

**CITY OF ALBANY
CITY COUNCIL AGENDA
STAFF REPORT**

Prepared Date: 1/31/05
Agenda Date: 2/7/05
Reviewed By: _____

SUBJECT: Workshop on Wireless Communication Ordinance

FROM: Dave Dowswell, Planning Manager
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RECOMMENDATION

Discuss the proposed wireless communication ordinance, as recommended by the Planning and Zoning Commission, in preparation for a public hearing scheduled for February 22, 2005.

BACKGROUND

City regulation of wireless facilities: At this time the City has no specific regulations covering wireless communication facilities. City approval of the wireless facilities that have previously been installed in Albany has been guided by a general requirement of the zoning ordinance that such facilities require a conditional use permit. Thus, approval is subject to the findings required generally for use permits by the ordinance, and conditions have been applied by the Planning and Zoning Commission as appropriate.

Wireless communication facilities have been established at the following locations:

1. 520 Cleveland: Sprint
2. 650 Cleveland: GTE Mobilnet (or successor) and MetroPCS
3. 423 San Pablo: GTE Mobilnet (or successor) and MetroPCS
4. 1035 San Pablo: Nextel
5. St Mary's High School: Cingular, MetroPCS, Sprint
6. 940-972 San Pablo (Town Centre): Cingular (Approved, installation not yet complete)

In addition, a re-application for facilities at 1530 Solano for Nextel and MetroPCS is anticipated.

As the wireless industry has grown in recent years, many local jurisdictions have seen the need to adopt regulations specific to wireless facilities. For Albany, a proposed new zoning section on wireless communication facilities was introduced during the

comprehensive update of the City's zoning ordinance. The proposed text was included in the zoning revisions that were recommended to the City Council on June 8, 2004.

Coincident with City Council consideration of the recommended zoning revisions, wireless communications became a matter of heightened public interest, prompted by concerns over facilities proposed on Solano Avenue and at Albany High School. In September, 2004 the City Attorney proposed that Council consider adding language to Subsection 20.20.090, particularly in respect to more detailed application requirements, findings, operation and maintenance standards, and certification of facilities. The Council was presented with additional proposals from a residents' group represented by Nan Wishner.

Moratorium: Given the level of public interest expressed about the proposed regulations, and because a thorough review of the wireless provisions would require considerably more time than had been thought initially, the Council deferred consideration and action on the wireless communication regulations. The purpose of the deferral was to allow time for staff to assess the new information and to propose appropriate revisions to the draft regulations, and for the Planning and Zoning Commission to consider revised language and make a recommendation to the City Council. Accordingly, the City Council adopted, on October 18, 2004, an urgency ordinance, establishing a 45-day moratorium on approvals of wireless facilities, pending adoption of new regulations. On November 15, 2004, the City Council extended the duration of moratorium to April 17, 2005.

Commission study session: Staff prepared a revised draft of wireless regulations, incorporating the various changes recommended by the City Attorney and the residents' group, plus other changes initiated by staff. The revised draft was considered by the Planning and Zoning Commission in a public study session on December 14, 2004. In the study session the Commission received statements from several residents as well as representatives of wireless carriers. A letter from the attorney for one of the carriers was introduced (Attachment N to this report). Following questions and discussion, the Commissioners provided instructions to staff for follow-up, specifically requesting a written report from the City Attorney addressing the legal points raised by the carrier's attorney.

Commission public hearings: The City attorney's report (Attachment L) was presented to the Commission during a public hearing on January 11, 2005. At that time the Commission also received additional written communications, and heard public testimony on the draft ordinance. The Commission reached preliminary conclusions, which are described below in the Discussion section. The public hearing was continued to January 25, 2005.

Based on directions provided by the Commission, staff made additional revisions to the draft ordinance, for review at the January 25 public hearing. At that hearing, the Commission heard additional testimony from residents and industry representatives. At

the conclusion of the hearing the Commission decided on the content of its recommendation and adopted Resolution No. PZ-05-01 (Attachment A).

CEQA status: In compliance with requirements of the California Environmental Quality Act (CEQA), staff circulated, for public comment, a draft Negative Declaration based on an Initial Study of potential environmental effects of the proposed ordinance. No comments were received during the 20-day review period that ended on January 11, 2005. However the Commission received a comment during the January 25 public hearing, regarding the adequacy of the noise analysis in the Initial Study. The Commission approved the draft Negative Declaration, subject to further staff analysis of potential noise effects. This work will be completed prior to the Council's public hearing on the proposed ordinance.

DISCUSSION

Public Input: Attachments to this report are indicative of the public interest in the City's regulation of wireless communication facilities. There have been three main streams of contributions from the public:

- Letters, petitions and information from a residents' group represented by Nan Wishner.
The group has sought to limit facilities to as few locations as possible, in particular to prohibit locations in residential areas and school and park sites. The group has stressed a need for detailed, precise information in support of applications for approval of facilities; high standards for verifying the need for facilities; and close and frequent monitoring of the performance of facilities.
- Letters from James Heard of Mackenzie & Albritton, attorneys representing MetroPCS, one of the applicants for the site proposed at 1530 Solano Avenue. This correspondence has been supported by Nextel, the co-applicant, as well as by Verizon.
The providers' position is that the City should avoid any regulations beyond aesthetics, noise and traditional zoning concerns, in particular that any concerns (direct or indirect) about the safety radio-frequency exposure are beyond the regulatory purview of the City. They generally oppose any ban of facilities from specific zones, and consider as burdensome many of the submittal requirements that have been suggested. They note that regulations that would have the effect of restricting providers' ability to deliver wireless service may be in violation of the Telecommunications Act.
- Letters from Catherine Engberg and Ellison Folk of Shute, Mihaly & Weinberg, attorneys representing Albany Resident Albert Chen, who opposes the 1530 Solano Avenue project.
These communications have provided specific suggestions for revisions to the draft ordinance, including the use of "preferred districts" as a way of controlling the locations of facilities in proximity to residential areas. They

have also recommend the use of “significant gap in coverage” as a standard for determining the necessity for locating any wireless facility in any zone other than the CMX zone near the freeways.

Planning and Zoning Commission deliberations: In its January 25, 2005 meeting, the Planning and Zoning Commission reached preliminary conclusions and directed staff;

1) that wireless facilities should be located according to a preferred order of zoning districts;
2) that application requirements should be consistent with requirements for other uses;
3) that certain detailed technical studies should be required at the discretion of staff; and
4) that special attention was needed to see that setbacks of facilities from residential properties were adequate. On January 25 the Commission heard additional testimony and worked through the draft ordinance on a point-by-point basis. The Commission agreed on certain changes, as indicated in the text attached to Planning and Zoning Commission Resolution No.PZ 05-01. (Staff has indicated, within the text, where the Commission’s decisions were other than unanimous). The Commission deferred to the City Council the determination of the appropriate content of the required findings, as the issue involves legal considerations.

Albany Hill: Although the Commissioners agreed that wireless facilities should not be allowed in parks, four members were supportive of an exception for Albany Hill Park, in view of its unique elevation. Since the possibility of wireless facilities in that location could affect a constituency that has not been directly involved in the discussions of the wireless ordinance, staff suggests that the question of such an exception be deferred for more focused discussion at some time after the Council has acted on the body of the ordinance. If the Council then determines that the exception would be desirable, the ordinance could be amended.

Staff believes that the Commission has achieved a desirable balance among conflicting positions set forth by different members of the public, while meeting the City’s needs to exercise regulations within the limitations of federal law. There is a reasonable satisfaction of the residents’ desires for detailed and careful application review, judicious findings for approval, ongoing monitoring of performance, as well as a generous separation between wireless facilities and neighboring residences. While the industry representatives may not be fully satisfied, the Commission has rejected some of the mandatory requirements requested by residents and has attempted to make the regulations consistent with typical planning and zoning practice.

Outstanding issues: The following is a list of issues for which the Wishner group may continue to seek inclusion in the ordinance, with notations reflecting staff and Commission positions:

1. Criterion for necessity of facility (i.e., significant gap in coverage).

(Commission has deferred on this. Staff believes that a broader criterion is needed, and believes that the general finding of necessity and desirability, already required by zoning section 20.100.030, is appropriate.)

2. Detailed application requirements to be stated in the ordinance (site plan, equipment specifications, data on provider's network performance, list of nearby childcare facilities). *(Draft provides that the Community Development Director will establish a detailed list of submittal requirements, as is regular practice.)*

3. Mandatory alternatives analysis. *(Commission agrees with staff that this should be at staff discretion.)*

4. Mandatory third-party review of technical data. *(Commission agrees with staff that this should be at staff discretion.)*

5. Maximum achievable setback from residential (at least 100 feet). *(Considering that 100 feet could only be achieved on a few commercial sites, Commission has recommended a more readily achievable 50 feet.)*

6. Expanded radius for public notice (at least 1000 feet). *(The Commission did not believe that a different standard should apply to wireless facilities, though some members were interested in a general expansion of the notification radius.)*

7. On site equipment shut-off for emergency worker protection. *(Commission felt that building code requirements are sufficient to cover such emergency needs.)*

Notes on sources: The draft Wireless Communication Facilities ordinance that has been developed by staff was based on adopted ordinances of a number of Bay Area cities, including Oakland, Petaluma and Sonoma, which were offered by ABAG as samples. Staff also consulted and adapted some language from Concord, Walnut Creek, Berkeley, Fremont and San Rafael. Since the Telecommunications Act sets standards for safety with respect to radiofrequency radiation, and prohibits localities from setting more stringent standards, staff has concentrated its efforts on attempting to regulate the installation of facilities so they have as little as possible visual or physical impact on the surrounding residential areas.

The public input by the Wishner group was based on various research, including ordinances of the Town of Great Barrington, Massachusetts and Santa Cruz County, California. The recommendations of the two law firms include citations of various laws, ordinances and case decisions.

Summary of draft ordinance: The following is an outline summary of the proposed regulations on wireless communications facilities, with general notes on proposed changes from the original draft which was reviewed by the Commission and Council as part of the overall zoning revision process:

A. Purpose and intent: Generally to establish standards for placement of antennas, and to encourage locations on public sites and to encourage joint use of facilities by multiple companies. Added language prevents facilities in residential districts, and requires compliance with all other codes and regulations.

B. Definitions: In the new zoning ordinance, definitions have been located in a separate Definitions section. Terms relevant to wireless communications are listed in Attachment A to the P&Z Resolution.

C. Exempt Facilities: A list of facilities, such as TV antennas and satellite dishes, and various radio antennas that are not covered by the proposed regulations.

D. Location by Zoning Districts: Wireless communication facilities are proposed to be prohibited in all residential districts and the waterfront district, and conditionally permitted in all commercial and public facilities (PF) districts (*newly proposed text:* except at school and park sites). PF districts include City Hall, the Gill Tract, the U.C. Little League fields, the USDA and the State Orientation Center for the Blind. The concept of "preferential tiering" of districts has been added.

E. Development Standards: Lists of standards to be generally applicable, and specific standards for building-mounted antennas and monopoles. Height limits are adjusted to correspond to newly adopted limits on other structures.

G. Application procedures: Use permits and design review are required. Added specifications for required submittal information, including a specific set of requirements for towers. Additional findings for approval added.

H. Operation and Maintenance Standards. Additional provisions suggested by the City Attorney to control ongoing compliance, with additional public recommendations.

I. Certification of Facilities. Additional provisions suggested by the City Attorney to assure compliance with FCC limits, with some additional material from the public.

I. Duration, Revocation and Discontinuance: Provisions for time limits, extensions, removal after discontinuance, and legal nonconforming status of pre-existing facilities. Additional language to assure compliance.

Attachments:

- A. P&Z Resolution No. PZ 05-01, including recommended draft ordinance
(The following are attached generally in reverse order of receipt:)
- B. Chao Shan, information on cell coverage, submitted to P&Z 1-25-05
- C. Mackenzie & Albritton (for Metro PCS), letter 1-20-05
- D. Verizon Wireless, letter 1-20-05
- E. Shute, Mihaly & Weinberger (for Albert Chen), letter 1-20-0
- F. Nan Wishner et al, letter with attachment 1-19-05
- G. Shute, Mihaly & Weinberger (for Albert Chen), letter with attachment 1-11-05
- H. Nan Wishner et al, letter 1-11-05
- I. Nan Wishner, testimony presented to P&Z, 1-11 and 1-25-05
- J. Michael Barnes, letter with attachments 1-9-05
- K. Nan Wishner et al, letter and attachments 1-6-05
- L. City Attorney, report to P&Z 1-4-05
- M. Commissioner Douglas Donaldson, memo 1-4-05
- N. Mackenzie & Albritton (for Metro PCS), letter 12-14-04
- O. Nan Wishner, et al, letter via email, 10-6-04
- P. Nan Wishner et al, letter with attachment 10-1-04
- Q. Nan Wishner, et al, letter with attachment 9-26-04
- R. Emails from other residents
- S. Petition of residents, on restriction of zoning districts, submitted to P&Z 1-12-05
- T. Petition of residents on siting and moratorium, submitted to City Council 10-18-04

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