



**Agenda Item E.1**  
**PUBLIC HEARING**  
**Meeting Date: March 17, 2009**

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**TO:** Mayor and Councilmembers

**FROM:** Tim W. Giles, City Attorney

**SUBJECT:** Proposed Adoption of an Interim Ordinance Continuing a Temporary Moratorium on the Approval of Permits for the Installation of Communication Facilities

**RECOMMENDATION:**

- A. Receive a report from the City Attorney pursuant to Government Code §65858 regarding an Urgency Interim Zoning Ordinance pertaining to the permitting of communication facilities within the City of Goleta.
  
- B. Introduce and conduct the first reading (by title only) and waive further reading of City Council Ordinance 09-\_\_ entitled " An Ordinance of the City Council of the City of Goleta, California, Extending 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 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.

On March 3, 2009, the City Council adopted a 45 day urgency moratorium on the permitting of communication facilities to allow staff to study and draft proposed revisions to the City's current communication facility regulations.

## **DISCUSSION:**

### **Extension of Moratorium**

The City has continued to process wireless communication facilities applications under the County zoning ordinance for communication facilities. 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 provided a planning consult for a company planning to locate an extensive network of wired and wireless communication facilities. Staff has also received comments from other carriers who state that they intend to file applications for additional facilities, but have not done so at this time. The moratorium only applies to permit approval and does not preclude filing or processing of applications. Based on the expedited process for developing the proposed ordinance, Staff does not feel that any applicant will be significantly delayed in consideration and decision of their application.

By maintaining the moratorium, the City and the public have the opportunity to develop standards applicable to pending and future applications and the developers 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. 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 of local concern as stated above.

The Council has before it for consideration a recommendation to continue the interim ordinance imposing a moratorium on the approval of new communication facilities while a new regulatory ordinance is studied and drafted. The moratorium was adopted for 45 days as an urgency matter. Staff recommends that this item be adopted as authorized pursuant to Government Code section 65858 to continue the moratorium from its current expiration for up to an additional ten months and 15 days.

Adoption of this interim ordinance requires a four-fifths vote for approval.

California Environmental Quality Act. 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.

### Report on Moratorium

Since the adoption of the urgency ordinance by the City Council on March 3, 2009, staff have begun the process of developing the new ordinance. Staff has determined that an inclusive process with input from various constituency groups is important to the success of this ordinance. Staff is also concerned that the process be expedited to avoid any unnecessary delays in the processing, approval and construction of important communication facilities. Staff proposes the following tentative processing schedule:

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|----|------------------------|--|
| a. | March 3, 2009          | Council Initiation                                     |
| b. | Late March             | Meet with industry representatives regarding reprocess |
| c. | Mid April              | First Public Workshop                                  |
| d. | Mid April to Early May | Draft and circulate proposed ordinance                 |
| e. | Mid May                | Second Public Workshop                                 |
| f. | June 16, 2009          | Planning Commission hearing                            |
| g. | July 21, 2009          | City Council hearing                                   |

Staff has retained assistance to research the legal and technical issues which are implicated by regulations in these areas. Staff is also aware of, and consulting with, other jurisdictions which have recently or are currently reviewing their ordinances.

Staff has identified a number of potential issues which may be addressed in the development of new regulations. While not intended to be an exhaustive list, some of these issues are identified below.

#### Public Rights-of-Way. Regarding public rights-of-way, the City may:

(1) Control the particular location of and manner in which the telephone antennas are located and constructed in the right of way to prevent unreasonable obstruction of travel. There is also a concern that compliance with the Americans with Disabilities Act be maintained.

(2) Impose fees for cost recovery. Due to the telecommunications providers possession of a state franchise under Cal. Pub. Util. Code §§ 7901, 7901.1 and 5800 et seq., the City is prohibited from charging franchise fees, rental or usage of public rights-of-way. However, the City may charge such fees that are fair, reasonable, competitively neutral and directly related to the management of the public rights-of-way.

(3) Require owners of telecom facilities located in public rights-of-way to bear the cost of relocating their equipment to accommodate public-works projects. That power is reserved to the local government's power to manage its public rights-of-way.

Radio Frequency Emissions. One of the chief concerns of the public is the health effects of exposure to Radio Frequency (RF) Emissions. This concern also applies to workers who may be exposed to RF Emissions while working in the field. Federal law largely preempts local authority to regulate wireless facility placement based on RF Emissions. 47 USC § 332(c)(7)(B)(iv). The FCC (Federal Communication Commission) recognizes the public's concerns about the health effects of RF Emissions. In order to address those concerns, and regulate the levels of RF Emissions based on public safety, the FCC has issued rules which require transmitting facilities to comply with RF exposure guidelines and thus safeguard human exposure to RF Emissions. 47 C.F.R. §§ 1.1307, 1.1310, 2.1091 and 2.1093. The FCC's rules adopt standards set by the National Council on Radiation Protection and Measurements, the American National Standards Institute, and the Institute of Electrical and Electronics Engineers. 47 CFR § 1.1310. The FCC issued Bulletin 65 which contains detailed information on methods for compliance with the FCC guidelines.

Although the City is preempted from regulating the siting of facilities based on RF Emissions to the extent that they do comply with FCC regulations, the City is not precluded from enacting the following reasonable non-burdensome requirements:

- (a) Satisfying itself that federal safeguards for RF Emissions will be met,
- (b) Take RF Emission radiation into account in choosing among alternative sites, so long as the choice does not "prohibit" wireless service,
- (c) Impose reasonable requirements that the carrier demonstrate that the facility complies with FCC emission standards.
- (d) Require the wireless provider to perform and, if necessary, pay for periodic testing of the antenna by a qualified independent contractor approved by the City to confirm the provider's RF Emission levels meet Federal Communications Commission (FCC) requirements.
- (e) Require that any wireless provider who fails to meet FCC radio frequency emission levels to remedy the problem within a set number of days of receiving notice of said failure from the City, and
- (f) Require a wireless provider to certify that its wireless telecommunications facility does not cause interference with reception of area television or radio operations and ensure continuous compliance with federal and state requirements regarding interference with reception of such operations.

Aesthetic Standards. There are a number of ways a city can limit the aesthetic impact of a communication facility provided the carrier is not prohibited or have the effect of prohibiting the provision of services and the City's limitation does not unreasonably favor one competitor over another. The possible areas of regulation include but are not limited to the following: select a less sensitive site, reduce the tower height, use a preexisting structure or require them to be camouflaged to fit in with their surroundings, and requiring a least intrusive means provided it does not deny gaps in coverage.

Alternative Sites. The wireless provider must show that the proposed facility site will fill an existing significant gap in the ability of users to access the network and that the chosen site is the least intrusive on the values of the local jurisdiction. While the City cannot deny a wireless facility entirely based on health concerns about RF Emissions or other reasons if such denial would deprive the telecommunications carrier from filling a gap in coverage, the City does have limited authority to require that a good faith effort has been made by the telecommunications provider to identify and evaluate less intrusive alternatives such as less sensitive sites, alternative system designs, alternative tower designs, placement of antennas on existing structures, and co-location. The solution ultimately selected by the carrier should be the least intrusive means of filling these gaps with a reasonable level of service.

Notice to the Public. For zoned private property, there does not appear to be any prohibition in the law against the City imposing reasonable noticing requirements for the residents in the vicinity provided they do not prohibit or have the effect of prohibiting service and/or do not unreasonably favor one competitor over another.

Preferred Zones. Require, to the greatest extent possible, that communication towers and poles be concentrated in preferred zones such as commercial and industrial locations. If communication facilities must be located in sensitive areas such as residential and historic zones, the carrier should be required to obtain a conditional use permit or other discretionary approval with a finding, submitted by the carrier, that it is infeasible to provide service in a significant portion of the area without locating a facility within the area.

Expert Review. Hire an expert in the field of telecommunications to review the individual applications, at the telecommunications provider's cost, particularly for site selection and propagation analyses submitted by telecommunications providers.

Undergrounding Facilities. Require all equipment associated with antennas to be placed underground.

#### **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 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:**

There is no fiscal impact by establishing the temporary ordinance.

Submitted By:

Reviewed By:

Approved By:

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Tim W. Giles  
City Attorney

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Michelle Greene  
Administrative Services  
Director

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Daniel Singer  
City Manager

**ATTACHMENTS:**

1. An Ordinance of the City Council of the City of Goleta, California, Extending 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, EXTENDING 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, EXTENDING 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**, without this 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 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**, on March 3, 2009, the city Council adopted as an urgency measure, a temporary moratorium on the approval of wireless facility applications while contemplating zoning and permitting proposals are being considered (Ordinance No. 09-04); and

**WHEREAS**, as a City and under State law (California Government Code section 65858,) the City may extend a 45 day interim ordinance for an additional period up to 10 months and 15 days that imposes a temporary moratorium on the approval of wireless facilities 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 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.

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 up to a year from the initial adoption of the moratorium. 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 on the 45<sup>th</sup> day following adoption of the urgency ordinance on March 3, 2009 (Ordinance No. 09-04). It shall be of no further force or effect 10 months and 15 days from the effective date 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 10.** This Interim Ordinance is adopted by a four-fifths majority vote of the City Council.

**SECTION 11.** 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 ON the 3<sup>rd</sup> day of March, 2009.

**PASSED, APPROVED AND ADOPTED** this 17<sup>th</sup> 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)

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DEBORAH CONSTANTINO  
CITY CLERK