

**Before the
San Francisco Board of Appeals**

Jeff & Nicole Cooper

Appellants

Permit Number: 10WR-0021

Appeal Number: 11-004

v.

Dept of Public Works, Bureau of Street Use
and Mapping

Real party in interest: NextG Networks of
California, Inc.

Respondent

RESPONSE BRIEF OF NEXTG NETWORKS OF CALIFORNIA, INC.

Natasha Ernst
Director of Government Relations
NEXTG NETWORKS, INC.
890 Tasman Drive
Milpitas, CA 95035-7439
Tel. (408) 409-6606
nernst@nextgnetworks.net

March 10, 2011

RESPONSE BRIEF OF NEXTG NETWORKS OF CALIFORNIA, INC.

I. INTRODUCTION

Most of us use our cell phones without thinking where the wireless signal comes from or why the phone works at all. However, for hundreds of thousands of residents and visitors in the City and County of San Francisco (“the City” or “San Francisco”), their cell phone signal is coming from a small antenna owned and operated by NextG Networks of California, Inc (“NextG”). NextG deploys wireless nodes on wooden streetlights and utility poles as part of its distributed antenna system (“DAS”). These wireless nodes are the smallest antenna and equipment boxes available to provide 3G and 4G cell phone coverage with the least visual impact. Because of San Francisco’s challenging topography and expansive residential areas, traditional large wireless antennas and equipment are often not possible; this makes DAS critical to cell phone coverage in the City.

NextG has been operating as a telephone corporation in California since 2003 when it received a Certificate of Public Convenience and Necessity (“CPCN”) from the California Public Utility Commission. It received its first wireless permit from San Francisco in 2008. It devotes extensive resources to ensure it complies with all federal, state, and local laws governing the permitting and installation of its wired and wireless equipment on existing utility poles and street lights.

In July 2010, NextG prepared and submitted to the Department of Public Works Bureau of Street Use and Mapping (“the Bureau”) all of the required materials to receive a Wireless Box permit on a Pacific Gas and Electric (“PG&E”) streetlight located on the sidewalk in the public right of way near 156 27th Avenue, San Francisco, California. On September 28, 2010, the Bureau issued the permit 10WR-0021. NextG completed substantially all of the construction on

December 28, 2010, and on December 31, 2010, the site began carrying commercial and e911 telecommunications traffic.

On December 22, 2010, Jeff & Nicole Cooper filed a Jurisdiction Request with the Board of Appeals (“The Board”). On January 12, 2011, the Board of Appeals granted the Jurisdiction Request, triggering an appeal process. On January 23, 2011, NextG received a copy of the Appellants’ brief. This response brief replies to the issues in raised in the Appellants’ brief and requests the Board modify the permit at issue to comply with the antenna configuration approved by the Planning Department for this type of equipment on “good” and “excellent” view streets

II. NEXTG FOLLOWED ALL FEDERAL, STATE AND LOCAL LAWS WHEN IT OBTAINED THE PERMIT FOR ATTACHMENT TO A WOODEN PG&E STREETLIGHT NEAR 156 27TH AVENUE

The Appellants have requested a complete repeal of the permit because of a possible mistake made on a city map. That remedy is unjustifiably extreme given that NextG relied upon the City’s official published map of the area’s street in preparing and submitting its application, and the City relied on the same official map in analyzing and granting NextG’s permit.

A. NextG Followed the 2007 Wireless Guidelines and Should not be Penalized Because of a Possible Mistake by the City.

When preparing the application for the Wireless Box permit 10WR-0021, NextG followed guidelines outlined in the City and County of San Francisco Department of Public Works Order No 177,173 issued on or around December 5, 2007 (“2007 Wireless Guidelines”). A complete copy of this application is attached as Exhibit A and includes (1) a transmittal letter prepared after consulting the City Planning Data for Wireless Permit Project map (“Wireless Map”) to make sure that Planning Department review would not be needed, (2) the Application, (3) proof of authority to attached to the PG&E streetlight, (4) proof of compliance with the California Environmental Quality Act (“CEQA”), (5) a radio frequency study ultimately approved by the Department of Public Health (also included), (6) a photo simulation, and (7) complete engineering drawings with equipment specifications.

NextG complied in every respect with the City's permitting requirements in obtaining the permit at issue. In San Francisco particularly, NextG exercises great care to select each site to have the lowest visual effect on the residential neighborhood, because there are often no setback requirements for the houses. It is challenging to design a network that meets the customer coverage requirements while also being as sensitive as possible that the houses directly abut the public right of way. As will be discussed further below, the pole near 156 27th Avenue was selected precisely because the tree would entirely screen the equipment box and effectively screen the antenna from many views. In addition, NextG checked the Wireless Map for 156 27th Avenue and relied on its accuracy in obtaining the permit at issue.

The Appellants make personal and unjustified attacks on city staffer, Rassendyll Dennis, who works at the Bureau with the job of reviewing permits. Brief of Appellants at 4. NextG worked closely with Mr. Dennis, as it customarily does, to make sure we provided him with everything required and that it was accurate. Mr. Dennis paid attention to every detail to make sure that applications were complete and only issued permits when everything was done. It is unfair to assign any blame of any sort to Mr. Dennis, who was only alerted to the discrepancy between the two maps on January 27, 2011—a full four months after Mr. Dennis issued the permit. NextG and the Bureau take their jobs very seriously, and yet the Appellants seek to insinuate something improper into an application process handled with accuracy and efficiency.

Thanks to NextG's network deployment, the residents and visitors to San Francisco received greatly expanded 3G service and some of the first 4G services in the nation before the end of 2010. The Appellants find reason to criticize and imply something improper about companies seeking to remedy network coverage and capacity problems in a timely manner to maintain customer satisfaction.. *Id.* at 5. Wireless carriers want to provide customers with the best coverage possible, and construction schedules are driven by contractual deadlines.

The Appellants accuse NextG of installing “as many of the sites as cheaply as possible” and insinuate that this has resulted in questionable installation quality. *Id.* The Appellants have no basis for these accusations and adduce no evidence to support them. NextG’s work throughout San Francisco has been approved by the City, the pole owner PG&E, and is in compliance with all state and local construction standards. It was built in compliance with approved engineering drawings and looks just like the photo simulation that was approved by the City. See Exhibit A.

B. It is Unclear Why There is a Discrepancy between the Two Maps

The Appellants’ brief does nothing to explain why there is a discrepancy between the General Plan map, which, while very hard to read, seems to show that the portion of 27th Avenue at issue is a “good” view street, and the Wireless Map, which does not. Neither NextG nor Mr. Dennis had the duty to translate the General Plan map over to the Wireless Map, which is more inclusive by also showing architecturally significant buildings. The Appellants’ insinuation that something improper or nefarious took place is unfounded.

C. NextG is Ready and Willing to Modify the Site to Conform with the Configuration Approved by the Planning Department.

While it is not clear why there is a discrepancy between the two maps, NextG is ready and willing to modify the antenna configuration on the pole near 156 27th Avenue to the same configuration that would have been required had the site gone to the Planning Department for review. Last summer, NextG had seven (7) sites with identical and similar antenna requirements reviewed by the Planning Department. The company developed an alternative antenna configuration for nodes on “good” and “excellent” view streets as well as those adjacent to architecturally significant structures. The Planning Department recommended all applications on “good” or “excellent” view streets for approval with the condition that the antennas be mounted to the side of the pole extension rather than on a pipe-mount above the pole extension. This approved design puts the top of the antenna at the same height as the pole extension, rather than

extending above it. Pictures of the approved configuration are attached as Exhibit C. NextG has offered and is willing to modify its installation in this location to conform to the flush-mounted standard.

In an effort resolve this issue, NextG offered this configuration to the Appellants on February 16, 2011, confirmed by email on February 17, 2011, attached at Exhibit D. If this map discrepancy had been discovered earlier, this location would have gone to the Planning Department just like the other seven (7) identical and similar sites. The Planning Department would have recommended for approval with the condition that the antenna configuration match that shown in Exhibit C. This modification would result in the same configuration here as that approved by Planning on all other applications for installations on “good” and “excellent” view streets.

The Appellants chose not to offer NextG the opportunity to assess the impact on their view from their bedroom window. Because Appellants’ Exhibit 11 is a deceptive close-up on the antenna taken with a telescopic lense without perspective, the purported obstruction of the view is distorted and misleading. We also know that the streetlight is over 18-feet away from the window. *Id.* at 6. The pole extension and antenna are visible, but not blocking light into the window, only slightly impeding a portion of the sky. This imposition can be lessened by lowering the antenna, which is what NextG has offered to do.

The Appellants did not accept NextG’s offer to modify the configuration of the node site as described in the previous paragraph. As a result, NextG is requesting that the Board modify the permit to insert this condition that would have been otherwise inserted as if the application had originally been submitted with a “good” street view label. As you can see in Exhibit E, the Planning Department has consistently in similar circumstances made its recommendation for approval conditional on the panel antenna being “flush-mounted to the extension bracket.”

In order to allow the Board to better evaluate the improved design from the perspective of the Appellants, NextG has prepared photo simulations of the location with the Planning Department approved configuration from the view of the bedroom window of the Appellants, attached as Exhibit F. The pole extension must remain in place in order to give the antenna separation from the streetlight arm, a code requirement under G.O. 95. By lowering the antenna behind the pole extension so that it does not extend higher than pole extension, the Appellants will not see much of the antenna at all.

Again, NextG requests the Board modify the existing permit 10WR-0021 by placing the identical conditions on the permit that were placed on identical antennas on “good” and “excellent” view streets, specifically from Exhibit E:

Conditions:

1. The panel antenna (Katherin) shall be flush-mounted to the extension bracket.
 2. All exposed pole attachments, including: extension arms, attachment brackets, equipment cabinets, antennas, antennae enclosures, and/or conduits be painted to match existing pole color;
 3. Should the installation vary from said conditions, the application shall be resubmitted to the Planning Department for further review and comment.
- By modifying the permit 10WR-0021, the Appellants will receive the same benefit given

to the residents living on correctly identified “good” and “excellent” view streets.

III. NEXTG’S SITE USES THE SMALLEST AVAILABLE EQUIPMENT TO MEET TECHNOLOGICAL REQUIREMENTS AND MINIMIZE VISUAL IMPACT

The Appellant states, “A wireless antenna and supporting equipment, as currently installed, is not appropriate on this quiet and scenic block.” Brief for Appellant at 7. However, as outlined in detail above, small wireless antennas are routinely placed on “good” and “excellent” view streets throughout the City. Without them, huge portions of the City’s residential neighborhoods would not have cell phone coverage.

NextG is committed to using the smallest available equipment to meet the customer coverage requirements. To give the Board an idea of size, this panel antenna is 22.8-inches by 10-inches by 5.5-inches. By comparison, in section 1503 of the Avalos legislation allows two panel antennas that are 48-inches by 18-inches by 18-inches under Tier II, so this single antenna is a fraction of the size.

The Appellant shows in Exhibit 8 a variety of NextG installations throughout the country. This is not the proper comparison because all of them use cylindrical antennas, which provide omni-directional coverage, and all but one installation are on municipally owned streetlights, which are not available in San Francisco. The customer coverage objective for the site at issue requires using a single panel antenna, which provides directional coverage.

The antenna at issue is providing excellent cell phone coverage to the green and blue areas in the Richmond and Sea Cliff neighborhoods, including the Appellants' residence and neighbors, shown in Exhibit G. Other NextG antennas provide coverage throughout the greater Richmond neighborhood. If the antenna is removed, the cell phone coverage will become very substandard, where it exists at all, and other portions will become complete "dead zones."

A. The Site Location is the Most Appropriate Site Because the Surrounding Streets Are "Excellent" View Streets or Underground Areas and the equipment is largely screened from view by a tree.

When NextG began designing this network last summer, it consulted a copy of the City's Wireless Map, the relevant portion of which the Appellants attached as Exhibit 19. That the map did not show 27th Avenue as a "good" street; but even if it had, the streetlight pole near 156 27th Avenue still would have been chosen because (1) the other surrounding streets are "excellent" view streets that the City prefers be avoided, (2) there are architecturally significant buildings to avoid further north on 27th Avenue, and (3) there are no wooden poles in the Sea Cliff neighborhood, which has underground utilities. Additionally, the streetlight pole in front of 156

27th Avenue is well screened by relatively large street trees. Even the antenna is hidden from view at some angles looking north, as illustrated in Exhibit H.

NextG understands that the Appellant can still see the installation, but if NextG relocated the installation to one of the large distribution poles on the other side of the street, the visual impact would be greater than the existing as-built configuration. The Appellant is incorrect to contend that it was “very possible that this location would have never been selected as a potential site if the DPW wireless exception map was correct.” *Id.* at 9. While NextG tries to avoid “good” and “excellent” view street, it is not always possible. Appellant’s Exhibit 7 accurately identifies a NextG node location one block over on 26th Avenue (DPW Permit 10WR-0109). This location uses different technology from that deployed at the site at issue, and NextG worked with the Planning Department to find an acceptable antenna configuration and obtain a recommendation for approval. Because of the technical network and spectrum requirements of this network, the same configuration is not possible here.

NextG has prepared a photo simulation of the reduced visual impact to 27th Avenue (looking south) if the Board modifies the permit to require the Planning Department antenna configuration. See Exhibit I. The top of the antenna will not extend over the height of the pole attachment, therefore blending with the overall structure.

B. The Visual Impact of the Panel Antenna is Smaller than and Blends with the Existing Infrastructure on 27th Avenue

The Appellant notes that the PG&E wooden streetlight in front of 156 27th Avenue did not have another equipment boxes on it. *Id.* at 6. This is correct, because G.O. 95 requirements mandate that poles with existing equipment attachments maintain certain separation distances for additional equipment. Wireless equipment is best on “clean” poles. Many of the poles in the Appellants neighborhood are cluttered with other types of utility equipment. The alternative

would be to replace such poles with larger and taller poles, something NextG typically seeks to avoid in order to minimize visual effect.

The Appellants repeatedly attack wireless infrastructure by discriminatorily focusing on the number of locations in residential area and providing selective photos while ignoring all the *other* types of infrastructure in the public rights of way completely. BofA at Exhibits 6, 7, 9. However, looking at the pictures provided by the Appellants, one cannot help but notice the very large utility poles with all sorts of non-wireless installations on the western side of 27th Avenue. *Id.* at Exhibits 11, 14, 15, 16, 17 and 18. These utility poles contain a variety of other equipment attachments, including electrical transformers and telecommunications terminals, but even this equipment gets lost in the visual clutter of the wires providing electrical, telecommunications, cable television and internet services. The Appellants provide a variety of photos of NextG's battery back-up box and PG&E's meters, which do nothing to obstruct the Appellants' view, but they fail to mention the large box located on the southwest corner of the block, which, as shown on Exhibit J, is virtually identical to that of NextG's including the PG&E meter panel. Ultimately the Appellants fail to recognize that the public way is intended to accommodate public utility installations such as NextG's. NextG has a right to install such utility infrastructure in the public ways of the State of California, including those in the City of San Francisco, pursuant to the statewide franchise accorded to NextG as a telephone corporation by the Legislature under Public Utilities Code § 7901.

The more one looks at utility poles, the more one realizes that we are constantly surrounded by all sorts of boxes, wires, and poles providing essential utility services to residents and business. NextG's equipment blends into the landscape with other existing installations and provides the newest generation of essential services—wireless cell phone and broadband internet services.

IV. NEXTG REQUESTS THE BOARD ORDER A MODIFICATION OF THE SITE TO COMPLY WITH THE CONFIGURATION APPROVED BY THE PLANNING DEPARTMENT

As discussed above, NextG requests that, if the Board believes the Appellants' appeal has any merit, the Board modify the Wireless Box permit 10WR-0021 to comply with the antenna configuration approved by the Planning Department for all identical and similar NextG antenna configurations on "good" and "excellent" view streets. We may never know exactly why there was a discrepancy between the two maps, but this modification will put the Appellant in the same position as existed with respect to NextG's applications submitted for other "good" and "excellent" view streets. NextG is ready and willing to modify the site if the Board so requires. Although other configurations are possible, they were considered and rejected by the City as more visually intrusive. The Planning Department determined that shrouding the antenna, for instance, would have a greater visual impact, because the shroud for a single panel would be 46-inches in length and 19-inches in diameter, as opposed to flush-mounting the antenna, which is only 22-inches in length and 10-inches in width. NextG requests that the Board make the same determination and modify the Wireless Box permit 10WR-0021 to conform with the Planning Department approved configuration, if it finds modification necessary or desirable. It would be difficult to argue that such a modification in this instance would not be a reasonable solution, since (i) NextG and the City's error, if there was one, was innocent, and (ii) such a configuration has been permitted in numerous other "good" view streets and would likely have been approved here, too, if noted on the application originally.

A. The Board Should Recognize NextG's Vested Rights in the Site and Its Rights to be in the Public Right of Way

Under California law, NextG's rights have properly vested at the location permitted under 10WR-0021. California vested rights doctrine can be summarized as follows:

It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon

a permit issued by the government, he acquires a vested right to complete construction in accordance to the terms of the permit. Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied.

Avco Community Developers, Inc. v. South Coast Regional Com., 17 Cal.3d 785, 791 (1976) (internal citations omitted).

NextG's rights vested on December 28, 2010, when, in reliance on Wireless Box permit 10WR-0021, it completed substantially all construction and incurred substantial liabilities in accordance with the terms of the permit. On December 31, 2010, the site began carrying commercial and e911 telecommunications traffic. Revocation of this permit would result in a violation of NextG's vested rights and expose the City to unnecessary liability.

Additionally, if the Board revoked NextG's permit, the City would be in violation of California Public Utilities Code § 7901 inasmuch as it fails to recognize that NextG is a "telephone corporation" and § 7901.1(b) for failing to treat all entities in the public way in an "equivalent manner." Sections 7901 and 7901.1 grant telephone corporations such as NextG a statewide franchise to deploy their facilities in the public rights of way and prohibit cities from interfering with such deployment, except to manage the time, place, and manner of the occupancy of the public rights of way, which management must be imposed on all entities in an equivalent manner. NextG fully complied with the 2007 Wireless Guidelines when the City properly issued permit 10WR-0021. The Board would be acting in an arbitrary and discriminatory manner should it revoke this properly issued permit.

B. The Board of Appeals Should Not Deem the Permit Invalid

NextG requests that the Board acknowledge that it acted in good faith and made every effort to follow the wireless guidelines and Wireless map as required by the City. In these

circumstances, NextG request the Board reject the Appellants' demand that the permit be deemed invalid.

If this antenna is removed, there would be an immediate deterioration or complete loss of cell phone services to the people who rely on their cell phones to work in their homes; this is particularly critical as people "cut-the-cord" when they have reliable cell phone coverage. The Appellants and their neighbors currently due, but in asking for the repeal of 10WR-0021, the Appellants are essentially asking the Board to cut off communications for the residents in their neighborhood, which is not very neighborly, particularly when NextG is offering to modify the antenna configuration for them.

However, should the Board decide to repeal the permit entirely, NextG request that it make it clear that reissuance of the permit relate back to the 2007 Wireless Guidelines because that was the law at the time this permit was applied for and obtained.

v. CONCLUSION

Based on the foregoing, NextG respectfully requests that the Board reinstate NextG's permit 10WR-0021.

Respectfully submitted,



Natasha Ernst
Director of Government Relations
NEXTG NETWORKS, INC.
890 Tasman Drive
Milpitas, CA 95035-7439
Tel. (408) 409-6606
nernst@nextgnetworks.net

March 10, 2011