MEMORANDUM RANCHO PALOS VERDES

TO: MAYOR BROOKS AND MEMBERS OF THE CITY COUNCIL

FROM: CAROL LYNCH, CITY ATTORNEY AND
GENA STINNETT, ASSISTANT CITY ATTORNEY

DATE: FEBRUARY 19, 2013

SUBJECT: THE CITY'S PROCESS FOR PERMITTING WIRELESS TELECOMMUNICATIONS AND OTHER SIMILAR ABOVEGROUND FACILITIES IN THE PUBLIC RIGHTS-OF-WAY

RECOMMENDATION

STAFF RECOMMENDS THAT THE CITY COUNCIL RECEIVE AND FILE THIS REPORT.

EXECUTIVE SUMMARY

With the advent of various technologies, the use of the public street rights-of-way has changed significantly with greater reliance on antennas and other structures that are placed upon or above City streets. With the increasing use of cellular telephones and other devices, the number of these facilities has grown dramatically. The public desires to be able to use these facilities, but no one likes to have them in front of or immediately adjacent to his or her home; accordingly, great pressure has been placed on local governments to regulate these facilities and outlaw them in residential areas. In response, the telecommunications industry heavily lobbied both the state and federal governments to adopt legislation that would preempt local regulation of wireless communication facilities.

Congress adopted the Federal Telecommunications Act of 1996, and the State Legislature has made changes to state law. Both sets of statutes, to a greater or lesser degree, afford some local control over these facilities. This has been an ever-changing area of the law, and the statutes have been amended since their adoption. Also, because of the adverse financial ramifications to the telecommunications industry arising from local regulation, many local ordinances have been challenged in court, which has resulted in a large body of case authority on this subject. Like the underlying statutes, judicial decisions reviewing and interpreting them have been evolving and changing.

Similar to other local entities, the City of Rancho Palos Verdes has attempted to afford the maximum protection to its residents while still complying with state and federal law. The purpose of this report is to provide background information to the City Council

about the City's current process for permitting above-ground facilities within the public rights-of-way and about the state and federal statutes that constrain what the City may do to regulate these facilities.

No action is being requested from the City Council this evening. On July 3, 2012, Council Member Campbell raised this topic as a future agenda item that he would like to bring forward. Accordingly, Staff anticipates that additional discussion of this issue along with direction from the City Council could occur at that time or at a subsequent City Council meeting.

BACKGROUND

The following discussion in this section of the report was taken primarily from prior staff reports that were prepared for former City Council Members, and is included so the current Council Members will be aware of this factual background.

Beginning in the summer of 2001, staff was notified by two wireless telecommunication providers that they intended to upgrade wireless communication throughout the City by installing a number of new cellular sites in the public rights-of-way. At the October 16, 2001 City Council meeting, staff made a presentation regarding the City's abilities and limitations on regulating the use of the rights-of-way by wireless providers in light of the Telecommunications Act of 1996 and state law. At that meeting, the proposed procedures for reviewing applications were discussed by the City Council. The Council received subsequent updates about this issue at Council meetings in 2002 and 2003, at which the Council gave direction to staff about refinements and improvements to the City's informal process.

For the most part, the City's process has been very successful, and the construction of the majority of the facilities has generated only minor feedback from the public. The City's review process attempted to strike a balance between the fact that the principal issue for most homeowners is the impact of these facilities upon views versus the fact that, at the time the informal process was initiated, the City had very limited authority with respect to restricting the use of the street rights-of- way by wireless providers, due to the way that courts had been interpreting the Federal Telecommunications Act of 1996 and state law.

Based on these principles, staff developed policies that apply to all of the public utilities that wish to place facilities within the public rights-of-way. Since some facilities are completely underground, they do not have a visual impact on the City's residents and are not discussed in this report. However, traditional public utilities, such as Southern California Edison Company and the Gas Company, do have cabinets and other aboveground facilities in the public rights-of-way, to which these policies apply.

For this reason, staff and the City Attorney met with the wireless telecommunications providers and the traditional utilities in late 2003. The traditional utilities and the wireless telecommunications companies generally supported the City's informal process. They also had some suggestions with respect to revisions to the ordinance that had been prepared by the City Attorney's office. Because the City's informal

process was working well, and because judicial decisions at that time frequently invalidated decisions by local governmental entities, staff continued to implement the City's informal process, rather than spending additional staff time and City funds in continuing to meet with the utilities and the cellular providers.

Wireless telecommunications facilities

Because of the unique issues that arise in the wireless telecommunications context (due to the need for the antennae), this report primarily focuses on companies that provide cellular telephone service.

Wireless telecommunications facilities (also called cellular sites) that are installed in the public rights-of-way, generally consist of the following elements:

1. An antenna, which can be comprised of various types and configurations and can be mounted on the entity's own pole or on a pole that is owned by another entity, such as a street light that is owned by the City.
2. A cabinet, which contains the telecommunication facility's "brain." The cabinet typically is attached to the pole where the antenna is located.
3. A ground-mounted cabinet, which provides primary or back-up power to the antenna and may include an electric meter.

In some cases, the antennas are connected by underground fiber optic cables.

Some of the more important principles that were considered when the City's review process was established were:

- The element of a cellular site that sets it apart from other utility installations is the need for a pole and antenna.
- The most controversial aspects of a new cellular site usually are the antenna and the pole.
- It is difficult to access whose view is impacted by a new antenna and/or pole.
- Residents generally have a lower tolerance for new poles.
- Residents generally have a higher tolerance for new cabinets. This is likely because many utility companies, as well as the City, install cabinets within the public rights of way.
- Although the public has a higher tolerance for cabinets, no one wants a cabinet directly in front of his or her home.
- A dark cabinet color and the presence of existing foliage generally help to minimize impact of the cabinet on the surrounding area.

The City's Guidelines:

Based on the principles set forth above, the following guidelines and procedures were established by the City for all above-ground facilities that are to be located in the public rights-of-way:

- Facilities shall be located along arterial roadways whenever possible.
- New cabinets shall not be installed above ground directly in front of a residential structure.
- If a proposed installation is along a roadway with homes on only one side, the above ground cabinet shall be installed along the side of the roadway with no homes.
- Antennas shall be located such that views from a residential structure are not significantly impaired.
- Antennas shall be located in a manner that protects pubic views over City view corridors, as defined in the City's General Plan, so that there is no significant view impairment.
- A new pole may be constructed if the new pole will not adversely impact views from private properties or will not adversely impact public view corridors, as defined in the General Plan, and if the pole can be located in an area where there is existing foliage or some other feature that obscures the view of the pole.

The City's Procedures for above-ground installations:

1. An applicant submits an application that includes 'before and after' photographic simulations and a computer rendering of a proposed installation.
2. Staff performs a field review of all applications to assure compliance with City standards
3. If the proposed site receives preliminary approval from the Public Works Department and includes a proposed antenna, the applicant installs a 'mock up' of the antenna for a period of at least 30 days to raise any issues from property owners who have a view impact from the proposed antenna.
4. If negative comments are received from the public regarding the antenna, staff advises the applicant of the concerns and attempts to resolve the issues, and the process returns to step one.
5. If no negative comments are received, the City issues a permit for construction.

The mock-up process was used with respect to the antenna and the pole because it is difficult to assess what properties may be affected by the antenna/pole and to whom the notification should be sent. Thus, the antenna 'mock up' for a 30-day period was

chosen as the tool that is used to notify property owners.

At the November 19, 2002 Council meeting, the Council discussed the then-existing policies and directed staff to improve the process so that residents would know whom to contact if they had concerns about a mock-up facility. Accordingly, staff now requires that a mock-up facility include a sign that displays the image of the proposed installation, including the cabinet, and the telephone number of the Public Works Department so that a resident knows whom to call if they have questions, concerns or comments. In addition, the Council also gave direction to staff that a new pole might be a better option to allow in certain circumstances, if the new pole could be located in a manner that would cause fewer impacts on the surrounding area than locating a facility on an existing pole.

DISCUSSION

A. Regulating Wireless Telecommunications Facilities Under Federal Law

Under the federal Telecommunications Act of 1996, a city may apply its general zoning and building requirements to the construction of new wireless telecommunication facilities. Those zoning and building regulations, however, may not:

- Regulate based on the environmental effects of radio frequency emissions from facilities that comply with the Federal Communication Commission's regulations governing those emissions;
- Unreasonably discriminate between wireless service providers of functionally equivalent services;
- Prohibit wireless services; or
- Have the effect of prohibiting wireless services.

A city regulation has the effect of prohibiting wireless services when it prevents a wireless service provider from closing a significant gap in its service coverage or imposes a regulation that effectively prohibits wireless facilities.

Under the Telecommunications Act, a wireless provider may either challenge the facial validity of a city's ordinance, or it may challenge the way the ordinance was applied to a particular wireless provider's proposed project. Prior to 2008, cities faced greater restrictions on how they could regulate wireless facilities. In the past, facial challenges were upheld if the regulation "potentially" prohibited the provision of telecommunications services. This led to the invalidation of many city ordinances.

Sprint Telephony PCS v. County of San Diego (9th Cir. 2008) 543 F.3d 571, changed that interpretation. Now, a wireless provider must establish either an outright prohibition or an effective prohibition on the provision of wireless services to support a facial challenge. A city ordinance will survive facial challenge even though it:

- Imposes a detailed application requirement reasonably related to a city's review of the project;
- Requires public hearings on the application;

- Requires review by a planning commission that exercises discretionary decision-making (with certain exceptions);
- Imposes requirements to meet aesthetic concerns, such as camouflage, modest setbacks, and maintenance of the facility.

When proposing a city regulation, we must ask whether the regulation is an outright prohibition or an effective prohibition on the provision of wireless services. Undergrounding requirements, for example, may effectively prohibit wireless facilities if the wireless facilities must be above ground in order to operate. Further, City regulations must have flexibility. As will be discussed below, while the City may express location preferences in its Zoning Ordinance, the City cannot prohibit a wireless facility in an area, for example, simply because overhead wires have been placed underground, if a wireless provider needs that location to fill a significant gap in its service using the least intrusive means to do so.

1. The City's Review of applications for wireless telecommunications projects must comply with federal law

If a city denies or conditions a wireless facility project, the decision must "be in writing and supported by substantial evidence contained in a written record." (*Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 721, 726.) The substantial evidence test contains two parts: (1) the city must prove its decision was authorized by local law, and if it was, (2) the city must show its decision was supported by a reasonable amount of evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 727.

A city decision regarding a wireless telecommunications facility has the effect of prohibiting wireless services if it prevents a wireless provider from closing a significant gap using the means least intrusive on the local land use values the city seeks to protect. To successfully challenge a city decision regarding a particular application, first, the wireless provider must prove a significant gap in its service exists. Second, the wireless provider must prove that it is using the least intrusive means to close that gap. If it succeeds in demonstrating both elements, the city will have the right to rebut the evidence presented.

The Telecommunications Act of 1996 also mandates that the regulation of the placement, construction, and modification of wireless telecommunications facilities cannot "unreasonably discriminate" among providers of functionally equivalent services. By using this language, the Act explicitly contemplates that some discrimination among providers of functionally equivalent services is allowed.

Providers alleging unreasonable discrimination must show that they have been treated differently from other providers whose facilities are "similarly situated" in terms of the "structure, placement or cumulative impact" as the facilities in question. (*MetroPCS v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d 715, 727.) In applying these rules, the federal courts will generally look to other wireless facilities in the same neighborhood that are similar to the proposed facility in terms of "structure, placement or cumulative impact." If similarly situated facilities are treated differently, a claim of unreasonable discrimination may be upheld.

2. Potential Federal Communications Commission regulations regarding the right-of-way

In May 2011, the Federal Communications Commission (FCC) published a "Notice of Inquiry" seeking comments from state and local governments, as well as the private sector, to identify means of improving right-of-way policies and siting of wireless facilities. The FCC was considering whether to adopt regulations that could have the effect of limiting city authority over wireless facilities in the right-of-way. The comment period closed in September 2011, and since then, FCC representatives have been meeting with various interested parties, including the National Association of Telecommunications Officers and Advisors (NATOA), a local government association, and the Personal Communications Industry Association (PCIA), an association of industries that comprise the wireless telecommunications sector.

To date, no proposed regulations have resulted from the FCC's process. We will continue to monitor the FCC's actions in this area, because new regulations could affect cities' ability to regulate wireless facilities.

B. California Law

State law limits certain local regulation of wireless telecommunications facilities, both on private property and in the public right-of-way. Specifically, a city may not do any of the following:

- Unreasonably limit the duration of any permit for a wireless facility. Limits of less than 10 years are presumed to be unreasonable absent public safety reasons or substantial land use reasons. Build-out periods for a particular site are permissible.
- Require all wireless facilities to be limited to sites owned by particular parties within the jurisdiction of the city.
- Require an escrow deposit for removal of a wireless facility.

A city may, however, require a performance bond or other surety or another form of security, so long as the amount of the bond security is rationally related to the cost of removal, taking into consideration cost of removal information provided by the applicant.

1. Right-of-Way Management

California Public Utilities Code Section 7901 provides that telephone corporations may construct telephone lines along and upon the public rights-of-way, in such a manner and at such points "as not to incommode the public use of the road or highway." Section 7901.1 adds that cities may reasonably regulate and restrict the time, place and manner in which telephone corporations access the public right-of-way. This includes wireless service providers that qualify as telephone corporations.

Based on recent Ninth Circuit decisions, a city may do any of the following with respect to wireless facilities in the public right-of-way:

- Prohibit the installation of any wireless facility that would unreasonably interfere with the public's use of the right-of-way;

- Determine insurance, bonding and indemnity requirements for entry into the right-of-way;
- Establish and enforce building codes; and
- Establish and enforce local zoning regulations, including aesthetic considerations.

A city may not, however, require that wireless service providers obtain a franchise prior to locating a wireless facility in the public right-of-way, if that provider qualifies as a "telephone corporation" under California law.

2. Regulation based on aesthetics

Previously, federal courts have been unwilling to interpret California law as granting cities the authority to regulate wireless facilities in the right-of-way based on aesthetics. The Ninth Circuit in *Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, changed that. At issue in *Sprint PCS* was a city ordinance allowing denial of a wireless telecommunications facility permit for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property." The ordinance required the city to consider such factors as the height of the tower and its proximity to residential structures, the nature of uses of nearby properties, the surrounding topography, and the surrounding tree coverage and foliage.

The Ninth Circuit determined that the California Constitution gives cities "the authority to regulate local aesthetics, and neither [California Public Utilities Code Section] 7901 nor [Section] 7901.1 divests it of that authority." The court recognized that the purpose of public streets is not limited to travel. Streets also serve important social expressive and aesthetic functions. Thus, time, place and manner rules regulating access may include aesthetic considerations.

Significantly, in that case, Palos Verdes Estates developed a good record including maps and mock-ups of the proposed installations, as well as a report detailing the aesthetic values at stake. In denying the application, the city was able to make findings based on the record that the proposed facilities would detract from the residential character of the neighborhood. As discussed above, to prevent such a denial from being overturned when challenged, the decision must be supported by substantial evidence. Also, even though state law may permit such aesthetic regulation, the city's decision also must pass muster under federal law's significant gap analysis as discussed above.

It is worth noting that while the Ninth Circuit's determination is binding on federal courts in California, it does not bind state courts. The Ninth Circuit's reasoning appears sound to us, but a California state court could reach a different conclusion.

C. Procedural Time Frames for Reviewing Applications

The federal Telecommunications Act of 1996 (the "TCA") requires local governments to act on an application to install or modify a wireless facility within "a reasonable period of time after the request is duly filed..., taking into account the nature and scope of such request." In 2009, the Federal Communications Commission (FCC) issued its "Shot Clock" Ruling, which established certain time frames within which zoning authorities must act on siting requests for wireless towers or antenna sites. (The Shot Clock rule

provides that a failure to act on an application within 150 days [or 90 days in the case of an application for collocation], is presumptively a failure to act within a reasonable period and is subject to suit under the TCA. Any such suit must be brought within 30 days of the alleged failure to act, and cities are entitled to present evidence to rebut the presumption that they failed to act within a reasonable period of time under the totality of circumstances.) A lawsuit filed by several cities challenging the Shot Clock Rule currently is pending before the United States Supreme Court. Additionally, the California Permit Streamlining Act requires the timely processing of development applications and applies to most if not all wireless facility applications.

D. Modification of Existing Facilities

Both state and federal law provide special rules for modification of existing wireless telecommunication facilities.

1. Under state law, subsequent collocations are permitted as of right to certain pre-approved facilities.

The California legislature has created a process for approving a "wireless telecommunications collocation facility" where a subsequent collocation facility is a permitted use and is not subject to a discretionary permit.

Basically, to qualify as a wireless telecommunications collocation facility, the facility must first be subject to a discretionary permit, comply with certain state and local requirements, and either an environmental impact report must be certified for the project, or a negative declaration or mitigated negative declaration must be adopted for the project in compliance with CEQA. In order to prepare the appropriate CEQA document, the project must describe all potential collocations at a particular site at full build-out. Those additional collocation facilities that have been studied may then be added as of right after the wireless telecommunications collocation facility is approved.

Significantly, if a wireless facility project is approved pursuant to a CEQA exemption, a wireless provider's facility cannot qualify as a wireless telecommunications collocation facility under state law.

2. Under federal law, certain modifications to existing facilities must be approved and cannot be denied.

Section 6409 of the "Middle Class Tax Relief and Job Creation Act of 2012" (the "Tax Relief Act") recently modified the federal Telecommunications Act. Section 6409 prohibits local governments from denying 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." The Tax Relief Act mandates that cities "may not deny, and shall approve" such a request.

The Tax Relief Act defines "eligible facilities request" to mean any request for modification of an existing wireless tower or base station that involves:

(a) collocation of new transmission equipment;

(b) removal of transmission equipment; or

(c) replacement of transmission equipment.

E. Special considerations for NextG, which is now referred to as Crown Castle International Corporation ("CCI")

The City Council previously approved an agreement with NextG/CCI regarding its use of the City's public rights-of-way. Among other things, CCI has agreed that its facilities will not be installed in a manner that will "cause a significant impairment of a view from the viewing area of a residential property located within the City, as those terms are defined in Section 17.020.040 of the [Rancho Palos Verdes Municipal] Code." (Section 5.1(b) of the Agreement.) The agreement goes on to provide a process for evaluating a mockup of the proposed facility, based on the City's current process. If the proposed facility causes significant view impairment, the facility will be moved, unless CCI demonstrates that relocation will cause a significant gap in CCI's service coverage or will preclude CCI from providing wireless service to its customers.

CONCLUSION

Staff believes that the existing process, as modified by the City Council in November 2002, has been very successful. It balances the City's goals of preventing the impairment of views and the adverse impacts on residential neighborhoods of new above-ground facilities in the public rights-of-way with the goals of the traditional utilities and wireless telecommunications providers of providing service to their customers. However, from time to time, residents have expressed concerns regarding the noticing requirements, and Staff will be making recommendations to improve that process.

Now that the case law is more favorable, this is a better time for the City Council to discuss formalizing or amending the City's process and placing it in the Municipal Code. Since Council Member Campbell raised this topic as a future agenda item that he would like to bring forward, it is anticipated that any action or direction from the City Council would occur along with or after that discussion, following the receipt of input from the public and from the entities that place above-ground facilities within the City's street rights-of-way. In the meantime, Staff will continue to follow the current process.