



Council Agenda Report

To: Mayor Pierson and the Honorable Members of the City Council

From: Christi Hogin, City Attorney
Brian Byun, Deputy City Attorney

Date prepared: September 8, 2020 Meeting date: September 29, 2020

Subject: Advocacy Action Plan Options to Address Proliferation of Wireless Telecommunications Facilities

RECOMMENDED ACTION: Consider whether to proceed with any or all of the options set forth in this report with respect to the City's advocacy response to the proliferation of wireless telecommunications facilities throughout the City and its public rights-of-way.

FISCAL IMPACT: If the City Council is interested in pursuing any or all of these options, staff will develop a course of action and analysis of the fiscal impact, which will be presented to the Council for final approval before any action is implemented. The Adopted Budget for Fiscal Year 2020-2021 does not include funding or staffing for any of the options presented in this report.

WORK PLAN: This item was not included in the Adopted Work Plan for Fiscal Year 2020-2021.

ADVOCACY PLAN ONLY: Note that this report does not address the companion effort to modernize the City's wireless telecommunications facilities ordinance. That ordinance will be presented by staff separately. This item presents options for the City to challenge restraints imposed on the City under federal law and advocate for changes that will increase the City's ability to regulate wireless telecommunications facilities.

DISCUSSION: Federal law is hostile to local regulation. As do most discussions of local control over wireless telecommunication facilities, this report starts with an unfavorable law bolstered by a (mostly) unfavorable court decision.

On August 12, 2020, a three-judge panel of the Ninth Circuit Court of Appeals in *City of Portland v. FCC* (Case No. 18-72689) (the "*Portland Opinion*"), largely sided with the industry-friendly Federal Communications Commission ("FCC"). The lawsuit challenged

certain FCC orders, including the “Small Cell Order”¹ and the “Local Moratoria Order”² (together, the “FCC Orders”). The *Portland* Opinion represents a significant win for wireless providers seeking to expedite broadband deployment over the objections of or in a manner detrimental to the community. More than 50 local governments, associations, and pole owning utilities had petitioned for review of multiple aspects of the FCC Orders when they were issued in the fall of 2018.

Many facets of the FCC Orders were challenged in the lawsuit because they imposed burdens on or restricted local authority. The lawsuit challenged, for example, the limits on fees allowed to be charged by local governments; “shot clocks” restricting the time in which local governments may act on wireless deployment applications; and a federal ban on local moratoria on accepting, processing, or approving wireless deployment applications.

For all of the challenges, the *Portland* Opinion gave local governments only one win: aesthetics. The Small Cell Order had provided that local governments’ aesthetic regulations were preempted unless they were “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.” The Ninth Circuit struck down the “no more burdensome” criterion because Section 332 of the Communications Act of 1996 “explicitly contemplates” that some discrimination among facilities related to differing technologies is permitted. The Court also rejected the FCC’s objectivity requirement because “intangible public harm of unsightly or out-of-character deployments” is inherently subjective, and thus the FCC’s objective standard was “neither adequately defined nor its purpose adequately explained.”

At this point, notwithstanding the win on aesthetics, the *Portland* Opinion has strengthened the position of wireless carriers because it affirms the FCC’s Orders which severely restrict a city’s ability to regulate small cell and wireless telecommunications facilities to be attached to city property in the city’s public right-of-way. The *Portland* Opinion is not yet completely final. The litigants may seek rehearing, request review of the case by the entire Ninth Circuit, or petition for review by the U.S. Supreme Court. We

¹ Adopted by the FCC in September 2018, the “Small Cell Order” has two parts: (1) a set of rules that govern shot clocks (i.e., how long the City has to act on wireless deployment applications before they are “deemed granted”); and (2) the FCC’s interpretation of “effective prohibition” by state and local regulations through local fees and aesthetics-related laws.

² Adopted by the FCC in August 2018, this order banned both actual moratoria and rules that had the same affect on accepting, processing, or approving applications or permits necessary for deploying telecommunications services and/or facilities. This order is of particular concern to local agencies because it is based on vague examples without specific citation put forward by the wireless industry that may chill local agencies’ efforts to exercise its regulatory authority to protect public health and safety, while encouraging wireless carriers to aggressively challenge any local restriction or regulation as an alleged “moratorium” and petition the FCC for relief.

are tracking this closely and will provide updates as events unfold. But for today, this is a critical part of the legal landscape.

As has been well-expressed by residents at a recent City Council meeting, the FCC and the industry have persistently infringed on local control. The City Council directed this item be placed on an agenda to consider advocacy options. Below are several non-mutually exclusive options the City Council may wish to consider and implement to address the rush of wireless carriers and their relentless deployment applications. The goal is to allow the City to manage how, where, and when wireless facilities are installed throughout the City.

OPTIONS

1. Adopt Resolution Soliciting the Industry's Cooperation

The City Council may pass and adopt a resolution inviting the carriers to work collaboratively with the City, its staff, and its residents to put in place a procedure and substantive requirements that all parties can find reasonable. A form of such resolution is attached here as **Exhibit A** for your consideration.

In light of the ban on local moratoria and the well-settled legal preemption of local regulation of wireless facilities as it pertains to radio frequency (RF) emissions, a more aggressively worded resolution implying a ban or moratorium on the continued deployment of wireless facilities would have little to no legal effect, and could mislead some to believe the City has set a higher standard than federal law allows. The proposed resolution would be mostly a proposal to demonstrate political compromise.

2. Join Coalitions

The City's law firm, Best Best & Krieger ("BB&K"), is currently representing two coalitions challenging (1) the Small Cell Order and Local Moratoria Order, which resulted in the *Portland* Opinion described above; and (2) the FCC declaratory ruling and order on Section 6409 requests ("Section 6409 Clarification Order").

Small Cell Order & Local Moratoria Order Coalition

This coalition was originally formed to participate and make comments in the FCC proceedings related to small cell regulations. When the Orders were released, the coalition challenged them through litigation on a number of issues. In light of the *Portland* Opinion, significant issues remain and continue to burden local governments. Among other problems, the FCC's rules for fees prevent cities from being adequately compensated for use of property in the public right-of-way, and there is no clear

guidance on which effective prohibition test should be applied. NOTE that this is not an issue that has come up much in Malibu.

At this point in the litigation, there are four main options for the coalition:

1. Do nothing and deal with the ramifications of the *Portland* Opinion and the Orders at the local level;
2. Ask the Ninth Circuit three-judge panel for a rehearing – Due September 28, 2020;
3. Request that the case be reviewed by the entire Ninth Circuit (*en banc* review) – Due September 28, 2020; or
4. File an appeal to the U.S. Supreme Court – Due January 11, 2021.

Section 6409 Clarification Order Coalition

The coalition that BB&K is representing with regard to the Section 6409 Clarification Order was formed to provide comments on a draft of the order that the FCC issued prior to adoption. After the Section 6409 Clarification Order was adopted, the coalition evolved to challenge the order through litigation. At the same time that the FCC issued the Section 6409 Clarification Order, it also issued a notice of proposed rulemaking (“NPRM”) about whether it should change certain rules related to Section 6409 requests. This NPRM presents another opportunity for the City to join a wireless-related proceeding.

The FCC adopted the Section 6409 Clarification Order on June 9, 2020, which provided “clarifications” on its existing rules for eligible facilities requests (EFRs). An EFR is a non-substantial modification to an existing wireless facility. If a project qualifies as an EFR, then under federal law, a locality must approve the application. The FCC “shot clock,” or timeline within which a locality must complete the permitting process, for an EFR application is 60 days.

The “clarifications” in the Section 6409 Clarification Order make it easier for a project to qualify to be an EFR. Key clarifications in the order are as follows:

- A. **Concealment Elements:** protections for concealment elements *only apply to stealth facilities*;
- B. **Aesthetic Conditions:** placement of a facility behind or beneath surrounding structures is an aesthetic condition that *cannot* prevent a non-substantial increase in height;
- C. **Equipment Cabinets:** the limit of four ground-mounted cabinets applies separately to each EFR and is *not cumulative*;
- D. **Height Increases:** for towers outside of the public right-of-way, height can increase 20 feet *plus* the height of new antenna, and there is *no limit* on new antenna’s height;

- E. **Shot Clock Rules:** the shot clock is triggered if an applicant: (1) takes a first procedural step in the locality's permitting process; and (2) submits documentation addressing the EFR criteria; and
- F. **Environmental Assessments:** under certain circumstances, an environmental assessment is not needed if an applicant and the FCC have entered into a memorandum of agreement.

The filing deadline for the appeal of the Section 6409 Clarifications Order was August 10, 2020. Appeals were filed by local governments in both the Ninth Circuit and the D.C. Circuit, and all appeals have been consolidated in the Ninth Circuit. The deadline to file interventions was September 9, 2020.

Through the NPRM mentioned above, the FCC is seeking input on whether: (1) it should change its rules to allow deployment or excavation of up to 30 feet outside of an existing site; and (2) it should define "site" as the boundary of the leased or owned property surrounding the tower and any related easements "as of the date that the facility was last reviewed and approved by a locality" or "as of the date an applicant submits a modification request." The formal comment period is closed.

Joining the coalition efforts described above will help support the fight against further encroachment on local authority.

3. Engage Lobbyists

Lobbyists can assist the City in two ways: (1) they can help promote the City's position to state and federal representatives and the FCC (as a general matter to educate and inform them about the City's concerns); and (2) they can help the City propose and support legislation or defend against industry legislation.

4. Create City Task Force or Study Group

There are two main purposes for engaging the public: (1) to educate and (2) to receive public input and be educated. There are a variety of ways to achieve these goals. Some cities have a study session or community meeting, while others form a subcommittee or a citizens' committee. The City can use various combinations of these actions. Ultimately, in order for these efforts to be translated into City action, staff is required.

5. Support Legislators & Legislation

State Senator Henry Stern represents District 27, which includes Malibu, and is a member of the Senate Standing Committee on Energy, Utilities and Communications (the "Committee"). The Committee held its last hearing for the 2019-20 legislative

session on August 28, 2020. The City may wish to work with the Senator to craft a legislative agenda for the new session beginning January 1, 2021.

6. Form Alliance with Coastal Commission

The Small Cell Order, largely upheld by the *Portland* Opinion, set new FCC shot clocks for small cell installations – 60 days for installations on existing structures and 90 days for installations requiring a new structure. The Small Cell Order explains that state and local governments are meant to take final action, including appeals, within the shot clock period. However, these shot clocks merely create a rebuttable presumption that a state or local government acted within a reasonable amount of time.

The FCC shot clocks apply to the permits or authorizations that the City or state has responsibility for issuing. The City must act within the shot clock time period, including any required coastal development permit.

In addition, the proliferation of wireless telecommunications facilities impacts coastal views but also may have other impacts on coastal resources, which have not been adequately studied. It is unknown whether the Coastal Commission would have interest in working with coastal cities on this issue. The Mayor could be tasked with raising the issue through the Coastal Cities Working Group of the League of California Cities and get the matter on an agenda for one of the joint Coastal Commission-local governments summits.

7. Draft or Participate in Amicus Briefs in Pending Litigation

On July 29, 2020, the Children’s Health Defense (“CHD”), a non-profit advocacy organization led by Robert F. Kennedy, Jr., submitted its principal brief in the lawsuit it filed against the FCC, entitled *Environmental Health Trust et al. v. Federal Communications Commission et al.*, Case No. 20-1025, pending in the D.C. Circuit Court of Appeals.³ The crux of the case is whether the FCC violated federal law by failing to update its 1996 safety regulations and standards regarding exposure levels to radiofrequency and electromagnetic fields emitted from wireless devices and infrastructure, in the face of substantial evidence submitted by the petitioners during the FCC’s 2013 reassessment inquiry. The brief was drafted and filed by, among others, attorney W. Scott McCollough, who spoke at a recent City Council meeting.

The City may consider filing an amicus brief in that case or joining forces with one of the four (4) groups that has already filed amicus briefs in the case. One of four is from the Natural Resources Defense Council and various local elected officials from California,

³ See <https://childrenshealthdefense.org/advocacy-policy/childrens-health-defense-principal-brief-in-landmark-case-against-fcc-on-5g-and-wireless-harms-submitted/>

Maryland, Massachusetts, and Hawaii, including the Mayor of the City of Petaluma, a City Councilmember from Berkeley, and a Supervisor from Marin County. That amicus brief is “focused on the adequacy of environmental review for the construction of wireless infrastructure and the relevance of the FCC’s RF standards to that review.” The FCC is scheduled to file its brief in response by September 22, 2020, and the petitioners’ reply brief is then due by October 16, 2020.

Another case that may become ripe for an amicus filing is *ExteNet Systems, Inc. v. City of Cambridge* (Case No. 19-cv-11836-ADB, U.S. Dist. Ct., D. Mass.). In that case, BB&K represents the City of Cambridge, and on August 26, 2020, successfully obtained dismissal of a lawsuit by “neutral host” provider ExteNet against the City.⁴ The City had denied ExteNet’s permit applications due to missing information required by its laws – namely, evidence that the proposed installation is needed to prevent a material inhibition of wireless services. ExteNet claimed that only its customer AT&T possessed that information. The court rejected this excuse, holding that the burden of proof was on ExteNet to prove the facilities were needed to fill a significant gap in coverage, would in fact be used to fill any gap that did exist, and there were no viable alternative locations.⁵

If ExteNet appeals this decision to the First Circuit Court of Appeals, it will present another opportunity for the City of Malibu to prepare and file an amicus brief or, again, lobby the League’s Legal Advocacy Committee to do so.

Proposed Timeline for Ordinance

On August 24, 2020, after the Council received a report on 5G wireless technology and small cells, the Council referred back to staff the assignment to update the City’s wireless telecommunication ordinance. The Council requested a proposed timeline.

The City currently has a professional services agreement with Telecom Law Firm, LLC for updating the Malibu Municipal Code (MMC) and Local Coastal Program (LCP) regulations on wireless facilities.⁶ The MMC and LCP regulations match; however, the changes to the LCP would have to be certified by the California Coastal Commission (CCC) before the MMC or LCP updates could go into effect.

The project is expected to involve the steps listed below and to take approximately seven months to have the LCP amendment ready to submit to the CCC. A staff planner or contract planner would need to be assigned to manage the consultant and coordinate

⁴ A copy of the memorandum opinion and order dismissing the case can be found here: https://childrenshealthdefense.org/wp-content/uploads/Extenet_Cambridge-MTD-Granted-Dkt-42-8-26-20.pdf

⁵ For a summary of and link to the decision, see https://childrenshealthdefense.org/protecting-our-future/5g-small-cell-proliferation-takes-a-hit-in-cambridge-ma/?itm_term=home

the project. The exact timeline for completing the amendments for CCC submittal would depend upon Council priorities, scheduling availability and other factors, including:

- Project initiation with consultant
- Evaluation of existing regulations and local ordinances
- Zoning Ordinance Revision and Code Enforcement Subcommittee (ZORACES) meeting
- 1st public workshop
- Administrative draft ordinance preparation by consultant and review by staff
- CEQA and public draft ordinance review
- Planning Commission hearing
- City Council hearing and adoption
- Submittal of LCP amendment to California Coastal Commission for certification.

Staff estimates anywhere from six to 12 months to achieve CCC certification. Early coordination with CCC staff could help streamline the certification process. During the CCC certification process, the consultant could prepare the implementation program, conduct staff training and prepare for a public workshop on the completed ordinance.

ATTACHMENT: Resolution Draft

RESOLUTION NO. 20-XX

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MALIBU INVITING WIRELESS TELECOMMUNICATIONS CARRIERS TO WORK COLLABORATIVELY WITH THE CITY AND ITS RESIDENTS TOWARD ESTABLISHING REASONABLE PROCEDURAL AND SUBSTANTIVE REGULATIONS FOR WIRELESS TELECOMMUNICATIONS FACILITIES DEPLOYMENT IN THE CITY

The City Council of the City of Malibu does hereby find, order, and resolve as follows:

SECTION 1. Recitals.

- A. Since the beginning of 2019, the City has been inundated with more than 50 applications from wireless telecommunications carriers (“Carriers”) seeking to install wireless telecommunications facilities of all sizes and nature (“Wireless Facilities”) throughout the City – both on private and City property and in the public rights-of-way (“PROW”).
- B. City residents at numerous City Council meetings have expressed deep concern about the unconstrained proliferation of Wireless Facilities, especially as it pertains to safety and potential adverse public health effects caused by so many Wireless Facilities in and near residential neighborhoods and commercial districts – namely, from Wireless Facilities’ radio frequency (“RF”) emissions.
- C. The City acknowledges that its ability to regulate Wireless Facilities and Carriers based on the environmental effects of RF emissions is impaired by federal law – namely, section 332(c)(7)(B)(iv) of the Telecommunications Act of 1996 (the “Act”) – and that if a Wireless Facility is in compliance with the Act’s standards for RF emissions, the City may not regulate the RF emissions further.
- D. Pursuant to the Act, on November 27, 2019, the Federal Communications Commission (“FCC”) adopted an order (FCC-19-126) (the “RF Order”) that concluded a 2013 inquiry about whether the FCC should reassess RF exposure safety standards; the FCC concluded that it should not, but rather it should maintain the same standards as first promulgated in 1996.
- E. Notwithstanding the federal RF standards and Carriers’ assertions that their respective Wireless Facilities are in compliance therewith, the City and its residents remain apprehensive about the negative effects of Wireless Facilities’ RF emissions on their health and the health of their children; this concern is amplified by both the FCC’s focus on RF emissions from cell phones and not Wireless Facilities and the inconclusive results of studies performed on exposure to Wireless Facilities RF emissions specifically.
- F. The City believes that the industry and the FCC will agree that the roll out of 5G technology should not be at any cost and that more information is required to identify what the cost could be, especially to public health and safety.

SECTION 2. The City Council of the City of Malibu hereby invites Carriers to work collaboratively with the City, its staff, and its residents to establish reasonable procedural and

substantive regulations for the deployment and installation of Wireless Facilities in the City. And further requests that the Carriers refrain from further deployment in the City before such regulations are in effect.

SECTION 3. The City Manager is hereby directed to provide a copy of this resolution to each carrier that has installed or sought permits to install Wireless Facilities in the City. The City Clerk shall certify to the passage and adoption of this resolution and enter it into the book of original resolutions.

PASSED, APPROVED, and ADOPTED this ___th day of _____ 2020.

MIKKE PIERSON, Mayor

ATTEST:

HEATHER GLASER, City Clerk
(seal)

APPROVED AS TO FORM:

CHRISTI HOGIN, City Attorney