



Office of the City Manager

ACTION CALENDAR
July 16, 2007

To: Honorable Mayor and
Members of the City Council

From: *PK* Phil Kamlarz, City Manager

Submitted by: Daniel Marks, Director, Planning and Development

Subject: 2721 Shattuck Avenue (Nextel) - ZAB's Decision

RECOMMENDATION

Certify for review the June 28, 2007 decision of the Zoning Adjustments Board and set a hearing on Use Permit #04-10000068 for a new wireless telecommunications facility (including six antennas and related equipment) for Nextel Communications at 2721 Shattuck Avenue. If Council determines that a hearing shall be held, the date of October 23, 2007 has been set aside and is recommended

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On June 28, 2007, the Zoning Adjustments Board denied (5-4-0-0) a Use Permit application from Nextel Communications to construct a new wireless telecommunications facility (including six antennas and related equipment) at 2721 Shattuck Avenue. At its meeting on May 22, 2007, the City Council directed Staff to place the item on their agenda as soon as possible after the Zoning Adjustments Board meeting.

BACKGROUND

Key dates and actions associated with the project include:

- June 16, 2004 Nextel Communications submitted a Use Permit application to construct a new wireless telecommunications facility (including six antennas and related equipment) at 2721 Shattuck Avenue.
- May 25, 2006 The Zoning Adjustments Board approved (7-0-2-0; Abstain: Shumer, Wilson) the application for a Use Permit subject to conditions and based on the required Zoning Ordinance findings.

June 19, 2006 A neighbor located at 2121 Ward Street, Berkeley, appealed the Zoning Adjustments Board's decision on behalf of the "Ward Street Neighbors".

September 26, 2006 .. The City Council remanded the project to the Zoning Adjustments Board for it to reconsider the project (including third-party engineering review), determine parking and loading requirements for the existing legal uses of the site, and consider allegations of illegal uses and work without permits.

January 25, 2007 The Zoning Adjustments Board denied (6-3-0-0) the application for a Use Permit.

February 20, 2007..... The applicant (Nextel Communications) appealed the Zoning Adjustments Board's decision to the City Council.

May 22, 2007 The City Council considered the appeal and remanded the application for a Use Permit to the Zoning Adjustments Board with instructions to reconsider the application in light of new evidence since the January 25, 2007, Zoning Adjustments Board decision, and legal information from the City Attorney.

On June 28, 2007 the Zoning Adjustments Board opened a public hearing to reconsider the application as directed by the City Council's remand. The Zoning Adjustments Board considered the following information:

1. Confidential memorandum from the City Attorney;
2. A report from Staff;
3. A supplemental report from the City's independent engineer that included an analysis of field tests of signal strength (coverage);
4. Information received since the previous Zoning Adjustments Board meeting on January 25, 2007;
5. Real-time closed captioner's transcripts of the City Council meetings on May 8, 2007 and May 22, 2007; and
6. Public testimony.

After reconsidering the application and the above information, the Zoning Adjustments Board denied (5-4-0-0) the application based on the following findings:

1. The required findings cannot be made, based on substantial evidence, that the proposed wireless telecommunication facility is necessary to provide personal wireless service in the coverage area (BMC 23C.17.100.D), since service is currently being provided and since no evidence has been presented that the existing service is not at an adequate level; and
2. The asserted gaps (dropped calls) of 1 – 3% for a few hours a day do not constitute "significant gaps" but are, rather, *de minimus*; and

3. The location is effectively in a residential area and that the objective of the ordinance is to prevent putting wireless telecommunication facilities in residential areas unless necessary to provide service (BMC 23C.17.020.B). The Board finds no such necessity; and
4. The City of Berkeley is in compliance with federal law in denying this Use Permit for wireless telecommunication facility at this location because to do so does not “prohibit or have the effect of prohibiting the provision of personal wireless services to this service area”. Wireless service exists with no significant gap; the asserted gaps are *de minimus*.

The Administrative Record for this project since May 22, 2007 is attached to this report (see Attachment 1). It excludes the Administrative Record preceding this date since this material has previously been provided to the City Council. The earlier part of the Administrative Record is available on request.

RATIONALE FOR RECOMMENDATION

Staff has previously recommended approval of the project to the Zoning Adjustments Board since it is consistent with the Zoning Ordinance and General Plan. The City Attorney has also addressed legal issues in a closed session with the City Council and provided a confidential memorandum. For these reasons, Staff recommends that the City Council certify the Zoning Adjustments Board’s decision for review, and set the matter for public hearing, thereby giving the City Council an opportunity to re-consider the project.

ALTERNATIVE ACTIONS CONSIDERED

Section 23B.32.090 of the Berkeley Municipal Code provides that the Council may certify for review any action of the Zoning Adjustments Board granting or denying a Use Permit. If Council certifies the Zoning Adjustments Board’s decision, Section 23B.32.060 of the Berkeley Municipal Code provides that the Council may then take one of the following actions:

1. Affirm Zoning Adjustments Board’s Decision: If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer do not warrant further hearing, the Council shall affirm the decision of the Zoning Adjustments Board and dismiss the appeal, in which case the application is approved;
2. Set for Public Hearing: If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer warrant further hearing, the Council shall set the matter for a public hearing; and
3. Remand to Zoning Adjustments Board: If the Council determines that the facts ascertainable from the record prepared by the Zoning Officer warrant reconsideration of the application by the Zoning Adjustments Board, or if the applicant has submitted revisions to the application, the Council shall remand the matter to the Zoning Adjustments Board to reconsider the application, in which

case it shall specify whether or not the Zoning Adjustments Board shall hold a new public hearing, and shall identify those issues which the Zoning Adjustments Board is directed to investigate and reconsider.

A new Zoning Adjustments Board decision may be appealed in the normal manner unless otherwise directed by Council. If 60 days pass, and the Zoning Adjustments Board has not made a subsequent decision, then the original decision and the original appeal of that decision shall be placed back on the Council agenda in the same manner as a new decision and appeal.

ACTION DEADLINES

The Notice of Decision setting out the Zoning Adjustments Board action was mailed on July 3, 2007. The City Council would need to certify the Zoning Adjustments Board's decision by July 17, 2007 (14 days from the mailing of the Notice of Decision) to review the action.

CONTACT PERSON

Mark Rhoades, AICP, Land Use Planning Manager, Planning and Development, (510) 981-7411.

Attachments:

1: Administrative Record



Attachment 1

Attachment 1 to this report is on file and available for review at the City Clerk Department, or can be accessed from the City Council Website.

City Clerk Department
2180 Milvia Street
Berkeley, CA 94704
(510) 981-6900

or from:

The City of Berkeley, City Council's Web site
<http://www.ci.berkeley.ca.us/citycouncil/>



Sprint Nextel
12657 Alcosta Boulevard, Suite 300
San Ramon, CA 94583
Fax: (925) 904-4059

**CITY OF BERKELEY
CITY CLERK DEPT**

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07 FEB 20 PM 4: 33

February 20, 2007

Sherry Kelly, City Clerk
The City Clerk's Department
2180 Milvia Street
Berkeley, CA 94704

RE: Appeal of Zoning Adjustments Board Decision to Deny Use Permit Application No. 04-1000068 – 2721 Shattuck Avenue – Nextel Communications

Sprint Nextel respectfully requests the City Council hear on appeal the Zoning Adjustments Board Denial of Use Permit No. 04-1000068 to construct a telecommunications facility at 2721 Shattuck Avenue.

The bases for the findings given by the Board and included in the Notice of Decision mailed on February 6, 2006 are as follows:

1. There is not substantial evidence that the facility proposed is necessary to provide personal wireless services to Nextel Communications customers since the third party review of the project was based on information that was supplied by Nextel Communications and the review did not include a test of signal reception in the area around the project site; and
2. There is not substantial evidence that the facility proposed is necessary in this particular location and that it could not be located in an alternative location further away from residential districts.

The third party review of the project was provided by RCC Consultants Inc. According to the Planning Department, RCC was the only potential third party review firm to respond to the City's request for proposals (RFP). The scope of work for this review was formatted by the Planning Department in response to City Council and ZAB direction.

The ZAB conclusion that the third party review did not include a test of signal reception in the area around the project site is invalid because the ZAB never provided notice to Nextel that third party review had to include a test of signal reception in the area around the project site. That the ZAB's conclusion violates due process of law for failure to give adequate notice can be seen from the following:

- The RCC scope of work, as presented to Sprint Nextel by the Planning Department, was to provide a third party technical review of the information that had already been submitted by Sprint Nextel to the Department and to provide further review of any requested additional information. Although Sprint Nextel was required to pay for the third party review, Sprint Nextel was not party to deciding the parameters for the scope of work.
- Third party testing of signal reception was neither discussed nor suggested as one of the tasks for the scope of work.

- The scope of work was precisely to provide review by qualified third party reviewer utilizing information supplied by Sprint Nextel as a basis for evaluating necessity.
- After analysis of the existing Nextel network and evaluation of the proposed coverage objective, the RCC report concluded the proposed facility is necessary to provide adequate coverage and capacity for the Nextel network.
- The ZAB's conclusion violates 47 U.S.C. Section 332(c)(7)(B)(iii) because there is not substantial evidence to support the conclusion that Nextel failed to supply information required for approval of its application by the ZAB.
- The ZAB's conclusion is arbitrary and capricious and denies Nextel due process of law.

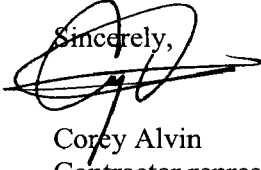
The ZAB's conclusion regarding the supposed lack of substantial evidence showing that the proposed facility was necessary in the proposed location, and that it could not be located in an alternative location further away from residential districts, is not valid. In particular:

- Nextel's coverage objective includes the area bounded by Addison and Grant Streets to the northwest, Dwight Way and Telegraph Avenue to the northeast, Ellis and Woolsey Streets to the southwest, and Wheeler and Woolsey Streets to the southeast. This area is considered South Berkeley. Shattuck Avenue lies essentially at the center of the coverage objective. The commercial spines of this area are all surrounded by residential districts. A building located along a commercial spine in South Berkeley is inherently likely to be adjacent to a residential district. It is not possible to move "further away" from residential areas and still serve the area to be served. This information is readily available from the City's own zoning maps. The tall, wholly commercial building proposed to be the location for the Nextel facility is located on such a commercial spine on Shattuck Avenue and is surrounded by a commercial district on all sides except the east side.
- Two alternative sites (2001 Dwight Way and 2300 Martin Luther King Way) were discussed and included in the Nextel original application. Both locations were rejected as viable alternatives because line of site from these buildings would not provide adequate coverage within the coverage objective.
- Buildings located further away from residential districts are likely to be located in the City's industrial West Berkeley area or on the UC Berkeley Campus. A Nextel facility located in either area would not yield signal sufficient to provide the necessary cellular coverage in the areas defined by the coverage objective.
- An alternative analysis was not requested by the Planning Department either before or after the original application was deemed complete.
- The ZAB's conclusion again denies Nextel due process of law because Nextel was never given notice that it was required to submit information on the lack of acceptable alternative locations other than the information already provided with its application.
- The ZAB's conclusion violates 47 U.S.C. Section 332(c)(7)(B)(iii) because there is not substantial evidence to support the conclusion that Nextel failed to supply information required for approval of its application by the ZAB.
- The ZAB's conclusion is arbitrary and capricious and denies Nextel due process of law.

In effect, the ZAB "moved the goalposts," after the previous remand from the City Council, by making its decision on the basis of criteria that were never identified to Nextel. This violated fundamental fairness. The City Council should, therefore, reverse the decision of the ZAB.

Thank you for your careful attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to be "Corey Alvin", written over the word "Sincerely,".

Corey Alvin
Contractor representative for Sprint Nextel

