
- Staff of the SCJPC -- which administers and monitors joint use of poles -- explained to us that: the SCJPC is not a regulatory body; the JPA itself is administrative rather than regulatory in nature; the SCJPC does not become involved in monitoring usage until after a joint installation has already occurred; in most cases the SCJPC is not even notified of these installations for many years (if ever) and therefore does not have a complete or current list; and, to their knowledge, there is no regulation of the siting, construction, height or appearance of these installations other than "self-regulation" by the members' *own* in-house "joint pole" departments.
- The JPA has no provisions referring to or purporting to regulate the location, placement, construction, height or appearance of poles.
- The JPA provides that all members *shall* abide by local regulations (i.e., the JPA contemplates local regulation of poles); in any event, the City cannot contract away its police power and authority to regulate the use of property to protect the public health, safety and welfare (see discussion on pp. 5-6 of report by Jack Allen filed in CF No. 09-2645 on November 17, 2009 -- "Jack Allen report").
- DWP claims that it signed the JPA in 1918, yet there is no confirming evidence that it in fact did so (PPRA requested copies of all signature pages under a recent Public Records Act request of DWP, but no such pages were produced); DWP is not listed as a member under the most current 1998 version (only the City itself is a member). [Note: Although requested by PPRA, DWP also did not produce any other governing documents, such as a so-called "SCJPC Handbook" specifically referenced by DWP officials at the LANCC meeting, which may provide further insight into the JPA's role, *if any*, in regard to pole installation.]

3. There is effectively no local regulation of free-standing cell towers or "monopoles" in PROWS.

- "Monopoles and antennas" which do not support overhead lines or wires are referred to only once in the AGF ordinance (i.e., as not within the definition of "utility poles" -- Muni. Code sec. 62.03.2.I); the ordinance's specific requirements as to height, dimensions, landscaping, anti-graffiti measures and the like refer only to power cabinets, and there are no particular requirements applicable to free-standing towers or monopoles.
- The ordinance calls for prior design approval of *cabinets* by the Cultural Affairs Commission (CAC); however, there is no requirement for design approval of free-standing towers or monopoles (sec. 62.03.2.III.C.5). CAC staff also told us that they do not issue design approval for "poles" but are supposedly "required" (unclear by whom or what authority) to approve all cabinet design proposals; in fact, CAC routinely issues bulk design approval for thousands of cabinets at a time, without actual notice or community input.
- "Pole-mounted facilities" are specifically exempt from the ordinance (sec. 62.03.2.IX.C).
- AGF ordinance drafters have confirmed to PPRA that the ordinance *was not intended to apply to towers or poles of any type*; it was intended to address the then-occurring problem of unregulated cabinets in PROWs (an intent supported by the ordinance's language); new poles or towers supporting antennas were not being installed in parkways, were not on the drafters' "radar," and were accordingly not addressed in the ordinance (other than the exemption for "pole-mounted facilities" and utility poles).

- We also note the argument on pp. 6-7 of the Jack Allen report to the effect that "pole-mounted facilities" may be subject to all other applicable requirements of law, including Muni. Code sec. 12.21.A.20 *et seq.* (the "WTF ordinance," or zoning regulations applicable to cell towers on private or other public property).
- Notwithstanding the above, BOE now requires telecoms to file AGF applications for free-standing towers or monopoles in PROWs; at the same time, Jeff LaDou of BOE has informed PPRA that he has been told (unclear by whom or what authority) that he supposedly "must" grant permission for free-standing towers, despite the lack of any standards and the inapplicability of the AGF ordinance on its face to such towers.
- With no specific standards for towers or poles in the AGF ordinance, the exemption for "pole-mounted facilities," the lack of design approval by CAC, the apparent "rubber-stamped" approval of all AGF applications for monopoles, and the failure to apply any other applicable regulatory authority to such installations, there is effectively no regulation of such structures under current City practices and procedures involving PROWs.

4. The City has a constitutionally based police power to control the location and manner of construction of public utility facilities in PROWs.

- It has long been recognized that although utility franchises in PROWs are matters of state concern, the city retains a constitutionally based power to do "such things in regard to the streets and the use thereof as were justified in the legitimate exercise of the police power." *Western Union v. Hopkins*, 160 Cal. 106, 118 (1911). Specifically, "the city still controls the particular location and manner in which public utility facilities are constructed in the streets." *Sprint v. Palos Verdes*, 583 F.3d 716, fn. 3 (9th Cir. 2009).
- In *Pac. Tel. & Tel. v. S.F.*, 51 Cal. 2d 766 (1959), San Francisco's public works code controlled the construction of public facilities in the streets and required *installation and excavation permits* showing location and manner of construction; the telephone company in that case "concede[d] the existence of the power in the city to exact these requirements." *Id.* at 773-774.
- As noted above, Los Angeles is not regulating utility pole cell site installations at the most basic level (i.e., issuance of installation and excavation permits) -- something that even utilities franchise operators concede is within the City's police power. *In PPRA's opinion, it is outrageous that in this respect the nation's second largest city is completely failing to exercise its power and duty protect the public health, safety and welfare.*

5. The PUC recognizes that it is the City's function to regulate the installation, location and design of poles.

- As explained on p. 5 of the Jack Allen report, under General Order 159A the PUC defers to local governments as to regulation of cell sites and issuance of land use approvals (acknowledging that "local citizens and local government are often in a better position than the Commission to measure local impact and to identify alternative sites"). [Note: GO 159A also states that the PUC's goals in connection with cell site construction are to ensure that a CEQA review will take place, that affected citizens and organizations are given notice and an opportunity for input in the process, and that public health, safety, welfare and zoning concerns are addressed -- none of which occur in Los Angeles in the case of utility pole cell site installations).

- PUC Rule 94 -- the only other PUC regulation specifically concerning cellular facilities -- is entirely concerned with technical requirements for placement of equipment on poles and contains no provisions for installation or regulation of poles themselves.
- PUC staff advised us recently that if it is confirmed (as it now has been) that any cell site installations are in fact not being regulated by the City or DWP and the PUC's goals are not being addressed or achieved, the PUC would be authorized to accept a complaint about the lack of regulation and to take such actions as it deems appropriate to ensure adequate regulation as contemplated by GO 159A.

6. In accordance with recent case law, the City can and should regulate the installation of all cell towers and poles in PROWs as well as on private property, with protections for residential areas and provisions for denial based on adverse aesthetic impacts.

- Under *Sprint v. San Diego*, 543 F.3d 571 (9th Cir. 2008), it is now clear that cities do have the ability under the Telecom Act to regulate more extensively for location and appearance and to protect residential areas to a greater degree than had previously been understood or believed, subject to the Act's specific restrictions on local regulation.
- More recently, in *Sprint v. Palos Verdes*, *supra*, the 9th Circuit held that cities have discretionary authority to bar cell towers from from state PROWs on aesthetic grounds (subject to Telecom Act restrictions) -- or, as the Court observed in fn. 3, "the City possesses constitutionally based police powers over aesthetics."
- According to commentary, this holding is a significant departure from previous case law and "represents a major blow to the wireless industry" (California Wireless Association newsletter, Dec. 11, 2009, pp. 3-4).
- As explained in PPRA's previous submission in this matter, neither the WTF ordinance nor the AGF ordinance has any particular protections for residential neighborhoods and there are no provisions specifically allowing the denial of cell towers (whether in PROWs or on private property) based on adverse aesthetic impacts -- protections and provisions which are now allowed under current decisions (subject to Telecom Act restrictions). Reform of the City's regulations should be undertaken to include these now-permitted protections and provisions.

7. Cell tower proliferation is rapidly growing -- as are serious concerns about inadequate or nonexistent regulation.

- In addition to those experienced in the Palisades, during the past year numerous cell towers and antennas were erected or proposed in PROWs and on private property near homes and schools throughout Los Angeles -- from San Pedro to Westwood to Tarzana, from Venice to Hollywood to Atwater Village -- many without notice or regulation, some seemingly overnight in parkways where there had been no poles before, and several in areas where residents claim that coverage is already good or where *other, less obtrusive alternatives* are available for antenna placement.
- Residents, community leaders and public officials are seriously concerned -- including the LAUSD Board, which unanimously passed a resolution in late 2009 (prompted by the erection of an "un-noticed" cell tower near a school and homes in San Pedro), condemning the siting of towers without notice near schools; these installations are continuing unabated in 2010 (outraged residents of West Hills saw yet another unregulated utility pole cell site installation attempt in late December 2009/early January 2010).

- Over 16 neighborhood councils, community councils and other associations have passed motions/resolutions or submitted letters to the City as of December 2009, expressing concern about cell tower proliferation and/or urging reform of the City's regulatory scheme (with most, including PPRA, calling for a comprehensive new ordinance and imposition of a moratorium).
- The City of Glendale responded to residents' concerns by imposing a moratorium on cell tower installations and drafting a new comprehensive ordinance -- with a "tiered" approach to tower siting, "preferred" and "non-preferred zones," and other protections for residential neighborhoods -- which is still in the public comment stage; the City of Burbank has indicated its interest in following suit.
- In November 2009, FCC commissioners publicly claimed a "pressing" need to "boost" cell tower installations, "cut local red tape," and "speed deployment" of "ubiquitous" antennas -- all to encourage many more antennas and towers to be built as rapidly as possible for enhanced broadband coverage.