



STAFF REPORT

AGENDA NO: 9a

MEETING DATE: June 21, 2021

To: Honorable Mayor and City Council

Date: June 21, 2021

From: Scott Spansail, Assistant City Attorney – (650) 558-7275

Subject: Wireless Regulations Update

Ordinance Amending Chapter 25.77 (Wireless Communications Facilities) of Title 25 of the Burlingame Municipal Code; and Adding Chapter 12.11 (Wireless Facilities in Public Rights-of-Way) to Title 12 of the Burlingame Municipal Code (CEQA Determination: Exempt Pursuant to State CEQA Guidelines Sections 15378, 15061(b)(3), 15302, 15303, and 15304);

Resolution Establishing Design and Location Standards for Wireless Facilities in Public Rights-of-Way and Utility Easements, and on Public and Private Land and Establishing Standard Permit Conditions;

Resolution Approving the Form of a Municipal Facility License Agreement (MFLA) for Small Cell Wireless Facilities Installation and Authorizing the City Manager to Execute and Amend the Agreement;

Resolution Establishing a Deposit for Wireless Permit Applications Under Chapter 12.11 and Establishing a Fee for Wireless Permit Appeals Under Chapter 12.11, and Authorizing the Finance Director to Amend the Master Fee Schedule

RECOMMENDATION

Staff recommends that the City Council (1) introduce on first reading the proposed Ordinance amending Chapter 25.77 ("Wireless Communications Facilities") and adding Chapter 12.11 ("Wireless Facilities in Public Rights-of-Way"). The Council is asked to take action only on the introduction of the attached Ordinance. For purposes of the June 21 meeting, the accompanying Resolutions are only for context, but not for action. If the Council adopts the first reading of the Ordinance, then at the July 6, 2021 meeting, Council will be asked to adopt the accompanying Resolutions.

As this agenda item contains multiple parts that are interdependent, staff has prepared a slightly more detailed list of recommended procedures and order of operations below.

Recommended Procedure and Order of Operations:

- A. Receive the staff report and ask any questions of staff. As the proposed Ordinance and accompanying Resolutions are interdependent, questions about each individual item may be asked at this time.
- B. Request that the City Clerk read the title of the proposed Ordinance.
- C. By motion, waive further reading and introduce the Ordinance.
- D. Conduct a public hearing.
- E. Following the public hearing, discuss the Ordinance and by motion adopt the first reading of the Ordinance and direct the City Clerk to bring the Ordinance back for adoption at the next regular City Council meeting.
- F. If Council is also in favor of the accompanying Resolutions, direct staff to bring them forward to be considered for adoption at the second reading of the Ordinance. If Council has guidance on changes to the proposed Resolutions, direct staff to make those changes to be considered at the next public hearing on this matter.

BACKGROUND

Local governments are responsible for siting wireless facilities; however, their authority is limited by various state and federal laws. Principal among them is a federal law dating from 1996 (47 U.S.C. 332(c)(7)) that:

- Requires action of applications to be within a reasonable period of time
- Provides that local regulations and placement decisions may not prohibit or effectively prohibit provision of personal wireless services
- Requires that denials must be in writing and supported by substantial evidence
- Prohibits any consideration of radiofrequency (RF) emissions in siting decisions if applicant meets Federal Communications Commission (FCC) standards
- Does not allow unreasonable discrimination among providers of functionally equivalent services
- Provides for expedited appeals to court.

Under state law, specifically, Pub. Util. Code Section 7901, telephone companies (including wireless carriers) have a franchise to use the public rights-of-way. While that franchise right is not unfettered, and Section 7901 broadly empowers a local authority to regulate a telephone corporation's facilities to ensure that they do not "incommode" the public use of the public right-of-way, including due to aesthetic considerations, see, *T-Mobile W. LLC v. City & County of San Francisco*, 438 P.3d 239, 249 (2019), any aesthetic or other regulations ensuring that the wireless carriers do not incommode the public use of the public right-of-way cannot be so restrictive so as to effectively keep the wireless carriers out of the public right-of-way entirely. Such restrictions could violate the wireless carriers' franchise rights under Section 7901.

Chapter 25.77 of the Burlingame Municipal Code regulates placement of wireless facilities both on private land and in the public rights-of-way. Chapter 25.77 has not been significantly updated since 2012 and does not take into account the numerous federal and state laws and regulations

that have come into force since that time, and which place various new restrictions on local permitting processes. Major elements of these new restrictions and requirements are summarized below:

1. Ban on Moratoria

On August 2, 2018, the Federal Communications Commission (“FCC”) adopted a Third Report & Order and Declaratory Ruling, 33 FCC Rcd. 7705 (rel. Aug. 3, 2018) (the “Moratoria Order”), that, among other things, contained a declaratory ruling prohibiting express and *de facto* moratoria for all personal wireless services, telecommunications services, and their related facilities under 47 U.S.C. § 253(a) and directed the Wireless Telecommunications Bureau and Wireline Competition Bureau to hear and resolve all complaints on an expedited basis. The declaratory ruling in the Moratoria Order was made effective upon release. This means that there can be no pause in accepting or processing applications to allow a city to study and address potential issues.

2. Shot Clocks and Enhanced Remedies

Since 2009, the FCC has adopted a total of five shot clocks or timelines within which to act on applications for wireless facilities. The most recent shot clocks have focused on small wireless facilities and modifications to existing wireless facilities.

2009 Shot Clocks: In 2009, the FCC adopted a Declaratory Ruling, 24 FCC Rcd. 18994 (rel. Nov. 18, 2009), to clarify existing federal law requiring local governments to act on wireless applications within a reasonable period of time. In that Declaratory Ruling, the FCC established two shot clocks for local action on wireless facilities applications: a 60-day shot clock for collocations, and a 150-day shot clock for all other types of wireless applications.

California later adopted AB 57 (Gov. Code 65964.1), a state law that took effect on January 1, 2016, and created a “deemed granted” remedy for applicants if the local government fails to act on an application during the time period allowed by these 90 and 150-day FCC shot clocks. This remedy is available for any applications under these shot clocks other than those proposed for placement on fire department facilities.

Eligible Facilities Requests: In 2012, Congress adopted a law (codified as 47 CFR Sec. 1455) requiring that certain applications to modify or add to existing wireless facilities must be approved at the local level. In 2014, the FCC adopted an implementing Order, including height and size criteria and a 60-day shot clock to process these “eligible facilities requests” (29 FCC Rcd. 12865). More recently, the FCC adopted clarifications and changes to its rules to further facilitate these types of deployments. A failure to act within this FCC shot clock period can result in the application being deemed approved under federal law.

Small Wireless Facilities Shot Clocks: On September 26, 2018, the FCC adopted a Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (rel. Sep. 27, 2018) (the “Small Cell Order”), which, among other things:

- created new shorter (60-day and 90-day) shot clocks for small wireless facilities (as defined in the Small Cell Order);
- interpreted existing shot clock regulations to require local public agencies to issue all relevant permits and authorizations within this period;
- established a national standard for an effective prohibition related to small wireless facilities that replaced the existing “significant gap” test adopted by the United States Court of Appeals for the Ninth Circuit; and
- provided that a failure to act within the applicable timeframe presumptively constitutes an effective prohibition, and therefore the application would be deemed approved.

The Small Cell Order went into effect in part on January 14, 2019, and in part on April 15, 2019. On August 12, 2020, a three-judge panel of the Ninth Circuit Court of Appeals upheld the Moratoria Order and significant portions of the Small Cell Order, including the shorter shot clocks and remedies for failing to meet a shot clock. On October 22, 2020, the Ninth Circuit Court of Appeals denied a petition for *en banc* review of the above-referenced panel’s decision and thus the panel’s decision applies to local agencies.

3. Limits on Design Standards

The Small Cell Order placed limits on aesthetic regulations for small wireless facilities, including undergrounding. The FCC declared that such requirements will not be preempted if they are reasonable, no more burdensome than those applied to other types of infrastructure deployments, and objective and published in advance so that applicants know what aesthetic requirements they must satisfy to be able to deploy facilities. However, in the August 12, 2020 Ninth Circuit Court of Appeals decision discussed above, the Court invalidated certain portions of the FCC’s rules for aesthetic standards. Now, a city’s aesthetic regulations for small wireless facilities will not be preempted if they are (1) reasonable (technically feasible); and (2) published in advance.

4. Limits on Fees

The Small Cell Order also declared that all fees (including permit fees and rental fees for use of government-owned infrastructure, such as streetlights) must be based on a reasonable approximation of the local government’s costs, such that only objectively reasonable costs are factored into those fees, and fees are no higher than the fees charged to similarly situated competitors in similar situations. The FCC established presumptively reasonable fee levels (called “safe harbors”) that include: non-recurring fees equal to \$500 for a single application for up to five collocations, plus \$100 for each additional collocation; and \$1,000 for each new pole. Recurring fees for attachment to municipal poles are presumed reasonable if equal to \$270 per facility/per year, including the fee for attachment to municipal infrastructure and use of the public rights-of-way.

5. State Preemption of Local Authority over Certain Backup Generators

On January 1, 2021, California's AB 2421 (Gov. Code 65850.75) took effect and will remain in effect until January 1, 2024. The law requires that applications for qualifying backup generators on macro cell sites be approved within a 60-day deadline. An application is deemed approved if the local agency has not acted on the application within the time period. The law does not apply to rooftop, small cell, or outdoor and indoor distributed antenna system sites.

6. Pending State Bills

The California Legislature is currently considering adoption of two bills that would further limit local authority over wireless siting, if adopted and signed into law. These are:

- SB 556, which would mandate use of City streetlight and traffic poles for wireless facilities at cost or a \$270 per year rental rate and impose short timelines for reviewing requests for use of the poles.
- AB 537, which would expand Government Code section 65964.1 to provide a deemed granted remedy for all types of wireless applications including small cells.

OVERVIEW

On April 5, 2021, the City Council held a study session where an overview of the proposed structure of the wireless update to the City's regulations was presented and discussed. Following discussion, the Council directed staff to proceed with preparing updated ordinances and related documents. The minutes from the study session are attached to this staff report.

At a May 24, 2021 public hearing, staff presented the updates to the Planning Commission, which considered recommendations to the Zoning Code (Chapter 25.77). Following the public hearing, the Planning Commission recommended that the City Council adopt the amendments to Chapter 25.77 proposed by staff with no changes.

Proposed Ordinance: The Ordinance updates the Burlingame Municipal Code to reflect the federal and state requirements outlined above. If adopted, the Ordinance would amend Chapter 25.77 of the Zoning Code ("Wireless Communications Facilities") to remove regulations pertaining to wireless facilities in the public rights-of-way, which will now be covered by a new chapter in Title 12 of the Municipal Code, discussed below. The other amendments to Chapter 25.77 update definitions for key terms, and modify the procedures to allow for a more streamlined review of applications that are subject to short shot clocks for action such as small cell facilities, collocations, and eligible facilities requests. Because of the strict time limitations imposed by the shot clocks, the Community Development Director will be the reviewing authority for an administrative use permit, and any subsequent appeal of the Director's decision will be to a Hearing Officer, whose determination is final. Conditional use permits will continue to be required for other types of wireless applications, including major wireless facilities and those that do not qualify as small cell facilities, collocations, temporary facilities, or eligible facilities requests. The Planning Commission will continue to hear and decide those applications at noticed public hearings, and appeals of Planning Commission decisions will continue to be heard by the City Council.

Additionally, the Ordinance would amend Title 12 of the Municipal Code to add Chapter 12.11 ("Wireless Facilities in Public Rights-of-Way"). For all wireless facilities in the public rights-of-way, this Ordinance provides the permit and review procedures as well as the operation and maintenance standards. Due to timing concerns related to FCC shot clocks, the Ordinance establishes an administrative process for taking action on the applications. The Public Works Director will be the reviewing authority. Any appeals will be heard by a Hearing Officer, whose determination is final.

Following the public hearing before the Planning Commission but before this City Council meeting, staff made additional edits to the Ordinance. Principal among these edits were changes to noticing requirements. These changes include:

- updating Section 25.77.110 to change noticing requirements for an Administrative Use Permit application. In the version presented to the Planning Commission, notice of the proposed *approval* of an application would have been sent only to the owners of property within 300 feet. Now, notice of the proposed *decision* will be given to *the applicant and all owners of property within 300 feet* of the proposed facility site;
- updating Section 12.11.070 to change noticing requirements for applications to place wireless facilities within the public rights-of-way. Similar to the change noted above, notice of the proposed *approval* of an application would have been sent only to the owners of property within 300 feet. Now, notice of the proposed *decision* will be given to *the applicant and all owners of property within 300 feet* of the proposed facility site.

Proposed Resolution re Design and Location Standards: This resolution adopts design and location standards for wireless facilities in the public rights-of-way and utility easements, and on public and private land, and establishes standard permit conditions. The design standards for installations in the public rights-of-way include requirements for facilities placed on utility poles and on light poles, among others.

The resolution also adopts a set of standard permit conditions that will apply if not modified by the approving authority or in case an application is deemed approve by operation of law.

Proposed Resolution re Form of Municipal Facility License Agreement (MFLA): This resolution approves the form of a municipal facility license agreement for small cell wireless facilities installation on City-owned poles, and authorizes the City Manager to execute and amend the agreement.

Exhibit A - Form Municipal Facility License Agreement: The City owns approximately 1,130 steel light poles; 1,050 standard design poles, and about 80 decorative poles. The Agreement provides a template for the City to use to allow carriers to deploy wireless facilities on City-owned poles in the public rights-of-way for a fee. Under the terms of the Agreement, the City agrees to make its facilities available for licensing for an initial term of ten years, and establishes a process for the entity to seek and obtain authorizations to use individual poles and to perform the work needed to allow for the installation and maintenance of the wireless facility. This Agreement is separate from the permitting process described above and requires that entities also obtain all required permits.

Proposed Resolution re New Wireless Application Fees: This resolution establishes a deposit in the amount of \$1,000 for Public Works to request of applicants before review of their applications pursuant to Chapter 12.11. There is currently no applicable fee for this review as the Chapter establishes a new permit and process and applicants under Chapter 12.11 will no longer be subject to the permit fees for review under Chapter 25.77. This resolution also creates a new Wireless Permit Appeal Fee of \$600, which will be collected when a party appeals the Director's decision on a wireless permit application. This \$600 fee is inclusive of noticing costs related to the appeal.

ENVIRONMENTAL REVIEW

The attached Ordinance is not a "project" within the meaning of Section 15378 of the State CEQA Guidelines, because it has no potential for resulting in direct or indirect physical change in the environment. Rather, it is only once an application is filed that CEQA would be implicated. Further, even if the Ordinance was interpreted to permit a "project," any applicable wireless facility would likely be exempt from CEQA review in accordance with State CEQA Guidelines section 15302 (replacement or reconstruction), State CEQA Guidelines section 15303 (new construction or conversion of small structures), and/or State CEQA Guidelines section 15304 (minor alterations to land). In addition, the Ordinance is not subject to CEQA pursuant to State CEQA Guidelines section 15061(b)(3), as it can be seen with certainty that there is no possibility the Ordinance may have a significant effect on the environment, in that adoption of the Ordinance will not result in the actual installation of any facilities in the City.

FISCAL IMPACT

There is no impact on the City General Fund. The City will continue to collect permit fees under its existing fee schedule for permits reviewed under Chapter 25.77. For permits under the new Chapter 12.11, the City will collect a deposit or fee to cover its costs.

Exhibits:

- Proposed Ordinance
- Proposed Resolution re Design and Location Standards
- Proposed Resolution re Form Municipal Facility License Agreement
 - Ex. A: Proposed Form Municipal Facility License Agreement
- Proposed Resolution re New Wireless Fees
- Minutes from April 5, 2021 Study Session