

September 3, 2021

VIA EMAIL ONLY

cacord@cityofboise.org

Celine Acord
Manager, Current Planning & Subdivision
BOISE CITY PLANNING & DEVELOPMENT SERVICES
150 N. Capitol Boulevard
P. O. Box 500
Boise, Idaho 83701-0500

Re: ZOA21-00004 – Comments on Draft Wireless Communication Facilities Ordinance

Dear Ms. Acord:

These comments are submitted on behalf of Idahoans for Safe Technology Foundation, Inc. regarding the City of Boise's draft Wireless Communication Facilities Ordinance (ZOA21-00004). We appreciate the invitation to provide comments and the opportunity to share with you our suggested changes to the Development Code.

Idahoans for Safe Technology supports inclusion of the following provisions in the City of Boise's Wireless Communication Facilities Ordinance. Please note that this proposed language was also submitted to the City of Eagle, which chose to adopt an ordinance prohibiting personal wireless facilities in residential land use districts and requiring application submittal documentation to allow for evaluation of the need for any proposed facility. Eagle City Code 11A-4-4.FFF. We encourage the City of Boise to do the same, as well as adopting the additional provisions suggested below, all of which fall within the City's authority.¹

¹ The Federal Telecommunications Act of 1996 does not allow state or local governments to prohibit the provision of wireless services or to regulate wireless facilities based on the environmental effects of radio frequency emissions to the extent that such facilities comply with the FCC's regulations concerning such emissions. 17 U.S.C. Sec. 332(c)(7)(B). Beyond this specific, limited federal preemption, the Act does not "limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. Sec. 332(c)(7)(A). In other words, the City of Boise may continue to exercise its authority to adopt, implement and enforce appropriate ordinances under Idaho's Local Land Use Planning Act ("LLUPA"), codified at Idaho Code Secs. 67-6501 *et seq.* and Article XII, Sec. 2 of the Idaho Constitution, including the provisions recommended by Idahoans for Safe Technology.

1. Tower and Zones Districts

Personal wireless facilities including towers supporting amateur radio antennas shall be prohibited in all residential and school land use districts. We encourage you to review the similar provision adopted by the City of Eagle. Eagle City Code 11A-4-4.FFF.1.

2. GL Insurance

The applicant shall provide the full insurance policy proving it provides comprehensive general liability insurance in the amount of no less than one million dollars (\$1,000,000.00) per occurrence with an aggregate of ten million dollars (\$10,000,000.00), and a company authorized to do business in the State of Idaho shall write the policy. The policy shall not contain any exclusions of coverage for Hazardous Pollution activities and no exclusion for injuries, illnesses or deaths from RF-EMR exposures. The insurance policy shall require at least thirty (30) days' notice to the City prior to termination of coverage for any reason. The applicant shall secure substitute liability insurance coverage prior to actual termination; failure to maintain comprehensive general liability insurance shall result in immediate withdrawal of the permit by the City. At the time of application, the applicant shall provide written indemnification for the City. The applicant shall provide Proof of Insurance with the City as a named Insured. The applicant shall provide proof of Pollution Liability Coverage for RF-EMR exposures. The applicant shall provide a list of its board of directors and its audited financials for purposes of indemnification.

3. Needs Test

A wireless Needs Test is designed to measure the signal strength of all wireless carrier-specific frequencies. Industry-standard Drive Tests can measure actual signal strength for all antennas currently installed and operating in the City. The Drive Tests would log, second-by-second, the existing signal strengths in decibel-milliwatts (dBm) for each frequency transmitted from antennas that reach the City's streets. The raw data and report would be entered into the public record every six months, so the results can be verified by any member of the public.

The results of the Drive Tests would provide verifiable, objective data to determine if a particular proposed wireless facility would be legally necessary to be installed in the public rights-of-way within the City's jurisdiction and legal authority. The raw data from the Drive Test would be used to establish if any carrier-specific significant gaps in telecommunications service coverage actually exist, considering results from the voice-frequencies specific to each carrier. Any new facility would only be licensed by the City if there is a proven significant gap in telecommunications service that could be corrected placing and constructing a wireless antenna using the "least intrusive means."

In evaluating the wireless Needs Test provision, we encourage you to review the additional application submittal requirements adopted by the City of Eagle. Eagle City Code 11A-4-4.FFF.9.

4. Purpose Statement

The City of Boise seeks to achieve the following objectives:

- a. Protect and promote the public health, safety and welfare of City residents and visitors;
- b. Promote public access to telecommunications which is safe, reliable, affordable, secure, respectful of privacy, consumer rights, and rights detailed in the Idaho Constitution;
- c. Ensure that the rights of residents and visitors with disabilities or pacemakers are duly protected under the laws, constitutions and rights of both the State of Idaho and United States of America;
- d. To the maximum extent possible under state and federal laws, prevent abuse of surveillance capabilities via telecommunications and information services and, in particular, prevent use of facial recognition or other surveillance equipment or devices with artificial intelligence capacities;
- e. Require bonds, indemnity, insurance, and/or any other financial protective measures sufficient to protect the City from potential claims for injuries, illnesses and deaths from pulsed, data-modulated, Radio-frequency Electromagnetic Microwave Radiation (RF-EMR) exposures as well as from liabilities for equipment removal or other costs caused by the placement, construction, modification or operation of wireless or wireline infrastructure.
- f. Regulate structures and siting to prevent or reduce other adverse impacts, such as top-heavy utility poles with a likelihood of falling on pedestrians;
- g. Preserve community character and protect aesthetic quality, preventing clutter and visual blight and fostering an aesthetically pleasing environment;
- h. Minimize interference with pedestrian and vehicular traffic,
- i. Avoid damage to or loss of street trees, protecting historic, cultural, and natural resources by preventing degradation of the surrounding settings or directly upon the resource;
- j. Encourage siting of wireless infrastructure in preferred locations to minimize intrusion of these uses into residential, community, and protected environmental areas;
- k. Minimize the total number of antennas throughout the community while still ensuring outdoor access to telecommunications service.
- l. Protect land and residential uses from potential adverse impacts of wireless infrastructure and protect the City's public rights-of-ways and municipal infrastructure located within the City's public rights-of-way;

- m. As long as the City is bound by state or federal laws requiring the following, this Chapter is not intended to, nor shall it be interpreted or applied to:
 - 1. prohibit or effectively prohibit any personal wireless telecommunications service provider's ability to provide personal wireless telecommunications service;
 - 2. prohibit or effectively prohibit any entity's ability to provide telecommunications service, subject to any competitively neutral and nondiscriminatory rules, regulations or other legal requirements for rights-of-way management;
 - 3. unreasonably discriminate among providers of functionally equivalent service;
 - 4. regulate the placement, construction or modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such wireless facilities comply with the FCC's regulations concerning such emissions;
 - 5. prohibit any collocation or modification that the City may not deny under federal or state law;
 - 6. impose any unreasonable, discriminatory or anti-competitive fees; or
 - 7. otherwise authorize the City to preempt any applicable federal or state law.
- n. This Chapter is not intended to and will not limit or prejudice any individual's right to accommodation or protection under the Fair Housing Amendments of 1988 American Disabilities Act, or any similar state or federal law or human right.
- o. No Waiver of Standing. This Chapter is not intended to and will not limit or prejudice the City's own rights to legal actions to protect the City and its residents. The City's grant or grant by operation of law of Wireless Telecommunications Facilities does not waive, and shall not be construed to waive, any standing of the City to challenge relevant federal or state law.

As noted in the City of Eagle's ordinance, "[c]ertain land uses may pose special circumstances that may have detrimental effects on surrounding land uses and require specific conditions." Eagle City Code 11A-4-4. The City of Boise would do well to keep this in mind as it considers a Purpose Statement for the Wireless Communications Facilities Ordinance. While the aesthetics of a proposed facility is certainly important (e.g., item no. 4.g. above), that is hardly the sole consideration for the public that you serve. To emphasize this point, please see the on-line petition initiated by Idahoans for Safe Technology, which has already been signed by over 1,000 individuals, 35% of whom reside in the City of Boise and many more of whom work, shop or dine in Boise, at <https://www.change.org/p/boise-city-planning-and-zoning-department-tell-city-officials-to-protect-us-from-adverse-health-effects-of-wireless-technology>. The petition, which will be submitted to the City of Boise, includes 15 suggested requirements for wireless facilities in the

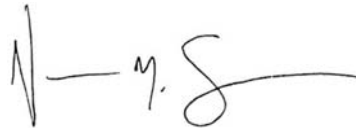
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City of Boise, some of which overlap with the specific proposal above. We encourage you to consider these additional requirements as you continue to draft your Wireless Communication Facilities Ordinance.

Again, we appreciate the opportunity to provide these suggested provisions for inclusion in the City of Boise's Wireless Communication Facilities Ordinance (ZOA21-00004) on behalf of Idahoans for Safe Technology Foundation, Inc. As this process moves forward, we stand ready to assist you, including answering any legal questions that may arise with regard to consideration of these and any other relevant provisions.

Respectfully submitted,

PARSONS BEHLE & LATIMER

A handwritten signature in black ink, appearing to read "N.M. Semanko". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Norman M. Semanko
Attorneys for Idahoans for Safe Technology
Foundation, Inc.

NMS:kea