



***Environmental
Planning
Commission***

***Agenda Number: 12
Project Number: 1001620
Case Number: 06EPC 01144
September 20, 2007***

Supplemental Staff Report

Agent City of Albuquerque Planning Department

Applicant City of Albuquerque City Council

Request Amending portions of Zoning Code §14-16-3-17, Wireless Telecommunications Regulations, and §14-16-1-5 (Definitions), §14-16-2-15 (O-1 zone), §14-16-2-16 (C-1 zone), §14-16-2-17 (C-2 zone), §14-16-2-19 (IP zone), and §14-16-2-22 (SU-1 zone).

Location City-Wide

Staff Recommendation

DEFERRAL of 07EPC 01144 to the October 11, 2007 special hearing, based on the Findings beginning on Page 7.

Staff Planner

Catalina Lehner, AICP-Senior Planner

Summary of Analysis

This request is for a recommendation to City Council regarding proposed text amendments to Zoning Code §14-16-3-17, Wireless Telecommunications Regulations. The proposed text amendments intend to minimize the visual impacts of Wireless Telecommunications Facilities (WTFs) by requiring that all new WTFs (except collocations) use a design that conceals their antennas.

This request was deferred in June 2007 by the applicant and in August by the EPC. A floor substituted version of the bill (F/S O-06-40), quite different than the original, had been introduced at City Council in April 2007. Staff's analysis is based on F/S O-06-40. No new information has been received from City Council.

Staff finds that a great deal of revision is necessary to avoid internal inconsistencies and potential loopholes that would render the Wireless Telecommunications Regulations more permissive and would make implementation more difficult. Staff's proposed conditions, which are a "middle-of-the-road" compromise between neighborhood and industry concerns, will remedy these issues.

The request was re-advertised and Staff conducted a workshop as asked. Some neighborhood input, and additional industry input, has been received. However, Staff recently became aware of a deficiency in the legal ad and therefore recommends a deferral to allow for a correct re-advertisement.

City Departments and other interested agencies reviewed this application from 8/7/06 to 8/18/06 (O-06-40) and 5/7/07 to 5/18/07 (F/S O-06-40). Agency comments used in the preparation of this report begin on Page 35 of the original Staff report.

This request (F/S O-06-40) was originally scheduled for the June 21, 2007 EPC hearing*, but was deferred at the applicant's request for 60 days. This request was considered at the August 16, 2007 EPC hearing, when the EPC voted to defer it for 30 days for the following reasons: 1) so Staff could obtain additional input, especially from the neighborhoods, and meet with interested parties and 2) so the request could be re-advertised to include citations for the associated Zoning Code sections that would be modified. Staff recommends a deferral to the October 11, 2007 special hearing date to allow for another re-advertisement (see p. 3 of this supplemental report).

* O-06-40 first entered the EPC process last fall and was scheduled for the September 21, 2006 hearing.

I. INTRODUCTION

Request

This request is for a recommendation to City Council regarding F/S O-06-40, known as the Wireless Telecommunications Facility (WTF) Ordinance. Proposed are text amendments to Section (§) 14-16-3-17, Wireless Telecommunications Regulations, found in the Comprehensive Zoning Code of the Albuquerque Code of Ordinances (ROA 1994). Because some zoning designations and the definitions section refer to WTFs, it will be necessary to amend several sections of the Zoning Code associated with the Wireless Telecommunications Regulations. The re-advertisement included citations to these sections, but needs to be re-done due to the recently discovered inadvertent omission of one section.

Context

A proliferation of non-concealed and poorly concealed wireless telecommunications facilities (WTFs) has prompted the City Council to seek to minimize the impact of WTFs on neighborhood aesthetics and views by requiring that all new WTFs in the City use concealed technology, which means using a design that hides or conceals the antennas.

O-06-40, containing text amendments to require concealment, was first introduced at City Council in August 2006 and subsequently referred to the Land Use Planning and Zoning Committee (LUPZ). A floor substitute version was introduced at City Council in April 2007. F/S O-06-40 was referred to the Environmental Planning Commission (EPC) as substituted, since the EPC is charged with hearing proposed Zoning Code amendments. The EPC will then make a recommendation to the City Council.

Background & History

Please refer to p.1 and 2 of the original Staff report dated August 16, 2007 (see attachment).

Zoning, Land Use & Definitions

Please refer to p.2 and 3 of the original Staff report (see attachment).

II. OVERVIEW (in brief) – Please refer to the original Staff report (see attachment) for details

The proposed text amendments to Zoning Code §14-16-3-17, Wireless Telecommunications Regulations, are found in F/S O-06-40 known as the Wireless Telecommunications Facility (WTF)

Ordinance. The intent of the proposed text amendments is twofold: 1) to minimize the visual impacts of WTFs by requiring that all WTFs in the City (except for pre-existing WTFs) be concealed, and 2) to encourage the siting of WTFs on City owned property. The idea is to require concealed WTFs as an alternative to the stereotypical “cell towers”, consisting of a steel pole with a ring of panel antennas at the top, which are often considered unsightly.

The proposed changes to the current regulations would accomplish the following: require that all new WTFs use a concealed design (though a waiver would be allowed), continue to allow collocation of antennas on existing WTFs, and encourage siting of WTFs on City owned property. Requirements applicable to view corridors, historic zones and distance between free-standing WTFs are proposed for deletion.

- ⇒ The August 16, 2007 Staff report classifies the proposed changes into four categories: Congruency & Clean Up Issues, Implementation Issues, Administrative Issues, and Other Minor Clean Up. A detailed discussion of each can be found on pages 10, 12, 20 and 23, respectively.

WTFs: Concealed vs. Non-Concealed, Free-Standing

Please refer to p.3 and 4 of the original Staff report (see attachment).

Application Review Process

Please refer to p.4 and 5 of the original Staff report (see attachment).

III. ANALYSIS

Federal Law (in brief)

The *Telecommunications Act of 1996* contains important provisions concerning the placement of towers and other facilities used to provide personal wireless services. Wireless telecommunications providers are required to comply with the FCC regulations contained therein.

The proposed text amendments to Zoning Code §14-16-3-17 do not conflict with Section 253 or Section 704 of the Act. Section 253 protects wireless carriers by not allowing any state or local regulation to prohibit these services. Requiring concealment would not have the effect of prohibiting service provision; rather, a variety of concealed designs using concealed (stealth) technology would be allowed and encouraged. 253(b) gives local governments the authority to impose regulation of the telecommunications industry, as long as all providers are treated equally. Nothing in the proposed text amendments would create an advantage for one provider over another.

Section 704 of the Act pertains siting of personal wireless service facilities. Note that the Act does not “limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service facilities.”

- ⇒ For a full discussion, please refer to p.5-7 of the original Staff report (see attachment).

The *Wireless Communications and Public Safety Act of 1999*, known as the 911 Act, was enacted on October 26, 1999 to ensure a comprehensive approach to emergency service. The 911 Act directed the FCC to make 911 the universal emergency number. The FCC ordered wireless carriers to help 911 centers by requiring carriers to transmit a number for each call (Phase I implementation) and transfer location data with each call (Phase II implementation).

The FCC worked extensively with the carriers to establish implementation plans for E-911, or Enhanced 911, with respect to Phase II. The FCC set the end of 2005 as the date by which compliance with Phase II of E-911 was to be completed, so it is likely that by Fall 2007 substantial progress has been made.

Staff points out that the carrier's compliance efforts with E-911, which are carried out directly with the FCC, began several years ago with the City's current wireless regulations in place. The towers needed to help fulfill the E-911 mandate have, in all likelihood, already been constructed. The proposed text amendments would not preclude the construction of new towers; they would simply require that any new towers use a concealed design. Existing non-concealed towers would not be affected.

Applicable City Ordinances, Plans and Policies

As demonstrated in the August 16, 2007 Staff report, the proposed Ordinance furthers the intent of the City Charter and the Zoning Code. Applicable Comprehensive Plan Goals and policies are furthered, partially furthered and not furthered.

⇒ Staff analysis begins on p. 7 of the original report (see attachment).

IV. CASE DEVELOPMENT UPDATE

The EPC deferred this case for 30 days so that: 1) the request could be re-advertised to include citations for the associated Zoning Code sections that would be modified, and 2) Staff could obtain additional input, especially from the neighborhoods, and meet with interested parties.

Re-advertising

The legal ad was updated to specifically mention that Zoning Code Sections 14-16-3-15, 14-16-2-16, 14-16-2-17, 14-16-2-19 and 14-16-2-22, ROA 1994 are proposed to be amended with the request to amend the Wireless Telecommunications Regulations in Section 14-16-3-17. Previously the legal ad referred to "associated sections" of the Zoning Code, which have now been specified as requested.

After that, however, Staff erred in listing the sections proposed for amendment. The citation for the Definitions section was inadvertently omitted. The corrected list of proposed amended sections is: 14-16-3-17 (current regulations), 14-16-1-5 (Definitions), 14-16-2-15 (O-1 zone), 14-16-2-16 (C-1 zone), 14-16-2-17 (C-2 zone), 14-16-2-19 (IP zone), 14-16-2-22 (SU-1 zone).

Additional Input

Staff sought additional input from the neighborhoods, industry and other interested parties as requested. Since the deferral, two events have occurred to this end:

1) *Notification:* Staff had provided a written description of the proposed text amendments to the Office of Neighborhood Coordination (ONC) prior to the June hearing, when this case was originally scheduled. The ONC emailed neighborhood representatives on May 25, 2007 and included the write-up in the Neighborhood News publication.

As directed, Staff coordinated with the ONC to accomplish a re-notification (see attachments). Staff provided a written description, along with an attachment (.txt file) of the August Staff report, for distribution to neighborhood representatives. The ONC sent the bulk email on August 22, 2007, and re-sent it on August 23rd with just the .txt file. (Some delivery failures had resulted with the first e-mailing due to the large attachment size). The written description was re-published in the Neighborhood News as well. The responses received from this notification effort, as of this writing, are few and are included as attachments.

2) *Workshop and Later:* Staff organized and conducted a workshop to discuss the proposed conditions of approval found in the August Staff report. The workshop, held Tuesday August 28th from 8:30 am to 12:00 pm, was well-attended by both neighborhood and industry representatives. The proposed conditions of approval were discussed one by one. The attendees made suggestions to clarify and improve some of the wording; Staff has incorporated these changes into the revised proposed conditions of approval.

At the workshop, Staff re-iterated that proposed conditions of approval already represent a compromise position. On one hand, neighborhoods tend to favor concealment of *all* WTFs, including collocations (of antenna) on existing non-concealed facilities and do not want any more non-concealed, free-standing towers or non-concealed collocations (see attached neighborhood letters). Some even want already existing non-concealed towers to be concealed.

On the other hand, the industry wants to continue to build non-concealed, free-standing towers without restrictions and wants the current regulations to be more permissive (see attached industry letters). This intent is reflected in F/S O-06-40, which was written primarily by industry representatives and was agreed upon when it was created. More recently, however, industry representatives have decided that they are no longer satisfied with F/S O-06-40. Also, they do not support Staff's proposed compromise position because apparently they do not want to "give" anything and meet the neighborhoods halfway.

The compromise, which Staff suggested last month, consists of the following: require concealment of all new WTFs *except* for collocations on existing non-concealed facilities such as existing towers and public utility structures, and do not conceal already existing non-concealed towers. Though neither side may be completely satisfied, Staff's "middle of the road" position offers a logical compromise that will result in concealment of most new WTFs while allowing the industry flexibility to continue non-concealed collocations and a variety of concealed monopole designs.

V. OUTSTANDING ISSUES

The August EPC hearing

Several relevant issues were discussed. One that particularly warrants clarification is the process. F/S O-06-40, introduced at City Council in April 2007, was provided to Planning Staff. Planning Staff is responsible for analyzing the proposed legislation and compiling a list of proposed changes. The EPC considers the proposed changes and makes a recommendation to City Council, which is the City's zoning authority that will make a final decision. Though it was stated at the hearing that changes have already occurred, no changes have been made to F/S O-06-40 at this stage. Note that Planning and Zoning Staff have extensively reviewed the proposed legislation in order to develop the recommended changes, and City Legal has provided guidance.

Another issue discussed was the possibility of retrofitting existing non-concealed, free-standing towers. Though included in the original O-06-40, the provision that would have required non-concealed, free-standing towers to become concealed within 5 years was removed from the F/S version by the industry-based task force. Planning Staff, in the spirit of compromise with industry, is not suggesting that the retrofit provision be reinstated. The industry is reluctant to even conceal future towers, and would be much less willing to retrofit existing ones.

Workshop & Beyond

Though some progress has been made, the issues discussed below remain outstanding. This list, however, is not exhaustive. It is noteworthy that the most recent letters from industry representatives (see attachments) have greatly broadened the scope of their concerns and have increased allegations of non-compliance with Federal law, for both the proposed text amendments and the City's current Wireless Telecommunications Regulations which have been in effect since 1999.

Concealment: The big debate concerning modification to the existing wireless regulations centers on concealment. The intent of the original O-06-40 is to require that all WTFs be concealed, including existing ones. In F/S O-06-40, the retrofit provision has been dropped and the requirement for concealment has been embedded and "watered down" throughout. Though the intent needs to be made more explicit, concealment would be required for new free-standing towers but not for new collocations on existing structures.

Industry representatives, who re-wrote the proposed legislation into the floor-substitute version, are reluctant to have to conceal new towers. Neighborhood representatives tend to favor concealment of new towers *and* collocations. Planning Staff is recommending concealment of new free-standing towers, but to continue to allow non-concealed collocations on existing structures.

Height: This point of contention was raised at the workshop, when industry representatives stated that the height allowance in the current regulations is too limiting. Currently, 65 ft. is allowed for a free-standing facility and 75 ft. for a collocated facility. Staff points out that the current height limitations already seem to be a compromise and have not posed implementation problems since their inception.

Setbacks: Industry representatives would like the required setback for a free-standing facility to be reduced. Currently, an 85 ft. setback is required from a residentially zoned property. They want the setbacks to be a 1:1 ratio- 1 ft. setback for every 1 ft. height. The neighborhoods favor setbacks greater than the current 85 ft., such as 100 ft. or even 150 ft. Staff suggests leaving the current requirement, which has not proven difficult in terms of implementation.

Preferred Location: F/S O-06-40 contains a proposed preferential hierarchy for locating future WTFs; it is not a requirement (see p. 3). Industry representatives are concerned that this provision would result in financial gain for the municipality at the expense of industry. Staff's agrees that municipal properties need to be available, and points out that there is an ongoing effort toward developing a master lease agreement for such properties. The idea is to encourage siting on municipal properties if feasible; a preference and a requirement are not the same thing.

VI. CONCLUSION

This request is for a recommendation to City Council regarding F/S 0-06-40, proposed text amendments to Zoning Code §14-16-3-17, the Wireless Telecommunications Regulations. The purpose of the text amendments is to minimize the visual impacts of WTFs by requiring concealment of new WTFs (excluding collocations), and to encourage the siting of WTFs on City owned property.

The City's current and proposed wireless regulations comply with Federal law. They do not prohibit or have the effect of prohibiting any entity from providing telecommunications service (Section 253). The City's current and proposed regulations do not ban wireless facilities. Many opportunities for concealed designs and collocations would continue to be available. Nor do the regulations discriminate between different wireless providers. Municipalities are allowed under Federal law to retain authority "over decisions regarding the placement, construction and modification of personal wireless service facilities" Section 704(a)(7)(A). Local regulation of WTFs is permitted under Federal law.

Staff's proposed conditions of approval will balance the proposed legislation and create a "middle of the road" position. Without them, F/S O-06-40 will remain a "one legged stool" that was re-written largely by industry representatives without adequately taking into account planning and zoning practice and neighborhood concerns.

For now, Staff recommends a deferral to the October 11, 2007 special hearing. After the deferral period, Staff will recommend that a recommendation of approval, with conditions, be forwarded to City Council.

FINDINGS- 06EPC 01144, September 20, 2007-Text Amendments Zoning Code §14-16-3-17, Wireless Telecommunication Regulations

1. This request is for a recommendation to the City Council regarding F/S O-06-40, which the City Council introduced in April 2007. F/S O-06-40 contains proposed text amendments to Zoning Code §14-16-3-17, Wireless Telecommunications Regulations, which have been in effect since 1999.
2. The purpose of the proposed text amendments is to: a) minimize the visual impacts of wireless telecommunications facilities (WTFs) by requiring that all new WTFs (except collocations) use a concealed design to hide their antennas, and b) encourage the siting of WTFs on City owned property.
3. The proposed text amendments do not conflict with Section 253 or Section 704 of the Federal Telecommunications Act of 1996. Requiring concealment would not have the effect of prohibiting service provision; a variety of concealed designs and non-concealed collocations would continue to be allowed [253(a)]. The text amendments would not create an advantage for one wireless provider over another; local regulation would remain competitively neutral [253(b)]. The text amendments, which do not discriminate between wireless providers, also address “reasonable time” for application review and substantiation of decisions in writing [704].
4. Achievement of the City Charter:
Adding provisions to the ROA 1994 to require that wireless telecommunication facilities (WTFs) use concealed (stealth) technology is an exercise in local government (City Charter, Article 1) which is allowable under Federal law. Requiring all future WTFs to be concealed expresses the Council’s desire to protect and preserve natural endowments, ensure the proper use and development of land, and promote and maintain an aesthetic urban environment (City Charter, Article IX).
5. The proposed text amendments *further* the following Comprehensive Plan Goal and policies with respect to the Developed Landscape:
 - A. Goal— Requiring concealment of new free-standing arrays will improve the quality of the natural and developed landscape. Concealed antennas blend in and are not readily visible the way non-concealed antennas are.
 - B. Policy II.C.8a — Features unique to Albuquerque, such as the volcanic escarpment and other amenities, will be protected from the adverse visual effects of non-concealed free-standing Wireless telecommunications facilities (WTFs).

- C. Policy II.C.8b— Wireless telecommunications facilities (WTFs) provide a public function. The proposed text amendments will require that WTFs do not detract from the visual attractiveness of the City, and may even contribute to beautification.
- D. Policy II.C.8e— New wireless telecommunications facilities (WTFs), except for collocations, will be concealed, and their materials and designs will be required to be in harmony with the landscape.
6. The proposed text amendments *partially further* the following Comprehensive Plan Goals:
- A. Community Identity and Urban Design— Though requiring concealment of Wireless telecommunications facilities (WTFs) will preserve the natural and built environments, the proposed text amendments remove protections for Historic Zones and View Corridors.
- B. Economic Development— The proposed text amendments will not impede wireless service provision; they will simply require use of designs that conceal the antennas (except collocations). The cost of balancing economic concerns with social and environmental goals will be quite low since the costs will be distributed among many users.
7. The proposed text amendments *do not further* the Comprehensive Plan’s Historic Resources Goal. The current regulations require that all WTFs in historic districts are concealed within existing buildings or structures. The proposed text amendments remove language that creates protections for Historic Zones.
8. The general intent of the Zoning Code is *furthered*. Adding provisions to the Revised Code of Ordinances of Albuquerque 1994 (ROA 1994) to ensure concealment of wireless telecommunications facilities (WTFs) (except collocations) will help achieve the intent of the City Charter, and generally furthers applicable Goals and policies of the Comprehensive Plan. However, as zoning authority for the City of Albuquerque, the City Council will make the final determination as required.
9. The proposed text amendments will necessitate corresponding revisions to other Sections of the Zoning Code, including §14-16-1-5 (Definitions), §14-16-2-15 (O-1 zone), §14-16-2-16 (C-1 zone), §14-16-2-17 (C-2 zone), §14-16-2-19 (IP zone), and §14-16-2-22 (SU-1 zone).
10. There is neighborhood concern regarding F/S O-06-40. Generally, neighborhoods favor concealment of *all* WTFs, including collocations (of antenna) on existing non-concealed facilities and do not want any more non-concealed, free-standing towers or non-concealed collocations. Some want already existing non-concealed towers to be concealed.

11. The industry wants to continue to build non-concealed, free-standing towers and wants the current regulations to be more permissive as reflected in F/S O-06-40, written primarily by industry representatives. However, industry representatives are no longer satisfied with F/S O-06-40. Also, they do not support Staff's proposed compromise position because apparently they do not want to meet the neighborhoods halfway.

12. Planning Staff's compromise position consists of the following: require concealment of all new WTFs *except* for collocations on existing non-concealed facilities such as existing towers and public utility structures, and do not conceal already existing non-concealed towers. Though neither side may be completely satisfied, Staff's "middle of the road" position offers a logical compromise that will result in concealment of most new WTFs while allowing the industry flexibility to continue non-concealed collocations and a variety of concealed monopole designs.

13. Staff recently became aware of a deficiency in the legal ad. The Zoning Code citation for the Definitions section (14-16-1-5) was inadvertently omitted. A deferral is needed to allow for a correct re-advertisement.

RECOMMENDATION- 06EPC 01144, September 20, 2007

DEFERRAL of 06EPC 01144, Text Amendments to Zoning Code §14-16-3-17, Wireless Telecommunication Regulations, to require that all proposed wireless telecommunication facilities (WTFs) in the City (except collocations on existing non-concealed facilities) use a concealed design, to the October 11, 2007 EPC special hearing based on the preceding Findings.

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