

CITY OF OAKLAND

AGENDA REPORT

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TO: Councilmember Jane Brunner, Chair, and Members of the Community and Economic Development Committee
FROM: Councilmembers Nancy J. Nadel, District 3, and Larry Reid, District 7
DATE: June 27, 2006
RE: An Urgency Ordinance, Pursuant To Government Code Section 65858, By The City Of Oakland, Establishing A Temporary Moratorium On The Approval Of Applications To Construct, Modify Or Place Wireless Communication Facilities

SUMMARY

This ordinance will enact a 45-day moratorium on the granting of any permits for the construction, modification, or placement of cell phone towers and antennae in the City of Oakland. Staff will use the 45-day moratorium to review all zoning regulations for such permit applications and to recommend amendments to the existing regulations which govern wireless communication facilities. The Community and Economic Development Agency (CEDA) is already in the process of reviewing portions of, and considering amendments to, the current Planning Code. CEDA staff has indicated it expects to complete revisions to the Planning Code by the end of 2006. However, absent clear direction by the City Council, CEDA is not planning to review, amend, nor update the regulations which govern wireless communication facilities.

The City's current telecommunication regulations, which were enacted in 1996 and have not been updated since 2000, are deficient in several areas, including but not limited to: they do not adequately address community concerns regarding locational standards and design specifications of wireless communication facilities, and they allow permit applications to be handled through an administrative review process that requires public notification through notice but does not include a public hearing.

Since 2000, the City of Oakland has received an increasing number of applications for the construction, modification, and/or placement of wireless telecommunication facilities throughout the City. Currently, CEDA approves, on average, *one such permit per week*. Further, changes in wireless communication technology, as well as projected increases in residential and commercial development throughout the City, coupled with the desire of wireless communication providers to increase wireless communication services in the City and surrounding areas, will likely produce additional permit applications for the construction, modification, and/or placement of wireless communication facilities within the City of Oakland.

This moratorium will allow City Council the time to direct CEDA to review and possibly amend the zoning regulations in order to provide *clear, consistent, and uniform* guidance to wireless communication service providers regarding the siting and design of wireless communication facilities while addressing community concerns within the limitations specified in the Telecommunications Act of 1996 (TCA). It should be noted that Section 704 of the TCA preserves the right of local municipalities to regulate locational standards and design

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specifications of wireless communication facilities, and appropriate considerations include design/aesthetics, visual impacts, and land use impacts.

FISCAL IMPACT

None. This is a policy and regulatory matter with no direct fiscal impact.

BACKGROUND

In October 2005, residents of District Seven brought to Councilmember Reid's attention concerns over the placement of a cell phone tower, without a fence or other surrounding safety mechanism, near a school in the Grass Valley area. At Councilmember Reid's request, this issue was placed on the December 13, 2005 Public Safety Committee meeting agenda for action on a report and recommendations from CEDA and the Finance and Management Agency (FMA) on the criteria used to determine design specifications and site locations for cellular phone antennas. At CEDA's request, the item was continued to the January 10, 2006 meeting of the Public Safety Committee.

On January 10, 2006, the FMA and CEDA presented their report, which included an outline of *the Federal guidelines and local ordinances that govern the installation of cellular sites in Oakland*, as well as recommendations that City Council review potential amendments to the current zoning regulations and review the federal regulatory framework in conjunction with proposed amendments. The Public Safety Committee moved, seconded, and carried a motion to approve the staff recommendations with the following amendments: staff is to visit the locations of concern to confirm that each site is in compliance with the City's regulations; those that are not, enforce the policy; and at locations that cannot be regulated look into implementing voluntary standards. This matter was adopted by the City Council on January 17, 2006.

To date, the cell tower in Grass Valley remains unfenced and unsafe.

Further, in April 2006, residents of District Three brought to Councilmember Nadel's attention concerns regarding the location and design specifications of a cell phone antenna to be placed on the roof of a residential building. In that case, the wireless provider submitted its permit application in December 2005, but a community meeting with concerned property owners did not occur until April 2006, at which time the wireless provider offered the property owners some site-specific modifications (which would not apply to any other antennae or permit applications).

There are continuing community concerns regarding the lack of consistency and uniformity in the design and placement of wireless communication facilities throughout the City of Oakland, particularly in light of the increasing number of permit applications and the fact that CEDA's Zoning and Planning Department must sometimes negotiate voluntary modifications by wireless providers on a site-by-site basis. There are also community concerns regarding the impacts that a proliferation of wireless communication facilities may have upon the City as a whole,

including, but not limited to: safety, noise, maintenance, lighting, visibility, adverse visual impacts, and incompatibility of commercial uses in residential zones.

KEY ISSUES AND IMPACTS

As indicated in the January 10, 2006 staff report, the Federal Communications Commission (FCC) and the TCA preserve state and local authority over zoning and land use decisions for personal wireless service facilities, but sets forth specific limitations on that authority, in particular:

- 1) State or local government shall not unreasonably discriminate among providers of functionally equivalent services.
- 2) State or local government shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
- 3) State or local government shall act on applications within a reasonable period of time after the application is duly filed, taking into account the nature and scope of the permit request.
- 4) State or local government may not regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the FCC's regulations concerning such emissions.
- 5) State or local government must make any denial of a permit application in writing supported by substantial evidence in a written record.

The City of Oakland's current telecommunication regulations do not provide uniform and consistent results. A cell tower in one district may or may not contain a surrounding fence for safety, residents in some parts of the City have successfully rejected the placement of towers or antennae in their neighborhoods while residents in other parts of the City have been forced to accept modified antennae. The current regulations also fail to require reports by wireless providers documenting continuing compliance with FCC regulations regarding emissions, or even continued compliance with the findings and conditions of approval under which the application was originally approved.

We need time to review and analyze possible amendments that would clarify and refine the current zoning regulations in order to better reflect the City's siting and regulatory objectives for wireless telecommunication facilities *and* balancing those objectives with the community concerns described above. The January 10, 2006 Staff Report did not address this issue.

The City's current telecommunication regulations, in comparison to those of comparable California cities, lack clarity and uniformity in certain sections, particularly with regard to locational standards and design specifications. Councilmember Nadel's office has performed extensive research on the successful adoption of moratoria and amended zoning regulations in other California cities to address community concerns regarding wireless communication facilities. Councilmember Nadel's office has provided documentation to CEDA staff regarding the comprehensive zoning regulations of the Cities of Pleasanton, Los Gatos, Davis, Brisbane,

and the County of Santa Cruz; staff should use those regulations as models for updating or amending the City of Oakland's regulations.

CONCLUSION

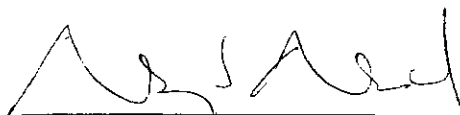
This ordinance will enact a 45-day moratorium on the granting of any permits for the construction, modification, or placement of wireless communication towers and antennae in the City of Oakland. Staff will use the 45-day moratorium to review all zoning regulations for such permit applications and to recommend amendments to our existing regulations.

Before the expiration of the 45-day moratorium, staff will ask the City Council to extend the moratorium up to six months to provide ample time for reviewing potential amendments and to present those amendments to the Planning Commission and to the City Council for adoption.

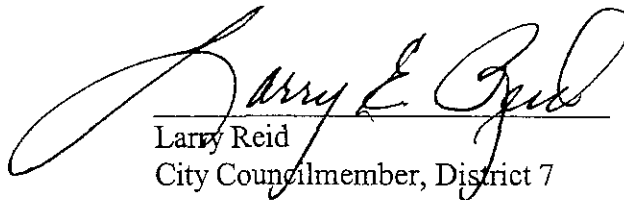
RECOMMENDATIONS AND RATIONALE

It is the recommendation of this report that the City Council adopt the Urgency Ordinance and approve the moratorium and give direction to staff to review possible amendments to our current telecommunication facilities zoning regulations and to return to Council for action on those recommended amendments.

Respectfully submitted,




Nancy J. Nadel
City Councilmember, District 3



Larry Reid
City Councilmember, District 7

Prepared by:

Marisa Arrona
Policy Analyst
Councilmember Nancy J. Nadel
District 3


City Attorney

COUNCIL CHIEF

OAKLAND CITY COUNCIL

ORDINANCE NO. _____ C.M.S.

INTRODUCED BY COUNCILMEMBERS NANCY NADEL AND LARRY REID

**AN URGENCY ORDINANCE, PURSUANT TO GOVERNMENT
CODE SECTION 65858, BY THE CITY OF OAKLAND,
ESTABLISHING A TEMPORARY MORATORIUM ON THE
APPROVAL OF APPLICATIONS TO CONSTRUCT, MODIFY OR
PLACE WIRELESS COMMUNICATION FACILITIES**

WHEREAS, Government Code § 65858 allows a city, including a charter city, without following the procedures otherwise required prior to the adoption of a zoning ordinance, to adopt, as an urgency measure, an interim ordinance prohibiting any uses which may be in conflict with a contemplated general plan, specific plan, or zoning proposal which the legislative body, planning commission, or planning department is intending to study within a reasonable time; and

WHEREAS, the City of Oakland's Community Economic Development Agency is in the process of studying proposed amendments to the City's zoning regulations, which amendments are expected to be enacted by the end of 2006 as part of the Agency's major initiative to update the Oakland Planning Code; and

WHEREAS, until such time that the City concludes its review and adopts and institutes new land use regulations governing permit applications for the construction, modification or placement of wireless communication facilities, the community is in jeopardy that wireless communication facilities could be constructed, modified or placed prior to the imposition of new regulations necessary for the protection of public health and welfare; and

WHEREAS, the City Council finds and determines that the approval of pending or new applications for wireless communications facilities during the moratorium period, in which possible amendments to the Zoning Code are being studied, could result in conflicts with any proposed amendments and would undermine the purpose of studying such amendments, thereby reducing the quality of life within the community to the extent the overall public health, safety and welfare are detrimentally affected; and

WHEREAS, the City's current wireless communication facilities regulations, which were enacted in 1996 and have not been updated since 2000, are deficient in several areas, including but not limited to: they do not adequately address community concerns regarding locational standards and design, and they allow permit applications to be handled through an administrative review process that requires public notification through notice but does not include a public hearing; and

WHEREAS, since 2000, the City of Oakland has received an increasing number of applications for the construction, modification, and/or placement of wireless telecommunication facilities throughout the City; and

WHEREAS, currently, the City of Oakland's Planning and Zoning Department approves, on average, one permit per week for the installation, construction, placement, and/or modification of wireless communication facilities; and

WHEREAS, changes in wireless communication technology, as well as projected increases in residential and commercial development throughout the City, coupled with the desire of wireless communication providers to increase wireless communication services in the City and surrounding areas will likely produce additional permit applications for the placement or modification of wireless communication facilities within the City of Oakland; and

WHEREAS, significant concerns have been raised in the community regarding the continued adequacy of the current regulations to address the increased number of permit applications and new technologies of wireless communication facilities, and to ensure informed, consistent, uniform, and fair decisions on permit applications for new and/or modified wireless communications facilities throughout the City; and

WHEREAS, citizens of the City of Oakland have also expressed significant concerns regarding the impacts that a proliferation of wireless communication facilities within the City of Oakland, may have upon the community as a whole, including, but not limited to, safety, noise, maintenance, lighting, visibility, adverse visual impacts, and the incompatibility of commercial uses in residential zones; and

WHEREAS, citizens of the City of Oakland have expressed a desire that the City receive adequate wireless telecommunication services provided that the facilities are designed and located to minimize the concerns described above; and

WHEREAS, it is the intent of the Oakland City Council to consider and adopt new zoning regulations pertaining to wireless telecommunication facilities in order to provide clear, consistent, and uniform guidance to wireless communication service providers regarding the siting and design of wireless communication facilities while also addressing the significant community concerns described above, and to better reflect the City's siting and regulatory objectives for wireless telecommunication facilities, all within the limitations specified in the Telecommunications Act of 1996; and

WHEREAS, the Oakland City Council has determined that a temporary moratorium on the approval of applications to construct, modify or place Wireless Communication Facilities will allow the City time to complete its review and revisions of its Telecommunications Regulations while ensuring to the maximum extent feasible that the siting and other objectives of the revised ordinance may be achieved; and

WHEREAS, for the reasons set forth above, this ordinance is declared by the Oakland City Council to be necessary for preserving the public peace, health, or safety and to avoid a current, immediate and direct threat to the health, safety, or welfare or the community, and the “Whereas” clauses above taken together constitute the City Council’s statement of the reasons constituting such necessity and urgency; now therefore

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby make them a part of this ordinance.

SECTION 2. The City Council finds and determines, for the reasons stated in the recitals, the adoption of this ordinance is exempt from CEQA under Sections 15061(b)(3), 15307, 15308, and 15183 of the State CEQA Guidelines.

SECTION 3. The City Council hereby directs the Community and Economic Development Agency to work on the preparation of amended zoning regulations governing the construction, modification, and placement of wireless telecommunications facilities within the City of Oakland, and to submit them for consideration by the Planning Commission and City Council.

SECTION 4. Until such time as the City concludes the review described above, and adopts new Telecommunications Regulations or otherwise amends Chapter 17.128 and/or Sections 17.10.860-17.10910 of the Planning Code, the City of Oakland hereby declares a moratorium on the approval of permit applications to construct, modify or place wireless communication facilities, as defined in section 5 below.

SECTION 5. For purposes of this Ordinance, the following definitions shall apply:

- a. “Wireless Communication Facility” means an unstaffed facility for the transmission and reception of low-power radio signals. (Planning Code §17.128, Ord. 11904 § 5.01 (part).)

SECTION 6. In accordance with Government Code Section 65858, this Ordinance shall be in full force and effect for a period of 45 days from the date of its adoption, i.e., **from June 27, 2006 through and including August 11, 2006**, prohibiting the approval of permits applications to construct, modify or place wireless communication facilities, except as provided in Section 6, below. This 45-day period may be extended by the City Council in accordance with the provisions of California Government Code Section 65858.

SECTION 7. Exceptions. Any proposed wireless telecommunication facility to be owned and operated by a public safety provider and reasonably necessary for the protection of life and public safety is exempt from the moratorium established under this urgency ordinance. The City Council shall determine, based on substantial evidence in the record, that the facility meets this requirement. In addition, the moratorium shall not apply to the following activities, as defined in Section 17.128.020 of the current Zoning Regulations:

- a. Ham radio operators;
- b. Microwave dishes;
- c. Minor modifications of existing wireless communications facilities and attached wireless communications facilities, whether emergency or routine, provided there is little or no change in the visual appearance. Minor modifications are those modifications, including the addition of antennas, to conforming wireless and attached wireless communications facilities that meet the performance standards set forth in this document;
- d. Antennas and equipment cabinets or rooms completely located inside of structures and whose purpose is to enhance communications within the structures. (Ord. 11904 § 5.01 (part), 1996: prior planning code § 8501.)

SECTION 8. During the term of this ordinance as set forth in Section 6 hereof, no use permit, building, zoning or other permit that has been issued for the construction, modification, or placement of any wireless communication facility, for which rights to proceed with the wireless communication facility have not vested pursuant to the provisions of State law, shall proceed; and no use permit, building, zoning or other permit for the construction, modification, or placement of any wireless communication facility shall be issued by any department, agency, employee, or agent of the City of Oakland. Only wireless communication facility use permits, development projects, facilities, or other activities which have vested, pursuant to the provisions of the State law, prior to the date of this Ordinance shall proceed in violation of the provisions of this Ordinance.

SECTION 9. Petition for Relief from Moratorium. Any person who has applied to construct, modify or place a Wireless Communication Facility which would be affected by this Moratorium, and who contends that the Moratorium as applied to him or her would be unlawful under Federal, State, or local law or regulation, may submit a written application to the Planning Director requesting relief from the Moratorium. The request for relief from moratorium shall identify the name and address of the applicant, the affected application number, and shall state how the Moratorium as applied to him or her would be unlawful under Federal, State, or local law or regulation. Within fourteen (14) calendar days of receipt of the completed request for relief, the City Administrator, or her designee, shall mail to the applicant a written determination accepting or rejecting the request for relief from Moratorium.

SECTION 10. The City Clerk shall certify to the passage and adoption of this Ordinance causing it to be posted, as required by the law, and it shall thereafter be in full force and effect. This Ordinance shall become effective immediately as an interim urgency ordinance, in order to protect the public health, safety, and welfare.

SECTION 11. For the term of this ordinance, as set forth in Section 6 hereof, the provisions of this ordinance shall govern, to the extent there is any conflict between the provisions of this ordinance and the provisions of any other City code, ordinance, resolution or policy, and all such conflicting provisions shall be suspended.

SECTION 12. This Ordinance is enacted pursuant to the City of Oakland's general police powers, Section 106 of the Charter of the City of Oakland, Article XI of the California Constitution and Government Code section 65858.

SECTION 13. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council declares that it would have adopted this Ordinance and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more section, subsection, sentence, clause, or phrase be declared invalid.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 20____

PASSED BY THE FOLLOWING VOTE:

AYES- BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST: _____

LaTonda Simmons
City Clerk and Clerk of the Council
Council of the City of Oakland, California