

URGENCY ORDINANCE NO. 19-0012-U

AN URGENCY ORDINANCE OF THE CITY OF MANHATTAN BEACH AMENDING MUNICIPAL CODE TITLE 13 TO ADD CHAPTER 13.04, "WIRELESS FACILITIES IN PUBLIC RIGHTS OF WAY" TO REGULATE WIRELESS FACILITIES IN THE PUBLIC RIGHT OF WAY AND DECLARING AN URGENCY THEREFORE

THE CITY COUNCIL OF THE CITY OF MANHATTAN BEACH DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. The City Council hereby adds Chapter 13.04 to Manhattan Beach Municipal Code Title 13 to regulate wireless facilities in the public right of way (ROW) to read as follows:

"CHAPTER 13.04

WIRELESS FACILITIES IN PUBLIC RIGHTS OF WAY

Section 13.04.010 Applicability.

The siting and construction of wireless facilities in the ROW are subject to the provisions of this Chapter 13.04. The siting and construction of wireless facilities on all other property are subject to the provisions in Chapter 13.02 of this Code (Regulation of Telecommunications Facilities).

Section 13.04.020 Purpose.

The purpose of this Chapter is to establish a process for managing, and uniform standards for acting upon, requests for the placement of wireless facilities within the ROW of the City consistent with the City's obligation to promote the public health, safety, and welfare, to manage the ROW, and to ensure that the use and enjoyment of the ROW is not inconvenienced by the use of the ROW for the placement of wireless facilities. The City recognizes the importance of wireless facilities to provide high-quality communications service to the residents and businesses within the City, and the City also recognizes its obligation to comply with applicable Federal and State law regarding the placement of personal wireless services facilities in its ROW. This Ordinance shall be interpreted consistent with those provisions.

Section 13.04.030 Definitions.

The terms used in this Chapter shall have the following meanings. In the event of any conflict between these definitions and applicable definitions in Federal law, the applicable provisions of Federal law shall control over these definitions.

Application: A formal request, including all required and requested documentation and information, submitted by an applicant to the City for a wireless encroachment permit.

Applicant: A person filing an application for placement or modification of a wireless facility in the ROW.

Base Station: The structure defined by the FCC in Title 47 Code of Federal Regulations (C.F.R.) Section 1.40001(b)(1), or any successor provision.

Collocation: As defined by the FCC in Title 47 C.F.R. Section 1.40001(b)(2), or any successor provision; currently defined as the mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting or receiving radio frequency signals for communications purposes.

Design Standards: Standards adopted by resolution by the City Council pursuant to Section 13.04.060.c.

Director: The Director of Public Works or designee.

Eligible Facilities Request: As defined by Title 47 C.F.R. Section 1.40001(b)(3), or any successor provision; currently defined as any request for a modification of an existing tower or base station that does not substantially change the physical dimensions of such tower, or base station, involving: (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment.

FCC: The Federal Communications Commission or its lawful successor.

Municipal Infrastructure: City-owned or controlled property structures, objects, and equipment in the ROW, including, but not limited to, street lights, traffic control structures, banners, street furniture, bus stops or other poles, lighting fixtures, or electroliers located within the ROW.

Permittee: Any person or entity granted a wireless encroachment permit pursuant to this Chapter.

Personal Wireless Services: As defined in Title 47 United States Code (U.S.C.) Section 332(c)(7)(C)(i), or any successor provision.

Personal Wireless Services Facility: A wireless facility used for the provision of personal wireless services.

Public Right of Way (ROW): Any public street, alley, sidewalk, street island, median or parkway that is owned or granted by easement, operated, or controlled by the City.

Small Cell Facility or Small Wireless Facility: As small wireless facility is defined in Title 47 C.F.R. Section 1.6002(1), or any successor provision, which is currently defined as personal wireless services facility that meets any of the following conditions.

1) The facility:

(i) is mounted on an existing or proposed structure 50 feet or less in height, including antennas, as defined in Title 47 C.F.R. Section 1.1320(d); or

(ii) is mounted on an existing or proposed structure no more than 10 percent taller than other adjacent structures; or

(iii) does not extend an existing structure on which it is located to a height of more than 50 feet or by more than 10 percent, whichever is greater;

2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in Title 47 C.F.R. Section 1.1320(d), is no more than three cubic feet in volume;

3) 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;

4) The facility does not require antenna structure registration under Title 47 C.F.R. Part 17;

5) The facility is not located on Tribal lands, as defined under Title 36 C.F.R. Section 800.16(x); and

6) The facility does not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in Title 47 C.F.R. Section 1.1307(b).

Structure: An apparatus located in the ROW which is in any way attached to, constructed on, or built into the ground, either directly or indirectly. This term includes, without limitation, street lights, traffic signals, and utility poles, but it does not include towers.

Support Structure: Any structure capable of supporting a base station.

Tower: Any apparatus built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities, including those that are constructed for personal wireless services, including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site. This definition does not include utility poles.

Underground Areas: Those areas where there are no electrical facilities or facilities of the incumbent local exchange carrier in the ROW; or where the wires

associated with the same are or are required to be located underground; or where the same are scheduled to be converted from overhead to underground. Electrical facilities are distribution facilities owned by an electric utility and do not include transmission facilities used or intended to be used to transmit electricity at nominal voltages in excess of 35,000 volts.

Utility Pole: A structure in the ROW designed to support electric, telephone and similar utility lines. A tower is not a utility pole.

Wireless Encroachment Permit: A permit issued pursuant to this Chapter authorizing the placement or modification of a wireless facility of a design specified in the permit at a particular location within the ROW, and the modification of any existing support structure to which the wireless facility is proposed to be attached.

Wireless Facility, or Facility: The transmitters, antenna structures and other types of installations used for the provision of wireless services at a fixed location, including, without limitation, any associated tower(s), support structure(s), and base station(s).

Wireless Infrastructure Provider: A person that owns, controls, operates or manages a wireless facility or portion thereof within the ROW.

Wireless Regulations: Those regulations adopted by the City Council or Director implementing the provisions of this Chapter.

Wireless Service Provider: An entity that provides personal wireless services to end users.

Section 13.04.040 Scope.

a) **In general.** A wireless encroachment permit is subject to all of the same requirements as an encroachment permit is under Chapter 7.36 in addition to all of the requirements of this Chapter. Unless exempted, every person who desires to place a wireless facility in the ROW or modify an existing wireless facility in the ROW must obtain a wireless encroachment permit authorizing the placement or modification in accordance with this Chapter. Except for small cell facilities, facilities qualifying as eligible facilities requests, or any other type of facility expressly allowed in the ROW by State or Federal law, no other wireless facilities shall be permitted pursuant to this Chapter.

b) **Exemptions.** This Chapter does not apply to:

1) The placement or modification of facilities by the City or by any other agency of the State solely for public safety purposes.

2) Installation of a "cell on wheels," "cell on truck" or a similar structure for a temporary period in connection with an emergency or event, but no longer than required for the emergency or event, provided that installation does not involve excavation, movement, or removal of existing facilities.

c) **Other applicable requirements.** In addition to the wireless encroachment permit required herein, the placement of a wireless facility in the ROW requires the persons who will own or control those facilities to obtain all permits required by applicable law, and to comply with applicable law, including, but not limited to, applicable law governing radio frequency (RF) emissions.

d) **Pre-existing Facilities in the ROW.** Nothing in this Chapter shall validate any existing illegal or unpermitted wireless facilities. All existing wireless facilities shall comply with and receive a wireless encroachment permit, when applicable, to be considered legal and conforming.

e) **Public use.** Except as otherwise provided by California law, any use of the ROW authorized pursuant to this Chapter will be subordinate to the City's use and use by the public.

Section 13.04.050 Administration.

a) **Review Authority.** The Director is responsible for administering this Chapter. As part of the administration of this Chapter, the Director may:

- 1) Interpret the provisions of this Chapter;
- 2) Implement standards governing the placement and modification of wireless facilities consistent with the requirements of this Chapter and applicable Council Resolutions, including regulations governing collocation and resolution of conflicting applications for placement of wireless facilities;
- 3) Implement design, location and development standards for wireless facilities in the ROW consistent with the requirements of this Chapter and applicable Council Resolutions, taking into account the zoning districts bounding the ROW;
- 4) Develop forms and procedures for submission of applications for placement or modification of wireless facilities, and proposed changes to any support structure consistent with this Chapter;
- 5) Collect, as a condition of the completeness of any application, any fee established by this Chapter;
- 6) Establish deadlines for submission of information related to an application, and extend or shorten deadlines where appropriate and consistent with Federal laws and regulations;
- 7) Issue any notices of incompleteness, requests for information, or conduct or commission such studies as may be required to determine whether a permit should be issued;
- 8) Require, as part of, and as a condition of completeness of any application, that an applicant for a wireless encroachment permit send notice to members

of the public that may be affected by the placement or modification of the wireless facility and proposed changes to any support structure;

9) Subject to appeal as provided herein, determine whether to approve, approve subject to conditions, or deny an application; and

10) Take such other steps as may be required to timely act upon applications for placement of wireless facilities, including issuing written decisions and entering into agreements to mutually extend the time for action on an application.

b) **Appeal.**

1) Any person claiming to be adversely affected by the decision of the Director pursuant to this Chapter may appeal the Director's decision. All appeals must be filed within two business days of the written decision of the Director, unless the Director extends the time therefore. An extension may not be granted where extension would result in approval of the application by operation of law.

2) The appeal will be considered by a hearing officer. The hearing officer shall decide the issues *de novo*. The hearing officer's written decision will be the final decision of the City. An appeal by a wireless infrastructure provider must be taken jointly with the wireless service provider that intends to use the wireless facility. As Section 332(c)(7) of the Federal Telecommunications Act of 1996 preempts local decisions premised directly or indirectly on the environmental effects of radio frequency (RF) emissions, appeals of the Director's decision premised on the environmental effects of radio frequency emissions will not be considered.

3) Where the Director grants an application based on a finding that denial would result in a prohibition or effective prohibition under applicable Federal law, the hearing officer shall review the decision.

4) Any appeal shall be conducted so that a timely written decision may be issued in accordance with applicable law. The appeal shall be conducted in accordance with any procedures adopted in the Wireless Regulations.

Section 13.04.060 General Standards for Wireless Facilities in the Public Right of Way.

Generally. Wireless facilities in the ROW shall meet the minimum requirements set forth in this Ordinance and the Wireless Regulations, in addition to the requirements of any other applicable law.

a) **Regulations.** The wireless regulations and decisions on applications for placement of wireless facilities in the ROW shall, at a minimum, ensure that the requirements of this section are satisfied, unless it is determined that the applicant has established that denial of an application would, within the meaning of Federal law, prohibit or effectively prohibit the provision of personal wireless services, or otherwise violate applicable laws or regulations. If that determination is made, the requirements of this

Chapter may be waived, but only to the minimum extent required to avoid the prohibition or violation.

b) **Minimum Standards.** Wireless facilities shall be installed and modified in a manner that:

(i) minimizes risks to public safety, utilizes installation of new support structures or equipment cabinets in the ROW only after all existing and replacement structure options have been exhausted, and where feasible, places equipment underground, and otherwise maintains the integrity and character of the neighborhoods and corridors in which the facilities are located;

(ii) ensures that installations are subject to periodic review to minimize the intrusion on the ROW; and

(iii) ensures that the City bears no risk or liability as a result of the installations, and that such use does not inconvenience the public, interfere with the primary uses of the ROW, or hinder the ability of the City or other government agencies to improve, modify, relocate, abandon, or vacate the ROW or any portion thereof, or to cause the improvement, modification, relocation, vacation, or abandonment of facilities in the ROW.

c) **Design, Location and Development Standards.** The City Council shall, by resolution, adopt design, location and development standards. All applications shall locate the facilities in accordance with such Design Standards and Wireless Regulations, taking into account the zoning districts bounding the ROW. All applicants shall, to the extent feasible, incorporate specific concealment elements to minimize visual impacts and incorporate design requirements in accordance with the Design Standards and Wireless Regulations and ensure compliance with all standards for noise emissions, unless it is determined that another design is less intrusive or placement is required under applicable law.

Section 13.04.070 Applications.

a) **Submission.** Unless the Wireless Regulations provide otherwise, the applicant shall submit a paper copy and an electronic copy of any application, amendments, or supplements to an application, or responses to requests for information regarding an application to the Director.

b) **Content.** An application must contain:

1) Any information required pursuant to the Wireless Regulations;

2) The name of the applicant, its telephone number and contact information, and if the applicant is a wireless infrastructure provider, the name and contact information for the wireless service provider that will be using the wireless facility;

3) The name of the owner of the structure, if different from the applicant, and proof of owner's authorization for use of the structure.

4) A complete description of the proposed wireless facility and any and all work that will be required to install or modify it, including, but not limited to, detail regarding proposed excavations, if any; detailed site plans showing the location of the wireless facility, and dimensioned drawings with specifications for each element of the wireless facility, clearly describing the site and all structures and facilities at the site before and after installation or modification; and a dimensioned map identifying and describing the distance to the nearest residential dwelling unit and any historical structure within 500 feet of the facility. Before and after 360 degree photo simulations must be provided.

5) Documentation sufficient to show that the proposed facility will comply with generally-applicable health and safety provisions of the Municipal Code and the FCC's radio frequency emissions standards.

6) A copy of the lease or other agreement between the applicant and the owner of the property to which the proposed facility will be attached. Proprietary information may be redacted.

7) If the application is for a small cell facility, the application shall state as such and shall explain why the proposed facility meets the definition of small cell facility in this Chapter.

8) If the application is for an eligible facilities request, the application shall state as such and must contain information sufficient to show that the application qualifies as an eligible facilities request, which information must show that there is an existing wireless facility that was approved by the City. Before and after 360 degree photo simulations must be provided, as well as documentation sufficient to show that the proposed facility will comply with generally-applicable health and safety provisions of the Municipal Code and the FCC's radio frequency emissions standards.

9) Proof that notice of the application has been mailed to owners and occupants of real property, and the resident manager for any multi-family dwelling unit that includes ten or more units, within 300 feet of the proposed wireless facility.

10) If the applicant contends that denial of the application would prohibit or effectively prohibit the provision of service in violation of Federal law, or otherwise violate applicable law, the application must provide all information on which the applicant relies on in support of that claim. Applicants are not permitted to supplement this showing if doing so would prevent the City from complying with any deadline for action on an application.

11) The electronic version of an application must be in a standard format that can be easily uploaded on a web page for review by the public.

12) Any required fees.

c) **Fees.** Application fee(s) shall be required to be submitted with any application for a wireless encroachment permit, as established by City Council resolution. Notwithstanding the foregoing, no application fee shall be refundable, in whole or in part, to an applicant for a wireless encroachment permit unless paid as a refundable deposit.

d) **Waivers.** Requests for waivers from any application requirement of this section shall be made in writing to the Director or his or her designee. The Director may grant or deny a request for a waiver pursuant to this subsection. The Director may grant a request for waiver if it is demonstrated that, notwithstanding the issuance of a waiver, the City will be provided all information necessary to understand the nature of the construction or other activity to be conducted pursuant to the permit sought. All waivers approved pursuant to this subsection shall be (1) granted only on a case-by-case basis, and (2) narrowly-tailored to minimize deviation from the requirements of the Municipal Code.

e) **Incompleteness.** Wireless facility applications will be processed, and notices of incompleteness provided, in conformity with State, local, and Federal law. If such an application is incomplete, the Director may notify the applicant and specify the material omitted from the application.

Section 13.04.080 Findings; Decisions; Consultants.

a) Findings Required for Approval.

1) Except for eligible facilities requests, the Director or Hearing Officer, as the case may be, shall approve an application if, on the basis of the application and other materials or evidence provided in review thereof, all of the following findings can be made:

(i) The facility is not detrimental to the public health, safety, and welfare; and

(ii) The facility complies with this Chapter and all applicable design and development standards; and

(iii) The facility qualifies as a small cell facility; and

(iv) The facility meets applicable requirements and standards of State and Federal law.

2) For eligible facilities requests, the Director or Hearing Officer, as the case may be, shall approve an application if, on the basis of the application and other materials or evidence provided in review thereof, it finds the following:

(i) That the application qualifies as an eligible facilities request; and

(ii) That the proposed facility will comply with all generally-applicable laws.

b) **Decisions.** Decisions on an application by the Director or Hearing Officer shall be in writing and include the reasons for the decision.

c) **Independent Consultants.** The Director or Hearing Officer, as the case may be, is authorized, in its discretion, to select and retain independent consultant(s) with expertise in telecommunications in connection with the review of any application under this Chapter, at the expense of the applicant. Such independent consultant review may be retained on any issue that involves specialized or expert knowledge in connection with an application, including, but not limited to, application completeness or accuracy, structural engineering analysis, or compliance with FCC radio frequency emissions standards.

Section 13.04.090 Conditions of Approval.

a) **Generally.** In addition to any supplemental conditions imposed by the Director or Hearing Officer, as the case may be, all permits granted pursuant to this Chapter shall be subject to the following conditions, unless modified by the approving authority:

1) **Code Compliance.** The Permittee shall at all times maintain compliance with all applicable Federal, State and local laws, regulations and other rules, including, without limitation, those applying to use of the ROW.

2) **Permit Duration.** A wireless encroachment permit shall be valid for a period of ten (10) years, unless pursuant to another provision of the Code or these conditions, it expires sooner or is terminated. At the end of ten (10) years from the date of issuance, such Permit shall automatically expire, unless an extension or renewal has been granted. A person holding a wireless encroachment permit must either (1) remove the facility within thirty (30) days following the permit's expiration (provided that removal of support structure owned by City, a utility, or another entity authorized to maintain a support structure in the ROW need not be removed, but must be restored to its prior condition, except as specifically permitted by the City); or (2) at least ninety (90) days prior to expiration, submit an application to the Director to renew the permit, which application must, among all other requirements, demonstrate that the impact of the wireless facility cannot be reduced. The wireless facility must remain in place until it is acted upon by the City and all appeals from the City's decision exhausted.

3) **Timing of Installation.** The installation and construction authorized by a wireless encroachment permit shall begin within one (1) year after its approval, or it will expire without further action by the City. The installation and construction authorized by a wireless encroachment permit shall conclude, including any necessary post-installation repairs and/or restoration to the ROW, within ninety (90) days following the day construction commenced.

4) **Commencement of Operations.** The operation of the approved facility shall commence no later than one hundred and eighty (180) days after the completion of installation, or the wireless encroachment permit will expire without further

action by the City. The Permittee shall provide Director notice that operations have commenced by the same date.

5) As-Built Drawings. The Permittee shall submit an as-built drawing within ninety (90) days after installation of the facility. As-builts shall be in an electronic format acceptable to the City.

6) Inspections; Emergencies. The City or its designee may enter onto the facility area to inspect the facility upon 24 hours prior notice to the Permittee. The Permittee shall cooperate with all inspections and may be present for any inspection of its facility by the City. The City reserves the right to enter or direct its designee to enter the facility and support, repair, disable, or remove any elements of the facility in emergencies or when the facility threatens imminent harm to persons or property. The City shall make an effort to contact the Permittee prior to disabling or removing any facility elements, but in any case shall notify Permittee within 24 hours of doing so.

7) Inspections and Reporting. The Permittee, when directed by the City, must perform an inspection of the facility and submit a report to the Director on the condition of the system to include any identified concerns and corrective action taken. Additionally, as the City performs maintenance on Municipal Infrastructure additional maintenance concerns may be identified. These will be reported to the owner of the facility. The City shall give the Permittee 30 days to correct the identified maintenance concerns after which the City reserves the right to take any action it deems necessary, which could include revocation of the permit. The burden is on the Permittee to demonstrate that it complies with the requirements herein. Prior to issuance of a permit under this Chapter, the owner of the facility shall sign an affidavit attesting to understanding the City's requirement for performance of annual inspections and reporting.

8) Contact. The Permittee shall at all times maintain accurate contact information for all parties responsible for the facility, which shall include a phone number, street mailing address and email address for at least one natural person.

9) Insurance. The Permittee shall obtain and maintain throughout the term of the permit a type and amount of insurance as specific in the Wireless Regulations. The relevant policy(ies) shall name the City, its elected/appointed officials, commission members, officers, representatives, agents, and employees as additional insured. The Permittee shall use its best efforts to provide thirty (30) days prior notice to the Director of to the cancellation or material modification of any applicable insurance policy.

10) Indemnities. The Permittee and, if applicable, the owner of the property upon which the wireless facility is installed shall defend, indemnify and hold harmless the City, its agents, officers, officials, and employees: (i) from any and all damages, liabilities, injuries, losses, costs, and expenses, and from any and all claims, demands, law suits, writs of mandamus, and other actions or proceedings brought against the City or its agents, officers, officials, or employees to challenge, attack, seek to modify, set aside, void or annul the City's approval of the permit, and (ii) from any and all

damages, liabilities, injuries, losses, costs, and expenses, and any and all claims, demands, law suits, or causes of action and other actions or proceedings of any kind or form, whether for personal injury, death or property damage, arising out of or in connection with the activities or performance of the Permittee or, if applicable, the private property owner or any of each one's agents, employees, licensees, contractors, subcontractors, or independent contractors. In the event the City becomes aware of any such actions or claims the City shall promptly notify the Permittee and, if applicable, the private property owner and shall reasonably cooperate in the defense. The Permittee and, if applicable, the property owner shall defend the City with counsel of the City's choice, and shall reimburse the City for any fees, costs and expenses incurred by the City in connection with such claim, demand, law suit, writ of mandamus, or other actions or proceedings.

11) Performance Bond. Prior to issuance of a wireless encroachment permit, the Permittee shall file with the City, and shall maintain in good standing throughout the term of the approval, a performance bond or other surety or another form of security for the removal of the facility in the event that the use is abandoned or the permit expires, or is revoked, or is otherwise terminated. The security shall be in the amount equal to 100% of the cost of removal of the facility as specified in the application for the permit or as that amount may be modified by the Director in in the permit based on the characteristics of the installation. The Permittee shall reimburse the City for staff time associated with the processing and tracking of the bond, based on the hourly rate adopted by the City Council. Reimbursement shall be paid when the security is posted and during each administrative review.

12) Adverse Impacts on Adjacent Properties. Permittee shall undertake all reasonable efforts to avoid undue adverse impacts to adjacent properties and/or uses that may arise from the construction, operation, maintenance, modification, and removal of the facility.

13) Interference.

(a) The Permittee shall not move, alter, temporarily relocate, change, or interfere with any existing structure, improvement, or property without the prior consent of the owner of that structure, improvement, or property. No structure, improvement, or property owned by the City shall be moved to accommodate a permitted activity or encroachment, unless the City determines that such movement will not adversely affect the City or any surrounding businesses or residents, and the Permittee pays all costs and expenses related to the relocation of the City's structure, improvement, or property. Prior to commencement of any work pursuant to a wireless encroachment permit, the Permittee shall provide the City with documentation establishing to the City's satisfaction that the Permittee has the legal right to use or interfere with any other structure, improvement, or property within the ROW or City utility easement to be affected by Permittee's facilities.

(b) The facility shall not damage or interfere in any way with City property, the City's operations or the operations of prior-existing, third party installations. The City will

reasonably cooperate with the Permittee and/or carrier to carry out such activities as are necessary to correct the interference.

(i) Signal Interference. The Permittee shall correct any such interference within 24 hours of written notification of the interference. Upon the expiration of the 24-hour cure period and until the cause of the interference is eliminated, the Permittee shall cease operation of any facility causing such interference until such interference is cured.

(ii) Physical Interference. The City shall give the Permittee 30 days to correct the interference after which the City reserves the right to take any action it deems necessary, which could include revocation of the permit.

(c) The City at all times reserves the right to take any action it deems necessary, in its sole discretion, to repair, maintain, alter, or improve the sites. Such actions may temporarily interfere with the operation of the facility. The City will in all cases, other than emergencies, give the applicant 30 days written notification of such planned, non-emergency actions.

14) No Right, Title, or Interest. The permission granted by a wireless encroachment permit shall not in any event constitute an easement on or an encumbrance against the ROW. No right, title, or interest (including franchise interest) in the ROW, or any part thereof, shall vest or accrue in Permittee by reason of a wireless encroachment permit or the issuance of any other permit or exercise of any privilege given thereby.

15) No Possessory Interest. No possessory interest is created by a wireless encroachment permit. However, to the extent that a possessory interest is deemed created by a governmental entity with taxation authority, the Permittee acknowledges that the City has given to the Permittee notice pursuant to California Revenue and Taxation Code Section 107.6 that the use or occupancy of any public property pursuant to a wireless encroachment permit may create a possessory interest which may be subject to the payment of property taxes levied upon such interest. Permittee shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interact taxes or other taxes, fees, and assessments levied against Permittee's right to possession, occupancy, or use of any public property pursuant to any right of possession, occupancy, or use created by this permit.

16) General Maintenance.

(a) The site and the facility, including, but not limited to, all landscaping, fencing, and related transmission equipment, must be maintained in a neat, safe and clean manner and in accordance with all approved plans. All graffiti on facilities must be removed at the sole expense of the Permittee within forty-eight (48) hours after notification from the City. The Permittee shall ensure that all equipment and other improvements to be constructed and/or installed in connection with the approved plans are maintained in a manner that is not detrimental or injurious to the public health, safety,

and general welfare and that the aesthetic appearance is continuously preserved, and substantially the same as shown in the approved plans at all times relevant to the permit.

(b) The Permittee shall repair, at its sole cost and expense, any damage including, but not limited to subsidence, cracking, erosion, collapse, weakening, or loss of lateral support to City streets, sidewalks, walks, curbs, gutters, trees, parkways, street lights, traffic signals, improvements of any kind or nature, or utility lines and systems, underground utility line and systems (water, sewer, storm drains, gas, oil, electrical, etc.) that result from any activities performed in connection with the installation and/or maintenance of a wireless facility in the ROW. The Permittee shall restore such areas, structures and systems to the condition in which they existed prior to the installation or maintenance that necessitated the repairs. In the event the Permittee fails to complete such repair within the number of days stated on a written notice by the Director the City will engage resources at the Permittee's sole cost and expense to complete such repairs. Such time period for correction shall be based on the facts and circumstances, danger to the community and severity of the disrepair. Should the Permittee not make the correction within the time period allotted the Director shall cause such repair to be completed at Permittee's sole cost and expense.

(c) The Permittee shall keep the site area free from all litter and debris at all times. Each year after the Permittee installs the wireless facility, the Permittee, if requested by the Director, shall submit a written report to the satisfaction of the Director, documenting the then-current site condition.

17) RF Exposure Compliance. All facilities must comply with all standards and regulations of the FCC and any other State or Federal government agency with the authority to regulate RF exposure standards. After transmitter and antenna system optimization, but prior to unattended operations of the facility, the Permittee or its representative must conduct on-site post-installation RF emissions testing to demonstrate actual compliance with the FCC Office of Engineering and Technology Bulletin 65 RF emissions safety rules for general population/uncontrolled RF exposure in all sectors. For this testing, the transmitter shall be operating at maximum operating power, and the testing shall occur outwards to a distance where the RF emissions no longer exceed the uncontrolled/general population limit.

18) Testing. Testing of any equipment shall take place on weekdays only, and only between the hours of 8:30 a.m. and 4:30 p.m., except that testing is prohibited on holidays that fall on a weekday. Testing is prohibited on weekend days.

19) Modifications. No changes shall be made to the approved plans without review and approval in accordance with this Chapter.

20) Agreement with City. If not already completed, the Permittee shall enter into the appropriate agreement with the City, as determined by the City, prior to constructing, attaching, or operating a facility on Municipal Infrastructure. This permit is not a substitute for such agreement.

21) Conflicts with Improvements. For all facilities located within the ROW, the Permittee shall remove or relocate, at its expense and without expense to the City, any or all of its facilities when such removal or relocation is deemed necessary by the City by reason of any change of grade, alignment, or width of any ROW, for installation of services, water pipes, drains, storm drains, power or signal lines, traffic control devices, ROW improvements, or for any other construction, repair, or improvement to the ROW.

22) Abandonment. If a facility is not operated for a continuous period of 6 months, the wireless encroachment permit and any other permit or approval therefor shall be deemed abandoned and terminated automatically, unless before the end of the 6 month period (i) the Director has determined that the facility has resumed operations, or (ii) the City has received an application to transfer the permit to another service provider. No later than thirty (30) days from the date the facility is determined to have ceased operation or the Permittee has notified the Director of its intent to vacate the site, the Permittee shall remove all equipment and improvements associated with the use and shall restore the site to its original condition to the satisfaction of the Director. The Permittee shall provide written verification of the removal of the facilities within thirty (30) days of the date the removal is completed. If the facility is not removed within thirty (30) days after the permit has been discontinued pursuant to this subsection, the site shall be deemed to be a nuisance, and the City may cause the facility to be removed at Permittee's expense or by calling any bond or other financial assurance to pay for removal. If there are two (2) or more users of a single facility or support structure, then this provision shall apply to the specific elements or parts thereof that were abandoned, but will not be effective for the entirety thereof until all users cease use thereof.

23) Collocation. Where the facility site is capable of accommodating a co-located facility upon the same site in a manner consistent with the permit conditions for the existing facility, the City may require collocation of third party facilities, provided the parties can mutually agree upon reasonable terms and conditions.

24) Records. The Permittee must maintain complete and accurate copies of all permits and other regulatory approvals issued in connection with the facility, which includes without limitation this approval, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval and any ministerial permits or approvals issued in connection with this approval. In the event that the Permittee does not maintain such records as required in this condition or fails to produce true and complete copies of such records within a reasonable time after a written request from the City, any ambiguities or uncertainties that would be resolved through an inspection of the missing records will be construed against the Permittee.

25) Attorney's Fees. In the event the City determines that it is necessary to take legal action to enforce any of these conditions, or to revoke a permit, and such legal action is taken, the Permittee shall be required to pay any and all costs of such legal action, including reasonable attorney's fees, incurred by the City, even if the matter is not prosecuted to a final judgment or is amicably resolved, unless the City should otherwise agree with Permittee to waive the fees or any part thereof. The foregoing shall not apply if the Permittee prevails in the enforcement proceeding.

26) The Permittee is responsible for obtaining power to the facility and for the cost of electrical usage.

27) Failure to comply with the City's adopted noise standard after written notice and opportunity to cure have been given shall be grounds for the City to revoke the permit.

28) The Permittee shall remove all non-operational equipment from any structure on which it installs new equipment under the permit

b) **Eligible Facilities Requests.** In addition to the conditions provided in Section 13.04.090 of this Chapter and any supplemental conditions imposed by the Director or Hearing Officer as the case may be, all permits for an eligible facility requests granted pursuant to this Chapter shall be subject to the following additional conditions, unless modified by the approving authority:

1) Permit subject to conditions of underlying permit. Any permit granted in response to an application qualifying as an eligible facilities request shall be subject to the terms and conditions of the underlying permit.

2) No permit term extension. The City's grant or grant by operation of law of an eligible facilities request permit constitutes a federally-mandated modification to the underlying permit or approval for the subject tower or base station. Notwithstanding any permit duration established in another permit condition, the City's grant or grant by operation of law of a eligible facilities request permit will not extend the permit term for the underlying permit or any other underlying regulatory approval, and its term shall have the same term as the underlying permit or other regulatory approval for the subject tower or base station.

3) No waiver of standing. The City's grant or grant by operation of law of an eligible facilities request does not waive, and shall not be construed to waive, any standing by the City to challenge Section 6409(a) of the Spectrum Act, any FCC rules that interpret Section 6409(a) of the Spectrum Act, or any modification to Section 6409(a) of the Spectrum Act.

c) **Small Cell Facilities Requests.** In addition to the conditions provided in 13.04.090 of this Chapter and any supplemental conditions imposed by the Director or Hearing Officer, as the case may be, all permits for a small cell facility granted pursuant to this Chapter shall be subject to the following condition, unless modified by the approving authority:

1) No waiver of standing. The City's grant of a permit for a small cell facility request does not waive, and shall not be construed to waive, any standing by the City to challenge any FCC orders or rules related to small cell facilities, or any modification to those FCC orders or rules.

Section 13.04.100 Breach; Termination of Permit.

a) For breach. A wireless encroachment permit may be revoked for failure to comply with the conditions of the permit or applicable law. Upon revocation, the wireless facility must be removed within thirty (30) days. A support structure owned by City, a utility, or another entity authorized to maintain a support structure in the ROW need not be removed, but must be restored to its prior condition, except as specifically permitted by the City. All costs incurred by the City in connection with the revocation and removal shall be paid by entities who own or control any part of the wireless facility.

b) For installation without a permit. A wireless facility installed without a wireless encroachment permit (except for those exempted by this Chapter) must be removed within thirty (30) days of notification by the City. A support structure owned by City, a utility, or another entity authorized to maintain a support structure in the ROW need not be removed, but must be restored to its prior condition, except as specifically permitted by the City. All costs incurred by the City in connection with the revocation and removal shall be paid by entities who own or control any part of the wireless facility.

Section 13.04.110 Infrastructure Controlled By City. The City, as a matter of policy, will negotiate agreements for use of Municipal Infrastructure. The placement of wireless facilities on those structures shall be subject to the agreement. The agreement shall specify the compensation to the City for use of the structures. The person seeking the agreement shall additionally reimburse the City for all costs the City incurs in connection with its review of, and action upon the person's request for, an agreement.

Section 13.04.120 Nondiscrimination. In establishing the rights, obligations and conditions set forth in this Chapter, it is the intent of the City to treat each applicant or ROW user in a competitively neutral and nondiscriminatory manner, to the extent required by law, and with considerations that may be unique to the technologies, situation and legal status of each particular applicant or request for use of the ROW.

Section 13.04.130 Effect on Other Ordinances.

Compliance with the provisions of this chapter shall not relieve a person from complying with any other applicable provision of the Municipal Code. In the event of a conflict between any provision of this chapter and other provisions of the Municipal Code, this chapter shall control.”

SECTION 2. This Ordinance is adopted as an urgency ordinance pursuant to Government Code Section 36937(b). The facts constituting the urgency are as follows:

(1) The purpose of this Ordinance is to amend the City's Municipal Code to provide uniform and comprehensive standards, regulations and permit requirements for the installation of wireless telecommunications facilities in the City's public right-of-way.

(2) The wireless telecommunications industry has submitted applications, and expressed interest in submitting additional applications for the installation of “small cell” wireless telecommunications facilities in the City’s public rights-of-way of the City.

(3) Installation of small cell and other wireless telecommunications facilities within the public right-of-way can pose a threat to the public health, safety and welfare, including disturbance to the right-of-way through the installation and maintenance of wireless facilities; traffic and pedestrian safety hazards due to the unsafe location of wireless facilities; impacts to trees where proximity conflicts may require unnecessary trimming of branches or require removal of roots due to related undergrounding of equipment or connection lines; land use conflicts and incompatibilities including excessive height or poles and towers; creation of visual and aesthetic blights and potential safety concerns arising from excessive size, heights, noise or lack of camouflaging of wireless facilities including the associated pedestals, meters, equipment and power generators; and the creation of unnecessary visual and aesthetic blight by failing to utilize alternative technologies or capitalizing on collocation opportunities which may negatively impact the unique quality and character of the City.

(4) The Federal Telecommunications Act of 1996 preempts and declares invalid all state rules that restrict entry or limit competition in both local and long-distance telephone service.

(5) The California Public Utilities Commission (CPUC) is primarily responsible for the implementation of local telephone competition and the CPUC issues certificates of public convenience and necessity to new entrants that are qualified to provide competitive local telephone exchange services and related telecommunications service, whether using their own facilities or the facilities or services provided by other authorized telephone corporations.

(6) California Public Utilities Code Section 234(a) defines a "telephone corporation" as "every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state."

(7) California Public Utilities Code Section 616 provides that a telephone corporation "may condemn any property necessary for the construction and maintenance of its telephone line."

(8) California Public Utilities Code Section 2902 authorizes municipal corporations to retain their powers of control to supervise and regulate the relationships between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility and the location of the poles, wires, mains, or conduits of any public utility on, under, or above any public streets.

(9) California Public Utilities Code Section 7901 authorizes telephone and telegraph corporations to construct telephone or telegraph lines along and upon any public road or highway, along or across any of the waters or lands within this state, and to erect poles, posts, piers, or abatements for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

(10) California Public Utilities Code Section 7901.1 confirms the right of municipalities to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed, which control must be applied to all entities in an equivalent manner, and may involve the imposition of fees.

(11) California Government Code Section 50030 provides that any permit fee imposed by a city for the placement, installation, repair, or upgrading of telecommunications facilities, such as lines, poles, or antennas, by a telephone corporation that has obtained all required authorizations from the CPUC and the FCC to provide telecommunications services, must not exceed the reasonable costs of providing the service for which the fee is charged, and must not be levied for general revenue purposes.

(12) State and federal law have changed substantially since the City last adopted regulations for wireless telecommunications facilities in the City. Such changes include modifications to “shot clocks” whereby the City must approve or deny installations within a certain period of time. State and federal laws require local governments to act on permit applications for wireless facilities within a prescribed time period and may automatically deem an application approved when a failure to act occurs. See Title 47 U.S.C. Section 332(c)(7)(B)(iii); 47 C.F.R. Sections 1.40001 et seq.; Cal. Gov't Code Section 65964.1. The FCC may require a decision on certain applications in as few as 60 days. See Title 47 C.F.R. Section 1.40001(c)(2); see also *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd. 12865 (Oct. 17, 2014) [hereinafter “2014 Report and Order”]; *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd. 13994 (Nov. 18, 2009). Pursuant to FCC regulations, the City cannot adopt a moratorium ordinance to toll the time period for review for certain type of facilities, even when needed to allow the City to maintain the status quo while it reviews and revises its policies for compliance with changes in state or federal law. See 47 C.F.R. Section 1.40001(c)(3); 2014 Report and Order, 29 FCC Rcd. at 219, 265. The City is in immediate need of clear regulations for wireless installations in the public right-of-way given the number of anticipated applications and legal timelines upon which the City must act.

(13) The public right-of-way in the City is a uniquely valuable public resource, closely linked with the City’s natural beauty including the beach and coastline. The reasonably regulated and orderly deployment of wireless telecommunications facilities in the public right-of-way is desirable, and unregulated or disorderly deployment represents an ever-increasing and true threat to the health, welfare and safety of the community.

(14) The regulations of wireless installations in the public right-of-way are necessary to protect and preserve the aesthetics in the community, as well as the values of properties within the City, and to ensure that all wireless telecommunications facilities are installed using the least intrusive means possible.

(15) The City finds that in light of more recent developments in federal and state law with respect to the regulation of small cell and other wireless telecommunications

facilities, there is a need for the City to update its current ordinances based on current telecommunications trends, updates in laws, as well as aesthetic and location options for wireless facilities. The City Council also finds that the lack of specifically-designed standards and regulations in the Municipal Code for wireless facilities located in the public right-of-way, the increasing requests for information about the City's regulation of wireless telecommunications facilities, the inability to adopt a temporary moratorium, and the potential liabilities and negative consequences for noncompliance with state and federal regulations (including, without limitation, automatic approvals) present current and immediate threat to the public health, safety and welfare. The City Council further finds and declares that the immediate implementation of the Ordinance is necessary to preserve and protect public health, safety and welfare.

(16) The City recognizes its responsibilities under the Federal Telecommunications Act of 1996 and state law, and believes that it is acting consistent with the current state of the law in ensuring that irreversible development activity does not occur that would harm the public health, safety, or welfare. The City does not intend that this Ordinance prohibit or have the effect of prohibiting telecommunications service; rather, but includes appropriate regulations to ensure that the installation, augmentation and relocation of wireless telecommunications facilities in the public rights-of-way are conducted in such a manner as to lawfully balance the legal rights of applicants under the Federal Telecommunications Act and the California Public Utilities Code while, at the same time, protect to the full extent feasible against the safety and land use concerns described herein.

Based on the foregoing, the City Council finds and determines that the immediate preservation of the public health, safety and welfare requires that this Ordinance be enacted as an urgency ordinance pursuant to Government Code Section 36937(b), and take effect immediately upon adoption. Therefore, this Ordinance is necessary for the immediate preservation of the public peace, health, safety and welfare and its urgency is hereby declared.

The Director or her designee, is directed to execute all documents and to perform all other necessary City acts to implement the effect this Ordinance, including the promulgation of regulations to implement this Ordinance.

SECTION 3. CEQA. This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act ("CEQA") Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. Most of the terms and scope of City discretion are guided by existing State and Federal law. This Ordinance creates an administrative process to process requests for wireless facilities in the ROW and the City's discretion with these applications is limited. The Ordinance does not authorize any specific development or installation on any specific piece of property within the City's boundaries, most of which will be placed on existing infrastructure. Alternatively, even if the Ordinance is a "project" within the meaning of State CEQA Guidelines Section 15378, the Ordinance is exempt from CEQA on multiple grounds. First, the Ordinance is exempt from CEQA because the City Council's adoption of the Ordinance is covered by the general rule that CEQA applies only to projects which

have the potential for causing a significant effect on the environment. (State CEQA Guidelines, Section 15061(b)(3)). This Ordinance creates an administrative procedure for wireless carriers to apply to place facilities in the ROW, often on existing infrastructure. Moreover, in the event that the Ordinance is interpreted so as to permit installation of wireless facilities on a particular site, the installation would be exempt from CEQA review in accordance with either 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), as these facilities are allowed under Federal and State law, are by their nature smaller when placed in the ROW and subject to various siting and design preferences to prevent aesthetic impact to the extent feasible.

SECTION 4. Internal Consistency. Any provisions of the Municipal Code, or any other resolution or ordinance of the City, to the extent that they are inconsistent with this Ordinance are hereby repealed, and the City Clerk shall make any necessary changes to the Municipal Code for internal consistency.

SECTION 5. Severability. If any section, subsection, sentence, clause, phrase, or word of this Ordinance is, for any reason, deemed or held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, or preempted by legislative enactment, such decision or legislation shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Manhattan Beach hereby declares that it would have adopted this Ordinance and each section, subsection, sentence, clause, phrase, or word thereof, regardless of the fact that any one or more sections, subsections, clauses, phrases, or word might subsequently be declared invalid or unconstitutional or preempted by subsequent legislation.

SECTION 6. Effective Date. The City Clerk is directed to certify to the enactment of this Ordinance and to cause this ordinance to be published and/or posted as required by law.

ADOPTED April 10, 2019

AYES:
NOES:
ABSTAIN:
ABSENT:

ATTEST:

LIZA TAMURA
City Clerk

STEVEN A. NAPOLITANO
Mayor

APPROVED AS TO FORM:



QUINN M. BARROW
City Attorney