

Introduced by: _____

ORDINANCE NO. _____

**AN INTERIM URGENCY ORDINANCE OF THE CITY OF PASADENA
TEMPORARILY PROHIBITING THE ISSUANCE OF PERMITS FOR THE
PLACEMENT, CONSTRUCTION, AND MODIFICATION OF GROUND-
MOUNTED COMMERCIAL WIRELESS FACILITIES IN RESIDENTIAL
ZONING DISTRICTS**

WHEREAS, the City of Pasadena (“City”) has adopted a Land Use Element to its General Plan and a Zoning Code (Chapter 17 of the Pasadena Municipal Code (“PMC”)) pursuant to its police powers to protect the public health, safety and welfare; and

WHEREAS, the Land Use Element sets forth policies and goals toward the protection of the residential character of Pasadena’s residential neighborhoods and the promotion of urban design which is compatible with Pasadena’s unique character and in context with surrounding development; and

WHEREAS, PMC § 17.50.310 currently governs the City’s regulation of wireless telecommunications facilities; and

WHEREAS, disputes have recently developed between the City and wireless providers, where the providers have asserted that they have legal authority to locate wireless facilities in the public rights-of-way pursuant to Public Utilities Code § 7901, free from land use regulation. The City disputes this interpretation of Public Utilities Code § 7901; and

WHEREAS, given the increasing use of business and personal devices relying on wireless facilities in society today, the City expects to receive applications for permits for “Ground-Mounted Commercial Wireless Facilities” (which include ground-mounted and partially above-ground fixtures, devices, and appurtenances for commercial wireless antennas) within residential zoning districts (1) in an increasing number; and (2) which facilities are significantly larger than most similarly situated existing installations; and

WHEREAS, given the rapidly evolving nature of the technology underlying wireless facilities, the increasing size of such facilities, and the expected encroachment of such facilities into the City's residential neighborhoods, the City must review and analyze its ability to implement the goals and objectives of its Land Use Element, potentially through development of new regulations relating to the placement, construction, and modification of Ground-Mounted Commercial Wireless Facilities in residential zoning districts; and

WHEREAS, the City recognizes its responsibilities under the Federal Telecommunications Act of 1996 and state law, and believes that it is acting consistent with the current state of the law in ensuring that irreversible development activity does not occur that would harm the public health, safety, or welfare; and

WHEREAS, the City Council finds that there is a current and immediate threat to the public health, safety, and welfare because, without this urgency ordinance, Ground-Mounted Commercial Wireless Facilities could be installed, constructed, or modified in residential zoning districts without conforming to the full intention to protect residential neighborhoods as set forth in the City's Land Use Element. This could lead to wireless facilities which:

1. Create land use incompatibilities, such as large lattice towers located in residential zoning districts;
2. Create visual and aesthetic blight or view interference due to excessive size, height, or absence of camouflaging;
3. Create traffic and pedestrian safety hazards due to unsafe location of poles, towers, equipment boxes, or other materials or construction;
4. Reduce property values;

5. Create operational conflicts with other land use or facilities authorized or existing on the same or neighboring sites; or
6. Deteriorate the quality of life in a particular community or neighborhood; and

WHEREAS, the City does not intend that this ordinance prohibit or have the effect of prohibiting telecommunications service; rather, it is a short-term suspension on new facilities until appropriate regulations can be developed.

NOW THEREFORE, the People of the City of Pasadena ordain as follows:

SECTION 1. The City Council finds that this ordinance is exempt from the California Environmental Quality Act (“CEQA”) pursuant to State CEQA Guidelines § 15060(c)(2) because it will not result in a direct or reasonably foreseeable indirect physical change in the environment, and pursuant to State CEQA Guidelines § 15262, because the ordinance involves only feasibility or planning studies for possible future actions which the City has not approved, adopted, or funded, and does not involve adoption of a plan that will have a legally binding effect on later activities.

SECTION 2. The provisions of this ordinance temporarily prohibit the issuance of permits for the placement, construction, and modification of “Ground-Mounted Commercial Wireless Facilities” in residential zoning districts pursuant to Title 17 of the Pasadena Municipal Code. “Ground-Mounted Commercial Wireless Facilities” is defined as ground-mounted and partially above-ground commercial wireless facilities, including, but not limited to, fixtures, devices, and appurtenances necessary to support wireless antennas.

SECTION 3. During the effectiveness of this ordinance, City staff is hereby directed to accept and process applications for permits for the placement, construction, and modification of Ground-Mounted Commercial Wireless Facilities in residential zoning districts to the point of decision on such pending applications.

SECTION 4. During the effectiveness of this ordinance, City staff is hereby directed to investigate the issue of Ground-Mounted Commercial Wireless Facilities in residential zones in consideration of the possible adoption of ordinances reasonably regulating such facilities in the interest of the public health, safety, and welfare, and existing legal requirements.

SECTION 5. The provisions of this ordinance shall not apply to:

1. New Ground-Mounted Commercial Wireless Facilities in the same location as existing facilities, which are required to repair, replace, or maintain such facilities, provided that the new facilities are substantially similar in size, shape, color, and exterior material.
2. Processing or approval of Ground-Mounted Commercial Wireless Facilities that are located outside residential zoning districts.

SECTION 6. This ordinance is additional to and supplemental to, and shall not affect, except as specifically provided herein, any provision of the Pasadena Municipal Code, which shall be operative and remain in full force and effect without limitation with respect to all such businesses.

SECTION 7. The City Council hereby declares that, should any section, paragraph, sentence, phrase, term or word of this ordinance, hereby adopted, be declared for any reason to be invalid, it is the intent of the City Council that it would have adopted all other portions of this ordinance irrespective of any such portion declared invalid.

SECTION 8. The City Clerk shall certify the adoption of this ordinance and shall cause this ordinance to be published.

SECTION 9. This ordinance shall be adopted and take effect upon publication, and shall remain in effect for a period of 45 days from the date of publication.

Signed and approved this _____ day of _____, 2007.

Bill Bogaard
Mayor of the City of Pasadena

I HEREBY CERTIFY that the foregoing ordinance was approved for adoption upon publication by the City Council of the City of Pasadena at its meeting held this _____ day of _____ 2007, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Date Published:

Jane L. Rodriguez, CMC
City Clerk

Approved as to form:



Javan N. Rad
Deputy City Attorney

LAW OFFICES

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REFER TO FILE NUMBER

290297-0137

VIA HAND-DELIVERY AND FACSIMILE (626) 744-3921

Bill Bogaard, Mayor
and Members of the City Council
City of Pasadena
117 E. Colorado Boulevard
Pasadena, CA 91105

Re: Letter in Opposition to Proposed Wireless Facilities Moratorium Ordinance

Dear Mayor Bogaard and Members of the City Council:

This law firm represents Omnipoint Communications, Inc. ("Omnipoint"), a subsidiary of T-Mobile USA, Inc., the applicant for Minor Conditional Use Permit No. 4808. The purpose of this letter is to present opposition to the City's proposed urgency ordinance ("Moratorium Ordinance"), adopting a moratorium on the issuance of permits for the installation of wireless telecommunications facilities in residential areas.

As shown below, the Moratorium Ordinance fails to satisfy the requirements of state law, and violates the federal Telecommunications Act of 1996.

1. The Proposed Moratorium Is Invalid Under State Law Because It Is Not Supported by Any Sustainable Findings.

California Government Code Section 65858 "Interim Zoning – Urgency Measures," which deals with the establishment of a moratorium, states: "The legislative body shall not adopt or extend any interim ordinance pursuant to this section unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety, or welfare."

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The proposed ordinance lists six reasons for adopting the moratorium. According to the ordinance, approval of wireless facilities in residential area will: "(1) create land use incompatibilities such as large lattice towers located in residential zoning districts, (2) create visual and aesthetic blight or view interference due to excessive size, height, or absence of camouflaging, (3) create traffic and pedestrian safety hazards due to unsafe location of poles, towers, equipment boxes, or other materials or construction, (4) reduce property values, (5) create operational conflicts with other land use or facilities authorized or existing on the same or neighboring sites; or (6) deteriorate the quality of life in a particular community or neighborhood."

The findings recited are not supported by any evidence. Further, the only specific example of "land use incompatibilities" cited in the ordinance are those presented by "large lattice towers," yet the ordinance on its face applies to applications for any kind of facility located in a residential zoning district, regardless of the type or visibility of the proposed facility. Finally, the City has failed to state any facts supporting a finding of urgency, or to explain why it is that the City's existing ordinance is not sufficient to address the conditions listed above, including "traffic and pedestrian safety hazards" and the undefined "operational conflicts."

2. The Moratorium Ordinance Violates the Federal Telecommunications Act of 1996.

Section 332 (c)(7)(B) of the federal Telecommunications Act of 1996 ("Telecom Act") provides for a limited preservation of local zoning authority; the exceptions to that authority are significant. The Act specifically prohibits certain local government actions, including, but not limited to:

- a. Unreasonably discriminating among providers of functionally equivalent services;
- b. Prohibiting or having the effect of prohibiting the provision of personal wireless services (see also 47 U.S.C. § 253(a), discussed below);
- c. Failing to act on permit applications for wireless service facilities within a reasonable time after submission of the application;
- d. Failing to support the action with substantial evidence.

(a) The Moratorium Ordinance Unlawfully Discriminates Among Service Providers.

Because the moratorium has the obvious effect of favoring providers who entered the market prior to enactment of the moratorium, the moratorium unreasonably discriminates

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among providers of functionally equivalent services, as prohibited by 47 U.S.C. § 332(c)(7)(B)(i)(I).

In addition to the discrimination resulting from the differential impacts of the ordinance on past and future facilities, the moratorium discriminates to the degree that it does not apply to other communications facilities, such as cable television, landline telephone, electrical power and traffic light equipment. See also Cal. Pub. Util. Code § 7901(b).

(b) The City's Reliance Upon Open-Ended Discretion Violates Section 253(a) of the Telecom Act.

Section 253(a) of the Telecom Act forbids state and local statutes and regulations that prohibit the provision of service. On its face, the moratorium constitutes a barrier to market entry, and therefore an unlawful prohibition. In addition, grounds such as "visual and aesthetic blight" or "view interference" are unavoidably subjective and ambiguous, and rest upon an open-ended scope of discretion that violates section 253(a) of the Telecom Act. See, e.g., *Sprint Telephony PCS, L.P. v. County of San Diego*, 479 F.3d 1061, 1075-76 (9th Cir. 2007). The same is true of the City's reliance upon the stated grounds that wireless facilities will "deteriorate the quality of life in a particular community or neighborhood," as well as "operational conflicts."

(c) Because the Moratorium Is Invalid Under State and Federal Law, Its Implementation Will Result in an Unreasonable Delay in the City's Processing of Telecommunications Facilities' Applications, and a Violation of the Telecom Act.

In *Sprint Spectrum, L.P. v. Jefferson County*, 968 F.Supp. 1457 (N.D. Ala. 1997), the Jefferson County Commission adopted a moratorium on the processing of applications approximately 14 months after the Telecom Act became law. The county cited *Sprint Spectrum, L.P. v. City of Medina*, 924 F.Supp. 1036 (W.D. Wash. 1996), a case affirming a moratorium, in its defense of Sprint's lawsuit.

The *Jefferson County* court declined to follow *Medina*, stating:

The facts of this case have little in common with *Medina*. The City of Medina issued its moratorium only "five days after the TCA became law." . . . In contrast, the Jefferson County Commission's third moratorium was issued approximately 15 months after the Act became law, and approximately 14 months after the Commission adopted a comprehensive regulatory scheme based on the requirements of the Act. Such a reaction can hardly

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be considered a "necessary and bona fide effort to act carefully."

Sprint Spectrum L.P. v. Jefferson County, supra, 968 F.Supp. at 1466.

The *Jefferson County* court ruled that the county's moratorium prohibited, or had the effect of prohibiting, the provision of personal wireless services, a local government action itself prohibited under 47 U.S.C. § 332(c)(7)(B)(i). There is no justification for the imposition of an ordinance by a City that has a wireless telecommunications ordinance already in place, especially where the subject ordinance is proposed eleven years after the enactment of the Telecom Act.

(d) Alleged Impacts on Property Values Will Not Provide Lawful Support for Enactment of the Moratorium Ordinance.

The City may not adopt a moratorium based on alleged impacts on property values. In light of the goals and prohibitions of the Telecom Act, the courts have looked with disfavor on denials of applications based upon purported decreases in property values -- and have summarily rejected denials based solely on generalized property value and aesthetic concerns. *See, e.g., Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir. 1999); *Sprint Spectrum L.P. v. Town of North Stonington*, 12 F. Supp. 2d 247 (D. Conn. 1998). Courts have done so, in part, because the consideration of alleged decreases in property values and aesthetics can too easily serve as a "proxy for the impermissible ground of environmental effects." *Town of Oyster Bay*, 166 F.3d at 496.

The courts have repeatedly rejected attempts by local jurisdictions to regulate placement of wireless telecommunications facilities based on generalized or speculative concerns. Instead, they require *evidence* beyond "unsupported and hypothetical potential" for such impacts. *See OPM-USA-Inc. v. Bd. of County Com'rs*, 7 F.Supp.2d 1316, 1324 (M.D.Fla. 1997); *see also Town of Oyster Bay*, 166 F.3d at 496 (2d Cir. 1999); *Town of North Stonington*, 12 F.Supp.2d at 254. A hypothetical fear of decrease in property value cannot be considered the basis of a threat of immediate harm, and therefore may not serve as a basis for enactment of the Moratorium Ordinance.

3. The Moratorium Ordinance Is Invalid for Failure to Create an Exception for Public Right-of-Way Facilities.

The ordinance makes no exception for facilities proposed to be located in the public rights-of-way. Because of the constraints imposed upon the City by §§ 7901 and 7901.1 of the California Public Utilities Code, which grants to telephone corporations such as Omnipoint a state-wide franchise to use the public rights-of-way for deployment of telecommunications systems, the City may not bar Omnipoint's access to the right-of-way on aesthetic grounds. Under § 7901.1, the City may regulate *only* the time, place and manner by

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which the right of way is accessed. On its face, the statute does not confer upon cities and counties a scope of discretion that reaches aesthetic factors. State law governs the weight to be accorded by the courts to the evidence relied upon by cities and counties in denying applications for the installation of telecommunications facilities. *Metro PCS, Inc. v. City and County of San Francisco* 400 F.3d 715, 725 (9th Cir. 2005); see also *Sprint PCS Assets v. City of La Cañada Flintridge*, 448 F.3d 1067, 1069, 1071-72 (9th Cir. 2006). Because aesthetic factors are entitled to no weight under state law, the City's reliance upon aesthetic factors as a basis for enacting the moratorium is unlawful.

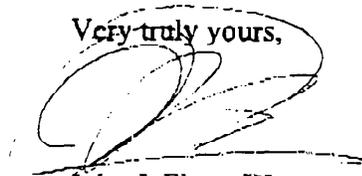
In addition, the right-of-way franchise system enacted by §§ 7901 and 7901.1 of the Public Utilities Code is fundamentally incompatible with a system of discretionary, conditional permitting, precisely the kind of permitting system assumed by the City as the foundation for its moratorium.

Finally, as stated, it seems unlikely that the City requires conditional use permits for placement of cable, landline telephone, electrical power and traffic light equipment. If that is the case, the City's ordinances and policies are discriminatory, in violation of § 332(c)(7)(B)(i)(I), § 7901.1(b), and the equal protection clauses of the California and United States constitutions.

4. Conclusion.

For the reasons stated within, we respectfully submit this letter in opposition the City's proposed moratorium on ground-mounted wireless facilities in residential zoning districts.

Very truly yours,



John J. Flynn III
of NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

JJF/mg

Enclosures