



Legislation Text

File #: AR CM2 19-00124, **Version:** 3

An appeal of City Planning Commission's denial of the Maizeland & Murray CMRS development plan to allow modification of an existing 99'-3" monopole tower located northeast of Constitution Avenue and Avondale Circle, and addressed as 2499 Avondale Drive.

(Quasi-Judicial)

Related Files: AR CM2 19-00124

Presenter:

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Summary:

Applicant/Owner: Mountain States Telephone & Telegraph Co.
Consultant Applicant/Appellant: Vertical Bridge
Location: 2499 Avondale Drive (northeast of Constitution Avenue and Avondale Circle)

Vertical Bridge is appealing the Planning Commission's denial of the administrative approval of the Maizeland & Murray CMRS (telecommunications tower) development plan to allow for the modification of an existing 99-foot tall monopole tower. Planning Commission's approval of the neighbor's appeal overturned staff's approval of the CMRS development plan.

The application is a development plan proposing modification of an existing 99'-3" monopole tower to bring the tower structure up-to-code and to make it structurally safe. The stated intention is to wrap the existing tower with new steel and pour additional concrete on top of the existing base to create a sturdy foundation for the addition tower steel.

The height of the tower will not increase with the proposal; however, the dimension will change from the existing width dimension of 5'-9" to a new width dimension of 10'-0". The color of the tower is proposed to remain the same gray steel color as the existing monopole tower. The elevation plans illustrate two additional antennas to be added to the monopole tower for co-location. The CMRS facility is located on a portion of a 5.01 acre lot northeast of Constitution Avenue and Avondale Circle.

As stated, the administrative approval was appealed to Planning Commission by a neighbor, Sally Maddocks. A detailed hearing summary including the appellant's arguments can be found in the following Board/Commission Recommendation section of this memo. The Planning Commission was required to make findings on Federal regulations as well as City Code. They found that the modifications to the tower substantially change the tower, and that the tower is not "existing" (pursuant to 47 C.F.R. 1.6100 et. seq.) or legal-nonconforming, but is, in fact, illegal by

abandonment. Vertical Bridge, the applicant, is appealing that decision. The appeal letter is attached as Exhibit 1. It outlines the opinion of the applicant that Federal law prohibits the City from denying the modification on the grounds that the tower is existing, and therefore meets the guidelines for modification.

Further details on the appellant's arguments, the Planning Commission findings and applicant documentation are found in the Background section of this memo.

Previous Council Action:

On October 22, 2019, at the request of the applicant (Vertical Bridge), the City Council moved to postpone the appeal to the November 12, 2019 City Council meeting.

Background:

A CMRS development plan application was submitted to the Planning Department for the modification of the existing 99'-3" monopole tower to bring the tower up-to-code, and to make it structurally safe for the installation of cellular equipment. The proposal provides for new antennas to be added to the monopole tower for co-location, and equipment shelter within the existing compound for the telecommunication facilities.

The application was administratively approved by staff on July 22, 2019. This approval was based on the facts of the application that stated this to be an existing tower with existing cellular antenna. An appeal of the administrative approval was filed by a neighbor, Sally Maddocks. The Planning Commission hearing was held on September 13. At the hearing, the Planning Commission voted to uphold the appeal, thus overturning the administrative decision. The applicant, Vertical Bridge, filed an appeal to City Council on September 20 and requested the automatic one-time postponement to the November 12 Council meeting.

The site contains two tower structures with heights of 99'-3" and 30". The parcel is designated as R 1-6000 (Single-Family) zone district and is comprised of 5.01 acres of unplatted land. The parcel is accessed by a 30-foot wide access easement at the rear of the properties that front along Alteza Drive starting at Avondale Drive near the intersection of Avondale Drive and Constitution Avenue.

Not only does Council need to consider City Code, but also Federal regulations that govern the use and placement of cellular equipment. Federal regulations state that a proposed modification to an existing facility may qualify as an "eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station".

However, the Planning Commission found that the tower is not legal non-conforming and does not qualify for modification as an eligible facilities request. The appeal is based on the applicant's assertion that Federal law governs the use of this tower and that Federal law requires the City to allow the modification and use of this tower.

The letter of appeal to Council (Exhibit 1) states that Planning Commission erred in finding this tower to be illegal and not subject to a modification as an existing facility. The applicant quotes FCC Report and Order 14-153 as stating "legal, non-conforming structures should be available for modification under 6409(a), as long as the modification does not 'substantially change' the physical dimensions of the structure". The FCC provides a general definition of legal non-conforming status as

“a structure that was approved at the time of construction but is not presently in conformance due to subsequent change to the governing zoning ordinance.” The appeal letter also states that the tower is existing utility infrastructure located on a utility site as additional support for the belief that City Code does not govern the use of the tower.

The Planning Commission made their decision to uphold the appeal and deny the administrative approval based on the findings that:

The proposal substantially changes the tower because it is functionally a replacement of the tower, not just a structural hardening of the tower;

That the tower is not in use and therefore not a legal non-conforming use; but is illegal by virtue of abandonment and discontinuation of a legal non-conforming use.

Areas of disagreement between the City Planning Commission and Vertical Bridge that should be considered by City Council include:

What is the “Site”?

The FCC states that a modification cannot involve deployment or excavation outside of the defined site. But what is the “Site”? The FCC defines “Site” under 47 CFR 1.6100 as “... the current boundaries of the leased or owned property surrounding the tower and any access easements currently related to the site.” Under that definition, the site could arguably be the entire 5 acres owned by Mountain States Telegraph, or the site approved in the 2006 development plan for a new antenna on the existing tower, or the current lease between Vertical Bridge and the property owner.

The Planning Commission determined that the “Site” was NOT the entire 5 acres and that proposed changes to the existing fenced area surrounding the tower and excavation outside of the originally defined tower area as depicted on the submitted plans (Figure 17 of the CPC Staff Report) constitutes a substantial modification. One commissioner went further to state she believed that the “Site” was as depicted and approved on the 2006 development plan - not the entire 5 acre parcel.

Is the tower “Legal Non-Conforming”?

FCC Report and order 14-153 § 201 requires the City to allow legal non-conforming towers to be modified. However, FCC Report and Order 14-153 § 174 does not require the City to allow modification of towers that were originally deployed unlawfully. City Code 7.5.1203.F allows continuance of a legal non-conforming use that has NOT discontinued its normal operation for a continuous period of one year.

There is conflicting information on whether the tower holds operational telecommunications equipment. Vertical Bridge stated in the original submittal materials and later at the City Planning Commission hearing that this is an operational tower. However, the appellant presented information from the FCC Universal Licensing System, which concluded that the antennas on the tower were no longer functional and that the licenses were cancelled March 19, 2004 and January 1, 2013.

The FCC does not provide clear guidance on whether or not the City must approve a proposed modification to a tower that was originally deployed lawfully, later becoming legal non-conforming,

and then becoming illegal due to the action or inaction of the owner.

Is the tower illegal?

As part of the consideration in determining whether an illegal tower is eligible for modification, City Council must determine whether or not the tower is actually illegal. City Code 7.4.609 states that a tower discontinued for a period of 6 months should be removed. However, City Code 7.4.602 states that CMRS facilities that are (i) attached to existing utility infrastructure and (ii) located within utility property are exempt from the removal requirement of 7.4.609.

That leaves the question of whether the tower is “existing utility infrastructure.” There is evidence that the tower was originally built for radio and/or television broadcast. However, radio and television broadcast are not utilities (C.R.S. 40-1-101 et. seq.). But, the property the tower is on appears to be owned by a public utility. If the tower is not “existing utility infrastructure,” then it is not protected under City Code Section 7.4.602 and should have been removed after 6 months of non-use pursuant to City Code Section 7.4.609. FCC Report and Order 14-153, Paragraph 200, states that a municipality retains authority to enforce “pre-existing conditions associated with the prior approval of construction or modification of the tower.”

The Planning Commission also determined that the tower is illegal because it has been out of service since 2013, whether the analysis is made under 7.4.609 or as a legal non-conforming use that is discontinued for longer than 1 year (City Code Section 7.5.1203). There is no evidence that the FCC or Congress intended to allow modifications of towers that are illegal, rather than legal non-conforming.

It is appropriate to look to City Code in order to determine if the tower is illegal or if it is legal non-conforming. Although the Spectrum Act begins with the line “Notwithstanding Section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station,” there is ample evidence that the FCC intended to preserve elements of local jurisdiction when promulgation its regulations. FCC Report and Order 14-153 contains multiple references to preservation of local jurisdiction over siting and safety, and to the necessity to reference local codes in order to interpret FCC regulations. Paragraphs 173-175 incorporate local code requirements into the definition of “Existing,” and Paragraphs 200-203 preserve local conditions of the original siting, general building and safety codes and Federal FCC, FAA and NEPA requirements. A reasonable reading of the Spectrum Act is that local codes are necessary and relevant to interpreting FCC defined terms such as “Existing,” “Substantially Change,” and “Modification.” Beyond their usefulness in interpreting defined terms, the FCC has also determined local codes related to safety and siting are preserved.

Originally, staff approved the development plan based on the materials submitted by Vertical Bridge with their application. The application makes statements to the existing use of the tower such as “the application is a modification of an existing monopole tower” and referenced “location of an existing monopole tower”. Responses from the applicant based on neighbor concerns include the statement “the existing tower was approved and is in use today.” In addition, Page S-1 of the approved development plan includes tower elevations and details for the existing tower and the proposed tower. The existing tower elevation, as represented on this development plan page, shows an

“existing antenna” at 93 feet.

With the new information provided by Sally Maddocks from the FCC website that states that the last license was discontinued in 2013, staff questions if the tower is considered legal non-conforming because it has not been in use for over one year. Had the application stated the tower was currently non-operational, staff action may have been different.

Staff has received information that the tenant that was to place the antennas on this tower has backed out and is no longer working with Vertical Bridge. If this is the case, and there is no tenant for the tower and no current proposal for an antenna, then the proposed modification may not involve co-location, replacement or removal of transmission equipment. FCC Report and Order 14-153, Section 180, states that a modification must encompass collocation, removal or replacement of transmission equipment, and that structural hardening must accompany, and be necessary for, a co-location, removal or replacement of transmission equipment. The applicant should clarify if there is currently still a user who intends to place transmission equipment on this tower site.

It is difficult to find policies and goals within PlanCOS that guide any decision making when it comes to cellular facilities. Staff cannot make a recommendation if this proposal meets the intentions of PlanCOS. There are general statements within the plan that allude compatibility, infill and provision for infrastructure; but those policies do not specifically apply to the determinations needing to be made as part of this appeal. The appeal discussion should be specific to 47 CFR 1.6100 in determining if this proposal for modification must be approved.

Financial Implications:

N/A

Board/Commission Recommendation:

The property owner of 4807 Avondale Circle, Sally Maddocks, appealed the administrative decision of City Planning staff. At the Planning Commission hearing, Ms. Maddocks provided a detailed presentation that the city should have denied the cellular tower.

Ms. Maddocks stated that the tower itself is not a cell or communications tower for three reasons: (1) The applicant submitted a structural report to city that there was a vacant space at the top of the tower; (2) The tower photos were examined by experts and verified that the top implements located at the top of the tower, is nonfunctional transmitting cell site structurally and the top girder section is only a steel structure with no transmitters, and (3) The remaining two non-functioning antennas on the tower are listed with the national registry as cancelled FCC licenses, UHF antenna was cancelled on January 1, 2013, and VHF antenna was cancelled on March 19, 2004.

Ms. Maddocks then discussed the FCC regulations per the Telecommunications Act of 1996 and the Middle Class Tax Relief and Job Creation Act of 2012. The regulations allow for modifications as long as there are no substantial changes from the existing tower to the proposed cell tower. Again, the site plan illustrates the substantial changes between the original leased area, versus the expanded leased area for the tower project that does entail excavation and deployment outside of the current site of the tower or base station.

Ms. Maddocks also provided a discussion on City Code Section 7.4.609 (Discontinuance of CMRS) and that the freestanding facility should have been removed from the site six (6) months after

notifying the FCC of discontinuance of CMRS facility. She also discussed the applicant's inconsistencies including; the monopole is not a telecommunications tower at all, the tower is to be a new tower structure not a tower modification by the remove and replace tower language, it's not clear as to how many antennas are to be allowed for the facility, the RF engineering analysis readings are inaccurate and misleading with low power density, and the photo simulations do provide justification that there will be an impact on the adjacent residential neighborhood.

The applicant's representative, Attorney James W. Grice, spoke to the Planning Commission in response to the appellant's testimony. He indicated that the tower was built as early as 1972 and the site has been continuously owned and used since 1956 by a publicly regulated utility, from Mountain State Telephone to Qwest, and now CenturyLink. He stated that the CMRS facilities and wireless broadband antennas and facilities attached to existing utility infrastructure (i.e. existing towers) located within utility owned property are exempt from these regulations per City Code Section 7.4.602.B. He also stated that the tower has housed different FCC regulated RF-emitting and receiving equipment over fifty years including television transmission, radio transmission, and cellular transmission, and because of these reasons the tower is a legal, nonconforming use and the setbacks requirements for today's code standards don't apply.

Mr. Grice also discussed the Federal regulations pertaining to Section 6409(a) of the Middle Class Tax Relief and Job Creation Act (47 U.S.C. 1455(a)), in that state and local governments may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimension of such tower or base station. In addition, the federal law expressly pre-empts local law specifically "notwithstanding ... any other provision of law, a State or local government may not deny, and shall approve ...". He stated that the Federal law defines existing towers broadly in that "We interpret 'tower' to include all structures built for the sole or primary purpose of supporting Commission-licensed or authorized antennas, and their associated facilities, regardless of whether they currently support base station equipment at the time the application is filed."

Mr. Grice stated that the site is the 5-acre parcel and that the definition per Federal regulations is "Site. For towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site ...". He also stated that the modification project is not a substantial change and meets the Federal law requirements of the FCC. The project is a modification of the tower not a removal of the existing tower structure.

Mr. Grice indicated that the cellular tower is necessary to provide reliable call service for public safety and for 911. In addition, there is a demand for cellular service since people rely solely on mobile phones, and studies show there's nominal impact to adjacent property owners, and federal law favors existing towers and modifications, instead of the installation of new telecommunication facilities. This is not a brand, new tower structure, for the neighborhood, but a tower structure existing since 1972. He also referenced City Code Section 7.4.607.A.1 that the city favors the use of existing towers for cellular facilities, in that cellular carriers are urged to select locations on 'existing structures such as buildings, water tanks, existing towers, signs, etc.'

In addition, the Planning Commission provided three reasons why the Spectrum Act did not apply to the proposed modifications: 1. The proposed modifications to the tower 'substantially change' the tower due to excavation and deployment outside of the current site; 2. The proposed modifications to

the tower are a replacement and not a modification of the tower because the modifications constitute a replacement of the tower as illustrated per the CMRS development plans, and not merely a structural hardening; and 3. The tower is not 'existing' under federal regulations because the tower is not merely legal nonconforming, but is now an illegal tower under City Code by virtue of its long abandonment.

The entire Planning Commission was in agreement that the modifications to the monopole tower exceeded the standards limits for a substantial change due to excavation/deployment beyond the current site. However, Planning Commission members voiced differing opinions as to what constitutes the "current site." They were in agreement that the Federal law would not apply where an existing tower had not supported cellular equipment for longer than a year and was therefore illegal (and not legal non-conforming).

The Planning Commission, after reviewing and hearing testimony from both the appellant and the applicant, made a motion to overturn the administrative approval of the Maizeland & Murray CMRS development plan. The commission determined that the application did not meet the requirements of City Code and of Federal regulations as a modification under 47 C.F.R. §1.6100, based on the following reasons: (1) The existing tower does not meet the development plan review criteria of City Code Section 7.5.502.E; (2) Additional comments of the Commissioners found that the existing tower is not legal nonconforming and is no longer legal due to abandonment; (3) The proposed modifications to the tower "substantially change" the tower due to excavation and deployment outside of the current site; (4) The proposed modifications to the tower constitute a replacement of the tower, and not merely a structural hardening; and (5) The tower is not "existing" under the federal regulations because the tower is not merely legal nonconforming, but is an illegal tower under City Code by virtue of its long abandonment.

The Planning Commission voted unanimously to uphold the appeal and deny the administrative approval of the CMRS development plan. (Commissioners Hente and Graham were absent).

The Planning Commission meeting minutes are attached.

Stakeholder Process:

The public process involved with the review of this application included posting the site and sending postcards to 269 property owners within 1000 feet for internal review and a neighborhood meeting held on April 22, 2019. Approximately 32 people attended the meeting. Comments were received during internal review. Again, the site was posted and postcards sent for the City Planning Commission meeting to 269 property owners within a 1,000 foot buffer of the site, and an e-mail was sent to those that were at the neighborhood meeting and did not receive a postcard during the first mailing.

Neighborhood comments were received in opposition of the project. Those in opposition cited concerns including not meeting the FCC regulations per Code of Federal Regulations Title 47 C.F.R. § 1.6100, abandonment of the pre-existing, legal nonconforming use status, maintenance and mitigation of the 30 ft. access easement - erosion occurring, provide RFF Frequency Analysis, health implications, more heavy traffic occurring, design of the tower, access into the site, replace the existing split rail fence, don't want a cellular tower in the neighborhood, limit the footprint of construction for wildlife preservation, plant landscaping in the disturbed areas, maintenance of the cell tower, impacts on the adjacent streets, possible relocation of the cell tower, provide contact

information on the easement owner, provide construction time-frame, negative impacts on property values, tallest structure in the neighborhood, and overall opposition to a cell tower in the neighborhood.

Staff sent the CMRS development plan to the standard internal and external reviewing agencies for comments. The external agency included Council of Neighborhoods and Organizations (CONO). Those commenting agencies included Colorado Springs Utilities, Enumerations, Traffic Engineering, City Engineering Development Review, Water Resources Engineering, and Airport. The Airport Advisory Commission met on Wednesday, March 27, 2019, and provided the following comment: The Airport Advisory Commission approved staff recommendation/comments for this land use item. All agency comments have been addressed for this CMRS development plan project.

Alternatives:

1. Uphold the action of the City Planning Commission;
2. Modify the decision of the City Planning Commission; or
3. Grant the appeal and reverse the action of the City Planning Commission - granting of the appeal will essentially approve the project as proposed.

Proposed Motion:

Due to the inconsistencies in the submittal and the outstanding question if this is an existing facility, staff has prepared two motions for Council.

Should Council determine that the City Planning Commission made a correct decision in granting the appeal and denying the administratively approved development plan, motion to deny the appeal as follows:

Deny the appeal, and uphold City Planning's decision's to deny the administrative approval of the CMRS development plan for Maizeland & Murray, based upon the findings that the appeal criteria in City Code Section 7.5.906.A.4 were not met, and that the CMRS project does not meet the requirements for an eligible facilities request under 47 CFR 1.6100 et. seq.

Should Council determine that the City Planning Commission erred in its findings and elects to motion to approve the appeal, motion to approve the appeal as follow:

Approve the appeal, and overturn City Planning's decision's to deny the administrative approval of the CMRS development plan for Maizeland & Murray, based upon the findings that the appeal criteria in City Code Section 7.5.906.A.4 were met, and that the CMRS project meets the requirements for an eligible facilities request under 47 CFR 1.6100 et. seq.