



Office of the People's Counsel District of Columbia

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October 16, 2002

Elizabeth A. Noël
People's Counsel

Chairperson Carol J. Mitten
District of Columbia Office of Zoning
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Washington, D.C. 20001

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Re: Office of Zoning October 17, 2002 Public Hearing on
Regulations for Wireless Telecommunications Infrastructure

Dear Chairperson Mitten:

On July 23, 2001, in the spirit of comity, the Office of the People's Counsel ("OPC" or "Office") submitted comments for your Commission's consideration in developing rules to ensure District of Columbia citizens' public health and safety is balanced with the proper siting of antennas, antenna towers, and monopoles. In light of the Public Hearing on October 17, 2002 (D.C.M.R., August 9, 2002), today, OPC again welcomes the opportunity to share its expertise in telecommunications with the Zoning Commission with respect to the Commission's goal in "striking a balance between the need to protect public health and safety while affording the flexibility needed to ensure that adequate telecommunications services are provided to every part of the District."

As mentioned above, OPC a written statement on July 23, 2001, in response to the Commission's request for public comment on the existing regulations governing antennas and associated infrastructure. The Office concluded first, the Zoning Commission retained the authority to regulate wireless telecommunications antennas and towers on the basis of safety and health issues to the extent that they do not address radio frequency emissions. Second, OPC concluded the Zoning Commission's regulations were adequate to protect the public safety and health concerns of D.C. residents.

OPC also recommended establishing uniform Special Height Exception requirements throughout all of the districts in D.C. More importantly, OPC recommended that the applicant bear the burden of demonstrating the proposed wireless antenna and associated structure comply with Federal Communications Commission's ("FCC") rules and regulations.

ZONING COMMISSION
District of Columbia
Case 01-02
Exhibit 74

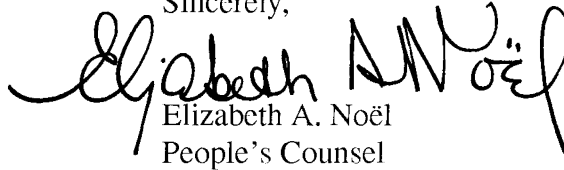
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ZONING COMMISSION
District of Columbia
CASE NO.01-02
EXHIBIT NO.74

Chairperson Carol J. Mitten
October 16, 2002
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The Office is submitting the attached statement to be included in the record as indicated in the Public Hearing Notice dated August 9, 2002. A representative of my Office will be in attendance at the October 17, 2002, hearing. Please contact me at 202-727-3071 if the Office can be of further assistance to you.

Sincerely,



Elizabeth A. Noël
People's Counsel

Att.

cc: Vice-Chair Anthony Hood
Commissioner Kwasi Holman
Commissioner Herbert Franklin
Commissioner John Parsons

SUBMISSION OF
THE OFFICE OF THE PEOPLE'S COUNSEL'S STATEMENT
ON DEVELOPING STANDARDS IN THE DISTRICT OF COLUMBIA TO
REGULATE ANTENNAS, TOWERS, AND ASSOCIATED INFRASTRUCTURE
IN RESPONSE TO ZONING COMMISSION
PUBLIC HEARING ON OCTOBER 17, 2002
(D.C.M.R. August, 9, 2002)

Elizabeth A. Noël
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October 16, 2002

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A. SUMMARY OF OPC'S FINDINGS

OPC has reviewed the proposed amendments and recommends the Zoning Commission ("Commission") incorporate the following recommendations:

- 1) provide the public an opportunity to comment on all applications for antenna citing whether or not the facility is categorically excluded under Federal Communications Commission ("FCC") regulations,
- 2) clearly indicate the circumstances in which an applicant must submit an Environmental Assessment or Environmental Impact Statement as required under federal statute; and
- 3) continue to involve historical institutions and preservation societies in the application review and approval process.

I. BACKGROUND

In 1989, the Commission issued Order No. 587 in which the Commission promulgated rules governing antennas, antenna towers, and monopoles erected in the District of Columbia. As a result of substantial technological advances in wireless communications and changes in federal regulations, the Commission held roundtable discussions in February and March 2001 to reexamine the existing rules for antennas, towers, and associated infrastructure. In those discussions, D.C. citizens were given an opportunity to voice their concerns on health and safety issues associated with wireless communications facilities.

The Commission sought testimony and/or comments on 1) whether the states were federally preempted from regulating antennas and associated infrastructure on the basis of health and safety issues, and 2) whether the existing regulations were sufficient to balance the public welfare of District of Columbia citizens with the telecommunications industry's need to provide adequate telecommunications services and up-to-date technology.

On July 23, 2001, OPC submitted comments recommending first, the Commission apply the special height exception rule to *all* districts in accordance with Commission Order No. 587 adopted

in 1989. More importantly, OPC recommended the Commission require the applicant to demonstrate its application complies with FCC regulations. Finally, OPC suggested the Commission utilize the FCC's publication, "*A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance*" in revising its rules and regulations ("*Local Government's Guide to RF Emission*") governing antennas, antenna towers and associated infrastructure.

Subsequent to the February and March 2001 roundtable discussions, the Commission amended the rules incorporating comments and testimony given by the public. OPC notes the Commission's rules address recommendations made with respect to applying uniform height restrictions on antennas, antenna towers, and associated infrastructure. Thereafter, on August 9, 2002, the Zoning Commission issued a Notice of Public Hearing inviting the public to submit comments on the amended regulations. In response to the Notice of Public Hearing, OPC's comments are submitted herein.

II. DISCUSSION

A. A Public Hearing Should be Held on All Applications Whether or Not Subjected to Board of Zoning Adjustment Approval

OPC submits, notwithstanding the fact that some facilities are categorically exempted by FCC regulations, community members should always have an opportunity to express their concerns as to whether a particular site complies with radiofrequency ("RF") exposure guidelines established by the National Environmental Policy Act of 1969 ("NEPA") and implemented by the FCC. Secondly, members of the public should have opportunity to comment on whether a proposed antenna siting is aesthetically acceptable to the community.

Wireless facilities that are categorically exempted by the FCC are presumed to comply with FCC RF emission guidelines and, therefore, are not subject to the Zoning Commission's review on RF health-related issues. However, OPC points out the Commission retains jurisdiction to regulate wireless telecommunications on matters that do not concern RF emission levels and antennas and towers that do not comply with FCC regulations, and hence the amended regulations should indicate community members will have opportunity to comment on all proposed wireless applications.

Under FCC regulations categorically exempted facilities consist of tower-mounted telecommunications antennas "radiation center" 10 meters or higher above ground level and rooftop antennas emitting less than 1000 watts of power.¹ Examples of such facilities include land mobile, paging, cellular, and amateur radio stations. Although categorically excluded from routine RF emission evaluations, these facilities may still require, on a case-by-case basis, an evaluation under other federal regulations in 47 C.F.R. § 1.1307(c) and (d).² The Local Government's Guide to RF Emissions provides an optional checklist for state and local governments to assess whether a wireless facility is categorically excluded and, thus presumed to comply with FCC RF exposure guidelines.

B. Regulation Section 2601.2 Should Clearly State an Applicant Must Submit an Environmental Assessment or Impact Statement in Addition to Other Certification Requirements

Environmental review of wireless facilities continues to fall under the ambit of state and local government jurisdictions under Section 332(c)(7) of the Communications Act³ and, therefore, Regulation Sections 2601.2, as proposed, should also state an applicant must append a completed

¹ *Infra*, n. 15.

² 11 FCC Rcd. 15123 at n. 9.

³ *See*, 47 U.S.C. § 332(c)(7).

Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”) in addition to the certification requirements delineated in Section 2601. Under federal regulations, an applicant must perform an EA or EIS for a facility that may be located in 1) wilderness areas, 2) wildlife preserves, or 3) affect threatened or endangered species or designated habitats, 4) Indian religious sites, 5) located in flood Plains, or 6) may significantly change surface features.⁴ Additionally, facilities that may affect historic or cultural structures for example, districts, sites, or buildings that are eligible for listing in the National Register of Historic Places must submit an EA or EIS. An applicant who fails to comply with FCC RF exposure guidelines is required under FCC regulations to prepare either of the above statements or be subjected to possible rejection of its application.

Although an applicant must demonstrate under federal regulations it complies with FCC RF guidelines, the submission of an EA or EIS is omitted under the Commission’s proposed amendments indicating an antenna complies with FCC regulations. OPC submits it would benefit the community and assist the Board of Zoning Adjustment in approving an application, if the applicant is also required to file a copy of its EA or EIS, as filed before the FCC, with the Commission as part of the certification requirements under Section 2601.2(a)-(j) establishing an antenna meets federal health and safety regulations.

C. OPC Recommends the Zoning Commission Continue to Involve Historical Institutions in the Application Review and Approval Process.

Former Rule Section 211.7 under “Antenna, Commercial Broadcast (R-1)” provided the Historic Preservation Review Board and the Commission on Fine Arts an opportunity to act upon an application, if applicable. OPC notes this provision has been omitted from Sections 2600, 2609,

⁴ 47 C.F.R. § 1.1307 (1999).

2610, and 2611, as proposed by the Commission. OPC submits it is imperative that historical institutions be afforded an opportunity to participate in the approval process in their efforts to protect and preserve the natural and cultural resources of the Nation's Capitol. Therefore, the aforementioned provisions should be revised to incorporate a review and comment period by the Historic Preservation Review Board and the Commission on Fine Arts.

III. CONCLUSION

State and local governments continue to have a role in ensuring applicants comply with FCC regulations and to assess the impact an antenna or tower structure will have on a community. OPC asserts that the District of Columbia Zoning Commission's proposed regulations sufficiently balance the need to protect D.C. ratepayers' concerns for public safety and health in relation to wireless telecommunications facilities with the communications industry's goal to provide advanced technological of telecommunications services in the District. In summary, OPC submits the three recommendations listed below for the Commission's consideration in finalizing its rules and regulations governing antennas, antenna towers, and associated infrastructure:

- 1) provide the public an opportunity to comment on all applications for antenna citing whether or not the facility is categorically excluded under Federal Communications Commission ("FCC") regulations,
- 2) clearly indicate the circumstances in which an applicant must submit an Environmental Assessment or Environmental Impact Statement as required under federal statute; and
- 3) continue to involve historical institutions and preservation societies in the application review and approval process.