



AGENDA REPORT

SAN CLEMENTE CITY COUNCIL MEETING
Meeting Date: August 20, 2019

Agenda Item 6W

Approvals:

City Manager [Signature]

Dept. Head [Signature]

Attorney [Signature]

Finance [Signature]

Department: Community Development Department, Planning Division
Prepared By: Katie Crockett, Associate Planner

Subject: **ZONING AMENDMENT 19-189 UPDATE ON PROPOSED ORDINANCE TO AMEND PERMITTING REQUIREMENTS FOR SMALL WIRELESS TELECOMMUNICATIONS FACILITIES IN RESPONSE TO RECENT FEDERAL COMMUNICATIONS COMMISSION REGULATIONS**

Fiscal Impact: None

Summary: At the May 21, 2019 City Council meeting, the City Council voted to initiate Zoning Amendment (ZA) 19-189 ("the Ordinance") to modify the procedures, requirements, and design standards for small wireless telecommunication facilities ("Small Cells"). At that time, the Council requested an informational update regarding staff's research related to the Ordinance prior to formal Council consideration of the draft Ordinance at a public hearing. This report summarizes existing and newly enacted Federal regulations, which limit the City's discretionary control over Small Cells, and summarizes the approach of some other jurisdictions to regulating Small Cells. Working within existing regulatory limitations and using precedent from other jurisdictions, staff is currently working on an Ordinance to update the City's permitting process for Small Cells and to set forth appropriate design standards for these facilities. The Ordinance will be reviewed by the Planning Commission at a noticed public hearing, and then brought to City Council for final consideration.

Background: What is a "Small Cell"
Small Cells are a new type of installation proposed in the City of San Clemente. Small Cells typically consist of one antenna and minimal associated equipment. Historically, the City has reviewed and approved larger types of wireless telecommunications facilities, commonly referred to as "macro sites." Macro sites typically consist of a cluster of cell antennas (approximately six to 12 antennas) mounted in a roof area of a multi-story building or a freestanding facility designed to look like a tree, such as a "monoeucalyptus" or "monopine." These facilities typically have a large equipment enclosure at ground level containing several equipment cabinets, generator, and/or other supporting equipment.

According to the FCC definition, Small Cells are wireless telecommunications facilities that: (1) are mounted on structures 50 feet or less in height, including their antennas; or (2) are mounted on structures no more than 10 percent taller than other adjacent structures; or (3) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater. Small Cells, according to the FCC, must also meet the following requirements: (1) each antenna associated with the deployment must be no more than three cubic feet; and

(2) all other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure is no more than 28 cubic feet in volume.

Regulatory Framework

The Communications Act of 1934 as amended by the Telecommunications Act of 1996 (“The Act”) governs local authority over decisions regarding the placement, construction, and modification of wireless telecommunication facilities. The Act generally preempts local regulatory authority over wireless communications providers, but allows local zoning authority over the placement, construction, and modification of wireless telecommunication facilities subject to certain limitations. Generally, these limitations include that the City, in exercising its zoning authority, (1) cannot prohibit or have the effect of prohibiting the provision of personal wireless services, (2) must act within a “reasonable” period of time on applications for personal wireless service facilities, and (3) cannot “regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission’s regulations concerning such emissions” (Communications Act Section 332(c)(7)(B)). The Federal Communications Commission (FCC) continues to hone these broad regulations by adopting various rules for implementation.

On September 26, 2018 the FCC adopted Declaratory Ruling and Order 18-133 (“the Order”) implementing rules that further limit the ability of the City to regulate Small Cells. Most portions of the Order went into effect January 14, 2019. Other portions of the Order related to aesthetic requirements on Small Cells went into effect April 13, 2019.

The Order includes other limitations on the City’s authority as follows:

- Timeframe limits within which the City must review and permit Small Cells, including all permits or permissions (“the shot clock”).
- Fee limits, both for the initial application, as well as annual licensing or similar fees.
- Limits to City design standards or aesthetic restrictions for Small Cell installations. However, the City may exercise reasonable control as to time, place, and manner of construction within the public right of way (ROW) and may impose aesthetic requirements that do not result in the actual or effective prohibition of wireless service and that are no more burdensome than those applied to other types of infrastructure deployments. Any design or aesthetic requirements the City wishes to impose on Small Cells must be published in advance of an application being made.

The public has previously raised concerns to the City Council regarding “5G,” or “Fifth Generation” wireless technology. Once implemented by the wireless industry, 5G would increase mobile data speeds from the current 4G technology and support the use of smart cars and other smart devices such as utility meters and appliances. The FCC preempts the City from regulating wireless communications providers, or regulating the types of wireless service within the City, such as 5G. However, the City maintains some local zoning authority over the placement, construction, and

modification of the facilities used to provide the service (such as Small Cells), so long as it does not have the effect of prohibiting any wireless service. Answers to some common questions regarding 5G and Small Cells have been included in Attachment 1.

Current City Process

The City requires a Conditional Use Permit (CUP) or City Antenna Permit for wireless telecommunications facilities depending on where they are located and how the facility is designed. Both permits require a noticed public hearing and Design Review Subcommittee (DRSC) review. Both permits require a \$5,000 deposit. Because of the new restrictions on fees, shot clock, and design standards set forth in the Order, the current permitting required by the City's Zoning Ordinance for wireless telecommunications facilities is not feasible and would render the City unable to comply with the Order. Furthermore, because the City does not have published Small Cell aesthetic standards any applications made now would be subject to the current Zoning Ordinance, which does not set forth specific requirements for Small Cells.

Other Jurisdiction Regulations

Many jurisdictions across the country have adopted Small Cell regulations, and staff has summarized such regulations in Attachment 2. Most jurisdictions utilize a list of "preferred locations." If an applicant wishes to site a facility outside of the preferred locations (in a residential neighborhood for example), the applicant must demonstrate that denial of such application would result in the effective prohibition of service, among other things.

Discussion: Primary staff considerations in establishing a recommended process for Small Cell facilities are twofold:

1. Expected timeframe. The shotclock established for Small Cells is either 60 days if proposed on an existing facility or 90 days if a new structure must be constructed. Upon application submittal, the City has 10 days to determine if the application is missing information. The current process of review through the Development Management Team (DMT) and required DRSC review do not fit within these timeframes. Preparing projects for public hearings before the Zoning Administrator or Planning Commission requires considerable staff time and also requires lead times for public noticing.
2. Expected cost. There are some nuances and exceptions to the rules put in place by the FCC related to cost. In general, for non-recurring fees (i.e. the permitting costs), the FCC believes a fee of \$500 for a single application that includes up to five Small Cells, with an additional \$100 for each Small Cell beyond five. This is two percent of the \$5,000 deposit amount we typically require for CUP applications. The CUP application deposit amount factors in the staff time processing CUPs, which involves review and analysis of the application materials by staff (Planning, Building, Engineering, etc.), and report preparation for DRSC and public hearings.

Through the Ordinance, staff will be proposing a streamlined review procedure to enable the City to comply with the FCC mandates with regard to time and cost, while

ensuring new Small Cell facilities comply with high standards for aesthetics and safety. In order to comply with the Order, a new permit type for Small Cells will be created. Staff is exploring elimination of DMT and DRSC from the mandatory review requirements to comply with shot clock requirements. The DMT (Engineering, Building, and Code Compliance Divisions) has been consulted about the proposed ordinance and will review and comment on the draft ordinance. The DRSC will review and comment on draft design standards. This review is tentatively scheduled for September 11, 2019. The Ordinance will be presented to the Planning Commission for review and recommendation prior to being presented for City Council consideration.

Environmental

Review: Not applicable.

Recommended

Action: STAFF RECOMMENDS THAT THE CITY COUNCIL, RECEIVE AND FILE THE REPORT

Attachments:

1. Small Cell F.A.Q.
2. Summary of other jurisdiction's Small Cell limitations

Notification: N/A

Small Wireless Telecommunications Facility ("Small Cell")

Frequently Asked Questions (FAQ)

Q: What is a small cell and what is it for?

A: A small cell as defined by the Federal Communications Commission (FCC) is a facility that provides wireless communications service of some kind and meets certain size criteria such as height and volume of equipment. Small cells are intended to augment existing service (provided by "macro sites") to cover gaps in coverage and densify signal to support increased consumer demand for wireless phone and data service. Additionally, in the future this infrastructure could support the use of smart cars, smart thermostats, and other smart devices that are a part of "the internet of things" ("IoT").

Q: Is this the same as "5G"?

A: "Small Cell" refers to the infrastructure being installed. "5G" is a technology. While the small cells that have been approved or are currently under review in San Clemente are not 5G, the equipment could be swapped out to update these sites for 5G. Depending on the type of modification proposed (i.e. the physical characteristics), the FCC requires that the City approve modifications meeting certain criteria. These modifications typically do not require a noticed public hearing.

Q: Where can small cells be located?

A: Anywhere "antenna facilities" as defined in the Municipal Code can be located, which is currently all zones (commercial, mixed use, residential, open space). The City is currently working on an ordinance specifically pertaining to small cells with some additional locational and design criteria that take into account the sensitivity of certain uses such as residential to the aesthetics of utility infrastructure. Small cells can be located on public or private property, provided the property owner consents to the use of their property for this purpose. Most commonly, small cells are located in public rights-of-way (ROW). The most common example of the public ROW is a public street. A ROW is a nonexclusive and nonpossessory real property right granted or reserved over land for public purposes, including transportation, provision of utilities, and freedom of expression. The City can regulate the time, place, and manner of installations of utility service in the ROW but cannot have the effect of prohibiting service. As a general rule, any regulation related to small cells in the ROW cannot be more restrictive than the regulations related to other utility infrastructure placed in the ROW.

Q: Can the City prohibit small cells in residential neighborhoods?

A: No. The city cannot prohibit or have the effect of prohibiting the provision of wireless service anywhere within the City. Nor can the City decide what is an "acceptable" level of service. For example, even if all the residents of an area say they have adequate coverage, if the wireless service provider would like to increase or augment service the City cannot prohibit or have the effect of prohibiting this. These limitations on the City's local zoning authority are imposed by the FCC. The City cannot change these limitations.

Q: I thought I heard that somewhere in Northern California prohibited small cells?

A: Staff has been researching how other jurisdictions are handling small cells. While there is a spectrum of how they are regulated (some cities have no regulations – others are highly regulated), all jurisdictions

ATTACHMENT 1

are limited to the same State and Federal laws with regard to wireless facilities in general and small cells in particular. As such, staff is unaware of any jurisdiction in the U.S. that has banned small cells or 5G in their jurisdiction, or even in certain zones in their jurisdiction. Some have placed some locational criteria (i.e. minimum distance from certain sensitive sites such as residences, schools, or parks) based upon view or aesthetic concerns and staff is looking into how best to incorporate these types of aesthetic limitations into the City's regulations.

Q: What about radiofrequency (RF) emissions? I'm concerned that these cell sites will have negative impacts on my health.

A: Cell sites produce RF emissions. As does your cell phone, the microwave in your kitchen, smart utility meters, wireless baby monitors, etc. The FCC has set forth limitations for acceptable exposure. The City cannot set different acceptable levels of exposure. The City cannot deny an application for a small cell (or any wireless facility) based on environmental or health concerns related to RF emissions to the extent that the emissions are compliant with the FCC's limitations. The City can and does require applicants to demonstrate that the proposed facility will be in compliance with the FCC's regulations.

Q: I think that a facility installed near me is exceeding the allowable FCC limitations. What can I do?

A: Concerns about RF emissions exposure at a particular site should be directed to the FCC Office of Engineering and Technology, RF Safety Program at (202) 418-2464 or rfsafety@fcc.gov.

Q: I don't trust the FCC and I think their scientific research is junk. What should I do?

A: If you want changes to the existing Federal laws that preempt the City in regulating wireless facilities, you should contact the FCC at 1-888-225-5322 (press 4 on the main menu). You can also contact your U.S. Congressman Mike Levin (49th Congressional District), and U.S. Senators Kamala Harris and Dianne Feinstein.

Q: I want to communicate with the City about the use of small cells in San Clemente. Who should I contact?

A: Please contact Associate Planner, Katie Crockett, at crockettk@san-clemente.org to be informed of the status of the proposed small cell ordinance, to comment on the proposed ordinance, or provide other feedback.

**Small Cell Ordinance Research
July 2019**

Every local ordinance drafted in response to the FCC rules have certain commonalities regarding small cell facilities such as (1) they have to comply with FCC RF emissions regulations; (2) they have to have private property owner approval (if located on private property as opposed to the ROW); and (3) size limitations to qualify as a “small cell facility.” They also have varying location regulations, design criteria, and application processing rules. Most important is that all ordinances have to comply with State and Federal regulations. An outright prohibition on installations in residential zones would violate the Federal Telecommunications Act of 1996. The typical practice is to establish “preferred locations” and require carriers to demonstrate that no other more-preferred locations are technically feasible if a non-preferred location is proposed.

Jurisdiction	Standard/Regulation
City of San Mateo	<p>Utilizes list of locations for wireless facilities from most to least preferred as follows:</p> <ul style="list-style-type: none"> (1) manufacturing districts; (2) transportation corridor or transit-oriented development districts; (3) executive districts; (4) central business districts; (5) commercial districts; (6) agricultural and open space districts; (7) shoreline districts; (8) Residential districts with multi-family residential uses; (9) Residential districts with single family residential uses.
Town of Danville	<p>Requires a noticed public hearing for all facilities proposed within 250 feet from a residential district. Utilizes list of locations for wireless facilities from most to least preferred.</p> <p>(a) Any locations within the downtown business district, within 250 feet from a residential dwelling, attached to a decorative light standard or otherwise not listed below in this section 32-70.7 shall be considered "discouraged."... ordered from most preferred to least preferred:</p> <ul style="list-style-type: none"> 1. private property and existing or replacement structures in the public rights-of-way outside the downtown business district and not within 250 feet from a residential dwelling; 7. new, non-replacement structures in the public rights-of-way on major arterial streets not within 125 feet of a residential dwelling." <p>If facilities are proposed that do not meet the locational criteria above, an applicant may apply for an exception. Exceptions are granted if the applicant shows that strict adherence to the preferred locational criteria would prohibit the carrier from providing service in a given location.</p>

City of Mill Valley (2018)	Prohibited in residential districts unless the applicant demonstrates that denying the application would violate federal and/or state law or would deprive the applicant of rights under federal and/or state law.
Town of Fairfax (2019)	Prohibited in residential districts unless the applicant demonstrates that denying the application would violate federal and/or state law or would deprive the applicant of rights under federal and/or state law.
City of Simi Valley	Prohibited on undeveloped residential lots or residential lots containing single-family residences. Prohibited in the ROW within 250 feet of a residential structure unless "Special Approval" findings are made. The Special Approval findings are similar to the exception findings in other jurisdictions (no other more preferred locations can be used, necessary to provide service, denial of the permit would result in effective prohibition of service, etc.).
City of Larkspur	<p>Utilizes list of most preferred and least preferred sites. An alternative site analysis is required if the proposed facility is located within fifty feet (50') of a "Least Preferred" location (i.e., parks, open space or residential zoning district).</p> <p>Most preferred:</p> <ol style="list-style-type: none"> 1. Most Preferred: <ol style="list-style-type: none"> a) City-owned parcels in any zoning district, excepting parks and properties located in the H (Historic) overlay zone and Residential Zoning Districts (R-1, R-2, R-3, RMP); 2. Least Preferred. <ol style="list-style-type: none"> a) Any parcel or public right-of-way located in an Open Space District; b) Any parcel or public right-of-way located in Residential Zoning Districts (R-1, R-2 and R-3, c) RMP); d) Any public park; e) Any parcel or public right-of-way within the PD Zoning District developed for residential use; <p>Towers, monopoles and antennas shall be set back, and not readily visible, from a residentially zoned property at a ratio of two (2) horizontal feet for every one foot in height.</p>

City of San Bruno	<p>All antenna facilities must be located in industrial or commercial zones unless the provider demonstrates to the city that “no other feasible nonresidential location is available that would meet a gap in service or other legitimate business need.”</p>
County of Marin	<p>Industrial, commercial and agricultural sites and areas near public facilities are preferred locations for antennas; residential and mixed-use sites and areas within 1,500 feet of schools and daycare centers are the least-preferred locations. Facilities are not prohibited in least preferred locations.</p>