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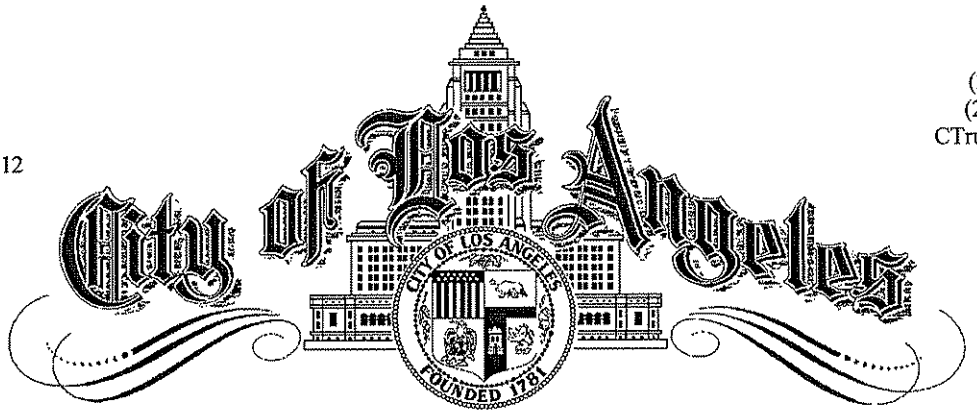

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REPORT NO. R11-0213

JUN 07 2011

REPORT RE:

DEVELOPMENTS IN THE LAW REGARDING REGULATION OF THE PLACEMENT OF CELL TOWERS AND RELATED EQUIPMENT

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Main Spring Street
Los Angeles, California 90012

Honorable Members:

Your Honorable Body requested that this Office report on legal developments regarding the regulation of the placement and aesthetics of cell towers and related telecommunication equipment (jointly referred to as "cell towers"), and how the developments impact the City's current cell tower regulations. Specifically, you asked us to review the federal Ninth Circuit Court of Appeals' ruling in *Sprint Telephony PCS, L.P. v. County of San Diego* (9th Cir. 2008) 543 F.3d 571, and to report whether the City may lawfully amend its ordinance regulating Above Ground Facilities Specifications and Procedures (AGFSP), Los Angeles Municipal Code (LAMC) § 62.03.2, to exercise greater control over cell tower placement and aesthetics.[1] In addition, you asked us to report on new tools available to the City to regulate cell towers in view of the federal Ninth Circuit Court of Appeals rulings in *Sprint v. County of San Diego* and in *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, and to inform the City Council of what steps have been taken in collaboration with the Department of Water and Power, Bureau of Engineering, and the Department of Planning to better control and regulate the location and appearance of cell towers.[2]

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1 See Council File Index No. 08-2440.

2 See Council Index File No. 09-2645.

To address these issues, this report will first outline federal and State laws regulating the installation of cell towers, and provide an overview of the AGFSP, that regulates the installation of such equipment in the public right-of-way. This report will also summarize the *County of San Diego* and *City of Palos Verdes Estates* decisions, and in light of the decisions this report will identify three basic tools that the City may use to better regulate the installation and appearance of cell towers. Finally, this report will describe the steps taken in collaboration with various City departments to better control and regulate the location and appearance of cell towers.

A. Background Information

The extent to which the City of Los Angeles may regulate the aesthetics of cell towers is governed by federal and State law. This section provides a brief overview of federal and State laws that govern municipal cell tower regulation, and the City's current cell tower installation ordinance.

1. Federal Law - The Telecommunications Act of 1996

The federal Telecommunications Act of 1996[3] prohibits municipalities from creating regulations that ban or effectively prohibit personal wireless telecommunications service. 47 U.S.C. §332(c)(7)(B)(i)(II) (2010). Local governments retain some authority to regulate telecommunications installations, provided that such regulation does not have the effect of prohibiting service. Whether a municipal regulation effectively prohibits wireless telecommunications service is a factual determination that hinges on whether the city has "prevent[ed] a wireless provider from closing a 'significant gap' in service coverage." *MetroPCS v. City and County of San Francisco*, 400 F.3d 715, 731 (9th Cir. 2005). Moreover, under federal law, a city's decision to deny a request from a wireless service provider to "place, construct, or modify" its facilities must be supported by substantial evidence. 47 U.S.C. § 332(c)(7)(B)(iii). Lastly, federal law does not permit municipal regulation of wireless communication facilities on the basis of the environmental effects of radio frequency emissions. 47 U.S.C. § 332(c)(7)(B)(iv).

2. State Law - California Public Utility Code

Telecommunications companies often rely upon California Public Utilities Code Section 7901 for their authority to install cell towers in the public right-of-way. Section 7901 states, in part, that such companies "may erect poles, posts, piers, or abutments . . . at such points as not to incommode the public use of the road or highway. . . .". The provisions of this law apply to both wireless communication providers as well as companies operating under California's new video franchise law, the Digital Infrastructure and Video Competition Act of 2006. See *GTE Mobilnet of California Ltd.*

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[3] Pub. L. No. 104-104, 110 Stat. 56.

Partnership v. City and County of San Francisco, 440 F.Supp.2d 1097, 1103 (N.D. Cal. 2006) and Public Utilities Code § 5800, *et seq.* The California legislature also enacted Public Utilities Code section 7901.1(a) which recognizes that, consistent with section 7901, municipalities have the right to exercise reasonable control as to the time, place, and manner that a public right-of-way is accessed[4].

3. Current LAMC Aesthetics Regulations for Cell Towers in Public Rights-of-Way

The City's specifications and procedures for above ground facilities (AGF) cell tower installations in the public rights-of-way are found in the AGFSP, at Los Angeles Municipal Code (LAMC) Section 62.03.2 V. This provision requires an applicant to demonstrate that a proposed AGF installation site satisfies the AGFSP aesthetic requirements. Generally, an AGF placed in a parkway should be "in line" with existing utility poles, streetlight fixtures and other similar objects in order not to obstruct streetscape views, shall be surrounded by landscaping consistent with existing surrounding landscaping, and shall be of a color similar to the surrounding landscaping.

The AGFSP specifically exempts utility pole and streetlight mounted wireless facilities, and as a result, the AGFSP aesthetic requirements described above do not apply to them. Utility pole and streetlight mounted facilities are, however, subject to the regulations of the Joint Pole Agreement[5] and Department of Water and Power guidelines, but neither regulates cell tower installation or aesthetics.

B. Summary of Federal and State Court Law Pertaining to Aesthetic Regulation of Cell Towers, Including Analysis of the Ninth Circuit *County of San Diego* and *City of Palos Verdes Estates* Opinions

The City Council specifically asked this Office to discuss the *City of Palos Verdes* and *County of San Diego* Ninth Circuit decisions. In both cases, the court upheld local governmental aesthetic regulations of cell towers. While one of the decisions interpreted Public Utilities Code Sections 7901 and 7901.1, there are no recent

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[4] There is a recently issued Public Utilities Commission General Order that suggests that local governments can issue only ministerial permits, and not discretionary permits, for telecommunications projects. General Order 170. There is pending before the Commission a motion for reconsideration, so General Order 170 is not yet final. We will keep you apprised of any changes in the law with respect to a city's authority to regulate time, place or manner of cell tower installation and aesthetics.

[5] The Joint Pole Agreement is an agreement among various utilities, including the Department of Water and Power, and telecommunication providers that pertains to the ways, means, standards, procedures and methods for members to jointly own or occupy utility poles and their appurtenances so as to maintain the least number of poles on streets, roads, highways, alleys, private property and other places. Although the Agreement Handbook restates the safety requirements for attachments on utility poles imposed by State law, the Joint Pole Agreement is contractual in nature and does not function as governmental regulation.

California published decisions interpreting the statutes and there is no State court legal precedent.

1. *Sprint Telephony PCS, L.P. v. County of San Diego*

In *Sprint Telephony PCS, L.P. v. County of San Diego*, Sprint PCS Assets (Sprint) sued the County of San Diego (County), claiming that the County's Ordinance violated the Federal Telecommunications Act (FTA) by effectively prohibiting Sprint's ability to provide wireless telecommunications services. The ordinance imposed aesthetic requirements on proposed cell tower installations, including a ban on non-camouflaged poles in residential and rural zones, and height and setback restrictions in residential zones. The Ninth Circuit Court of Appeals ruled that a plaintiff suing a municipality under the FTA must show an actual or effective prohibition of its ability to provide telecommunication services in order to successfully prove a violation of the FTA. This differed from the Court's previous rulings, which only required that a plaintiff demonstrate that a municipality's law could potentially prohibit the provision of telecommunication services. Applying the new standard, the Court found that the County's regulation of cell towers on aesthetic grounds did not bar Sprint from providing telecommunications services and thus the ordinance did not violate the FTA.

2. *Sprint PCS Assets, L.L.C v. City Council of the City of Palos Verdes Estates*

In *Sprint PCS Assets, L.L.C v. City Council of the City of Palos Verdes Estates*, the Ninth Circuit Court of Appeals addressed whether aesthetic concerns could legally be used to deny cell tower permits under California state law. The Palos Verdes Estates Ordinance stated that cell tower permits could be denied for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property."[6] Sprint sued the City of Palos Verdes Estates when two of its permits were denied on aesthetic grounds. The Court held that the City of Palos Verdes Estates' decision to regulate aesthetics was authorized by the California Constitution, which allows cities to exercise police power, and ruled that neither Public Utilities Code Section 7901 nor 7901.1 abrogated the City's authority to regulate local aesthetics.

Public Utilities Code section 7901 states that telecommunication companies may erect facilities in "such manner at such points so as not to incommode the public use of the road or highway." The Ninth Circuit determined the word "incommode" included aesthetic concerns and therefore held that the City could consider aesthetics as part of the cell tower installation application process. The Court also ruled that Public Utilities Code Section 7901.1, that grants to municipalities the "right to exercise reasonable control as to the time, place and manner" in which a public right-of-way is accessed,

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[6] *Sprint PCS Assets, L.L.C. v. City Council of the City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 720.

reinforced the City's ability to consider aesthetics and concluded that California law does not prohibit local governments from taking into account aesthetic considerations when deciding whether to permit the development of cell towers within their jurisdictions. The Court stated that Section 7901.1 "was added to the PUC to 'bolster the cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction' without jeopardizing the telephone corporations' statewide franchise. If the preexisting language of PUC § 7901 did not divest cities of the authority to consider aesthetics in denying [cell tower] construction permits, then, a fortiori, neither does the language of PUC § 7901.1, which only 'bolsters' cities' control."[7]

3. There is no Controlling California Legal Precedent on this Issue

There is no published California State court opinion addressing whether a city may consider aesthetics in deciding whether to grant a cell tower permit application. Noting the lack of legal precedent on which it could rely, the Ninth Circuit in *City of Palos Verdes Estates* concluded that its task was to "predict how the California Supreme Court would resolve the issue."[8] The court identified disagreement on the issue in unpublished opinions, noting that *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge* (9th Cir. 2006) 182 Fed. Appx. 688, held that a city could not consider aesthetics, while *Sprint Telephony PCS, L.P. v. County of San Diego* (Cal. Ct. App. 2006) 140 Cal. App. 4th 748, held that a city may consider aesthetics. The California Supreme Court declined the Ninth Circuit's request to review whether Public Utilities Code Sections 7901 and 7901.1 permit public entities to regulate the placement of wireless facilities on aesthetic grounds.

C. Enactment by Other California Cities of Ordinances Regulating Cell Tower Aesthetics

After issuance of the *County of San Diego* and *City of Palos Verdes Estates* decisions, a number of California cities, including the cities of Richmond and Glendale, and the City and County of San Francisco, enacted ordinances regulating cell tower installation. All three jurisdictions incorporated aesthetic standards into their regulations, allowed consideration of a variety of factors, including landscaping, equipment camouflaging and height limitations, and applied their regulatory schemes to utility pole and streetlight mounted facilities.

1. City of Richmond Ordinance

In February of 2010, the City of Richmond enacted an ordinance to regulate cell tower placement and design. The ordinance requires anyone who prepares to install or

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7 *Id.* at 724 (citations and emphasis omitted).
8 *Id.* at 722, n.2.

modify a cell tower to obtain a permit that lasts for ten years, and includes in the permitting requirements the following: cell towers are to be located on existing cell tower facilities, if possible; cell towers shall be placed, camouflaged and landscaped to minimize cell tower visibility; cell tower height limitations; and differing street setback requirements depending on whether the cell tower is placed in a residential or commercial zone. The City also requires an applicant to pay for a radio frequency expert to review the proposed installation to analyze "issues such as project design, radio frequency coverage, compliance with radio frequency emissions standards, the identification of alternative locations, and the justifications for installation of monopoles[9] or for any requested exceptions to City standards."

In addition to the foregoing requirements, upon a determination that the proposed cell tower may create significant interference with a neighborhood's quiet enjoyment, the City may require an applicant to pay for an independent, third-party review to determine the potential cell tower impacts on a neighborhood and to indentify less intrusive sites and facilities. The City may also require an applicant to submit additional information pertaining to the cumulative radio frequency emissions, and an analysis of alternative sites.

2. City of Glendale Ordinance

The City of Glendale's ordinance enacted in April of 2010, regulates cell towers on, under or above public property or a public right-of-way, and requires anyone desiring to install or modify a cell tower to obtain, in addition to all other permits that may be required, a City-issued wireless telecommunications facility encroachment permit.[10] Information that must be included in the permit application includes: an analysis, with photographic simulations, demonstrating the visual impact of the cell tower; a description of all accessory equipment to be installed; a description of efforts to blend the cell tower facility with the surrounding area and to locate the cell tower on other sites; and where a proposed site is located within 1,000 feet of a residential zone, the application must include information describing why the proposed site is superior to other potential locations. The City may also require an applicant to analyze installation of more visually compatible antennas. Furthermore, if the City determines that it needs assistance in evaluating an application, it may require an applicant to pay the cost of retaining an independent consultant.

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[9] The Richmond ordinance defines "monopole" as a free-standing antenna that is at least seventeen feet in height and stands without the use of guy wires.

[10] Glendale also regulates cell towers on private property, and requires applicants to obtain a wireless telecommunications facility permit. The standards by which the City decides whether to issue a permit, and the administrative appellate rights available to an applicant or a member of the public, are similar to the standards and administrative review procedures applicable to cell towers on the public right-of-way. Both sets of regulations seek to minimize cell tower environmental, aesthetic and public safety impacts.

Glendale requires all cell towers to use camouflage techniques to minimize the visual impact of the facilities and to hide them from public view, and its ordinance contains detailed camouflage requirements depending on the proposed cell tower location and type of equipment to be installed. The City also imposes cell tower height limitations. In addition to mandated camouflage requirements, height limitations, and considerations of alternative sites, Glendale's ordinance expressly allows the City to impose other conditions to minimize environmental, aesthetic and public safety impacts. Glendale's wireless telecommunications facilities are permitted for a ten year period unless unusual circumstances would require a longer period, and the City's director of public works may allow two five-year extensions.

Glendale requires all applicants to provide written notice of an application to all owners of real property located within 500 feet of a proposed cell tower site. The ordinance provides to an applicant and members of the public a right to administratively appeal a decision whether to issue a cell tower encroachment permit. After an initial review and decision by a City board of appeals, an applicant or member of the public may appeal the decision to the Glendale City Council.

3. City and County of San Francisco Ordinance

The City and County of San Francisco's ordinance enacted in January, 2011, regulates cell towers in the public right-of-way[11] and requires those seeking to construct, install or maintain a cell tower in a public right-of-way to obtain a Personal Wireless Service Facility Site Permit. It imposes different criteria for consideration of a permit application depending on the location of the proposed site and the size of the equipment to be placed at the site. San Francisco's Personal Wireless Service Facility Site Permit has a two year term, and the permittee may renew the permit for four additional two year terms.

In determining whether to issue certain cell tower permits, San Francisco may impose conditions on the permit, including a requirement that the applicant install a tree to screen the cell tower from public view. As a prerequisite to issuance of certain permits, the appropriate San Francisco department must affirmatively determine that the proposed cell tower satisfies the "compatibility standards" identified in the ordinance. These standards require that the proposed cell tower be compatible with the character of the location where it is to be installed (*i.e.,* historic, scenic, or residential). In addition, the Department of Public Health must determine that the proposed cell tower satisfies the Public Health Compliance Standard which requires that any potential human exposure to radio frequency emissions would be within the FCC guidelines, and that the noise would not be greater than a specified amount when measured at a distance three feet from any residential building facade.

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[11] San Francisco regulates cell towers on private property through a conditional use permit application process that allows San Francisco to regulate the aesthetic impacts of a proposed cell tower on private property.

For the largest cell towers, San Francisco issues a tentative decision before issuance of a permit. San Francisco requires applicants for these types of cell towers to notify property owners within 150 feet of the site and neighborhood associations within 300 feet, and allow any person to administratively protest issuance of the permit. Upon receipt of a protest, a hearing officer determines whether the City's tentative decision was in error.

When San Francisco issues a final determination on a cell tower permit application, the applicant may administratively appeal a denial, and any person may administratively appeal a permit issuance. San Francisco's Board of Appeals hears and rules on any appeal.

D. Tools Available to the City of Los Angeles to Regulate Cell Tower Aesthetics

In light of the Ninth Circuit decisions, we recommend consideration of three tools available to the City to enhance aesthetic regulation of cell towers, and although all three carry some degree of legal risk, the *County of San Diego* and *City of Palos Verdes Estates* decisions provide legal support for this application. The three tools are not mutually exclusive, *i.e.,* the City may use one, two, or all three of the tools. First, the City could remove the AGFSP exemption for utility pole and streetlight mounted facilities and subject utility pole and streetlight mounted facilities to existing aesthetics requirements in the AGFSP. Second, the City could broaden the scope of public notification requirements in the AGFSP to require notification to more people, and to require more information to be included in the notification. Finally, the City could enhance existing aesthetic criteria for cell towers consistent with *County of San Diego* and *City of Palos Verdes Estates* decisions.

1. Remove the AGFSP Exemption for Utility Pole or Streetlight Mounted Cell Towers

As discussed above, cell towers mounted on utility poles or streetlights are exempt from the AGFSP, and therefore the AGFSP aesthetics and permit processing requirements and other procedures, including public notification, do not apply to the installation or modification of utility pole or streetlight mounted cell towers. Neither federal or state statutes nor cases on the subject, nor the Joint Pole Agreement, require the City to retain this exemption.

2. Expand the AGFSP Notification Requirements

The City could expand both the content and scope of the required public notice. The AFGSP requires applicants to provide notice to owners of "adjoining lots, abutting lots, [and] lots across the public right-of-way from adjoining and abutting lots," and "relevant Council District Offices, neighborhood councils, and homeowners

associations." The notice must state whether the applicant is seeking a variance, and "shall include information regarding the specific AGF location and cabinet design."[12] The AGFSP does not, however, require an applicant to notify residents located nearby, but not on a lot that is adjacent or abutting (or across the street from an adjacent or abutting lot) to the lot on which the proposed installation would take place, nor does the AGFSP require the notice to include information about related proposed installations that may be exempt from the AGFSP, such as utility pole or streetlight mounted facilities, or below-ground facilities. The City could expand both the scope and content of the public notice by requiring applicants to notify all persons on lots located within a specific number of feet from the proposed facility and to include in the notice information about all ancillary proposed installation.

3. Enhance Existing Aesthetic Criteria in the AGFSP Consistent with the *County of San Diego* and *City of Palos Verdes Estates* Decisions

The City could amend the AGFSP to expressly authorize denial of a cell tower permit application on aesthetic grounds. Although the AGFSP states that an applicant "shall demonstrate that the AGF installation site meets the aesthetic requirements of the AGFSP," the AGFSP does not contain language specifically allowing denial for adverse aesthetic impacts. LAMC, §62.03.2 V (A). In addition, denial of an application due to adverse aesthetic impacts must be supported by substantial evidence, and the City could amend the AGFSP to create a process for integrating into the administrative record substantial evidence of the adverse aesthetic impacts of a proposed cell tower, including diagrams, reports detailing the potential impacts on aesthetics, and public comment. We believe that both of these amendments would enable the City to better defend legal challenges to a denial of a cell tower permit application on aesthetic grounds.

With regard to specific aesthetic requirements that the City may establish in the AGFSP, it may be instructive to note that the following aesthetic based regulations were included in the ordinances upheld by the Ninth Circuit in the *County of San Diego* and the *City of Palos Verdes Estates* decisions: non-camouflaged cell towers were prohibited in residential and rural zones; all signs or other attention-getting graphics, except those containing safety warnings, on cell towers were prohibited; cell tower colors and designs had to be integrated and compatible with existing on site and surrounding buildings; cell tower base stations and all wires had to be placed underground, if feasible; and cell tower setbacks were required and cell tower height was limited The City, of course, is not limited to enacting the regulations that were included in the County of San Diego or City of Palos Verdes' ordinances. If the City Council wants to amend and strengthen the AGFSP aesthetic regulations, we will work with you to develop lawful regulations that enhance the aesthetics of the City.

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[12] LAMC §§ 62.03.2 III C 3 and 62.03.2 VIII D.

E. Steps Taken with other City Departments

The City Attorney's Office and the Bureau of Engineering met with DWP to discuss cell tower regulations. We will meet again with DWP and other City departments and agencies, but would consider it helpful and desirable to obtain Council direction regarding the issues discussed in this report.

F. Conclusion

Although there is no published California decision on the issue of whether a municipality can regulate cell tower aesthetics, two Ninth Circuit rulings on the subject indicate a likelihood that the California Supreme Court would recognize that under California law, municipalities may deny cell tower installation applications on the basis of aesthetics, and we believe that the City may enhance existing aesthetic criteria in the AGFSP consistent with these rulings. Additionally, even without enhancing the AGFSP aesthetics requirements, the City may expand the reach of the ordinance by removing the exemption for utility pole and streetlight mounted facilities. The City may also broaden the AGFSP notification provisions to increase the number of people who must be notified about a cell tower installation application and expand the information that must be included in the required notices.

If you have any questions regarding this matter, please contact Assistant City Attorney Edward Jordan at (213) 978-8199. He or another member of this Office will be present when you consider this matter and to answer any questions you may have.

Very truly yours,

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