



County of Santa Cruz

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June 21, 2002

Agenda: June 25, 2002

Board of Supervisors
County of Santa Cruz
701 Ocean Street, Room 500
Santa Cruz, California 95060

Re: Urgency Ordinance Adopting Temporary Moratorium on Approval of Applications for Wireless Telecommunication Facilities

Dear Members of the Board:

On June 18, 2002, your Board directed staff to prepare an urgency ordinance to establish a temporary moratorium on the approval of new wireless communication facilities. Attached as Exhibit A is the proposed urgency ordinance.

A.. The Key Provisions of the Proposed Urgency Ordinance.

1. Duration of Moratorium.

As an urgency ordinance, the proposed moratorium is limited in its initial duration to 45 days. (Cal. Gov't Code 65858.) In the likely event the revised wireless communication facilities ordinance is not completed within that 45 day period, staff contemplates returning to your Board with a similar ordinance at your August 6, 2002 meeting extending the moratorium to a total of 180 days.

2. Exceptions.

In order to clarify that the regulatory scope of the Interim Zoning Regulations Regarding Wireless Communication Facilities (the "Interim Ordinance") is not being extended by the moratorium, the ordinance excludes those facilities which are currently exempt under the Interim Ordinance.

The second exception was included in response to a provision in the Federal Telecommunications Reform Act of 1996 (“FTRA”) that states that applications must be acted upon “within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.” In light of that Federal requirement, the moratorium would not apply to the two applications which County Staff has deemed to be complete, and which have not yet been approved or denied.

Finally, according to General Services staff, the County, jointly with other local agencies, is pursuing grant funds arising under homeland security initiatives which may to improve communication facilities for public safety purposes. General Services staff expressed a desire not to encumber such a time-sensitive and selective process with questions about the scope of the County’s moratorium on wireless communications facilities. As a result, although the Interim Ordinance already exempts publically operated facilities used solely for public safety purposes, the proposed moratorium ordinance clarifies that it does not apply to public agency facilities to be used for public safety or homeland security purposes. After reviewing the last exemption with County Counsel, Sheriff Tracy has indicated no objections to the proposed ordinance.

3. Processing of New Applications.

In accordance with Guidelines agreed upon among the Federal Communication Commission’s Local and State Government Advisory Committee, the Cellular Telecommunications Industry Association, the Personal Communications Industry Association, and the American Mobile Telecommunications Association (discussed below), the ordinance provides that the County will continue to accept and process applications during the pendency of the moratorium on approvals.

4. Appeals Procedure.

Federal law forbids counties from regulating the placement, construction, and modification of personal wireless service facilities in a manner which discriminates among providers of functionally equivalent services or which prohibits or has the effect of prohibiting the provision of personal wireless services. Although County Counsel does not believe that the moratorium would violate these (or any other) provisions of Federal law, a procedure has been included in the draft ordinance to allow applicants to petition to the Planning Director for relief from the moratorium if an applicant is able to establish that the moratorium - as applied to his or her application - would violate the law.

1 47 U.S.C. § 332(c)(7).

This procedure should provide the County with an early warning in the unlikely event the moratorium is unlawfully burdensome on a particular applicant and, in such a exceptional case, should avoid the need to litigate the issue.

B. The Legality of a Temporary Moratorium on Wireless Telecommunication Facilities.

For your convenience, the following discussion repeats a portion of the staff report which was prepared for your Board's June **18,2002** meeting which discussed the legality of a temporary moratorium the approval of new applications for wireless telecommunications facilities. Several provisions in the urgency moratorium are based on the restrictions discussed in that analysis.

A short-term, wireless communication facility moratorium may be utilized, where necessary, when the County needs time to review and possibly amend its regulations to address issues relating to the siting of cellular phone facilities in a manner that addresses local concerns, provides the public with access to wireless services for its safety, convenience and productivity, and complies with the Federal Telecommunications Reform Act of **1996**. ("FTRA")

On August 5, 1998, the Federal Communication Commission's Local and State Government Advisory Committee, ("LSGAC")² the Cellular Telecommunications Industry Association (CTIA), the Personal Communications Industry Association, and the American Mobile Telecommunications Association entered into an agreement addressing issues relating to moratoria on the siting of wireless telecommunications facilities. This agreement sets out recommended guidelines for local governments and carriers to follow in connection with moratoria, and it establishes a non-binding alternative dispute resolution procedure that either carriers or local governments may invoke. In addition, CTIA agreed to withdraw its pending Petition for Declaratory Ruling seeking preemption of certain local moratoria.

Those Guidelines acknowledge that a moratorium may be "utilized, where necessary, when a local government needs time to review and possibly amend its land use regulations to adequately address issues relating to the siting of wireless telecommunications facilities in a manner that addresses local concerns, provides the public with access to wireless services for its safety, convenience and productivity, and

² The LSGAC is a body of elected and appointed local and state officials, appointed by the Chairman of the Federal Communications Commission ("FCC").

complies with the FTRA.³

The Guidelines also provide that once a moratorium is adopted, the County must “work together” with affected wireless service providers “to expeditiously and effectively address issues leading to the lifting of the moratorium.” Moratoria should be for a fixed (as opposed to open ended) period of time, with a specified termination date. The length of the moratorium should be “that which is reasonably necessary for the local government to adequately address” the valid issues giving rise to the need for the Moratorium. The Guidelines also suggest that a **180** day limit is appropriate “in many cases.”

The Guidelines also caution that “Moratoria should not be used to stall or discourage the placement of wireless telecommunications facilities within a community, but should be used in a judicious and constructive manner.”

Finally, the Guidelines provide that during the time that a moratorium is in effect, the local government should, “within the frame work of the organization’s many other responsibilities,” continue to accept and process applications (e.g., assigning docket numbers and other administrative aspects associated with the filing of applications), subject to ordinance provisions as may be revised during the moratorium.”

It is also clear that the moratorium may not be adopted in such a way as to violate the FTRA. County Counsel believes the moratorium would violate the FTRA: (a) if it was adopted to avoid or reduce environmental effects of radio frequency emissions at levels allowed by the FCC, or (b) if it unreasonably discriminated among providers of functionally equivalent services; or (c) if it had the effect of prohibiting the provision of personal wireless services. Also, applications must be acted upon “within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.”⁴

Reading the Guidelines and the Act together, County Counsel believes that the proposed Moratorium would be proper as long as four key criteria are met: (a) the moratorium is of a fixed length, preferably **180** days or less; (b) it provides for the continuing acceptance and processing of applications during the moratorium; (c) it is adopted for an allowable purpose, and not simply to stall or discourage the placement of

³ A copy of the Agreement from the FCC website is attached hereto as Exhibit A. The Agreement may also be reviewed at <http://www.fcc.gov/statelocal/agreement.html>.

⁴ 47 U.S.C. § 332(c)(7).

wireless communication facilities within the community; and (d) it still allows applications to be acted upon within a reasonable period of time.

Based on discussions with Planning Staff, it appears that the proposed moratorium would be justified on the grounds that the County needs time to review and possibly amend its regulations to address issues relating to the siting of cellular phone facilities in a manner that addresses local concerns. Specifically, the most recent draft of the final Wireless Communications Facility Ordinance (“Draft Final Ordinance”), which has been circulated for public review and input, would better accomplish siting objectives than the provisions of the Interim Wireless Communications Facility Ordinance (“Interim Ordinance”) through a number of measures, including, but not limited to:

- a. The Draft Final Ordinance would require measures to determine whether adequate coverage already exists in a given area, rendering the additional facilities unnecessary;
- b. The Draft Final Ordinance would broaden and detail provisions concerning the analysis of feasible and environmentally superior project alternatives;
- c. The Draft Final Ordinance contains enhanced radio-frequency (“RF”) radiation monitoring to better ensure compliance with Federal standards;
- d. The Draft Final Ordinance contains sufficient set-back requirements from property lines and structures to create safe fall zones for towers;
- e. The Draft Final Ordinance contains measures to more effectively encourage co-location, and incentives for older towers to be dismantled and their antennas to be co-located on to newer, less obtrusive towers;
- f. The Draft Final Ordinance would require additional engineering detail on project plans and maps to allow greater understanding of the design and aesthetic impacts of the projects, and to allow more accurate independent third-party review by RF/telecommunications engineers; and
- g. The Draft Final Ordinance would expand notification requirements to owners and residents of parcels neighboring proposed facilities.

Some carriers have expressed reservations about the potential burdens associated with some of these objectives. Other members of the public indicate that the proposed measures would not be sufficiently protective against their concerns. In either case, a moratorium would help ensure that there would be adequate time to review and amend these measures and to fully consider the competing perspectives on these issues.

IT IS THEREFORE RECOMMENDED that your Board:

1. Adopt the attached Ordinance establishing a temporary moratorium on the approval of applications to construct, modify or place Wireless Communication Facilities as an urgency measure;
2. Direct Staff to report back to your Board on August 6, 2002 on the status of the revisions to the Interim Ordinance and, if necessary, to return at that time with **an** ordinance extending the moratorium to provide additional time (up to a total of **180** days) to complete approval of the revisions to the Interim Ordinance.

Very truly yours,

DANA McRAE, COUNTY COUNSEL

By 
 David Kendig
 Assistant County Counsel

RECOMMENDED:


 SUSANA A. MAURIELLO
 County Administrative Officer

Attachments:

1. Proposed Moratorium Ordinance

ORDINANCE NO. _____

AN ORDINANCE OF THE COUNTY OF SANTA CRUZ
ESTABLISHING A TEMPORARY MORATORIUM ON THE
APPROVAL OF APPLICATIONS TO CONSTRUCT, MODIFY
OR PLACE WIRELESS COMMUNICATION FACILITIES

WHEREAS, on June 26, 2001, the County adopted Ordinance 4631 which added Section 13.10.659 to the Santa Cruz County Code, setting forth the County’s Interim Zoning Regulations Regarding Wireless Communication Facilities (the “Interim Regulations”); and

WHEREAS, citizens of Santa Cruz County have expressed significant concerns relating to the location of wireless communication facilities within the County under the provisions of the Interim Regulations. The concerns relate to potential aesthetic and other effects of the continued proliferation of such facilities on the community as a whole; and

WHEREAS, citizens of Santa Cruz County have also expressed a desire that the County receive adequate wireless telecommunication services provided that the facilities are designed and located to minimize aesthetic and related concerns; and

WHEREAS, since the adoption of the Interim Regulations, the County has approved many applications to construct, modify or place Wireless Communication Facilities within the County; and

WHEREAS, drawing from its experience since the adoption of the Interim Regulations and based on input received from the public and wireless communication companies, County Staff has drafted revisions to the Interim Regulations, conducted several public meetings with representative of the wireless telecommunications industry and with the public, and, has further refined the draft regulations in order to formulate zoning regulations which are better reflective of the County’s siting and regulatory objectives for wireless telecommunication facilities; and

WHEREAS, on June 18, 2002, the Board of Supervisors acted to extend the Interim Regulations while County staff continues its review and revisions of the draft provisions; and

WHEREAS, County staff and the Board need time to review and possibly amend the County’s Interim Regulations to address issues relating to the siting of cellular phone facilities in a manner that addresses local concerns. Specifically, the most recent draft of the Wireless Communications Facility Ordinance (“Draft Revised Ordinance”), would better

accomplish siting objectives than the provisions of the Interim Ordinance through a number of measures, including, but not limited to:

- a. The Draft Revised Ordinance would require measures to determine whether adequate coverage already exists in a given area, rendering the additional facilities unnecessary;
- b. The Draft Revised Ordinance would broaden and detail provisions concerning the analysis of feasible and environmentally superior project alternatives;
- c. The Draft Revised Ordinance contains enhanced radio-frequency (“RF”) radiation monitoring to better ensure compliance with Federal standards;
- d. The Draft Revised Ordinance contains sufficient set-back requirements from property lines and structures to create safe fall zones for towers;
- e. The ~~Draft~~ Revised Ordinance contains measures to more effectively encourage co-location, and incentives for older towers to be dismantled and their antennas to be co-located on to newer, less obtrusive towers;
- f. The Draft Revised Ordinance would require additional engineering detail on project plans and maps to allow greater understanding of the design and aesthetic impacts of the projects, and to allow more accurate independent third-party review by RF/telecommunications engineers; and
- g. The Draft Revised Ordinance would expand notification requirements to owners and residents of parcels neighboring proposed facilities; and

WHEREAS, the Board of Supervisors has determined that a temporary moratorium on the approval of applications to construct, modify or place Wireless Communication Facilities will allow the County time to complete its review and revisions of its Wireless Communication Facilities ordinance while ensuring to the maximum extent feasible that the siting and other objectives of the revised ordinance may be achieved. The Board finds that a temporary Moratorium prohibiting uses which may be in conflict with the contemplated changes to the interim zoning ordinance which planning department staff is studying is necessary and appropriate to protect the public health, safety and welfare; and

WHEREAS, the Board of Supervisors is cognizant that two applications to construct, modify or place Wireless Communication Facilities have been deemed complete but have not yet been acted upon for approval or denial, and that fairness to such applicants suggests that action to approve or deny those completed applications should not be delayed by a moratorium; and

WHEREAS, the Board of Supervisors is aware that efforts are being undertaken by Federal, State and local agencies to protect the public and to ensure homeland security, and the Board finds that it is not the purpose of this moratorium to limit or otherwise affect those efforts.

NOW, THEREFORE, the Board of Supervisors of the County of Santa Cruz ordains as follows:

SECTION II

(a) Moratorium. No applications to construct, modify or place Wireless Communication Facilities shall be approved during the **45** day period extending from June **25**, 2002 to August **9**, 2002, except as provided in Section II(b) below.

(b) Exceptions. The moratorium set forth in Section II(a) shall not apply to the following:

- (1) Exempt facilities, as described in Subsection (e) of Santa Cruz County Code section **13.10.659**;
- (2) Applications for Wireless Communications Facilities which have been deemed complete on or before June **25**, 2002;
- (3) Wireless Communication Facilities to be used for public safety or homeland security purposes, installed and operated by authorized Federal, State or local public safety agencies (e.g., County **911** Emergency Services, police, sheriff, and/or fire departments, etc.)

(c) New Applications. During the pendency of the Moratorium, the Planning Department shall continue to accept and process applications to construct, modify or place Wireless Communication Facilities. Those submitting or completing applications after June 25, 2002 shall be informed that standards for project approval or denial will be those standards in effect at the time of project approval or denial.

(d) Petition for Relief from Moratorium. Any person who has applied to construct, modify or place a Wireless Communication Facility which would be affected by this Moratorium, and who contends that the Moratorium as applied to him or her would be unlawful under Federal, State, or local law or regulation, may submit a written application to the Planning Director requesting relief from the Moratorium. The request for relief from moratorium shall identify the name and address of the applicant, the affected application number, and shall state how the Moratorium as applied to him or her would be unlawful under Federal, State, or local law or regulation. Within fourteen (**14**) calendar days of receipt of the completed request for relief, the Planning Director shall mail to the applicant a written determination accepting or rejecting the request for relief from Moratorium.

(e) Completion of Revised Ordinance. County staff shall work together with affected wireless service providers and the public to expedite completion of the revised Zoning Regulations Regarding Wireless Communication Facilities.

SECTION III

Severability. If any provision of this section or its application to any person or circumstance is declared invalid or unenforceable by a court of competent jurisdiction, this section, to the extent it can be given effect, or the application of this section to persons other than the person to whom it is held invalid, shall not be affected thereby, and to this end, the provisions of this section are severable.

SECTION IV

This ordinance shall take effect immediately based on the findings by the Board of Supervisors that this ordinance is adopted consistent with Government Code Section **65858**, and is necessary for the protection of the public health, safety, and general welfare. Pursuant to Government Code Section **65858**, this ordinance shall be in full force and effect for **45** days **from** the date of its adoption by the Board of Supervisors, unless, following a public hearing noticed pursuant to Government Code Section 65090 and four-fifths vote of its members, the Board of Supervisors extends the interim ordinance in accordance with the provisions of Government Code Section 65858.

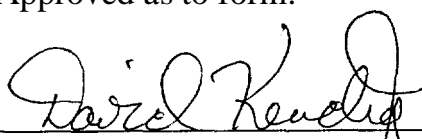
PASSED AND ADOPTED this _____ day of June, 2002, by the Board of Supervisors of the County of Santa Cruz by the following vote:

- AYES: SUPERVISORS
- NOES: SUPERVISORS
- ABSENT: SUPERVISORS
- ABSTAIN: SUPERVISORS

Chairperson of the Board of Supervisors

Attest: _____
Clerk of the Board

Approved as to form:



Assistant County Counsel