

To: Mr. Michael Ortega
City Manager, City of Tucson
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Tucson, AZ 85701
citymanager@tucsonaz.gov

cc: Mayor, City Council Members and City Clerk

- Mayor Regina Romero Mayor.Romero@tucsonaz.gov or 520-791-4201
- Ward 1 Council Member Lane Santa-Cruz ward1@tucsonaz.gov or 520-791-4040
- Ward 2 Council Member Paul Cunningham ward2@tucsonaz.gov or 520-791-4687
- Ward 3 Council Member Karin Uhlich ward3@tucsonaz.gov or 520-791-4711
- Ward 4 Council Member Nikki Lee ward4@tucsonaz.gov or 520-791-3199
- Ward 5 Council Member Richard Fimbres ward5@tucsonaz.gov or 520-791-4231
- Ward 6 Council Member Steve Kozachik ward6@tucsonaz.gov or 520-791-4601
- Roger Randolph <cyclerk@tucsonaz.gov> or 520-791-4213
- Yolanda Lozano Yolanda.Lozano@tucsonaz.gov

From: Russell S. Witte, Ph.D.
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[City Clerk, please add this email/letter to the City of Tucson Public records for Feb 23, 2021, Study Session Agenda Item 5: "Insufficient Local Regulation of so-called "small" Wireless Telecommunications Facilities (sWTFs) in Residential Zones". Please also ensure that this email/letter gets printed and placed into the paper file for this agendized item.

I hereby request that this email/letter and all communications and other substantial written evidence that we place in the Public Record be added to the agenda packet that will be distributed to the City Council members for any future meetings, and included in a related agendized items for any and all related deliberations. Thank you for your cooperation in this matter.]

Re: Postpone Publishing and Implementing the Public Utility Manual; Amend the Tucson Wireless Ordinance

Date: July 28, 2021

SENT BY EMAIL AND CERTIFIED USPS

Dear Mr. Ortega,

I very much appreciate your time meeting with me earlier this month to discuss problems with 5G small cell technology and amending Tucson's wireless ordinance to better protect the safety, privacy and property values for the people of Tucson. I also want to thank you for including several residents associated with Wire Tucson to participate in yesterday's Zoom meeting (July 27) regarding revisions to the City of Tucson Public Utility Administrative Manual, which adds a significant chapter on so-called "small" Wireless Telecommunications Facilities (sWTFs).

At yesterday's meeting, Ms. Diana Alarcon directed participants to add questions to the chat. Here's one of the first questions:

- **From chat:** "We know that the Council on Feb 23 voted to give direction to the City Manager and City Attorney to update the old Tucson Wireless Ordinance . . . why is Tucson doing a manual and not an Ordinance?"

The following answer was from Mr. Roi Lusk:

- **From Roi Lusk:** "So, Diana I think it's important at this point to note that there are two members of a local group here on the call that are not associated with industry so that our industry partners are aware of that those two persons made their concerns known about 5G in general . . . we have been in contact with the council our direction in terms of implementing a manual versus an ordinance and they're OK with that. This manual will do the things that are necessary to make the rights-of-way amenable to all installations of all utilities and not just of small cell wireless [facilities] and so that's the direction that we are going . . . Any issues we address in terms of our management the City's management of the ROW will be included in the manual."

This statement by Mr. Lusk appears to be inconsistent with the Feb 2021 Study Session Council vote because on Feb 23, 2021, the City of Tucson City Council voted for a **revised Tucson Wireless Telecommunications Facilities (WTFs) Ordinance**.

Feb 23, 2021 Study Session Agenda

Mayor Romero called the [Feb 23 Study Session](#) to order at 12:36 p.m.

1. Discussion to Adopt CROWN Act (City Wide) SS/FEB23-21-46
2. Report and Update on the Continuing COVID-19, Emergency
3. Continuing Budget Discussions
4. Central Business District Impact Analysis Review (City Wide) SS/FEB23-21-40
5. [SS/FEB23-21-44](#) – Follow-up Discussion on the Installation of Small Cell Poles
6. Discussion of Charter Provisions for Filling Vacancies on the City Council
7. Discussion to Amend Tucson Code, Chapter 16, Section 16-11 (c) Relating to Minimum Standards for Safe Housing (Cooling Requirements) (City Wide) SS/FEB23-21-42
8. Updates on State and National Legislation and Regional Committees (City Wide) SS/FEB23-21-36
9. Mayor and Council Discussion of Regular Agenda (City Wide) SS/FEB23-21-37
10. Mayor and Council Discussion of Future Agendas (City Wide) SS/FEB23-21-38

It is clear that an administrative Utility Manual is NOT an Ordinance.

1. Council Member Kozachik <https://youtu.be/GSh9i1WTCVI?t=4h54m52s>

"Where I am heading with this is **an ordinance** that will require the telecom providers to show that they have completely exhausted all options before landing on a site for a proposed pole."

2. Council Member Kozachik <https://youtu.be/GSh9i1WTCVI?t=4h59m48s>

"We don't have the staff, City staff, quite frankly has Jesse Sanders who I guess is on contract doing these – he doesn't have the time to chase these down. This is going to be a big, big deal for this City . . . we have to start protecting the aesthetics of this city . . . **I would like a local ordinance that requires** the providers to demonstrate to us that they have exhausted all other possible locations for a pole site."

2. *Council Member Kozachik* <https://youtu.be/GSh9i1WTCVI?t=5h6m0s>

"I will frame that in the form of a motion: **a local ordinance** that requires providers to demonstrate to us that they have exhausted all other possible locations for a pole site."

3. *Council Member Fimbres* – <https://youtu.be/GSh9i1WTCVI?t=5h6m12s>

"Second."

4. *City Attorney Rankin* – <https://youtu.be/GSh9i1WTCVI?t=5h13m8s>

"You act on the motion that has been presented and if the additional direction is that staff is directed to find any other lawful mechanisms to incentivize co-location as the preferred type of installation and **to bring those back for Mayor and Council consideration and approval.**"

5. *Council Member Fimbres* – <https://youtu.be/GSh9i1WTCVI?t=5h13m30s>

"That works for me."

6. *Mayor Romero* – <https://youtu.be/GSh9i1WTCVI?t=5h13m34s>

"So, there is a motion and a second. Any further discussion? All those in favor of the motion, indicate by saying 'Aye'" (**Vote:** Ayes 5 / Noes 0)

Please identify the deliberation, followed by a vote, which occurred in a public forum that had proper public notice of when, where, and which agenda was set, with minutes recorded, pursuant to [A.R.S. § 38-431.02](#) (see Appendix B) -- a proper due process that **changed** the direction from City Council to City staff to produce a **manual** instead of an **ordinance**?

Absent such evidence, then it would NOT be appropriate for the City of Tucson to publish, adopt, or implement the manual at this stage, since the public, as full stakeholders in the management and ownership of the public rights-of-way -- stakeholders with rights to the quiet enjoyment of their streets and homes -- has been denied the opportunity to participate in both the existence of and shaping of the final work product. Instead, this manual could be considered as **one DRAFT**, along with others, including the proposed Tucsonans' Wireless Telecommunications Facilities (WTFs) Ordinance (<https://www.wiretucson.org/tucsonans-wtf-ordinance/>) that would lead to a revised City of Tucson WTF Ordinance, after proper engagement, dialogue, and participation with and by the public, discussions with public experts, Council deliberation and vote. Will you please also address the questions raised in Appendix A?

I would appreciate meeting with you by phone, Zoom or in person, perhaps joined by Wire Tucson, as soon as possible to assure your commitment to **NOT** publish any revised Tucson

Public Utility Administrative Manual **until** there is a revised City of Tucson WTF Ordinance lawfully voted through by the City Council. Thank you.

Given the seriousness and urgency of this matter, I would appreciate a response to this letter and my request by Friday, July 30, 2021. Otherwise, I will follow up with your office next week.

Signed, this Twenty Eighth day of July 2021,



Prof. Russell S. Witte, Ph.D.
Tucson, Arizona 85719 (Ward 6)
rwitte@protonmail.com

Appendix A: Zoom Chat from the 7/27 Utility Manual Meeting

Here is a copy of the chat where many more questions remain to be satisfied:

- 10:29:32 From Paul G to Everyone: Can we ask questions via chat?
- 10:30:06 From Diana Alarcon to Everyone: Yes, questions can be asked via the chat.
- 10:30:15 From Diana Alarcon to Everyone: Good Morning Danielle.
- 10:30:17 From Paul G to Everyone: Thank you.
- 10:31:33 From Danielle Agee to Everyone: Good morning all!
- 10:31:58 From Paul G to Everyone: We know that the Council on Feb 23 voted to give direction to the City Manager and City Attorney to update the old Tucson Wireless Ordinance . . . why is Tucson doing a manual and not an Ordinance?
- 10:32:05 From Roi Lusk to Everyone: Good morning!
- 10:32:33 From Diana Alarcon to Everyone: This is the direction we are moving forward with
- 10:33:50 From Paul G to Everyone: How is a “manual” the same as an ordinance?
- 10:35:37 From Diana Alarcon to Everyone: Paul, We are moving forward with the manual to manage the work that will be allowed in our ROW
- 10:37:48 From Paul G to Everyone: “Moving forward” and passing an ordinance are too different things. Only the latter is consistent with the Feb 23, 2021 City Council vote.
- 10:38:51 From Diana Alarcon to Everyone: Thank you for your comment.
- 10:39:19 From Paul G to Everyone: Cities have an obligation and duty to deliver conditions of ACTUAL public safety per the 1996 TCA and ARS HB-2365.
- 10:39:31 From Heidi Miller to Everyone: so what is a manual? Is it a policy? Is it a code?
- 10:40:21 From Paul G to Everyone: A manual is a publication; it is not a local law as it has not been voted on by the City Council.
- 10:41:22 From Paul G to Everyone: In a government of the people, by the people and for the people, City staff CANNOT publish local laws without a City Council vote.
- 10:41:34 From Danielle Agee to Everyone: Hi Diana. You mentioned sharing the industry comments with your legal team. Will the industry be able to discuss our concerns with your legal team directly?

- 10:41:58 From Roi Lusk to Everyone: Hey Danielle, I am on and available for discussion if necessary
- 10:42:53 From Danielle Agee to Everyone: Thanks, Roi. Did you receive the memo we sent or should I forward it to you?
- 10:43:17 From Roi Lusk to Everyone: Just now...I have briefly reviewed but not gone line by line
- **10:43:46 From Heidi Miller to Everyone: Mr. Lusk will you please answer Paul's questions and mine?**
- **10:44:27 From Roi Lusk to Everyone: This meeting is for discussion of the manual...if you have specific questions about the contents of the manual feel free to put them in the chat and we will attempt to answer them**
- 10:44:30 From Danielle Agee to Everyone: Understandable, Roi. Can the industry schedule a call to go over the legal issues with you?
- **10:45:33 From Roi Lusk to Everyone: Sure reach out to me offline and we can set that up.**
- 10:45:44 From Chinwe Mary Okoye to Everyone: How did the City determine the 150 ft and 300 ft distances for small cell location and neighborhood notice?
- **10:45:55 From Heidi Miller to Everyone: Mr. Lusk these questions are for you: We know that the Council on Feb 23 voted to give direction to the City Manager and City Attorney to update the old Tucson Wireless Ordinance . . . why is Tucson doing a manual and not an Ordinance?**
- **10:46:13 From Roi Lusk to Everyone: This is not a question about the contents of the manual**
- 10:46:29 From Heidi Miller to Everyone: so what is a manual? Is it a policy? Is it a code?
- **10:46:39 From Paul G to Everyone: Will the manual be voted on by the City Council before it gets "published"?**
- **10:47:26 From Paul G to Everyone: We are not sharing "concerns." We are sharing only substance, facts and law.**
- 10:47:27 From Heidi Miller to Everyone: there was a vote?
- 10:47:47 From Melissa Bomar - Crown Castle to Everyone: In regards to section 10.13 - if a utility uses existing irrigation and the plants end up dying, will the city be able to provide documentation that the plants were watered appropriately and it is not the utility's responsibility to replace them?
- **10:48:18 From Heidi Miller to Everyone: all utilities must comply with NEPA this manual contains no NEPA checks but records show they are needed according to federal NEPA requirements**
- **10:48:57 From Paul G to Everyone: Was the public consulted on lowering the notice radius from "larger" to 300 feet? What was the larger before it was reduced?**
- 10:49:24 From Melissa Bomar - Crown Castle to Everyone: I may have missed it in the manual but will you be providing your review times in writing somewhere (this includes flood control review)? An escalation path would be helpful too
- **10:49:39 From Heidi Miller to Everyone: Can we set up a public workshop to gather public input before publishing?**
- 10:50:20 From Chinwe Mary Okoye to Everyone: Thank you for your response regarding the 150ft and 300ft.
- **10:50:41 From Heidi Miller to Everyone: Mr. Lusk, please cite the code that gives the DOT full authority to implement public policy?**
- **10:51:09 From Paul G to Everyone: How does the manual balance the Mayor's goal of planting and growing 1 million HEALTHY trees and the unnecessarily high levels of RF Electromagnetic Microwave Radiation (RF-EMR) that damage trees?**

- 10:52:11 From Paul G to Everyone: Can we consider in the manual what levels of RF-EMR are needed to provide effective telecommunications service and if that is compatible with healthy trees?
- 10:52:27 From Heidi Miller to Everyone: Please describe the appeals process.
- who is allowed to submit an appeal and who has final authority?
- will evidence for appeals be contained in the public record?
- 10:52:43 From Heidi Miller to Everyone: What is the process by which this manual gets approved for "publishing"? Who has the final say? City Manager? City Attorney? City Council?
- 10:52:52 From Heidi Miller to Everyone: What does "publishing" the manual mean? How will any of this get enforced?
- 10:52:58 From Melissa Bomar - Crown Castle to Everyone: I didn't get an answer to the question - if a utility uses EXISTING irrigation and the plants end up dying, will the city be able to provide documentation that the plants were watered appropriately and it is not the utility's responsibility to replace them?
- 10:53:35 From Paul G to Everyone: Why are we allowing signal strength in areas accessible to people at anything higher than -85 dBm, a level the industry considers to be excellent coverage?
- 10:53:49 From Heidi Miller to Everyone: Why was a Utility Manual chosen instead of an ordinance, which would require public input
- 10:54:21 From Wendell Nelson to Everyone: Is that landscaping manual new or a change? Ones we have seen in the past have added many new requirements to folks who work in the ROW.
- 10:55:40 From Paul G to Everyone: In Black's Law Dictionary: public safety is defined as "the welfare and protection of the general public usually expressed as a governmental responsibility." Can we add this to the manual, please?
- 10:55:46 From Heidi Miller to Everyone: Who has final authority in approving or denying an application?
- 10:55:56 From Melissa Bomar - Crown Castle to Everyone: Sorry, I didn't clarify - I was referring to new plants that we had to replace
- 10:56:50 From Wendell Nelson to Everyone: So.....It will be published without review by all impacted?
- 10:56:55 From Carlet Castro, Tucson Electric Power to Everyone: Will we have a review and comment period for the new Landscape Manual?
- 10:57:03 From Paul G to Everyone: The public's critique and suggestions will be collecting here → <https://wireamerica.org/az/tucson-utility-manual/>
- 10:57:41 From Paul G to Everyone: Will we have a review and comment period for the new Utility Manual? If not, why not?
- 10:58:30 From Wendell Nelson to Everyone: I was able to review changes in the past.
- 10:58:37 From Paul G to Everyone: Will we have a review and comment period for the UPDATED Utility Manual? If not, why not?
- 10:58:57 From Adriana Mariñez to Everyone: Diana - If not DTM, who is managing the update to the manual?
- 10:58:57 From Paul G to Everyone: Diana, why are you ignoring these questions?
- 10:59:23 From Paul G to Everyone: You are managing the Utility manual, Ms. Alarcon.
- 10:59:25 From Adriana Mariñez to Everyone: yes, landscape manual
- 10:59:33 From Adriana Mariñez to Everyone: Thank you.
- 10:59:46 From Heidi Miller to Everyone: what about public review
- 10:59:50 From Paul G to Everyone: SECOND ATTEMPT: Will we have a review and comment period for the UPDATED Utility Manual? If not, why not?

- 11:00:01 From Heidi Miller to Everyone: Ms. Alarcon, please answer all questions in the chat
- 11:00:47 From Heidi Miller to Everyone: we want to require proof of NEPA compliance
- 11:00:52 From Paul G to Everyone: NEPA enforcement is optional for the City
- 11:00:59 From Roi Lusk to Everyone: Questions unrelated to the purpose of this meeting will not be addressed
- 11:01:00 From Heidi Miller to Everyone: NEPA regulates power
- 11:01:22 From Heidi Miller to Everyone: When can we weigh on this?
- 11:01:57 From Heidi Miller to Everyone: SO the public will not have a chance to influence policy?
- 11:02:16 From Heidi Miller to Everyone: When will they be addressed?
- 11:03:14 From Heidi Miller to Everyone: Did the state law removed public participation from policy? The state law requires an ordinance. Not a manual.
- 11:03:44 From Russ W. to Everyone: Who has final authority to deny or approve a permit application? Who is allowed to submit an appeal? Is the appeal process part of public record?
- 11:04:32 From Melissa Bomar - Crown Castle to Everyone: I have a question about asphalt restoration that would be easier to ask unmuted rather than via chat if possible.
- 11:05:08 From Heidi Miller to Everyone: When will there be a public workshop before manual is published?
- 11:06:41 From Heidi Miller to Everyone: Roi please answer: did the state law remove public participation from policy? (citation please) The state law requires an ordinance. Not a manual. Why is Diana citing the state law as it regards a manual when an ordinance is what is required.
- An ordinance requires public input.
- 11:07:27 From Heidi Miller to Everyone: and is this manual policy? is it code?
- 11:08:10 From Russ W. to Everyone: I think he needs to unplug and plug in his mic
- 11:08:47 From fred felix to Everyone: I get a message the host is not allowing
- 11:10:11 From Michael to Everyone: I would suggest you put your specific questions in writing you believe were not answered and get them to Diana and her team. They will then prepare responses...
- 11:11:56 From Heidi Miller to Everyone: Can Mr. Lusk please answer my last question above. I think everyone should know if this is a code or a policy and how it can be enforced. What does publishing a manual really mean?
- 11:12:28 From Melissa Bomar - Crown Castle to Everyone : thank you. I may need to send a follow up email
- 11:12:33 From Wendell Nelson to Everyone: In my understanding of Melissa's example, we would have normally gone outside the roadway, still in ROW, but under the trees and landscaping.
- 11:13:27 From Heidi Miller to Everyone: and those from residents?
- 11:13:31 From Chinwe Mary Okoye to Everyone: Can we see Tucson Water's comments?
- 11:13:35 From Heidi Miller to Everyone: when will the manual be published?
- 11:13:43 From Adriana Mariñez to Everyone: TEP will be submitting its latest redlines by the end of week. Thank you

Appendix B: ARS Section 38-431.01

38-431.01. Meetings shall be open to the public

A. All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting.

B. All public bodies shall provide for the taking of written minutes or a recording of all their meetings, including executive sessions. For meetings other than executive sessions, the minutes or recording shall include:

1. The date, time and place of the meeting.
2. The members of the public body recorded as either present or absent.
3. A general description of the matters considered.
4. An accurate description of all legal actions proposed, discussed or taken, including a record of how each member voted. The minutes shall also include the names of the members who propose each motion and the names of the persons, as given, who make statements or present material to the public body and a reference to the legal action about which they made statements or presented material.

C. Minutes of executive sessions shall include items set forth in subsection B, paragraphs 1, 2 and 3 of this section, **an accurate description of all instructions given** pursuant to section 38-431.03, subsection A, paragraphs 4, 5 and 7 and other matters as may be deemed appropriate by the public body.

D. **The minutes or a recording of a meeting shall be available for public inspection** three working days after the meeting except as otherwise specifically provided by this article.

E. A public body of a city or town with a population of more than two thousand five hundred persons shall:

1. Within three working days after a meeting, except for subcommittees and advisory committees, post on its website, if applicable, either:

- (a) A statement describing the legal actions taken by the public body of the city or town during the meeting.
- (b) Any recording of the meeting.

2. Within two working days following approval of the minutes, **post approved minutes of city or town council meetings on its website**, if applicable, except as otherwise specifically provided by this article.

3. Within ten working days after a subcommittee or advisory committee meeting, post on its website, if applicable, either:

(a) A statement describing legal action, if any.

(b) A recording of the meeting.

F. All or any part of a public meeting of a public body may be recorded by any person in attendance by means of a tape recorder or camera or any other means of sonic reproduction, provided that there is no active interference with the conduct of the meeting.

G. The secretary of state for state public bodies, the city or town clerk for municipal public bodies and the county clerk for all other local public bodies shall conspicuously post open meeting law materials prepared and approved by the attorney general on their website. A person elected or appointed to a public body shall review the open meeting law materials at least one day before the day that person takes office.

H. A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body. At the conclusion of an open call to the public, individual members of the public body may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. However, members of the public body shall not discuss or take legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.

I. A member of a public body shall not knowingly direct any staff member to communicate in violation of this article.

J. Any posting required by subsection E of this section must remain on the applicable website for at least one year after the date of the posting.