CITY OF PALO ALTO

CITY COUNCIL
Colleagues Memo

Sponsors: Council Member Lydia Kou and Vice-Mayor Lauing

Meeting Date: October 21, 2024
Report #: 2410-3600

TITLE
Colleagues Memo - Restoration of subjective aesthetic standards to Palo Alto's Wireless Communication Facilities (WCF) ordinance.

RECOMMENDATION
Repeal objective-only aesthetic standards for the siting and design of cell towers (WCFs) and restore subjective aesthetic standards, public hearings, and Architectural Review Board review.

Support for Recommendation

1. The only reason that the City imposed "objective" standards was because the FCC forced it in new rules issued in 2018. PTC and others did not think this was the right path. In fact, Palo Alto's ordinance anticipated that the Council could quickly repeal the "objective" standards once it regained the authority to do so, because over 100 cities and the League of California Cities had already sued the FCC by the time that Palo Alto enacted the new ordinance in 2019. (PACC § 18.42.110(g)(h).)

Here is what the Ninth Circuit said in August, 2020, when it struck down the FCC's restriction:

> We conclude that the FCC's requirement that all aesthetic regulations be "objective" is arbitrary and capricious. At the very least, the agency must explain the harm that it is addressing, and the extent to which it intends to limit regulations meant to serve traditional zoning objectives of preventing deployments that are unsightly or out of neighborhood character. . . The requirement that local aesthetic regulations be "objective" is neither adequately defined nor its purpose adequately explained.
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> *City of Portland v. United States*, 969 F.3d 1020, 1042 (9th Cir. 2020).

Before there were "objective-only" standards, there was a thoughtful list of subjective standards, a list that had been prepared collaboratively by multiple City departments and by the ARB. The City can seamlessly return to these standards now.

2. Careful and comprehensive review of wireless facilities is particularly necessary because federal law allows small cell sites that are not entirely hidden to be increased in height and girth by ten feet not withstanding zoning limits. (47 CFR § 1.6100(b)(7)(i).) This means

that even if a site complies with "objective" standards on the day it is approved, it can be altered in ways that will not be compliant in the future. No other permit operates this way.

3. Currently, because of the narrow scope of "objective" aesthetic review, issues with the site of a proposed cell tower are not even eligible to be considered. Having a robust and demanding discretionary application review process pushes applicants to self-regulate and submit the best option in the first place, so there will be less need for appeals.

4. Staff has concern with shot clock compliance. But in practice, the 60-90 day shot clocks are extended frequently - often because the applicant needs more time to get its own application organized and complete internal engineering or planning related to trenching and fiberoptic backhaul for installation.

   Moreover, so long as the City makes a Director-level decision before the shot clock period ends, it will have complied with the FCC regulations. (47 CFR § 1.6003(a).) The impact of the shot clocks expiring after a decision is made will only be to cut off any subsequent right to appeal *if* the applicant does not agree to an extension. In many instances, due to the importance of cooperation from the City and the collaborative framework created by the Master License Agreement, cell tower applicants will likely enter into shot clock tolling agreements to stop the clock, even if it means allowing an appeal (sometimes that appeal will be for their own benefit). Recently, for example, AT&T agreed to extend the shot clock to allow a resident in Santa Cruz County to appeal because the County requested this extension so that their process can play out as intended in their ordinance.

   Voluntary shot clock tolling also goes both ways. If the City is approaching the end of the shot clock and does not have the information needed to approve the application, the City will deny the application to avoid blowing the shot clock. In those instances, the applicant needs the City's approval to extend the shot clock. As the regulations say, a tolling agreement to stop the shot clock requires "a written agreement between the applicant and the siting authority [i.e, the City]." (47 C.F.R. § 1.6003(d).) Caselaw confirms that denying an incomplete application, without offering the applicant further opportunity to remedy it, is lawful. (*ExteNet Sys. v. City of Cambridge*, 481 F. Supp. 3d 41, 51 (D. Mass. 2020).)

   It is also important to keep in mind that while shot clocks were tightened by the FCC small cell order from 2018, the concept was not new. Since 2009, a 90-day FCC shot clock was in place for colocations. (FCC, Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 FCC Rcd 13994 (November 18, 2009),) so the City has had experience operating the discretionary process under similar time pressure.

5. Other cities have "small cell" cell tower ROW approval processes that include multiple levels of review, each with a publicly-noticed hearing (e.g.Carmel-by-the-Sea, Malibu, Martinez, Mill Valley, Pinole, San Francisco).

6. Presently, unless there is an appeal to City Council, there is no opportunity at all for a public hearing because the Planning Director's decisions are made in private. (Note that the cell tower applicant may hold a "community meeting", but this is a one-sided show by the applicant. It is no substitute for real public participation, including input to city officials. (PACC § 18.42.110(d)(7)).)

7. The inclusion of the ARB in the review process should not significantly increase the workload of Planning staff. It somewhat increases the load on the ARB, but this is something they want to take on. Moreover, applicants generally use consistent designs, so it should not be that burdensome for the ARB to review an application. The main question for them is how facilities can be camouflaged and best positioned to minimize esthetic impacts.

   In particular, the ARB is best qualified to prioritize siting and design goals. Right now, there is *no* prioritization going on. Staff evaluates cell tower applications solely on the basis of how few "exceptions" to objective standards they require, without taking into account what the exceptions are that are being sought. Hence, proximity to a residence, which is what residents care most about, is deemed no more important than, for example, the color of the paint used on the pole.

8. So far, the City has only approved one standard design for cell towers, a design for a tower located on a decorative metal lamp pole. As things stand now, the "objective" standards are not actually consistently objective, because applicants frequently request and obtain exceptions based on their own claims of necessity. (PACC § 18.42.110(k); Design Standards, p.8.) Since non-objective (that is, subjective) decisions and tradeoffs are being made all the time anyway, the question is, who should make them: The Planning Director or the ARB? The ARB is best qualified to do this.

9. More robust review is also important because cities, such as San Mateo, are finding that small cell applicants are not in fact compliant with permit conditions and are then resistant to remedying these deficiencies when they are discovered.

10. Staff acknowledge that they lack the expertise to assess the accuracy of any transmission-related assertions that applicants use to justify exceptions to the City's standards. The City should hire a technical expert that does not work for the telecom industry to quickly make sure applications are complete so that the shot clocks can be halted within the 10 days after receipt of the application, and also to advise on what is or is not technically feasible. This cost will, by law, be passed on to applicants. There are a few engineering firms that solely represent municipalities, such as Center for Municipal Solutions (http://www.telecomsol.com/www2/node/20), which review all applications submitted to some of its city clients.

BACKGROUND

On September 26, 2018, the Federal Communications Commission (FCC) enacted the Declaratory Ruling and Third Report and Order, known as the "Small Cell Order," directing that local regulation of Small Wireless Facilities in the public right-of-way must be published in advance and be "(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective."

In response to the Small Cell Order, on June 13, 2019, the City Council adopted Ordinance 5465, which provided that Tier 2 wireless communication facilities (WCFs) (e.g., adding new equipment to an existing small wireless facility ("collocation")) and Tier 3 WCFs (e.g., new small wireless facilities) would be no longer be subject to site-specific review and approval by the Architectural Review Board (ARB) under Municipal Code Section 18.76.020, and instead would be required only to comply with objective standards to be established by resolution. To be clear, the shift to objective aesthetic standards didn't simply dispense with subjective standards, it a) eliminated public hearings for proposed cell towers, and b) left the decision to approve a cell tower solely in the hands of the Director of Planning & Development.

On December 16, 2019, the City Council adopted Resolution 9873 amending and consolidating objective aesthetic, noise, and related standards for WCFs on streetlights and wood utility poles in the public rights of way.

In recognition that the Small Cell Order was being challenged in a lawsuit brought by numerous municipalities against the FCC—a lawsuit City Council supported—Ordinance 5465 provides that in the event that "the City Council repeals all objective standards, an application [for a Tier 2 or 3 WCF] shall not be granted unless, in addition to the other requirements of this section, all of the architectural review findings in Section 18.76.020(d) can be made."

On August 12, 2020, the Ninth Circuit issued its decision in City of Portland v. Federal Communications Commission, 969 F.3d 1020, 1041-43,[1] ruling that the Small Cell Order's requirement that local regulations must "be no more burdensome" and "objective" exceeded the FCC's authority and "must be vacated." (A link to the Ninth Circuit's ruling is attached below.)

FISCAL/RESOURCE IMPACT

The recommendation to restore prior subjective wireless standards and ARB findings and processes is a straightforward task. This can be accomplished by directing staff to amend the Wireless Communications Facility ordinance (PAMC section 18.42.110) in a manner consistent

[1] On Petitions for Review of Orders of the Federal Communications Commission, *Publication;* https://www.cityofpaloalto.org/files/assets/public/v/1/city-clerk/misc/18-72689.pdf

with this colleagues' memo. This process requires an ordinance amendment that would be reviewed by the Planning and Transportation Commission (PTC) which would forward a recommendation to the City Council for action. Alternatively, for a more expedient process, the City Council could bypass the PTC in accordance with PAMC section 18.80.090 and amend the WCF ordinance on a temporary basis, e.g. two years, with the additional direction to refer a permanent amendment to the PTC.

However, modifying the design standards and review process poses additional resource impacts. Potentially the most significant impact would be to the ARB and City Council agenda management. Switching from the current process, in which the Planning Director reviews a project's compliance with the objective standards and subjective standards are applied to any requests for exceptions, to a fully discretionary review by the ARB will increase the amount of time it takes to process applications. Staff would need to anticipate potential appeals on every project and schedule final action hearings on the City Council's agenda prior to the ARB review hearing, in order to meet the mandated shot clock requirements, some of which are more stringent than those mentioned in the memo. While the colleagues' memo authors suggest an extension for application review or appeals can be granted if agreed upon by the parties, this approach cannot be mandated or relied upon for application processing. Applicants are unlikely to choose this approach when presently, state or federal law (or both) provides "deemed granted" approvals for all types of wireless project if the City fails to approve or deny it within the limited shot clock period. In short, wireless communications facility applications are expected to require time on the Council's agenda to make final subjective determinations on any appeal from the ARB's project decision. This would impact the Council's ability to advance other Council priorities or discussions without flexibility for rescheduling to a later week for agendas that are busy or run late.

In addition, changing the design standards and review process will impact staff resources. Staff from Planning, Utilities, Public Works, Urban Forestry and the City Attorney's Office already participate in the application review, and would also need to be available for ARB and City Council meetings. While staff can engage professional service agencies to respond to application processing and review, administrative and overhead staff support will be required to review work products, reports, and to schedule meetings. Initial training on the review process and legal framework for wireless project decisions would also be required for ARB members, for work currently performed and coordinated by Planning staff. Public meetings before the ARB would require attendance from all departments contributing to wireless project review. A wholly subjective process may impact the quality of applications received, since there will be less guidance for project applicants on the City's standards for review. It would also increase the likelihood of applicant appeals or requests for judicial review if the City does not approve a project, which would require further legal services to defend.

ATTACHMENTS

Attachment A: DRAFT Resolution Repealing Objective-Only Standards