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From: Ralph Wyngarden [mailto:ralph.wyngarden@faulkandfoster.com]

Sent: Thursday, July 03, 2003 9:53 AM

To: 'councilgroup@rcgov.org'

Cc: 'vicki.fisher@rcgov.org'

Subject: 7/7/03 Council Meeting: Western Wireless Zoning Ordinance Text C hange Request

Dear Members of Council,

I am providing you with the attached comments in order to assist you in evaluating the Western Wireless request for an ordinance text change to allow microcell cellular communications facilities as defined in section 17.04.483 of the zoning ordinance on buildings greater than or equal to 45 feet or 5 stories in the HDR High Density Residential District.

Thank you very much for your consideration of this important matter. I will be present to respond to any questions at the meeting Monday night.

Respectfully,

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<<Western Wireless Proposed Text Change.doc>>

Dear Members of Council:

I am providing you with the following comments in order to assist you in evaluating the Western Wireless request for an ordinance text change that will be on the July 7 agenda. The comments reflect Western Wireless' presentation at the planning commission and its response to the planning staff's report.

THE PROPOSED CHANGE

The proposed zoning ordinance text change requests amendment of sections 17.14.020 and 17.14.030 to allow microcell cellular communications facilities as defined in section 17.04.483 on buildings greater than or equal to 45 feet or 5 stories in the HDR High Density Residential District as follows:

Add the following subsection D to the list of permitted uses in section 17.14.020:

D. Microcell cellular communications facilities as defined in section 17.04.483 on buildings greater than or equal to 45 feet or 5 stories.

Add the following subsection J to the list of conditional uses in section 17.14.030:

J. Microcell cellular communications facilities not meeting standards as defined in section 17.04.483 on buildings greater than or equal to 45 feet or 5 stories.

BACKGROUND

By way of background, what prompted this ordinance amendment request is Western Wireless' need to fill a bowl-shaped area of the city centered northeast of the hospital. The only way to do it is to have a site within this bowl (Verizon has been pursuing coverage in the same location but is awaiting the outcome of this matter before taking further action). The target search area was completely within a large area of single-family homes in the bottom of the bowl. For this reason Western Wireless was forced to look at locations farther up the side of the bowl.

In the course of working diligently with city planning staff it was suggested that we attend the public open house on February 10 regarding the proposed telecommunications master plan and ordinance. At that time there was no negative public or staff feedback regarding changing the ordinance to allow microcells in the HDR High Density Residential District and the plan was to include the change proposed today as part of the total telecommunications ordinance package. At that time, staff indicated it looked like a good idea and was attractive because it furthered the city's goals of using existing structures and avoiding the proliferation of new towers.

I submitted proposed language and was of the understanding that it was being worked into the draft of the proposed telecommunications ordinance until April 10. It was on this date that Verizon requested a planning commission discussion regarding placing its antennas at the same location. I attended that meeting as well and was advised by planning staff after the meeting that the telecommunications ordinance process was stalled and that to avoid delay I should submit a separate request for an ordinance change rather than waiting for the planning staff's ordinance revision.

As a point of correction to the planning staff report, I would also like to note that there has evidently been some confusion between Western Wireless and Verizon because Western Wireless was not at the March 27, 2003. I attended only the April 10 meeting and my comments there focused on the impermissibility of regulating FCC compliant sites on the basis of radio frequency emissions.

The minimal impact and aesthetic superiority to a freestanding tower that made this attractive to the public and planning staff early in the year still remain. The backing away from encouraging this that has since occurred appears to be primarily because of radio frequency (RF) emission concerns -- a reason that is not supported by scientific evidence and is not a legally valid basis for regulation where FCC standards are met.

In its report staff did not address the issue of whether RF health concerns are a legally permissible consideration although it was thoroughly addressed with citation to statute and case law and federal regulations. The City Attorney's office did make a brief statement at the Planning Commission meeting to the effect that the planning commission's discretion was not impacted but did not at that time or in response to my further request provide any citation to any legal authority or explain how the authorities cited by Western Wireless do not apply.

THE ORDINANCE CRITERIA FOR A TEXT CHANGE ARE MET

Contrary to the planning staff's report, the four criteria for text amendments contained in Section 17.54.040(D)(1) are indeed met by Western Wireless' request.

THE PROPOSED TEXT AMENDMENT WILL HELP APPROPRIATELY CHANNEL GROWTH RESULTING FROM GROWING PUBLIC DEMAND WHICH IS A CONSTANTLY CHANGING CONDITION REQUIRING ADDITION OF NEW SITES (Sec. 17.54.040(D)(1)(a))

The planning staff's recommendation simply makes a blanket statement that there have been no changing conditions that would justify an amendment. However, just as the invention and spreading use of the automobile gave rise to more and more regulatory changes regarding roads and parking and continues to have impact to this day, so also, the increasing demand for mobile communications has regulatory implications.

As cellular traffic and the need for coverage grows so does the public's demand for quality service. This increasing demand means more and more sites, which require the placement of antennas either on new towers or on existing structures.

This body's adoption of the existing microcell ordinance was a recognition of the growing need and a policy determination that the use of existing structures should be encouraged. Ordinance 3734 was passed 9-0 by the Planning Commission on August 23, 2001 and passed 8-2 by the City Council upon second reading on September 17, 2001. As a result microcell cellular communications facilities as defined in Sec. 17.04.483 are currently allowed in the CB Central Business District, GC General Commercial District, GAD General Agricultural District, Hotel-Motel Zoning District, Public District, Civic Center District, and Business Park District. Given the proximity and similar character of these districts, allowing this use in the HDR district would not be out of character. By its current request Western Wireless is simply stating that for the same reasons the microcell ordinance was passed rooftop locations on tall buildings in the HDR district should also be recognized and promoted as an alternative to new towers.

If there is not an existing tower in an area and no rooftop or alternative is available a carrier is forced to construct a new tower to provide the effective service required under its license and as a matter of national policy under the Telecommunications Act of 1996. Western Wireless sees this ordinance change which would allow it to seek placement of antenna panels on the wall of the penthouse of the Pennington Housing building as a win-win situation which would allow it to provide the needed coverage while preserving the city's viewscape in that area.

Every impact that the staff points out in its staff report would be that much greater if Western Wireless had to construct a new tower on a parcel next door which is zoned to allow such facilities.

THE PROPOSED TEXT AMENDMENT DOES IS CONSISTENT WITH THE INTENT AND PURPOSES OF THE ZONING ORDINANCE (Sec. 17.54.040(D)(1)(b))

The planning staff's report takes a narrow focus in stating that because microcells don't encourage "good housing" the proposed amendment is not consistent with the intent and purposes of the ordinance. This ignores the fact that the current microcell ordinance is designed to encourage use of existing structures rather than new towers in a number of districts irrespective of the primary purpose of those districts.

For example, microcells are not currently allowed in the General Agriculture District because that promotes "good agriculture," rather, it is because the intent and purpose of the ordinance to promote as many alternatives to new towers as possible. Western Wireless' proposed amendment is clearly consistent with this intent and purpose without adversely impacting other planning goals as discussed below.

THE PROPOSED TEXT AMENDMENT DOES NOT ADVERSELY IMPACT THE CITY (Sec. 17.54.040(D)(1)(c))

The planning staff's report raises the fear of commercial "activity" in a residential district but the proposed ordinance will not damage the character of the district. Microcell sites are unmanned, they don't generate traffic, and they don't negatively impact city services or the delivery of city services to residents. In fact, the sites enhance the delivery of communication services to residents and in addition to the benefit to personal and business interaction the improved communication serves an important public safety function. If asked in what way they were adversely affected by a rooftop antenna installation how could a resident respond other than that their quality of life was improved or at least that there was no impact. While one can talk in the abstract about the general inappropriateness of commercial activity in a residential district this narrowly tailored ordinance proposal is no more an inappropriate "activity" than a telephone pole or a power line or a water main. It is simply part of the background infrastructure that serves the daily needs of residents with no real concrete negative impact.

The real negative impact is if the building was unavailable and the aesthetic impact of a new tower resulted.

It also must be remembered that this is a very narrowly tailored proposal and does not involve indiscriminately throwing the doors open to microcell sites in residential areas. The proposed text change only allows microcells in the HDR district and not in other residential districts. It only allows building installations as defined in the ordinance and not new freestanding towers. Furthermore, most of the HDR district

itself is not affected as it only allows these rooftop installations on buildings in excess of 45' or 5 stories.

THE PROPOSED TEXT AMENDMENT DOES NOT CONFLICT WITH RAPID CITY'S DEVELOPMENT PLAN (Sec. 17.54.040(D)(1)(d))

This section requires that the proposed amendment "be consistent with and not in conflict with" the city's development plan. Planning staff's recommendation just makes the statement that this is not an appropriate land use and does not contribute to the orderly growth of the city but there is no citation to any portion of the development plan to support this assertion.

In fact, the city's development plan does not speak to this issue. This is why the city hired SEH to draft a Master Plan for Telecommunication Facilities as well as a proposed ordinance. Although SEH was let go, the city continues to work to fill this vacuum. To the extent there is any discernable policy it is to favor use of existing towers and structures over the proliferation of new freestanding towers. This is reflected in the initial draft of the Master Plan for Telecommunications Facilities, in public comment, and in the current microcell ordinance. The proposed text amendment goes with rather than against the trend of city regulation and public opinion and furthers the policy of directing wireless providers to existing structures where possible.

RADIO FREQUENCY (RF) EMISSIONS FROM FCC COMPLIANT SITES DO NOT POSE A HEALTH THREAT AND REGULATION ON THAT BASIS IS NOT LEGALLY PERMISSIBLE UNDER FEDERAL LAW

This issue was addressed in-depth with citation to legal authority in Western Wireless' written submission. However, I bring it up here because it is clear from interaction with staff, the staff report, and comments from the planning commission that the driving concern behind reservations over this proposal is the issue of whether the proposal would allow RF emissions that would adversely impact health.

The written submission details how the FCC has already studied and regulated the area of radio frequency emissions and determined that there is no valid health concern with sites that comply with FCC guidelines. Both the Code of Federal Regulations and the Telecommunications Act of 1996 specifically prohibit regulation of these sites on the basis of concerns about emissions where they meet guidelines. The federal government has essentially said that within certain criteria the health issue is our concern and not that of the local jurisdiction. Only if the site does not meet the stated guidelines may the local jurisdiction step in and regulate on the basis of emissions.

It is important to note that each microcell site that could be permitted under the proposed ordinance amendment still has to go through the SDCL 11-6-19 review process and, as part of that process, information showing compliance with FCC guidelines can be required (Western Wireless has already provided this information as it relates to its proposed site).

Given the directional nature of the beam from a panel antenna there would actually be more exposure to residents of a building in the HDR district from antennas on a freestanding tower across the street in a permitted district than there would be from antennas mounted on the wall of the penthouse at the top and facing outward. However, in either case, the FCC has conclusively determined that there is no significant impact on human health where antennas on a freestanding tower are at

least 10 meters above the ground or where building mounted antennas generate less than 1000 watts effective radiated power per sector.

SUMMARY

The four criteria for an ordinance text change are met. The impact is positive rather than negative and fosters the goal of providing alternatives to the proliferation of new towers. The city can rest assured that adoption of this amendment poses no threat to public health and no unwanted impact on city services, the character of the HDR district, or its residents' quality of life. Like the initial microcell ordinance which it mirrors, this proposed amendment will provide an avenue for carriers to provide the communication services that benefit residents, businesses, and visitors and enhance public safety and emergency response while avoiding the visual impact of a new tower.

Thank you very much for your consideration of this important matter. I will be present to respond to any questions at the meeting Monday night.

Respectfully presented,

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