



City of Culver City

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Staff Report Details (With Text)

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Title: CC - Adoption of a Resolution, Denying Without Prejudice, T-Mobile's Application for a Proposed Wireless Telecommunications Facility in the Public Right-of-Way West of 10876 Culver Boulevard.
Sponsors:
Indexes:
Code sections:
Attachments: 1. 2018-08-27_ATT 1_First Application Submittal.pdf, 2. 2018-08-27_ATT 2_First Notice of Incomplete.pdf, 3. 2018-08-27_ATT 3_Second Application Submittal.pdf, 4. 2018-08-27_ATT 4_Second Notice of Incomplete.pdf, 5. 2018-08-27_ATT 5_City Letter April 30_2018.pdf, 6. 2018-08-27_ATT 6_Tolling Agreement May 14_2018.pdf, 7. 2018-08-27_ATT 7_City Email July 26_2018.pdf, 8. 2018-08-27_ATT 8_Proposed Resolution of Denial of Application.pdf

Date	Ver.	Action By	Action	Result
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CC - Adoption of a Resolution, Denying Without Prejudice, T-Mobile's Application for a Proposed Wireless Telecommunications Facility in the Public Right-of-Way West of 10876 Culver Boulevard.

Meeting Date: August 27, 2018

Contact Person/Dept: Sammy Romo/PW; Roland Miranda/City Attorney's Office

Phone Number: 310-253-5619; 310-253-5660

Fiscal Impact: Yes ☐ No ☒ **General Fund:** Yes ☐ No ☒

Public Hearing: ☐ **Action Item:** ☐ **Attachments:** ☒

Commission Action Required: Yes ☐ No ☒ **Date:**

Public Notification: (E-Mail) Meetings and Agendas - City Council (08/21/18);

Department Approval: Charles D. Herbertson, Public Works Director/City Engineer (08/21/18)

RECOMMENDATION

Staff recommends the City Council adopt a resolution denying without prejudice a wireless

telecommunications facilities permit application filed by T-Mobile West for the installation of a wireless telecommunications facility, including accessory equipment and new free standing pole in the public right-of-way west of 10876 Culver Boulevard.

BACKGROUND

Procedural Background

On September 29, 2017 T-Mobile West submitted an application for a permit for a proposed wireless telecommunications facility (Attachment 1) pursuant to Culver City Municipal Code (CCMC) Chapter 11.20. For this type of wireless telecommunications facilities application, the Federal Communications Commission (“FCC”) has established that 150 days is a presumptively reasonable period within which a municipality has to render a decision on this type of wireless telecommunications facilities application (“FCC shot clock”). A failure to act within this 150-day FCC shot clock period will place the city at risk of a claim by the applicant that the application has been “deemed approved” under state law, as discussed further below in the *Legal Background* section of this report.

After initial review of the application, the City issued a timely Notice of Incompleteness (NOI) on October 28, 2017 (Attachment 2) and T-Mobile West resubmitted the application on January 17, 2018 (Attachment 3). In response, the City issued a second NOI on March 6, 2018 (Attachment 4).

With the FCC shot clock deadline for City action approaching and having received no response to the City’s second NOI, on April 30, 2018 the City wrote to T-Mobile West, requesting the parties agree to toll the shot clock if T-Mobile West intended to respond to the City’s second NOI, and requesting a response from T-Mobile West no later than May 4, 2018 (Attachment 5). No response was received by May 4th so a resolution to deny this application was placed on the agenda for the City Council meeting of May 14, 2018. A related courtesy notice was sent to T-Mobile West on May 10, 2018. T-Mobile West then asked the City to withdraw the resolution of denial from the City Council agenda of May 14th and to execute a tolling agreement, to facilitate T-Mobile’s continued pursuit of this application. The City agreed and the parties then entered into an agreement tolling the expiration of the FCC shot clock until September 11, 2018 (Attachment 6).

Unfortunately, since the parties entered into the above-referenced tolling agreement, there have been no further efforts by T-Mobile to complete this application. Prior to placing tonight’s proposed resolution denying T-Mobile’s application on the City Council agenda (for a second time), staff contacted T-Mobile and its two representatives by email on July 26, 2018 and asked them to confirm, by August 8, 2018, whether T-Mobile was still interested in pursuing this application (Attachment 7). To date, staff has not heard anything further from either T-Mobile or its representatives.

In summary, T-Mobile West’s application, submitted more than ten months ago, remains largely incomplete and contains inconsistent information. T-Mobile West has shown little interest in seriously pursuing the application. In the City’s second NOI, the City identified the continued deficiencies and inaccuracies in the application documents. These deficiencies have not been addressed by the applicant in the more than five months since the second NOI was sent and despite entering into a tolling agreement for that very purpose.

T-Mobile’s Proposed Project

T-Mobile West is proposing to install a wireless telecommunications facility to provide personal wireless services (principally voice services) as well as data services to its wireless customers in the vicinity.

The proposed project would include the installation of a new free standing pole in the public right-of-way, just west of 10876 Culver Boulevard. The new pole would stand 30 feet in height and include a radome measuring three feet in diameter and housing three antennas. The proposed project would also include two ground mounted cabinets and a power pedestal placed above ground approximately 25 feet from the new pole. The power pedestal would be 48 inches in height, 16.25 inches in width and 17 inches in depth. The cabinet, referred to as the “boxer cabinet” in the plans, would be 22.5 inches in height, 25.5 inches in width and 22.5 inches in depth. The largest proposed cabinet would be 57 inches in height, 51.18 inches in width and 27.5 inches in depth.

Legal Background

The City regulates telecommunications public utility infrastructure in public right-of-way pursuant to its police power authority. Public Utility Code Section 7901 establishes a statewide franchise which allows telecommunications companies, including wireless companies like T-Mobile West, to install telecommunications infrastructure in the public rights-of-way. However, that franchise is subject to important limitations: 1) Installations must not “incommode” the public use of the public right-of-way (in determining whether a proposed installation will incommode the public’s use of the public right-of-way, municipalities may consider aesthetic impacts); and, 2) access to the public right-of-way is subject to the City’s exercise of reasonable time, place and manner controls.

Further, Public Utilities Code Section 2902 protects a local government’s right “to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets...within the limits of the municipal corporation.”

Pursuant to CCMC Chapter 11.20, telecommunications companies must submit a telecommunications application and obtain an encroachment permit from the City Council prior to installing any telecommunications infrastructure in the City’s rights-or-way. For wireless installations, the City’s application process requires submission of information needed in order for City staff to evaluate the application and make a recommendation to City Council.

Further, among other requirements of 47 U.S.C. 332(c)(7), the City must act on wireless telecommunication facilities applications within a “reasonable period of time.” The FCC has established certain time frames deemed to be “reasonable period[s] of time” within which municipalities are supposed to make their decisions regarding any wireless telecommunication facilities applications. These time frames are referred to as the FCC shot clocks. Per the FCC, the shot clock for applications seeking to place a new wireless facility, such as the T-Mobile West’s proposed project, is 150 days.

Under state law (Gov. Code 65964.1), if a city or county fails to render a decision regarding a wireless application within the applicable FCC shot clock, an applicant may, in certain circumstances, rely on that failure to then assert that their application be “deemed granted.” Any applicant asserting that their application has been “deemed granted” must first provide written notice to the municipality

that the applicant is asserting that their application has been deemed granted because of the expiration of the applicable FCC shot clock. Municipalities may then challenge a “deemed granted” assertion only by seeking judicial review within 30 days of receiving such notice.

Finally, federal law does not permit a denial that would result in an effective prohibition of personal wireless services. Key elements of the effective prohibition standard are whether there is a “significant gap” in personal wireless services and whether the applicant has shown that it has proposed the least intrusive alternative for closing the significant gap identified, after consideration of alternatives.

DISCUSSION

The area of Culver Boulevard where the proposed wireless telecommunications facility would be placed has existing residential and commercial developments. Consistent with the City’s aesthetic values, the street is lined with carefully chosen landscaping and hardscape. In the vicinity of proposed project, there are existing utility poles and street lights.

The subject location is within the City’s Open Space General Plan designation, intended to regulate, protect, and preserve publicly accessible land that is well suited for active recreation, amusement, relaxation, and/or scenic viewing. Any private development within the Open Space designation is subject to a Comprehensive Plan, addressing how the development encourages and promotes a desirable park development, and open space preservation that is compatible with surrounding neighborhoods, and protects the quality of life. In accordance with the City’s General Plan Land Use Element, Open Space includes landscape areas within or adjacent to public rights-of-way, streetscape improvements, and desirable urban design features which visually link neighborhoods and businesses throughout the City. This includes parkways, medians, and other land within the public view. The proposed wireless project is immediately adjacent to single family residential properties, neighborhood commercial, as well as a public park. The proposed project detracts and negatively impacts the linkage between the neighborhood commercial, residential, and park space by obstructing the visual continuity between the uses and small scale development in the immediate vicinity.

The area of the proposed project is characterized by low level single or two story buildings with wide parkways on either side of Culver Boulevard and down the middle of the street. The parkways and median are dressed with pine trees and a backdrop of creeping vines, bushes, and ground shrubs. The proposed mono-pole is not compatible with the character of the landscaping, use, and visual aesthetic of the parkways and streetscape.

As proposed in T-Mobile West’s application, the proposed project is inconsistent with the aesthetics of the immediate area. As can be seen in the photo simulations (Exhibit H1d of Attachment 3), the new pole, with a large radome, is visually obtrusive and aesthetically unpleasing, as it is unlike any other public right-of-way infrastructure in the area. Based on the application documents, the applicant’s attempt to stealth the wireless telecommunications facility by housing the antennas in a radome (which is intended to conceal the panels and cables) is insufficient in part due to the large diameter of the radome, making it more visible than a slimmer radome (such as a radome that is similar in size to the pole diameter). From the application documents it is unclear why it is necessary to install such a large radome.

In addition, the proposed project of large equipment boxes above ground is visually obtrusive and would negatively impact the public right-of-way and the aesthetic quality of Culver Boulevard because it would conflict with the carefully designed right-of-way detailed above. While the applicant proposes to install some landscaping to obscure the boxes, there is no landscaping depicted in the photo simulations. The boxes proposed are large and obtrusive. In addition, the applicant would be required to remove existing landscaping and maintain the new landscaping. The City has requested that the applicant provide detailed information about both removal and maintenance but the applicant has not responded to this request.

Based on all of the concerns detailed herein and based on the limited information provided by the applicant, the proposed project is generally out of character with the surrounding uses and right-of-way infrastructure.

Further, the application documents fail to include, among other information, a noise study and structural integrity calculations that are necessary to fully consider the proposed wireless telecommunications facility's possible impacts on the convenience and safety of the general public.

When the applicant fails to provide the information requested in the wireless telecommunications facilities application, the City cannot readily determine if the proposed project should be granted an encroachment permit. Through the NOIs, the City has identified significant deficiencies with the application documents. Based on the documents that have been provided to the City thus far, the proposed project is not consistent with the City's standards. The City has twice requested the documents needed to make an informed decision but, unfortunately, T-Mobile West has not provided the needed information.

Recommended Action

Based on all of the foregoing, City staff recommends the City Council deny T-Mobile's application without prejudice.

In light of the above, the only remaining question is whether approval should nevertheless be recommended because denial would result in an effective prohibition under 47 U.S.C. Section 332(c) (7)(B)(i)(II). City staff does not believe a finding of effective prohibition can be made based on the record. Inconsistencies in the application documents are notable. T-Mobile West's application documents do not adequately justify the need for the installation of a new pole and despite the City's multiple requests for detailed information justifying the need for the proposed project, T-Mobile has failed to provide that information. For example, at Section III, question 5 of the City's form application, T-Mobile West indicates that there is no "significant gap" in services to be filled by the proposed project. By contrast, Exhibit C2 of the application purports to establish that, in fact, there is a significant gap. Hence it is unclear if the applicant is claiming a significant gap or not.

Further, a key element of effective prohibition standard is whether an applicant has shown that it has proposed the least intrusive alternative for closing the identified gap, after consideration of alternatives. Placement of a new pole for the proposed wireless telecommunication facility is obviously the most intrusive alternative because there is other vertical infrastructure potentially available in the public right-of-way on which the proposed wireless facility could be installed. T-Mobile West's application contains an alternative site analysis that identifies private property alternatives and indicates that the landlords were unwilling to lease space for the proposed project. T-Mobile West also alleges that a nearby streetlight is insufficient due to potential interference. However, T-Mobile

West fails to explain why the proposed project cannot be located on other existing infrastructure in the public right-of-way. Thus, even assuming there is a significant gap, given that applicant has not shown it considered other possible locations or designs at the proposed site that would be less intrusive, an effective prohibition finding is not warranted.

As this recommendation is for a denial without prejudice to reapplication, there will be a full opportunity to revisit the effective prohibition issue, if necessary, in light of evidence and alternatives the applicant may present on resubmission of this application.

FISCAL ANALYSIS

There is no fiscal impact to the City.

ATTACHMENTS

1. First application submittal dated September 29, 2017
2. First Notice of Incomplete dated October 28, 2017
3. Second application submittal dated January 17, 2018
4. Second Notice of Incomplete dated March 6, 2018
5. City Letter dated April 30, 2018
6. Tolling Agreement dated May 14, 2018
7. City Email dated July 26, 2018
8. Proposed Resolution of Denial

MOTION

That the City Council:

Adopt a resolution denying without prejudice the application for a proposed wireless telecommunication facility to be installed in the public right-of-way west of 10876 Culver Boulevard.