

DATE ISSUED: October 3, 2002 REPORT NO. 0224

ATTENTION: Land Use and Housing Committee
Agenda of October 9, 2002

SUBJECT: DRAFT WIRELESS COMMUNICATION POLICY

REFERENCE: Manager's Report No. 02-035, dated February 7, 2002
Manager's Report No. 01-247, dated November 9, 2001
Manager's Report No. 01-196, dated September 17, 2001

SUMMARY

- Issues -
1. Should the Land Use and Housing Committee of the City of San Diego recommend to the City Council adoption of a Wireless Communication Facility Policy (attachment 1), which does not change the decision maker or level of review for wireless facilities, but does clarify site preferences and criteria for review and approval?
 2. Should a moratorium be imposed on wireless communication facilities in residential zones?
 3. Should the Manager resume the processing of wireless communication facilities on city park sites (Attachment 2)?

Manager's Recommendation -

Direct staff to:

1. Adopt the proposed policy, which does not change the level of decision maker for approval of wireless communication facilities, but does clarify site preferences and criteria for review and approval of wireless communication facilities (Attachment 1).
2. Do not implement a moratorium for wireless communication facilities in residential zones. The associated issues are addressed within the text of the draft policy and this report.
3. Lift the suspension of processing leases and complete reviews for City park sites (Attachment 2).

Community Planners Committee (CPC) Recommendation - The CPC met on March 26, 2002 to review and discuss the Draft Wireless Communication Facilities Policy and voted 13-5-2 to approve a revised draft (Attachment 3). Their resolution **1**) supports the concerns expressed by the Community Planners Committee (CPC) representative and

other community members of the reconstituted Telecommunications Issues Committee (TIC); **2)** recommends that LU&H approve a revised “draft” that restricts the placement of wireless communication facilities in Agricultural and Open Space Zones, City Parks and Open Space, Public Right-of-Way adjacent to residential, Multi-family and Single-family Residential Zones, Premises containing Historical Resources and potentially designated Historical Resources, Premises within the MHPA and Coastal Overlay Zones unless the applicant has provided justification clearly indicating that recommended high and limited preference locations were explored in good faith and found unacceptable, that a denial would be a violation of the Telecommunication Act of 1996 (TCA) or other federal, state or local regulation and that the proposed wireless facility constitutes the “least intrusive method” of satisfying the applicant’s requirement; and **3)** recommends that LU&H approve a site preference matrix that ensures appropriate accountability to elected representatives by providing for a Process 3 with extraordinary appeal to City Council (a procedure permitted under the old code) in cases of applications for wireless communication facilities within Agricultural and Open Space Zones, City Parks and Open Space, Public Right-of-Way adjacent to residential, Multi-family and Single-family Residential Zones, Premises containing Historical Resources, Premises within the MHPA and Coastal Overlay Zones.

Historical Resources Board - On August 19, 2002, the Historical Resources Board subcommittee reviewed and voted to recommend approval of the draft policy if one of the following changes were made (in order of preference): 1) remain silent on historical resources and instead rely on the existing regulations, or 2) leave the policy as it is written and add a reference to the Historical Resource regulations contained in the Code, 3) or amend the Code to be consistent with the draft policy. Staff has deleted the language in the policy referring to historical premises and will rely on the current regulations. This is consistent with item number one above.

Environmental Impact - The policy was deemed exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15061(b)(1).

Fiscal Impact - Project review for compliance with the Wireless Communication Facility Policy would be fully cost recoverable through deposit accounts provided by wireless communication facility applicants.

Code Enforcement Impact - The adoption of this policy is not anticipated to have any impact on Code Enforcement.

Housing Impact Statement - There would be no impact on affordable housing as part of this action.

BACKGROUND

Since the February 13, 2002 Land Use and Housing meeting, staff has met four times with the Telecommunication Issues Committee (TIC) to collectively review and debate the content of the draft policy. The committee members include concerned community representatives and

representatives from the wireless industry (Attachment 4). Revisions where a consensus was reached are incorporated into the draft policy. The issues where agreement could not be achieved are listed below and are also included in attachment 5 with the citizens and industry positions outlined in greater detail. The Committee remains divided on these issues.

1. The **process** for wireless communication facilities in Preference 2, 3 and 4 categories (Attachment 6).
2. The required **justification** related to sites within the above mentioned categories.
3. The **wording** related to restricting wireless facilities in the above mentioned categories.
4. The **process** related to wireless communication facilities on **non-residential uses within residential zones**.
5. The **process** related to installations in the **public right-of-way**.
6. **Evaluation of compliance with FCC rules and regulation** for Wireless Communication Facilities.
7. The Use of “**shall**” vs. “**Should**” as policy language.

The City Attorney’s Office has also reviewed the draft policy prepared by staff and has recommended modifications to the document in order to comply with federal regulations. Based on staff experience with wireless communications and based upon the laws pertaining to the industry, the resulting document attempts to address the concerns raised in the process. However, staff does take a position on those issues where agreement could not be achieved, as listed in the matrix (Attachment 5).

In addition to the disputed TIC issues, staff believes that the issues identified previously by LU&H (moratorium and leasing procedures) have been adequately addressed in the draft policy and therefore a moratorium on wireless facilities on residentially zoned land and continued suspension of processing wireless facilities on park land is not recommended.

MORATORIUM:

Staff does not believe a moratorium is warranted given the comprehensive regulations and policies that have been recently adopted. The purpose of a moratorium is to suspend issuance of permits for a short duration of time until regulations governing permit issuance can be adopted. A moratorium cannot be a permanent or long term prohibition on the issuance of permits according to the City Attorney. The issue of implementing a moratorium in residential zones is to temporarily prohibit wireless communication facility (WCF) installations involves three main issues:

1. Visual - The most obvious issue is the potential visual impact these facilities have on

surrounding properties. In many cases a WCF will be architecturally integrated into a residence so that it visually serves as an addition to the house. Other WCF installations on homes on canyon rims quite often involve pipe mounted antennas or faux trees within the backyard of the residence. Although these types of installations have the tendency to be more visually obtrusive, landscaping can provide screening of the WCF from nearby properties.

2. Radio Frequency (RF) - The second issue is RF emitted from the facility to adjacent properties. Acknowledging that Federal law prohibits the City from basing their decision on issues related to RF, it is still a common concern raised by opponents of these facilities in residential areas. For public disclosure purposes, the current regulations include language requiring providers to furnish an RF Report for each of their installations. The draft policy goes a step further requiring providers to submit, within 60 days of commencement of operation, either verification that the WCF is categorically excluded from determining compliance with the federal guidelines or a project implementation report that provides cumulative field measurements of RF electromagnetic fields of all antennas installed on the premises.

3. Property Values - The third issue relates to property values of homes surrounding a nearby WCF installation. To date, there has not been any definitive evidence indicating that there is an actual drop in property values where WCF's are located.

Conclusion - Of these issues, the only one that can be regulated by the City is the visual impact of WCF's. The draft policy includes language advocating integration and screening for all WCF installations. In addition, the policy establishes a clear preference for sites in industrial and commercial zones and in the right-of-way. This hierarchy of site preferences should reduce the number of sites on residential properties. City staff is not able to make the findings to support the emergency action required to impose a moratorium on WCF installations in residential zones. The draft Policy, in conjunction with the current regulations, will serve to provide the necessary tangible standards and mandates that will in effect, protect communities and afford adequate public notice.

WIRELESS COMMUNICATIONS FACILITIES ON CITY OWNED PROPERTY

Since 1996, City staff has been marketing City-owned sites to wireless communications providers. The current lease portfolio includes 78 executed transactions that generate \$941,900 in revenue per year (Attachment 7). Of the 78 leases, 41 are cellular installations and the remaining 37 consist of mountaintop transmitter facilities and telephone or cable lines. The Real Estate Assets Department has primarily used short-term leases for these sites to ensure flexibility if the leases need to be terminated or renegotiated due to changes in technology.

There are a number of issues that have been raised with respect to city-owned sites including:

- 1) Determination of fair market rent and other consideration;
- 2) Allocation of lease revenue;
- 3) Suspension of processing applications for park sites.

Utilize Independent Appraisal as the Valuation Methodology:

Each prospective site is valued based upon an outside appraisal performed by an independent specialist in this field. Attachment 8 provides a detailed discussion of valuation methodology which analyzes the unique features of each individual site. In addition to fair market rent, all current leases contain an annual five percent increase. City staff has contacted numerous other jurisdictions which has confirmed the City is achieving top dollar for City-owned sites.

Establish a Special Fund for a Site Access Fee With a 5% Annual Increase:

There has been extensive discussion through the Park and Recreation Board system regarding a standardized site access fee for Parks. This amount was established as a one time fee of \$20,000. Real Estate Assets also recently negotiated a site access fee of \$15,000 for Fire Station 24 in Carmel Valley amortized over the term initial of the lease. Staff recommends that a policy is established to include a minimum site access fee in all leases as follows: \$20,000 for parks and open space; \$15,000 for fire stations, libraries and similar facilities; and \$10,000 for all other sites. These amounts should be increased by five percent annually and be charged in addition to fair market rent. If this Committee feels these amounts are inappropriate, staff requests direction on what amounts the Committee would recommend.

Lease Revenues Should be Allocated During Budget Process:

Various stakeholder groups have made it clear that their support of wireless facilities on City-owned land is contingent upon receipt of some direct community benefit in the allocation of the revenues. City staff recommends that all rents generated be tracked and allocated to the appropriate department as part of the annual budget process. Staff further recommends that the Site Access fees be allocated to the particular site or community where the wireless facility is located for specific needs as determined and recommended by the appropriate department director. Staff also recommends establishing a special fund to allow these revenues to accumulate over time to fund specific projects. Each department and facility manager should also work with the local community to establish priorities for funding. This process should ensure ongoing stakeholder support.

Twenty-three Park Sites Currently Suspended

On September 13, 2001, the City Manager directed staff to suspend processing of all application of City-owned Parks or Open Space (Attachment 2). It is estimated that this is a potential loss to the general fund of approximately \$750,000 over the last year. The TIC Committee recommended that those applications that have received approval through the Park and Recreation Board, and Community Planning Group should immediately move forward. Eight of these applications have completed the planning process that existed at that time, which concluded with a recommendation from the Park and Recreation Board but not the Community Planning Group (as this requirement was added later). In addition, City staff have delayed process requests on non-park, City-owned sites (such as fire stations, libraries and water facilities) due to the outstanding policy issues. These proposals need to be processed and complete the City's review process.

Given the lapse in time, City staff is seeking Council action on the proposed policy and further City Council direction regarding the processing of applications on City owned property to facilitate the timely processing of these projects.

PREFERENCE 3 AND 4 CATEGORIES (PROCESS, JUSTIFICATION AND WORDING):

Process and Justification

The Development Services Department sent copies of the previous City Manager's Report (No. 02-035) containing the draft policy to each of the Community Planners Committee (CPC) representatives following the previous LU&H meeting on February 13, 2002. The CPC met on March 26, 2002 to review, discuss and vote on the draft policy. They produced a strikeout/underline version of the policy, which is attached (Attachment 3) and they adopted a resolution indicating that they:

1. Support the concerns expressed by the Community Planners Committee (CPC) representative and other community members of the reconstituted

Telecommunications Issues Committee (TIC).

2. Recommend that LU&H approve a revised “draft” that restricts the placement of wireless communication facilities in Agricultural and Open Space Zones, City Parks and Open Space, Public Right-of-Way adjacent to residential, Multi-family and Single-family Residential Zones, Premises containing Historical Resources and potentially designated Historical Resources, Premises within the MHPA and Coastal Overlay Zones unless the applicant has provided justification clearly indicating that recommended high and limited preference locations were explored in good faith and found unacceptable, that a denial would be a violation of the Telecommunication Act of 1996 (TCA) or other federal, state or local regulation and that the proposed wireless facility constitutes the “least intrusive method” of satisfying the applicant’s requirement.
3. Recommend that LU&H approve a site preference matrix that ensures appropriate accountability to elected representatives by providing for a Process 3 with extraordinary appeal to City Council (a procedure permitted under the old code) in cases of applications for wireless communication facilities within Agricultural and Open Space Zones, City Parks and Open Space, Public Right-of-Way adjacent to residential, Multi-family and Single-family Residential Zones, Premises containing Historical Resources, Premises within the MHPA and Coastal Overlay Zones.

It should be noted that there are provisions of the CPC proposed draft policy that could subject the City’s regulations to legal challenge. The citizen component of TIC also advocates a similar version of a strikeout/underline policy and has identified the three issues outlined above and a recommendation to revise the policy to incorporate stronger language, specifically, the word, “shall.”

The issue of “significant gap” relates back to justification and staff believes that the draft policy along with Information Bulletin 536 (Attachment 9) sufficiently delineates the necessary requirements for demonstrating justification. Both the policy and the regulations support the principle behind the issue of justification, which includes the substantial evidence test. Applications are routinely reviewed for compliance with applicable regulations on a case by case basis. Required application materials include coverage objective maps and alternative sites analyses.

Traditionally with process, the issue has always been public notification and participation in the hearing process. The proposed policy addresses this issue. As mentioned earlier in the report, the citizen component of TIC endorses the re-establishment of the Extraordinary Appeal process so that for the more controversial projects located in sensitive land use areas, the City Council would be accountable for the decisions made on these types of projects. If the Extraordinary Appeal process is not re-established, it is the citizen’s desire to shift the Preference 3 categories, which are currently Process Three (Hearing Officer as decision maker) to Process Four (Planning Commission as decision maker). This would allow the Planning Commission decisions to be appealed to the City Council.

In general, staff does not recommend a change to the current level of decision maker for WCF’s in residential and park sites. CPC and the community members of TIC recommend that the City Council be the ultimate decision maker on all WCF’s in residential and park site locations. The industry representatives of TIC do not recommend a change to the current process.

Should Council wish to implement the CPC alternative to process all residential and park sites as a Process Four (Planning Commission decision- appealable to the City Council), additional staff will need to be added for the estimated increase in permits, which is anticipated to be approximately 50-75 applications per year.

Shall vs. Should

The draft policy was written as a policy document containing the language “should.” The citizens component of TIC want this changed to “shall.” They are basing this recommendation on various Council Policies which utilize the word shall throughout the documents. Although some Council policies have used the word “shall” in place of “should”, most of the City’s policy documents contain the word “should.” This preference is based on recognized and preferred practice in drafting policy documents. In the interest of consistency, staff recommends that this policy contain the word “should” and that the word “shall” remain reserved for the implementing regulations. It is Council’s discretion to use either word.

Public Notification

One of the major issues identified over the past year is public notification. Currently, all processes above Process One include public notification via the San Diego Daily Transcript and by U.S. Mail to property owners and tenants within 300-feet of the subject property. Community Planning Groups are included in the City’s distribution for all discretionary projects and the applicant’s schedule their projects for presentations with the individual groups. In addition to current practices, the draft policy includes language that requires all projects to be distributed to the recognized Community Planning Group and all discretionary projects to be distributed to the affected Council District. It should be noted, however, that Process One is a ministerial action and therefore, approval cannot be legally withheld or delayed in the process and is not subject to community review or appeal.

Application Trends

In reviewing the projects that have had decisions since Land Use and Housing began looking into the wireless communication issue in September of 2001, the following information is available:

Process One	Process Two	Process Three (all 3 appealed)	Process Four (in conjunction with a Planned Development Permit [PDP])-	City Council
95 approvals	5 approvals	2 approvals	2 approvals- (both appealed)	1 approval

2 denials		1 denial		1 denial
28 pending	10 pending	5 pending	1 pending	

The trend continues to indicate that providers continue to seek out sites in the Preference 1 category, which is what the draft policy and current regulations encourage. The data also indicates that discretionary projects qualifying for Process Three and Four reviews are always appealed. The appeals have been similar in tone, but have included the following issues: hazardous chemical materials, Covenants, Codes and Restrictions (CC&R) violations, facility design, alternative commercial sites, development regulation deviations, inadequate environmental review, and procedural errors in noticing. To date, two of the appeals were ultimately denied, one by the Planning Commission and the other by the City Council.

PUBLIC RIGHT-OF-WAY INSTALLATIONS

Staff strongly encourages the use of the public right-of-way for wireless communication facility installations. The right-of-way is especially conducive to installations in residential areas, where there is controversy surrounding wireless communication facilities on premises containing homes. The policy provides an incentive to the industry to locate in the right-of-way in residential areas by recommending a Process Two, which is a staff decision appealable to the Planning Commission. It provides for public notification and Community Planning Group review. Staff believes this is an opportunity to discourage installations on single-unit residential properties, which require a Process Three, Hearing Officer decision. The difference in processing time between a Two and a Three can be as much as four weeks.

The industry believes right-of-way installations should be processed as a ministerial permit, Process One. The policy as currently drafted, identifies Process One (ministerial), Two (staff decision, appealable to the Planning Commission) and Three (Hearing Officer, appealable to the Planning Commission) for different types of right-of-way installations. The specific process depends on the adjacent zone and whether the equipment is above ground or vaulted under ground. The industry believes Section 7901 of the State Public Utilities Code limits the City’s regulatory power over right-of-way installations to time, place and manner. They contend that any process higher than Process One is inconsistent with their state franchise rights. Currently, the regulations identify the following processes for right-of-way installations:

	Above ground equipment	Subterranean equipment
Adjacent to Residential	Process Three	Process Two
Adjacent to Non-Residential	Process Three	Process One

Upon consultation with the City Attorney’s office on this issue, it has been determined that the draft Policy and the existing regulations as written are legally supportable.

EVALUATION OF COMPLIANCE WITH FCC RULES AND REGULATIONS

The policy is written recommending that the industry supply an RF study model for each application and then once the facility is built and operational, the provider must supply an on-air test identifying RF measurements. TIC agreed on this language, however, the citizen members of TIC also desire to add language requiring an annual compliance report for each of their sites. Staff does not recommend annual reports because the FCC is the regulatory agency that oversees the on-going operation of these facilities, not the City of San Diego. The industry firmly believes that compliance issues are the responsibility of the FCC and maintain that the City is prohibited from regulating this part of the facility operation.

CONCLUSION

The City's Wireless Communication Antenna Policy has continued to evolve in order to respond to community input, legal trends, advancing technology and consumer demand. Originally, the primary focus of the permit process was to minimize the visual impacts associated with wireless facilities. The draft policy maintains that goal while comprehensively addressing issues such as process, park and right-of-way installations, public notification and justification.

As this report indicates, agreement could not be reached on all issues. The attached draft policy is more closely in alignment with emerging issues in the community within applicable law in staff's opinion. The City Attorney's office has analyzed the policy and believes that the approach satisfies the Telecommunication Act of 1996.

Respectfully submitted,

Tina P. Christiansen, A.I.A.
Development Services Director

Approved: P. Lamont Ewell
Assistant City Manager

TPC:kla

Note: The attachments are not available in electronic format. A copy is available for review in the Office of the City Clerk.

- Attachments:
1. Draft Wireless Communication Policy
 2. Proposed Wireless Communication Sites
 3. Community Planners Committee (CPC) Resolution and Strikeout/Underline Version of Draft Policy
 4. TIC Membership
 5. Unresolved Issues Matrix
 6. Preference Category Identification
 7. Existing City-Owned Lease Sites
 8. Valuation Methodology
 9. City Manager's Memo on Suspending Processing

10. Information Bulletin 536

Note: Due to the number of attachments, the distribution will be limited to the Committee binders. Additional Copies are available for review in the Office of the City Clerk.