CONVENE: 7:17 p.m.

PRESENT: Mayor Pete Kmet and Councilmembers Neil McClanahan, Joan Cathey, Eileen Swarthout, Debbie Sullivan, Tom Oliva, Leatta Dahlhoff, and Michael Althauser.

Chair Jessica Hausman and Commissioners Doty Catlin, Terry Kirkpatrick, Richard Manugian, Nam Duc Nguyen, Meghan Sullivan Goldenberger, Nancy Stevenson, and Michael Tobias.

Excused: Commissioner Joel Hansen.

Staff: City Administrator John Doan, Assistant City Administrator Heidi Behrends Cerniwey, City Attorney Karen Kirkpatrick, Police Chief Jon Weiks, Public Works Director Jay Eaton, Community Development Director Michael Matlock, Planning Manager Brad Medrud, and Recording Secretary Tom Gow.

Others: Ken Fellman, Kissinger & Fellman, P.C., Grace O'Connor, Thurston County Prosecutor's Office, Michele Underwood, Thurston County, Kim Allen, Wireless Policy Group, and Kelsey Holmes, Puget Sound Energy.

ORDINANCE NO. O2018-025, TELECOMMUNICATIONS: Manager Medrud reported the briefing is on the proposed amendments to Tumwater Municipal Code (TMC) Title 11 *Telecommunications and Telecommunications Facilities Chapter* that were prompted by new rules issued by the Federal Communications Commission (FCC), which regulates wireless communications facilities and specifically addresses "Eligible Facilities Modification." The provisions cover development regulations for collocation, removal, and replacement of wireless transmission facilities to conform to federal law and regulations. The City contracted with Colorado attorney Ken Fellman with Kissinger & Fellman, P.C. Mr. Fellman has been meeting with a workgroup of staff involved at some level with the provisions contained in Title 11. He introduced Mr. Fellman.

Mr. Fellman shared information on his professional background as an attorney specializing in telecommunications and utility issues, and public service as a mayor, city councilmember, and planning commissioner.

In 1996, wireless changed when Congress passed the Telecommunications Act. The wireless industry's focus is

about deploying networks as quickly, efficiently, and as inexpensively as possible. Because local elected and appointed officials understand the importance of broadband in the community, the goal is mutual to deploy networks quickly while also preserving the aesthetic values of the community. Some representatives in the wireless industry respect that perspective while other executives of many wireless companies complain to officials in Washington, D.C. that local officials are employing barriers for deployment of networks and preventing progress. They urge the federal government to preempt local authority preventing the ability of local officials to protect the aesthetic integrity of the community or recover the costs of administering the process.

Another FCC ruling in 2014 prevented local jurisdictional oversight or discretion of some pre-existing wireless sites that are proposed for modification, colocating, adding height, or adding new facilities. The City complied with federal law but did not update the Code to adopt processes. Concurrently, the industry began creating wireless networks with more antennas at lower heights (5G) and deployed in rights-of-way.

Mr. Fellman said he assisted the City in reviewing TMC Title 11. The review resulted in some proposed amendments to Title 11 and minor amendments to Title 18 covering land use to conform to changes proposed for Title 11. The review also included some updates, deletions, and changes for consistency.

Title 11 Chapters cover a variety of telecom issues. Chapter 11.02, General Purposes and Definitions, include minor changes to the Purpose section and an addition of a substantive paragraph. New definitions were added to address 2014 rules for colocation and when applications must be approved. An FCC order released in September 2018 requires major changes, and, in some cases, provisions for local authority over rights-of-way both for wireless and for wireline facilities. The rule addresses how much can be charged for permits, changes some definitions, and created at least 20 internal inconsistencies in the rule. One example pertains to 20 states in the country with state laws addressing small wireless facilities (small cells). The FCC order stipulates that for those states, the rule does not preempt most of the provisions in state law; however, the rule does not identify those provisions that are preempted creating uncertainty for both states and local jurisdictions. The order is under appeal through the federal court and the City of Tumwater is a party to the appeal.

Another inconsistency is FCC's direction for local governments to change policies and adopt new policies on aesthetics while enacting the order effective 90 days after publication (January 2019), which effectively prevents sufficient time for jurisdictions to adopt new policies on aesthetics. A motion was filed to stay the effective day of the order.

Mr. Fellman emphasized that although the City complies with federal laws; federal rules that are currently under appeal do not compel the City to cut and paste those federal rules into the City's code.

Some new definitions are the same as FCC rules. Other new definitions (such as camouflage) are to facilitate City authority under the new rules. Some definitions are consistent with the new FCC wireless and wireline infrastructure Order, and some may or may not be, since the Order is less than clear and is under court challenge.

Key definitions for inclusion of the requirements of the 2014 colocation rules include:

- "Antenna"
- "Base station" – a base station is any structure with antenna attached that is not a tower
- "Camouflage", "concealment", or "camouflage design techniques"
- "Colocation" – is defined as adding something to a wireless site already approved. The FCC order in September 2018 includes a different definition of "colocation." Under the September 2018 order, the definition states, "Colocation is adding an antenna on any structure that is capable of holding large facilities." Today, two different FCC rules define the same term differently and in a different context. The Court of Appeals will be asked to address the issue.
- "Eligible Facilities Request (EFR)" – is an existing federal statute governing modification or colocating an existing facility if the request does not involve a substantial change in the physical dimensions of the site. A local government shall not deny and shall approve the application. If not approved within 60 days of a complete application, the requested action is deemed as granted. The federal statute does not define "substantial

change." FCC rulemaking in 2014 issued new rules surrounding "Eligible Facilities Request" if the provider is adding height to a facility not located in right-of-way, such as a tower or rooftop. The rule stipulates that the addition of 10% height would not be a substantial change and must be permitted. However, adding 20 feet to a 45' tower would be considered substantial by a jurisdiction. The FCC has determined that in that situation, it is not considered a substantial change and the application must be approved.

- "Eligible support structure"
- "Existing wireless communication tower" or "existing base station"
- "Micro wireless facility"
- "Site"
- "Small cell wireless facility"
- "Substantial change"
- "Transmission equipment"
- "Wireless communication facility" or "WCF"
- "Wireless communication tower"

Other terms in the wireless industry speak to "small cells" or "small wireless facilities." The September 2018 FCC Order defines "small cells" as "small wireless facilities." The City might consider revising the amendment changing "small cells" to reflect "small wireless facilities for consistency with FCC rules. "Small" does not refer to size, but rather it refers to coverage area for network capacity. Small cells would not replace towers, but are part of a broader network. The FCC determined that associated antennas could be up to three cubic feet and associated equipment could be up to 28 cubic feet.

The definitions section and other chapters include requirements for "Universal Service." Other than cable system build out obligations, the City may not impose universal service obligations on broadband providers. Definitions in Title 18 were also modified to be consistent with the modified and new definitions in Title 11. Lists of permitted, conditional, and accessory uses in Title 18 were also modified for consistency with the modified and new provisions in Title 11.

Today, the wireless industry has four major providers. Each company wants to install infrastructure, as well as others that lease capacity. Each company has received licenses for radio frequency spectrum from the FCC. Not all frequencies are in

the same band making them incompatible. Verizon is actively seeking more permitted sites. When all companies deploy required facilities, jurisdictions could receive 30 to 60 new applications for sites per square mile. Most cities avoid pole clutter. Most existing vertical infrastructure in rights-of-way includes streetlights, electric distribution poles, and traffic signals.

Councilmember Althauser asked whether the City's design guidelines for wireless facilities have been preempted. Mr. Fellman responded that the new order enables local government to impose requirements under three conditions:

1. The requirements must be published in advance
2. Reasonable (not defined)
3. Applied equitably or equally to other kinds of similar infrastructure

Significant changes to Chapter 11.06, Telecommunications Master Permit, include:

- Master permit not required of cable operator for provisions of cable service but may, (1) be required of a cable operator for providing telecom (non-cable) services, or (2) may be waived by the City.
- Permit applicant must agree to comply with all applicable provisions of the TMC.
- Permit will be granted or denied administratively – no longer a requirement for a public hearing at City Council.
- September 2018 FCC rule indicates fees must reflect actual costs incurred by a city, sets caps for fees for right-of-way permits, and presumes that higher fees have the effect of prohibiting service in violation of federal law.
- Code provides that master permit fees will be set annually to cover the City's costs in connection with reviewing, inspecting, and supervising the use and occupancy of right-of-way. Essentially, the City can best determine how to limit fees to its "actual" costs, not a federal bureaucracy in Washington, D.C.

Councilmember Althauser questioned the removal of language affording the City some flexibility in terms of considering other factors that may demonstrate the continued welfare, public

health, and safety of the community. Mr. Fellman replied that in some sections of the code, the workgroup recommended eliminating subjective and judgmental language when the law provides a right that is subject to local powers as a way to improve the specificity of the language with respect to the criteria and lessen the likelihood of the City subjected to challenges by the industry.

Mr. Fellman reported Chapter 11.07, Special Rules Applicable to Open Video Systems, is recommended for repeal, as the industry does not offer video systems.

Chapter 11.08, Facilities Lease, addresses the leasing of City facilities to telecom companies. The following minor edits are proposed to the section:

- Added requirement to provide photo simulations of the facility
- Added requirement to ensure use of City property will not exceed federal radio frequency standards
- Deleted requirement to provide information about what services would be offered through the facilities
- Deleted various requirements that are ordinarily included in telecom site leases

Councilmember Althauser questioned why language was struck in TMC 11.08.060 stating, "Unless otherwise specified in a lease agreement, a facilities lease granted hereunder shall be valid for a term of one year…" Mr. Fellman explained that he has never encountered leases for telecommunications facilities on public or private property that were one year in duration. The networks are very expensive to deploy and limiting a lease agreement to one year would likely result in companies installing networks elsewhere.

Commissioner Manugian asked about the reason for deleting the requirement to provide information about services that would be offered through the facilities as the City would want to know if a specific service was determined to be harmful. Mr. Freeman said the language speaks to the services provided rather than the method of providing the service, such as internet, telephone, or cable service. Companies are required to provide assurances in writing that the company would not violate any of the federal standards addressing protections to the community.

Mayor Kmet recalled some earlier issues with larger cell towers creating interference with TV reception in homes. The City implemented a requirement of not exceeding the standards, as well as requiring companies to periodically monitor facilities, which likely is no longer possible under the new FCC rules. Mr. Fellman referred to several court case rulings affirming FCC as the sole authority of health standards and interference standards for broadband frequencies. Should a community experience problems, the remedy is not testing periodically, but contacting the FCC for possible action.

Commissioner Goldenberger asked about California case law prohibiting any deployment of 5G in the state. Mr. Fellman said he was unaware of any case law prohibiting 5G other than the City of Santa Rosa's pursuit for prohibiting the deployment of 5G facilities in the city. The status of that action is unknown at this time. Deployment nationwide of 5G has been limited with some smaller systems deployed that are enhancing 4G networks in preparation for 5G technology. The final technical standards for 5G have not been completed. Some cities are beta testing 5G networks; however, Santa Rosa is opposing the facilities. Additionally, the FCC has not updated health standards for radio frequencies for many years. Concerns by some citizens are on the higher use of radio frequency spectrum in 5G technology that could potentially damage human health than radio frequency spectrum in use today. The FCC has had an open proceeding for over five years to update the standards for wireless facilities. He serves on the local government and state government advisory committee of the FCC and has urged the FCC to complete the proceeding, as the update would serve as a good tool for local governments when confronted by citizens concerned about the harmful effects of 5G.

Mr. Fellman reviewed several minor changes to Chapter 11.10, Conditions of Telecommunications Right-of-Way Use Authorizations, Master Permits, and Facilities Leases:

- Added provision so that this Chapter now covers licenses as well as leases and master permits
- Clarifies that the Director of Public Works is the officer with authority
- Clarifies that in the event of conflicts in any lease, permit or license and the Code, the Code controls
- Clarifies that the City retains the right to require

facilities to be underground, except for wireless facilities that must be above ground in order to function.

- Clarifies language related to damages and timing for notice of various obligations under this Chapter
- Provides that when a permit holder is installing new conduit, the City may install its own conduit in the trench and will pay the incremental increase in cost for the City installation
- Modifies costs to be paid for the use of City-owned conduit to be determined in a manner consistent with state and federal law
- Updates insurance, indemnification, and security fund provisions
- Modifies hearing procedure – hearings on decisions of City staff will be before a hearing officer as opposed to the City Council

Very minor edits addressing inconsistent use of key terms are proposed for Chapter 11.12, Construction Standards.

Mayor Kmet asked whether small cell facilities are interconnected with cable. Mr. Fellman replied that the facilities are connected at some point to a fiber backbone. Signals are transmitted between small cell facilities, which eventually download to a fiber optic backbone.

Kim Allen, Wireless Policy Group, added that a distributed antenna system site or node is interconnected to other system sites through fiber that is transmitted to a central hub or backbone. Small cell facilities are not interconnected but include a fiber connection to a local wireless hub.

Mayor Kmet noted that the City requires undergrounding of utilities for new developments in the City. The City is spending much money to underground cables in other areas of the City as well. He said that should wireless companies install facilities with poles and wires, the community likely would respond negatively. He is hopeful all new facilities would be underground. Ms. Allen responded that for those areas that that have been undergrounded, the companies would underground the new systems; however, in areas that have not been undergrounded, the preference of the industry is to access aerial fiber until such time the City undergrounds the area.

Mayor Kmet asked about the possibility of requiring a

particular type of pole, such as poles located within the Historic District and other areas of the City for affixing small cell facilities to ensure aesthetic consistency throughout the City. Mr. Fellman said it likely could be possible; however, it is an area where the industry can work more effectively with local governments prior to submitting a permit application to define different designs that would benefit the City. It likely would be difficult to require one specific design standard. Rather, the best course is working with industry representatives to define several pole designs to avoid issues at the time of permit submission.

Mr. Fellman reported amendments and additions to Chapter 11.20, Communication Antennas and Towers, address current technology, compliancy with FCC 2014 colocation rules, preparation for the increased number of applications for small wireless facilities, and addressing small cell facilities in the rights-of-way. Other goals within the Chapter encourage wireless facilities in non-residential areas; minimize towers in residential areas; provide for managed development of wireless communications facilities; encouraging colocation; effective management of wireless communications facilities in the rights-of-way; developing design criteria; and accommodating the need for wireless facilities while protecting the community and minimizing visibility consistent with applicable laws. Other proposed changes include:

- Provides for permit applications and the type of facilities exempt from applications
- Addresses "Eligible Facilities Requests" which are those applications for colocation, which must be approved under federal law
- Colocation applications must be approved unless they would result in a "substantial change" in the physical dimensions of a site. The 2014 FCC rules stipulate that if the change would defeat concealment elements of a site it would constitute a "substantial change" and would not be an eligible facilities request with no requirement for the City to approve it. It is important that the City's criteria are very clear for approval or denial of applications for wireless facilities that include a concealment requirement. For example, if AT&T was approved to construct a fake tree and subleases to another provider that wants to increase the site by 10 feet, the sublease could be denied because the proposal would adversely affect the intent for the facility to

resemble a tree.

- Colocations cannot violate any generally applicable laws, regulations, or other rules codifying objective standards reasonably related to public health and safety
- Must act on "Eligible Facilities Requests" application within 60 days of receipt of a complete application
- Shot clock may be stalled if application is incomplete
- Failure to act means application is deemed granted under federal law
- If application does not qualify as "Eligible Facilities Request", it will be considered in accordance with the Code, and pursuant to the federally mandated shot clocks for other wireless facilities

Mr. Fellman responded to questions about the new rules and explained that the rule adopted by the FCC that is under appeal has little or no bearing on "Eligible Facilities Requests." The impetus for the City's review of the Code 18 months ago was based on the 2014 FCC rules, which have been upheld by the courts. When the review was first initiated, the focus was not on small cell facilities, but the mandatory colocation rules that have been codified.

City Attorney Kirkpatrick added that the City is also contending with additional shot clocks, as well as the requirement that design guidelines must be in writing and published prior to being effective. The City is facing some short timelines for adopting requirements.

Mr. Fellman pointed out that the purpose of the City's initial review was because of the 2014 FCC rules; however, the importance of adopting the Code prior to the end of the year is because of the new FCC rule. The proposed amendments are 85% effective rather than 100% because the requirements apply to new technology that is also subject to ongoing litigation.

Mr. Fellman continued his review of other proposed amendments to Chapter 11.20:

- Code provides a list of what must be complied with and allows for the City to request a compliance report within 45 days after installation
- Modifies and updates provisions for development standards for WCFs
- City has limited regulatory authority over ham radio

facilities – code clarifies what that is.

- Attached WCFs permitted in all zone districts except Capitol Boulevard Community, Historic Commercial, Green Belt, Open Space, and Manufactured Home Park zone districts, but prohibited on single-family dwellings.
- Clarifies code language on design requirements and when camouflaged sites are required
- Maximum heights mostly as indicated in each zone district, except on rooftops may request administrative deviation to allow for additional height.
- WCFs in the right-of-way – maximum heights addressed in Chapter 11.20.095.
- Towers allowed with conditional use in Light Industrial, Heavy Industrial, and Airport Related Industrial zone districts, and prohibited in Neighborhood Commercial, Capitol Boulevard Community, Town Center, Historic Commercial, Brewery District, Green Belt, and Open Space zone districts.
- No conditional use permit required for colocation, subject to certain conditions such as no increase in height.
- No "Eligible facilities request" application, applicant must comply with Code and federal law
- Clarifies setback requirements for different kinds of wireless cell facilities in each zone district
- Clarifies maximum height for towers: in any zone district exclusive of industrial zone districts not exceeding the maximum allowable heights for building in the same zone district or fifty feet, whichever is less; provided: maximum allowable height may be increased upon approval of an administrative deviation. *Mr. Fellman added that the FCC order for small communications facilities allows up to 3 cubic feet for antennas and 28 cubic feet for other equipment attached to structures up to 50 feet. The order does not convey that the jurisdiction must allow a fifty-foot site in any location in the community. Additionally, aesthetic requirements are allowed. Height requirements are deemed as an aesthetic requirement. Staff recommends a 40-foot limit with the ability for the Director to allow for a deviation. He shared a photograph of a fifty-foot pole installed in a suburb of Montreal, Canada.*
- Wireless cell facilities in the rights-of-way are treated separately under federal law and are exempt from some conditional use processes because the Code includes

administrative approvals. Requirements are included for abandonment if the facility is no longer used

City Administrator Doan reported the goal and intent is for the City Council to adopt the ordinance by the end of this year. Adoption of the proposed ordinance is scheduled for the Council's consideration at the December 18, 2018 meeting with a public hearing before the Planning Commission on Tuesday, December 11, 2018.

City Attorney Kirkpatrick added that following adoption of the ordinance, a 30-day waiting period is required. If the proposed timeline is not possible, the ordinance could be considered at the Council's first meeting in January 2019 as an emergency ordinance.

Mayor Kmet encouraged the Commission and the Council to consider from a policy perspective issues surrounding height, aesthetic considerations, location criteria, and other issues that would have an impact on the community. His goal is to enable the blending of the facilities to the extent possible to afford availability of the technology to the community.

Councilmember Cathey inquired as to necessity of placing the facilities along streets or other areas of high visibility. Mr. Fellman said small cell facilities are designed to provide a limited coverage area. Some small cell facilities located some distance from a road would not be very effective. The facilities can be attached to structures; however, providers avoid those scenarios as it involves a lease. Installing the facilities on street rights-of-way is at no cost other than covering the City's costs for permitting. The goal is placing smaller cell facilities at or close to the edge of the street with most located in rights-of-way. The Code addresses small cell facilities and standard-sized antennas placed on the façade of a building or roof.

Councilmember Cathey asked whether the City could prohibit the placement of cell facilities onto a structure or on a roof. Mr. Fellman indicated it could be possible to include a blanket rule for limited areas in the City. From a policy perspective, limiting the areas would not support the goal of avoiding new poles in the street. Placing the facilities on an existing building would result in less of a visual impact versus a new pole in the street or on a streetlight.

Mayor Kmet pointed out that as society advances in the use of

autonomous vehicles, wireless technology will play an important role in how vehicles communicate. Mr. Fellman added that the advent of "Smart Cities" offering different wireless applications would require bandwidth and wireless connectivity. Not only would citizens benefit from the applications, the City would also benefit from applications, especially in the arena of public safety.

Commissioner Manugian commented on the anticipation of wireless hardware installed throughout the City and in neighborhoods, which will possibly be at additional government cost that inevitably will lead to many angry property owners. He asked whether the Council has considered a communications plan or strategy as installations unfold that clearly conveys to the public who should bear the blame. Mr. Fellman responded that the Association of Washington Cities (AWC) is addressing something similar. AWC communicates regularly with the City's congressional delegation. Congress has oversight authority over the FCC to keep rules in check. Congress also can also affect the FCC's budget. Most cities have legislative policies and meet with members of Congress on a regular basis. It is an option the City could consider. It would be important to convey community concerns about FCC rules forcing taxpayers to subsidize the industry by adopting rules limiting the reimbursement of City costs to $500.

The Council and the Planning Commission thanked Mr. Fellman for the information on the proposed amendments.

ADJOURNMENT: **With there being no further business, Mayor Kmet adjourned the joint special meeting at 8:58 p.m.**

Prepared by Puget Sound Meeting Services, psmsoly@earthlink.net