



AGENDA REPORT

CITY OF SAN CLEMENTE

CITY COUNCIL MEETING

910 Calle Negocio
2nd Floor
San Clemente, California
www.san-clemente.org

Meeting Date: October 17, 2023

Agenda Item: 10C

Department: Community Development
Prepared By: Jonathan Lightfoot, City Planner

Subject:
WIRELESS COMMUNICATIONS FACILITY LOCATED AT 616 DEL DIOS

Fiscal Impact:
None to receive and file this report.

Summary:
On October 3, 2023, the City Council directed staff to prepare a summary report regarding applications submitted for the modification and construction of wireless communications located at 616 Del Dios, Assessor's Parcel Number 690-552-05. American Tower Management, the applicant and owner, submitted two Building permits to: 1) decrease the height of the tower, and 2) collocate wireless infrastructure on the tower. The Building permit to reduce the height of the tower has been issued, however, the Building permit to collocate new infrastructure is currently under review by City staff. City staff is coordinating a meeting with community members to discuss the proposed project. The meeting is anticipated to occur on October 18, 2023 during a Study Session with the Planning Commission.

Background:
An existing cell facility at the subject site is operated by American Tower Management (Applicant) and was approved under a Conditional Use Permit (CUP) in 1962 by the County of Orange (Attachment 1). Per the CUP, the wireless communications facility was approved for an approximate 28 ft. by 58 ft. building and a 70 ft. antenna tower. Per Applicant representatives, the tower component of the wireless communications facility is 137.6 ft, but is further extended to 156 ft. when the height is measured from the highest existing appurtenance affixed to the tower.

The County, Applicant, and City have not been able to locate any records authorizing the expansion in height beyond the originally permitted height of 70' approved by the County of Orange. As a result, the City denied a collocation request in 2020, which initiated discussions between legal counsel for the Applicant and the City. The Applicant ultimately agreed to voluntarily reduce the height of the existing tower to the 70' maximum permitted by the 1962 County of Orange CUP. A Voluntary Compliance Agreement was executed on July 6, 2023 between the Applicant and the City of San Clemente to reduce the height of the existing antenna tower to the permitted height of 70' (Attachment 2). During the review of records that preceded the compliance agreement, legal counsel for the Applicant noted that the tower is still used today for the wireless transmission of telephone services. Additionally, the City approved a Building permit (B16-2650), for wireless equipment that was installed and the permit was finalized on August 28, 2017. Existing equipment still present on the tower is proposed to be removed and

replaced by the equipment referenced in permit B23-2265, which is currently under review and described further in the following section.

Discussion:

Due to the public interest regarding proposed work efforts at the site and City Council's request for additional information, City staff has prepared the following summary for the two recent applications submitted for the site.

The requests by the Applicant are to: (1) decrease the height of the tower from 137' to 70' in conformance with the 1962 CUP obtained from the County of Orange, and (2) for the collocation of infrastructure on the existing tower. Proposed collocation infrastructure consists of three (3) panel antennas, three (3) sector mounts, six (6) remote radio units (RRUs), three (3) back-to-back mounts, one (1) overvoltage protector (OVP), and one (1) hybrid cable. One (1) new equipment cabinet is also proposed.

- **B23-1495:** A building permit was issued on 08/30/2023 to reduce the height of the existing tower from 138' to 70' measured from the existing adjacent grade to the highest appurtenance affixed to the tower. This permit has not been finalized as work to complete this project is still underway.
- **B23-2265:** A "Wireless Communications Facilities" application screening form was submitted by Tower Engineering Professionals (applying on behalf of Dish Wireless) for a Dish collocation of three new Dish Wireless panel antennas that would be affixed to the existing tower. The submitted application is a required screening form submitted prior to a Building permit application to evaluate the proposed collocation, pursuant to Section 6409(a) of the Middle-Class Tax Relief and Job Creation Act of 2012 for facilities outside of the public right-of-way. The applicant submitted a third-party produced Radio Frequency (RF) Compliance Analysis that details the occupational and public exposure levels. The analysis for this site indicated that the RF and power levels will not exceed the FCC established Maximum Permissible Exposure Levels (MPE) for the General Public or Occupational environments. The report recommended the installation of notice/informational signage at the gate entrance to the facility. The screening form was evaluated and approved by the Planning Division on 9/5/2023. The applicant subsequently applied for a Building permit on 9/14/23 for the proposed collocation. This Building permit is currently under review.

The application for modification to the above referenced tower facility, based on initial review, qualifies under Section 6409 of the Spectrum Act (47 U.S.C. § 1455(a), 47 C.F.R. § 1.6100 as an eligible facility for streamlined, ministerial review because it meets the following criteria:

1. It is an existing utility tower.
2. The proposed modification:
 - Does not propose a height increase of more than 10% or 20' of the existing height,
 - Does not propose more than 4 new equipment cabinets,
 - Complies with prior conditions of approval, and
 - Does not defeat the concealment elements of the existing facility.

The timeframe (also called a “shot clock”) for review is 60 days for permits to be issued from the date the application is submitted or the application is “deemed approved” under federal law. Any concerns regarding the completeness of an application must be raised by City staff within 30 days of application submittal.

As part of this process, staff will continue to review plans for the submitted Building permit, B23-2265, as required under federal law. Staff may require modifications to ensure compliance with the Municipal Code, if enforcing the Municipal Code requirements complies with federal law. City staff is pausing any issuance of building permits regarding the collocation request until staff has convened a meeting with interested members of the community. City Planning staff is coordinating a meeting with community members to discuss the proposed project. The meeting is anticipated to occur on October 18, 2023 during a Study Session with the Planning Commission.

It should be noted that the City lacks discretion with respect to collocation requests if it meets applicable requirements. Federal regulations severely limit a local agencies ability to regulate such facilities. The Telecommunication Act of 1996 expressly prohibits state or local regulations that have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. This has been interpreted very broadly to extremely limit local authority.

Furthermore, under federal law, the City is expressly prohibited from regulating the placement, construction and modification of wireless service facilities on the basis of the environmental effects of radio frequency (RF) emissions, if the facilities comply with the Federal Communication Commission’s (FCC’s) regulations concerning RF emissions. The FCC guidelines incorporate maximum permitted exposure limits established by the Congressionally-chartered National Council on Radiation Protection. The United States Court of Appeals for the Second Circuit has upheld the FCC guidelines setting health and safety standards on RF emissions and prohibiting local governments from considering health effects of emissions in zoning decisions. Therefore, City decision makers cannot take comments or information concerning potential health effects or other environmental effects into consideration in determining whether to approve permits for cellular facilities.

City decision makers can, however, ensure an individual or collocated wireless communications facility (WCF) will operate within the FCC standards for public exposure. In order to ensure compliance with FCC RF emission standards, the City requires verification from the Applicant that the proposed WCF will either comply with the FCC’s guidelines for human exposure to RF emissions or will be categorially excluded from having to determine compliance with the guidelines per 47 CFR §1.1307(b)(1). Information regarding potential health effects is available from the cellular providers upon request and it is also required from the FCC. During the previous City Council meeting, the topic of health effects from the proposed WCF was a large concern of the public; however, as noted above, the City is precluded from considering such effects under federal law, if the RF emissions comply with FCC standards.

Council Options:

- Receive and file the Administrative Report.
- Continue the item and direct staff to provide additional information.

Environmental Review/Analysis:

Informational reports are not a "project" under the California Environmental Quality Act (CEQA). Furthermore, the federal process for reviewing eligible facilities requests requires applications be subject to ministerial review only. Therefore, eligible facilities are not subject to the CEQA per § Section 21080(b)(1) of the California Public Resources Code.

Recommended Actions:

Staff Recommendation

STAFF RECOMMENDS THAT the City Council receive and file this report.

Attachment:

1. County of Orange Conditional Permit (CP-1021), dated December 12, 1962
2. Voluntary Compliance Agreement, dated July 6, 2023

Notification:

Rancho San Clemente Homeowners Association and Interested Parties.

San Clemente

C.P. 1021

5
 Nov. 27, 1962
 Dec. 12, 1962
 RDipd
 26-8-7 (None)
 Barnes
 Bldg. Dept.
 J. Scherman
 City of San
 Clemente

APPLICATION FOR CONDITIONAL PERMIT

UNDER ORDINANCE NO. 14, 1961
 CHAPTER 14, SECTIONS 14.01 TO 14.05

American Telephone & Telegraph Company c/o DT & T Company 1475 6th Avenue,
 San Diego 1, Room 401 235-6129
 W. H. Watts 1475 6th Avenue, Room 401, San Diego 1 235-6129

TO SHOW: the establishment of a microwave relay station in connection with a public telephone service in the Al General Agricultural District.

Said station will consist of an approximate 28 ft. by 58 ft. building and a 70 ft. antenna tower all located substantially as indicated on the attached plot plan.

Access to the site will be via an existing private road running northeasterly approximately 2 miles from the City of San Clemente Reservoir site.

The structures will be enclosed by a 6 ft. chain link fence with locked gate.

There will be no employees on the premises except for periodic maintenance.

Height Variance for Antenna: From 35 ft. to a maximum of 70 ft.

All in accordance with the attached plot plan which is hereby made a part hereof. In any case of conflict between the language of this application and the plot plan, the plot plan shall prevail.

LEGAL REPRESENTATIVE

See attached sheet.

Approximately 2 miles northeasterly from the end of Avenida
 Sylvester (at San Clemente water reservoir) at end of a private road,
 Brush; range land. northeast of San Clemente

APPROVED: _____ None.

ATTACHMENT 1

VOLUNTARY COMPLIANCE AGREEMENTPARTIES

This Voluntary Compliance Agreement ("Agreement") is entered into by and between American Tower Management, LLC ("ATC") and the City of San Clemente ("City"). ATC and the City are sometimes referred to in this Agreement individually as "Party" and collectively as the "Parties". This Agreement is entered into as of July 6, 2023 ("Effective Date").

RECITALS

This Agreement is made with reference to the following:

1. ATC operates a wireless communication facility (Site No. 89366) ("Wireless Communications Facility"), located at Rancho San Clemente Trail, Rancho San Clemente, California 92672 (APN: 690-552-05) ("Property") that was approved under a Conditional Use Permit in 1962 by the Orange County ("County") Planning Division, which then had jurisdiction over the Property ("1962 CUP").

2. The 1962 CUP permits a wireless communications facility, consisting of "an approximate 28 ft. by 58 ft. building and a 70 ft. antenna tower", in connection with a public telephone service.

3. According to ATC, the tower component of the Wireless Communications Facility is 137.6 ft. in height, which is further extended to 156 ft. when the height is measured from the highest existing appurtenance affixed to the tower.

4. Neither the City, the County, nor ATC have been able to locate any records authorizing the expansion in height of the tower from 70 ft. to the current height.

5. Accordingly, because no records of any County or City approvals authorizing the expansion of the tower from 70 ft. to its current height have been located, ATC voluntarily agrees to reduce the height of the existing tower to the 70 ft. maximum identified in the 1962 CUP.

6. To the best of the City's information and knowledge, the only known violation of the 1962 CUP or applicable law with respect to the Wireless Communications Facility is the tower's height.

7. The City and ATC desire to resolve this matter.

AGREEMENT

In consideration of and in return for the promises, covenants, and agreements made herein by the Parties, the sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. The above recitals are incorporated into the terms of this Agreement.
2. The height of the existing tower component of the Wireless Communications Facility will be reduced to a maximum of 70 ft., when the height is measured from the existing adjacent grade to the highest appurtenance affixed to the tower.
3. All work required to reduce the height of the tower to a maximum of 70 ft. shall be performed and completed by ATC, at its sole cost and expense, within 12 months from the date that a building permit is issued by the City in accordance with Section 5, below. ATC shall submit a complete application for a building permit within two (2) months of the Effective Date.
4. ATC agrees that once the height of the tower is reduced, ATC will comply with the 1962 CUP and maintain the Wireless Communications Facility in compliance with all applicable laws, including, but not limited to, the San Clemente Municipal Code and the California Building Code. This includes, but is not limited to, obtaining any necessary permits and other approvals for construction, modifications and/or uses prior to any such changes, to ensure continued compliance

with the 1962 CUP and applicable law in effect at that time. ATC shall also maintain the Wireless Communications Facility in compliance with all applicable state and federal laws and regulations, now existing or hereinafter enacted.

5. ATC agrees, prior to commencing any work to reduce the height of the tower stipulated in this Agreement, to obtain a building permit from the City for alterations to the tower. The City agrees to process and issue the building permit with reasonable diligence and without delay.

6. The City agrees that, following the reduction in the height of the tower, the Wireless Communications Facility will be in compliance with the 1962 CUP, and specifically that (i) the 1962 CUP is vested; (ii) the 1962 CUP does not contain an expiration date; and (iii) the 1962 CUP permits the current use of the Wireless Communications Facility for wireless telecommunication purposes; and (iv) the 1962 CUP permits a 70' tower. As a result, the City shall not require a discretionary approval, including but not limited to a new CUP or renewal of the 1962 CUP, in connection with the reduction in height and ongoing operation of the Wireless Communications Facility consistent with the 1962 CUP.

7. In contemplation of, and based on ATC's agreement to reduce the tower height in compliance with this Agreement and to maintain the Wireless Communications Facility in compliance with the law as set forth in Section 4 above, the City hereby will forego any enforcement proceedings for non-compliance related to ATC's tower prior to expiration of the deadline established in Section 3 above.

8. ATC hereby releases the City, its agents, employees, attorneys, elected officials, appointed officials and representatives, from any and all actions, causes of action, losses, claims, demands, damages, costs, loss of use, loss of revenue, expenses, compensation and other form of

damages arising from or relating to any enforcement proceedings for non-compliance as of the expiration of the deadline established in Section 3 above (the "ATC Released Claims"). However, this release provision does not extinguish, release, or discharge any of the obligations and rights set forth and encompassed in this Agreement. ATC shall indemnify, defend (with counsel acceptable to City) and hold the City its agents, employees, attorneys, elected officials, appointed officials and representatives from any and all actions, causes of action, losses, claims, demands, damages, costs, loss of use, loss of revenue, expenses, compensation and other form of damages by any third party arising from or relating to the ATC Released Claims or this Agreement, the 1962 CUP or ATC construction, operation or maintenance of the Wireless Communications Facility, including, but not limited to, any environmental review or approval in connection therewith.

9. Effective upon ATC's completion of the work on the tower in compliance with applicable laws and as contemplated by this Agreement, the City releases ATC, its agents, employees, attorneys, elected officials, appointed officials and representatives, from any and all known actions, causes of action, losses, claims, demands, damages, costs, loss of use, loss of revenue, expenses, compensation and other form of damages arising from or relating to any non-compliance of ATC's tower. However, this release provision does not extinguish, release, or discharge any of the obligations and rights set forth and encompassed in this Agreement.

10. ATC also hereby specifically waives the protections of California Civil Code section 1542, which provides:

A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her,

would have materially affected his or her settlement with the debtor or released party.

11. As required by law, the City hereby reserves its right to enforce future violations of law relating to the Wireless Communications Facility or those violations currently unknown, as provided by law, and seek any remedies or rights available to the City. This section is merely intended to clarify that the City is not waiving any future rights or obligations it may have under law pertaining to future occurring or currently unknown, and therefore not contemplated, violations of law that may exist.

12. Advice of Counsel. The Parties represent that they have had the opportunity, whether or not they have chosen to do so, to discuss this Agreement with legal counsel.

13. Entire Agreement. This Agreement is the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous oral and written agreements and discussions. This Agreement may be amended only by an agreement in writing signed by all Parties, except that a change in contact information may be made simply by sending notice to the other party.

14. Severability. Each provision of this Agreement is separate, distinct and severable from the others. If any provision is held unenforceable, the rest of the Agreement shall be enforced to the greatest extent possible.

15. Governing Law. This Agreement shall be governed and interpreted in accordance with the laws of the State of California.

16. Choice of Venue. The venue for any disputes arising out of this Agreement shall be in the County of Orange. ATC waives any rights that it may have to removal under Code of Civil Procedure section 395.

17. Successors and Assigns. This Agreement and all terms, conditions and obligations contained herein are binding upon and inure to the benefit of any assigns and successors-in-interest of the Parties, and each of them. Each of the Parties represents and warrants that as of the Effective Date none of the claims or causes of action being released herein have been transferred, assigned or otherwise conveyed to any other person or entity, and each of the Parties is the holder of the claims being released.


18. Force Majeure. Neither Party shall be liable for its failure or delay to perform under this Agreement (a) caused by reason of acts of God, wars, revolution, terrorism, civil commotion, or similar unlawful acts of third parties, fire, flood or other casualty, embargo, acts of government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, business shutdowns, government regulations preventing performance, epidemics or pandemics preventing performance, labor or supply shortages preventing performance, picketing or boycotts, or any other similar circumstances beyond the reasonable control and not involving any fault or negligence of such Party, and (b) provided that Party gives prompt notice to the other Party and makes all commercially reasonable efforts to perform.

[continued on following page]

19. Signatures. By signing below, the Parties acknowledge that they have read, understood, and agree to all of the terms of this Agreement.


CITY OF SAN CLEMENTE

Dated: June 29, 2023

By: 
Andy Hall, City Manager


AMERICAN TOWER MANAGEMENT,
LLC

Dated: June 11, 2023

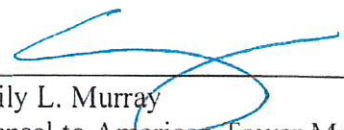
By: 
Margaret Robinson
Vice President, Legal Operations UST
American Tower Management, LLC

APPROVED AS TO FORM:

Dated: July 6, 2023

By: 
Elizabeth A. Mitchell
City Attorney for the City of San
Clemente

Dated: June 5, 2023

By: 
Emily L. Murray
Counsel to American Tower Management,
LLC