

CALIFORNIA COASTAL COMMISSION

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Staff: RMR/LB *RMR*
Staff Report: December 27, 1995
Hearing Date: January 9-12, 1996
Comm. Action on Findings:



STAFF REPORT: REVISED FINDINGS
Denial of Revocation Request

APPLICATION NO.: R5-93-027

PERMITTEE: PacTel Cellular

AGENT: Pillsbury Madison & Sutro

INDIVIDUALS REQUESTING REVOCATION:

Catherine Rowe and David Carroll of Parents for the Elimination of the Schoolyard Tower, Jeanne Boyle (8811 Pacific Coast Highway #209) and Lynn Freeman Massey (8811 Coast Highway, #210) residents of the El Morro Trailer Park

PROJECT DESCRIPTION: Construction of an unmanned cellular telecommunication facility with an underground 25 foot long by 11 foot wide and 10 foot high equipment room and a 90 foot high monopole with five 15 foot high antennas.

PROJECT LOCATION: El Morro Elementary School, 8681 North Pacific Coast Highway
Laguna Beach, Orange County

COMMISSION ACTION: Denial of Request for Revocation

DATE OF COMMISSION ACTION: May 10, 1995

COMMISSIONERS ON PREVAILING SIDE: Williams, Doo, Flemming, Giacomini,
Glickfeld, Rick, Vargas, Staffel

STAFF NOTE

Although the primary basis for denial of the revocation request was that the persons requesting the revocation did not pursue the revocation before the Commission with due diligence as per Section 13108(d) of the California Code of Regulations, the Commission also made findings regarding the evidence presented to support revocation under Section 13105(a) or (b) of Title 14 of the California Code of Regulations. The Commission determined that the evidence presented was not sufficient to support a finding for revocation under Section 13105(a) or (b) of Title 14 of the California Code of Regulations. These findings are detailed in section E of this staff report.

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following revised findings in support of the Commission's action on May 10, 1995 denying the request for revocation of permit.

STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolution:

I. DENIAL

The Commission hereby denies the request for revocation on the grounds that the persons requesting revocation did not file the request with due diligence according to Section 13108(d) of Title 14 of the California Code of Regulations and that the evidence presented at the hearing was not sufficient to support revocation under section 13105(a) or (b) of Title 14 of the California Code of Regulations.

II. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares as follows:

A. Project Description and Location

In April 1993 the Commission approved development consisting of an unmanned cellular telecommunication facility with an underground 25 foot long by 11 foot wide and 10 foot high equipment room and a 90 foot high monopole with five 15 foot high communication antennas. The development was sited on a 32 x 32 foot area leased from the Laguna Beach Unified School District. The monopole was installed in September of 1993.

The monopole is located within the property boundary of the El Morro Elementary School, which is an inholding located within the boundaries of Crystal Cove State Park. To the east is the inland portion of Crystal Cove State Park. To the north is the Newport Coast development area. To the north and east is the Laguna Beach Water District reservoir. To the west is the Pacific Coast Highway and then the seaward portion of Crystal Cove State Park. To the south is the El Morro Trailer Park which is owned by the State Department of Parks and Recreation and leased to tenants.

B. Permit History

At the April 1993 hearing, staff recommended denial of the proposed development on the grounds that it presented significant adverse visual impacts from the inland side of Crystal Cove State Park, from the Pacific Coast Highway scenic corridor, and from the seaward side of Crystal Cove State Park.

The development was approved with special conditions by the Commission by a vote of 7 to 0. Commissioners voting were Doo, Glickfeld, Neely, Rick, Wright, Yokoyama and Gwyn. Included in the Commission's approval was a special condition to mitigate the impacts of the monopole by situating it to maximize screening by trees and to submit a color scheme acceptable to both the Executive Director and the State Department of Parks and Recreation. A

revised findings staff report was prepared to support the Commission's decision to approve the project.

The revised findings were approved by the Commission in June 1993. The special condition was satisfied and the permit was issued on June 22, 1993. The monopole was installed in September of 1993.

C. Revocation Request

Section 13106 of the California Code of Regulations states:

Any person who did not have an opportunity to fully participate in the original permit proceeding by reason of the permit applicant's intentional inclusion of inaccurate information or failure to provide adequate public notice as specified in Section 13105 may request revocation of a permit by application to the executive director of the commission specifying, with particularity, the grounds for revocation.

On March 15, 1995 the South Coast District Office received a written request for revocation of coastal development permit 5-93-027 from Catherine Rowe and David Carroll, spokespersons for PEST (Parents for the Elimination of the Schoolyard Tower). At the revocation request hearing PEST was joined by two residents of the El Morro Mobile Home Park, Jeanne Boyle and Lynn Freeman-Massey, who are residents within 100 feet of the parcel on which the development is proposed.

The persons requesting revocation contend that the permit was approved without the necessary public notice, and also that AirTouch made intentional misrepresentations as to the monopole's visual impacts as seen from Pacific Coast Highway or within Crystal Cove State Park.

D. Due Diligence

Section 13108(d) of the California Code of Regulations states:

A permit may be revoked by a majority vote of the members of the commission present if it finds that any of the grounds specified in Section 13105 exist. If the commission finds that the request for revocation was not filed with due diligence, it shall deny the request. (emphasis added)

The persons requesting revocation maintained that they pursued the request for revocation with due diligence. They contend that because they had received no public notice of the project they were unaware of the Coastal Commission hearing process. They maintained that they pursued negotiations with both the School District and PacTel Cellular beginning in the fall of 1993 when they first became aware of the project but did not obtain the records of the project showing Coastal Commission involvement until December 1994. They then contacted Commission staff and filed for revocation in March of 1995.

The agent for the permittee maintained that the persons requesting revocation did not pursue revocation before the Coastal Commission with due diligence. The agent stated that the school site was posted in April 1993 for the original Coastal Commission hearing, was posted again in June 1993 for revised findings, and the monopole was erected in September of 1993. The agent for

the permittee stated that once the objectors saw the monopole they should have made inquiries and begun the process of revocation. However, the agent noted that the persons requesting revocation did not contact the Commission staff until March of 1995, approximately one and a half years after the installation of the monopole.

The Commission finds that the site was posted once for the April 1993 hearing and again for the revised findings in June 1993. The Commission finds that the 90 foot monopole was constructed and in place by September of 1993. The Commission finds that many of the people requesting revocation, particularly those in the mobile home area, knew of the Coastal Commission's involvement in this geographic area. Further the Commission finds that it was reasonable to expect that the persons requesting revocation would have discovered, when they began investigating the construction of the monopole and talking with both the school district and Pac-Tel Cellular people, that the Coastal Commission was involved and had issued a coastal development permit. Finally, the Commission finds that because the persons requesting revocation did not bring forward a request for revocation until two years after the Commission's approval and a year and a half after the installation of the monopole, the persons requesting revocation did not in fact pursue the revocation request with due diligence. The Commission, therefore, denied the request for revocation of permit based upon section 13108(d) of Title 14 of the California Code of Regulations.

E. Grounds for Revocation

1. Section 13105(a)

Pursuant to 14 California Code of Regulations (C.C.R.) Section 13108, the Commission has the discretion to grant or deny a request to revoke a coastal development permit if it finds that either of the grounds, as specified in 14 C.C.R. Section 13105 exist. 14 C.C.R. Section 13105 states, in part, that the grounds for revoking the permit shall be as follows: (a) that the permit application intentionally included inaccurate, erroneous or incomplete information where accurate and complete information would have caused the Commission to act differently; and, (b) that there was a failure to comply with the notice provisions where the views of the person(s) not notified were not otherwise made known to the Commission and could have caused the Commission to act differently.

With regard to any alleged grounds for revocation under Section 13105(a), the Commission must consider three essential elements or tests:

- a. Did the application include inaccurate, erroneous or incomplete information relative to the permit amendment?
- b. If the application included inaccurate, erroneous or incomplete information, was the inclusion intentional (emphasis added) on the part of the applicant?
- c. Would accurate and complete information have caused the Commission to require additional or different conditions or deny the application?

As indicated above, the first standard consists, in part, of the inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application. The revocation request alleges that the

applicant misrepresented the visual impact of the monopole from the park and specifically the ranger station, the availability of alternative locations, and the visual impact of the existing L.A. Cellular monopole located at the water district site. A staff recommendation supporting revocation was based upon specific statements made by the permittee at the April 1993 hearing concerning the visual impact of the monopole from various points in the State Park, an exhibit of a cross-section of the terrain from the ranger station to the monopole showing no visual impacts from the ranger station, and the fact that the monopole was more visible from PCH than the permittee claimed.

The Commissioners find that the large scale cross-section presented at the original permit hearing was incorrect. However, the Commission also finds that the permittee did acknowledge, by other photographic evidence and verbal testimony, at the April 1993 hearing that the monopole would have visual impact from within the State Park, at the Ranger Station and also along Pacific Coast Highway. The Commission further finds that in imposing a special condition requiring the applicant to color the monopole to mitigate the visual impacts, the Commission assessed the conflicting evidence of visual impact in the record. Therefore, the Commission finds, as discussed further below, that although the application included erroneous information, the Commission did not base its discussion on any information alleged to be inaccurate.

The second standard of Section 13105(a) consists of determining whether the inclusion of inaccurate, erroneous or incomplete information was intentional. Staff has not found any evidence of the intentional inclusion of inaccurate, erroneous or incomplete information. Further, the revocation request does not contain any evidence that would indicate that the information presented was intentionally inaccurate, erroneous or incomplete. Therefore, the Commission finds that there was not any intentional inclusion of inaccurate, erroneous or incomplete information in connection with this permit application. The second standard is not met.

The third standard for the Commission to consider is whether accurate or complete information would have resulted in the requirement of additional or different conditions or the denial of the application. No factual evidence has been presented by the applicant for revocation which would indicate that the inclusion of additional information would have resulted in the Commission requiring different conditions or denial of the permit. In its revocation request, PEST did not allege that its views were not otherwise made known to the Commission.

Moreover, in a March 31, 1993 Staff Report, the Commission Staff recommended denial of AirTouch's project. The Staff Report discussed in detail the Staff's projections of the project's potential visual impacts on visitors to the Park and from the PCH. At its April 15, 1993 hearing, the Commission decided by a 7-0 vote to approve the project. On June 10, 1993, the Commission adopted revised findings for approval of the project. These findings clearly acknowledge the competing views on visibility and indicate the pole would be visible to some degree. Therefore, the Commission cannot find, based on the evidence, that the third standard has been met.

Therefore, the Commission finds, there is no evidence to indicate that the inclusion by the applicant of additional information in connection with the subject coastal development would have caused the Commission to require

additional or different conditions on the permit or deny the application. Therefore, the revocation request does not meet the grounds for revocation under section 13105(a) of the California Code of Regulations, as all of the three essential elements of that section are not met.

2. Section 13105(b)

The second alleged grounds for revocation of the permit is that the applicant failed to comply with the Commission's notice requirements. The three elements the Commission must consider are: 1) whether or not there was "failure to comply with the notice provisions of Section 13054, 2) whether the views of the person(s) not notified were not otherwise made known to the Commission and, 3) whether the views of the person not notified could have caused the Commission to require additional or different conditions on a permit or deny an application.

First Element of Section 13105(b)

The revocation request asserts that the applicant did not provide the required public notice. The notification requirements for permits are found in Sections 13054 of the Coastal Commission's administrative regulations. These provisions require, that (1) the applicant shall provide a list of addresses of all residences and parcels within one hundred feet of the perimeter of the parcel on which the development is proposed, (2) provide stamped envelopes for all parcels previously described, and (3) post a notice, provided by the Commission, in a conspicuous place on site which describes the nature of the proposed development.

a. 13054(a)

Section 13054(a) states:

...provide the Commission with a list of the addresses of all residences, including apartments and each residence within a condominium complex, and all parcels of real property of record located within one hundred feet of the perimeter of the parcel on which the development is proposed and the name and address of the owner of record on the date on which the application is submitted, of any such parcel which does not have an address or is uninhabited.

The persons requesting revocation assert that the permittee did not comply with the noticing provisions of Section 13054(a) in that residents of the El Morro Mobile Home Park were not notified. Instructions in the coastal development permit application require that the property owners and occupants within 100 feet of the perimeter of the parcel on which the development is proposed be sent written notice of a public hearing.

Coastal Commission staff has reviewed the original permit file in order to determine if the notice provisions of Sections 13054 have been met. Staff has determined the following. Staff has independently verified that the mailing list did not include all residents within 100 feet of the subject parcel. The permittee had notified all property owners but not all occupants within 100 feet of the subject parcel.

Residents of the mobile home park at sites 207, 210, 212, 219 and 220 signed a petition attached to the request for revocation. Residents of the mobile home park at units 210, 223, 195, 141, 154, and 181 signed another petition which states that had they known about the development, they would have objected to it. Six of these residences are within 100 feet of the school property boundary. Two of the residents within 100' were parties to the request for revocation.

Therefore the Commission finds that the permittees did not comply with the noticing requirements of 13054(a) of the Coastal Act in that they did not notify in writing all residents within 100' of the perimeter of the parcel where the project was situated.

b. 13054(b)

Section 13054(b) states that the applicant must post, at a conspicuous place, easily read by the public and as close as possible to the site of the proposed development, notice that an application for a permit for the proposed development has been submitted to the Commission.

The persons requesting revocation maintained that they frequented the school grounds but had never seen the posting of the permit hearing and that they were in fact interested parties because their children attended school at the site. They alleged that had the sign been posted in a conspicuous location they would have seen it. The representatives of the permittee stated that school officials had both chosen the site for the posting notice and had physically posted the notice as well. They maintained that they fulfilled their responsibility under 13054(b) of the California Code of Regulations.

The permittee submitted the Sworn declaration of Marie Landaal, AirTouch's consultant who supervised the posting. On March 23, 1993, she obtained posting of the notice of the CDP application at the school, following direction provided by school staff as to a "conspicuous" location most "easily read by the public." For the April 15 hearing, the wall was posted adjacent to the site where other notices were posted. For the June 10 hearing, the site chosen was a bulletin board located near the school office. The permittee argues that these locations were directed by the school as most likely to reach the greatest number of concerned public, while being "as close a possible to the site of the proposed development."

The Commission finds that the permittee complied with the noticing provisions of Section 13054(b) of the California Code of Regulations because the permittee posted the notice at the location chosen by and under the direction of the local school authorities.

Second Element of Section 13105(b)

Regarding the second element of Section 13105(b), Section 13105(b) states that there are grounds for revocation when there is a failure to comply with the notice provisions of Section 13054, where the views of the person(s) not notified were not otherwise made known to the Commission and could have caused the commission to require additional or different conditions on a permit or deny an application. (emphasis added)

The persons requesting revocation contend that had they been able to attend the hearing they could have presented cross-sections and photographic and other materials disputing and contradicting the expert testimony of the permittee. They contend that this fact combined with the fact that alternative locations were available to the permittee to site the monopole, could have caused the Commission to change its decision or impose different conditions.

The persons requesting revocation presented photographs showing the visual impact of the project from points north and south on Pacific Coast Highway, points inland of the project, and from points on the seaward side of Crystal Cove State Park which, they say, disputed the claims of the permittee. The persons requesting revocation stated that they could have provided evidence showing that other potential sites were available to locate the monopole. They stated that these facts, combined with the fact that many people, including parents, mobile-home residents, children and teachers would have showed up to protest the proposed location of the project, would have caused the Commission to reconsider approving the project.

Regarding this second part of the above test, it is necessary to determine whether the views of the persons who were not notified were otherwise made known to the Commission. In this case, the views expressed in the revocation request (largely, that the monopole would be visible) were made known to the Commission at the time the Commission originally approved the monopole and again at the time the revised findings in support of the Commission's action were adopted on June 30, 1993.

The Commission finds that the permittee acknowledged both by photographic and verbal testimony that the monopole would have visual impacts from both within the State Park and along Pacific Coast Highway. The Commission finds the fact stated at the 1993 hearing that the monopole would extend approximately 30 feet above the surrounding trees. The Commission finds that in requiring a special condition to mitigate the impacts of the monopole, the Commission was acknowledging that the development would have visual impacts. Finally, the Commission finds that whether the pole was visible for two seconds or for ten seconds was immaterial to the fact that the pole was visible.

Therefore, the Commission finds that no evidence exists to suggest that the views of persons not notified were not otherwise made known to the Commission.

Third Element of 13105(b)

Lastly, the third element of Section 13105(b) asks if the views of persons not notified and not otherwise made known to the Commission could have caused the Commission to require additional or different conditions or deny the application.

The Commission finds that no evidence exists to suggest that the views of persons not notified were not otherwise made known to the Commission. In addition, based on the discussion provided in the preceding paragraph relative to the staff's and Commission's knowledge of the visibility of the monopole, the Commission finds that any issues or views that may have been raised with respect to the project could not have caused the Commission to either require additional or different conditions or deny the application. Therefore, the Commission finds that the third element of the test of 13105(b) is not met.

Because all three essential elements of 13105(b) are not satisfied, the Commission finds that no grounds for revocation exist under 13105(b).

Conclusion

As listed above, the request for revocation does not meet the requirements of 14 C.C.R. 13105(a) or (b). The Commission finds, therefore, that this revocation request is denied on the basis that no grounds exist because there is no intentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application which would have caused the Commission to require additional or different conditions on a permit or deny an application; and on the basis that there is no evidence that there was defective notice where the views of the person(s) not notified were not otherwise made known to the Commission and could have caused the Commission to require additional or different conditions on a permit or deny an application.

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