

Law Office of Rose M. Zoia

50 Old Courthouse Square, Suite 401
Santa Rosa, California 95404
707.526.5894 . fax 267.381.6097
rzoia@sbcglobal.net

December 5, 2011

via email and fax 823-1135
The Honorable Guy Wilson, Mayor,
and City Council Members
Sebastopol City Council
7120 Bodega Avenue
Sebastopol CA 95472

RE: Appeal of Planning Commission Approval of Use Permit Application to
Install Additional Panel Antennas @ 7120 Bodega Avenue
Applicant: Crown Castle
City Council Hearing: December 6, 2011

Dear Mayor Wilson and Council Members:

On behalf of the EMF Safety Network, please accept these comments on the proposed Class 1 exemption under the California Environmental Quality Act (CEQA) for the above-referenced project.

Class 1 projects (Guidelines, § 15301)

consist[] of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, *involving negligible or no expansion of use* beyond that existing at the time of the lead agency's determination. . . . *The key consideration is whether the project involves negligible or no expansion of an existing use.*

A. The Project Does Not Fit the Exemption

Whether a project factually fits within an exempt category is determined by the substantial evidence standard of review.¹ Substantial evidence is defined as

¹ *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356. 1382.

“facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.”² Importantly, substantial evidence is not just any evidence:

. . . , if the word ‘substantial’ means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with ‘any’ evidence. It must be reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.³

In this case, the addition of three LTE (Long Term Evolution) panel antennas for a total addition of 3,786 watts of power which will support 3G and 4G networks and enhance the capacity of the site to handle increased levels of both voice and data transmission (and possibly increase the range of signals) does not comprise negligible or no expansion of an existing use. In fact, it significantly *expands* the existing use. Also, it is unknown whether the three replacement panels will be the same as those presently existing or whether they will be the more powerful LTE panel antennas.⁴ The latter is a fair assumption, thus furthering supporting the conclusion that the project does not involve a negligible expansion of use.

B. In Any Event, the Project is Excepted from the Exemption

In any event, the exemption in this case is not proper because the project meets an exception to the exemption.

Under CEQA, following the initial determinations of whether the project fits within the scope of an exemption, the low-threshold “fair argument” standard is

² Pub. Resources Code §§ 21080, subd. (e)(1), 21082.2, subd. (c).

³ *In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644.

⁴ *See Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296 (“While a fair argument of environmental impact must be based on substantial evidence, mechanical application of this rule would defeat the purpose of CEQA where the local agency has failed to undertake an adequate initial study. The agency should not be allowed to hide behind its own failure to gather relevant data...”)

applied as to whether a project meets an exception to the exemption.⁵ This standard states that whenever it can be fairly argued on the basis of substantial evidence that there is a reasonable possibility that a project *may* have a significant effect on the environment, an exemption is not proper.⁶ This is so even if substantial evidence was presented that the project will not have such impact. If there is substantial evidence that the proposed project *may* have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an initial study.⁷

Even if a project otherwise fits within a categorical exemption, it can be excepted out of the exemption pursuant to section 15300.2 of the CEQA Guidelines (14 Cal. Code Regs.). That regulation provides in relevant part:

(c) Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

Regarding the significant effect exception, the California Resources Agency “is empowered to exempt only those activities which *do not* have a significant effect on the environment, . . . [i]t follows that where there is any reasonable possibility that a project or activity *may* have a significant effect on the environment, an exemption would be improper.”⁸ Even initially exempt projects could have effects that would render it nonexempt due to the unusual circumstances exception of section 15300.2, subd. (c).⁹ “Any activity that *may* have a significant effect on the environment cannot be categorically exempt.”¹⁰

⁵ *E.g., Banker’s Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, 266.

⁶ *Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1198.

⁷ *Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3^d 988, 1002.

⁸ *Wildlife Alive v. Sherman Chickering* (1976) 18 Cal.3^d 190 at 205-206 [emphasis supplied].

⁹ *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 99 at 104.

¹⁰ *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 124 [emphasis supplied].

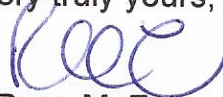
Subdivision (c) of section 15300.2 provides" that a categorical exemption will not be applied when the project will have a significant effect on the environment due to unusual circumstances (referred to as the significant effect exception).¹¹ The test to determine whether unusual circumstances exist is satisfied where the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects.¹²

In this case there is a reasonable possibility that the project will have significant impacts on the environment due to unusual circumstances related to its proximity to the Laguna, an internationally recognized wetlands. Based on evidence in the record, the project may affect that environment. (See, e.g., appeal letter and attached studies.)

The staff report states that, per Federal Communications Commission regulations, the City does not have the authority to deny the application based on health effects. The concern with effects on wildlife and wetlands plant species, however, are environmental concerns related to the degradation of biological resources. The FCC regulations appear to relate to human health.

EMF Safety Network requests that the City prepare a CEQA initial study for this project. Thank you for your close attention to this matter.

Very truly yours,



Rose M. Zoia

cc: Kenyon Webster, Planning Director
Larry McLaughlin, City Attorney

¹¹ See *Azusa Land Reclamation Co. Inc.*, *supra*, 52 Cal.App.4th at 1191.

¹² *Myers v. Board of Supervisors of Santa Clara County* (1976) 58 Cal.App.3d 413; *Azusa*, *supra*, 52 Cal.App.4th at 1207.