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## Orinda moves toward 5G cautiously, fearing suit

*By Sora O'Doherty*

Orinda is moving toward taking the steps required by the federal government to implement small cell technology, otherwise known as 5G, but hopes to do only the minimum to prevent the city from being sued.

Attendance was low at the Sept. 17 city council meeting, the second on the subject, with those speakers who did attend expressing concerns about safety of the new technology. The council also heard from Dante Williams, a representative of Verizon, and Kathleen Schwallie, an attorney who addressed controversial elements of the proposed approval process.

Outside counsel Trip May of Telecom Law Firm was present to explain to the council and the public the progress being made to meet recent federal regulatory requirements that eliminate city discretion on approval of 5G applications. With only three council members present, an ordinance was introduced and first reading was waived. At an upcoming meeting, the ordinance will go to a second reading, and the resolution that contains the policy on small wireless installations will come back to the council with the changes the city council discussed.

May explained that the ordinance amends Orinda's municipal code, adding chapter 12.10 on small wireless facilities in the public rights-of-way, and amending chapter 17.34 by adding two new sections on eligible facilities requests and small wireless facilities in the public rights-of-way. The resolution includes an approved pole license agreement form, and authorizes the city manager to execute agreements for the installation of small wireless facilities on city-owned vertical infrastructure in the public right-of-way.

May reiterated his remarks at an earlier meeting that changes in state and federal law affect the city's ability to regulate small wireless facilities. If eligible 5G facilities meet certain federal criteria the city must approve them and if the city fails to act, May explained, the law deems them granted anyway. He added that there is "not a lot of clarity" about what would happen if a facility were deemed approved owing to inaction by the council. New section 17.34 gives the criteria that allows staff to determine if an application qualifies for this type of treatment. If it does, May says, the section sets out a process by which the application can be approved, with the conditions that the city would normally apply, to avoid any problems with the deemed approved remedy. Co-locations and modifications to existing structures are approvable "by right," he added.

"Small wireless facilities" is a special regulatory term adopted by the FTC, but they are not necessarily small, May explained. The federal requirements include a shorter "shot clock" (timeline for approval), and the city cannot apply subjective criteria. There are also limitations on fees, essentially taken such facilities out of the zoning process. The federal government is, according to May, asking cities to handle them faster with less authority to change them and with fewer resources.

He did note that these rules are subject to a legal challenge, in which Telecom Law Firm is representing the League of California Cities and several other cities, but it has not yet been decided; May suggested that there might perhaps be a decision by the middle of next year. May talked about various cases concerning the health risks of radio frequencies. There are a lot of different agencies that can challenge the statute, he said, but not the city. He added that he expects that in the next month or two the FCC will declare 5G to be perfectly safe.

After discussions with stakeholders both from industry and the community, some changes have been made. The more notable include: More detailed application requirements, including an affidavit under penalty of perjury that the radio-frequency compliance statements are correct; requiring an environmental impact statement (what level of CEQA treatment a project is required to undergo); requiring a structural analysis and making some changes to the pole license agreement allowing some flexibility in how it is implemented.

Community meetings, May said, while strongly encouraged, would trigger the shot clock and would therefore have to be voluntary. Pre-submittal appointments for the applicant, are also encouraged.

Following submittal of a detailed application, notices will be mailed to all properties within 300 feet of the proposed site. If the application meets the requirements and is in compliance with radio-frequency rules, it will be approved by the public works director. Following approval, any interested party may appeal within seven days. The only basis for an appeal is if the facility is not compliant with FCC rules. For other issues, such as a facility not being compliant with noise requirements, not maintaining their records, or not cleaning up their facilities, the city has the ability to bring enforcement actions.

Mayor Inga Miller noted that while she supported the resolution, the city was put into a difficult position by the federal government on a hard issue. Vice Mayor Darlene Gee agreed that it was a challenging balancing act. "We can't just refuse [applications] or we'll be sued, and we can't afford to defend suits," she said. But she suggested that the city can raise issues with the state and federal governments and, over time, see how things go.

Other items that were discussed included the method of notice to the public and whether or not there should be a comment period before the director makes a decision. It was decided that the Orinda Outlook could be used for widespread notice of 5G applications, and that notices can also be posted on the specific poles on which the facilities are proposed to be added, so long as the notices are also later removed. May explained that the very short time frame would make it very difficult for staff to act on applications if there were a pause for comments before approval, although he added that it wasn't impossible to implement. Verizon representative Dante Williams expressed the company's concerns about subjective criteria, and said the company would prefer a straightforward checklist approach. Some conditions, he suggested, could make it infeasible to cover all of Orinda. Undergrounding may be technically infeasible.

Attorney Kathleen Schwallie appreciated working with the staff. She was pleased with the suggestion that the internet could be used for notice. "That would be the cheapest and easiest," she said, adding, "We do not want to create more complexity." She still favored a comment period before approval, but suggested perhaps four days instead of seven. She also talked about potential conflicts between these regulations and the Americans with Disabilities Act. "Although there is a very limited time to do a complex job," she urged, "it shouldn't limit the right of the public to participate. The public can raise the issues, the council can then decide."

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