BOARD OF SUPERVISORS
AGENDA LETTER

Clerk of the Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101
(805) 568-2240

Agenda Number:

Department Name:	Planning and Development
Department No.:	053
For Agenda Of:	December 1, 2009
Placement:	Departmental
Estimated Tme:	1 hour
Continued Item:	No
If Yes, date from:	
Vote Required:	Majority

TO: Board of Supervisors

FROM:

Department Director(s)	Glenn Russell Ph.D., Director, 568-2085 Planning and Development
Contact Info:	Dave Ward, Deputy Director, 568-2520 Development Review Division-South County

SUBJECT: **Briefing on Telecommunications Program and Current Projects**

County Counsel Concurrence
As to form: Yes

Auditor-Controller Concurrence
As to form: N/A

Other Concurrence: N/A
As to form: N/A

Recommended Actions:

That the Board of Supervisors:

1) Receive a briefing in the matter of the Santa Barbara County Telecommunications Program and current permit processing;

2) Provide further direction to Staff concerning potential amendments to the County's existing regulations for telecommunication facilities; and

3) Provide further direction to Staff concerning a possible moratorium on the approval of applications for the siting of wireless telecommunication facilities.

Summary Text:

Planning and Development provided a briefing on October 20, 2009, to generally discuss the permitting framework of telecommunications facilities. At this hearing, the Board directed staff to research process changes for the telecommunications program, including the potential for a moratorium to update the

ordinance provisions of Land Use Development Code (LUDC). This briefing is a follow-up to the items the Board discussed at the October 20th hearing. Specifically, this briefing will provide further discussion of a potential moratorium, the permit process, the public process, technical report requirements, franchise agreements and a potential work program for ordinance amendments. Under the LUDC, your Board is the final local appeal authority and therefore staff is not presenting merits of the individual projects, as this is not an appeal hearing.

Moratorium

Your Board directed Staff to explore the possibility of adopting a moratorium ordinance, which would allow the County to examine potential changes to its existing regulation of wireless communication antennas and towers. Courts analyzing mobile services zoning moratoria that were adopted immediately after enactment of the Telecommunications Act of 1996 generally began by asking whether a moratorium was "a necessary and bona fide effort to act carefully in a field with rapidly evolving technology." (See *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996).)

As is discussed at pages 4 through 5 of this Board Agenda Letter, the Federal Communication Commission's Declaratory Ruling of November 18, 2009 defines what is a presumptively "reasonable time," beyond which a local jurisdiction's inaction on a siting application constitutes a prohibited "failure to act" under 47 U.S.C. Section 332(c)(7). Section 332(c)(7) is part of the Communications Act of 1934, which was amended by the Telecommunications Act of 1996. The FCC's new definitions are likely to impact how courts will rule in future litigation over moratoria involving siting of wireless telecommunications facilities.

California Government Code Section 65858 generally allows local governments to adopt interim zoning moratoria, to prohibit uses that may be in conflict with a contemplated zoning proposal that they are studying or intend to study within a reasonable time. Section 65858 also provides that the moratorium and any extensions:

- Cannot exceed a total of two years, and
- Must contain findings that the approval of additional permits or other entitlements for the use prohibited by the moratorium would result in an immediate threat to the public health, safety, or welfare.

Courts analyzing mobile services zoning moratoria have looked at one or both of two separate limits on local zoning authority within the Telecommunications Act of 1996:

- The limitation from Section 332(c)(7)(B)(i)(II), that local zoning authority "shall not prohibit or have the effect of prohibiting the provision of personal wireless services;" and/or
- The limitation from Section 332(c)(7)(B)(ii), that local government shall act on any request to place or construct personal wireless service facilities "within a reasonable period of time after the request is duly filed…"

Using this framework, a United States District Court concluded in 2001 that a township's six-month moratorium was unlawful. (*APT Minneapolis, Inc. v. Stillwater Township*, No. 00-2500, 2001 U.S. Dist LEXIS 24610 (D. Minn. Jun. 22, 2001).) The court first considered reviews of telecommunications facility moratoria by six other courts. The court noted, for example, that another court had upheld the City of Medina's six-month moratorium, in 1996, which Medina enacted only five days after the Telecommunications Act of 1996 was enacted and when the city lacked a comprehensive tower ordinance. The court then concluded, however, that Stillwater Township's six-month moratorium was unlawful because the township adopted its moratorium:

- Almost five years after the Telecommunications Act of 1996 was enacted; and
- "[L]ong after it had already adopted a comprehensive regulatory scheme governing wireless communications facilities."

The *APT Minneapolis* decision would not be binding on a court in California and -- in 2001 and before the FCC's Declaratory Ruling of November 18, 2009 -- even left open the possibility that the Telecommunications Act did not absolutely preclude a narrow moratorium in which a local government continued to accept and process applications while the moratorium was pending.

The examples below provide a sample of how some California cities recently approached wireless telecommunication facility moratoria:

- On June 18, 2007, City of Pasadena adopted a 45-day moratorium on the approval of permits for the installation of "Ground-Mounted Commercial Wireless Facilities" in residential zoning districts. On July 30, 2007, City of Pasadena extended its moratorium for an additional 10 months and 15 days. On June 9, 2008, City of Pasadena extended its moratorium again for an additional twelve months. On May 18, 2009, City of Pasadena adopted an ordinance adding and amending chapters to the Pasadena Municipal Code concerning wireless telecommunications facilities. Staff's understanding is that before May 18, 2009 City of Pasadena had not previously amended its Municipal Code provisions concerning wireless telecommunications facilities since it adopted those provisions in 1997, which was the year after the Telecommunications Act of 1996 was enacted. Omnipoint Communications brought litigation in 2007 that challenged both Pasadena's moratorium and its denial of a Minor Conditional Use Permit to construct a commercial wireless facility in a residential zone. The Stipulated Judgment in 2008 in that case yielded Pasadena's approval of Omnipoint's application.

- On January 13, 2009, City of Glendale adopted a 45-day moratorium on the approval of permits for the installation of wireless telecommunication facilities in residential zones and public right of way areas within 1000 feet of any residential zone. On January 27, 2009, City of Glendale amended that 45-day moratorium to clarify the term "wireless facilities." On February 24, 2009, the City of Glendale extended its moratorium for an additional 120 days. On June 16, 2009, the City of Glendale extended its moratorium again for an additional twelve months, up to and including June 15, 2010. Staff's understanding is that City of Glendale has not amended its Municipal Code provisions concerning wireless telecommunications facilities since it adopted those provisions in 1996, which was the year in which the Telecommunications Act of 1996 was enacted. Staff also believes that, as of November 18, 2009 when this Board Agenda Letter was prepared, no party had initiated litigation yet against City of Glendale concerning its moratorium.

- On October 14, 2009, City of Agoura Hills adopted a 45-day moratorium on the approval of permits for the installation of wireless telecommunication facilities anywhere in the city. Staff's understanding is that City of Agoura Hills has not amended its Zoning Code provisions concerning wireless telecommunications facilities since it adopted those provisions in 1995, which was the year before the Telecommunications Act of 1996 was enacted. Staff also believes that, as of November 18, 2009 when this Board Agenda Letter was prepared, no party had initiated litigation yet against City of Agoura Hills concerning its moratorium.

Declaratory Ruling of November 18, 2009 by Federal Communications Commission

On July 11, 2008, CTIA – The Wireless Association® filed a petition requesting that the Federal Communications Commission issue a Declaratory Ruling, concerning provisions in 47 U.S.C. Sections 253 and 332(c)(7), regarding state and local review of wireless facility siting applications. On November 18, 2009, the Federal Communications Commission adopted and released its Declaratory Ruling in that matter, WT Docket No. 08-165.

Briefly addressing arguments that the FCC should deny CTIA's petition because of health hazards that commenters attributed to radiofrequency emissions, the Declaratory Ruling stated,

> …To the extent commenters argue that State and local governments require flexibility to deny personal wireless service facility siting applications or delay action on such applications based on the perceived health effects of RF emissions, this authority is denied by statute under Section 332(c)(7)(B)(iv). Accordingly, such arguments are outside the scope of this proceeding.

The first major part of the Declaratory Ruling defines what is a presumptively "reasonable time" beyond which a local jurisdiction's inaction on a siting application constitutes a prohibited "failure to act" under 47 U.S.C. Section 332(c)(7). The FCC found that a "reasonable period of time" is, presumptively:

- 90 days to process personal wireless service facility siting applications requesting collocations; and

- 150 days to process all other applications.

Accordingly, if state or local governments do not act upon applications within those timeframes, then a prohibited "failure to act" has occurred and personal wireless service providers may seek redress in court within 30 days, as provided in 47 U.S.C. Section 332(c)(7)(B)(v). The state or local government, however, would have the opportunity to rebut the presumption of reasonableness.

Within the first major part of the Declaratory Ruling, the FCC also adopted a general rule for currently pending applications that a "failure to act" will occur 90 days (for collocations) or 150 days (for other applications) after the November 18th release of the Declaratory Ruling. But, a party whose application already has been pending for the newly-established timeframes, or longer, as of the release date of the Declaratory Ruling, may, after providing notice to the relevant State or local government, file suit under

Section 332(c)(7)(B)(v) if the State or local government fails to act within 60 days from the date of that notice.

The second major part of the Declaratory Ruling concluded that a state or local government violates 47 U.S.C. Section 332(c)(7)(B)(i)(II) if they deny a personal wireless service facility siting application solely because that service is available from another provider.

The third major part of the Declaratory Ruling denied CTIA's request for preemption of ordinances that impose blanket variance requirements on the siting of wireless facilities. The Declaratory Ruling stated, "CTIA does not present us with sufficient information or evidence of a specific controversy on which to base such action or ruling," and concluded that any further consideration of blanket variance ordinances should occur within the context of specific cases.

Permit Process

The County Telecommunications Ordinance provides for a four tiered permitting system that requires: ministerial permits (staff level review) for small unobtrusive facilities; Director review (discretionary) for more visible facilities; and Zoning Administrator or Planning Commission review (discretionary) for larger, more complex projects. The theory behind this approach was that the review process for minor projects would be minimized and streamlined while still providing a higher level of review of larger projects. That is, as the size and complexity of the facility and potential for environmental impacts or policy inconsistencies increased, the decision-making body shifted upward (e.g., from the Director to the Zoning Administrator). Below is a table summarizing the tiers found in LUDC Section 35.44.010.C.

Project Level Tier	Zones Where Allowed	Permit Requirements	Review Authority
Tier 1 Project (Small antenna installed on an existing utility pole)	All zones	Coastal Development Permit or Land Use Permit	Staff
Tier 1 Project (Antennas entirely concealed within an existing structure)	Nonresidential zones	Coastal Development Permit or Land Use Permit	Staff
Tier 2 Project (Tenant improvements and architectural projections)	Nonresidential zones	Development Plan approved by the Director	Director
Tier 2 Project (Additions to existing structures or New structure within height limit)	Nonresidential zones, except not allowed in the Recreation (REC) zone	Development Plan approved by the Director	Director
Tier 3 Project (New structure exceeding height limit but not to exceed 50 ft.)	Nonresidential zones, except not allowed in the Recreation (REC) zone	Minor Conditional Use Permit	Zoning Administrator
Tier 4 Project (All others)	All zones	Conditional Use Permit	Planning Commission

The Federal Telecommunications Act precludes local jurisdictions from prohibiting or even having the "effect of prohibiting" telecommunications facilities. (47 USC § 332(c)(7)(B)9i)(II).) Staff's understanding is that this would include "blanket" prohibitions, such as prohibiting them in all residential zones. However, the County Telecommunications Ordinance already properly provides for design and additional permitting requirements for certain constrained development areas such as

residential and recreational areas. The County LUDC addresses siting of facilities through permitting tiers and development and processing standards, such as:

- **Setbacks from Residential.** For projects in Tiers 1-3, the base of any new freestanding antenna support system must be set back from any residentially zoned parcel a distance equal to five times the overall height of the antenna and support structure.
- **Permit Requirement for Residential Zones.** Facilities proposed to be located in residential zones (except for very small facilities that qualify under Tier 1) require a Major Conditional Use Permit under the jurisdiction of the Planning Commission.
- **Additional Coverage Demonstration Finding.** For significantly visible new freestanding antenna support structures in residential areas, the Planning Commission, in order to approve such a conditional use permit, must find that that the area proposed to be served by the facility would otherwise not be served if the facility were not allowed to be constructed.
- **Additional Noticing Requirement.** If the subject lease area is located within 1,000 feet of a lot with a residential zone designation and the application includes a new freestanding antenna that is visible from the surrounding area noticing must include residents and owners within 1,000 ft. of the subject lease area.
- **Permit Requirement for Recreational Zones.** Facilities proposed to be located in recreational zones (except for very small facilities that qualify under Tier 1) require a Major Conditional Use Permit under the jurisdiction of the Planning Commission.

Telecommunications facilities are ultimately regulated by the Federal Communications Commission (FCC), from whom carriers must obtain licenses. The FCC established federal health and safety standards including radiofrequency exposure limits with which all telecommunications facilities must comply at all times. In this regard, the County requires that all permit applications include a technical report by a qualified third party projecting whether the proposed project complies with the federal requirements for radiofrequency emissions. As with all project technical reports, including biological, archeological, historical, etc., these emissions reports may be subject to peer review in the event that staff determines additional clarification is warranted. Should peer review be determined to be necessary, the County requires the report be reviewed by an independent third party qualified professional.

Public Process

The County permitting process allows a number of venues for public involvement. Permit applications are now searchable on the County's website through the Citizen Access feature. This search engine allows the public to find information on permit applications including the project description and current project status. In addition to the Citizen Access feature, the County provides project-specific web pages for larger or more involved projects. The project-specific pages offer relevant project documents, graphics, hearing information and planner contact information. Additionally, project planners and supervisors are available by phone and email to answer more specific questions about current applications.

Noticing alerts the public in the vicinity of a proposed project to seek and obtain information regarding permit applications. Noticing requirements vary depending on the permit type and project location

(inland vs. coastal) however all noticing requirements generally provide for two forms of noticing 1) a posted notice, and 2) a mailed notice. The prototype for posted notices was just recently (August 2009) changed in the inland areas to a 24"x 36' format to increase visibility of the notice and public awareness of projects. In some cases, additional noticing is also provided in legal or display ads in local papers.

Lastly, the public may further involve themselves through the County appeals process. In the event that a member of the public disagrees with a permit action, for substantiated reasons, they may file an appeal of the permit decision. With the exception of Zoning Clearances, Revisions and Substantial Conformity Determinations, all permits are appealable. Appeal applications are reviewed and decided on by the appeal i.e. the Zoning Administrator, the Planning Commission or the Board of Supervisors, depending on the action or permit being appealed.

Franchise Agreement

Your Board directed staff to examine the County's franchise ordinance with Southern California Edison ("SCE") and determine whether:

- A separate franchise agreement is required or permissible before allowing a telecommunications provider to install facilities in the right-of-way; and

- Whether a telecommunications provider is entitled to attach its equipment to SCE poles and structures.

California Public Utilities Code Section 7901, and the sections following, establish a statewide franchise for telephone companies. As a result, staff understands that the County is preempted from collecting franchise fees from a telecommunications provider if that provider holds a Certificate of Public Convenience and Necessity issued by the California Public Utilities Commission ("CPUC"). Such providers are entitled to use public rights-of-way without charge under this statewide franchise.

The County Franchise Agreement with SCE provides at Section 2.5 that "Except in those cases where Grantee (SCE) is required by State or Federal law to provide access to its Facilities, use of Grantee's Facilities for any purpose other that the uses permitted by this Ordinance shall require notice and consent by County."

As allowed by federal law, the California Public Utilities Commission ("CPUC") regulates telecommunications activities within the state. CPUC Decision 98-10-058, known as the *Rights-of-Way Decision* ("the *Decision"),* regulates telecommunications access to electric utility poles. The *Decision* requires electric utilities to allow pole access to telecommunications providers possessing a Certificate of Public Convenience and Necessity from the CPUC.

Since the CPUC requires that SCE provides access on their poles to telecommunications providers possessing a Certificate of Public Convenience and Necessity, Staff understands that the provision of the County Franchise Agreement with SCE requiring notice and consent of the County is inapplicable, and that no franchise or other charge may be imposed on a telecommunications provider for the use of County rights-of-way.

Framework for Ordinance Amendment Work Plan

At the October 20, 2009 hearing, the Board requested that staff research potential amendments to the current Telecommunications Ordinance. Items suggested to be changed included such things as, requirements for additional noticing, provisions for requesting a public hearing on Tier 1 projects, and prohibition of cell sites around sensitive receptor areas, such as schools, daycares, etc.

The amendment work plan would include amendments to Article II/Coastal LUDC, the County Inland LUDC and the Montecito LUDC. Completing amendments to these ordinances would require staff to devote research, time and County resources at the direction of your board. Given the amount of litigation surrounding regulation of telecommunications facilities, this work effort would also require direct involvement by County Counsel staff.

There are generally five steps involved in processing an ordinance amendment:

1) Research other jurisdictions regulatory approach for potential changes to the County ordinance;
2) Public/Planning Commission outreach;
3) Preparation of the draft ordinance amendment;
4) CEQA process;
5) Hearing preparation/adoption; and
6) Coastal Commission hearing/adoption (for coastal portions).

With the involvement of both inland and coastal ordinances, completing this scope of work would be an involved process. Should your board support an amendment to the Telecommunications Ordinance, the Department would include this scope of work in the annual Planning and Development Departmental Work Program for the 2010-2011 fiscal year. Should your Board require a more expedited amendment process, resources necessary to carry forward the process, which are currently unavailable, would need to be identified.

Performance Measure:

N/A

Fiscal and Facilities Impacts:

Budgeted: Yes

Fiscal Analysis: Preparation of this Board briefing was unanticipated. The 50 hours of staff time is budgeted in the Permitting and Compliance Division of the Development Review South Division on page 308 of the adopted 2009-2010 fiscal year budget.

Staffing Impacts:

None.

Special Instructions:

N/A.

Attachments:

None.

Authored by:

Megan Lowery, Planner II

Development Review South

cc:

Anne Almy, Supervising Planner

G:\GROUP\Permitting\Case Files\CNS\09 cases\09CNS-00000-00032 NextG\BOS\2009.12.01 BOS\BOS Memo-Telecom Briefing 12.01.09.doc