



AGENDA REPORT

CITY OF SAN CLEMENTE

CITY COUNCIL MEETING

910 Calle Negocio
2nd Floor
San Clemente, California
www.san-clemente.org

Meeting Date: October 17, 2023

Agenda Item: 10B

Department: Community Development

Prepared By: Adam Atamian, Community Development Director

Subject:

REGULATING UTILITIES WITHIN OPEN SPACE ZONING DISTRICTS

Fiscal Impact:

None to receive and file this report.

Summary:

This report provides information on the regulation of public utility uses within the City's Open Space zoning districts. The City's Zoning Ordinance and Specific Plans contain regulations to specify the types of utilities permitted by-right and those that are conditionally permitted. While not every potential type of utility or utility-related project is expressly called out in these documents, staff believes that existing City regulations are adequate to properly regulate utilities in open space zones.

Background:

On October, 3, 2023, the City Council requested a report on the zoning of "utilities" within open space areas, to include topics such as how utilities are defined and the type of utilities that may be potentially permitted.

Discussion:

The City's Zoning Ordinance and Specific Plans identify land uses that are permitted by-right and those that are permitted conditionally with approval of a Conditional Use Permit through a public hearing process. For utilities, regulations are contained within these documents to specify the types of utilities permitted by-right and those that are conditionally permitted. For major public utilities, the California Public Utilities Code may also serve to clarify permitted uses, as that state code takes precedence over local regulations.

Below are excerpts from the California Public Utilities Code, the San Clemente Municipal Code (SCMC), as well as two examples of how the City's Specific Plans (Talega and Rancho San Clemente) define "utilities".

- **California Public Utilities Code Section 216** defines "Public utility" as "every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof" (the full State law section is provided as Attachment 1).

- **SCMC 17.28.240 – Public Utilities.** The SCMC identifies utilities as either major or minor, stating, “*Major utilities shall include, but shall not be limited to, reservoirs, utility substations, including electrical distribution and transmission substations, and above-ground pump stations, such as sewage and potable water system pump stations, antennas (other than satellite antennas, antennas on City property, and small cell facilities) and similar facilities.*” For minor utilities, the SCMC states, “*Minor utilities shall include, but shall not be limited to, below-ground pump stations, stand pipes, and transformers.*” Attachment 2 provides the entire SCMC Section 17.28.240. The SCMC does not define “private utilities.”
- **The Talega Specific Plan** defines “Public Utility Uses” as “*the facilities of a public service corporation, providing some public utility and subject to special governmental regulations, usually a protected monopoly. Typical uses shall include communication, reception, and relay facilities; transmission lines and facilities; and electrical substations.*” The Talega Specific Plan does not define “private utilities.”
- **The Rancho San Clemente Specific Plan** defines “Public Utility” as a “*business organization, such as a public-service corporation, performing some public service and subject to special government regulations, usually a protected monopoly. Typical uses shall include public-utility buildings, structures, and facilities.*” The Rancho San Clemente Specific Plan does not define “private utilities.”

If a land use is not specified or it is unclear whether a proposed land use fits within the types of land uses identified in the SCMC or the City’s Specific Plans, the SCMC provides a process for interpretations. This process is used to determine if a proposed land use is consistent with the purpose of a zoning district and is similar to a land use that is identified, in terms of the use’s function and potential land use impacts. An interpretation of “utilities-related” land uses in open space zones would most likely require a Planning Commission determination, as that body is responsible for making interpretations that are considered major.

In addition to zoning regulations, the use of open space is restricted by General Plan policy (*Policy BPR-4.09. Measure V Initiative*) adopted as an outcome of the City’s 2008 ballot initiative, Measure V. The policy requires majority voter approval of any proposal to change open space zoning and permitted uses that existed as of September 2007 with limited exceptions. This majority vote must occur for the City to process an amendment to policies and regulations to allow a proposed change to open space zoning unless exempted from Measure V.

Using the Talega Specific Plan’s Open Space Standards section (provided as Attachment 3) as an example provides a good illustration of how the City’s current zoning requirements are applied. In the Talega Private Open Space area, the Specific Plan identifies the permitted uses related to utilities as: “*Infrastructure facilities and extensions necessary to serve the open space area and adjacent development areas, such as roads, utilities, and flood-control improvements, and fuel modification.*” Based on this description and using a battery energy storage system (BESS) use as an example, staff believes that a Specific Plan Amendment would be required to allow this type of use. This is because: 1) this type of infrastructure facility is not “necessary” to serve “adjacent development areas,” and 2) does not “serve the open space area.” There are no conditionally-permitted uses allowed in the Talega Private Open Space Zones that are specific to utilities. While the Specific Plan wording is not an outright prohibition on BESS, staff’s analysis is

that this type of proposed use is not consistent with the permitted uses of the Talega Specific Plan. Therefore, to process an application for a BESS use, an applicant has two options: 1) request a Planning Commission interpretation that the use is permitted, contrary to staff's analysis, or 2) pursue voter approval of a proposal to initiate the Specific Plan Amendment to allow this type of use.

In conclusion, staff believes that existing City regulations are adequate to properly regulate utilities in open space zones.

Council Options:

1. Receive and file this report. Staff will maintain implementation of existing regulations.
2. Direct staff to initiate work on amendments that clarify which public utilities are potentially allowed within open space.
3. Continue this item to request additional information.

Environmental Review/Analysis:

Informational reports are not a "project" under the California Environmental Quality Act.

Recommended Actions:

Staff Recommendation:

STAFF RECOMMENDS THAT THE CITY COUNCIL receive and file this report.

Attachment:

1. State definition of Public Utility
2. Zoning Ordinance Section for Public Utilities (SCMC 17.28.240 – Public Utilities)
3. Talega Specific Plan Section 507 – Open Space Standards

Notification:

None.

Cal. Pub. Util. Code § 216

Section 216 - Public utility

(a)

(1) "Public utility" includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof.

(2) A provider of last resort, as defined in Section 387, that is providing service pursuant to Article 8.5 (commencing with Section 387) of Chapter 2.3 is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part regarding providing that service.

(b) Whenever any common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, or heat corporation performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, or heat corporation, is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.

(c) When any person or corporation performs any service for, or delivers any commodity to, any person, private corporation, municipality, or other political subdivision of the state, that in turn either directly or indirectly, mediately or immediately, performs that service for, or delivers that commodity to, the public or any portion thereof, that person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.

(d) Ownership or operation of a facility that employs cogeneration technology or produces power from other than a conventional power source or the ownership or operation of a facility which employs landfill gas technology does not make a corporation or person a public utility within the meaning of this section solely because of the ownership or operation of that facility.

(e) Any corporation or person engaged directly or indirectly in developing, producing, transmitting, distributing, delivering, or selling any form of heat derived from geothermal or solar resources or from cogeneration technology to any privately owned or publicly owned public utility, or to the public or any portion thereof, is not a public utility within the meaning of this section solely by reason of engaging in any of those activities.

(f) The ownership or operation of a facility that sells compressed natural gas or hydrogen at retail to the public for use only as a motor vehicle fuel, and the selling of compressed natural gas or hydrogen at retail from that facility to the public for use only as a motor

vehicle fuel, does not make the corporation or person a public utility within the meaning of this section solely because of that ownership, operation, or sale.

(g) Ownership or operation of a facility that is an exempt wholesale generator, as defined in the Public Utility Holding Company Act of 2005 (42 U.S.C. Sec. 16451(6)), does not make a corporation or person a public utility within the meaning of this section, solely due to the ownership or operation of that facility.

(h) The ownership, control, operation, or management of an electric plant used for direct transactions or participation directly or indirectly in direct transactions, as permitted by subdivision (b) of Section 365, sales into a market established and operated by the Independent System Operator or any other wholesale electricity market, or the use or sale as permitted under subdivisions (b) to (d), inclusive, of Section 218, shall not make a corporation or person a public utility within the meaning of this section solely because of that ownership, participation, or sale.

(i) The ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge light duty plug-in electric vehicles does not make the corporation or person a public utility within the meaning of this section solely because of that ownership, control, operation, or management. For purposes of this subdivision, "light duty plug-in electric vehicles" includes light duty battery electric and plug-in hybrid electric vehicles. This subdivision does not affect the commission's authority under Section 454 or 740.2 or any other applicable statute.

Ca. Pub. Util. Code § 216

Amended by Stats 2020 ch 370 (SB 1371),s 245, eff. 1/1/2021.

Amended by Stats 2019 ch 408 (SB 520),s 1, eff. 1/1/2020.

Amended by Stats 2015 ch 109 (AB 1008),s 1, eff. 1/1/2016.

Amended by Stats 2011 ch 480 (AB 631),s 1, eff. 1/1/2012.

Amended by Stats 2008 ch 558 (AB 3048),s 8, eff. 1/1/2009.

Amended by Stats 2001ExSess ch 2 (AB X1-6), s 1, eff. 1/18/2001.

17.28.240 Public Utilities.

- A. **Purpose and Intent.** The purpose of this section is to ensure that public utility facilities, such as substations or reservoirs, and antennas (other than satellite antennas and antennas on City property, which are regulated elsewhere) are located and built in a manner which is compatible with adjacent uses. An additional purpose of this section is to define the review process for public utilities initiated by the City and those initiated by outside agencies. Please refer to Section 17.28.070, Antennas on City Property, and Section 17.28.080, Satellite Antennas, for regulations for other types of antennas.
- B. **Review Requirements.**
1. City Projects. For the required review process for City-initiated public utility projects, please refer to the City's Public Works Department policy on the review of capital improvement projects.
 2. Projects Initiated by Outside Agencies/Applicants.
 - a. Major utilities shall require the approval of a Conditional Use Permit, in accordance with Section 17.16.060, Conditional Use Permits. Major utilities shall include, but shall not be limited to, reservoirs, utility substations, including electrical distribution and transmission substations, and above-ground pump stations, such as sewage and potable water system pump stations, antennas (other than satellite antennas, antennas on City property, and small cell facilities) and similar facilities. If the installation of the antenna is stealth, as determined by the City Planner, then the process is administrative and no Conditional Use Permit is required. The standards in Subsection (C)(1), Minimum Standards for Projects Initiated by Outside Agencies, Major Utilities, shall apply to major utilities initiated by outside agencies. The City Engineer shall be responsible for determining whether a utility is major.
 - b. Minor utilities shall be permitted outright, subject to the concurrent review requirements found in Section 17.12.090, Consideration of Concurrent Applications. Minor utilities shall include, but shall not be limited to, below-ground pump stations, stand pipes, and transformers. The standards in Subsection (C)(2), Minimum Standards for Projects Initiated by Outside Agencies, Minor Utilities, shall apply to minor utilities initiated by outside agencies. The City Engineer shall be responsible for determining whether a utility is minor.
 - c. Public utility distribution and transmission line towers and poles, and underground facilities for distribution of gas, water, telephone and electricity shall be allowed in all zones without obtaining a Conditional Use Permit. However, all routes and heights of proposed electric transmission systems of 69 KV and over, telephone main trunk cables, from one central office to another and water or gas transmission mains which are above ground, shall be located in conformance with the General Plan of the City.
 - d. Small cell facilities shall require the approval of a Wireless Permit in accordance with Section 17.16.075.
 3. Modifications to Existing Antenna Facilities. The City Planner shall review and decide on requests to modify existing wireless towers or base station structures that support antennas, transceivers, or other related equipment. This includes the addition and removal of wireless transmission equipment such as the co-location of new transmission equipment, the removal of transmission equipment, or the replacement of transmission equipment. Modifications shall not substantially change the physical dimensions of the wireless tower or base station, as defined by the Federal Communications Commission. The City Planner may approve projects that meet minimum standards in Section 17.28.070(D)(5).

C. Minimum Standards for Projects initiated by Outside Agencies.

1. Major Utilities.
 - a. Compatibility. All buildings, structures and landscaping shall be visually compatible with surrounding development.
 - b. Development Standards. The standards for major utilities shall be determined through the Conditional Use Permit process.
 - c. Location. Please refer to the permitted and conditional use tables in Chapters 17.32, Residential Zones and Standards through 17.48, Public Zones and Standards.
2. Minor Utilities.
 - a. Compatibility. All minor utilities shall be placed underground or shall be screened in accordance with Section 17.24.050, Building Equipment and Services and Their Screening.
 - b. Development Standards. Minor utilities shall comply with the standards for ground-mounted equipment in Section 17.24.050, Building Equipment and Services and Their Screening.
 - c. Location. Please refer to the permitted and conditional use tables in Chapters 17.32, Residential Zones and Standards through 17.48, Public Zones and Standards.
 - d. Parking. The parking requirements for a public utility use such as an electric distribution and transmission substation, public utility service yard or similar use may be waived or modified, subject to the approval of a Conditional Use Permit in accordance with Section 17.16.060, Conditional Use Permits, upon a finding that the use requires no full-time or permanent employees.
3. Modifications of Existing Wireless Towers or Base Station Structures. Refer to Section 17.28.070(D)(5) for minimum standards that apply to modifications of existing wireless towers or base station structures.
4. Small Cell Facilities.
 - a. Design and Development Standards. The design and development standards, which contain aesthetic and location criteria for small cell facilities shall be adopted by Resolution of the City Council.

(Ord. 1304 § 21, 2005; Ord. 1172 § 3 (part), 1996)

(Ord. No. 1594, § 3(Exh. A, § 30), 5-5-2015; Ord. No. 1690, § 3(Exh. A), 2-18-2020)

3. Driving ranges and putting greens.
4. Golf maintenance facilities.
5. Restaurants ancillary to a golf course. (The sale of alcoholic beverages is subject to the approval of a Conditional Use Permit.)
6. Golf equipment, sales and rental.
7. Recreation uses and facilities such as tennis courts, racquetball courts, and health clubs.

C. Development Standards

1. Maximum Building Height - Forty (40) feet (maintenance buildings shall be a maximum of twenty (20) feet).
2. Minimum Building Setbacks:
 - a. From scenic highway: Thirty (30) feet for one-story buildings.
Fifty (50) feet for two-story buildings.
 - b. From residential uses: Fifteen (15) feet.
3. Fences, Walls, and Hedges - Pursuant to Section 17.24.090 of the Zoning Code, fences, walls, and hedges shall be no higher than six (6) feet in height in the required setback areas. Walls adjacent to scenic highways shall conform to Design Guidelines in Chapter 6. No planters, walls, or hedges in excess of thirty (30) inches high will be permitted adjacent to golf course tees, greens, and fairways.
4. Parking - Parking requirements shall be determined through the Site Plan Review process.
5. Screening - Maintenance and storage areas shall be screened to minimize visibility.
6. Elevation - Tees, greens, and fairways shall be separated from adjacent (higher) residential areas by either five (5) feet of finished grade or a combination of three (3) feet of finished grade and thirty (30) inch wall or hedge.

507 OPEN SPACE STANDARDS

A. Purpose and Applicability

1. Purpose - The purpose of this Section is to provide for the recreational use of and preservation of open space major ridgelines and prominent natural features.

2. Applicability - This section applies to all designated Natural Open Space Planning Areas (see *Figure 2-2* and *Table 2-2*).
3. Standards Not Listed - Whenever a standard or regulation is not set forth in this Specific Plan, the Zoning Code shall regulate.
4. Land Uses Not Listed - In cases where it is not clear whether a proposed land use is permitted under this Section, the Planning Commission shall determine if the use is consistent with the purpose set forth hereinabove and is either permitted as a principal, conditional, accessory, or temporary use, or is not permitted.

B. Principal Uses Permitted

1. Animal grazing (excluding feed-lot operations).
2. Archaeological, paleontological, and nature study areas.
3. Fire stations.
4. Infrastructure facilities and extensions necessary to serve the open space area and adjacent development areas, such as roads, utilities, and flood-control improvements, and fuel modification.
5. Open space, undeveloped.
6. Recreation trails, pedestrian, bicycle, and equestrian.
7. Rest areas and vista points, including minor structures such as gazebos and restroom facilities.

C. Conditional Uses Permitted (if a Use Permit is approved by the City)

1. Equestrian centers provided any such facilities are located at least one hundred (100) feet from any dwelling.
2. Farming, crop and tree.
3. Parks, athletic fields, and recreation centers.
4. Public and semi-public institutional facilities, such as schools, libraries, museums, government offices, and police stations.
5. Parking facilities for community facilities and/or institutional uses.

D. Accessory Uses and Structures Permitted

1. Fences, walls, shelters, restrooms, and similar facilities needed to support a permitted use.
2. Other accessory uses and structures determined by the City to be normally incidental to a permitted principal or conditional use.

E. Development Standards

Development standards shall be established through the Site Plan Review process.

508 OPEN SPACE RESERVE LAND USE STANDARDS

The use of the open space reserve shall be consistent with the purpose and intent of the Articles of Incorporation of the Rancho Mission Viejo Land Conservancy (Talega Reserve) or its successor guardian of the reserve for ecological and conservation purposes (see *Appendix C*).