Internet Communications Utilities Regulation

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MEMORANDUM

From: W. Scott McCollough
To: Malibu City Council Members
Date: August 23, 2020
Subject: Summary and Explanation; Malibu Wireless Code Chapter 17.46 Replacement Concerning Wireless Antennas and Related Facilities

The attached draft ordinance accomplishes a complete re-working of the current Malibu ordinance relating to wireless facilities placement. Some current substance was retained, but it appears in context with the new language and wording.[1] The great preponderance of the wording, however, is basically new. A full-rewrite of the Malibu ordinance relating to wireless facilities is necessary to take account of technological and substantive developments that have occurred since the current ordinance was last amended. The proposed ordinance deals with issues that have arisen from changes in state and federal law, some judicial decisions, and new technology challenges, but it also takes up issues not covered by the former provisions, such as satellite dishes, over the air receiving devices and amateur radio antennas.

The ordinance is organized in a specific way to logically and rationally deal with both general and particular issues. Section A is the statement of purpose and intent, and also contains some of the underlying policy expressions that are then carried out in the substance that follows. Section B deals with "general" provisions that impose substantive requirements for each and all of the different types of wireless facilities, although it does contemplate the possibility of exemption or variance from the general rule in particular applications. The later sections then have specific requirements particular to a specific type of facility or permit. Section C is another "general" section. It builds on Section B, but it only governs standards for all Personal Wireless Service Facilities, including each of the sub-topics in Sections D through G. Section C does not govern satellite (Section H), OTARD (Section I) or amateur radio antennas (Section J), whereas Section B does apply to Sections H-J.

In a few instances the specific application sections contain exceptions to the general rule when required by federal law or state law. Examples are Sections F and G. Section F addresses "minor modifications" of the type contemplated by the so-called "Spectrum Act." Congress imposed (and FCC has expanded) several discrete preemptive terms and conditions that do not apply to other wireless facilities. Section F

[1] City staff will likely need to re-format to conform to the City's normal form for ordinances, including how items are numbered. For example, each of the major sections may need to become numbered rather than alphabetized. There are also probably boilerplate recitations, representations, signatures, stamps and dates that must be included. Finally, all internal cross-references will need to be updated and verified.

has different requirements from some of the general conditions imposed in Sections B and C. Similarly, the FCC has imposed some particulars for "small wireless facilities" that prohibit requirements local authorities can impose in other areas. Thus, Section G implements those FCC-imposed particulars. Satellites, OTARD and Amateur Radio antennas are different from other fixed or mobile services, so they too have specific rules – many of which are particular to those applications and they are not appropriately grouped with the services/facilities addressed in Sections C-G, although Section B still applies to some extent.

Explanation for Section A

This Section lays out the purpose, intent and statement of premises, policies, priorities and goals related to the overall ordinance. These foundational findings and statements of policy are important in many ways, because they assert and preserve the City's prerogatives, but also acknowledge and lament the extent to which the City's police-power based right and duty to regulate rights-of-way, perform zoning and protect its citizens' health and safety has been preempted by federal and state law. Section A acknowledges these preemptions and limitations, states a genuine intent to abide by the laws that impose them, and includes an interpretive rule of consistency with them. Section A also, however, notes the City's disagreement with this interference and announces in clear terms that the City intends to regulate to the fullest extent allowed by law. Malibu will make every effort to not violate any law, but it will exercise every option and power it retains.

The Whereas clauses make some findings of note. They recognize that wireless services afford some benefits, but also present legitimate concerns. Health and safety are among those concerns, but they are not the only ones. Section A expressly sets out these concerns, issues and goals, and – given the partial preemption of local authorities' ability to regulate wireless environmental effects – those other concerns, issues and goals largely drive and provide legal support for the specific provisions that appear in subsequent sections.

Explanation for Section B

Section B provides the General Provisions that can be largely applied to all topics and facilities. Subsection 1 restates that the ordinance and any permit approved pursuant to its standards do not grant any vested rights and all permits can be voided, amended, revoked or otherwise modified as allowed by law, especially any changes of law. Subsection 2 states the matters to which Section B applies. Subsection 3 imposes general requirements for all permits, prohibits transfers unless assignee agrees to be bound by the permit terms, and sets out general notice rules. Subsection 4 addresses disability, housing and discrimination. The ordinance notes that state and federal law applies to public accommodations in general, the zoning process in particular, and to service providers in some instances. It establishes a means by which those entitled to individual relief under these disability, handicap and discrimination laws may seek such relief as part of the application process.

Explanation for Section C

Section C provides the general requirements for all facilities related to personal wireless service and the slightly broader class of "wireless facilities" covered by the Spectrum Act's "minor modifications" provisions.[2]

Subsections 1 and 2 list what must be done and obtained prior to any installation depending on application type.

Subsection 3 and 4 delegate certain functions – here determination of completeness and compliance – to the City of Malibu Community Development Director or its designee ("director").

Subsection 4 also requires the Planning Commission ("commission") to find (at an appropriate point) whether the facility is required to "close a significant gap in coverage" and if so whether the proposed antenna or facility is "the least intrusive means to do so."[3]

Subsection 5 has seminal procedural and substantive content requirements for all applications, absent an express exception elsewhere. Among these are certain binding representations and disclosures and some substantive obligations like a master plan, siting analysis, noise studies, automated monitoring. There is also an application fee.[4]

Subsection 6 sets out the City's preferred zones and locations for facility placement. The general and primary preference is for placement in an existing site in a commercial area. If that is not feasible then the second choice is for public facilities or recreation zones, although those are disfavored. The last option is and must be placement in residential areas or near schools. Even so, placement within 1,500 feet of a residence or school is prohibited unless the applicant can demonstrate and the director/commission finds that is the only location that will close a significant gap, is the least intrusive means to do so and placement in that location best minimizes adverse impacts. This and other parts of the ordinance contemplate that the director and/or commission will design basic forms that incorporate the content requirements and allow them to make fairly quick determinations whether the application is complete, compliant and proper for further processing. This is necessary since federal law imposes small windows for non-compliance determinations as part of the "shot clock" process.

Subsection 7 restates the 1,500-foot set-back rule for residences and schools, and then imposes other design requirements, such as applicable codes, regulatory rules, prohibited interference with City communications systems, lighting, aesthetics,

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[2] As noted, however, Section F in some instances departs from the Section C general rules insofar as is necessary to implement federal law.

[3] "Significant gap in coverage" and "least intrusive means" are crucial terms of art that are repeatedly applied throughout the personal wireless service portions of the ordinance. They are defined in Section O, and are further discussed in the next main portion of this memo.

[4] This ordinance does not set the fees. Instead it contemplates the City will establish appropriate fees and levels by resolution, presumably based on the City's reasonable costs as required by the FCC's recently-affirmed order on that subject.

specifics on undergrounding and above-ground equipment, signage, noise and situations where the facility will largely provide coverage for outside-city areas. Finally, there are fire-hazard requirements, such as coordination with and monitoring by the Fire Department.

Subsection 8 authorizes and requires engagement of an outside expert (paid for by the applicant) to review technical matters and for compliance with the ordinance's strictures.

Subsection 9 prescribes the conditions of approval that will attach to permits and apply throughout the permit and facility operational life, subject to amendment. This restates some of the matters in prior sections but addresses abandonment.

Subsection 10 requires the applicant, operator and property owner (as appropriate) to fully indemnify the City for all potential liabilities, including from operation and maintenance.

Subsection 11 imposes a 10-year term, the minimum generally allowed by state law.

Subsection 12 addresses potential city-mandated removal based on changed circumstances and allows the permittee to appeal the director's order to the commission and, if desired, the council.

Subsection 13 requires the permittee to cooperate in post-permit compliance reviews.

Subsection 14 sets out certain required findings the commission and/or council must enter prior to any approval. These are supplemented in other sections dealing with particular facility types. These findings pertain to the requirement that the applicant demonstrate the facility is needed to address a "significant gap in coverage," is the "least intrusive means to do so" and the facility is consistent with the location preferences stated in the ordinance.

Subsection 15 imposes specific insurance requirements. The policy must be issued by an "A" rated company, cover named applicant and each antenna operator, be "claims made,"[5] list the City as an additional insured, and have coverage limits of at least $2 million per person and $25 million per incident. The policy must not exclude personal injury or damage liability from exposure to radiation. This latter requirement is necessary since most general liability policies typically have pollution exclusions that also apply to environmental contamination such as RF/EMF radiation. An addendum or rider is typically necessary. The permittee must supply proof of insurance before the permit is issued.

Subsection 16 reinforces the indemnity condition in Subsection 11 by requiring that the indemnification occur before permit issuance.

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[5] A "claims-made" policy provides coverage that is triggered when a claim is made against the insured during the policy period, regardless of when the wrongful act that gave rise to the claim took place. This type coverage is necessary given the possibility of claims arising several years in the future, including perhaps after the facility has been removed.

Subsection 17 recognizes that Malibu, or at least significant parts of it, are within the area governed by the California Coastal Commission. It provides that the Malibu permit will not issue until the applicant also secures any necessary permits from the Coastal Commission.

Subsection 18 requires proof of NEPA compliance.

Subsection 19 requires submission of as-built plans and photographs within 90 days of construction completion.

Subsection 20 requires compliance with all applicable codes, laws and regulations as a condition. It also addresses fire hazard issues by requiring ongoing monitoring by the Fire Department in high fire zones, and expressly requires compliance with Fire Department directives during any emergency.

Subsection 21 requires that the project be built in compliance with the approved plans.

Subsection 22 addresses violations. A violation leads to possible revocation and a 1-year bar from further permits. Repeated violations of the permit or other permits can result in revocation of all current permits.

Subsection 23 allows the City to review, renew or revoke a permit based on certain changed circumstances. It also imposes a general desire for upgrades as the technology progresses, including those providing even greater visual impact mitigation. If a permittee seeks modification of a permit, the existing permit is re-opened so the director can determine whether technological or concealment upgrades should be required.

Subsection 24 provides the general basis for revocation and compliance review by the director.

Extended discussion of "significant gap" and "least intrusive" tests for most applications in residential areas, recreation zones and near schools

The general premise underlying this ordinance is that – to the greatest extent and wherever allowed by federal law – the City will only approve a wireless service facility permit, especially near residences, schools or in recreation zones, if the applicant can prove and the City expressly finds that the facility is necessary at that location to fill a "significant gap in coverage" and the proposed approach is the "least intrusive means to do so." These terms – along with the requirement to use "call testing"[6] to identify whether there is a gap – are defined in Section O (Definitions). The prescribed test is a predominant approach when a local authority desires to limit proliferation and exclude non-covered services while still adhering to the federal preemption of local authority

[6] "Call testing" is a bit of a misnomer but is the standard usage. The ordinance does not limit determination of a significant gap to only whether "voice calls" can be made. If the applicant also desires to offer other "covered" services like texting or push-to-talk it may use a reasonable method to assess whether those services are effectively precluded unless the proposed facility is approved. The significant gap and call testing regime, however, does not extend to other non-covered services such as Internet access or data services that do *not* qualify as a "covered" "personal wireless service."

imposed barriers to entry, discriminatory regulation and an "effective prohibition" (47 U.S.C. §§253, 332(c)(7)(B)).

There has been considerable litigation over what is and is not a barrier, discriminatory or prohibitory, and the Ninth Circuit has addressed the topic on several occasions. *See American Tower v. City San Diego*, 763 F.3d 1035 (9th Cir. 2014), *applying T-Mobile USA, Inc. v. City of Anacortes,* 572 F.3d 987, 994 (9th Cir. 2009) and *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc); *Metro PCS, Inc. v. City of San Francisco*, 400 F.3d 715, 730-31 (9th Cir. 2005); *see also City of Portland v. United States*, 2020 U.S. App. LEXIS 25553, *15-22, 43 (9th Cir. Aug. 12, 2020) (approving FCC fee "safe harbor" but vacating FCC requirement that aesthetic requirements for "small cells" be "no more burdensome" than applied to "other infrastructure deployment."). *American Tower,* 763 F.3d at 1056-1058, expressly restated and again approved use of the "significant gap"/"least intrusive" test:

> We have adopted a two-pronged analysis, "requiring (1) the showing of a 'significant gap' in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations." *Id.* (internal quotation marks and citation omitted). The significant gap prong is satisfied "whenever a provider is prevented from filling a significant gap in its own service coverage." *MetroPCS, Inc*., 400 F.3d at 733. We evaluate the feasibility prong under a "least intrusive means" standard, which "requires that the provider show that the manner in which it proposes to fill the significant gap in services is the least intrusive on the values that the denial sought to serve." *City of Anacortes*, 572 F.3d at 995 (internal quotation marks and citation omitted).
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> …
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> As we explained in *MetroPCS, Inc.*, the "least intrusive means" standard "allows for a meaningful comparison of alternative sites . . . [and] gives providers an incentive to choose the least intrusive [means] in their first [ ] application[]." 400 F.3d at 734-35. To achieve these objectives, the applicant must make a *prima facie* showing of effective prohibition, which the locality may then rebut by demonstrating the existence of a potentially available and technically feasible alternative. *City of Anacortes*, 572 F.3d at 996-99. ATC did not adduce evidence allowing for a meaningful comparison of alternative designs or sites, and the City was not required to take ATC's word that these were the best options.

The ordinance faithfully implements the Ninth Circuit test set forth above. The applicant has the burden of proving it meets the effective prohibition/least intrusive test, and if the City agrees, it can so find by applying the evidence to each part of the test. The City can also disagree with the applicant, "rebut" the applicant's evidence and enter findings why the application does not meet the test.

Note, however, that the City cannot reject Subsection F "minor modification" applications based on a failure to meet the effective prohibition/least intrusive test. The statute and FCC rules do not allow recourse to this limiting method for minor modifications to existing sites. This test, however, can and does apply to all other applications, especially in or near residences, schools and recreation zones.

Explanation for Section D

Section D applies to applications for facilities not in the public right-of-way. For the most part, the contemplated facility will be placed on privately-owned property. The requirements in Section C apply, and then there are additional criteria specific to facilities not in public right-of-way.

Subsection 1 deals with location and aesthetic concerns. (a)(i) imposes a general set-back requirement for freestanding or monopole installations. This is for safety reasons and addresses aesthetic concerns. (a)(ii) lists specific areas[7] where the installation must be "stealth" designed to obscure or blend in with the surroundings. (b) has a list of prohibited locations where no facility may be placed on private property. (c) provides priority guidance in terms of structure type.

Subsection 2 imposes aesthetics-based design and development standards. It prefers undergrounding for equipment or complete enclosure/screening, with the further requirement that the color scheme be compatible with the surroundings.

Subsection 3 requires City Council approval of any application for placement in a prohibited location. The applicant must conclusively prove, and the Council must make specific findings, that the facility is required at that location under the significant gap/least intrusive test.

Explanation for Section E

Section E applies to applications for facilities in public right-of-way ("PROW"). These build on Sections B and C but provide requirements specific to PROW. Even though the City owns this property, the FCC managed to convince the Ninth Circuit Court of Appeals that the FCC could compel municipalities to allow facilities in PROW, and even on city infrastructure like poles and lights. The Ninth Circuit did, however, reject the FCC's (and industry's) efforts to preclude reasonable aesthetic protection. This Section therefore has specific aesthetic and safety requirements for facilities in PROW.

Subsection 1 reserves the City's rights and powers to the maximum extent allowed by law. It also requires the applicant to show it is entitled to demand access to PROW.

Subsection 2 contains safety and aesthetic guidelines. It emphasizes undergrounding where possible and appropriate stealth enclosure/screening for equipment where undergrounding is not feasible. There are also safety requirements, height/size and distance limitations, and an express obligation to not create an ADA or FHA violation.

Subsection 3 sets out the additional findings that must be made, and then additional conditions of approval. The director is allowed to impose additional conditions that protect health, safety or prevent pedestrian/vehicle interference and damage to the right-of-way and adjoining property.

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[7] Subsection 1(a)(ii)(B) mentions "the Old Town overlay zone." This is a placeholder for any particular overlay zone in Malibu the Council may want to list as requiring stealth.

Subsection 4 provides instruction on how the director imposes conditions and the notice to be given.

Subsection 5 deals with contemplated moves, alterations, relocations, changes, and interference with nearby facilities and structures. The City must approve any such efforts and the applicant/operator must pay all costs and expenses.

Subsection 6 requires the applicant/operator to assume liability for damages and/or injuries and requires proof of authority to take the proposed action.

Subsection 7 addresses electric utility service to the site and any meter cabinets.

Explanation for Section F

Section F applies to "minor modifications" to existing facilities covered by the federal "Spectrum Act" that was part of the 2012 Middle Class Relief Act. Congress chose to limit local jurisdictions' authority over minor modifications. The FCC has promulgated rules to implement the federal law.

Subsection 1 notes that its purpose is to adhere to the federal requirements but retain and implement, to the fullest extent possible, the authority that remains.

Subsection 2 describes when the Section applies and lists the permits that may be required.

Subsection 3 requires a permit but allows the applicant to use the normal formal facility permit process or – assuming entitlement – the minor modification process.

Subsection 4 applies the application content requirements in Sections B and C, except where federal law requires an exception or waiver, and then supplements them to address issues particular to minor modifications. There are provisions for a form, a fee, the independent consultant deposit, and site, construction, visual and demolition plan requirements. It also requires the applicant to assert and prove entitlement to the minor modification permit process, provide copies of the relevant existing permits, a structural analysis and a noise study, and requires the applicant to provide the necessary notice. Finally, it allows the City to determine what other additional information is necessary and require that this information be provided.

Subsection 5 describes the application review, notice and hearing process. A significant issue is the federally-imposed "shot clock" and this Subsection details the rules for counting days and any allowed tolling of the clock.

Subsection 6 provides for director approval after hearing, but only if specific and express and detailed findings are made that the applicant is entitled to the permit.

Subsection 7 imposes conditions that will apply to any minor modification permit. Among them are "no automatic renewal," continued compliance with prior approvals, submission of as-built plans, and ongoing compliance with applicable laws and plans. It also addresses violations and then expressly states that if the federal Spectrum Act is invalidated or limited in material part, any permits previously granted expire after 12 months. Grant of permits is not a waiver of the City's rights to challenge the federal law.

Subsection 8 addresses denial, which shall be "without prejudice" to resubmission, under certain listed circumstances. It also provides that denial does not eliminate the City's right to recover fees.

Explanation for Section G

Subsection G applies to "small wireless facilities" permits. The FCC established this application type by rule in 2018. Generally speaking, the Commission limited local jurisdictions' authority over "small cell" applications in three primary areas: fees, aesthetic requirements, and processing time (the "shot clock"). The Ninth Circuit affirmed the rules on fees[8] and the shortened shot clock, but vacated the aesthetics rules. The ordinance does not set specific fees; rather it contemplates that the City will establish reasonable fees by separate resolution. The ordinance applies the FCC shot clock rules, and also impose some aesthetic requirements that might have not passed muster under the now-vacated rules but are allowed under the Ninth Circuit's decision. For example, the ordinance does require that installations "conform to the character of the neighborhood" in ways that vacated portions of the FCC rule would have prohibited but the Ninth Circuit deemed legitimate. *City of Portland*, 2020 U.S. App. LEXIS 25553 at *40.[9] Some might conclude the specific aesthetic requirements in Section G are too modest or ineffective. We observe that the City could choose even more expansive aesthetic requirements but the Ninth Circuit did hold that they must be "technically feasible and reasonably directed" at remedying aesthetic harms. *Id.* at 42-43.

Subsection 1 states Section G's purpose: that it is intended to apply the still-effective FCC small cell rules.

Subsection 2 requires that all related required permits be sought together. For example, if an encroachment, building, or electrical permit is also necessary then they must be simultaneously sought. The purpose is to fully understand the project scope and to ensure the City does all that the applicant claims is required within the times allowed by the FCC shot clock.

Subsection 3 specifies the required application contents. The applicant must use the City's prescribed form, include all relevant information required by Sections B, C, D and/or E, understanding that either D or E may not apply. The fee must be paid, along with the independent consultant deposit. Site and construction plans and surveys, visual and structural analyses, noise study and a sworn assertion, with proof, that the small cell rules apply must also be supplied. There is a provision allowing the City to require additional relevant information by posting the requirement(s) on the City's website.

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[8] The FCC fee rules did not set specific caps. It required that fees be based only on cost and established relatively low "safe harbor" presumptively-reasonable fees a City could adopt without fear of challenge. Malibu can therefore analyze its costs and set fees that recover those costs or it can choose to simply apply the safe harbor fees with full understanding that the City will very likely end up recovering amounts that fall far short of the actual cost.

[9] It does so by incorporating the general design standards in Subsection C(7), and in particular the aesthetic-related specifics in C(7)(c), several of which basically require conformity to the character of the neighborhood and otherwise require stealth.

Subsection 4 provides that – consistent with the FCC small cell rule – applicants can use a "batch" process, or simultaneously submit up to 5 separate applications for concurrent processing, subject to certain provisos. If the applicant does so and if any one of the batch is rejected for incompleteness or ultimately denied then, all applications in the same batch are also rejected or denied.

Subsection 5 requires that notice be given to all persons entitled to notice at the time of submission.

Subsection 6 details the application for review process and reaffirms that the FCC shot clock requirements will be met. If the director finds the application is complete then the director provides notice of the required hearing.

Subsection 7 addresses incomplete or defective applications. Consistent with the FCC rules the City has 10 days to identify any deficiencies in order to reset the shot clock.

Subsection 8 provides standards for the director to either approve or deny the application. The director must make specific findings of compliance and entitlement or the basis for any denial.

Subsection 9 builds on Subsection 8 and provides that the director can only approve the application if the director enters specific and individual findings on a series of discrete topics and requirements imposed by the ordinance.

Subsection 10 imposes conditions and provides that a permit is not automatically renewable. Any related prior permits remain in effect and must be obeyed. The permittee must submit as-built plans, comply with all applicable laws, rules, codes, and the approved plan, and must commit no violations, or it will face potential revocation. If the law changes after a permit is granted, the permit expiration date is shortened to one (1) year after the change.

Subsection 11 addresses denial without prejudice and provides for appeal or resubmission. It also clarifies that all fees remain due and cannot be recovered in the event of denial.

Explanation for Section H

Section H introduces a new topic: satellite earth stations other than the "OTARD" devices and direct-to-home and receive/transmit fixed satellite antennas addressed in Section I. These various types of devices are separately treated because they are subject to different FCC rules. The Section H devices are governed by FCC rules at 47 C.F.R. Part 25, whereas the Section I devices are governed by FCC rules at 47 C.F.R. 1.4000.

Subsection 2 implements the FCC part 25 rules that require a statement of purpose. It states the City's goals and preferences relating to stable economic and social environments, health and safety, and property values. It also generally requires that all subject antennas be designed, installed, and maintained in compliance with FCC regulations.

Subsection 3 states that if the use is entirely on the subject property and there are no cross-property boundary impacts, no permit is necessary for antennas/terminals

smaller than 1 meter in diameter. A permit is required for antennas/terminals larger than 1 meter. Administrative review is allowed for antennas/terminals between 1-2 meters, and a conditional use permit is required for any antenna terminal larger than 1 meter if it will be located in a designated scenic corridor.

Subsection 4 prohibits leakage of RF/EMF emissions across the property boundary. It recognizes that leakage onto someone else's property can be a nuisance and violate the adjoining property owner's property and bodily integrity rights. This restriction is permissible because in contrast to personal wireless services, federal law does not prohibit local regulation of Section H devices based on environmental effects. Nonetheless, if there will be cross-property effects, the owner can apply for a conditional use permit, after providing notice to nearby property owners – who would, in turn, have an opportunity to contest the application and assert their own rights.

Subsection 5 provides the application contents and required notice for those situations where a permit or clearance is required. All property owners within 300 feet shall receive formal notice.

Subsection 7 prohibits placement in front or side yard setbacks in any zone, and no antenna can itself cross the property line. This prohibition apples regardless of whether a permit or clearance is required.

Subsection 8 requires neutral paint colors, and compatibility with the surrounding neighborhood. This requirement apples regardless of whether a permit or clearance is required.

Subsection 9 mandates undergrounding of all wiring. Again, this requirement apples regardless of whether a permit or clearance is required.

Subsection 10 has specific and additional requirements for residential areas, independent of whether a permit or clearance is required. It requires ground mounting, in the back yard when that is technically feasible, limits height to 15 feet, limits installation to only 1 antenna per property or 1 antenna per dwelling in multiple family sites, requires a 6 foot wall, fence, or vegetation and when the antenna is taller than a property boundary fence it must be set back from the boundary by an equal length to the height of the antenna. Diameter is limited to 2 feet unless the director otherwise approves. Use must be only private and noncommercial.

Subsection 11 addresses nonresidential zones. Here the rules are somewhat relaxed in relation to residential zones although they do apply regardless of whether a permit or clearance is required. The antenna may be roof-mounted but must be screened in a manner approved by the director. Ground mounted antennas cannot be located between a structure and a public street and must be properly screened. Height and location must comply with any specific zone requirements. If the site abuts a residential zone, the antenna must be set back or screened.

Explanation for Section I

Section I addresses other wireless and satellite terminals, and specifically those covered by 47 C.F.R. 1.4000. If the installation meets all mandates, no permit or clearance is required.

Subsection 1 so recites, but clarifies that 1.4000 only applies when the listed equipment types are (i) within the exclusive use or control of the antenna/terminals user where the user has a direct or indirect ownership or leasehold interest in the property and (ii) the antenna/terminal serves only residents of the same residential or commercial property. If these conditions are not met, then the City's normal zoning laws fully apply.

Subsection 2 recites the equipment types. The descriptions come directly from the FCC rule. Subsection 3 defines "fixed wireless signals" for purposes of one of the equipment types.

Subsection 4 recites the purpose of the regulations, consistent with the FCC requirement that any regulation of these types do so. The recitation of purposes is the same as that in Section H. It goes on to require that design, installation and maintenance be FCC-compliant.

Subsection 5 is an interpretive tool. It is designed to ensure that the rules not be found to conflict with the FCC's effective rules.

Subsection 6 addresses size, height and numerosity limits, requires physical separation and setback from adjoining properties, restricts operation to only private noncommercial use and prohibits cross-boundary RF/EMF intrusions.

Subsection 7 allows for variances through the conditional use process. It requires notice to all property owners within 300 feet to allow them to object and assert their rights.

Explanation for Section J

Section J addresses amateur radio antennas. It allows installation without need for a permit or clearance if all requirements are met.

Sections 1-4 impose height limits and allow for ground or roof mounting but prohibit installation in front or side yard setbacks.

Subsections 5 and 6 allow for variances and prescribe the process and required notice.

Explanation for Section K

Section K is a stand-alone provision that gives notice that the City will not be liable if subsequent developments impair reception, transmission or function for any antenna type covered by Sections A-J.

Explanation for Section L

Section L designates the planning commission as the "commission" responsible for processing and hearing of all applications under the ordinance.

Explanation for Section M

Section M addresses a non-exclusive enforcement mechanism.

Subsection 1 allows the city attorney or prosecutor to bring a civil action. If the City prevails, the statutory damages allowed by Subsection 5(a)(ii) are trebled. Section

5(b) requires that damages awarded in any City-initiated action be paid to the general fund, unless the court finds they should be paid to a damaged third party.

Subsection 2 provides a private cause of action, if the action is brought within 60 days after the private enforcer gives notice to the City and the alleged violator and the City has not initiated an action in the interim.

Subsection 3 requires notice to the City and alleged violator within 7 days of filing.

Subsection 4 requires notice to the City of any proposed settlement. The City determines whether the settlement is reasonable and if it is deemed unreasonable, the City can block or set aside the settlement.

Subsection 5 provides for damages. Actual damages are recoverable. If actual damages cannot be proven, the ordinance grants statutory damages of $500 per day for any continuing violation. Damages cannot be recovered for the same violation if there was a prior successful action regarding that violation. Restitution is also available. Exemplary damages are allowed in cases of oppression, fraud, malice or conscious disregard for public health and safety. Attorney's fees and costs are also available.

Subsection 6 allows for injunctive relief or a judgment payable on condition of further violations.

Subsection 7 makes clear that a private enforcer is acting on behalf of the public and not in a private capacity. It also provides that the private enforcer can still bring a separate action to vindicate private rights based on other laws.

Subsection 8 clarifies the action can be filed in small claims court.

Subsection 9 reaffirms that the remedies are cumulative and not exclusive.

Explanation for Section M

Section M addresses hearing notices. It supplements and does not replace the other more general hearing rules for the planning commission and council in zoning related matters.

Subsection 1 prescribes distance boundaries for notices of hearing. Personal wireless service applications require notice to all property owners within 1,500 feet. Satellite, OTARD and amateur radio applications (when one is required) require notice to all property owners within 300 feet. Applicant is required to bear the cost of this hearing notice, which is separate from the initial notice already provided when the application is first filed.

Subsection 2 makes special provision for shortened notice when required to meet any applicable FCC shot clock rules.

Subsection 3 distinguishes between the initial notice in terms of voidability. An applicant's failure to provide proper initial notice of filing can void a permit, if granted. See Subsection B(3)(f). Failure to comply with the hearing notice required by Section M, on the other hand, does not, on its own, render any permit void or voidable, if and to the extent all other laws regarding notice have been followed.

Subsection 4 allows for appeals, consistent with applicable local, state or federal laws.

Explanation for Section O

Section O is the definitions section. Many simply recite the substance of state or federal legal provisions and others are technical in nature. Five in particular deserve highlighting because they provide the foundational premises for the most important criteria that will apply.

"Personal wireless service" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services. This is the definition used in the Communications Act in the context of local zoning. What is important is that the “covered” services and the protection afforded by most of the Communications Act’s preemptive provisions do not extend to Internet access, other data-only services that are not “covered” services or private mobile service.

"Significant gap," "Least intrusive means" and "In-kind call testing" all relate to the basic test for an actual need for the facility, and actual proven need to fill an existing gap is the linchpin. Unless the applicant can prove the facility is needed to fill a gap in personal wireless service, as opposed to mere supplementation or for Internet access, other data-only services that are not “covered” services or private mobile service, the City will ultimately experience widespread, unnecessary proliferation, with all the attendant negative impacts.

"Stealth facility" is a commonly used term relating to aesthetic considerations, actions and requirements. The definition addresses various means of concealment and/or efforts to obtain consistency with the surrounding environment.