From: Chris Spitz <ppfriends3@hotmail.com>
To: Ted Jordan <ted.jordan@lacity.org>, Norman Kulla <norman.kulla@lacity.org>
CC: Whitney Blumenfeld <whitney.blumenfeld@lacity.org>, Frank Hong <frank.ho...
Date: 12/9/2009 10:33 AM
Subject: cell towers/CF No. 09-2645
Attachments: Presentation Attachments - Burbank.pdf; Editorial - Dec 5 2009 Burbank Lead er.pdf

RE: CF No. 09-2645

To Deputy City Attorney Ted Jordan and other interested parties:

I attach for your information materials concerning ongoing issues in the city of Burbank related to cell tower regulation. That city is holding one or more "study sessions" in an attempt to get a handle on an apparently growing problem.

Included within the second attachment (entitled "presentation attachments") is a memorandum from the Burbank City Attorney to the Mayor, City Council Members and Planning Board, dated Dec. 8, 2009, entitled "Significant Developments in Telecommunications Law."

I commend this memorandum to you. The City Attorney's discussion and conclusions as to the impact of Sprint v. Palos Verdes may be applicable in Los Angeles as well (like Burbank, Los Angeles has no current regulation specifically authorizing denial of a WTF on the basis of adverse aesthetic impact).

Sincerely,
Christina Spitz
Pacific Palisades Residents Association

10-1-1118: PERSONAL WIRELESS TELECOMMUNICATIONS SERVICE FACILITIES: REGULATIONS AND DEVELOPMENT STANDARDS:

A. PERMITTED IN R-3, R-4, AND R-5 ZONES AND IN ALL NON-RESIDENTIAL ZONES.

Subject to the regulations contained in this section and any other applicable regulations, personal wireless telecommunications service facilities may be erected and maintained in R-3, R-4 and R-5 zones and all non-residential zones and on property owned by the United States, the State, the City or the Burbank Unified School District.

B. PERMIT REQUIRED.

A building permit shall be obtained from the Building Division prior to the installation of a personal wireless telecommunications service facility. Personal wireless telecommunications service facilities shall be installed and maintained in compliance with the requirements of the Building Code and the Zoning Code.

C. FEDERAL, STATE, CITY OR SCHOOL PROPERTY.

For the purposes of the regulations contained in this section, property owned by the United States, the State, the City and the Burbank Unified School District shall be treated as if it were located in a non-residential zone, unless such property is improved with a residential dwelling unit and is used for residential purposes.

D. ONLY BUILDING-MOUNTED IN R-3, R-4 AND R-5 ZONES.

Only building-mounted personal wireless telecommunications facilities are permitted in the R-3, R-4 and R-5 zones. Ground-mounted personal wireless telecommunications service facilities are not permitted in the R-3, R-4 and R-5 zones.

E. NUMBER.

One personal wireless telecommunications service facility shall be allowed per lot, unless a conditional use permit is granted.

F. HEIGHT.

(1) Unless otherwise provided, the maximum permitted height of a ground-mounted personal wireless service facility shall be determined by its distance from the closest lot line of any property zoned R-1, R-1-E, R-1-H, and R-2 (or a comparable PD Zone), as follows:

EXHIBIT A

DISTANCE FROM R-1, R-1-E, R-1-H OR R-2 LOT LINE (OR COMPARABLE PD ZONE)	DISTANCE FROM R-3, R-4 OR R-5 LOT LINE (OR COMPARABLE PD ZONE)	MAXIMUM HEIGHT FOR GROUND-MOUNTED FACILITES
(i) 0 - less than 25 feet		1 foot height per 1 foot distance from R-1, R-1-H, R-1-E or R-2 lot line
(ii) 25 - less than 50 feet		25 feet
(iii) 50 - less than 150 feet		35 feet
(iv) 150 - less than 300 feet	0 - less than 300 feet	50 feet
(v) 300 feet or greater (not located in an adopted specific planning or redevelopment planning area)	300 feet or greater (not located in an adopted specific planning or redevelopment planning area)	70 feet
(vi) 300 to 500 feet (located in an adopted specific planning or redevelopment planning area)	300 to 500 feet (located in an adopted specific planning or redevelopment planning area)	70 feet
(vii) Greater than 500 feet (located in an adopted specific planning or redevelopment planning area)	Greater than 500 feet (located in an adopted specific planning or redevelopment planning area)	Maximum height limit to be determined through the conditional use permit

(2) For the purposes of this subsection, property zoned R-1, R-1-E, R-1-H, and R-2 also includes similarly zoned property outside the boundaries of the City of Burbank.

(3) The height of a personal wireless telecommunications service facility is the distance from the base of the facility, including any support structure, to the highest point of the facility when fully extended.

(4) A conditional use permit is required for a ground-mounted personal wireless telecommunications service facility with a height of more than thirty-five (35) feet and for a building-mounted personal wireless telecommunications service facility with a height of more than fifteen (15) feet.

(5) Whip antennas of up to fifteen (15) feet in height shall not be subject to the height restrictions.

(6) A personal wireless telecommunications service facility of up to fifteen (15) feet in height may be erected on a building in the R-3, R-4 and R-5 zones and all non-residential zones, regardless of building height or residential proximity.

(7) A personal wireless telecommunications service facility of more than fifteen (15) feet in height may be erected on a building in the R-3, R-4 and R-5 zones and in all non-

residential zones as long as the personal wireless telecommunications service facility does not extend more than fifteen (15) feet beyond the maximum permitted height of the building.

G. SETBACK.

A ground-mounted personal wireless telecommunications service facility shall comply with the setback requirements for the zone in which it is located.

H. LOCATION.

No personal wireless telecommunications service facility shall be located in the area between the front property line and the main structure or building. No portion of a personal wireless telecommunications service facility shall extend beyond the property lines or into any front yard area. No part of a personal wireless telecommunications service facility may be located inside a residential dwelling unit.

I. COLOR.

A personal wireless telecommunications service facility shall be finished in a color to blend in with its immediate surroundings, to reduce glare and to minimize its visual intrusiveness and negative aesthetic impact.

J. PLACEMENT OR SCREENING OF BUILDING-MOUNTED FACILITIES.

All building-mounted personal wireless telecommunications service facilities shall be located or screened so as to minimize pedestrian level view from public streets or from any neighboring residential uses.

K. WARNING LIGHT.

Flashing red beacon lights shall be installed on top of personal wireless telecommunications service facilities, if deemed necessary by the Police Chief, in a type and manner approved by the Police Chief.

L. SIGNS PROHIBITED.

The display of any sign or any other graphics on a personal wireless telecommunications service facility or on its screening is prohibited, except for public safety warnings.

M. REMOVAL.

Personal wireless telecommunications service facilities shall be removed within twelve months of cessation of operation. [Added by Ord. No. 3439, eff. 7/22/96.]

City Attorney's Office
City of Burbank

Dennis A. Barlow, City Attorney

Memorandum

Date: December 8, 2009

To: Honorable Mayor and Members of the City Council and Planning Board

From: Dennis Barlow, City Attorney
By: Jina Oh, Senior Assistant City Attorney

Subject: Significant Developments in Telecommunications Law

This memorandum is intended to provide legal analysis on whether and to what extent the City can regulate wireless telecommunications providers. It also gives legal background and an overview of the seminal case of *Sprint PCS v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. October 2009), which has had a significant impact on the City's ability to regulate wireless telecommunications providers.

CURRENT STATE OF THE LAW *("WHAT YOU NEED TO KNOW")*

The City of Burbank may legally regulate wireless communications facilities on the basis of aesthetic concerns as long as (1) there exists authorization to do so in the local ordinance (current BMC does not contain language specifically allowing denial for adverse aesthetic impacts); (2) there is substantial evidence documenting the potential aesthetic impacts and such findings are in writing; and (3) there is not a complete or an effective ban on wireless communications facilities as a result of the regulations.[1]

[1] BMC 10-1-1118 sets forth some standards for wireless telecommunications facilities, such as setbacks, location, color and screening, but there is no provision specifically allowing the denial of such facilities based on adverse aesthetic impacts. Thus, it is likely a court would rule there is no local authorization for the City to deny a wireless telecommunications facility on the basis of adverse aesthetic impact.

Some examples of legitimate local agency concerns include:

- Does the wireless communications facility have a commercial appearance that would detract from the residential character and appearance of the surrounding neighborhood?
- Is the wireless communications facility incompatible with the character and appearance of the existing development?
- Does the wireless communications facility negatively impact the views of residents?
- Does the height of the tower and its proximity to residential structures have a negative aesthetic impact on the neighborhood?
- What is the nature of uses of nearby properties, the surrounding topography, and the surrounding tree coverage and foliage?
- Are there existing wireless telecommunications facilities or utility poles?

If a wireless communications provider shows evidence that there are no feasible alternative facilities or site locations, thereby arguing there is an effective ban on wireless communications facilities, the City must provide evidence that there are feasible and available alternatives to the provider's proposal and then allow the provider the opportunity to dispute the City's alternatives before a permit can be denied.

The City of Burbank currently does not have any regulations specifically allowing the denial of wireless telecommunications facilities on the basis of adverse aesthetic impacts. Without amending the BMC to authorize such, the City will likely not be able to deny wireless telecommunications facilities on that basis.

If such local authorization is adopted, situations will be very fact specific. It is very important for the City to examine all the available evidence and establish written findings in making their decisions. It is especially important that decisions are not, in fact or in appearance, a ruse for denying wireless telecommunication facilities applications based on impermissible considerations, such as health and environmental concerns based on electric and magnetic fields emissions (EMFs), which under the Telecommunications Act, local municipalities are still prohibited from considering as a factor for denial.[2]

For example, if the City denies a wireless telecommunications facility on the basis of aesthetic concerns and makes the appropriate written findings but during the course of the public hearing there was a lot of questioning and discussion about the health risk of EMFs, a court could easily find the aesthetic concerns were simply a cover and overturn the City's decision. While it is permissible for the City

[2] Telecommunications Act of 1996, § 704(a)(7)(B)(iv): No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

to ensure a wireless communications provider is complying with the federal standards on EMF emissions, the City cannot establish its own standards.

BACKGROUND

Historically, there has been little or no meaningful judicial guidance to local agencies in how to draft local regulations regarding wireless telecommunications services. Up until very recently, courts have repeatedly narrowed a local agency's ability to regulate wireless antennae. In the past, federal courts have regularly invalidated local regulations that not only prohibited outright the ability of any entity to provide telecommunications services but also any regulations that might have the effect of prohibiting such services. Thus, if a local regulation merely created a substantial barrier to the provision of telecommunication services, it was struck down as a violation of federal law.[3]

This changed with the case of *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571 (9th Cir. September 2008), when the court reversed its previously broad definition and stated their previous interpretation of the word "may" as meaning "might possibly" is incorrect. Wireless telecommunications providers now must show "actual or effective prohibition", rather than the mere possibility of prohibition.[4]

In *T-Mobile USA v. City of Anacortes*, 572 F.3d 987 (9th Cir. July 2009), the court applied the standard previously established in *County of San Diego* and required wireless telecommunications providers to show "actual or effective prohibition", rather than the mere possibility of prohibition.[5] It further stated whether there is substantial evidence to support the local agency's decision to deny must be measured in the context of local and state law and not federal law.

Despite these advances it was still difficult for local agencies to gain judicial guidance on how to regulate wireless telecommunications providers due to remaining conflict between federal and state law and state regulatory decisions. The case of *Sprint PCS v. The City of Palos Verdes Estates* helped clarify much of the remaining conflict and remains the state of the law, at least for the time being.

[3] 47 U.S.C. §253: "No State or local statute or regulation…may *prohibit or have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service."
47 U.S.C. § 332: "The regulation of the placement, construction and modification of personal wireless service facilities…shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

[4] This case dealt with 47 U.S.C. 253.

[5] This case dealt with 47 U.S.C. 332.

Sprint v. City of Palos Verdes Estates – October 14, 2009

Introduction

Sprint PCS v. City of Palos Verdes Estates, 583 F.3d 716 (9th Cir. October 2009) is the most important case regarding the ability of local agencies to regulate wireless telecommunications providers. For the moment it creates one standard that satisfies federal and state law.

Factual Background

In 2002 and 2003, Sprint applied for permits to construct wireless telecommunications facilities in the City of Palos Verdes Estates, a planned community consisting of about one quarter public rights-of-way that serve the City's transportations needs and contribute to its aesthetic appeal. The City granted eight permit applications but denied two others. The denials were based on a City ordinance that provides that wireless telecommunications facilities permit applications may be denied for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property."

The City's Public Works Director denied Sprint's wireless telecommunications facilities permit application, concluding that the proposed wireless telecommunications facilities were not in keeping with the City's aesthetics. The City Planning Commission affirmed the Director's decision. The matter was appealed to the City Council which took evidence, through a written staff report, public comments, and a presentation by Sprint's representatives. The evidence detailed the potential aesthetic impacts of the proposed wireless telecommunications facilities and confirmed that cellular service from Sprint was already available in relevant locations in the City. The City Council affirmed the denial of Sprint's permit applications concluding that the two proposed wireless telecommunications facilities would disrupt the residential ambiance of the neighborhood and detract from the natural beauty that was valued by the City at the proposed sites.

Sprint sued the City in federal court on the basis that the City's decision violated various provisions of the Telecommunications Act of 1996. The case was eventually appealed to the Ninth Circuit, United States Court of Appeals.

The Ninth Circuit determined the following two prong test:

(1) Was the City's decision authorized by local law and, if it was,
(2) Was the decision supported by a reasonable amount of evidence?

(1) Was the City's decision authorized by local law?

• The City of Palos Verdes Estates municipal code specifically authorized the denial of wireless telecommunications facilities permit applications on aesthetic grounds.

• The California Constitution gives the City the authority to "make and enforce within [its] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general [state] laws." Regulation of aesthetic conditions is a valid exercise of this broad police power.

• The California Public Utilities Code, which provides telecommunications companies the state right to construct wireless telecommunications facilities "in such manner and at such points as not to incommode the public use of the road or highway," does not divest the City of its constitutional authority to consider aesthetics.

• "California law does not prohibit local governments from taking into account aesthetic considerations in deciding whether to permit the development of wireless telecommunications facilities within their jurisdictions."

(2) Was the decision supported by a reasonable amount of evidence?

• If a City uses aesthetics as a basis to deny a wireless telecommunications facilities permit, it is required by the federal Telecommunications Act to (1) produce *substantial evidence* to support its decision, and, (2) *even if it makes that showing, its decision is still invalid if it operates as a complete ban or an effective prohibition*.

(1) Substantial Evidence

~ If authorized by local law, a City's decision will be upheld under the federal Telecommunications Act's "substantial evidence" requirement if it is supported by a reasonable amount of evidence. A reasonable amount of evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

~ Substantial Evidence is very fact specific and can consist of propagation maps, mock ups of proposed wireless communications facilities, reports that detail potential impacts on aesthetics, public comments, and applicant's presentations.

~ A City's determination that a proposed wireless communications facility would adversely affect its aesthetic values satisfies the "reasonable amount of evidence" standard as long as it is based on substantial evidence.

(2) Effective Prohibition (Complete ban is self-explanatory)

~ Two prong test for effective prohibition:

(1) There is a "significant gap" in coverage;
(2) There is some inquiry into the feasibility of alternative facilities or site locations.

~ "Significant gap" determinations are extremely fact specific. No bright line legal rules. A "gap" in coverage is not enough; the relevant service gap must be truly significant. Mere presentation of radio frequency propagation maps will not be sufficient. A baseline for analysis must be clearly established to show a "significant gap".

Significant Gap Analysis Factors:

(1) Affect on significant commuter highway or rail way.
(2) Nature and character of area and number of potential users affected by alleged lack of service.
(3) Whether facilities improve weak signals or fill a void.
(4) Whether gap covers well traveled roads with no roaming capabilities.
(5) Affect on commercial district.
(6) Creation of public safety risk.

~ Feasibility of alternative sites - The wireless telecommunications provider has the burden of determining there are no feasible alternatives to the proposed facility and/or that the proposed method of closing the significant gap in coverage is the "least intrusive on the values that denial sought to serve". Once the provider makes a prima facie showing of such, the local agency then has the burden of showing there are some potentially available, technologically feasible alternatives. The provider then has the opportunity to dispute the availability and feasibility of the alternatives favored by the locality. [6]

[6] In *MetroPCS v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. March 2005) the court stated a local agency could have the "effect of prohibiting" wireless telecommunications facilities in violation of the federal Telecommunications Act if it prevented a wireless provider from closing a "significant gap" in service coverage. The two-pronged analysis required (1) the showing of a "significant gap" in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations. The telecommunications provider has the burden of showing a "significant gap", and showing that after inquires into alternative facilities or site locations the proposed method is the least intrusive means of filling the gap. In other words, the telecommunications provider has the burden of showing that the denial of its proposal will effectively prohibit the provision of services. Once a provider makes a prima facie showing of effective prohibition, however, the local agency has the burden of showing there are some potentially available and technologically feasible alternatives which the provider than has the opportunity to dispute.

WHERE DO WE GO FROM HERE?

The City of Burbank does not currently have an ordinance that allows us to effectively regulate wireless telecommunications facilities on the basis of adverse aesthetic impacts. Thus, should the City desire to do so, the first step is to develop such an ordinance along with the requisite substantive studies to create a record as to its necessity. For example, the City of Glendale is currently studying a proposed draft ordinance through meetings with the community and telecom industry.

Although the holding in *Sprint PCS v. City of Palos Verdes Estates*, allowing local agencies to regulate wireless telecommunications facilities based on adverse aesthetic impacts, is the current state of the law, it remains to be seen whether that and other similar cases will be further appealed, thus, making this area of law still somewhat of a moving target.

WIRELESS FACILITIES STUDY SESSION

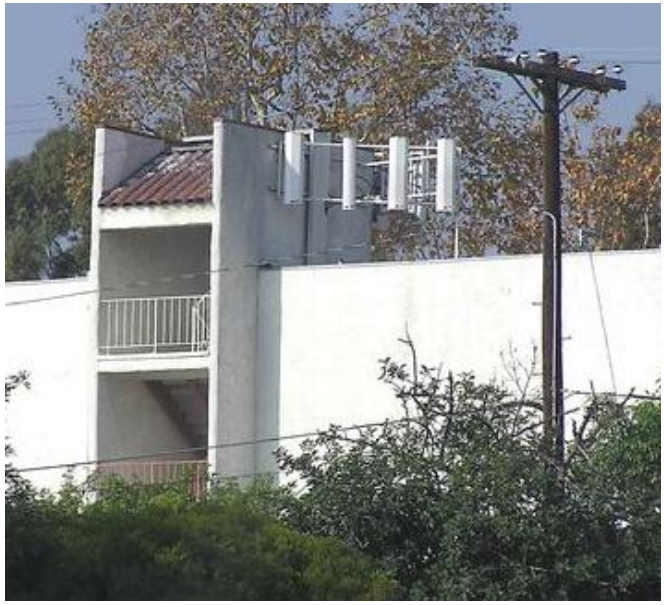
December 8, 2009

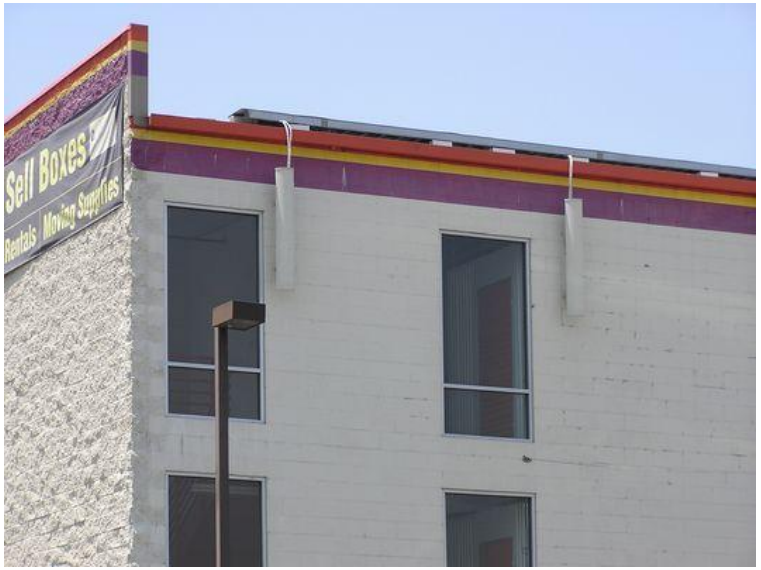
What are wireless facilities?

- Antennas and related equipment operated by cell phone carriers
- Types:
  - Building mounted
  - Ground mounted
- Locations:
  - Private property
  - Public property
  - Public right-of-way

Building Mounted

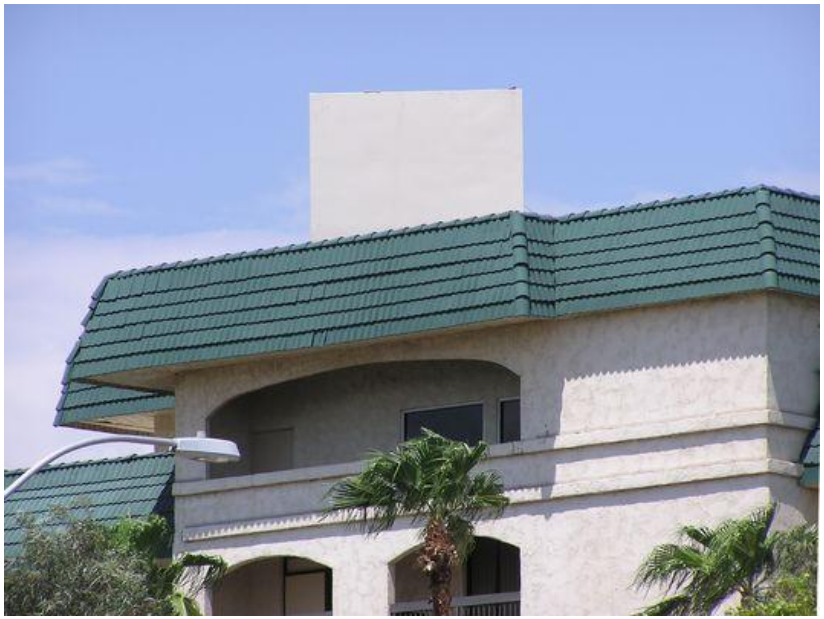
- On top of roof or wall-mounted to façade
- Older facilities often not screened
- Newer facilities screened or integrated into building





Building Mounted

- First facility allowed by-right
- Subsequent facilities (co-locations) require CUP
- Maximum height 15 feet above roof or CUP required

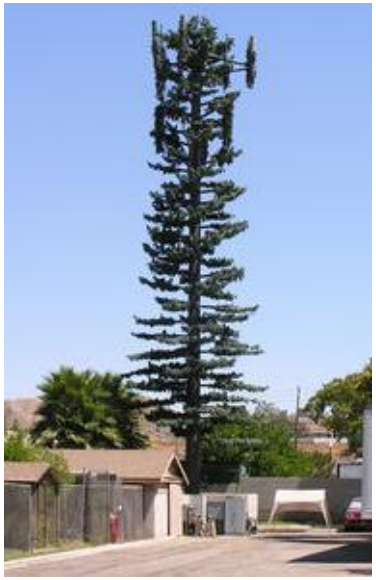


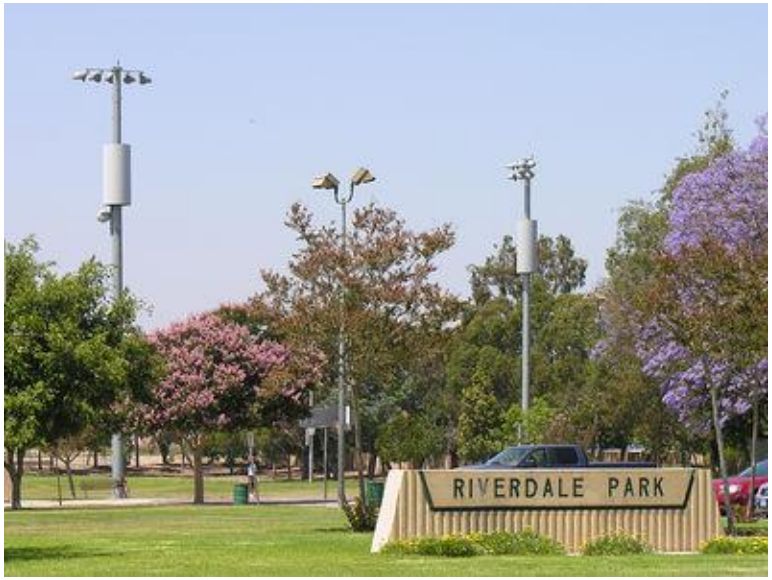
Ground Mounted

- Mounted on dedicated pole or existing light or utility pole
- Older facilities and facilities in non-sensitive areas not masked
- Newer facilities masked or hidden

Ground Mounted

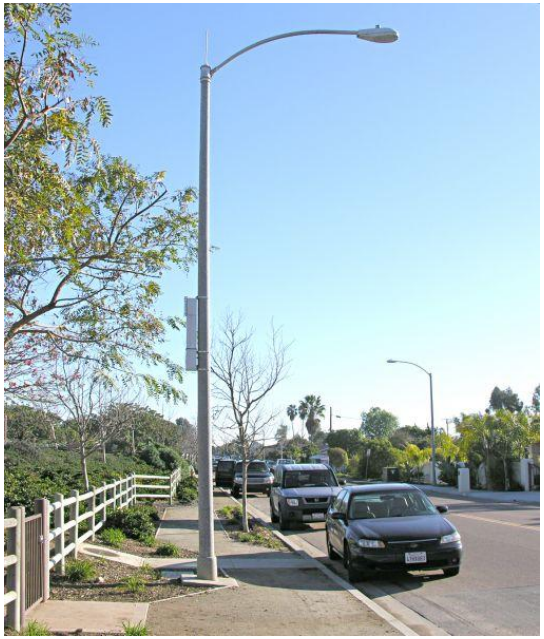
- First facility allowed by-right
- Subsequent facilities (co-location) require CUP
- Maximum height determined by distance from R-1 and R-2; up to 35 feet maximum or CUP required

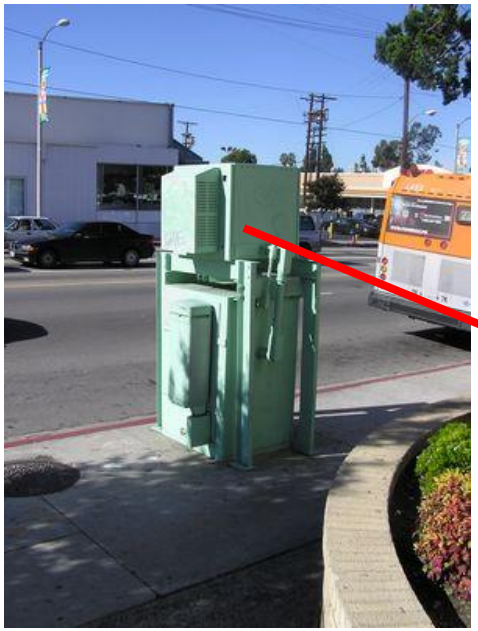




Public Right-of-Way

- Zoning does not apply
- Encroachment permit required; no requirements specific to wireless facilities
- No facilities in Burbank yet





Federal Regulations

- Telecommunications Act of 1996
  - Cities may not discriminate among carriers or have the effect of prohibiting wireless service
  - Cities must act upon requests within a reasonable time; any denials must be supported in writing based on substantial evidence
  - Cities may not regulate wireless facilities or require modification on the basis of radio frequency (RF) emissions so long as the facility complies with FCC regulations

Impacts and Controversy

- Two impacts of primary concern are aesthetics and RF emissions
- Cities generally have ability to regulate facility location and design as it pertains to aesthetic impacts
- Federal law prohibits cities from regulating on the basis of RF emissions

Radio Frequency Emissions

- Controversy and discussion over whether wireless facilities have health impacts
- Various scientific studies have conflicting conclusions
- Some argue that more study is needed
- Cities may require applicants to verify compliance with FCC regulations on RF emissions but may not regulate RF emissions or deny an application on that basis

Glendale

- January 13, 2009: adopted moratorium on wireless facilities in residential zones and in public rights-of-way within 1,000 feet of residential zones
- October 15, 2009: released draft wireless ordinance for public review
  - Requires wireless permits for facilities on private property and those in rights-of-way
  - Specifies preferred zones and locations
  - Extensive technical information must be submitted and reviewed with each application

Recent Actions by Other Agencies

- **City of Glendale:** adopted resolution for federal government to study RF emissions, revise federal law, and provide greater flexibility to cities
- **County of Los Angeles** and **LAUSD:** both adopted resolutions supporting repeal of federal pre-emption regarding RF emissions and greater authority from state to allow cities to regulate in public rights-of-way
- Other cities have passed similar resolutions

Current Burbank Issues

- Neighborhood opposition to proposed wireless facility in Brace Canyon Park
- Application to amend zoning to allow building mounted facilities on institutional buildings in R-1 zone (currently prohibited in R-1)
- Ordinance is 13 years old
- Requests by Planning Board for RF and additional information with CUP applications

What's next?

- Revisit zoning requirements
  - CUP for first facility?
  - Lower height limits?
  - Preferred zones or locations?
- Policy for public rights-of-way
- Policy for City properties
  - Change zoning requirements?
  - Public notice required?
  - Preferred locations?

Questions and Discussion

- Staff
- Representatives from California Wireless Association (CalWA)
- Representatives from wireless carriers

the BURBANK LEADER

BurbankLeader.com Serving the Burbank community since 1901 Weekend December 5 - 6, 2009

Editorials

Attend to cell towers now

The story of a group of hillside residents opposing a proposed cellular antenna is, by now, a familiar one. In Pasadena, Hollywood, Glendale and other Southland cities, residents have started asserting themselves against the sometimes ungainly metal poles that have cropped up alongside our appetite for all things mobile.

T-Mobile's application to build a 35-foot-tall cellular antenna in the likeness of a pine tree at Brace Canyon Park, and the neighborhood opposition that has formed, is not unlike the stage the company set when it proposed a so-called "micro-cell site" in a posh north Glendale residential area last year.

Residents there formed an action group, distributed yard signs and set up a website. They lobbied the City Council and took their case to the media. Adding to their cause was a municipal election season rife with politicians eager to take up constituent complaints.

It worked in more ways than one.

Yes, T-Mobile withdrew its application, but more importantly, Glendale imposed a moratorium and initiated a draft ordinance that should dance around federal restrictions while setting at least some local guidelines for future wireless telecommunications facilities.

So far, Burbank doesn't appear to be heading in that direction, which could cause bigger headaches down the road.

In nearly every city that's confronted the issue, a comprehensive ordinance with public input had come out of it. It may not be ideal for either residents or telecommunications companies, but local guidelines at least put everybody on the same stage using the same script.

Without regulations, all parties rely on a discombobulated set of city, state and federal standards that only confuse and inflame arguments. Considering the fact that once one wireless antenna gets a certain amount of attention, others are sure to follow, Burbank planners would be smart to start the process now.