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EXHIBIT 1 - STAFF REPORT

DATE: November 16, 2017
TO: McMinnville Planning Commission
FROM: Ron Pomeroy, Principal Planner
SUBJECT: G 4-17 Wireless Communications Facilities – Proposed Zoning Text Amendment – Chapter 17.55 (Wireless Communications Facilities)

Report in Brief:

This is a public hearing to review and consider a proposed zoning text amendment to Chapter 17.06 (Definitions) and Chapter 17.55 (Wireless Communications Facilities) of the McMinnville Zoning Ordinance. The proposed zoning text amendment is related to achieving a more desirable community aesthetic while ensuring code compliance with current Federal Communications Commission (FCC) regulations.

Background:

McMinnville's first Wireless Communications Facilities ordinance (Ordinance 4732) was adopted in June, 2000 as Chapter 17.55 of the McMinnville Zoning Ordinance. This is the first proposed amendment to that Chapter in the 17 years since its original adoption.

In February, 2017, the Planning Department presented the Commission with an overview of a three-year Department work plan to accomplish a number of projects along with estimated calendar targets of when you might expect to see those work products. One of the first-year identified projects is an update to the Wireless Communications Facilities chapter (Chapter 17.55) of the McMinnville zoning ordinance.

Discussion:

Currently, wireless communications towers located in Industrial zones have no height limitation. This has resulted in some towers being constructed into the 140 to 150-foot height range; the most recent being the towers intended to serve telecommunications companies that are currently being installed near the maintenance shop at the Yamhill County Fairgrounds and on property located south of Highway 18, north of the Airport hangers.

While the current code requires telecommunication antennas in residential zones and the historic downtown area to be obscured from view from all streets and immediately adjacent properties, there is little guidance as to how this should be accomplished. The current chapter also allows 20-feet of additional height to be added to antenna support structures in all zones except for the Agricultural Holding and Floodplain zones. Additionally, while co-location of antennas is required prior to the installation of new towers, there is little required to demonstrate the inability to co-locate and the need for a new tower to be installed.

Attachments:

Attachment A - Decision, Findings of Fact and Conclusionary Findings for G 4-17

In our review of this chapter, we considered the wireless facility requirements of other jurisdictions. In that review we found that, while many cities had not updated their wireless requirements for seven or more years, the City of Wilsonville's code was updated in 2016 and addressed many of the areas that have been a concern to the McMinnville Planning Department and has provided guidance for these proposed amendments. The key proposed modifications occur in the following areas:

- Height limitations
- Visual Impact
- Screening and Landscaping
- Color
- Signage
- Limitation on equipment building storage size and height; exceeding these standards would require the facility to be placed in an underground vault.
- Lighting
- Setbacks and Separation
- Co-Location – Burden of proof required
- Updated exemptions
- Application submittal requirements
- Noise
- Abandoned Facilities
- Review process and approval criteria

Staff provided a copy of the proposed amendments to the legal team of Beery Elsner & Hammond, LLP, for review and current FCC compliance; BEH specializes, in part, in municipal law & governance, and land use & development review, and is contracted with the City of McMinnville to provide legal counsel. Staff incorporated the resultant comments and recommendations from legal counsel in the draft amendments that were provided to the Planning Commission at their regularly scheduled July 20, 2017 work session. Following review and discussion of the draft, the Commission requested that this matter be presented for Commission review at a public hearing during their regularly scheduled August 17, 2017 public meeting.

Notice of the August 17, 2017 public hearing was published in the August 8, 2017 edition of the News Register newspaper. At the August 17, 2017 meeting, the Commission opened the public hearing on this item and received testimony. A memo from Community Development Director, Mike Bisset, and dated August 11, 2017, was submitted into the record (Decision Document: Attachment 4). The memo relayed a concern related to the City's continued ability to install and utilize Supervisory Control and Data Acquisition (SCADA) systems that remotely monitor and control pump stations. Modified code language was suggested during the staff presentation to address this concern. Written testimony (Decision Document: Attachment 5) and verbal testimony were also received from Patrick Evans, a representative of Crown Castle, relative to the proposed text amendments; Crown Castle is the nation's largest provider of shared wireless infrastructure. Following discussion, the Commission elected to keep the record open and continue the hearing to the October 19, 2017 Planning Commission public meeting.

Staff initiated additional conversation and review of the proposed amendments with Mr. Evans and incorporated some of that resulting dialogue into the draft code amendments presented to the Commission at the October 19, 2017 hearing on this matter. Additionally, staff reached out on August 18, 2017 to the other two largest national wireless communications purveyors, SBA Communications and American Tower Corporation, inviting review and comment on the proposed code amendment. No response from either of those two companies has been received to date.

At the October 19, 2017 Planning Commission hearing, a staff presentation was provided culminating with a request that the Commission leave the record open and continue the public hearing to the

Attachments:

Attachment A - Decision, Findings of Fact and Conclusionary Findings for G 4-17

November 16, 2017 Planning Commission public meeting. This recommendation was to allow time for additional legal counsel review of the recommended amendments, in particular the list of Federal Communications Commission (FCC) wireless communications exemptions recently incorporated into the draft recommendation. Following discussion, the Commission elected to keep the record open and continue the hearing to the November 16, 2017 Planning Commission public meeting.

On October 30, 2017, the Planning Department received additional email communication from Mr. Evans regarding the proposed amendments that were provided to the Commission at the October 19th public hearing (Decision Document, Attachment 6). Legal counsel was asked to review the observations offered and recommendations have been incorporated into the current proposed draft amendments to the Wireless Communication Chapter (Chapter 17.55) of the McMinnville Zoning Ordinance. Relevant summary responses to Mr. Evans' observations are offered below:

ADDITIONAL TESTIMONY

Email testimony was provided by Patrick Evans on October 30, 2017 as noted below in ***“bold italics”*** and attached to this Decision Document (Attachment 6). City responses follow each of Mr. Evan's observations. City responses include legal and staff evaluation and review.

“17.55.050(A)(4) Screening. I question the applicability of this section to WCF's in the Industrial Zone and would argue that the Industrial Zone, by its very nature, would not visually benefit from extensive and expensive screening, particularly vegetation.”

Response: Landscaping and/or screening requirements of wireless facilities is at the discretion of the local jurisdiction. No change is recommended.

“17.55.050(A)(5)(b) Color – Waivers of ODA/FAA marking requirements. I can assure you that a waiver will likely never be applied for nor granted...nor would a carrier want to take on the potential liability of an unmarked tower installation if called for by the FAA or ODA. Strongly suggest that you drop this requirement as it would apply only in Industrial zones anyhow.”

Response: From the perspective of maintaining and protecting aesthetic qualities of the City, there is value in this criterion (if the Council is so inclined to oversee those aesthetics). As it is was unclear how often such waivers (both for paint color and/or lighting) are granted by FAA/ODA staff contacted the FCC and together jointly reviewed FCC and FAA requirements on November 9, 2017. It was determined that tower facilities located within air hazard zones (locally, that would be the McMinnville Municipal Airport) must comply with both FCC and FAA color and lighting requirements.

“17.55.050(A)(8) Underground vaults. Again, based on 25 years experience, I would offer that under-ground vaults are highly impractical, prone to flooding and equipment damage and normally require a crew of 2 to open and enter due to OSHA hazardous gas requirements. Strongly suggest that any and all references to UGV's be eliminated as it will create an unneeded impediment to equipment installation. I'd focus instead on stealthing to the maximum extent possible including placement of equipment in adjacent yards or buildings.”

Response: The Council can consider including a provision allow for stealthing/screening when an applicant demonstrates that requiring an underground vault would be impractical/infeasible (high water table, shallow bedrock, etc.) and text to this effect has been incorporated into the draft amendments.

“17.55.050(A)(12) I would strongly suggest that the City is opening itself to potential liability by inserting itself into FAA issues. I would argue that the Planning Director lacks the expertise to get involved in whether, and to what extent, a tower should be lit. Dangerous area.”

Attachments:

Attachment A - Decision, Findings of Fact and Conclusionary Findings for G 4-17

Response: It is practicable to retain the first and last sentences and delete the middle portion of the previous amendment recommendation. In addition, staff has also added the terms State and Federal to this section as represented in the current draft amendments.

“17.55.050(B)(2) Setbacks. A 1:1 fall down radius combined with limits for WCF support structures to (almost) exclusively Industrial zones, virtually eliminates placement of new towers even in those industrial zones. Unless the Director and staff can point to a demonstrable hazard with WCF towers falling down, I would argue that this additional setback requirement is absolutely unnecessary.”

Response: This requirement is at the discretion of the local jurisdiction and no amendments are recommended. The safety concern is legitimate. The determinative question is more of a planning question than a legal question, specifically as to whether facilities can be potentially sited on some properties with this requirement imposed. It doesn't need to be “most” properties, so long as the potential to site exists on a reasonable number of properties with the setback requirement in place.

“17.55.060(A)(9)(b) Additional requirements for co-location. A site survey is a particular type of document and narrative produced by a professional surveyor and costs several thousand dollars. If what you are looking for is an accurate representation of the placement of the new equipment relative to the approved site plan, then please just specify that and leave out the word “survey”.”

Response: Staff and legal counsel recommend utilizing the language provided by Crown (such as “a detailed Site Plan as part of a set of drawings stamped by a Registered Architect or Professional Engineer”) and this has been provided in the current draft amendments.

“17.55.070(C). Public Meetings. First of all, the noticing requirement is not clear as applying to development of new WCF towers. The way it is written now, any permit, antenna support structure (whether otherwise complying with code) may be required to go through the noticing requirement which also appears to me to be discriminatory as I believe City Code does not require 1000' notice for other types of applications.”

Response: Not a concern as the intent of this additional public meeting requirement applies only to WCF which are defined as being specific to Towers (monopoles, lattice, etc.) and not Alternative Antenna Support Structures.

“17.55.070(E). There is no requirement anywhere for an “FCC Construction Permit”. There is a requirement for FCC registration (so called Antenna Site Registration). Please clarify or eliminate.”

Response: “Construction Permit” can be changed to “authorization” and the sentence can maintain applicability. This amendment has been incorporated into the draft amendments.

“17.55.070(G). Number of WCF. It is completely unrealistic to ask an initial applicant how many future WCF will actually be present on a fully developed site. The question asked earlier is to make certain that the WCF (and I assume you mean only a new tower) has the capacity for multiple co-locates. That is all that can be legitimately answered by the initial applicant. Anything else is a complete guess and likely serves no useful purpose.”

Response: This concern can be adequately addressed by adding “proposed” to the following sentence in the section: “The Application shall include a detailed narrative of all of the proposed equipment and components to be included with the WCF...” Staff does not recommend removing this provision, or the scope of any approval granted becomes unclear. As Crown notes and the proposed amendments

acknowledge, certain alterations are exempt under Federal law, and so the provision does not apply to those exempt alterations. This suggestion has been incorporated into the draft amendments.

“17.55.070(H) Safety Hazards. As I’ve said many times before, there are no identifiable safety hazards with the installation of a new WCF nor will the City ever get an applicant to identify “all known or expected safety hazards”. This section, which appears in no other Municipal codes in Oregon (other than perhaps Wilsonville) should be completely removed from the proposed draft.”

Response: Not an issue as staff contends that the City is within its legal authority to ask for identification of known or expected safety hazards. If an applicant is unable to identify any known/expected safety hazards, the applicant can simply say “None.” However, there is no legal basis for not asking an applicant to think about it and be proactive in that regard. Additionally, authority originates from City’s broad Home Rule powers under Oregon law. Specifically, the City has an interest in maintaining the health/safety/welfare and other “police powers” not otherwise pre-empted by the State or Federal governments.

“17.55.090(A)(2)(c). Owner’s Responsibility. Proposed code is only reiterating what is common law and the mere redundant presence in code appears to be raising an issue best left to the litigants and the courts.”

Response: Since referencing this private right of action, which currently exists between private parties, and is not actually creating a new legal right or managing an existing one, this section has been removed from the draft code amendment.

“17.55.090(B)(5). Signage is limited elsewhere in this draft to a single sign. Suggest you eliminate this reference in its entirety.”

Response: Not an issue. This section addresses contact information located on a cabinet and the previous mention of sign information is to be located on a perimeter fence

“17.055.100(D). I doubt if the City has a similar process for demolition of other commercial installations that go unused for an extended period of time...otherwise quite a number of buildings in downtown would be razed. I would suggest the City proceed cautiously in the taking of personal property from wireless carriers unless it is prepared to do same for all other unused commercial properties.”

Response: The City has broad authority in addressing abandoned structures/facilities that pose a potential risk to the health, safety and welfare of the community, pose as a potential attractive nuisance, and/or can contribute to blight.

Additional staff comments

There are a few considerations worth revisiting in Section 17.55.030.E (Exemptions):

Although the City’s regulatory authority is limited by the federal regulations, and a time limit of 60 days for review is also imposed, the City does retain some review authority over “eligible facilities” to be located within the City. Instead of providing a blanket exemption for such facilities as previously offered, the City could preserve the limited review authority that it does have as provided by the FCC regulations and require proposers to demonstrate that the facilities were in fact “eligible facilities.” To achieve that, it is recommended that the previously proposed exemption language of 17.55.030.E be modified to read:

- E. Modifications to Certain Existing Facilities that Qualify as “Eligible Facilities Requests” Under Federal Law. Any “Eligible Facilities Request” that does not “substantially change” the

Attachments:

Attachment A - Decision, Findings of Fact and Conclusionary Findings for G 4-17

physical dimensions of a WCF, as those terms are used and defined under 47 U.S.C. 1455(a) and implemented by 47 CFR Part 1.40001. Applicants shall submit applications consistent with Section 17.72.020 demonstrating that the proposed modification qualifies as an “eligible facilities request” under applicable federal law, and compliance with all applicable building and structural codes. Filing fees shall be paid by applicants pursuant to Section 17.72.030. All such requests shall be reviewed by the City pursuant to 17.72.100.

This proposed alternative Section 17.55.030.E language would preserve the City’s limited review authority consistent with Federal law.

Recommended Text Amendments:

The amendments being proposed to Chapter 17.06 (Definitions) are provided as Attachment 1 and the Amendments being proposed to Chapter 17.55 (Wireless Communications Facilities) are provided as Attachment 2 of the Decision Document with the existing text of Chapter 17.55 recommended to be repealed is provided as Attachment 3 of the Decision Document; the intent of this recommendation, if approved, is a full replacement of the existing Wireless Communications Facilities chapter (Chapter 17.55) of the zoning ordinance.

Fiscal Impact:

None

Commission Options:

- 1) Close the public hearing and recommend that the City Council **APPROVE** the application, per the decision document provided which includes the findings of fact.
- 2) **CONTINUE** the public hearing to a specific date and time.
- 3) Close the public hearing, but **KEEP THE RECORD OPEN** for the receipt of additional written testimony until a specific date and time.
- 4) Close the public hearing and **DENY** the application, providing findings of fact for the denial in the motion to deny.

Recommendation/Suggested Motion:

The Planning Department recommends that the Commission make the following motion recommending approval of G 4-17 to the City Council:

THAT BASED ON THE FINDINGS OF FACT, THE CONCLUSIONARY FINDINGS FOR APPROVAL, AND THE MATERIALS SUBMITTED BY THE CITY OF McMinnville, THE PLANNING COMMISSION RECOMMENDS THAT THE CITY COUNCIL APPROVE G 4-17 AND THE ZONING TEXT AMENDMENTS AS RECOMMENDED BY STAFF.

RP:sjs