



Legislation Text

File #: ID-390-18, **Version:** 1

Department of Community Development

Reference: Wireless Communications Facilities Code Amendment

To: Mayor Kenneth J. Kreutzer and Members of City Council

Through: Philip A. Rodriguez, City Manager

Marv Falconburg, AICP, Assistant City Manager

Holly Prather, AICP, Community Development Director

Prepared By: Mike Tylka, AICP, Senior Planner

Date Prepared: November 15, 2018

PURPOSE

City Council continued the proposed code amendment regarding Wireless Communications Facilities from their meeting on November 13th, 2018, to their meeting on November 20th, 2018. City staff has been instructed to work with the wireless communications industry representatives, some of whom spoke at the public hearing on November 13th, in order to further analyze their comments and to bring back a revised code amendment that takes their input into account.

As mentioned in the report for November 13th (see attached), the recommendation by City staff is to repeal Sections 12-16-200 through 12-16-270 that deal with 'Telecommunication Facilities' to repeal Section 17-20-140 titled 'Commercial Mobile Radio Service (CMRS) facilities' and replace it in its entirety with new text that includes a new title of 'Wireless Communications Facilities' (WCFs); and to amend the 'Table of Uses' in Section 17-32-30 as it pertains to WCFs.

STRATEGIC FOCUS AREA

Recognizable and Well-Planned Community

BACKGROUND

As further described in the report from November 13th (see attached), this code amendment is necessary as Colorado House Bill 17-1193 has already set standards for small cell facilities, and local municipalities are able to further set standards for these facilities to deal with placement, design, and the ability to address property, maintenance, and safety concerns.

City staff has worked diligently with our WCF code consultant, Brandon Dittman of Kissinger and Fellman, P.C., to analyze and make additional suggestions via the drafted amendment based on further communication with wireless communications industry representatives. These parties represent AT&T, Verizon, and T-Mobile.

CRITERIA BY WHICH COUNCIL MUST CONSIDER THE ITEM

Section 17-8-90 of the Land Use and Development Code addresses amendments to the Code, and allows the Community Development Director, City Manager, Planning Commission, and City Council the option to initiate text amendments. This code section outlines the process for review, recommendation, and adoption.

SUMMARY OF FINDINGS / STAFF ANALYSIS

City staff is not recommending any changes to our earlier recommendation to repeal Sections 12-16-200 through 12-16-

270. However, city staff is recommending changes to the previously provided draft of a repealed and replaced Section 17-20-140. There are some issues that have been raised where staff does not support the industry professional's stance, and there are others where staff is proposing a reasonable middle ground. The following outlines the major areas of change and recent conversation:

1. Industry representatives have taken issue with our use of aspirational language in the Purpose and Intent Subsection wherein the City would like to encourage the deployment of smaller, less intrusive WCFs (*Draft Sec. 17-20-140(a)(3)*). Industry representatives assert that this aspirational language tries to give advantage to one kind of technology over another, which the City is prohibited from doing by federal law. City staff believes that our language does not state an advantage to one technology over another and that our statement is merely aspirational, stating that we would like smaller facilities.
2. Industry representatives have raised concern over our use of aspirational guidance in the Purpose and Intent Subsection that states that the Code encourages the location of WCFs in non-residential areas in a manner that minimizes the total number of WCFs needed (*Draft Sec. 17-20-140(a)(6)*). They feel that the draft is making a binding statement. City staff feels that this language is only meant to provide interpretive and aspirational guidance, since the Code is clear throughout that small cells are allowed in residential areas. Our language is only to say that macro towers are discouraged in residential areas.
3. AT&T has questioned staff's proposed definition of 'Collocation' (*Draft Sec. 17-20-140(c)*). Staff does not support changing this, as this definition comes directly from the FCC Report and Order *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 F.C.C. Rcd. 12865, 12990 (2014).
4. Due to concern by industry representatives, City staff has changed the definition of 'Existing Tower' (*Draft Sec. 17-20-140(c)*) to eliminate the ability for conflicting interpretations.
5. T-Mobile has suggested that staff's proposed definition of 'Small Cell Wireless Facility' (*Draft Sec. 17-20-140(c)*) be modified to increase the allowable size for primary equipment enclosures from 17 cubic feet in volume to 28 feet. However, because our draft uses the state law definition, we will wait and incorporate whatever higher number is issued by the FCC once they issue their Wireless Order.
6. Industry representatives have expressed two concerns with the draft's definition of 'Substantial Change' (*Draft Sec. 17-20-140(c)*). The first concern was the draft's use of adding in 'Alternative Tower Structures in the Rights-of-Way (ROWs).' Industry representatives felt this was unnecessary and could cause conflict with classifications of structures in certain federal law. However, staff drafted this language to assist in the City's administration of the Code and feels that it does not impede the application of any federal law. Industry representatives' second concern was the draft's use of language describing undermining concealment elements. Staff's position is that the language used in the draft comes directly from an FCC order explaining the intent of what "defeat" means. This guidance language is consistent with the intent of the FCC's report and order and has proven to be necessary in the past due to some creative interpretations of "defeat" by some industry consultants in the past.
7. At the request of AT&T, City staff has removed the last line describing federal requirements from the earlier drafted Section 17-20-140(e)(1). This was done so as to not cause confusion as to who is authorized to have a WCF removed for violating a federal standard. AT&T was worried that the City was trying to enforce federal statutes.
8. AT&T took issue with drafted Sec. 17-20-140(e)(3), as they felt that it forced standards to be applied retroactively. Staff has added in the phrase "in effect at the time of original installation or modification" to eliminate this concern.
9. AT&T was concerned with the proposed removal period in drafted Sec. 17-20-140(e)(4) and recommended

increasing this period. Staff found no issue with increasing the removal period from 30 days to 60 days.

10. T-Mobile took issue with the draft's inclusion of undergrounding of equipment (*Draft Sec. 17-20-140(f)(2)(a)*), as they stated that it is not technically feasible. Staff believes that undergrounding is an option in some situations, and our consultant has assisted in sites where undergrounding was an option. Staff's proposed draft simply mentions that undergrounding may be an option.
11. Industry representatives expressed concern that the use of the language of "particular sensitivity" in drafted Sec.17-20-140(f)(2)(a)(1)) was too subjective for the purposes of the need for heightened camouflaging. The City's consultant feels that the draft's language is defensible. Staff is not recommending that this be changed, but has added in language to clearly state that the Downtown Historic District is an area of heightened importance.
12. Industry representatives expressed concern with draft language regarding collocation in the Design Standards subsection (*Draft Sec. 17-20-140(f)(4)*), since small cell collocation is not yet technically feasible. Staff has amended the draft language to ensure that collocation is carried out to the extent technically feasible.
13. Industry representatives took issue with the drafted language regarding landscaping requirements as they feel that certain areas may not warrant such a requirement (*Draft Sec. 17-20-140(f)(7)(b)*). The draft calls out that this requirement excludes small cells in the ROW for a buffer of plant material. As staff agrees that there may be a circumstance where the visual impact of a WCF would be minimal, staff has added language that the Community Development Director may reduce or waive this requirement.
14. AT&T called for small cells to be completely exempt from setback requirements (*Draft Sec. 17-20-140(f)(8)*). Staff's position is that setback requirements will not practically be a problem for small cells in the ROW except those which are required for sight lines and ADA access which cannot be waived. As such, staff has not changed this provision.
15. Industry professionals raised concern that the draft pushed rooftop antennas too far away from the edge of structures (*Draft Sec. 17-20-140(f)(9)(b)*). Staff feels that rooftop screening must be required, but has added in language that pushing equipment back from view shall be done to the "greatest extent technically feasible".
16. The height of roof-mounted panel antenna as stated at a maximum of six feet in the earlier draft of Sec. 17-20-140(f)(9)(b)(4)(3) has been requested to be increased by industry representatives. AT&T has requested ten feet and T-Mobile has requested eight feet. Staff has amended the draft to eight feet.
17. At the urging of industry representatives, staff has clarified the language in multiple lines of draft Sec. 17-20-140 (f)(9)(e) in order to ensure the City standards are easily understood.
18. Staff has agreed with industry representatives that the earlier drafted height extension limit to five feet can be increased to eight feet in the ROWs if the pole is under 40 feet in total height (*Draft Sec. 17-20-140(f)(9)(e)(9)*).
19. Staff does not support industry representatives' calls to eliminate or reduce the 600 foot spacing requirement in ROWs for WCFs (*Draft Sec. 17-20-140(f)(9)(e)(10)*). However, staff did add language to allow for the Community Development Director to reduce the requirement if the applicant demonstrates technical reasons with documentation or other factors such as topography or adjacent uses, as long as the intent of reducing visibility and visual clutter of WCFs is still met.

20. Staff has clarified language in Draft Sec. 17-20-140(f)(10)(b) to ensure that it is clear that 350 square feet of accessory equipment shall be allowed for each carrier as it relates to a specific WCF.
21. Industry representatives would like to remove the requirement that the applicant provide a list of both the applicant's existing sites in the City, as well as proposed sites for outside of the City within one mile of its boundaries (*Draft Sec. 17-20-140(g)(3)*). Staff does not support removing this provision. Also, the industry has strongly objected to staff asking for information on future sites. Staff has removed this provision from the draft. Additionally, staff has added language to state that the inventory will only be required from an applicant once per year in which they have submitted an application.
22. Staff has added language to Draft Sec. 17-20-140(g)(4) to further outline Administrative Review.
23. Staff has added in further procedures to clarify that the City's procedures for small cells in the ROWs follow state law (*Draft Sec. 17-20-140(g)(7)*).
24. T-Mobile stated that they would like 30 days instead of 10 from the time of notification to repair any damage (*Draft Sec. 17-20-140(g)(9)*). Staff has made this revision as it sees no problem with this request, since this is similar to what Council has approved with recent Conditional Uses for Cellular Towers.
25. Industry representatives requested changes be made to the Approval Criteria subsection to extend the height limitation to the top of poles and to reduce the ROW spacing requirement (*Draft Sec. 17-20-140(h)(1)(c)*). Staff updated the five to eight foot change as mentioned earlier, did not alter the 600 foot spacing requirement, and added in the Director's ability to reduce the spacing requirement if warranted.

City staff is not recommending any changes to our earlier recommendation to repeal and replace the applicable categories of the Table of Uses in Section 17-32-30.

PUBLIC NOTICE AND INQUIRY

Pursuant to Section 17-8-30(f)(2) of the Land Use and Development Code, a notice was published in the *Brighton Standard Blade* on October 24, 2018 (attached).

PLANNING COMMISSION RECOMMENDATION

The Planning Commission initially heard the request on September 25, 2018, at a public hearing and recommended unanimous approval at their October 9, 2018, meeting (see the attached Resolution No. 18-13).

STAFF RECOMMENDATION

Staff finds that the proposal meets the review criteria found in Section 17-8-90 of the Land Use and Development Code, and therefore recommends approval of this amendment.

A draft resolution has been provided to the Council should it decide to proceed with the code amendment as presented.

OPTIONS FOR COUNCIL CONSIDERATION

The City Council has four options when reviewing this amendment. City Council may:

- 1.) Approve the Ordinance on first reading as drafted;
- 2.) Approve the Ordinance on first reading with specific changes;
- 3.) Deny the Ordinance as drafted with specific findings to justify the denial; or
- 4.) Continue the item to be heard at a later, specified date.

ATTACHMENTS

- Revised Draft City Council Ordinance

- Copy of the Planning Commission Recommendation (Resolution No. 18-13)
- Newspaper Notice
- Newspaper Publication Proof
- Draft City Staff PowerPoint for City Council's November 20, 2018, Meeting
- City Staff Report for City Council's November 13, 2018, Meeting (Without Attachments)
- Draft City Staff PowerPoint for City Council's November 13, 2018, Meeting