



Council Meeting: November 13, 2012

SUBJECT: 2012-7112 Discussion and Possible Action to Introduce an Ordinance to Amend Regulations for Telecommunication Facilities Located in Public Right of Way (Study Issue)

REPORT IN BRIEF

Using utility and City light poles for wireless telecommunication facilities (or cell sites) is an effective way for wireless carriers to provide service to hard-to-serve areas of Sunnyvale. This study considers options for how to review these applications (see Attachment A for study issue paper). Although Sunnyvale has not had a large number of requests for these facilities, other nearby cities have experienced significant interest in using this technology to provide service to residential areas of their cities.

In 2010, T-Mobile proposed using eight utility poles (known as joint poles, meaning joint usage by different utilities) to provide wireless coverage in residential areas of Sunnyvale. Since the Zoning Code does not clearly apply to poles in the public right-of-way (ROW), an encroachment permit from the Department of Public Works (DPW) was used. An encroachment permit is typically used for short-term public projects in the ROW and does not typically include public notification, rights to appeal, or discretion in applying design criteria or conditions of approval.

In order to provide better direction and guidance to carriers and the public, staff recommends adopting the Criteria for Wireless Facilities on Joint Poles and Light Poles in the Public Right-of-way (see Attachment B for draft criteria). Staff also recommends amending the Zoning Code to require a planning permit for wireless facilities in the ROW.

Initially, staff recommended using a staff-level Miscellaneous Plan Permit (MPP) or Planning Commission Use Permit for joint pole or light pole applications. After receiving feedback from an attorney for a wireless carrier prior to the Planning Commission hearing on October 22, 2012, staff recommended changing the permit type to a Design Review for these applications. The Planning Commission voted unanimously to accept the changes and recommended to Council to adopt the draft criteria and to amend the zoning code to include the change in permit type (Attachment C).

Design Review (DR) would assure the review is limited to design criteria and not to determine whether the use is necessary, which the courts have determined is beyond the scope of a city's review. Design Review would still allow discretion in applying design criteria, and would include public notice and appeal rights to the community. Projects located away from sensitive locations, such as historic resource areas, a public park or a public school, would be reviewed through a staff-level DR application, with the decision appealable to the Planning Commission.

If the proposed location is within 300 feet of those sensitive locations, or if the director determines that the facility creates a visual impact or is not in keeping with the visual character of the surrounding area, a Design Review with a public hearing would be required. That permit would be appealable to the City Council.

BACKGROUND

The City adopted wireless telecommunications zoning regulations in 1999, with the focus on wireless projects on private property. Since that time, there has been rapid growth and revolutionary changes in the wireless telecommunications field, with the focus moving from providing adequate coverage for car phones, to relying on wireless phones for home service, to the exploding use of mobile devices and the concomitant desire for data service. With this growth and expansion, wireless carriers' needs have evolved from a focus for *coverage* to providing *capacity* to serve the growing numbers of mobile devices. Since a cell site serves a limited number of users at a time, the carriers need more sites closer to their users. This has resulted in having more, less tall cell sites, especially in residential areas.

Providing service to some parts of Sunnyvale, especially residential areas, is a particular challenge because of the lack of taller structures on which to locate their antennas and equipment. One option for providing wireless coverage in these hard-to-serve areas is to use light poles or utility poles for new wireless facilities. These facilities can be individual poles to serve a certain location or a broader solution known as DAS (distributed antenna system) where a large area is covered by a string of wireless facilities on utility poles.

T-Mobile was seeking individual joint poles to cover specific areas of Sunnyvale, but stopped working on the project when AT&T proposed a merger, and the facilities were never approved nor built.

EXISTING POLICY

GOAL CV-1: Achieve a community in which citizens and businesses are informed about local issues and City programs and services.

GOAL LT-2 Attractive Community: Preserve and enhance an attractive community, with a positive image and a sense of place, which consists of distinctive neighborhoods, pockets of interest, and human scale development.

Policy LT-4.1 Protect the integrity of the City’s neighborhoods; whether residential, industrial or commercial.

Policy LT-4.2 Require new development to be compatible with the neighborhood, adjacent land uses, and the transportation system.

Policy LT-4.4 Preserve and enhance the high quality character of residential neighborhoods.

DISCUSSION

Much of Sunnyvale developed with large blocks of residential neighborhoods built around a public facility, such as a school or park, with neighborhood commercial uses on the perimeter (especially in south Sunnyvale). This development pattern makes it difficult for wireless carriers to serve the many residences in these large blocks because the Zoning Code prohibits wireless facilities on sites with residential uses. Although the carriers have used public parks and churches for wireless facilities, these sites may not always provide the carriers with the coverage they need.

Wireless facilities can be found on taller buildings in commercial or industrial areas, on PG&E towers, on church steeples, on the roofs of buildings, or freestanding poles and towers built for their purposes. Wireless carriers are “vertical opportunists,” looking for tall structures on which to mount antennas, because objects such as buildings and trees can block the antenna’s signal. Given the difficulty in adding new tall structures, particularly in residential areas, carriers are increasingly looking at existing utility poles in the public right-of-way on which to add their antennas. These poles are often the tallest objects in a neighborhood (the zoning height limit for buildings is 30 feet in single-family zones; however most of the homes are not 30 feet tall). The majority of the residential areas in Sunnyvale have overhead utility lines, with the utility poles located either in a property’s backyard or in front in the public right-of-way.

A consortium known as the Joint Pole Association (JPA) owns the majority of these utility poles. PG&E, AT&T, Comcast, wireless carriers and other entities make up the Northern California Joint Pole Association (see Attachment D for their recent membership). Electric, telephone, and cable T.V. lines are typically found on joint poles (see Attachment E for a description of how joint poles are used).

When a wireless company uses a joint pole for a cell site, they prefer to mount their antennas above the top wires (typically electrical lines), with the radio equipment and utility boxes mounted below the lowest line (typically cable or

telephone, see Attachment F). The radio equipment used at this type of site is known as a “microcell.” This type of equipment can usually handle fewer calls and cover a smaller area than a typical wireless facility (or macrocell); therefore, an installation on a joint pole has a more limited use. The design of a typical joint pole wireless facility needs to have all necessary equipment mounted on the side of the pole, including the microcells and a PG&E meter that allows use of the power from the electric lines on the pole. There is typically no ground equipment associated with these facilities (see Attachment F for pictures of different types of facilities).

The California Public Utility Commission (CPUC) has guidelines and rules for joint poles, and specifically for their use by wireless carriers. The CPUC does not treat commercial wireless providers as public utilities in the same sense as electric and landline telephone utilities in that local jurisdiction approval can be required for a wireless facility where it may not be required for a true utility. City-owned light poles can also be used for wireless facilities. The installation is generally the same on a light pole, but the City owns the pole (not the JPA) and has independent authority to allow its use for telecommunication facilities as the owner.

Neither type of pole is set up to allow co-location of more than one carrier. This is because the equipment boxes are mounted on the pole below the lowest utility lines, and there are requirements to require climbing space for workers to climb the pole as well as possible structural issues due to weight on the pole.

Current Ordinance and Requirements

In general, the Zoning Code provides regulations for private properties, because the public realm is historically where City or utility projects are located. In cases where the right-of-way (ROW) is used, it is typically for temporary projects for which an encroachment permit is obtained. The City Zoning Code has been applied to private uses in the ROW, such as fences. This study addresses only utility poles located in the ROW.

Utility poles located in the rear yard of a residence are on land owned by the private property owner (in an easement) and the use of these poles for a wireless facility would be **prohibited** because wireless telecommunications facilities are prohibited on residentially used properties.

When T-Mobile approached the City about using joint poles in the ROW, staff opted for the Department of Public Works (DPW) to issue an encroachment permit for each proposed site, with specific requirements for the permit (see Attachment F for a description of the requirements). DPW was the lead department, with support from the Planning Division and the Office of the City Attorney (OCA). As the City worked with T-Mobile on these projects, it became evident that the encroachment process had limitations. Encroachment permits

do not have a formal noticing process and do not provide for an appeal process. Neighbors were frustrated by the process, and had no appeal rights should the permit have been issued. If the permit requirements were regulated by the Zoning Code, typical appeal procedures would apply and projects would be reviewed for compliance with design criteria.

Types of Wireless Telecommunications Found in the ROW

In general, there are two different types of wireless telecommunication facilities found in the ROW: Singular antenna sites, and distributed antennas systems (DAS). Singular antenna sites are those where a carrier sees a specific need in an area for which no other good option exists. In general, carriers prefer macro sites over micro because of the wider range of options allowed, including range, capacity and different types of antennas for the varying technologies used.

A DAS is a project by a carrier or a third party that installs the infrastructure for a subsequent carrier to use. These facilities tend to string sites together by using fiber optic lines from pole to pole, and are typically used to cover a wider area with a definable network of sites.

Other City Approaches

Technology using poles in the ROW has been used in many different communities throughout the country, and specifically in nearby cities. Palo Alto, Los Altos and Mountain View recently had requests to install DAS and/or individual sites on joint poles throughout their cities. Each city used a different approach in reviewing the project. Palo Alto, which owns the power poles, first approved the project in concept, and then required each carrier to obtain design review approval for each site. Mountain View treated the sites the same as any other wireless telecommunications facility, and required design review approval at a noticed public hearing. Both cities focused their review on the design of the site, specifically how the antennas were mounted on the poles. An example of a method of installation that was not approved in Mountain View is shown in Attachment E. Instead, Mountain View approved a design where the antennas are mounted inside a single fiberglass radome mounted on the top of the pole. Los Altos used the encroachment permit process, with the permit issued by Public Works.

Items to Consider

Wireless telecommunication facilities bring out a great deal of passion from members of the community. Residents that live closest to a facility do not want to have a cell site adjacent to them for the benefit of a larger area. Many people have concerns about the health impacts of the facilities, but the federal Telecommunications Act of 1996 prohibits communities from setting their own radio frequency (RF) emission standards. This restriction applies to joint pole sites as it would any other site. A city can require carriers to prepare an emissions study to prove the facility will not exceed federal standards. The

City's main purview in reviewing telecommunications projects is for aesthetic and compatibility concerns.

Although there is often opposition to cell site applications, wireless users expect their device to work where and when they need them, and many people support having better coverage in their homes (known as "in-building" coverage). In Sunnyvale, that type of coverage may not be possible unless wireless facilities are allowed closer to the homes. Using existing utility poles for wireless facilities is a good alternative to a new monopole; however, under current rules, it is possible that a joint pole next to a sidewalk or park strip and immediately adjacent to a home can be used without public input, where a new freestanding pole at a public park would be required to meet setbacks, meet specific design criteria, and allow an appeal of any decision.

In considering using a joint pole as a wireless telecommunication site, there are a few items to consider:

- Due to CPUC rules governing safe distances from power lines, the antennas are required to have a six-foot clear zone from the top line to the bottom of the antenna. With a typical six-foot panel antenna, this results in a 12-foot extension from the top of the existing pole to the top of the antennas (which are typically 30-40 feet in height).
- Carriers want from three to six cabinets/boxes mounted on the pole. In some cases, this and/or the antennas may require the pole be replaced due to structural load concerns.
- Most power can be brought to the new pole-mounted meter directly from the power line on the pole, but if the existing power voltage is too high, a transformer may need to be added to the pole, which would result in additional pole clutter.
- Most telephone service (telco) can also be brought directly from the existing telephone lines on the pole, but there are cases where telco needs to be brought to the pole from a different pole. In a couple of the T-Mobile cases, they proposed to add a new power or telco overhead line across the back of the adjacent residential property to the joint pole. The adjacent property owner, in these cases, would not only have a cell site on the pole next to their home, but could also have an additional overhead line running across the back of their property.
- Finding an appropriate pole location is a balance between the carrier's RF coverage needs and the area in which it is located. Staff believes it best to not have the cell sites located immediately in front of a home, but is better along the street side yard of a corner lot. Also, it may be more appropriate for a chosen pole to be on more heavily travelled roads, rather than on quiet residential neighborhood streets.
- The carrier pays the JPA for use of the joint pole for a wireless site, and since no equipment would be on the ground, the City would not be

compensated. It is possible for a carrier to use City light poles, for which compensation would be expected.

- The City's plan for undergrounding utilities should be considered whenever reviewing a joint pole application, since the long-term goal is to underground existing utility poles, especially along arterial roads.
- Wireless facilities require periodic service, which consists of a technician visiting the site to tune the antennas and perform service on the radio equipment.

Staff has identified the following objectives for review of telecommunications facilities in the ROW:

- Allow public input on any proposal;
- Provide clear direction to the carriers, public, decision-makers and staff about the process and standards used in review of an application;
- Create an efficient and understandable process, preferably one already in use;
- Prepare clear design and operational guideline criteria;
- Include the staff Project Review Committee (PRC) in any joint pole application in order to have input from all key divisions and departments (Building, DPW, Public Safety); and
- Regardless of permit type, an encroachment permit from DPW will be required for any construction in the public ROW (it would be an expanded encroachment review if no planning permit is required).

Criteria for Wireless Facilities on Joint Poles in the ROW

For any type of application used (zoning or encroachment), design criteria should be established for requested installation (See Attachment B for draft criteria), including:

- Acceptable poles would be located along arterials or residential collectors.
- Poles in front of a home or across the street from the front of a home are not acceptable.
- Pole height should not be increased beyond the minimum to meet CPUC standards (resulting in a 12 foot extension of the pole), unless the specific site location is not easily visible from nearby residences; overall height should not exceed 60 feet.
- No new overhead lines shall not be added to serve the wireless facility,
- The number of equipment cabinets on a pole should be limited to three to minimize the visual impact to the surrounding area.
- Utility poles that are an active part of the City's underground utility program are not acceptable (but light poles in those areas can be considered).
- Carriers shall defend, indemnify, and hold harmless the City for its facility.

APPROACHES

There are two basic permit options that can be chosen to address permitting of these facilities: An encroachment permit or a zoning permit. These types of permits can be summarized as follows:

Encroachment Permit

If a Planning permit is not chosen as the permitting option, this type of telecommunications facility would require an encroachment permit from DPW (see Attachment F for process used in the past). Any work in the public ROW requires an encroachment permit, but if an encroachment permit was the preferred permitting option, a more extensive review would be necessary to include public notification and a limited level of design review.

Zoning Permit Options

Amend the Zoning Code: If a planning permit is chosen to review these types of projects, Title 19 should be amended to clearly apply to facilities in the ROW. Permit types could include either a staff-level Design Review permit or a Design Review requiring public hearing. Both could include 300 foot noticing requirements, conditions of approval, and appeal options. A Design Review requiring public hearing would require a noticed public hearing. The staff-level Design Review permit could be appealed to the Planning Commission. This amendment would not change the regulation prohibiting a wireless telecommunications facility on a residential property that has a residential use (except for personal use, as specified in the Zoning Code). An encroachment permit would still be required for any work proposed in the ROW, but that permit would focus on traffic control and ensuring public facilities are protected during construction.

There are three basic application options to review these applications with existing planning permit types:

1. Require Design Review with public hearing for all applications;
2. Require Design Review without a public hearing for all applications; or
3. Require a blend of permit types as shown below.

Staff suggests that an appropriate approach is a blend of permit types as shown below.

Design Review Requiring Public Hearing: Sites located or designed, as follows would require consideration by the Planning Commission:

- Next to a park or public school site;
- In Heritage resource areas;
- Within 300 feet of a Heritage landmark or Heritage resource; and
- Projects that do not meet the Criteria for Wireless Facilities on Poles in the ROW.

Design Review Without Public Hearing: This staff-level permit could be required for the following:

- Other areas not defined above in the Design Review with public hearing section; and
- Projects that meet the required design criteria.

If a staff-level Design Review application (no public hearing) is deemed to create a visual impact or is not in keeping with the character of the surrounding area, the permit could be elevated to the Planning Commission, as determined by the Community Development Director.

FISCAL IMPACT

There is no direct fiscal impact on the location of wireless facilities on joint poles. There would be a fiscal benefit if the facility were located on a City-owned pole, in which case a rental rate can be applied. Regardless of the location, a carrier would need to indemnify the City from damages or accidents due to the facility being located in the public ROW. All types of review could include notice to nearby property owners and tenants, and decisions could be appealed.

PUBLIC CONTACT

Public Contact was made through posting of the Council agenda on the City's official-notice bulletin board, on the City's Web site, and the availability of the agenda and report in the Office of the City Clerk. A public outreach meeting was held on September 12, 2012, at which a few people attended with specifying concerns about safety, commercial uses in residential neighborhoods and the desire to have better wireless coverage at their homes. Staff also met with industry representatives on September 19, 2012 in order to better understand their concerns and to learn more about the technology.

On October 22, 2012, the Planning Commission considered the project at a noticed public hearing. Two letters were received for the project, one from a carrier's attorney and the other from a Sunnyvale resident (see Attachment H). As a result of the letter from the attorney, staff revised the recommended permit type to Design Review, in order to make clear the intent of review by the City. The Planning Commission voted unanimously to accept the revised ordinance, and to adopt the recommended criteria for wireless telecommunications facilities in the public right-of-way.

ALTERNATIVES

1. Adopt Draft Guidelines for Wireless Facilities on Joint Poles in the Right-of-way (Attachment B).
2. Introduce an ordinance to amend the Zoning Code (Attachment C) to regulate telecommunication facilities located in the right-of-way with the following permit requirements:
 - a. Require a Design Review with public hearing for wireless applications on utility or light poles located in Heritage Resource areas, within 300 feet of a Heritage Landmark or Resource adjacent to a park or school, or if the director determines that the facility creates a visual impact or is not in keeping with the character of the surrounding area.
 - b. Require a Design Review without a public hearing for any other pole facility other than that described in 2.a.
 - c. Require notification to property owners within 300 feet of the proposed location, and allow decisions to be appealed.
3. Adopt an alternative with modifications desired by Council.
4. Maintain existing Encroachment Permit Process.

RECOMMENDATION

Staff recommends to City Council: Alternatives 1 and 2.

Wireless carriers serve the entire community, and their customers expect good and consistent coverage for their wireless devices. But carriers have a responsibility to the community to design the best possible facility for the area. There is no denying the value good wireless telecommunications coverage brings to a community, but the carrier also has a responsibility to the community to build a facility that meets the City's goals for design and compatibility. Using an existing taller structure to avoid adding new structures in a neighborhood is a value to the community.

By amending the ordinance to clearly include these uses in the Zoning Code and to require a planning permit, guidelines and conditions can be used, and the community would have an opportunity to appeal the decision should there be a concern about the facility. Adopting clear, understandable policies and guidelines will assist the carriers, the public, staff and the decision-makers in considering a specific project.

Reviewed by:

Hanson Hom, Director, Community Development
Reviewed by: Trudi Ryan, Planning Officer
Prepared by: Andrew Miner, Principal Planner

Reviewed by:

Kent Steffens, Director, Public Works

Approved by:

Gary M. Luebbers
City Manager

Attachments

- A. Study Issue Paper
- B. Draft Criteria for Wireless Facilities on Joint Poles in the ROW
- C. Draft ordinance
- D. Northern California Joint Pole Association membership
- E. Joint pole usage
- F. Pictures of types of joint pole facilities
- G. Existing encroachment process for joint pole usage
- H. Correspondence
- I. Draft Planning Commission minutes

2012 Council Study Issue

CDD 12-06 Regulations for Telecommunication Facilities Located in the Public Right of Way

Lead Department Community Development

History 1 year ago None 2 years ago None

1. What are the key elements of the issue? What precipitated it?

In Sunnyvale, wireless telecommunication carriers have used traditional methods of providing service to their customers: antennas mounted on free-standing structures (monopoles, fake trees, PG&E towers) or on commercial/industrial buildings. This has worked well for the majority of the city, but as more people use (and demand) wireless service from their home, the carriers try to find ways to provide service in residential areas. In many areas of Sunnyvale, finding an appropriate location for wireless facilities is difficult, and the most used method of providing coverage in residential areas has been the use of park sites.

Another option is being used more often, which is to use existing utility poles on which to place their antennas. The antennas are typically mounted above the top of the utility pole, with the other equipment on the pole below the lowest power line. These types of systems can be for individual stand-alone sites, or as part of a "distributed antenna system" (DAS). The advantage of using utility poles is that they already exist in a neighborhood. The disadvantage is that the poles are typically found in the public right-of-way, so only an encroachment permit from Public Works *would be necessary and the proposed facilities would not be subject to zoning code requirements, public hearings, nor the right to appeal the decision.* Also, the utility poles tend to be located immediately adjacent to homes.

The City currently has a "joint pole" agreement with T-Mobile, which details the encroachment permit process for placing equipment on a utility pole in the City right-of-way. The process includes requiring them to notify neighbors within 250 feet of the site. Planning participates in this review, offering input on aesthetic concerns and compatibility issues. During the recent review of a joint pole site in the City, several neighbors complained about the design and location of the facility. The concern was mentioned that a wireless facility in a park would require a Use Permit, along with a hearing and the right to appeal the decision, but locating a facility on a joint pole across the park could be done through an encroachment permit process.

This study would determine if wireless telecommunication facilities located on public right-of-way (which the zoning code does not cover currently) should be included in the zoning code or addressed through a separate ordinance. The study would determine standards for review, the type of permit necessary, public notification required, and appeal processes, should the code be changed.

2. How does this relate to the General Plan or existing City Policy?

GOAL CV-1

Achieve a community in which citizens and businesses are informed about local issues and City programs and services.

GOAL LT-2 Attractive Community

Preserve and enhance an attractive community, with a positive image and a sense of place, that

consists of distinctive neighborhoods, pockets of interest, and human scale development.

Policy LT-4.1 Protect the integrity of the City's neighborhoods; whether residential, industrial or commercial.

Policy LT-4.2 Require new development to be compatible with the neighborhood, adjacent land uses, and the transportation system.

Policy LT-4.4 Preserve and enhance the high quality character of residential neighborhoods.

3. Origin of issue

City Staff Planning

4. Staff effort required to conduct study Moderate

Briefly explain the level of staff effort required

Research of other cities' regulations and legal issues: public and industry outreach; preparation of reports; and, public hearings.

5. Multiple Year Project? No Planned Completion Year 2012

6. Expected participation involved in the study issue process?

Does Council need to approve a work plan? No

Does this issue require review by a Board/Commission? Yes

If so, which? Planning Commission

Is a Council Study Session anticipated? No

7. Briefly explain if a budget modification will be required to study this issue

Amount of budget modification required

Explanation

8. Briefly explain potential costs of implementing study results, note estimated capital and operating costs, as well as estimated revenue/savings, include dollar amounts

Are there costs of implementation? No

Explanation

9. Staff Recommendation

Staff Recommendation Support

If 'Support', 'Drop' or 'Defer', explain

Although the zoning code does not typically include projects in the public right-of-way, the placement of wireless telecommunications facilities is a unique situation. These "joint pole" applications propose a facility similar to those located on private property, but which are not

currently subject to the same review process. This study would clarify the City's intent about review process and requirements for these facilities. It is likely the City will have more of these types of applications, and it would be prudent to have deliberated and have clear direction on how best to process and review the proposals, and what type of public input is desired.

Reviewed by



Department Director

9/30/11
Date

Approved by



City Manager

10-3-11
Date

**CRITERIA FOR WIRELESS FACILITIES DESIGN AND
PROCESSING ON JOINT POLES AND LIGHT POLES IN THE
PUBLIC RIGHT-OF-WAY**

1. Pole selection in residential zones should minimize aesthetic impacts through selection of poles adjacent to trees and foliage that provide screening, placement away from primary views, placement on poles between parcel lines or adjacent to driveways and avoiding corner locations that can be viewed from multiple directions;
2. All poles and attached equipment shall be restricted to a maximum height of sixty-five feet when located adjacent to single-family residential zoning districts;
3. Pole height should not be increased beyond the minimum to meet California Public Utility Commission standards, which would typically result in a 12 foot extension of the pole, unless the specific site location is not easily visible from nearby residences;
4. No new overhead lines shall be added serve the wireless facility;
5. Limit the number of equipment cabinets on a pole to three to minimize the visual impact to the surrounding area;
6. Do not use utility poles planned for undergrounding by the City (but light poles in those areas can be considered);
7. Ancillary support equipment in the public right-of-way shall be located on a pole, except where ground mounted equipment reduces visual impact;
8. Carriers shall defend, indemnify, and hold harmless the CITY and its agents, officers, and employees ("indemnified parties") from any claim, action, or proceeding against the CITY or indemnified parties to attack, set aside, void, or annul the Project or any prior or subsequent related development approvals or Project condition imposed by the CITY or as a result of the CITY granting any permits for the Project, or to impose liability against the City or indemnified parties resulting from the grant of any permits for the Project, which claim, action or proceeding is brought within the time period provided by law, including any claim for private attorney general fees claimed by or awarded to any party against the CITY.

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY
OF SUNNYVALE TO AMEND CERTAIN SECTIONS OF
THE SUNNYVALE MUNICIPAL CODE RELATING TO
WIRELESS TELECOMMUNICATIONS FACILITIES**

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SUNNYVALE DOES ORDAIN AS FOLLOWS:

SECTION 1. SECTION AMENDED. Section 19.54.030 of Chapter 19.54 (Wireless Telecommunication Facilities) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

19.54.030. General requirements.

The following general requirements apply at all times to all wireless telecommunications facilities located on private or public property in all zoning districts:

(a) – (c) [Text unchanged.]

~~(d) At least ten feet of horizontal clearance must be maintained between any part of the antenna and any power lines unless the antenna is installed to be an integral part of a utility tower or facility;~~

(e) – (g) [Text unchanged.]

SECTION 2. SECTION AMENDED. Section 19.54.040 of Chapter 19.54 (Wireless Telecommunication Facilities) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

19.54.040. Design requirements.

In addition to all other requirements set forth in this chapter, all wireless telecommunication facilities shall meet the following design requirements:

(a) – (f) [Text unchanged.]

(g) Satellite dish or parabolic antennas shall be situated as close to the ground as possible on private property to reduce visual impact without compromising their function. No such antenna shall be located in any front yard, nor in a corner side yard unless the antenna is screened from pedestrian-level view. No such antenna exceeding thirty-nine inches in diameter shall be located within a required setback unless approved through a miscellaneous plan permit upon a showing that no reasonable alternative location is available.

(h) – (k) [Text unchanged.]

(l) In order of preference, ancillary support equipment for facilities shall be located either within a building, in a rear yard or on a screened roof top area. Support equipment pads, cabinets, shelters and buildings require architectural, landscape, color, or other camouflage treatment for minimal visual impact.

(m) – (o) [Text unchanged.]

(p) Freestanding facilities, including towers, lattice towers, and monopoles, shall be restricted to a maximum height of sixty-five feet when

located adjacent to residentially zoned properties. New Facilities on private property shall be setback at a ratio of two horizontal feet for every one foot in height. ~~The facilities located on private property~~ shall not be readily visible to the nearest residentially zoned property.

(q) [Text unchanged.]

(r) Except as approved by use permit, no component of any facility shall be located within required front or side yard setbacks, except for facilities mounted on poles in the public right-of-way, or facilities and related equipment not readily visible mounted on existing or new structures already allowed by the Municipal Code. No facility component shall be located so that it straddles a property line.

(s) [Text unchanged.]

SECTION 3. SECTION AMENDED. Section 19.54.160 of Chapter 19.54 (Wireless Telecommunication Facilities) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

19.54.160. Public property and public right-of-way.

~~—(a) The city manager or the manager’s designee may establish terms and conditions under which any public property or facility or public right-of-way may be made available by lease or franchise as a location for a wireless telecommunication facility.~~

~~—(b) No wireless telecommunication facility shall be constructed in or upon a public property or facility owned by the city, unless the telecommunication provider seeking to operate the facility has obtained a lease from the city, authorizing the provider to occupy the property or facility. The lease terms shall include the standard set forth in this chapter.~~

~~—(c) No wireless telecommunication facility shall be constructed in a public right-of-way unless the telecommunication provider seeking to operate the facility has obtained a franchise and any applicable encroachment permit. The franchise terms shall include the standards set forth in this chapter.~~

~~—(d) The telecommunications provider shall indemnify and hold harmless the city and its officers and employees from any and all liability for damage proximately resulting from any operations of the provider under its lease or franchise.~~

~~—(e) The telecommunications provider shall pay to the city on demand the cost of all repairs to public property made necessary by or proximately resulting from any operations of the provider under its lease or franchise.~~

19.54.160. Telecommunication Facilities in the Public Right-of-way.

(a) Design Criteria. The city council has established criteria and various guidelines for design review of wireless telecommunication facilities in the public right-of-way.

(b) Design Review without a Public Hearing. An application for a wireless telecommunication facility in the public right-of-way shall be considered by the director of community development following the procedures in Chapter 19.98 (General Procedures) if the facility:

(1) Meets the adopted design criteria for wireless telecommunication facilities on joint poles or light poles, and

(2) Is on a pole located more than 300 feet from the property line of a public park, public school or heritage resource or landmark.

(c) Design Review Requiring a Public Hearing. An application for a wireless telecommunication facility in the public right-of-way shall be considered by the planning commission following the procedures in Chapter 19.98 (General Procedures) if the facility:

(1) Does not meet the adopted design criteria for wireless telecommunication facilities on joint poles, or

(2) Is on a pole located within 300 feet of a public park, public school or heritage resource or landmark, or

(3) If the director determines that the facility creates a visual impact or is not in keeping with the character of the surrounding area.

SECTION 4. SECTION AMENDED. Section 19.98.040 of Chapter 19.98 (General Procedures) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

19.98.040. Notice Requirements.

(a) Design Review Not Requiring a Public Hearing. The director of community development may take an action without public notice or hearing except as provided herein:

(1) – (2) [Text unchanged.]

(3) Wireless Telecommunication Facilities in the Public Right-of-way. Prior to any action being taken on any design review application for wireless telecommunication facilities in the public right-of-way, notice of the pending application shall be given by mail to owners and tenants of properties located within three hundred feet of the subject property, stating that the application is available for review and comment for fourteen days following the date on the notice.

(b) Design Review Requiring a Public Hearing. For design reviews requiring a public hearing, the following notification is required:

(1) – (2) [Text unchanged.]

(3) Wireless Telecommunication Facilities in the Public Right-of-way. For design reviews requiring action by the planning commission in accordance with Section 19.54.160(b), notice of the time and place of the public hearing shall be given at least ten calendar days prior to the day of the hearing in the following manner:

(A) By posting a copy of the notice of hearing:

(i) At a conspicuous location at the site location which is the subject of the application,

(ii) On the public notice bulletin board at the Sunnyvale City Hall;

(B) By mailing a copy of the notice to:

(i) The owner and applicant, and
(ii) The owners of all properties within three hundred feet of the subject property;

(C) By publishing at least once in a newspaper of general circulation in the city, a copy of the notice.

SECTION 5. SECTION AMENDED. Section 19.98.070 of Chapter 19.98 (General Procedures) of Title 19 (Zoning) of the Sunnyvale Municipal Code is hereby amended to read as follows:

19.98.070. Appeals.

(a) Appeal of Design Review Permits.

(1) **Residential** Design Review by Director. An applicant, the owner of the subject property, or the owner of a property within the required noticing radius as described in Section 19.98.040, aggrieved by a design review decision of the director of community development with regard to nonconformance with applicable design guidelines may file an appeal to the planning commission by five p.m. on the fifteenth calendar day following such action. All proceedings initiated by the decision of the director of community development shall be suspended pending a determination by the planning commission on the merit of the appeal. The decision of the planning commission is final.

(2) **Residential** Design Review with Public Hearing. An applicant, the owner of the subject property, or the owner of a property within the required noticing radius as described in Section 19.98.040, aggrieved by a design review decision of the planning commission made pursuant to Section 19.80.040(c) with regard to nonconformance with applicable design guidelines may file an appeal to the city council by five p.m. on the fifteenth calendar day following such action. All proceedings initiated by the decision of planning commission shall be suspended pending a determination by the city council on the merit of the appeal. The decision of city council is final.

(b) [Text unchanged.]

(c) [Text unchanged.]

(1) Any decision by the director of community development may be appealed to the planning commission and city council, except:

(A) Miscellaneous plan permits **and design reviews of wireless telecommunications facilities in the public right-of-way**, where the decision of the planning commission is final; except that decisions by the director on findings of convenience or necessity may be appealed directly to the city council.

(B) – (G) Text unchanged.]

SECTION 6. EXEMPTION FROM CEQA. The City Council finds, pursuant to Title 14 of the California Code of Regulations, Section 15061(b)(3), that this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) in that it is not a Project which has the potential for causing a significant effect on the environment.

SECTION 7. CONSTITUTIONALITY; SEVERABILITY. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such decision or decisions shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

SECTION 8. EFFECTIVE DATE. This ordinance shall be in full force and effect thirty (30) days from and after the date of its adoption.

SECTION 9. POSTING AND PUBLICATION. The City Clerk is directed to cause copies of this ordinance to be posted in three (3) prominent places in the City of Sunnyvale and to cause publication once in The Sun, the official publication of legal notices of the City of Sunnyvale, of a notice setting forth the date of adoption, the title of this ordinance, and a list of places where copies of this ordinance are posted, within fifteen (15) days after adoption of this ordinance.

Introduced at a regular meeting of the City Council held on _____, 2012, and adopted as an ordinance of the City of Sunnyvale at a regular meeting of the City Council held on _____, 2012, by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

ATTEST:

APPROVED:

City Clerk
Date of Attestation: _____

Mayor

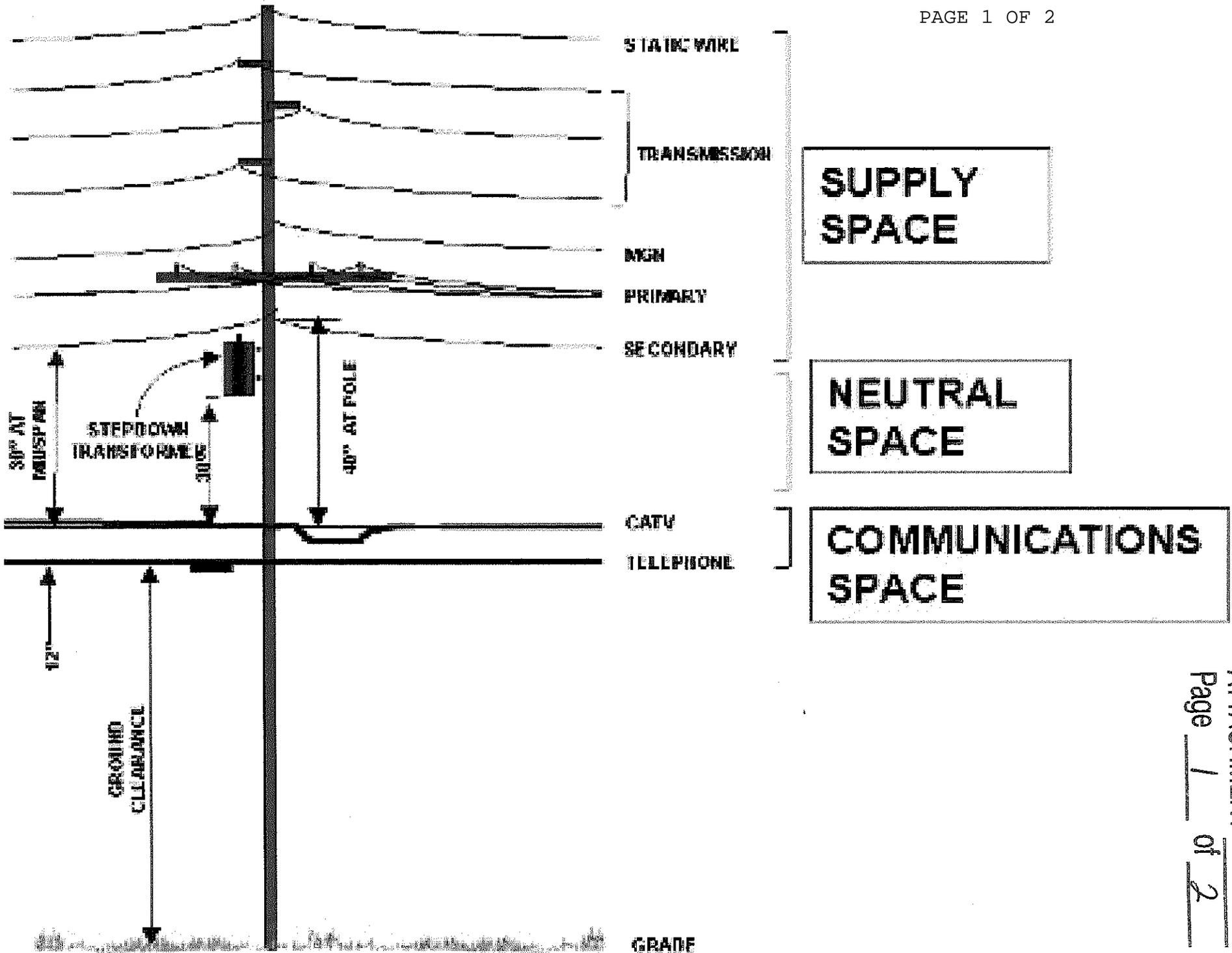
SEAL

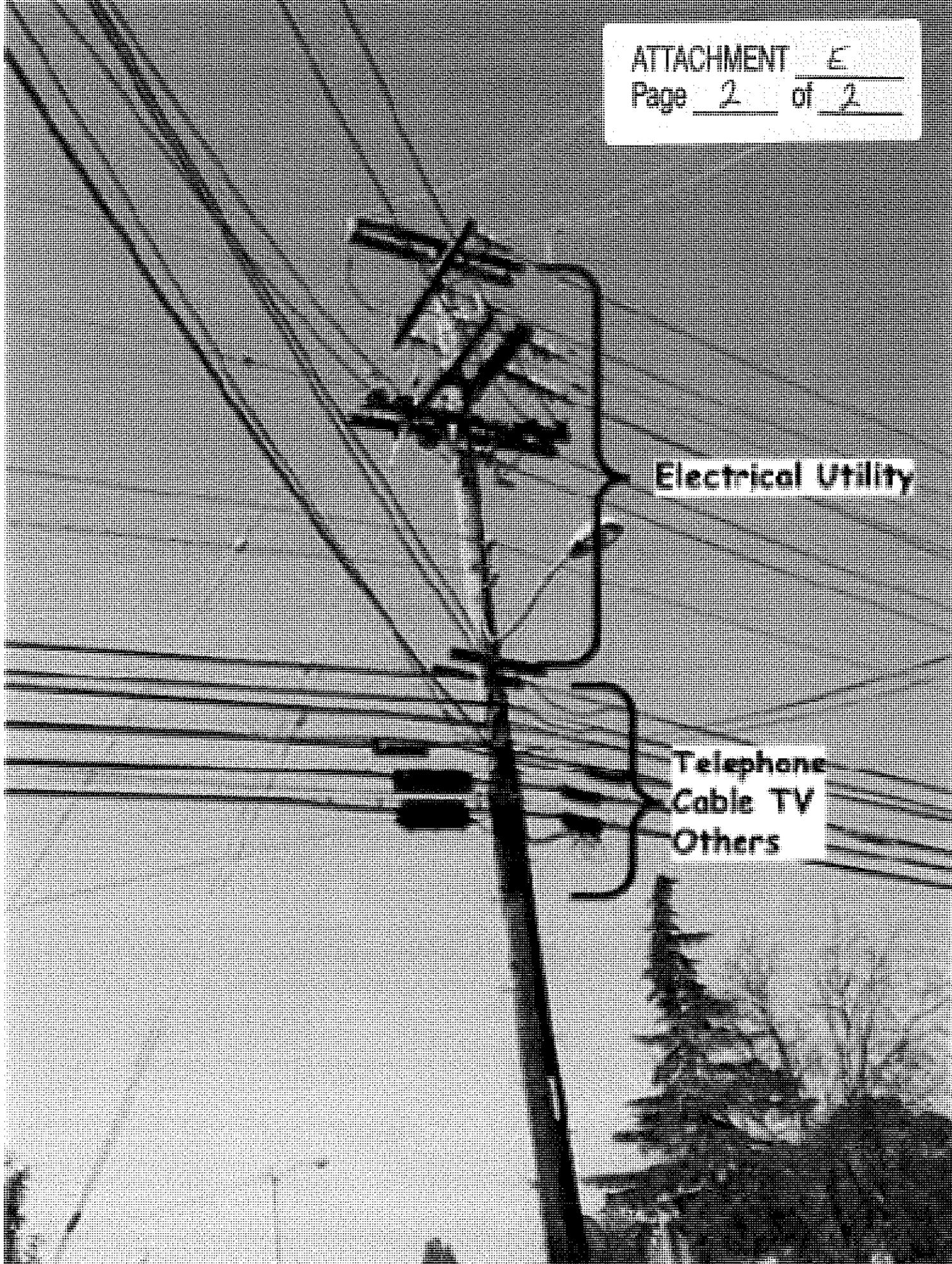
APPROVED AS TO FORM AND LEGALITY:

Michael D. Martello, Interim City Attorney

2010 Northern California Joint Pole Association Membership

American Tower Outdoor DAS, LLLC
AT&T CA (SBC, PacBell)
AT&T Wireless
Alameda Power & Telecom
Calaveras Telephone Company
City & County of San Francisco
City of Gridley
City of Lodi
City of Lompoc
City of Roseville/Roseville Electric
City of Shasta Lake
ClearLinx
Comcast Corp.
Crown Castle Solutions
Digital West
East Bay Municipal Utility District
Frontier, A Citizens Communications Co.
Geysers Power Company, LLC
Global Valley (Evans Tele)
Happy Valley Telephone Company
Lassen Municipal Utility District
MCI Metro
MCI Telecommunications Inc.
Mpower/TelePacific Communications
Merced Irrigation District
Metro PCS
Modesto Irrigation District
New Path Networks
NextG Networks of CA
PG&E
Sacramento Municipal Utility District
Sierra Telephone Company
Siskiyou Telephone Company
Sprint/Nextel
Sure West Telephone (Roseville Telephone)
T-Mobile
Trinity Public Utility District
Turlock Irrigation District
Ubiquitel PCS
Verizon California Inc. (GTE of California)
Verizon Wireless
Volcano Telephone Company
Wave Broadband/Astound (RCN of California)
Western States Teleport Corporation





Electrical Utility

**Telephone
Cable TV
Others**

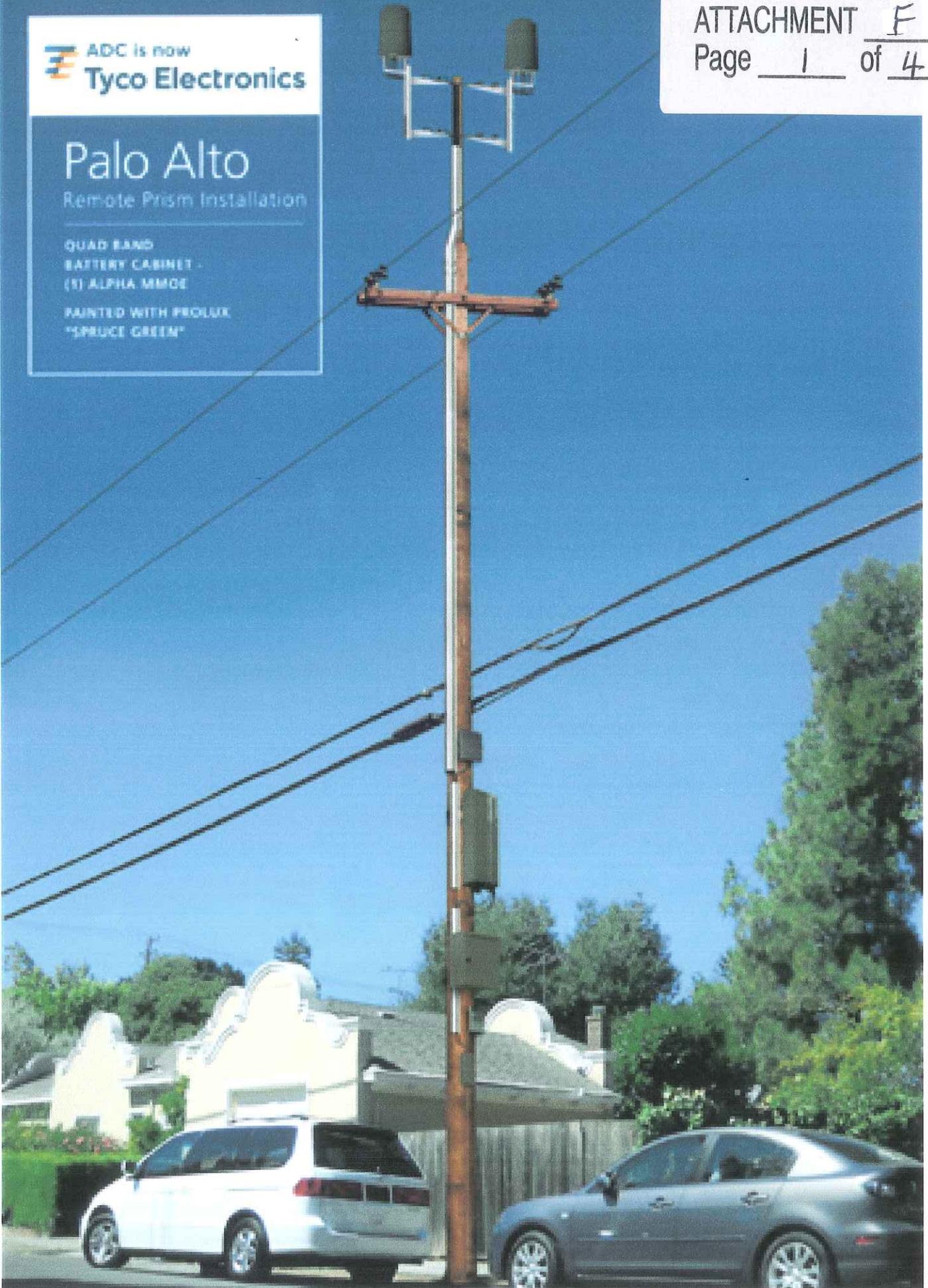
ADC is now
Tyco Electronics

Palo Alto

Remote Prism Installation

QUAD BAND
BATTERY CABINET -
(1) ALPHA MMDS
PAINTED WITH PROLUX
"SPRUCE GREEN"

ATTACHMENT F
Page 1 of 4



Existing



Proposed



view from Sequoia Drive looking northwest at site

Existing



Proposed



view from Reed Avenue looking east at site
T-Mobile SF14171 Pole Cap Reed
977 Reed Avenue, Sunnyvale, CA

view from Reed Avenue looking southeast at site



SF14171 Pole Cap Reed
977 Reed Avenue, Sunnyvale, CA

Existing

Proposed



ATTACHMENT F
Page 4 of 4

CITY OF SUNNYVALE
Public Works Department/Engineering Division
Location Guidelines and Public Notification Associated with
Wireless Telecommunications Provider Use Of Utility Pole In City Right-of-Way
(With or Without Modifications To Existing Pole)

Location and Public Notification Guidelines and Procedures

1. Wireless Telecommunications Provider (WTP) shall submit preliminary site plans and project descriptions to Department of Public Works/Engineering Division (DPW). Plans shall include:
 - a. Project location and descriptions
 - b. Site plan showing properties within 250 feet of proposed pole location.
 - c. Height of the pole, antenna and its associated equipment
 - d. Antenna details
 - e. Photo-simulations of proposed pole and equipment.
2. Upon complete submittal, DPW and Department of Community Development/Planning Division (CDD) shall review plans and DPW shall provide consolidated comments to WTP within 21 calendar days. DPW may schedule a site visit to take place within those 21 days with CDD and WTP to review and discuss the location and possible options.
3. If preliminary approval given for location and design (including equipment appearance and size, height and compatibility) WTP shall enter into an Encroachment Agreement with the city and commence and complete public outreach process:
 - a. WTP shall mail out letters to the residents and property owners adjacent to the cell antenna location. Additionally, WTP shall mail out letters to the residents and property owners within 250 feet of the wireless facility pole extension on the same street.
 - b. The letter shall include the following:
 - i. Description of scope of work
 - ii. Plan sheet showing the location of the pole and related equipment.
 - (i) A photo simulation of the proposed pole extension.
 - c. The notification letter shall state that property owners have 20 calendar days from the date of notification to send questions and concerns directly to WTP to a contact phone number and/or address provided by WTP on the notification letter.
 - d. WTP shall maintain copies of the notification letters and proof of mailing in WTP file for each proposed cell antenna location.
 - e. If responses are received from any of the residents or property owners, WTP shall work directly with the resident or property owner to address their concern and notify DPW in writing of the outcome. If WTP is unable to resolve any concern, the DPW shall:
 - (1) Contact the resident or property owner to understand the issues and concerns. (What action, if any, is DPW to take?)
 - (2) Address requests other than health concerns by requesting WTP to

- evaluate possible modification or relocation of the cell antenna.
- i. If WTP can modify the site design and/or locate a replacement site, it shall submit new drawings showing the modification or proposed new location.(if new location, then public notification process for new site must be followed).
 - ii. If WTP can not modify the cell antenna or locate a suitable replacement site, it shall provide the DPW a written evaluation of the possible modifications or replacement site and why they were not feasible.
 - iii. DPW shall determine, with assistance of City Attorney, if applicable state or federal law requires approval of encroachment permit, or if permit shall be denied.
 - iv. WTP shall send a letter to the resident or property owner objecting to the cell antenna demonstrating the effort made in trying to modify the cell antenna or identify replacement sites and the reasons why such modifications or replacement sites were determined by WTP to not be feasible.
4. When location, height and design are final, WTP shall submit two (2) sets of the completed construction drawings on 11" by 17" size plans.
- a.WTP shall include PG&E proposed service point based on field verification by PG&E and WTP personnel.
 - b.Research shall be performed by WTP to include the following information:
 - i.Existing PG&E service and other existing utility facilities.
 - ii.Conduit routing/pull box location.
5. DPW reviews the encroachment permit application. Minor comments shall be shown as red-lined on plans.
6. If comments are major, plans are returned to WTP for resubmission to address comments and incorporate requested changes.
7. WTP submit two (2) sets of final plans to the City in an 11" by 17" size with signatures from professional engineers (civil and electrical) for final review/approval by DPW.
8. DPW Issues Encroachment Permit with conditions of approval.

Permit Fees:

Wireless Telecommunications Provider shall pay for the actual permit review and inspection service fees according to the City Fee Schedule at the time of the payment for each encroachment permit application with additional hourly fees billed if the permit review process requires extended or non-standard review.

CITY OF SUNNYVALE
Public Works Department/Engineering Division
Encroachment Permit Application Requirements
Associated with Wireless Telecommunications Provider Use Of Utility Pole In City
Right-of-Way (With or Without Modifications To Existing Pole)

The following requirements shall be met prior to issuance of a Public Works encroachment permit associated with a Wireless Telecommunications Provider :

1. Permittee submit two (2) sets of traffic control plans (per 2006 California Manual of Uniform Traffic Control Devices), where applicable and needed depending upon location and hours of operation) for DPW approval.
2. Contractor provides Certificate of Insurance with general liability insurance or proof of self-insurance of single coverage of **\$1,000,000.00 minimum**. Said policy shall name **the City of Sunnyvale as an additional insured** (A separate endorsement sheet is required with the insurance policy, and **the location and job description** must be included on the policy).
3. Contractor has a **Class A General Engineering license**. The following licenses are acceptable for the scope of work as described. All other class licenses will only be issued a permit upon approval by the Assistant City Engineer.

C7 Low Voltage System Contractor may install, service and maintain all types of communication and low voltage systems which are energy limited and do not exceed 91 volts. These systems include, but are not limited to telephone systems, sound systems, cable television systems, closed-circuit video systems, satellite dish antennas, instrumentation and temperature controls, and low voltage landscape lighting.

C10 Electrical Contractor may place, install, erect or connect any electrical wires, fixtures, appliances, apparatus, raceways, conduits, solar photovoltaic cells or any part thereof, which generate, transmit, transform or utilize electrical energy in any form or for any purpose.

C8 Concrete Contractor may form, pour, place, finish and install specified mass, pavement, flat and other concrete work; and places and sets screeds for pavements or flatwork.

C12 Earthwork and Paving Contractors may dig, move, and place material forming the surface of the earth, other than water, in such a manner that a cut, fill, excavation, grade, trench, backfill, or tunnel (if incidental thereto) can be executed, including the use of explosives for these purposes. This classification includes the mixing, fabricating and placing of paving and any other surfacing materials, perform grading work.

C27 Landscaping Contractors may construct, maintain, repair, install, or subcontract the development of landscape systems and facilities for public and private gardens and other areas which are designed to aesthetically, architecturally, horticulturally, or functionally improve the grounds within or surrounding a structure or a tract or plot of land. In connection **Wireless Telecommunications Provider** therewith, a landscape contractor prepares and grades plots and areas of land for the installation of any architectural, horticultural and decorative treatment or arrangement.

C31 Construction Zone Traffic Control Contractor may prepare or remove lane closures, flagging, or traffic diversions, utilizing portable devices, such as cones, delineators, barricades, sign stands, flashing beacons, flashing arrow trailers, and changeable message signs, on roadways, including, but not limited to, public streets, highways, or any public conveyance.

4. Contractor provides proof of worker's compensation coverage
5. Contractor has a valid city business license
6. Approval from other agencies (Caltrans, Santa Clara County Valley Water District, etc.) may be needed as part of the permit process; however, if it is determined after filing of the permit that such approval is required, such approval may supplement the permit application and the permit shall not need to be refiled.

NOTE: All work is to be in conformance with Section 13.08 of the City of Sunnyvale Municipal Code (Right of Way Encroachments) and latest version of the City of Sunnyvale Standard Specifications and Details. It is the Contractor/Permittee's responsibility to become familiar with those terms, conditions, and rules prior to commencement of work.

1. By signing the permit application, Permittee agrees to provide a public information telephone number to City for referral of any inquiries that may arise regarding permitted improvements.
2. By signing the permit application, Permittee agrees to operate, repair and maintain at Permittee's sole expense the cabinet(s), conduit, pad, and other structural items shown on the plans as part of the permit application for the life of such improvements. Permittee shall restore landscaping to conditions prior to or better than beginning of work. After installation, Permittee shall not be responsible for maintenance of any vegetation or landscaping
3. By signing the permit application, Permittee acknowledges that the decision of the City Engineer shall be final as to whether any material or workmanship reasonably meets the applicable standards, specifications, plans and grades.
4. By signing the permit application, Permittee acknowledges that permit issuance shall not release Permittee from the responsibility for or the correction of any errors, omissions or other mistakes that may be contained in the permit application.
5. By signing the permit application, Permittee understands and acknowledges that, pursuant to and in accordance with all applicable state and federal laws and regulations, City may request that Permittee remove or relocate any improvement items whenever City determines that the removal or relocation is needed: (1) to facilitate or accommodate the construction, completion, repair, relocation or maintenance of a City project, (2) because the improvement items interfere with or adversely affects proper operation of other City facilities, or (3) to protect or preserve the public health or safety.
6. By signing the permit application, Permittee acknowledges and agrees that Permittee bears all risk of loss or damage of its equipment and material installed in City's public right-of-way or public utility easement area except to the extent said loss or damage was caused by the negligent acts or omissions of City, its employees or agents.
7. By signing the permit application, Permittee agrees promptly remove graffiti from any above-ground cabinet installed pursuant to this permit within a commercially reasonable period. In addition to having its maintenance personnel monitor such equipment as they are performing work in

neighborhoods, Permittee shall provide the City with a means to notify Permittee of graffiti and request removal of same, which Permittee shall respond to in a commercially reasonable time.

8. By signing the permit application, Permittee agrees to comply with all federal, state and city laws, statutes, ordinances, rules and regulations and the orders and decrees of any courts or administrative bodies or tribunals in any manner affecting the performance of the permit conditions. This condition does not limit Permittee's right to pursue any or all available legal remedies to challenge the validity or legality of any such laws, statutes, ordinances, rules, regulations, orders, or decrees.
9. Permittee agrees to indemnify, defend, and hold harmless City, its officers, agents, and employees, attorneys, consultants, or independent contractors from and against any liability for damages and for any liability or claims resulting from tangible property damage or bodily injury (including accidental death), to the extent proximately caused by Permittee's construction, operation, or maintenance of the equipment installed pursuant to this permit, provided that City shall give Permittee written notice of its obligation to indemnify within ten (10) days of receipt of a claim or action. City agrees to cooperate with Permittee to assist in the defense against any such action. Notwithstanding the foregoing, Permittee shall not indemnify City for any damages, liability, or claims resulting from the negligence or willful misconduct of City, its officers, agents, employees, attorneys, consultants, independent contractors or third parties.
10. By signing the permit application, Permittee agrees to self-insurance as specified in Exhibit A and shall provide proof of such self-insurance to meet the requirements of the City.

MACKENZIE & ALBRITTON LLP
220 SANSOME STREET, 14TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE 415 / 288-4000
FACSIMILE 415 / 288-4010

October 22, 2012

VIA EMAIL

Gustav Larsson, Chair
Maria Dohadwala, Vice Chair
Commissioners Bo Chang, Glenn Hendricks,
Arcadi Kolchak, Russell Melton
and Ken Olevson
Planning Commission
City of Sunnyvale
456 West Olive Avenue
Sunnyvale, California 94086

Re: Ordinance to Amend Regulations for
Telecommunication Facilities Located in the Public Right of Way
Planning Commission Public Hearing Item #4, October 22, 2012

Dear Chair Larsson, Vice Chair Dohadwala and Commissioners:

We write to you on behalf of our client Verizon Wireless with respect to the proposed amendment to the Sunnyvale Zoning Code to address the placement of telecommunications facilities in the public right-of-way. We appreciate the thorough analysis by Planning Division staff and the opportunity to provide comment to the Planning Commission prior to any action being taken by the City of Sunnyvale (the "City"). We recommend that the Planning Commission adopt the first and fourth alternative recommendations of staff, but not the second and third. As set forth below, while the City may retain authority to regulate the aesthetic impacts of wireless facilities under its traditional right-of-way regulations, state law does not allow the City to require use permits for telephone corporations such as Verizon Wireless to use the public right-of-way. The proposed incorporation of the public right-of-way into Sunnyvale Zoning Code Chapter 19.54 is unlawful and must be rejected.¹

State Law

Verizon Wireless is a "telephone corporation" as defined under California Public Utilities Code §234. California Public Utilities Code §7901 grants a statewide franchise

¹ Should the Planning Commission elect to amend the Wireless Telecommunication Facilities chapter of the Sunnyvale Zoning Code, then it must address the illegal ban in Section 19.54.070 prohibiting wireless facilities on private property in residential zones, which violates 47 U.S.C. Section (c)(7)(B)(i)(II).

Page 2 of 4

to telephone corporations for the placement of “telephone lines” and “poles, posts, piers, or abutments . . . and other necessary fixtures” to facilitate communication by telephone. This franchise applies to both traditional wire-line and wireless telephone companies.² In other words, under this state law, telephone corporations are granted a state right to use the public right-of-way for their telephone facilities, and local jurisdictions are preempted from precluding such use. In the same way, it is inappropriate for local jurisdictions to require use permit findings for a telephone corporation to occupy the right-of-way where that right has already been granted by the state. For this reason alone, the City should continue to grant encroachment permits for wireless facilities in the right-of-way.

While the City cannot legally deny telephone corporations the use of the right-of-way, the City does maintain the right to regulate the “time, place and manner” of the placement of wireless facilities in the right-of-way under California Public Utilities Code §7901.1. Under recent federal court decisions, this state law has been interpreted to allow local jurisdictions to regulate the aesthetics of wireless facilities in the public right-of-way. While no state court has weighed in on this question, reasonable aesthetic guidelines for wireless facilities in the public right-of-way that do not conflict with other state laws governing facilities in the right-of-way may be appropriate.

Staff Alternative Recommendations 1 and 4

Based upon the state law framework described above, the Planning Commission should reject the staff alternative recommendation of amending Sunnyvale Zoning Code Chapter 19.54 (Wireless Telecommunication Facilities) to include the public right-of-way. Instead the Planning Commission should follow staff’s fourth alternative recommendation to continue the encroachment permit process. If the Planning Commission wishes to address community concerns regarding the absence of an appeal for facilities in the right-of-way, we suggest that you should direct staff to incorporate a protest process following the grant of an encroachment permit. Protest procedures currently in place in other cities allow residents to challenge the granting of an encroachment permit through procedures before a public works hearing officer.

Similarly, the Planning Commission should consider Planning Division staff’s first alternative recommendation to develop aesthetic guidelines for wireless facilities in the public right-of-way. In this regard, Verizon Wireless could support reasonable aesthetic guidelines with respect to appearance such as color, bulk and height and other aesthetics impacts such as acoustics. Reasonable aesthetic guidelines assist both the City and wireless providers in the timely processing of wireless facility applications acceptable to the community. However, Verizon Wireless cannot presently accept the criteria proposed by staff.³

² See California Public Utilities Code §233, which defines “telephone line” to include telephony “with or without the use of transmission wires.”

³ As drafted, we are concerned that the design criteria impermissibly dictate the technology to be used by wireless providers (See *New York SMSA v. Town of Clarkstown*, 612 F.3d 97 (2d Cir. 2010)) and may represent impermissible regulation of radio-frequency emissions in violation of 47 U.S.C. Section 332(c)(7)(B)(iv).

Page 3 of 3

Conclusion

Verizon Wireless very much appreciates the opportunity to comment on the proposed amendment to the Sunnyvale Zoning Code. Taking proactive steps to address placement of wireless facilities in the right-of-way is in the interest of wireless providers as well as the community. We encourage you to provide direction to staff to modify the existing encroachment permit process to accommodate community concerns and to work with the wireless industry to develop reasonable guidelines to accomplish this laudable goal.

Very truly yours,



Paul B. Albritton

cc: Michael Martello, Esq., Interim City Attorney
Hanson Hom, Community Development Director
Trudi Ryan, Planning Manager
Andrew Miner, Principal Planner

From: Peter Stefan <[REDACTED]@yahoo.com>
To: Andrew Miner <aminer@ci.sunnyvale.ca.us>
CC: "[REDACTED]@yahoo.com" <[REDACTED]@yahoo.com>
Date: 10/22/2012 8:42 AM
Subject: Oct 22 Planning Agenda 4 : ...telecom facilities ...
Attachments: Broken Pole.JPG

ATTACHMENT H
Page 4 of 18

Hi Andy:

Thank you for sending Report 2012-7112, and for initiating the study issue. I hope that Sunnyvale will simulate best practices from other cities, in this case, Mountain View.

Telecom facilities mounted on light poles are aesthetically superior to the use of utility poles. The photos in attachment E show utility poles which are in better shape than many others. In the T-Mobile proposal on Carlisle Way last year, the utility pole chosen was quite bent by the forces exerted on it, and the addition of a long straight section of a different material, creating a contrast, would result in a structure both unkempt and out-of-place. At the outreach meeting in September, I learned that you tried to encourage T-Mobile to use the nearby light poles on Fremont Avenue, and I appreciate your effort.

At the meeting, I also mentioned that in my neighborhood, a wooden pole was broken by some trees that fell and pushed on the telephone and TV cables connected to it. I have attached a photo. It had a similar diameter as the utility pole at Carlisle. Since then I have noted that there is quite a variation in the utility poles in my neighborhood, and how they are prevented from being pulled too much one way.

I am concerned about the maximum height of 65 ft stated in the draft criteria in attachment B. As I understand, a telecom facility added to a 30 ft-tall utility pole will result in a structure 42 ft. in height and no more as a rule. But the law seems to allow extending a light pole on a residential street up to 65 ft., and with only a miscellaneous plan permit without a public hearing. I think many residents will be unhappy with this possibility. A process that may lead to an appeal to the Planning Commission is less efficient than a good public hearing by the Planning Commission to begin with.

I guess the number 65 comes from Table 19.54.080, in item (2) under "Major Use Permits". Even though this item refers to a new freestanding facility, and not an existing light pole on a street, a 65 ft-tall structure is simply very tall, regardless of its former life.

I would like to suggest the following may:

Light poles, with addition of no more than 6 ft -- miscellaneous plan permit If total exceeds 42 ft, minor use permit (public hearing).

Utility poles, standard addition of no more than 12 ft -- minor use permit (public hearing) If the utility poles are taller than 30 ft, can ask for variance.

Since these are intended for microcells, I assume that the application for the cluster will be considered at the same meeting, while each pole is examined. If the cluster includes any utility poles, minor use permit.

I would also like to suggest that, in attachment B, underground equipment should be considered for visual and safety reasons, as well as clearance in some cases. If underground, no limit to the number of equipment cabinets.

Thank you.

Mei-Ling Stefan



PHOTOGRAPH BY
J. J. WILSON

MACKENZIE & ALBRITTON LLP

220 SANSOME STREET, 14TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

TELEPHONE 415 / 288-4000
FACSIMILE 415 / 288-4010

November 6, 2012

VIA EMAIL

Mayor Tony Spitaleri
Vice Mayor David Whittum
Councilmember Christopher Moylan,
Jim Griffith, Pat Meyering,
Tara Martin-Milius and Jim Davis
City Council
City of Sunnyvale
456 West Olive Avenue
Sunnyvale, California 94088

Re: Ordinance to Amend Regulations for
Telecommunication Facilities Located in the Public Right-of-Way
City Council Agenda November 13, 2012

Dear Mayor Spitaleri, Vice Mayor Whittum and Councilmembers:

We write to you on behalf of our client Verizon Wireless to provide further comment on the ordinance under consideration by the City of Sunnyvale (the "City") to amend the Sunnyvale Municipal Code (the "Code") to accommodate facilities in the right-of-way (the "Proposed Amendments"). We appreciate the City's careful consideration of our comments to the Planning Commission dated October 22, 2012 and restructuring of the Proposed Amendments. By providing design review of wireless telecommunication facilities in the right-of-way, and avoiding "use" permit review where such use is already granted under state law, the Proposed Amendments focus the City on the issues properly within its jurisdiction. As a result, we comment primarily on issues related to placement of ground-mounted radio equipment in the right-of-way and noticing. We also comment on the *Draft Criteria for Wireless Facilities on Joint Poles and Light Poles in the Public Right-of-Way* (the "Design Criteria") which gain greater significance under the Proposed Amendments.

Ground-Mounted Equipment

The proposed amendment to Code §19.54.040(I) provides that "Ancillary support equipment in the public right-of-way shall be located on a pole." In contrast, the Design Criteria provide that "Ground-mounted equipment can be considered in locations that do

Page 2 of 4

not have residences immediately adjacent to the pole”. This conflict should be addressed. In doing so, the Council should accommodate the variety of right-of-way wireless facilities in use today. Most jurisdictions include placement of equipment in the public right-of-way adjacent to utility poles and light standards as one of the design options for right-of-way facilities. In certain circumstances, diminutive equipment boxes in the right-of-way, such as in a median strip, screened by landscaping, can be preferred to a collection of pole-mounted equipment cabinets, particularly on a light standard. There is no apparent justification to limiting the design flexibility to the pole itself where ground-mounted equipment may be aesthetically superior in certain circumstances. We recommend adding to the end of Code §19.54.040(l) the phrase “except where ground-mounted equipment reduces visual impact.”

Noticing

Proposed Code §§19.98.040(a)(3) and (b)(3) provide for three hundred foot radius noticing of properties for facilities in the public right-of-way. This is contrary to the noticing requirements provided for right-of-way facilities in many jurisdictions, which normally recognize that wireless facility permits in the right-of-way are a non-discretionary exercise of the local jurisdiction’s authority to regulate “time, place and manner” under California Public Utilities Code §7901.1, and where traditional land use noticing requirements do not apply. *See, e.g.*, Code §13.08, Right-of-Way Encroachments. Indeed, traditional land use noticing for right-of-way facilities would be inappropriate where three hundred foot radius noticing would include back yards of properties that have no relation to the street where the proposed facility is to be located. Consistent with the understanding reflected in the Proposed Amendments that wireless facility permits in the right-of-way are non-discretionary design review, and not the granting of a use permit, these noticing provisions should be revised to be consistent with traditional permitting in the right-of-way where notice is provided to parcels adjoining, abutting and across from the proposed right-of-way facility. *See, e.g.*, Los Angeles Municipal Code §62.03.2(III)(C)(3), Berkeley Municipal Code §16.80.050. The Council may consider a 150-foot linear noticing along the right-of-way where the facility is to be located. *See, e.g.*, San Francisco Public Works Code, Article 25, §1512(b)(1)(A).

Design Review Criteria

Effectively drafted design criteria can help guide applicants toward successful designs of wireless facilities while reflecting community design preferences. Overly restrictive design criteria, however, can stifle innovation and improved engineering and design. We recommend revisions to the Design Criteria to meet these goals as follows:

- **Single-family residential zone poles.** Rather than prohibiting poles in front of or across from homes, this criterion should provide guidance on pole selection in residential zones. For example: “Pole selection in residential zones should minimize aesthetic impacts through selection of poles adjacent

Page 3 of 4

to trees and foliage that provide screening, placement away from primary first or second story views, placement on poles between parcel lines or adjacent to driveways and avoiding corner locations that can be viewed from multiple directions.”

- **Single-family residential zone height.** Maximum pole height is less relevant in communities with flat topography and heavy foliage, where the tops of poles are frequently above the view plane of pedestrians, vehicles and homes. This maximum height criterion is unnecessary given the following criterion, which merely limits the extension on existing poles.
- **Pole extension restriction.** This restriction is generally acceptable, although we recommend referencing California Public Utilities Commission General Order 95.
- **New overhead line restriction.** We question the enforceability of this restriction. The City may not lawfully prevent telephone corporations from using the right-of-way under the statewide franchise granted under Public Utilities Code §7901. In addition, distributed antenna systems in rights-of-way are generally connected by overhead fiber-optic cabling. This criterion should be deleted.
- **Three cabinet rule.** This type of restriction is short-sighted. One can easily imagine a diminutive four-cabinet solution that is preferable to three large boxes on a pole. This criterion should encourage aesthetically-sensitive design, by stating, for example: “Pole-mounted equipment must be designed to minimize aesthetic impacts while complementing the shape and size of the utility pole to maximize screening and minimize aesthetic impact. Subject to state law requirements, pole-mounted equipment should be mounted at a sufficient height and best pole quadrant to minimize pedestrian view impacts and avoid incommoding public use of the street and sidewalk.”
- **Undergrounding.** Undergrounding districts are very difficult to fund. Accordingly many more poles are planned for undergrounding than ever are actually undergrounded. Like other utilities, wireless providers should simply be required to remove or relocate their facilities once the proper permits have been granted for the removal of a utility pole.
- **Ground-mounted equipment.** Please see our comments above. We believe ground-mounted facilities should not be prohibited in Sunnyvale. Again, we would suggest aesthetic criteria for ground-mounted facilities rather than prohibition.
- **Indemnity.** This indemnity has no place in design criteria. If necessary, indemnities can be included in application forms or permit forms signed by the applicant.

Conclusion

Again, we appreciate the revisions that have been made based on our prior comments to the Planning Commission. As set forth above, the proposed amendments

Sunnyvale City Council
November 6, 2012

ATTACHMENT H
Page 9 of 18

Page 4 of 4

should remain consistent with these prior revisions. In order to be consistent, noticing should be limited to that associated with non-discretionary right-of-way permits. Similarly, design review should be focused on design and should not arbitrarily limit facilities with respect to the ground-mounting of equipment or number of cabinets on a pole. We encourage you to pay particular attention to your design criteria as they will shape the wireless facilities that will ultimately benefit the Sunnyvale community with enhanced wireless services.

Very truly yours,



Paul B. Albritton

cc: Michael Martello, Esq., Interim City Attorney
Hanson Hom, Community Development Director
Trudi Ryan, Planning Manager
Andrew Miner, Principal Planner



JOHN DI BENE
General Attorney
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November 7, 2012

Via E-mail council@ci.sunnyvale.ca.us

City Council
Sunnyvale City Hall
456 West Olive Avenue
Sunnyvale, CA 94086

Re: AT&T's Comments to Proposed Amendments to
Sunnyvale City Code

Dear Honorable Council members Spitaleri, Whittum, Moylan, Griffith, Meyering,
Martin-Milius and Davis:

I write on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility ("AT&T") to provide comments on the City of Sunnyvale's proposed amendments to its wireless code (Chapter 19.54) regarding wireless telecommunications facilities in the public right-of-way ("Proposed Amendments"), as well as the Draft Criteria for Wireless Facilities on Joint Poles and Light Poles in the Public-Right-of-Way ("Draft Criteria"). I know City staff worked hard to develop the Proposed Amendments and these guidelines. In particular, AT&T supports the staff's stated objectives to "provide clear direction" in this area and to "create an efficient and understandable process." We also recognize there are many challenges in crafting such an amendment and such guidance, not the least of which include the challenge of legislating in the midst of rapid technological advances and in crafting such rules that properly respect the limits imposed by state and federal law in this area.

However, it is unclear that there is any need for a new layer of rules and process in this very limited regulatory space that the City can occupy. AT&T suggests that the City's objectives would be better left to the more flexible parameters within the current encroachment permitting framework. Indeed, the City does not have traditional zoning authority in the public right-of-way as it relates to wireless facilities, but, instead, is limited to only reasonable "time, place, and manner" regulations. These regulations must also be non-discriminatory, and cannot disfavor telephone corporations such as wireless providers from other users of the public rights-of-way. California Public Utility Code § 7901.1. Even if this were not the case, the City's objectives can be addressed in the

existing processes without risking unnecessary violations of state and federal law and without curtailing the flexibility needed for wireless providers to serve their customers as technology and needs develop. Thus, we urge the city to reconsider codifying a series of new rules and procedures, and suggest, instead, that the Council return this issue to the public works staff for consideration of their code. Anything more than the current permitting framework risks creating a process that will be less clear, more cumbersome, and ultimately legally uncertain.

Applicable Federal Limitations

AT&T's comments to the Proposed Amendments also must be viewed in the context of applicable federal law. AT&T agrees that in the context of siting wireless telecommunications facilities, the City must provide a clear path that does not get bogged down in process, so that the city can meet its legal obligation to act promptly when an application to install a wireless telecommunication facility is filed. For this reason, applications to install a wireless telecommunication facility in public rights-of-way should be subject to the current encroachment permit process.

Many of the issues raised by the Proposed Amendments straddle the boundary between issues within the exclusive authority of the Federal Communications Commission ("FCC") and the smaller universe of issues left to state and local authorities. Under the Telecommunications Act of 1996, 47 U.S.C. § 332 (the "Act"), Congress preempted all regulation of mobile services, with the exception of preserving state and local governments' traditional land-use and zoning authority in the context of permitting wireless communication facilities. While some powers remain with state and local governments, these statutory limits serve to promote the important national goal to deploy wireless technologies. In 2005, the United States Supreme Court helpfully explained:

Congress enacted the Telecommunications Act of 1996 (TCA), 110 Stat. 56, to promote competition and higher quality in American telecommunications services and to "encourage the rapid deployment of new telecommunications technologies." *Ibid.* One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers. To this end, the TCA amended the Communications Act of 1934, 48 Stat. 1064, to include § 332(c)(7), which imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities, 110 Stat. 151, codified at 47 U. S. C. § 332(c)(7).¹

¹ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115-16 (2005).

Indeed, the purpose of the Act was "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."² In discussing the need to speed deployment and availability of wireless technologies, the House Committee found that "current State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular communications network."³

To promote "rapid deployment of new telecommunications technologies," the Act requires state and local governments to take final action on permit applications seeking to construct wireless communication facilities within a reasonable period of time by issuing their decisions in writing and supported by substantial evidence.⁴ In so doing, state and local governments are precluded from effectively prohibiting a wireless provider from providing personal wireless services.⁵ Likewise, state and local governments are precluded from unreasonably discriminating among providers of functionally equivalent services.⁶

The City is within the jurisdiction of the Ninth Circuit United States Court of Appeals, which applies the so-called "least intrusive means" test when evaluating whether a city has violated the Act by effectively prohibiting a wireless provider from providing personal wireless service.⁷ In accordance with this federal case law, AT&T identifies ways to close service coverage gaps and alleviate network capacity constraints within the framework of the relevant local ordinances. Thus, in the context of each application for a permit to construct wireless communications facilities, to the extent the local law is not preempted by federal law, AT&T evaluates options by working within the preferences set forth in the City's code.

In 2009, the FCC issued an important declaratory ruling (the "Shot Clock Order") aimed at removing impediments to installation of wireless communications facilities caused by protracted state and local permitting procedures.⁸ The Shot Clock Order

² H. Conf. Rep. No. 104-458, at 1 (1996).

³ H. Rep. No. 104-204, at 94 (1995) (describing the section of the House bill that became 47 U.S.C. § 332(c)(7)).

⁴ 47 U.S.C. § 332(c)(7)(B)(ii) and (iii).

⁵ 47 U.S.C. § 332(c)(7)(B)(i)(II)

⁶ 47 U.S.C. § 332(c)(7)(B)(i)(I)

⁷ See, e.g., *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987 (9th Cir. 2009); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005).

⁸ See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Ruling 13994 (2009) (the "Shot Clock Order"); see also, *City of Arlington v. Federal Communications Com'n*, 668 F.3d 229 (5th Cir. 2012) (holding "the FCC is entitled to

establishes presumptive maximum numbers of days that constitute a "reasonable period of time" for the state or local authority to take final action, in writing and supported by substantial evidence, within the meaning of the Act. For collocations, state or local governments must take final action within 90 days from the time a complete application is filed.⁹ For sites other than collocation, the presumptive maximum time from completed application to final action is 150 days.¹⁰

Congress empowered the FCC to encourage broadband deployment and to "remove barriers to infrastructure investment." See 47 U.S.C. § 1302(a). Thus, in 2011, in order to serve the federal interests in and authority over deployment of wireless technologies, the FCC issued a Notice of Inquiry seeking comments to foster the acceleration of broadband deployment throughout the United States.¹¹ The FCC received hundreds of comments from communities around the country, from wireless services providers, including AT&T, and from a host of other interested parties and groups. In the Acceleration of Broadband NOI, the FCC explained, "[i]ncreasing broadband deployment throughout the nation is one of the great infrastructure challenges of our time."¹² To this end, the FCC aptly noted that state and local policies for siting wireless facilities "affect how long it takes and how much it costs to deploy broadband."¹³ In support of this statement, the FCC pointed out that the wireless industry will need to build 16,000 new sites across the country to fulfill broadband demands, and the FCC noted that this figure is likely understated.¹⁴

Through the Act and its regulations, the FCC has exclusive authority over technical and operational matters concerning wireless communications. Thus, as the Second Circuit Court of Appeals explained, state and local governments are preempted from exercising authority over decisions about the technologies and operation of personal wireless facilities:

* * * While section 332(c)(7) "preserves the authority of State and local governments over zoning and land use matters," H.R.Rep. No. 104-458, at 207-08 (1996), 1996 U.S.C.C.A.N., at 222, this authority does not extend to technical and operational matters, over which the FCC and the federal government have exclusive authority, *id.* at 209. Indeed, in Freeman v. Burlington Broadcasters, 204 F.3d 311 (2d Cir. 2000)] we held that "[i]n light

deference with respect to its exercise of authority to implement § 332(c)(7)(B)(ii) and (v)".

⁹ *Id.*, ¶¶45-48, 71.

¹⁰ *Id.*

¹¹ See *In the Matter of Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, Notice of Inquiry, 26 FCC Ruling 5384 (2011) ("Acceleration of Broadband NOI").

¹² *Id.*, ¶1.

¹³ *Id.*, ¶4.

¹⁴ *Id.*, n.7.

of the FCC's pervasive regulation of broadcasting technology, [section 332(c)(7)(A)] is most reasonably understood as permitting localities to exercise zoning power based on matters not directly regulated by the FCC." 204 F.3d at 323.¹⁵

In this case, the court held that a local government was preempted from requiring, or legislating a preference, that wireless providers build new sites using alternate technologies. The court explained that local governments "are also preempted because they interfere with the federal government's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law."¹⁶

Most recently, Congress enacted a new statute that further restricts local governments from regulating the collocation of wireless communication facilities. The new law provides that notwithstanding 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."¹⁷ Under this new law, state and local governments do not have discretion with respect to certain collocation applications, but instead have a duty to approve them. Combined with the Shot Clock Order, state and local governments have 90 days to approve eligible facility requests that are consistent with the new law.

Limitations to Local Regulation of Public Rights-of-Way

The City has no zoning authority in the Public right-of-way. Historically, the City's authority has been limited to ensuring public use of the rights-of-way by preventing unreasonable obstructions to that use. Beyond that very limited role, municipalities could not regulate installations of wireless telecommunications facilities in the public rights-of-way. In 1996, the legislature codified that cities had the right to "exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed," but only if such control treated all "entities" in an "equivalent manner." California Public Utility Code §§ 7901, 7901.1.

Thus, the City needs to treat every entity that uses the public right-of-way in the same manner. The right of non-discriminatory access that telecommunications carriers have to poles, as well as access to right of ways, easements, conduits and ducts (under the

¹⁵ *New York SMSA L.P. v. Town of Clarkstown*, 612 F.3d 97, 106 (2d Cir. 2010).

¹⁶ *Id.*, 612 F.3d at 105.

¹⁷ 47 U.S.C. 1455(a) (Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, P.L. 112-96) ("Section 6409(a)").

FCC or other state commission jurisdiction) make no distinction as to zoning or land use classification or as to where those poles are located.¹⁸

Wireless services are telecommunications carriers authorized and regulated by the California Public Utilities Commission, and they must be afforded the same rights as other utilities. State law also circumscribes local authority with respect to publicly owned electric poles. Indeed, Public Utilities Code Section 9510, et seq., supports the broad public policy favoring installation of wireless facilities on local publicly owned electric poles. And Public Utilities Code Section 9511 requires electric utilities to make room (space and capacity) on poles for wireless and ensures reasonable terms, conditions, and rates in contracts for such space and capacity.

Specific Comments On Proposed Amendments and Draft Guidance

With these important federal and state laws and objectives in mind, AT&T offers the following specific comments to the Proposed Amendments and to the Draft Criteria for Wireless Facilities on Joint Poles and Light Poles in the Public-Right-of-Way.

Section 19.54.040(l).

This section, which sets preferences for the placement of ancillary support equipment, seeks to mandate that ancillary support equipment in the public right-of-way must be located on a pole. This provision is too limiting, as a general matter, as it seeks to treat equipment in the public right-of-way more restrictively than areas over which the City has zoning authority. Additionally, this ignores the need for flexibility as wireless technology changes and develops. As such, this provision encroaches upon the exclusive federal authority over technical and operational aspects of wireless communication technology.

Section 19.54.040(r).

The last sentence of this subsection should be deleted because there very well may be poles in the public right-of-way that straddle property lines. To disallow wireless communication facilities where other utilities are allowed and exist would be unlawfully discriminatory. Moreover, there is no reasonable basis for this requirement.

Section 19.54.160.

¹⁸ While the Court in *Sprint PCE Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2007) interpreted Section 7901.1 to allow consideration of aesthetics, that decision does not authorize a city to impose the full weight of its zoning code to the public rights of way. Instead, that decision addressed the City's authority where the carrier was found to have failed to establish a need for the sites, and needs to be considered in that context. If it were so interpreted, the result would be contrary to decades of contrary state law precedent that was not addressed by the *Palos Verdes Estates* Court and that have not been addressed by any of the California appellate courts.

This section, which identifies applications that require a public hearing, fails to distinguish between new facilities and updates or modifications. The new federal law, Section 6409(a), requires local governments to approve certain applications for replacements and modifications. Thus, applications covered by Section 6409(a) should be excluded from any public hearing requirement.

Draft "Criteria" are guidelines and should be called guidelines.

City staff has confirmed that the Draft Criteria are intended to serve as guidelines when determining whether an application should be subject to design review or subject to a full hearing by the Planning Commission. In fact, the new proposed language for Section 19.54.160(a) refers to criteria as guidelines. The term "criteria" suggests that the statements are mandatory rather than to serve as guidance for applicants and the City. When read apart from the Proposed Amendments, this may cause some incorrectly to conclude that these element are mandatory for every installation to be approved.

Poles located in front of single-family homes.

The Proposed Amendments, by application of the Draft Criteria, would prohibit placing wireless telecommunications facilities in the public rights-of-way directly in front of residences or across streets from residences. This prohibition unlawfully prevents wireless providers from occupying rights-of-way and may unlawfully prohibit wireless telecommunications facilities under the Act. Moreover, this blanket prohibition will not always serve the City's interests and objectives. In working with neighboring communities, AT&T has found that the most appealing locations for wireless telecommunications facilities in the public rights-of-way, such as on utility poles, are sometimes in front of residences than rather than down the street. For example, natural screening from existing trees in front of a residence is often preferred to an unscreened pole down the street. At most, the City could establish preferences to indicate that sites in front of residences are not preferred, or even discouraged where other feasible sites are available.

65-foot maximum height limit.

For the same reasons, the proposed 65-foot limit will not always be beneficial, such as where existing structures or vegetation is present. Moreover, the relative height of nearby structures and vegetation may require antennas above 65 feet in order for AT&T to meet it service coverage needs. AT&T recommends against a specific maximum height requirement, but suggests that most of AT&T's needs likely could be fulfilled with antennas not taller than 75 feet.

Three equipment cabinets limit.

The City's proposed three-cabinet limit for pole-mounted equipment is improper and may be unlawful. This is another issue that would be ill-served by a new layer of regulation as proposed by the City. This bright-line rule would not further the City's objectives, and it puts the City at risk for running afoul of state and federal laws. For

example, based on our dialogue with City staff, staff has asked for a sample shut-off switch box (a very small box) to possibly make an exception to the three-cabinet rule for such devices. Not all cabinets are the same, and not all wireless technologies require the same equipment. The needs of wireless providers and the variety of designs of pole-mounted equipment makes this issue better left to design review within the encroachment permit process. Further, many jointly-owned poles already house multiple equipment cabinets for other utilities. Thus, this draft guideline, if taken as mandatory, would effectively prohibit AT&T from attaching to many poles in the public rights-of-way within the City, which would violate federal law. As a solution to this issue, AT&T recommends that this limitation be imposed upon "radio equipment cabinets" and that the provision be given added flexibility to avoid running afoul of the federal preemption over technical aspects of wireless technology.

Prohibition against new overhead lines.

The City's prohibition on new overhead lines in connection with an application to install wireless telecommunications facilities in the public rights-of-way is improper. The City cannot prohibit telecommunication or electric utilities from provisioning services to their customers. Importantly, the city needs to treat every occupant of the public right-of-way in the same way. The right of non-discriminatory access that telecommunications carriers have to poles, as well as access to right of ways, easements, conduits and ducts (under the FCC or other state commission jurisdiction) make no distinction as to zoning or land use classification or as to where those poles are located. To the extent that the city seeks to regulate the placement of wireless telecommunications facilities in the public rights-of-way differently from the way it treats other occupants of the same space, the city would be unlawfully discriminating against wireless providers. Additionally, the Telecommunications Act of 1996 prohibits unreasonable discrimination among providers of functionally equivalent services. To the extent the city's efforts could result in treating different wireless providers differently, perhaps as a function of varying technologies and varying needs, the city risks violating the federal law.

Limitation on ground-mounted equipment.

As with poles in front of single-family residences, in specific instances it may make better sense to allow ground-mounted equipment poles adjacent to residences in certain specific circumstances. Accordingly, AT&T recommends that the City adopt a preference against such installations, but avoid a blanket ban.

These blanket limitations – prohibiting the location of facilities on poles in front of residences, the 65-foot height limit, prohibiting facilities on poles along certain types of streets, and the three-cabinet limit – each impose significant restrictions on the ability of AT&T to deploy its chosen technologies in the manner necessary to build its network to serve its customers. Thus, each of these limitations risks effectively prohibiting AT&T's ability to provide personal wireless services, which would violate federal law. These prohibitions are not reasonably related to the City's concerns for aesthetics and use compatibility. This is why the more flexible design review approach to regulating

wireless telecommunications facilities in the public rights-of-way should be preferred over additional rules and new processes as proposed.

Inherent process delays in Proposed Amendments.

The City must be sure to comply with state and federal laws, including the FCC's Shot Clock Order, that require prompt consideration of applications for permits to install wireless telecommunications facilities. Unfortunately, the Draft Criteria for Wireless Facilities builds in significant opportunity for delays that could jeopardize the City's compliance with this important federal law. There is no clear path to pursuing a Miscellaneous Plan Permit because the Community Development Director has sole discretion to refer any particular application to the Planning Commission. And there is no indication of when or how that must take place. The pathway to appeal may be multi-layered if a Miscellaneous Plan Permit application is denied.

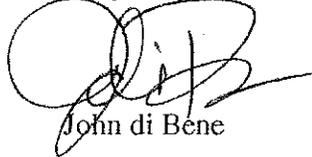
Moreover, the timing of the various public notices, which are themselves not entirely defined, and the multiple layers of hearings that could be had under any of the available processes, puts at significant risk the city's ability to comply with state law and the Shot Clock Order.

With respect to installations on poles in the public rights-of-way, only an administrative permitting process is needed. There is no need for a prolonged procedure to include public notices, public hearings, or various levels of review. The City should reconsider the recommendation to adopt more onerous and complex processes in this area over which the City has very little regulatory authority.

Conclusion

Thank you in advance for considering these issues. Please do not hesitate to contact me if you have any questions or concerns regarding this matter.

Very truly yours,



John di Bene

Cc: Andrew Miner

4. **File #:** 2012-7112
Location: City-wide
Council Study Issue: Consider Possible Regulations for Telecommunications Facilities Located in the Public Right-of-Way.
Environmental Review: Categorically Exempt Class 1
Staff Contact: Andrew Miner, (408) 730-7707, aminer@ci.sunnyvale.ca.us
Notes: *This item is scheduled to be considered by City Council on 11/13/12.*

Andrew Miner, Principal Planner, presented the staff report. He said two letters were received after the report was completed and are provided on the dais. He said that one letter is from Mackenzie and Albritton LLP, representing Verizon, expressing concern about the type of permit that would be filed for telecommunications facilities in the public right-of-way, and another letter from a neighbor. Mr. Miner said also provided on the dais is a revised proposed draft ordinance changing the permit type from a Use Permit to a Design Review.

Comm. Melton discussed with staff the Joint Pole Association and whether they are a private association. Comm. Melton commented that he thinks, aesthetically, that joint poles are a disaster. Mr. Miner indicated that the City does not have authority on the placement of poles in the right of way. He said staff has included in this study proposed criteria to help lessen the aesthetic impact of wireless equipment mounted on poles. **Kathryn Berry**, Senior Assistant City Attorney, discussed a case referred to in the Mackenzie and Albritton LLP letter and commented about City poles. Mr. Miner further discussed City poles, undergrounding of utilities and residential neighborhoods, and heights of light poles and joint poles. He said the wireless companies are looking for height. Comm. Melton commented that on his street, there are joint poles with street lights attached.

Vice Chair Dohadwala said she is happy to hear that the wireless poles are not permitted in the backyard of residential areas and discussed with staff the undergrounding of utilities in regards to wireless carriers and Use Permits versus Design Reviews. **Trudi Ryan**, Planning Officer, provided an example of a Design Review. Ms. Berry provided further clarification about what is in the City's purview regarding cell towers which includes regulating the time, place, manner and aesthetics of the poles. Ms. Berry discussed what the City cannot impose or prohibit and the considerations that must be balanced by the City. Ms. Berry said the residential areas are not well covered by cell service. Mr. Miner added issues are not the same in industrial areas and residential areas, and discussed how microcells versus macrocells are meant to augment the existing network.

Comm. Hendricks discussed with staff utility poles in residential backyards, easements on residential properties and the public right-of-way. Comm. Hendricks asked staff about light poles, joint poles and aesthetics. Ms. Berry and Mr. Miner addressed the issues of reviewing the aesthetics and differences of light poles and joint poles. Mr. Miner commented about the differences in leases and who can collect fees. Ms. Berry discussed the proposed ordinance and the 300-foot notice to allow public input about the aesthetics in the Design Review process. Comm. Hendricks further discussed aesthetics and the approval process with staff. Ms. Berry noted legal aspects. Comm. Hendricks expressed concern about aesthetics being the only tool to regulate and yet we cannot define what designs should

look like. Ms. Ryan added that since we do not know where a carrier needs coverage that it is difficult to determine what the optimal locations are.

Chair Larsson opened the public hearing.

Randy Okumura, External Affairs with AT & T, said he appreciates the discussion and the ordinance and the lead that Sunnyvale is taking on this issue. He commented about the time it takes to process an application. He said he supports the notion of the encroachment permit with some flexibility in the design. He said he respects that the Planning Commission has many different designs and configurations to consider.

Mei-Ling Stefan, a Sunnyvale resident, said she understands this study was motivated by microcell applications and discussed her concern about 65 foot cell towers and macrocell criteria. She discussed the different types of permits for different types of cell applications including Use Permits and Miscellaneous Plan Permits. She said she would like the proposed ordinance to specify that it is for microcells only, and would like a decrease in the allowed height of the poles from the stated 65 feet. She said she thinks antennas look better on light poles than on utility poles. She said smaller antennas would create less impact than larger antennas and she hopes the Design Review for aesthetics would also include review of the structural integrity of the related pole.

Chair Larsson closed the public hearing.

Comm. Melton discussed with staff Design Review permits and the decision makers for these reviews. Comm. Melton discussed with staff points brought up by the speaker including structural integrity of poles, and the 65 foot pole height.

Chair Larsson discussed with staff macrocells and poles. He noted that with the many changes cellular technology, that the ordinance should not specify only microcells.

Comm. Hendricks asked staff about the revised draft ordinance in regards to changing Use Permits to Design Reviews with staff saying the revision of the permit type to a Design Review is clearer.

Chair Larsson discussed with staff about revoking different types of permits including Use Permits or encroachment permits. Ms. Berry explained that an encroachment permit is normally temporary.

Comm. Melton made a motion that included the revised ordinance on the dais, to recommend to City Council Alternatives 1 and 2 with modifications to: 1. Adopt Design Guidelines for Wireless Facilities on Joint Poles in the Right-of-way. 2. Introduce an ordinance to amend the Zoning Code to regulate telecommunication facilities located in the right-of-way with the following permit requirements:

- a. Require a Design Review with Public Hearing for wireless applications on utility or light poles located in Heritage Landmark or Resource areas, within 300 feet of a Heritage Landmark or Resource or adjacent to a park or school, or if the Director of Community Development determines that the facility creates a visual impact or is not in keeping with the visual character of the surrounding area based on criteria defined in the Zoning Code.

- b. Design Review with Public Hearing for any other pole facility other than that described in a.

Comm. Hendricks seconded the motion.

Comm. Melton said he learned a lot from this study and thinks the staff and citizen oversight about what is aesthetically acceptable is good. He said he likes the concept that the City retains the rights for time, place and manner for situations regarding structural integrity.

Comm. Hendricks said he thinks this issue came about because there is a gap in the code and he likes the fact that the City is putting something in place. He said he has concerns about the aesthetics.

Chair Larsson said he would be supporting the motion and he is glad we are using an existing process.

Comm. Kolchak said he would be supporting the motion and commended **Comm. Melton** on his comments. He said it is important to have solid guidelines.

Vice Chair Dohadwala said she would be supporting the motion and that she agrees with **Comm. Hendricks** that there was a gap in the code that this fills.

ACTION: **Comm. Melton** made a motion on 2012-7246 to recommend to City Council Alternatives 1 and 2 with modifications to: 1. Adopt Design Guidelines for Wireless Facilities on Joint Poles in the Right-of-way. 2. Introduce an ordinance to amend the Zoning Code to regulate telecommunication facilities located in the right-of-way with the following permit requirements:

a. Require a Design Review with Public Hearing for wireless applications on utility or light poles located in Heritage Landmark or Resource areas, within 300 feet of a Heritage Landmark or Resource or adjacent to a park or school, or if the Director of Community Development determines that the facility creates a visual impact or is not in keeping with the visual character of the surrounding area based on criteria defined in the Zoning Code.

b. Design Review with Public Hearing for any other pole facility other than that described in a.

Comm. Hendricks seconded. Motion carried 7-0.

APPEAL OPTIONS: This recommendation will be provided to City Council and is scheduled to be considered at the Council meeting on November 13, 2012.