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Opinions vary on small cell 5G safety, but Orinda garners praise for handling

By Sora O'Doherty

Public opinions differ on the safety of small cell technology, known as fifth generation or 5G, but there was a broad consensus among speakers that Orinda is dealing with the situation as well as is possible. The Federal Communications Commission has ordered that local governments cannot deny any reasonable application for a small cell installation, but the federal order leaves localities some discretion with regard to the aesthetics of 5G equipment.

Orinda hired outside counsel Telecom Law Firm to help draft an ordinance on small cell applications for Orinda. The law firm had previously drafted rules for Danville and Mill Valley, among other localities. Under the FCC rules, localities have until April 15 to put local regulations in place. If they don't, they would have no say at all on any proposed 5G installation. Orinda decided to adopt their rules by means of a resolution, rather than an ordinance, with attached aesthetics guidelines. Resolutions can be changed more easily than ordinances, according to the staff report. On April 9 the city council adopted Resolution No. 16-19 and Policy No. 16-19. The resolution and policy become effective immediately.

The policy covers small wireless facilities and other infrastructure deployments within the public rights-of-way. One point that is clarified in the policy document is that a private road is deemed a public right-of-way. A right-of-way use permit is required for all small wireless facilities and other infrastructure deployments located in whole or in part within the public right-of-way, with limited exceptions. No permit is required for facilities owned and operated by the city for its use, for over-the-air reception devices, or for wireless facilities or infrastructure deployments already covered by a valid franchise, pole license or other encroachment agreement between the applicant and the city. Also exempted are applications to collocate, replace or remove transmission equipment at an existing wireless tower or base station.

Neighbors within 300 feet of a proposed installation will be given notice of any application. The approval of applications is governed by FCC's "shot clock," a term utilized by the FCC to indicate that applications must be approved on a very short time scale. Because the applications will be for installation of the 5G equipment in the public right-of-way, the responsibility for approval will fall to the Director of Public Works Larry Theis, but he will work closely with the Director of Planning Drummond Buckley in evaluating the applications.

Mayor Inga Miller expressed a preference for black or dark green as the color of the installations, because that will make them less noticeable.

Over 20 members of the public came out to speak about the small cell agenda item at the well-attended April 9 council meeting. The staff report on the small cell resolution was presented by Orinda Senior Planner Mayank Patel, and the main presentation was by Robert "Trip" May of Telecom Law Firm. May explained that although many local jurisdictions are challenging the FCC order, petitions for judicial review do not stay the effectiveness of the order. Vice Mayor Darlene Gee quipped, "I have a feeling we'll all wish we'd gone to law school before we're done with this!" She wondered about other jurisdictions, that appear to be defying the FCC order. May explained that while it may appear that their rules prohibit 5G installations in residential districts, they generally have an exception that says, "except where exempted by federal law." Council Member Dennis Fay echoed public concern about installations close to schools and nursing homes in residential areas. Council Member Amy Worth thanked the public for coming out to express their opinions and acknowledged that it is frustrating when the federal government preempts local control.

Different opinions were expressed about whether or not sensitivity to radio frequencies is a disability recognized by the Americans with Disabilities Act (ADA). Alice Lee came from Alamo to urge the council to exercise its power and require annual checks of equipment. However, attorney May stated that regular checks have not been upheld by the courts. Checks can only be performed, he said, when there is a reason to suspect that the installation is out of compliance with the federal standards.

Cancer survivor Christine Firstenberg praised the council for drafting the best rule. She said she had met with the mayor and that everything she asked for was included. On the other hand, Dan Miller, an electrical engineer educated at Cornell and Stanford Universities, assured the council that "radio waves are radiation, like light is radiation. It is non-ionizing, it doesn't give you cancer." He explained that small cell is "like wifi, low power, as safe as shining a flashlight in your face." Nora Paymer also spoke in favor of 5G, saying, "I hope that Orinda will grow with modern technology." She added, "I want our city not to fall behind in technology."

A speaker who works for Verizon Wireless assured the council of the safety of small cells, and said, "we're keeping up with capacity, not driving it." He suggested that small cell technology is necessary to meet people's expectations that when they call 911 or text a police department that it will work.

Several speakers suggested fiber optic as an alternative, although Fay questioned whether fiber optic can provide wireless service, and May explained that small cell installations require fiber optic, while other speakers opined that cell service in Orinda is wonderful, and that there is no need for 5G. Valerie Benkman wondered if Orinda could simply declare that it was not a market for 5G, but May said that would not be possible.

Gee concluded that Orinda staff and their consultant have done a good job and come up with the best and most restrictive rules possible right now. She moved to adopt the resolution with one slight amendment, and the council voted unanimously to do so. The city will continue to monitor efforts to overturn the FCC order, and can amend the resolution as the law evolves.

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