



# Office for Community Technology

## WIRELESS BACKGROUND INFORMATION—FAQ Office for Community Technology (OCT) – Updated 4-2013

### GENERAL BACKGROUND

The City's Broadband Strategic Plan<sup>1</sup> recognizes broadband networks as fundamental infrastructure to the future of Portland's citizens and businesses. Such broadband networks rely upon both wired and wireless telecommunications technology for both infinite capacity and mobility and connectivity. More and more Portlanders are relying upon cell phones, smart phones, and the wide range of wireless devices available instead of using landline phones and wireline internet connections. The Federal Communications Commission estimates that wireless phones are the source of over 70% of calls to the 9-1-1 emergency communications center,<sup>2</sup> and federal surveys show that more than one third of Americans have dropped their landline phones completely (35.8%).<sup>3</sup> Dependable access anywhere and everywhere, without signal loss, is viewed by many as essential to their daily lives. As the technology is mobile, access to the technology has very little to do with demand or interest in any particular neighborhood. It has far more to do with the right and ability of the carrier to provide an adequate signal to mobile users wherever those users happen to be in the service area, regardless of neighborhood. Reliable wireless access depends upon signal availability. Increasing numbers of wireless users, wireless devices, and data traffic means more antennas are necessary to provide reliable signals. Unsurprisingly, there is some debate in the community about the placement of wireless sites. Some citizens prefer such facilities be located away from residential neighborhoods. They cite sincerely-held concerns about potential health impacts, aesthetic issues, and property values. There are others who support wide availability of access to wireless choices, and regard such availability, along with good connections and competitive pricing, as an asset to the City and its neighborhoods.

### LEGAL LIMITATIONS

- All wireless carriers have a legal right under federal law to offer wireless services with adequate signal quality anywhere within the geographic area where the carrier is licensed.
- A wireless carrier has basic legal authority to place antennas to provide service to fill a coverage gap. The antenna placement decision itself is an engineering decision related to quality of signal/service.

<sup>1</sup> <http://www.portlandoregon.gov/revenue/57451>

<sup>2</sup> <http://www.fcc.gov/guides/wireless-911-services>

<sup>3</sup> <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.PDF>



- Under federal law, no state or local government can “prohibit or effectively prohibit” the offering of wireless services in any area where the carrier is licensed. See *Communications Act*, 47 USC 253(a).
- Federal law prohibits the City from making decisions modifying or denying any wireless sites based on allegations regarding human health impacts (47 USC 332(c)(7)). Arguments regarding effects on property values are mixed at best, and nothing in the statutes or case law indicates the City can legally take these arguments into account when making wireless siting decisions.
- Wireless carriers have enforceable rights under both federal and state law to place wireless facilities on utility poles.
- In Portland, wireless sites on private property are administered by the Bureau of Development Services (BDS) through the Zoning Code (Title 33) via land use reviews and/or building permits.
- The Office for Community Technology (OCT) reviews administrative permits for sites located within the public right of way, e.g. attachments on utility poles. Administrative permits are not governed by the Zoning Code. Because the City’s legal authority is limited under the federal Communications Act, its primary concern has been to regulate the time, place, and manner of wireless site installations.

## **HISTORY OF CITY WIRELESS SITING FOR SITES IN THE RIGHT OF WAY**

As a result of increased concern by both citizens and City Council members, in 2009 staff undertook a public process to take a fresh look at right of way (ROW) regulations governing wireless attachments, which included multiple public hearings. The public ROW is generally the area between neighboring properties and includes street surfaces, curbs and sidewalk, and also frequently includes additional areas on either side of the sidewalk. This process looked at multiple options and included consultation with interested citizens, neighborhood representatives, the City Attorney’s Office, staff in the Office for Community Technology (OCT) and the Bureau of Development Services (BDS), and wireless industry representatives. The goal of the City in the revised process is to strike a balance between the City’s legal obligations, while also taking into account to the extent legally possible the sensitive nature and livability of our residential neighborhoods.

The result of the re-booted process is the current system adopted by the City Council for sites within the ROW. It requires wireless carriers to follow a hierarchy for placement of new facilities in the ROW. Under the 2009 City process, if there is an existing building or structure, such as a business, existing cell tower, water tank, or utility pole where new antennas can be placed (“co-location”), that option is preferred. Facilities can be placed on poles within the ROW, but only based on a four-tier street ranking, with busy streets and arterials (Priority 1) strongly preferred over neighborhood residential (Priority 4 – the least preferred). Generally, the re-tooled wireless siting system is set up to give preference to facilities placed on a pole on the largest or busiest street possible. The process developed in 2009 allows current utility poles in the right of way to be replaced with taller structures so there can be fewer facilities, rather than shorter structures that require more sites to reach “line of sight” coverage connections.

Before 2009, permits to place antennas on utility poles were processed like most other ROW permits—without neighborhood notice or input. The current process increases the ability of neighbors to participate in the process of siting antennas in the ROW in residential neighborhoods. This ability to participate is not absolute, however, and the current process provides for limited local input. Federal law makes it clear that wireless siting decisions are ultimately based on the engineering judgment of the licensed wireless carrier regarding the coverage needs in the area to be serviced. The City’s process is designed to facilitate the exchange of information between carriers

and neighbors and to provide a forum where neighbors can ask questions and express opinions about the proposed site and aesthetic and design considerations. Ultimately, it is in the carrier's discretion whether it chooses to modify the proposal in response to comments.

### **PLACEMENT ON PRIVATE PROPERTY (Zoning Code) vs PLACEMENT IN STREETS (ROW)**

Administration of wireless siting within the City of Portland is primarily shared between two bureaus or offices—the Bureau of Development Services (BDS) and the Office for Community Technology (OCT). The jurisdiction for each office is determined by where the proposed siting is located. Through the Zoning Code, Portland City Code Title 33, BDS administers and review requests for sites located on private property. This is typically through land use reviews and building permits. OCT administers and reviews requests for sites located within the public right-of-way (ROW), i.e. attachments on utility poles located near the road or sidewalk.

Occasionally, a wireless site may involve both offices. For example, an applicant may propose to attach wireless facilities and antennas on a utility pole in the right of way, but may choose to locate the associated equipment on adjacent private property. In this case, OCT reviews the request for the wireless facilities on the utility pole, and BDS reviews the request for the equipment as a Type I conditional use review.

Because the Zoning Code does not apply to the ROW, approvals or denials to work in the streets are administrative permits, not land use cases. Citizen influence on ROW permit decisions is much different from citizen influence in land use cases. OCT does not make discretionary decisions. Rather, OCT staff review whether all applicable standards are met. Nevertheless, during the public process in the spring of 2009, participating community members clearly stated that they wanted both notice and meetings of proposed new sites, even if these meetings are not structured like land use cases and even if the public does not have the same voice in these ROW permits as it does for land use cases. The City's current requirements were designed with this input in mind.

While some citizens have recommended applying the full range of zoning rules to ROW applications, this recommendation is not reasonable. The City's governing legal framework draws a sharp distinction between administrative ROW permits and land use processes. It is not clear that investing substantial City resources and staff for this issue is justified, particularly in light of other pressing challenges and current federal law.

### **PROPOSALS OR REPORTED ACTIONS IN OTHER CITIES**

Portland City staff appreciates and will follow up on references to what other cities are doing on this issue. However, given legal constraints, we are not aware of any local city code or licensing provision enacted or under discussion or development in any other US city that allows any US city to arbitrarily deny wireless service coverage, or to consider alleged human health impacts in connection with siting decisions. The City continues to manage the proliferation of wireless sites, balancing citizen and neighborhood needs and interests, the licenses for wireless carriers, and applicable legal constraints.

### **HEALTH CONCERNS**

The Communications Act is the overall federal statute which governs the telecommunications industry. The Telecommunications Act of 1996 amended portions of the Communications Act and preempts local governments' decision-making authority in approving or denying wireless sites based on the issue of health effects. This relevant section of law is located at 47 U.S.C. §332(c)(7) and states that "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."

This section has been upheld in a number of court cases to invalidate any local decision that appears in any way to deny, delay, or obstruct any local wireless siting decisions on the basis of health concerns. The City does not have legal authority to recognize or consider whether a given wireless installation may have adverse health impacts on adults or children in the local wireless siting process. This is true regardless of the sincere belief or concern of anyone on this subject. Other cities that have challenged or tested this preemption have lost in litigation.

In order for a local government to legally consider potential health concerns in local siting decisions, scientifically documented or otherwise, Congress and the FCC would first need to act to amend this section of the Telecommunications Act.

### **IMPACT ON PROPERTY VALUES**

The issue of whether property values may be affected by a new wireless installation is also not a legally recognized criterion in the local wireless siting process. The reason for this is that applicable federal law strongly promotes the deployment of any and all advanced telecommunications services and the lack of any case law or precedents the City is aware of which have successfully halted or delayed wireless siting for these reasons. Moreover, it is worth noting that the argument that property values are affected by wireless sites (positively or negatively) has very little documentation other than anecdotal sources. City staff is aware of arguments on both sides of this issue.

### **ARGUMENTS REGARDING LACK OF NEIGHBORHOOD DEMAND FOR WIRELESS SERVICES (OR SERVICES FROM PARTICULAR PROVIDERS)**

Wireless technology is **mobile**, and therefore access to such technology has very little to do with demand or interest in any particular neighborhood. It has far more to do with the federal right and ability of the carrier to provide an adequate signal to mobile users in and traveling through the service area, whether or not those users live in the neighborhood.

### **OCT PROCESS OVERVIEW (ROW APPLICATIONS ONLY)**

Portland has granted wireless carriers the authority to use the city rights-of-way since approximately 2005 in the form of right-of-way use agreements. These agreements allow wireless carriers to place its facilities on existing utility poles located in the right-of-way. Each carrier's agreement is substantially similar to that of other wireless carriers, and each agreement is available on OCT's website. Beginning in mid-2009, these rights-of-way use agreements require carriers to follow a pre-application notification process for new sites proposed in certain residential areas. The notification process seeks to balance the need for wireless infrastructure with the concerns of

residential neighborhoods for prior notification for such wireless sites. In 2012, OCT promulgated administrative regulations to provide clarification on the pre-application process.

ROW permits are administrative permits in public streets, and NOT discretionary land use cases. There are two phases of this process for new ROW applications, and in this section we have outlined OCT's pre-application and application process for new sites in the public ROW. Please note that installations on private property are managed by BDS under existing land use codes and procedures, governed by the Zoning Code (Title 33). OCT's wireless ROW siting process is very different from land use cases for private property as administered by BDS.

#### PRE-APPLICATION PROCESS FOR RESIDENTIAL AREAS (ROW applications only)

- The wireless carrier determines that it wants to apply for a new site within the ROW. If the proposed new site is on a Priority 4 or within 400 feet of a Priority 4 street, this decision triggers a pre-application notice and meeting requirement for the proposed site.
- The wireless carrier sends a notice of an upcoming informational neighborhood meeting to discuss the proposed site. The city requires carriers to hold this meeting and provides that meetings may be moderated by a third-party.
  1. The notice must be sent to property owners and residents within 400 feet of the proposed ROW site. The notice must also be sent to the neighborhood association, any business associations, and the neighborhood district coalition.
  2. The notice will also have contact information about the pole owner. The large majority of utility poles are owned by PGE and Pacific Power & Light. CenturyLink (formerly Qwest), Frontier (formerly Verizon), and the City own a small number of poles throughout the City. It is the wireless company's responsibility to identify the pole owner and provide the correct contact information for the pole owner on the meeting notice.
  3. The notice must describe the proposal and provide names and contact information for the wireless carrier and the City.
  4. The notice must be sent 14 – 30 days before the meeting date.
- The carrier holds the informational neighborhood meeting. The carrier is expected to discuss its proposed plan and to provide interested parties with certain information about the proposed site, including a photograph of the pole and a photo simulation of how it will appear after the equipment is attached. The carrier must also present design options to address mitigation of visual, scale, or other aesthetic impacts of the proposed site. Neighbors are encouraged to ask questions and offer suggestions about the design alternatives.
  1. The intent of the neighborhood meeting is to facilitate the exchange of information between carriers and neighbors and to provide a forum where neighbors' questions about the proposed site can be answered. The city also asks that neighbors provide feedback regarding the carriers' proposed design alternatives for the site and for carriers to consider this particular feedback before making its application to the City.
  2. If questions are asked which need follow up, the applicant should seek a primary neighborhood contact person so that answers can be provided and distributed after the meeting.
- If the carrier chooses to proceed, it must wait 30 days after the meeting to submit its application to OCT. During this period, the City expects the dialogue about the carrier's proposal, which began at the informational neighborhood meeting, to continue.
  1. The carrier's application must include information on how it responded to public input. You may review the application form on OCT's website. It is in the carrier's discretion whether it chooses to modify the proposal in response to comments.

## FORMAL APPLICATION (ROW applications only)

- Once it has received an application, OCT reviews the application against contractual requirements. Applications will not be approved if they are incomplete or do not comply with the contractual requirements.
  1. This is a process review. If the form and process are not met, OCT will return the application to the applicant for correction. Unlike land use review cases, there is no specific timeline for the City's review of applications. This allows flexibility to respond to citizen questions and clarify issues with the applicant before action is taken.
  2. Please note that, like all other ROW permits, there is no formal notification process required for citizen or neighbors after OCT review is complete. That being said, the City has at times offered to provide a courtesy notice to the neighborhood association chair when the application is moved forward. This decision is made on a case-by-case basis.
- Once OCT has verified that the City's Wireless Application process and criteria are met, it notifies the Portland Bureau of Transportation (PBOT) that the wireless application has satisfied necessary requirements and forwards the application to PBOT.
- At this point, the application is under the jurisdiction of PBOT. OCT is not involved in the technical ROW permit process. PBOT processes the application against the requirements of Title 17 of the City Code (transportation and street use provisions). PBOT staff performs their technical review and can approve, modify, hold or deny the application. Ultimately, if all other requirements are met, PBOT issues the ROW construction permits to the applicant and allows construction to commence. Applicants may start work the day PBOT issues the permit, or they may wait and start several months later.
  1. The antennas can be attached to an existing utility pole or the utility pole can be replaced with a slightly taller one.
  2. This permitting step can take a few weeks.
- Post-installation – After the facility is installed, PBOT conducts a field inspection to ensure the facility was constructed as proposed. If the facility does not operate in accordance with standards or stops operating correctly, i.e. noise and vibration levels are excessive, PBOT and/or OCT will require the facility owner to correct the problem(s).

## WHAT ELSE IS THE CITY DOING?

The City continues to carry out its responsibilities under applicable law, but is also active in legal and policy issues involving for responsible regulation of cellular facilities. For example:

- The City has participated in numerous court proceedings to advocate for local jurisdictions to retain its local control to make certain decisions regarding wireless sites. Many companies seek to preempt local governments by creating federal or state regulations to bypass local authority. One key victory for local governments is that telecommunications companies can only sue cities & counties for denying a permit based on actual or effective prohibitions of service, and not speculative or theoretical ones under 47 USC 253(a).
- The City recognizes that potential health effects have been a concern for many residents. Unfortunately, the city is pre-empted by the federal government from considering potential health concerns when making siting decisions. The City's Office of Government Relations continues to work with our federal Congressional delegation to request that the federal government re-evaluate potential health impacts of wireless sites. On March 29, 2013, the FCC

released a report, order, further notice of proposed rulemaking, and notice of inquiry (FCC 13-39) on the potential health effects of radio frequency radiation. The City is reviewing the document and plans to submit comments. It has also forwarded this information to our Congressional delegation.

- Portland City Council unanimously approved a resolution requesting that the Federal Communications Commission update studies on potential health effects of radio frequency wireless emissions. City Council Resolution No. 36706<sup>4</sup>.
- Relevant city bureaus, including OCT, BDS, and PBOT, continue to work together in reviewing applications and issues arising from cellular facilities in ROW or on private lots. Remember, OCT's jurisdiction extends only to ROW facilities—wireless sites on private property are governed by the procedures of the City's Zoning Code and BDS.
- The City will continue to follow up on individual issues and complaints (e.g. noise, inspection issues, nuisance regulations, etc.).

## **CONCLUSION**

Given the significant legal constraints on the City and the increasing reliance of Portlanders upon wireless devices, OCT believes its review process strikes a balance in an otherwise difficult situation. To provide for more local control in this area, the only realistic recourse at present is to change the governing federal legal mandates. Such change can only be achieved by citizens asking Congress to pursue necessary amendments of federal statutes at the national level. OCT encourages concerned citizens to continue to urge Congress to address these issues responsibly and promptly.

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<sup>4</sup> <http://www.portlandoregon.gov/revenue/article/401854>