

CITY OF ALBANY
CITY COUNCIL
Council Chambers
Wednesday, October 8, 2014
7:15 p.m.

MINUTES

CALL TO ORDER

Mayor Sharon Konopa called the meeting to order at 7:15 p.m.

PLEDGE OF ALLEGIANCE TO THE FLAG

Konopa led the pledge of allegiance to the flag.

ROLL CALL

Councilors present: Councilors Rich Kellum, Bill Coburn, Bessie Johnson, Ray Kopczynski, and Dick Olsen.

Councilors absent: Councilor Floyd Collins was excused.

SCHEDULED BUSINESS

Public Hearing

CU-01-14, Conditional Use Permit for a new 120-foot tall telecommunications facility (appeal)

Konopa said, this is a continuation of a quasi-judicial *de novo* public hearing regarding an appeal of the Planning Commission's decision to deny the Conditional Use (CU) application. The location of the property is immediately south of 1122 53rd Avenue SW. The applicant is Verizon Wireless LLC.

Open: Konopa opened the public hearing at 7:15 p.m.

Konopa asked if any Councilors wished to declare a conflict of interest. No one did.

Konopa asked if any Councilors wished to report any ex parte contact. Councilor Bill Coburn said he got an email from a constituent. They are in favor of the project; their cell reception is poor and they think this might help. Councilor Ray Kopczynski said he got the same email.

Konopa asked if any Councilors wished to report a site visit. No one did.

Konopa asked if any Councilors wished to abstain from participating in the proceedings. No one did.

Konopa asked if anyone wishes to challenge the City Council's right to determine this matter or the participation of any Councilor in this hearing and decision. No one did.

Konopa said for those wishing to testify there is a sign-up sheet at the table.

Konopa said, for those wishing to testify, please be aware that you must raise an issue with enough detail to afford the Council and parties an opportunity to respond to the issue if you later want to raise that issue on appeal to the Land Use Board of Appeals (LUBA). Testimony and evidence must be directed towards the approval standards staff will describe or other criteria in the comprehensive plan or development code which you believe to apply to the decision. If additional documents or evidence are provided by any party, the City Council may allow a continuance or leave the record open to allow the parties a reasonable opportunity to respond. Any continuance or extension of the record requested by the applicant shall result in a corresponding extension to the 120-day limit. Failure of the applicant to raise constitutional or other issues relating to the proposed conditions of approval with enough detail to allow the local government or its designee to respond to the issue precludes an action for damages in Circuit Court.

Konopa called for the staff report.

Staff report

Planner II Melissa Anderson said this is a continuation of the public hearing from August 27, 2014. Because it is a continuation the public record is still open. Verbal or written testimony may be submitted this evening.

Anderson said that since the last public hearing the applicant submitted additional information to address some of the issues that were raised at the August 27, 2014, meeting. One of the changes they proposed was to set back the proposed cell tower further away from the existing bowling alley building. It is proposed to be set back 120 feet from the eastern property line.

Anderson said there is a letter submitted by Jason Cadwell of Cadwell Realty Group in Albany. Cadwell's testimony is on the dais for the Council's review (see agenda file.)

Anderson said the applicable review criteria for this decision is the CU permit criteria as well as design standards for cell towers, which was included in the Council packet. The criteria requires discretion so it is up to the City Council to decide if the review criteria have been met or not. Tonight, Council is requested to make a tentative decision and then direct staff to return at the next meeting on October 27, 2014, with final findings.

Applicant Testimony

Konopa said, if anyone wishes to enter an exhibit into the record as part of your testimony, please briefly describe the exhibit and present it to the City Clerk.

Applicant

Mike Connors, representing Verizon Wireless, resides at 520 Yamhill Street, Suite 235, Portland. Connors said he asked for a continuance at the last hearing so they would have more time to address additional issues that came up at the hearing. The two primary issues that came up are seeing if they can accommodate the neighboring property owner Roger Nyquist; and their evaluation of alternative sites, such as the industrial sites in the area. The information is in the agenda packet.

Connors said the first issue was to try to accommodate the adjacent property owner. This was a challenge because of dealing with engineering requirements, City code, flood plains, wetlands, and environmental overlays. They were able to relocate the tower to the west, 120 feet from the property line of the bowling alley. Since the bowling alley is 8-10 feet off the property line the tower is actually set back 130 feet. It meets all the other criteria. They provided the plan to Nyquist prior to the hearing. Connors said Nyquist got back to him this morning and said it did address his safety concerns, but he is not withdrawing his letter since it contained other policy issues. He said he did appreciate their willingness to accommodate that issue. Connors noted that they are asking for a condition to allow some minor modifications in the specific location of the site because it is close to some of the flood plain areas. They would comply with flood plain criteria. To the extent that they make minor modifications, they will be no closer than 120 feet from that property line.

Connors said the second issue was to provide clarification and additional information on alternative sites, particularly their evaluations of the industrial sites. Connor said he has a letter from Jim Jagers, the site acquisition manager, and the Verizon Radio Frequency (RF) engineer, who reconsidered the sites to see if they work. His report shows the background in relation to being in the search ring. He described how the search ring works. There are limitations so the acquisition manager asked if they could look at properties outside the search ring but as close as possible to the ring. Based on looking at viable sites that would accommodate the tower and willing property owners, he identified light industrial and heavy industrial sites, as marked on the map. But the RF engineer said the industrial sites are too far north of the search ring to meet capacity needs and would create potential conflict with other sites. That was the basis for the determination that this is the only viable site for their needs. So Connors asked the RF engineer to reevaluate, and they still said no. Connors hopes this helps to fill in the gaps and answer the questions raised at the prior hearing.

Connors said they made a substantial effort to evaluate the industrial sites. No one has provided evidence that there was another site that could work, and Verizon has supplied substantial evidence that they have satisfied the requirements to look at alternative sites.

Connors said after the hearing he got an email from the President of the Mennonite Village retirement community who suggested he look at their site. They had an engineer look at it but it is two miles away from the subject site, so it is too far. They also did an updated alternative site analysis.

Connors addressed a few other issues from the letter from Konrad Hyle, from Black Rock, regarding potential structural issues and geotechnical issues. Verizon provided some of the information that was already part of the building permit application material to show that they exceed all the requirements for those particular criteria. It is built to the standards and is in excess of the standard so there is not going to be any safety related issues. They also provided new photo simulations to illustrate the proposed new location. Connors said if the Council is concerned about visual impacts they should look at pages 23-27 in the agenda packet. In the context of some of the utility poles and wires that are already out there, it will have less of an impact than someone might normally think. There are already visual obstructions there so this won't be as significant an impact as if none of the utility poles were there.

Connors said in reviewing the criteria, this facility is allowed in the zone subject to CU permit approval and there is no height limitation listed in the code. The mitigation measure they are putting in place include a monopole design so there is less of a visual impact; they have limited it to the minimum height necessary to meet their objectives; and they have moved the site to try to accommodate the adjacent owner's concerns. He feels they have done what they can. The staff report from prior meeting indicates there is no more mitigation to be made. He thinks the Planning Commission got off track in evaluating the subjective criteria and suggesting that the height should be limited to the other buildings in the area. Connors said, that is not how we interpret the Code

and we don't think you should either because it is not just this particular site or zone; a number of your zones have discretionary criteria and the same height issue would come up.

Councilor Rich Kellum said that Connors did not address that the tower doesn't fit the zoning or the character of the area; that is one of the things the Planning Commission spoke to. Connors said, we believe it does fit the zoning. The Planning Commission had determined that just by its very nature, its height, that it was inconsistent with the zone. Connors said Verizon's position is that is not a correct interpretation of the Code. He said, you start first with, is the use allowed? Then you ask the second question, is the height somehow inconsistent with the zoning standards? There is no height limitation. He said, if you look at it in that context, it is Verizon's position that it is consistent with the zone. Additionally, they have tried to mitigate the other concerns, to the point that City staff said there is no more they can do. He thinks that the Planning Commission's interpretation ignored the fact that it is an allowed use and that it isn't subject to a height restriction.

Kellum said from the Planning Commission's perspective, it is subjective; what fits, and what doesn't fit. It is a judgment call. He said, you could mitigate it more by making it look like a tree, like the one in Salem. It doesn't seem to fit the other items in the area. He said, it is outside your circle/ring, and you put a lot of credence in the circle. Kellum said that tells him that the circle/ring is not that important. Kellum said, if people don't want to lease to you, it could be that it is too tall or that it is not enough money. Connors said in the conversations he was having with the property owner, it didn't rise to the level of talking about money. He explained the process of how they have the conversation about potential leases.

Kopczynski said he was in favor before, and with the additional mitigation it reinforces his support. He thinks they should allow it in that location.

Konopa said what has not been addressed is using a tree style instead of the monopole. Many communities have cell towers that look like trees. Connors said there are some facilities designed that way, but those are ones that when looking at them in close proximity, you can tell it is not a tree. It is very wide and bulky in comparison to the monopole Verizon is proposing. They are typically only appropriate in a landscape where there are other surrounding trees that they can blend with and are used to mitigate visual impacts from afar, such as a forested area. Here, it is not appropriate because there are no other surrounding trees, so it will be a far bulkier structure than the monopole. It will just look like a metal tree. It wasn't considered for that reason. The Code talks about a preference for a monopole so that is what they pursued. Konopa disagrees; she thinks they do blend in well. For example, the one in Salem doesn't have other trees next to it and she still thinks it looks nice. Also, the proposed site is located around trees.

Konopa referred to the sign-up sheet (see agenda file).

Support

Jana Pierce, 2117 Bobcat Avenue, said they have had Verizon for a long time and had great coverage and service until they moved to this address, which is in the far corner of the subdivision. Now they do not have great service. She needs to count on her cell phone to work for her family's sake; also her security system is hooked up to it. They often have problems being disconnected or with dropped calls. It is becoming a safety issue. She has called Verizon and they said she is in a dead zone and that they are working on it. She said she gets that no one wants it in their backyard, but folks really don't notice cell towers in communities because they do blend in, unless they are looking for them. She lives back there, and she wants reliability that her phone will work and her security system will work. With the mitigations they have made and the setback, it will blend in. She said, there is a 300 foot tall radio tower half a mile down the road. She asked the Council to not consider what it looks like but consider the service it would be providing. She said the Federal Communications Commission (FCC) and Telecommunications Act say she has the right to the access, but she is not getting it now. It is a safety issue.

Kellum asked, is there a way to have a regular landline? Peirce said yes but it would cost more. Kellum said, but you do have other choices. Pierce said that the FCC and Telecommunications Act say she cannot be prohibited from access to cell service and by not having a cell tower, she doesn't have access to service.

Konopa asked, does anyone else wish to speak in favor of the application? No one did.

Opposed

Meredith Hanson, 1550 Beaver Court SW, said she is a resident of the Brookfield community at Oak Creek. She is within 1,000 feet of the proposed tower. She moved there in April after having searched a long time for a community. If that tower were there, they would not have bought the home. It is not just a home, but a community. She explained how the trail combines and connects several communities. Her major concern as a resident is that home values will be impacted. Her home is her largest asset. Jason Caldwell turned in a letter with his concern as a real estate agent selling residential and commercial properties. Hanson is involved with Caldwell in fundraisers around Albany and she said when he found out about the tower he was shocked because of how much residential is around that site. She has a young daughter and planned to raise her here, and to spend her high school years here. The lack of research and studies about longevity of exposure, such as 20 years, is a concern. She asked, how does it affect us and our children? They need more studies, and nothing shows her that

she should not be concerned. It just raised more questions. More important than what it looks like, is how it will affect her family and neighbors in terms of property values and health.

Councilor Bessie Johnson asked Hanson if she has good service. Hanson said yes.

Bill Ryals, 935 Jones Avenue NW, said there are some essential issues. The first is zoning. As to the Village Center (VC), he is impressed with how nice the neighborhoods are and how much of a neighborhood there is. North Albany has a VC and it is an amenity and an important part of why he lives there. The zoning has been created for a VC, to include localized shopping, restaurants, and a place for people to gather. There will eventually be more development in South Albany and that area will become increasingly important as a commercial hub. He thinks the City planners had great foresight regarding the VC concept. As a planner by profession, he knows that that area is not overly large for a VC. People don't gather at cell towers. The one in Salem is quite nice, and is placed along a similar location as to Albany, along the high school. It is a fir tree and he thinks it looks nice.

Ryals said the other aspect of the Code for VC is that anything built must reflect the local character of the VC. The Code says that any development in the VC has to go out of its way to make itself part of the character of the VC. He said a monopole does not do that. Across the board he gives cell towers a "D-" in terms of maintenance around the poles. The bottom of the towers looks like garbage dumps. Most are in industrial areas. He said, if you grant this, given his reading of the Code, you have to have reasonable rules and they must be applied fairly. He asked, if you decide to grant this exemption, how can you deny AT&T when they want to put a tower in another VC in other areas of town? That is where fairness in federal regulations weighs in. In his reading about other municipalities that get into fights about this subject, as long as they are consistent with the application of the Code, cities are okay. So, if you allow this, then you will be on the hook for the next applications you get.

Kopczynski asked Ryals if it concerns him that the first thing a driver sees coming over the bridge into North Albany is a monopole. Ryals said that pole is a long ways from Rays Market, is in a large area, and is not very tall. He doesn't like it but at least it is not in the middle of the VC.

Councilor Dick Olsen asked Ryals if he knows the cost to make a tower look like a tree. Ryals said no, but for Verizon, any additional costs would be mitigated since they really want this location. This site must make sense for them economically. They have put in infrastructure and Ryals doubts that requiring them to make this pole aesthetically pleasing would kill the project. It would cost more, but considering the cost of the project it would not be much.

Olsen said that he read that one of the most dangerous jobs is folks who climb those towers and he wonders if making them look like a tree makes it more hazardous. Ryals said that nationwide there is an issue with kids climbing them and getting hurt. He described the poles. It is less of a concern in an industrial area but it is a concern if it is in a VC; it is an attractive nuisance.

Ryals thinks the Council should not find in favor of the request. It is not in keeping with the zone and it sets the City up for other problems later.

Johnson asked if there are other towers in North Albany. Ryals is not aware of others in North Albany. But if there are, they are not located by places where people gather.

Kellum asked how many billions in business Verizon does. He said, maybe we shouldn't worry so much about how much it will cost Verizon to make it look right.

Ryals said the Councilor's job is to stand up for the citizens of this town and the desirability of the community. Kellum said that has two pieces; ease of operation and how it looks.

Konopa asked, does anyone wish to speak in opposition of the application? No one did.

Konopa asked, does anyone wish to speak who is neither in favor nor in opposition to the application? No one did.

Applicant rebuttal

To Hanson's comments, Connors said he appreciates that the towers are not popular, but he has confidence that the City Council understands it is an important piece of the infrastructure. There is a lack of coverage in that area. As to property values, Connors said, if you look at the Code there is nothing that asks us to take property values into account, which is why we have not submitted anything. In his experience, when that question is raised, numerous studies show that it does not have significant impact. To Caldwell's written testimony about not knowing the exact number of future value loss and his assertion that there is a high probability it will slow down the amount of buyers, Connors said there is no real evidence behind that. If his testimony had been submitted earlier, Connors could have submitted studies that showed it does not have a negative impact.

Connors said the other issue brought up tonight is health, which comes up quite frequently. The health related impacts are a federalized standard adopted by the FCC after extensive studies. Federal laws says that state and

local governments cannot take into account health related issues; the reason for that is because it is a very complex and sophisticated issue so they don't want it to be determined on an ad-hoc basis. He said, federal law prohibits you to consider that.

To Ryals' comments about the VC standards, Connors said the criteria for compatibility are not specific just to the VC; it applies to any facilities that are proposed in any of the mixed use zones. There is a similar standard in the site plan review process, so it is not just a matter of not being appropriate in specific zones; it is a general use standard. This project should be looked at in terms of, what are the specific standards for this zone? Is the use allowed and is there a height limitation?

Connors said he understands the point of putting towers along the highway, and he agrees; but that infrastructure has already been built out. So when the wireless industry starting building their networks they built in those areas first. But as we have progressed in our use and reliance on these devices, not just the number of folks using devices but also what we are using them for, the need is not just for coverage but also for capacity. So pockets are starting to form and the needs are not always in the area we wish we could put towers, rather the towers need to go where they can provide the service to the people in that proximity. That is why we are here today; there is a need, and we evaluated that need. Based on all the factors, this is the only viable site to meet that need.

Connors said Ryals made a point about towers not being maintained, but Verizon does maintain theirs. He said that being a big company helps because they do have the resources and they want to protect their reputation by making sure their facilities are maintained.

Connors said that this is not the area where they would typically use a tree. Unlike the monopole where antennas are at the top of the tower, the trees have a crown and the antennas come off of that, which actually increases the height. He encouraged them to look at the photos. He thinks the monopole would blend in better with the utility poles than a tree would. He doesn't think tree would address the issues like a monopole would, which is lower in height, slender, and is a more effective mitigation.

City Attorney Jim Delapoer said staff has recommended the City Council make a tentative decision and staff will come back to a later meeting with findings. If the Council can't make a decision with four votes, Delapoer asked Connors if they would agree to give the City a 30 day extension so they can have a full Council. Connors said yes.

Closed: Konopa closed the public hearing at 8:15 p.m.

Johnson said they have heard different views about what can be in the zoning. What do they need to do to fit into the Code? Anderson said the language is discretionary and in that sense, the decision is not clear cut and is subjective. The primary criteria at issue are whether the use is consistent with the intended character of the base zone and the operating characteristics of the neighborhood; and that it is compatible with existing and anticipated uses in terms of size and scale, etc. Also, the tower should be located in an area that is unobtrusive and not substantially detracting from aesthetics or neighborhood character. The Code allows a cell tower of more than 50 feet tall to be considered through a CU permit review process. In that sense, the Council could find either way. Planning Manager Bob Richardson added that the standard is that if it is greater than 50 feet then the telecommunications facility requires the discretionary review.

Johnson said that on page 25, she can't tell where the pole is.

City Manager Wes Hare said if this were a 50 foot cell tower, this would not be before the Council because it is allowed outright. The Code does not prohibit taller cell towers; it just says they need review from the Planning Commission and the City Council. So the issue of whether this meets the criteria is highly subjective. He has lived in that area for nine years, uses the trail, and has had cell reception issues. He said he never even noticed there were 80 foot tall towers on his street until this tower was proposed; only now does he notice them. That can be interpreted either as a pro or con. He thinks that if he hadn't noticed before, then they can't be that bad. He also hadn't noticed the 270 foot tower down the street. He said, when you try to figure out how this impacts the community's character, it just depends on who you talk to.

Johnson said the demand for service is requiring this to be placed; for her, that is the main reason for this.

Konopa said, if more are coming in the future, maybe we need to look at our code.

MOTION: Kopczynski moved to approve the conditional use permit application CU-01-14, subject to adoption of the final Findings and Conclusions. This motion is based on those findings and conclusions in the August 27, 2014, Staff Report that demonstrate that applicable review criteria have been satisfied, and findings and conclusions made by the City Council during deliberations on the request. Coburn seconded the motion.

Kellum said he won't vote for this without mitigation. He said the Council has made an issue in the past about not stepping on the Planning Commission. He said, we use them because we want their judgment. They said this is not right. He doesn't mind the cell tower there if the people around it don't have a problem with it, but it should fit in with the neighborhood. He doesn't think it fits in.

Delapoer explained procedural issues, including that Kellum can't make a decision to support the Planning Commission's recommendation simply because they made it, because this is a *de novo* hearing. He said, you are supposed to make the decision as though the Planning Commission hearing did not occur, and base your decision on the evidence presented in this meeting.

AMENDED MOTION: Kellum moved to amend the main motion to include approval, if Verizon makes it look like a tree. There was no second to the motion.

VOTE: A vote was taken on the main motion and it passed 4-1, with Kellum voting no.

Konopa said, within five days of the final decision the Community Development Director will provide written notice of the decision to the applicant and any other parties entitled to notice. A decision of the City Council may be appealed to LUBA by filing a Notice of Intent to Appeal not later than 21 days after the decision becomes final.

Business from the Public

Greg Bechtel, 978 Ferry Street, spoke about the marijuana tax issue. The Council is considering a tax on marijuana. Initiative 91 preempts local municipalities from taxing marijuana. He understands that some cities want to be out in front of the Initiative and why Albany might consider that. But, he said, a few months ago this Council did not want to be out front on marijuana issues, hence the moratorium on dispensaries. He said, but now you are considering being out front on taxation. He said, people are proud of Albany for our stand on marijuana.

Becthel said, we already pay a due to have medical marijuana in Albany, and now the Council is considering that we pay more money. There is already current Code about the sale of marijuana in Albany, and Initiative 91 says there cannot be tax on the sale of medical or recreational marijuana. He said some may argue that the current Code is in conflict with the initiative. He said this ordinance would be a guaranteed lawsuit if it is enforced; and if not enforced, it is pointless. There are still illegal dispensaries in Albany despite the Albany Municipal Code; he said they need to deal with that first. If the medical marijuana is taxed at 0%, then why put it in there at all?

Becthel said, you are talking about a tax on an illegal activity, which in his opinion is ludicrous. According to statistics, meth makes more money than marijuana. He suggested the Council tax meth; it is the same principle. He thinks it is a bad idea. He said he is open to taxes on recreational marijuana, but this is not the way.

First Reading of Ordinance

Establishing a tax on the sale of marijuana and marijuana-infused products in the city of Albany

Delapoer noted that it does not take a motion to do a first reading of an ordinance. He also noted that at the October 6, 2014, Work Session, there was a failed motion to remove this item from this Council agenda. He said that unless the Council takes it off this agenda, he would do a first reading.

MOTION: Olsen moved to remove the item from the agenda and Coburn seconded it. The motion failed 3-2 with Johnson and Kellum voting no. It takes four votes of the City Council to decide any question.

Delapoer read the ordinance for the first time in title only: AN ORDINANCE ESTABLISHING A TAX ON THE SALE OF MARIJUANA OR MARIJUANA INFUSED PRODUCTS IN THE CITY OF ALBANY.

Delapoer said this ordinance will come back to a meeting of the full Council and will be listed on the agenda under Second Reading of the Ordinance.

Adoption of Resolution

Establishing tax rates for the sale of marijuana, medical marijuana, and marijuana-infused products in the City of Albany

There was no action taken on this item.

Adoption of Consent Calendar

- 1) Approval of Minutes
 - a) July 23, 2014, City Council Regular Session.
- 2) Accepting a sidewalk easement from Glorietta Bay, LLC.

RES. NO. 6360

MOTION: Coburn moved to adopt the Consent Calendar as presented. Kopczyński seconded the motion and it passed 5-0.

Approval of Funding Request

Transient Lodging Tax Ad Hoc Committee

This item will be considered at the November 5, 2014, City Council meeting.

BUSINESS FROM THE COUNCIL

Johnson attended the League of Oregon Cities (LOC) and will have a report in the near future.

Olsen said he has been having conversations with the public about the state of the City. He spoke with a man who moved here and said he appreciates a place where he can ride bikes.

Konopa said she was at the LOC Conference and did a walking tour of downtown Eugene to see their revitalization efforts. They have lost a lot of historic structures and stock over the years. Discussion followed about urban renewal.

Johnson said one of the LOC sessions included people from Washington talking about how legal marijuana has impacted that state. Many things were affected that they had not thought about.

Hare noted that Albany's 150th Birthday celebration would be on Saturday at the Farmer's Market and on Sunday at City Hall. There will also be a movie about Albany's history at the Pix Theater.

NEXT MEETING DATE: Work Session: October 20, 2014
 Regular Session: October 22, 2014

ADJOURNMENT

There being no other business, the meeting was adjourned at 8:45 p.m.

Respectfully submitted,

Reviewed by,

Mary A. Dibble, MMC
City Clerk

Wes Hare
City Manager