



City Council

Staff Report

TO: Honorable Mayor and City Council

FROM: Moses Diaz, Esq., Deputy City Attorney
Joseph Berry, Esq., Deputy City Attorney

THROUGH: John Jansons, City Manager *JJ*

DATE: August 8, 2016

SUBJECT: Interim Urgency Ordinance (draft Ordinance # 477) establishing a 45 day moratorium on the establishment or operation of wireless equipment and facilities within public rights-of-way.

RECOMMENDED ACTION:

- 1) Direct the City Manager (or designee) and City Planner move forward with development of an ordinance(s) governing wireless telecommunications facilities after studying how to best regulate such facilities, especially within public right-of-ways, and to bring such ordinance(s) to the Council for consideration along with a staff report; and
- 2) Adopt the attached urgency ordinance which contains a declaration of urgency, and which will establish a forty-five (45) day moratorium on approval of new and relocated wireless telecommunications facilities within public right-of-ways, to take effect immediately. (4/5 vote required)

SUMMARY:

Recent changes in the law governing wireless telecommunications facilities have occurred since the turn of the century which have spurred interest in development of additional wireless facilities, including within public right-of-ways. The City of Farmersville does not have local standards or regulations in effect for such wireless facilities within public right-of-ways.

BACKGROUND:

In 1996, Congress enacted the Telecommunications Act of 1996 (the "Act"). Among other provisions, the Act established the framework within which local government may regulate wireless telecommunications facilities (i.e., cellular telephone towers).

In 1996 and subsequent years, many cities across the country enacted local ordinances to regulate the development, siting, installation, and operation of wireless facilities consistent with the Telecommunications Act of 1996. Farmersville has not enacted an ordinance to address wireless facilities located within a public right-of-way.

Since the turn of the century, state and federal law addressing the scope and manner of local regulation of wireless facilities has continued to evolve as a result of various court cases and Federal Communications Commission rules. Requirements for local ordinances have also evolved over time in response to regulatory changes at the state and federal level. Not only has Farmersville not enacted a wireless facilities ordinance for right-of-ways, the municipal code has not been studied or updated to reflect recent changes that may now be legally necessary.

In addition to detracting from public views and neighborhood character, unsightly wireless facilities and their related visual clutter can lead to or exacerbate public safety hazards such as distracted driving. This poses a safety concern in Farmersville where members of the public, including children, commonly walk along public right-of-ways. For these reasons, the City Council is urged to consider regulating the appearance and location of wireless facilities within the public right-of-ways in order to promote the public health, safety and welfare.

Telecommunication Facilities within a Public Right-of-Way:

While the zoning code provides for regulations for wireless communication facilities not in the public right-of-way, staff is proposing to study the latest changes in state and federal law in order to develop new, and update existing, local regulations for all types of telecommunication facilities, but particularly wireless communication facilities within a public right-of-way and on public property. The California Public Utilities Code ("Code") includes regulations governing the relationship between municipalities and utility companies. The Code states that "...telephone corporations may construct...telephone lines along and upon any public road or highway,...and may erect poles, posts, piers or abutments for supporting insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway..." This includes wireless service providers.

Historically, municipalities could regulate the time, place and manner in which right-of-ways were accessed. At the same time, state law provided that a utility could not unreasonably interfere with the public's use of the right-of-way and that a municipality can require a discretionary permit, insurance and bonding, indemnification, compliance with the building code and aesthetic objectives be met, though such law is presently under a legal challenge which remains pending in the First District Court of Appeals in a case involving T-Mobile and the City and County of San Francisco. In light of this legal challenge and recent state and federal legislation and case law, additional time is needed to prepare, evaluate and adopt reasonable regulations regarding wireless facilities.

Government Code § 65858 allows a city to adopt an urgency ordinance to establish a temporary moratorium on any specified land use, either to allow the city to study how to appropriately regulate it or when that land use may be inconsistent with zoning regulations being considered by the City Council, Planning Commission or City Planning staff:

"(a) Without following the procedures otherwise required prior to the adoption of a zoning ordinance, the legislative body of a county, city, including a charter city, or city and county, to protect the public safety, health and welfare, may adopt as an urgency measure an

interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time. That urgency measure shall require a four-fifths vote of the legislative body for adoption. The interim ordinance shall be of no further force and effect 45 days from its date of adoption. After notice pursuant to Section 65090 and public hearing, the legislative body may extend the interim ordinance for 10 months and 15 days and subsequently extend the interim ordinance for one year. Any extension shall also require a four-fifths vote for adoption. Not more than two extensions may be adopted.” [Government Code § 65858(a).]

To ensure that no new or relocated wireless facilities are approved which increase distractions for drivers, unsafely encroach upon busy right-of-ways, degrade existing aesthetics or which are inconsistent with the latest developments in the law, staff recommends that the City Council adopt an urgency ordinance pursuant to this provision so that staff can study and consider updated requirements for wireless facilities within public right-of-ways. As noted above, such an ordinance would be effective for forty-five (45) days, after which time the City Council could hold a public hearing to further extend the moratorium for up to an additional ten (10) months and 15 days, for a total period of one year. The statute above also provides that ten (10) days prior to the expiration of the interim urgency ordinance (or any extension thereof), the City Council must issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance. Staff will provide to the Council a proposed report on or before said deadline if the urgency ordinance is enacted.

The City Council would have the option to further extend the ordinance, though staff believes that one year may be adequate to study and develop wireless facility regulations for Planning Commission and City Council consideration. The proposed moratorium would not prohibit collocation of new antennas and equipment on existing wireless facilities or the maintenance, updating, repair or improvement of an existing wireless facility provided that the physical dimensions thereof are not substantially changed or increased.

COORDINATION & REVIEW:

The recommendation to enact this interim urgency ordinance 477 was coordinated and review with City planning consultant and the City Attorney.

FISCAL IMPACT:

None

CONCLUSION:

It is respectfully recommended that the City Council:

) Direct the City Manager (or designee) and City Planner move forward with development of an ordinance(s) governing wireless telecommunications facilities after studying how to best regulate such facilities, especially within public right-of-ways, and to bring such ordinance(s) to the Council for consideration along with a staff report; and

2) Adopt the attached urgency ordinance which contains a declaration of urgency, and which will establish a forty-five (45) day moratorium on approval of new and relocated

wireless telecommunications facilities within public right-of-ways, to take effect immediately. (4/5 vote required)

Attachment(s): 1 – draft Urgency Ordinance #477

Approved By:



John Jansons,
City Manager

DRAFT

ORDINANCE NO. 477

AN INTERIM URGENCY ORDINANCE OF THE CITY OF FARMERSVILLE, ENACTING A TEMPORARY MORATORIUM ON THE ISSUANCE OF ANY PERMITS FOR NEW AND RELOCATED WIRELESS TELECOMMUNICATIONS FACILITIES WITHIN PUBLIC RIGHT-OF-WAYS, PURSUANT TO GOVERNMENT CODE SECTION 65858.

THE CITY COUNCIL OF THE CITY OF FARMERSVILLE DOES ORDAIN AS FOLLOWS:

SECTION 1. Findings.

The City Council finds and declares as follows:

A. Under Public Utilities Code § 7901.1, a municipality can adopt reasonable time, place and manner regulations with respect to the manner in which public rights-of-way may be accessed by telephone companies, including wireless communication companies which have been granted state authorization permitting the construction of facilities in public rights-of-way.

B. Title 47, United States Code § 332 appears to authorize municipalities to regulate the placement, construction and modification of wireless telecommunication facilities, subject to specified limitations.

C. As used in this ordinance, “Wireless Facilities” means all equipment installed for the purpose of providing wireless transmission of voice, data, images or other information including, but not limited to, cellular telephone service, personal communications services and paging services, consisting of equipment and network components such as towers, utility poles, transmitters, base stations and emergency power systems. “Wireless Facilities” shall not be deemed to include facilities constructed by and operated by suppliers of electric, gas or water utilities.

D. The Farmersville Municipal Code (FMC) is silent with respect to the development, siting, installation, and operation of Wireless Facilities within City rights-of-way.

E. State and federal law addressing the scope and manner of local regulation of Wireless Facilities continues to develop and evolve as evidenced by the following cases and rule changes:

i. In *Sprint Telephone PCS, L.P. v. County of San Diego* (2008) 543 F.3d 571 (“**Sprint Telephone**”), the Ninth Circuit Court of Appeals overruled seven years of Ninth Circuit jurisprudence relating to 47 U.S.C. § 253, a provision of Federal Telecommunications Act that, until this case was decided, had been interpreted to severely limit local authority to regulate Wireless Facilities.

ii. In *Sprint PCS Assets, LLC v. City of Palos Verdes Estates* (2009) 583 F.3d 716 (“**Sprint PCS**”), the Ninth Circuit Court of Appeals set out significant new standards establishing how municipalities may consider and decide applications for Wireless Facilities to be located within the public right-of-way.

iii. On February 22, 2012, section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012 (“**Act**”) was enacted and changed how co-located Wireless Facilities must be evaluated, and in some cases must be approved, changing more than a decade of national jurisprudence relating to 47 U.S.C. § 332 that, until the passage of the Act allowed local governments wide latitude and discretion in considering co-location of Wireless Facilities in the public right-of-way, and on public and private property.

iv. On October 17, 2014, the Federal Communications Commission (“**FCC**”) issued a Report and Order updating its rules and procedures governing new and modified Wireless Facilities, which includes clarifications on local zoning powers with respect to Wireless Facilities and the procedures for the review of siting applications.

v. Presently, the case of *T-Mobile West, LLC et al. vs. City and County of San Francisco et al.* is pending in the California First District Court of Appeals (Case No. A144252) and involves a legal challenge to longstanding legal authority of municipalities to regulate timing, location and manner of construction of Wireless Facilities.

F. The City has recently received and anticipates receiving additional requests by telecommunications providers to establish new or expanded Wireless Facilities within the City. However, as noted above, the existing provisions of the FMC are inadequate and time is needed to review, study and revise the FMC to fully take into account the impacts related to the timing, location and manner of construction of Wireless Facilities by multiple telecommunication providers within the public rights-of-way as well as other public and private property, including the public health, safety and welfare concerns of pedestrian and vehicular traffic.

G. In addition to detracting from public views and neighborhood character, unsightly Wireless Facilities and their related visual clutter can lead to or exacerbate public safety hazards such as distracted driving. This poses a safety concern in Farmersville where members of the public, including children, commonly walk along public right-of-ways. For these reasons, the City Council finds that it must consider regulating the appearance and location of Wireless Facilities within the public right-of-ways in order to promote the public health, safety and welfare.

H. The FMC must be updated in order to protect the public against the potential threats to the health, safety and welfare of the public arising from telecommunication providers constructing Wireless Facilities throughout the City. The City requires additional time to prepare, evaluate and adopt reasonable regulations regarding the use of the public rights-of-way and other public and private property within the City for Wireless Facilities.

I. The absence of this ordinance would impair the orderly and effective implementation of contemplated amendments to the FMC, and any further authorization to construct Wireless Facilities in the City's rights-of-way or other public or private property within the City during the period of this moratorium may be in conflict with or may frustrate the contemplated updates and revisions to the FMC.

J. Without the enactment of this ordinance, multiple telecommunication providers could quickly receive permits to install Wireless Facilities that pose a threat to the public health, safety and welfare. For example, without this ordinance, Wireless Facilities could:

- i. Create land use conflicts and incompatibilities including excessive height of poles and towers;
- ii. Create visual and aesthetics blights and potential safety concerns arising from excessive size, heights, noise or lack of camouflaging of Wireless Facilities including the associated pedestals, meters, equipment boxes and power generators;
- iii. Create unnecessary visual and aesthetic blight by failing to utilize alternative technologies or capitalize on collocation opportunities;
- iv. Cause substantial disturbances to rights-of-way through the installation and maintenance of Wireless Facilities;
- v. Create traffic and pedestrian safety hazards due to the unsafe location of Wireless Facilities; and
- vi. Negatively impact the unique quality and character of the City.

K. The City Council further finds that this moratorium is a matter of local and City-wide importance and is not directed towards any particular telecommunication provider that currently seeks to establish a Wireless Facility.

L. Government Code §§ 36937 and 65858 authorize the adoption of an urgency ordinance to protect the public health, safety and welfare, and to prohibit certain

land uses that may conflict with land use regulations that the City's legislative bodies are considering or intend to study within a reasonable time.

M. The City Council finds that there is a current and immediate threat to the public health, safety and welfare based on the above findings, and upon that basis has determined that an urgency ordinance prohibiting the issuance of new permits or approvals for new Wireless Facilities in public rights-of-way within the City is warranted.

SECTION 2. Applicability. This ordinance applies to all applications for the installation of new, and the relocation of existing, Wireless Facilities within any public right-of-way in any zone within the City of Farmersville.

SECTION 3. Moratorium on New Wireless Facilities.

A. Except as provided in Section 4 below, for a period of forty-five (45) days from the date of adoption of this ordinance, no permits or other approvals may be issued for any:

1. Installation of a new Wireless Facility in a public right-of-way; or
2. Relocation of an existing Wireless Facility in a public right-of-way.

B. For new applications for Wireless Facility installations and relocations received after the effective date of this ordinance, any time limits or mandatory approval time frames relative to the processing or action upon permit applications for any Wireless Facilities described in Section 3(A) are tolled during the term of this moratorium. The City Council intends to terminate this moratorium as soon as reasonably feasible within a timeframe to allow the adoption of new local regulations with respect to Wireless Facilities, to the extent reasonably advisable by staff following its study. Notwithstanding the foregoing, City staff may deny any application for a permit which prohibited from being issued under this ordinance.

SECTION 4. Exceptions. The provisions of this ordinance shall not be construed to prohibit the issuance of permits or approvals for the following:

- A. The collocation of new antennas and other equipment on an existing

Wireless Facility, provided that the exterior physical dimensions of the existing Wireless Facility are not substantially changed or increased;

B. The maintenance, updating, repair or improvement of an existing Wireless Facility, provided that the physical dimensions of the Wireless Facility are not substantially changed. The determination of whether the physical dimensions will be substantially changed shall be in accordance with criteria stated in the FCC Report and Order dated October 17, 2014.

SECTION 5. Report.

The City Manager or the same's designee is authorized and directed to prepare and issue, on behalf of the City Council, a written report describing the measures taken by the City to alleviate the conditions which have led to the adoption of this ordinance, at least ten (10) days prior to the expiration of this ordinance. A copy of the same shall be subsequently provided to the City Council for review.

SECTION 6. CEQA Review. The City Council hereby finds that this ordinance is not subject to review under the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines sections 15060(c)(2) [the activity will not result in a direct or reasonably foreseeable indirect physical change in the environment], 15060(c)(3) [the activity is not a project as defined by CEQA], and 15061(b)(3) [there is no possibility the activity in question may have a significant effect on the environment]. These findings are premised on the fact that the adoption of this urgency interim ordinance will maintain existing environmental conditions arising from the City's current land use regulations without significant change or alteration. The City Manager is hereby directed to ensure that a Notice of Exemption is filed pursuant to CEQA Guidelines section 15062 [14 C.C.R. § 15062].

SECTION 7. No Liability. The provisions of this ordinance shall not in any way be construed as imposing any duty of care, liability or responsibility for damage to person or property upon the City of Farmersville, or any official, employee or agent thereof.

SECTION 8. Pending Actions. Nothing in this ordinance or in the codes hereby adopted shall be construed to affect any suit or proceeding pending or impending in any court, or any rights acquired, or liability incurred, or any cause or causes of action acquired or existing, under any act or ordinance or code repealed by this ordinance, nor shall any just or legal right or remedy of the City of any character be lost, impaired or affected by this ordinance.

SECTION 9. Severability. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this ordinance, or its application to any other person or circumstance. The City Council of the City of Farmersville hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

SECTION 10. Construction. The City Council intends this ordinance to supplement, not to duplicate or contradict, applicable state and federal law and this ordinance shall be construed in light of that intent. To the extent the provisions of the Farmersville Municipal Code as amended by this ordinance are substantially the same as provisions in the Farmersville Municipal Code existing prior to the effectiveness of this ordinance, then those amended provisions shall be construed as continuations of the earlier provisions and not as new enactments.

SECTION 11. Urgency; Effective Date; Duration and Publication.

This ordinance is adopted by the City Council pursuant to the California Constitution, article XI, section 7 and Government Code section 65858 by a four-fifths (4/5) or greater vote, as an urgency measure to protect the public health, safety and welfare, and shall take effect immediately. The reasons for such urgency are set forth in

Section 1 above. This ordinance shall expire and be of no further force or effect forty-five (45) days after its adoption, unless it is extended pursuant to Government Code section 65858. Prior to the expiration of fifteen (15) days from the passage hereof a certified copy of this ordinance shall be posted in the office of the City Clerk pursuant to Government Code section 36933(c)(1) and a summary shall be published once in the _____, a newspaper printed and published in the City of Farmersville, State of California, together with the names of the Council members voting for and against the same.

THE FOREGOING ORDINANCE was passed and adopted by the City Council of the City of Farmersville, State of California, on the _____ day of _____, 2016, at a regular meeting of said Council duly and regularly convened on said day by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

GREGORIO GOMEZ, Mayor
CITY OF FARMERSVILLE

ATTEST: _____
PAUL BOYER, City Clerk Pro Tempore,
[Gov. Code § 36804]