DEPARTMENT OF PLANNING &
ECONOMIC DEVELOPMENT
Jonathan Sage-Martinson, Director

CITY OF SAINT PAUL
Christopher B. Coleman, Mayor

25 West Fourth Street
Saint Paul, MN 55102

Telephone: 651-266-6700
Facsimile: 651-228-3220

DATE: March 19, 2015

TO: Comprehensive Planning Committee

FROM: Bill Dermody, City Planner

RE: Cellular Telephone Antenna Zoning Study

ISSUES

The Federal Communications Commission (FCC) published its Final Rules on Wireless Infrastructure on January 8, 2015. The Final Rules allow certain automatic size increases not contemplated by the City's regulations, as well as establishing parameters for review. Zoning Code amendments via a zoning study may be advisable in order to manage the regulatory changes contained in the Final Rules. Additionally, the Zoning Code treats cellular facilities on residential structures in residential districts differently than on other types of structures with similar or greater community impacts.

BACKGROUND

The FCC occasionally adopts rules and regulations that interpret and implement federal law. FCC rules take precedence over local regulation such as the City's Zoning Code. The recently released Final Rules address several wireless infrastructure issues: interpretation of terms in the *Spectrum Act* regarding wireless facility collocations, reevaluation of FCC's previous *2009 Declaratory Ruling* "shot clock" provision regarding processing timelines, exemptions from National Environmental Protection Act (NEPA) and National Historic Preservation Act (NHPA) reviews for small cell sites, and exemptions from environmental notification for temporary towers. The *Spectrum Act* interpretation is of greatest significance to zoning regulations. The background section below addresses the FCC's *Spectrum Act* interpretation, its updated "shot clock" interpretation, and the potential effect on the City's Zoning Code. It also addresses the question of whether all buildings in residential, traditional neighborhood, and business districts should be treated the same as residential buildings in residential districts with regard to cellular antenna provisions and conditional use permits.

Spectrum Act Interpretation

The *Spectrum Act* is a small section within the 102-page *Middle Class Tax Relief and Job Creation Act of 2012*, as follows:

> **SEC. 6409. WIRELESS FACILITIES DEPLOYMENT.**
>
> (a) FACILITY MODIFICATIONS.—
>
> (1) IN GENERAL.—Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104–104) or any other provision of law, a State or local

> government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.
> (2) ELIGIBLE FACILITIES REQUEST.—For purposes of this subsection, the term ''eligible facilities request'' means any request for modification of an existing wireless tower or base station that involves—
> (A) collocation of new transmission equipment;
> (B) removal of transmission equipment; or
> (C) replacement of transmission equipment.

Among other aims, the FCC desired to determine the meanings of "existing wireless tower or base station" and "substantially change the physical dimensions." The Final Rules determined that an "existing wireless tower or base station" includes not only towers built expressly to support wireless facilities, but also other structures (such as commercial or residential buildings, or utility poles) that support wireless facilities. The Final Rules also determined that a modification that "substantially changes the physical dimensions" is generally one that does any of the following:

(1) increases the height of a tower outside the public rights-of-way by more than 10% or 20 feet, whichever is greater, or protrudes from the edge of said tower by more than 20 feet (20 feet height increase is measured from top of existing antennas to bottom of new antennas; Note: current technology generally consists of 6- or 8-foot tall antennas);
(2) increases a base station's (building's or utility pole's) height by more than 10% or 10 feet, whichever is greater, or protrudes from the edge of said structure by more than 6 feet (height increase measured from height of base station, presumably to top of new antennas);
(3) defeats the existing concealment elements of a tower or base station (e.g. church steeple enclosure or painting to match the building); or
(4) does not comply with conditions of the facility's prior approvals, besides those restricting height or size.

Local government approval of such eligible facilities requests can be conditioned only on compliance with building codes and other standards reasonably related to health and safety. Aesthetics cannot be taken into account, except with regard to maintaining existing concealment elements.

Notably, the *Spectrum Act* does not apply to local governments acting in their proprietary capacities, meaning that the City retains its usual discretion to allow or reject wireless facilities on City-owned land such as rights-of-way or parks.

"Shot Clock" Provision: Effect on City Reviews

In 2009, the FCC declared that local governments have 150 days to process applications for new wireless facilities and 90 days to process collocations, unless an extension is mutually agreed to. The Final Rules have shortened the review time period for collocations that are covered by the *Spectrum Act* to 60 days. Additionally, the Final Rules specify that such application that is not reviewed within 60 days is automatically "deemed granted." The 60-day review period is intended only to allow a local government to determine whether the application is an "eligible

facility." Though the Final Rules do not specify that *Spectrum Act*-eligible facilities be reviewed administratively, the limited scope of review and the short timeline essentially require administrative reviews.

FCC Rules' Effect on Zoning Code

The Zoning Code contains several regulations affected by the Final Rules and their allowance for "automatic" future collocations.

First, Sec. 65.310(a) requires a conditional use permit for cellular antennas on a residential structure less than 60 feet high in residential districts, but none of the evaluation criteria account for the new reality that allowing one set of antennas in a particular setting on the structure could automatically allow for future antennas to be placed in different settings on the same structure. One solution for this issue is to simply state that conditional use permit reviews shall take into account not only the subject application's request, but also any potential future "automatic" collocations. Additionally, in its conditional use permit review the City could consider adding specific conditions to address placement on a structure (e.g. set back at least 10' from the front façade parapet), concealment requirements (e.g. painted to match the rooftop equipment canopy), or other issues of theoretical concern for collocations, even if they are not presented by the subject application.

Second, Sec. 65.310(d)(3) refers to antennas "blend(ing) into the surrounding environment" with paint color or camouflaging treatments, which is similar to the "concealment" language used in the Final Rules. Inserting the term "concealment" would make clear the intent of applicability for the Final Rules' requirement of future collocations to maintain concealment elements.

Finally, there are four (4) Zoning Code clauses that involve cellular antenna height, addressed individually below:

- Sec. 65.310(b) allows antennas in residential, traditional neighborhood, and OS—B3 and B5 districts to extend no more than 15 feet above the structure to which it is attached, and no more than 40 feet above such structure in the B4 district. The Final Rules would not allow automatic collocations exceeding these height regulations, except on structures greater than 150 feet in height. No amendment of this language is recommended.
- Sec. 65.310(d)(1) generally restricts new freestanding towers in residential, traditional neighborhood, and business districts to 75 feet in height, or 100 feet if they are designed to carry two (2) antennas. (The height limits can be exceeded if the applicant demonstrates that the surrounding topography, structures, or vegetation make the limits impractical.) The Final Rules would allow for a tower designed to carry two (2) antennas that is currently built to 100 feet to be further extended by about 28 feet (20-foot separation + 8-foot high antennas), provided that it does not need replacement for structural reasons. Clearly, the Zoning Code intends for 100 feet to be an absolute height limit, unless there are site-specific impracticalities. One solution for this issue is to eliminate the explicit allowance for antennas designed to carry multiple antennas to exceed 75 feet, knowing that the Final Rules allow a similar height increase (approximately 28 feet).
- Sec. 65.310(d)(2) requires antennas on freestanding poles in residential, traditional neighborhood, and business districts to be set back by the antenna height + 10 feet from

the nearest residential structure. Since the Final Rules allow such poles to be increased in height by approximately 28 feet, it may be appropriate to increase the setback from residential structures accordingly.

- Sec. 65.310(e) limits antennas on freestanding poles in industrial districts to 150 feet in height and requires setbacks from the nearest residential structure of the antenna height + 10 feet. Since the Final Rules allow such poles to be increased in height by approximately 28 feet, it may be appropriate to decrease the allowed height and increase the setback from residential structures accordingly.

Conditional Use Permits for Cellular Antennas: History and Considerations

A conditional use permit is a regulatory tool for permitting uses in certain contexts that may be inappropriate in other contexts. With regard to cellular antennas, it allows for balancing of service need and community impact considerations. Due to the uncertainty presented and additional time required for processing, proposed cellular antenna sites requiring conditional use permit review are inherently discouraged relative to sites that can be approved administratively.

Initially, when cellular antennas were first recognized in the Zoning Code in 1993 they were permitted in all districts in a similar manner as today with three main exceptions: no conditional use permits, a demonstration of need was required for all applications, and freestanding poles were only permitted if there were no buildings of sufficient height in the area. There was also no 25 foot height increase given to freestanding poles in non-industrial districts that could accommodate multiple carriers. Overall, the effect of the 1993 code language was to encourage locating on buildings of any height and any land use type rather than on poles.

Currently, the Zoning Code requires a conditional use permit for cellular antennas on a residential structure less than 60 feet high in residential districts and for a new freestanding pole in any non-industrial district. A "residential structure" refers only to single-use residential structures, which in residential districts are far more predominant than mixed-use residential structures. No conditional use permit is required to place cellular antennas on residential structures of any height in other zoning districts. The current code's overall effect is to encourage locating cellular antennas on existing poles, taller buildings of all types, and shorter buildings that are either not purely residential or are not zoned residential.

The conflict between service need and community impact is most likely to arise in less dense, generally residential parts of the city with few tall buildings or structures. In those areas, some of the best locations for reduced community impact are atop the tallest existing buildings at the intersections of major streets. The tallest buildings in these contexts also tend to be the sites preferred by service providers. Such buildings are sometimes residential, sometimes commercial, and sometimes mixed use, as illustrated in the figures below. Current code encourages seeking non-residential or non-residentially zoned buildings in these locations, even if they are the shortest structures in the area.

Figure 1: Marshall/Cleveland Intersection (map with photos of each quadrant)

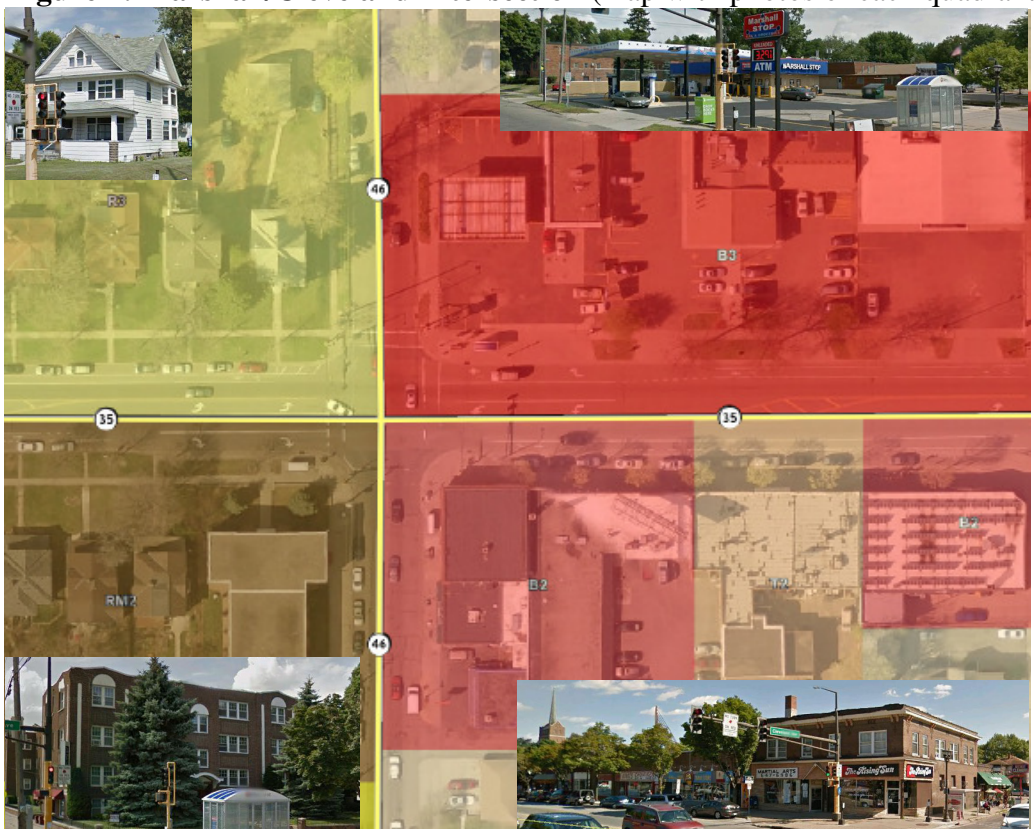

Figure 2: Marshall/Cleveland Intersection (map with photos of each quadrant)

Figure 3: Maryland/White Bear Intersection (map with photos of each quadrant)

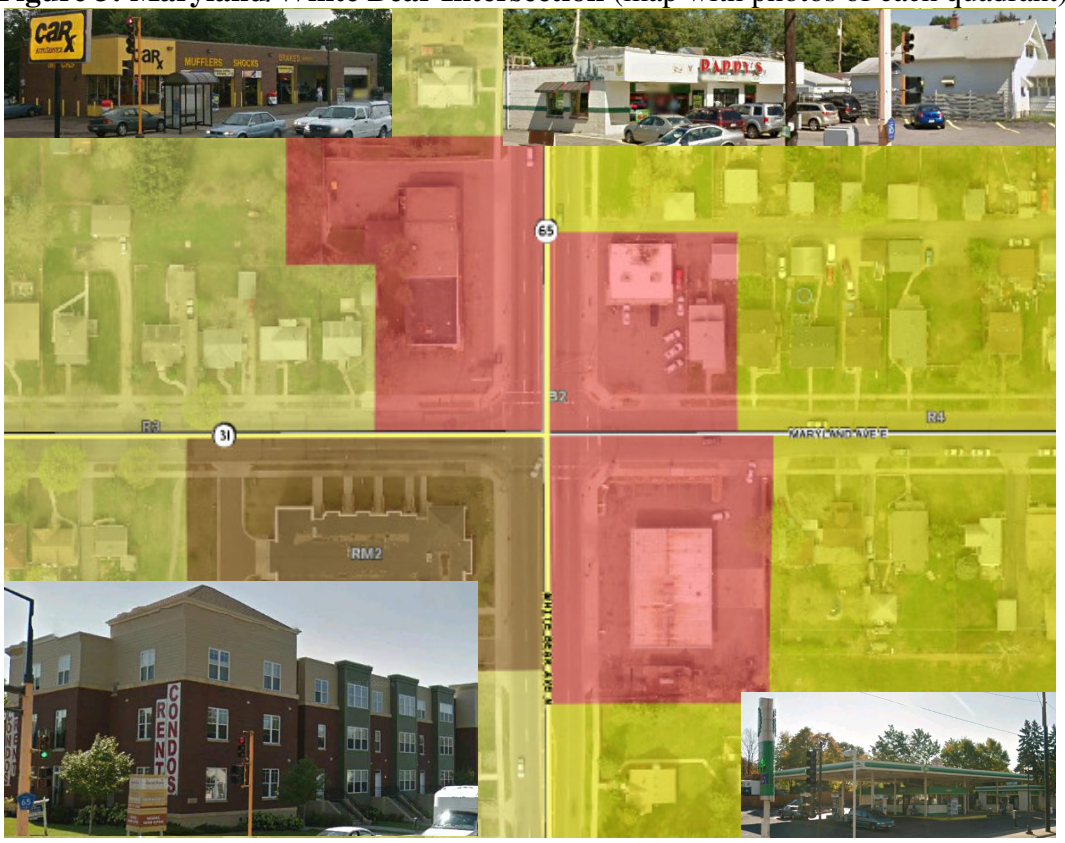

Figure 4: 3rd/Bates Intersection (map with photos of each quadrant)

In each of the above examples, the current code permits locating cellular antennas on the shortest building at the intersection, which would have the greatest visual impact on the surrounding area. In the case of Figure 3, the current code also permits locating antennas atop a single-family house at the northeast corner that is zoned B2.

It is recommended that the Zoning Code incentivize locating cellular antennas on the tallest buildings in the city's more residential areas without regard to the building's land use type. It is the visibility of antennas, which is experienced in the area surrounding the building rather than within the building, that can present a negative land use impact. Accordingly, the occupancy or zoning of the building itself are not significant to land use impact from cellular antennas; building height, on the other hand, is very significant to land use impact of such antennas. At major intersections in the city's more residential areas, the tallest buildings are often about 35 to 40 feet tall, but can approach 50 feet on RM2-zoned properties. However, buildings of approximate 35-foot height can also be found away from such major intersections in places of greater potential visual impact given the context. In order to properly incentivize cellular antenna site locations and allow for context-sensitive review, it is recommended that conditional use permits be required for locating cellular antennas on all buildings under 45 feet in height.

PUBLIC HEARING TESTIMONY

The Planning Commission held a public hearing on March 13, 2015 and left the record open for written comments through March 16, 2015. Written comments were received from the District 11 Council and AT&T (see attached). Representatives from T-Mobile and AT&T spoke at the hearing. The District 11 Council expressed support for the proposed amendments. The other testimony is summarized below.

AT&T opposes several of the proposed amendments because they would effectively remove the benefit and contradict the intent of the FCC's new rules implementing the *Spectrum Act*. The proposed amendments in question are to Sec. 65.310(a) (accounting for future collocations in Planning Commission review of conditional use permits); Sec. 65.310(d)(1) (elimination of a 25' height increase to freestanding poles in residential, traditional neighborhood, and business districts if they are built to accommodate two users); and Sec. 65.310(e) (reducing maximum freestanding pole heights in industrial districts). AT&T states that reducing the maximum freestanding pole heights would severely limit the ability to collocate multiple cellular antennas on new freestanding poles, that the amendments would lead to a need for more freestanding poles due to collocation limitations, and that carriers would be impaired or prohibited in their ability to provide reliable service or increase network capacity. AT&T suggests that proposed amendments to Sec. 65.310(d)(1) and Sec. 65.310(e) be rejected. AT&T also suggests deletion of the proposed additional language for 65.310(a) and replacement with a statement affirming that conditional use permits are not required for eligible facility modifications.

T-Mobile notes that there is already protection given to local governments through historic review, and requests that the ambiguity and subjectivity of conditional use permits be rejected in favor of objective set numbers addressing setbacks and height.

STAFF ANALYSIS OF TESTIMONY
The section below analyzes the main issues raised by public testimony.

1. Issue: Amending the Zoning Code in a manner that restricts rather than promotes wireless facility deployment is contrary to the intent of the FCC Final Rules.

   Response: The FCC Final Rules implementing the *Spectrum Act* address modifications of wireless infrastructure on existing towers or base stations. The FCC specifically declined to regulate sites that do not yet contain wireless infrastructure, thereby leaving such authority with state and local governments. The FCC does not mandate nor express the assumption that local regulation of first-time facilities would be frozen in time and never change in response to legitimate local land use concerns. No revision to the proposed amendments is recommended.

2. Issue: Reducing maximum freestanding pole heights would severely limit the ability to collocate and would impair or prohibit the ability of carriers to improve their networks.

   Response: The proposed amendments provide the same eventual permitted pole heights and do not prohibit collocations; therefore, they would not generally limit the ability to collocate. However, for freestanding poles in residential, traditional neighborhood, and business districts, those designed for multiple carriers at heights of 100 feet would need to be built in two phases rather than all at once, which could discourage collocations by adding extra process, even if no certainty of outcome is lost. Since collocations on existing poles generally have a lesser negative impact on the surrounding community than multiple freestanding poles, it is recommended that the final sentence of Sec. 65.310(d)(1) be maintained rather than deleted. Maintaining Sec. 65.310(d)(1) in full would have the negative impact of allowing freestanding poles built for multiple carriers to eventually be approximately 128' in height rather than 100'. Avoiding multiple poles is a more positive outcome than avoiding the additional height. No revision to Sec. 65.310(e), regarding freestanding pole heights in industrial districts, is recommended. With these revisions, the proposed amendments regarding pole heights have no significant negative effect on the ability of carriers to improve their networks.

3. Issue: Conditional use permits should not be required for eligible facility modifications.

   Response: The proposed amendments do not require conditional use permits for eligible facility modifications. The federal law supersedes local zoning codes, which is affirmed by proposed language in Sec. 65.310(a). No further amendments to this section are recommended.

4. Issue: Local governments are already afforded protection through historic review.

   Response: The FCC Final Rules supersede local government regulation such as Saint Paul Heritage Preservation Commission (HPC) review of proposed eligible facility collocations in *locally* designated historic districts and sites. That is, it appears that eligible collocations that would normally have required HPC review will no longer

require it. Such collocations on *nationally* designated properties receive advisory review through the National Environmental Protection Act and the National Historic Preservation Act with regard to the effect on the property's historic designation, but this process does not include local regulatory control. The advisory review is only with regard to historic considerations (not other local government considerations), and is in effect only within a certain distance of nationally designated historic resources, not throughout the city.

5. Issue: Expansion of the conditional use permit process to residential buildings under 60' height in traditional neighborhood and business districts should be rejected, either all together or in favor of objective numerical standards. An expanded CUP process is burdensome and makes wireless facility provision more difficult.

   Response: Residential buildings under 60' height in traditional neighborhood and business districts exist in a wide variety of settings. In some settings, such as where there are few tall structures nearby and cellular facility provision is difficult, it may be appropriate to permit new antennas atop a building with minimal conditions. In other settings, neighborhood protection may take higher precedence and lead to denial or more restrictive conditions for a request. The Zoning Code contains specific standards and conditions to apply to such an application. To apply strict numerical standards rather than a CUP review process would require the code language to address the most restrictive situation – the CUP process, on the other hand, would allow for less restrictive conditions in the situations where it is appropriate. It is appropriate to consider collocations now allowed by federal law when reviewing CUPs for initial installation, since that is effectively what the City could be approving.

COMPREHENSIVE PLAN ANALYSIS

The Comprehensive Plan refers to the importance of ensuring investments in local and regional infrastructure supportive of economic development, as well as the importance of promoting aesthetics and development standards. There are also two clauses of the Comprehensive Plan's Land Use Chapter with more specific guidance: Strategy 2.23 calls for site plan review standards in the I1, I2, and I3 districts that enhance the aesthetic quality of the district, and Strategy 3.7 calls for using the Zoning Code to make development compatible with the existing and planned character of a neighborhood or other area of the city.

STAFF RECOMMENDATION

Staff recommends that the Comprehensive Planning Committee recommends approval of the revised proposed Zoning Code amendments.

Attachments

1. Revised Proposed Zoning Code Amendments
2. Draft Planning Commission Resolution
3. Written Testimony
4. FCC Final Rules