



Agenda Item D.1
DISCUSSION/ACTION ITEM
Meeting Date: March 3, 2009

TO: Mayor and Councilmembers

FROM: Tim W. Giles, City Attorney

CONTACT: Tim W. Giles, City Attorney

SUBJECT: Urgency Interim Ordinance Establishing a Temporary Moratorium on the Approval of Permits for the Installation of Communication Facilities

RECOMMENDATION:

Read in Title only, waive further reading and adopt by four-fifths vote Ordinance No. 09-____ entitled "An Ordinance of the City Council of the City of Goleta, California, Adopting as an Urgency Measure an Interim Zoning Ordinance Pursuant to California Government Code Section 65858 Pertaining to the Permitting of Communication Facilities within the City of Goleta."

BACKGROUND:

Upon incorporation, the City of Goleta adopted the antiquated regulations for communication facilities that were then in place in the County of Santa Barbara zoning code. The County had last revised these regulations in 1997. Since the last revision of the regulations, there have been numerous and significant technological advances in the wireless communications industry.

The authority of the City to regulate communication facilities has been extremely limited by nature of the federal (Federal Communication Commission) and state (California Public Utilities Commission) regulatory agencies and the existing laws governing these services. Judicial decisions interpreting the scope of local agencies authority have further eroded the ability of cities to protect local standards and apply reasonable restrictions to these types of facilities. However, late last year, the Ninth Circuit in *Sprint Telephone PCS, L.P. v. County of San Diego* (2008) 532 F.3d 571 reversed course and issued an interpretation of federal telecommunication law that significantly restored authority to cities to regulate the installation of wireless facilities.

DISCUSSION:

The City has continued to process wireless communication facilities applications under the zoning ordinance for communication facilities inherited from the County. In light of recent changes in interpretation of federal regulations, the City now has expanded authority to review and revise its regulation of communication facilities to more appropriately address the numerous issues of local concern, including, safety, access, aesthetic, co-location, and additional management issues of public right of way, public property and private property.

The City currently has a number of existing, but dormant, applications for wireless facilities and has been contacted by a company requesting a planning consult for locating an extensive network of wired and wireless communication facilities. By adopting a moratorium, the City and the public will have the opportunity to develop standards applicable to these and future applications and the applicants will have the ability to participate in the formulation of the regulations as well as to process their applications with an understanding of the regulations which the City will apply to them.

The Council has before them for consideration a recommendation to adopt an interim ordinance imposing a moratorium on the approval of new communication facilities while a new regulatory ordinance is studied and drafted. Staff recommends that this item be adopted as an urgency measure, as authorized pursuant to Government Code section 65858, because the ordinance is necessary to protect the public safety, health and welfare. If the City were to approve the pending and anticipated projects without the benefits of regulations anticipated by this ordinance, the opportunity would be lost to protect the public by addressing issues such as safety, access, aesthetic, co-location, and additional management issues of public right of way, public property and private property.

Adoption of this proposed ordinance as an urgency item requires a four-fifths vote for approval. The urgency item will expire 45 days after adoption. With Council's concurrence, staff will bring this item back on the March 17, 2009 agenda for a report and recommendation to initiate an extension of the interim ordinance.

ALTERNATIVES:

Council may elect to not adopt the interim ordinance. If the Council elects not to adopt the interim ordinance, the Council may direct staff to either continue the process of developing a new ordinance regulating communication facilities or to continue to process applications under the City's existing ordinances. If the Council elects not to adopt the interim ordinance, applications which are filed and processed would not be subject to any subsequently adopted regulations.

FISCAL IMPACTS:

Other than staff time, there is no fiscal impact by establishing the temporary ordinance.

Submitted By:

Reviewed By:

Approved By:

Tim W. Giles
City Attorney

Michelle Greene
Administrative Services
Director

Daniel Singer
City Manager

ATTACHMENTS:

1. "An Ordinance of the City Council of the City of Goleta, California, Adopting as an Urgency Measure an Interim Zoning Ordinance Pursuant to California Government Code Section 65858 Pertaining to the Permitting of Communication Facilities within the City of Goleta."

ATTACHMENT 1

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF GOLETA,
CALIFORNIA, ADOPTING AS AN URGENCY MEASURE AN INTERIM
ZONING ORDINANCE PURSUANT TO CALIFORNIA GOVERNMENT
CODE SECTION 65858 PERTAINING TO THE PERMITTING OF
COMMUNICATION FACILITIES WITHIN THE CITY OF GOLETA**

ORDINANCE NO. 09-__

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF GOLETA, CALIFORNIA, ADOPTING AS AN URGENCY MEASURE AN INTERIM ZONING ORDINANCE PURSUANT TO CALIFORNIA GOVERNMENT CODE SECTION 65858 PERTAINING TO THE PERMITTING OF COMMUNICATION FACILITIES WITHIN THE CITY OF GOLETA

WHEREAS, the City of Goleta was incorporated on February 1, 2002 and at that time adopted existing County of Santa Barbara zoning regulations as Goleta Municipal Code Chapter 35, Article II, the Coastal Zoning Ordinance and Article III, the Inland Zoning Ordinance; and

WHEREAS, these zoning regulations govern the processing of all communications facilities with the intent to ensure that these facilities are properly sited and designed in a manner consistent with the provisions of Article II and Article III, promote orderly development, and ensure that these facilities are compatible with surrounding land uses; and

WHEREAS, these City of Goleta zoning regulations pertaining to communications facilities were last amended in 1997 by the County of Santa Barbara and since that time there have been numerous and substantial technological advances in the wireless communications industry and significant changes in the regulatory authority local jurisdictions have over communication facilities; and

WHEREAS, in recent months the City has received a number of applications and pre-application requests for consultation for the installation of numerous wireless antennae and associated communication facilities in public rights of way, on public property and on private property (collectively "Wireless Facilities"); and

WHEREAS, Wireless Facilities as defined consists of only those antennas, base stations, antenna supports, and related equipment and structures used for: cellular radiotelephone services (47 C.F.R. Part 22); personal communications services (47 C.F.R. Part 24); and private land mobile radio services--specialized mobile radio services (47 C.F.R. Part 90), which are all functionally equivalent, and which are located or proposed to be located within all zones of the City; and

WHEREAS, the proliferation of applications for the installation of Wireless Facilities was not fully anticipated at the time the City established its existing regulatory structure for the approval of Wireless Facilities and, as a result, an immediate need exists to explore regulatory options for better managing and minimizing the safety, access, aesthetic, co-location, and additional management issues arising from public right of way, public property and private property implicated by the potential proliferation of Wireless Facilities in the City; and

WHEREAS, in *Sprint Telephony PCS, L.P. v. County of San Diego* (2008) 543 F.3d 571 ("*Sprint*"), the Ninth Circuit Court of Appeals' expressly overruled the last seven (7) years of Ninth Circuit jurisprudence relating to 47 U.S.C. § 253, a key provision of Federal Telecommunications Act that, until the ruling in *Sprint*, had been expansively interpreted in a manner that severely limited local authority to regulate the installation of Wireless Facilities; and

WHEREAS, the proliferation of applications for Wireless Facilities coupled with the significant change in law created by *Sprint* creates a need and an opportunity for the City to review and analyze its existing ordinances and the current state of the law so that, as far as legally possible, the City Council may safeguard the City from the

intrusion of incompatible and potentially disruptive uses through the development of a new ordinance relating to the placement, construction, and modification of Wireless Facilities; and

WHEREAS; there is a current and immediate threat to public health, safety and welfare because, without this urgency ordinance, Wireless Facilities could be installed, constructed or modified in the City without conforming to the City's full intention to minimize disruption to the City caused by the proliferation of Wireless Facilities including better managing and minimizing the safety, access, aesthetic, co-location, and additional management issues arising from public right of way, public property and private property. Without this urgency ordinance, Wireless Facilities could affect the City as follows:

1. Create land use incompatibilities including excessive height of poles and towers; or
2. Create visual and aesthetic blight and potential safety concerns arising from excessive size, height, or lack of camouflaging of Wireless Facilities and their associated pedestals and meters; or
3. Create visual and aesthetic blight and potential safety concerns by failing to capitalize on alternative technologies, co-location opportunities, and protocols for investigating the feasibility of alternative installation locations and configurations; or
4. Create traffic and pedestrian safety hazards due to unsafe location of poles, towers, equipment boxes or other materials or construction related to Wireless Facilities; or

5. Create operational conflicts with other land uses, facilities, or utility systems authorized or existing on the same or adjacent sites; or
 6. Create intensification of legal non-conforming uses subjecting City to unnecessary costs and/or fines and penalties related to compliance with existing law; or
 7. Deteriorate the quality of life in a particular community or neighborhood;
- and

WHEREAS, the City Council desires to provide for the health, safety and welfare of the City of Goleta citizens by exercising the police power provided for in the California Constitution that underlies the City's zoning powers, so that the installation and maintenance of Wireless Facilities in the City will be conducted in such a manner as to be safe, compatible with existing and future uses, and consistent with the Goleta General Plan, and state and federal law; in order that this may be accomplished, the City Council intends to impose, on an urgency basis, a temporary moratorium on the issuance of discretionary or ministerial permits for the installation and/or augmentation of Wireless Facilities in the City of Goleta, so that City staff, the City Council, and the citizens of the City will have sufficient time to consider a comprehensive ordinance lawfully regulating the installation, augmentation, and maintenance of Wireless Facilities; and

WHEREAS, as a City and under State law (California Government Code section 65858,) the City may adopt an interim ordinance that imposes a temporary moratorium on the approval of applications while contemplated zoning and permitting proposals are being considered.

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

SECTION 1. The above recitals are true and correct.

SECTION 2. *CEQA.* The adoption of this interim measure is exempt from the California Environmental Quality Act (“CEQA”) pursuant to (i) CEQA Guideline 15060(c)(2) (14 Cal. Code Regs. § 15060(c)(2)) because it will not result in a direct or reasonably foreseeable indirect physical change in the environment and (ii) CEQA Guideline 15061(b)(3) (14 Cal. Code Regs. § 15061(b)(3)) because there is no possibility that the adoption of this ordinance may have a significant adverse effect on the environment. This measure provides a moratorium to study the laws under which the City may consider feasibility or planning studies for possible future actions which the City has not approved, adopted or funded, and does not involve adoption of a plan that will have a legally binding effect on later activities. A Notice of Exemption has been completed in compliance with CEQA and CEQA Guidelines.

SECTION 3. *Applicability.* This ordinance shall apply to all applications for the installation and/or augmentation of Wireless Facilities within the City of the following functionally equivalent telecommunications services:

- (1) Cellular radiotelephone services (47 C.F.R. Part 22); and
- (2) Personal communications services (47 C.F.R. Part 24); and
- (3) Private land mobile radio services--specialized mobile radio services (47 C.F.R. Part 90).

Because this ordinance is necessary to protect public health and safety, it shall operate retroactively as to all pending and active encroachment permits issued for the installation or augmentation of Wireless provided that the rights to construct such

Wireless Facilities have not vested pursuant to *Avco Community Developers, Inc. v. South Coast Regional Com.*, 17 Cal. 3d 785 (1976).

SECTION 4. *Temporary Moratorium.*

A. *Temporary Moratorium Applies To All Private Properties, Public Properties And Public Rights Of Way.* Within all private properties, public properties, and public rights-of-way, there shall be a temporary moratorium in effect, commencing on the effective date of this ordinance, prohibiting the approval of zone clearances, variances, conditional use permits, encroachment permits, special use permits, planned development permits, building permits, electrical, mechanical, or plumbing permits, or use and occupancy permits for any installation or relocation of any Wireless Facilities including on new or existing co-location sites, except those described in Section 5, notwithstanding other existing Zoning or Municipal Code provisions and regulations of the City of Goleta.

B. *Applicants for Wireless Facilities May Elect To Have City Staff Continue To Accept And Process Applications During Period Of Moratorium.* Except to the extent otherwise prohibited by law, this temporary moratorium is not intended to, and does not, affect the acceptance and/or processing of permit applications for any and all Wireless Facilities described in Section 5(A); rather, it is intended to, and does, prohibit only the issuance of approvals and permits for such Wireless Facilities. City staff shall continue to accept applications for Wireless Facility approvals and augmentations received after the effective date of this ordinance. At a Wireless Facility applicant's written request, during the term of this moratorium the City shall continue to process applications for permits or approvals relating to Wireless Facilities; however,

any new standards for such Wireless Facilities and the permitting thereof which are adopted during the moratorium and are effective at the expiration of the moratorium shall nevertheless apply to such application(s). Any time limits or mandatory approval time frames relative to the processing and/or action upon permit applications for any and all Wireless Facilities described in section 3 are tolled during the term of this moratorium.

SECTION 5. The provisions of Interim Urgency Ordinance shall not apply to:

A. *Residential Facilities.* Privately owned and operated noncommercial communications facilities attendant to a residential use or uses, including but not limited to television reception antennas, satellite dish antennas no greater than two (2) meters in diameter and/or amateur “ham” radio facilities.

B. *Government and Emergency Medical Facilities.* Existing Government owned and operated communications facilities and/or existing emergency medical care provider owned and operated communications facilities, or new facilities in the same location as such existing facilities, which are required to repair, replace, maintain or enhance such existing facilities, provided such new facilities are used primarily to protect public health, safety and welfare, all as determined by the City Manager.

C. *Facilities Exempted Under Federal Law.* Any antenna facilities exempted from this ordinance by federal law.

D. *Broadcast Facilities.* Properties with existing broadcast facilities regulated pursuant to 47 C.F.R. Part 73 or 47 C.F.R. Part 74, or new or modified broadcast facilities in the same location as existing broadcast facilities which are

required to repair, replace, maintain or enhance such existing broadcast facilities but only as such facilities currently exist in the commercial or industrial zones of the City.

SECTION 6. This ordinance is an interim zoning ordinance adopted as an urgency measure pursuant to Government Code Sections 65858 to protect the public safety, health and welfare by prohibiting land uses which may, in the absence of reasonable, lawful, regulation, be in conflict with the City General Plan, Zoning Code, or the environmental and aesthetic welfare of the City and its citizens. Specifically, this ordinance is necessitated by the proliferation of applications for Wireless Facilities within the City, coupled with the additional enhanced regulatory opportunities created by the *Sprint* decision.

The City Council hereby finds that the facts, circumstances, and opportunities described in the recitals for this ordinance, and adopted by the City Council in Section 1 of this ordinance, demonstrate a current and immediate threat to the public health, safety and welfare because the existing regulatory structure for Wireless Facilities is not sufficient to adequately protect the City and its citizens from the safety, aesthetic, and other right of way management-related considerations implicated by the proliferation of Wireless Facilities.

Based on the foregoing, and based on the new judicial guidance provided by the *Sprint* decision, the City Council finds and declares that the City must proceed thoughtfully and deliberately in the wireless communications area so that the installation and maintenance of Wireless Facilities in the City are conducted in such a manner as to lawfully balance the legal rights of applicants under the Federal Telecommunications Act and the California Public Utilities Code while, at the same time, protecting to the full

extent feasible against the aforementioned safety and land use concerns. The preparation of such an ordinance, together with the necessary public outreach, legal research, and City processes for consideration of such enactments will require, at a minimum, forty-five (45) days. In the interim, a moratorium as described in Section 4 is required to protect the public from threats to the public health, safety and welfare discussed above.

SECTION 7. *Effective Date.*

This Ordinance shall take effect immediately upon its passage. It shall be of no further force or effect 45 days from the date of adoption unless extended following a public hearing, as provided in Government Code Section 65858.

SECTION 8. *Severability.* This ordinance is adopted under the authority of City Council of the City of Goleta and State law. If any section, subsection, clause or phrase is declared invalid or otherwise void by a court of competent jurisdiction, it shall not affect any remaining provision hereof. In this regard the City Council finds and declares that it would have adopted this measure notwithstanding any partial invalidity hereof.

SECTION 9. The City Attorney is directed and ordered to prepare and submit for City Council adoption, at least ten (10) days prior to the expiration of this ordinance, or any extension hereof, a written report describing the measures taken to alleviate the conditions which led to the adoption of this ordinance.

SECTION 11. This Interim Urgency Ordinance is adopted by a four-fifths majority vote of the City Council.

The City Clerk shall certify to the passage of this Ordinance and cause the same to be published and posted in the manner prescribed by California law.

INTRODUCED , PASSED, APPROVED, AND ADOPTED this 3rd day of March, 2009.

ROGER S. ACEVES, MAYOR

ATTEST:

APPROVED AS TO FORM:

DEBORAH CONSTANTINO
CITY CLERK

TIM W. GILES
CITY ATTORNEY

STATE OF CALIFORNIA)
COUNTY OF SANTA BARBARA) ss.
CITY OF GOLETA)

I, DEBORAH CONSTANTINO, City Clerk of the City of Goleta, California, DO HEREBY CERTIFY that the foregoing Ordinance No. 09-__ was duly adopted by the City Council of the City of Goleta at a meeting held on the __ day of _____, 2009, by the following vote of the Council:

AYES:

NOES:

ABSENT:

ABSTAIN:

(SEAL)

DEBORAH CONSTANTINO
CITY CLERK