Legislation Text

File #: 19-0210, **Version:** 1

TO:
Honorable Mayor and Members of the City Council

THROUGH:
Bruce Moe, City Manager

FROM:
Anne McIntosh, Community Development Director
Stephanie Katsouleas, Public Works Director
Sanford Taylor, Information Technology Director

SUBJECT:
Consider Introducing an Ordinance and Adopting an Urgency Ordinance Regulating Wireless Facilities in the Right-of-Way, and Regulations, Including Design, Locational and Design Standards, for Wireless Facilities in the Right-of-Way (Community Development Director McIntosh).
a) ADOPT URGENCY ORDINANCE NO. 19-0012-U
b) INTRODUCE ORDINANCE NO. 19-0012
c) ADOPT RESOLUTION NO. 19-0044

RECOMMENDATION:
Staff recommends that the City Council:

1. Adopt Urgency Ordinance No. 19-19-0012-U amending the Manhattan Beach Municipal Code to regulate wireless facilities in the City's rights-of-way.
2. Introduce Ordinance No. 19-0012 amending the Manhattan Beach Municipal Code to regulate wireless facilities in the City's rights-of-way; and
3. Adopt Resolution No. 10-0044 imposing design, location and development standards upon wireless facilities in the City's rights-of-way.

FISCAL IMPLICATIONS:
Fiscally neutral. The Federal Communications Commission (FCC) has imposed limits on the amounts cities may charge wireless telecommunications providers.

EXECUTIVE SUMMARY:
In the last few years, there has been a flurry of activity on the federal level, state level, and in the courts regarding wireless telecommunications. Staff has been in the process of developing new, up-to-date regulations for over a year, only to see technological advances or yet another legal development render older approaches ineffective. At the last City Council meeting, the Mayor requested that staff bring back an ordinance regulating wireless facilities. In light of the ever-changing landscape, staff recommends that the City Council adopt regulations on an urgency basis, to establish a review process, and place design, location and development standards upon applications. This will provide staff, the PPIC and the Council additional time to study and develop

"permanent" regulations, but still have the ability to utilize the most current regulations and standards in processing applications in the interim. Staff anticipates that proposed regulations will be considered by the Parking and Public Improvements Commission in May, followed by a subsequent opportunity for Council review, with several opportunities for public input.

DISCUSSION:
The demand for wireless broadband is expected to grow exponentially over the next several years. This growth is a result of the implementation of the tremendous amount of digital content such as streaming video, social media, Smart City applications, robots, drones, self-driving cars, artificial intelligence, and many more Internet of Things (IoT) applications. Traditionally, wireless antennas and equipment were primarily installed on large towers on private land and on the rooftops of buildings.

In recent years, companies increasingly seek to install wireless facilities in a right-of-way (ROW) on utility poles, streetlights and new poles. To accommodate the ever growing demand for wireless broadband telecommunications, the industry is starting to look for small cell 5G (fifth generation of cellular mobile communications) technology which is a 10-fold improvement in capacity over existing broadband. 5G technology is distinguished from the present 4G based wireless service by use of low power transmitters with coverage radius of approximately 400 feet - 5G thus requires close spacing of antennas and more of them. Street light poles and other poles are therefore ideally suited for 5G antenna placement due to their sheer numbers and locations where they are deployed throughout municipalities. Current predictions indicate that the next wave of wireless facility deployment, specifically 5G, will involve $275 billion in investment over the next decade, with the vast majority of these new facilities anticipated to be placed in the ROW.

Limits of City Authority and Regulatory Setting:

The City's role in the siting and design of wireless communication facilities is generally limited to aesthetics. Essentially, the federal Telecommunications Act is intended to ensure that the public has sufficient access to telecommunication services. Based on this federal law a local government shall not prohibit or have the effect of prohibiting the provision of personal wireless services. Further, no state or local government may regulate cell tower placement based on "the environmental (health) effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." The consideration of health effects, including potential effects on property values due to potential radio frequency emissions, may not serve as "substantial evidence" for purposes of denying a wireless communication facilities.

As utilities, telephone companies, which include wireless telecommunications providers, may use the public right of way to deploy facilities under their state franchise conferred in California Public Utilities Code Section 7901. That right does have some limitations. Specifically, Section 7901 provides that such use must be "in such manner and at such points as not to incommode the public use of the road...." The phrase "incommode the public use" in Section 7901 means "to unreasonably subject the public use to inconvenience or discomfort; to unreasonably trouble, annoy, molest, embarrass,

inconvenience; to unreasonably hinder, impede, or obstruct the public use." "Incommode" is "broad enough 'to be inclusive of concerns related to the appearance of a facility'", and therefore, Section 7901 does not prohibit local governments from conditioning the approval of a particular permanent siting permit on aesthetic concerns. Last week, the California Supreme Court held that regulations adopted by San Francisco were not preempted by state law and confirmed that local governments may continue to condition permit approval on aesthetic or other considerations that arise under the local police power. In doing so, the Court explained that denial of a particular permit application simply prevents the construction of lines in a proposed manner at a proposed location, and does not, as State law intends to prevent, completely bar an applicant from operating within a city.

In addition to Section 7901, Public Utilities Code Section 2902 also protects a local government's right "to supervise and regulate the relationship 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, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets...within the limits of the municipal corporation." This provision is a further basis for a local government to restrict the location of proposed facilities due to public safety reasons or other local concerns or even deny applications in appropriate circumstances.

Further, a local government has the right under Section 7901.1 "to exercise reasonable control as to the time, place, and manner in which roads...are accessed [by telephone companies]." The "time, place and manner" of temporary access refers to "when, where, and how telecommunications service providers gain entry to the public rights-of-way." This includes a requirement for obtaining encroachment permits. There are other tangential constraints on local regulation from state and federal law. At the state level, the California Public Utilities Commission (CPUC) may have authority to invoke the statewide interest in telecommunications services to take action to preempt local ordinances for particular telecommunications projects.

Recent FCC Orders:

In addition, recent changes in federal law place shortened time frames or "shot clocks" and other requirements on local review of wireless facility installations in the ROW. Under a Federal Communications Commission (FCC) declaratory order and regulations which went into effect on January 14, 2019, if a city does not render a decision on a small wireless facility application within a specified time period (60 days for installations on existing structures, and 90 days for new structures), the failure to meet the deadline for action will be presumed to violate federal law (both a failure to act within a reasonable period of time and an effective prohibition of wireless services). On aesthetics and undergrounding, the FCC declares 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.

While the legal validity of both of the FCC orders is being litigated, the effectiveness of the orders has not been stayed pending the resolution of the litigation. Staff, therefore, is taking steps discussed in this report to address wireless deployments in the ROW consistent with the new federal regulations, and among them, recommends Council adopt the draft design standards that would provide the industry guidance with regarding to aesthetics, location and design.

Summary of Proposed Ordinance:

The ordinance would add a new Chapter 13.04 to the Municipal Code, Wireless Facilities in the Public Right of Way. For all wireless facility installations in the ROW, the ordinance provides, among other regulations, the permit and review procedures as well as the operation and maintenance standards. The ordinance treats wireless installations in the ROW similar to other installations in the ROW by requiring an encroachment permit. Specifically, the ordinance sets additional standards and requirements for obtaining an encroachment permit to install wireless facilities. The ordinance balances the community's need for wireless services, the industry's need to deploy quickly, and the City's obligation to maintain safety and protect the aesthetic qualities of our neighborhoods. Finally, the ordinance allows for necessary adaptability, by allowing the Director to publish administrative regulations to help implement the ordinance. Once the encroachment permit is issued, the carrier may still need to obtain traffic control plans, construction permits and if necessary, a license to attach to City infrastructure.

Under the ordinance, wireless encroachment permits are approved by the Public Works Director and may be appealed to a hearing officer. Given the short time that the City has to act on these applications under Federal law, having two days to process appeals, staff recommends that the appeals be heard by an independent hearing officer, who can hold hearings on short notice within the short time frame. Doing so also provides an independent level of oversight over the decisions before they become final and subject to challenge in court.

The ordinance contains a comprehensive list of permit conditions that will apply to wireless encroachment permits, including insurance requirements, indemnity, performance bond for removal upon abandonment, and maintenance and inspection requirements. The permits are in effect for a term of 10 years, which stems from a State law that allows the City to limit the permits to 10 years; compared to utility poles, for example, which are erected in perpetuity.

Summary of Proposed Design, Location and Development Standards:

The ordinance provides that design, location and development standards will be established by resolution. Given how fast this technology is changing, staff recommends having these guidelines adopted by separate resolution and not placing them in the Municipal Code. Given the frequent and often important changes to the law and technology of wireless installations, especially the pending litigation surrounding the FCC Order, adopting standards by resolution affords the City the flexibility

to readily adapt and tailor its regulations to these changes and the concerns of the City. Many cities follow this format. Indeed, the proposed regulations, with a few exceptions borrowed from Mill Valley and San Marino, are virtually identical to the regulations adopted by Hermosa Beach.

The draft standards are included in the Resolution. The FCC order also requires that cities have design standards published by mid-April. The intent of these designs standards is to establish objective requirements for location, camouflage and concealment elements, etc. for small wireless service facilities in the ROW. The more advance guidance that the City can provide to the wireless industry through its design standards, the easier it is for the carriers to design to meet those standards, and the easier it is for the City to review and process the applications within the short timeframes (shot clocks) set by the FCC.

Siting these facilities can be a difficult task for the carriers, as they try to meet the City's goals while providing the capacity and coverage they need to serve their customers. The design standards encourage a pre-application meeting during which City staff can discuss the proposal with the carrier and confirm whether the proposal meets the standards. This also provides the carriers an opportunity to discuss location with staff and attempt to site the facilities in a way that best meets the City's aesthetic and safety goals.

Determining the appropriate height in the ROW can be challenging. The guidelines propose that wireless facilities be located no higher than 10% or 10 feet (whichever is greater) than the maximum height allowed in the adjacent zoning district. This would ensure consistency in height limits and ensure that facilities relate in size and scale to their surroundings. In response to carrier concerns about compliance with the PUC's minimum vertical clearance requirements, language has been added to allow an exception if a different height is required to comply with those PUC requirements.

In order to avoid visual clutter, the preferred method of concealment is to place the equipment associated with the antennas underground. The antenna and pole mounted accessory equipment must be camouflaged. Lastly, modifications to existing facilities may not defeat existing concealment elements on the existing structure or pole.

Allowable locations are on existing infrastructure such as street lights or utility poles. Should the carriers need to replace the infrastructure with new lights or poles to incorporate the wireless facility, that is permitted and referred to as a replacement pole. Replacements must be in the same location, unless they need to be moved slightly to meet the pole owner's requirements. In addition, staff proposes that the City require that locations in commercial areas be considered prior to residential areas. The standards also provide that right of way locations in residential areas are subject to the following order of descending preference:

a. Signalized intersections.

b. Non-signalized intersections with existing “cobra head” street lamps.

c. Streets with existing “cobra head” street lamps.

d. All other residential areas.

Wireless facilities are prohibited in the following locations, which shall be considered the least preferred in the following descending order:

a. Within 200 feet of any public or private school.

b. In any median.

The standards also try to balance the unique land use characteristics in Manhattan Beach. For example, staff proposes that in the City’s narrow alleys adjacent to residential properties, the facilities be placed above roof lines in order to avoid facilities next to residential windows and decks. Staff also recommends that when there is a choice in location, carriers should choose to site on a pole or light that is between structures and not immediately adjacent.

While electric meters should not be needed if unmetered service is available in the area, any electrical meters shall be as unobtrusive as possible. The standards also require that any landscaping proposed to be removed during installation shall be replaced with like kind or better. Cabling shall run internally within all poles to the maximum extent feasible.

On utility poles, the antennas, brackets and cabling shall match the color of the pole. The equipment and enclosures shall be narrow so that it is less likely to impair views of buildings and scenic resources or detract from streetscapes. Equipment shall be oriented away from residential windows and the primary travel direction, and shall be stacked close together.

These proposed standards reflect staff’s best proposal to balance all of the competing interests, including safety of the ROW, aesthetics, evolving technology and federal law requirements and

different design needs for each carrier. It can be difficult to draft one-size fits all standards to cover different carriers with different design and coverage needs in this evolving space. Therefore, there must be some limited flexibility in the standards. Under the City's new wireless ordinance, the Public Works Director may waive a standard if that standard would create a prohibition on service in violation of federal law. If a wavier is warranted, it shall only be to the minimum extent required to avoid the prohibition or violation.

Environmental Analysis:

These Ordinances and the Resolution is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act ("CEQA") Guidelines, because they have 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. The Ordinance creates an administrative process to process requests for wireless facilities in the ROW and the City's discretion with these applications is limited. This resolution sets forth the design standards for those wireless facilities to protect the aesthetic interests and ensure a safe and accessible right of way. These standards do not authorize any specific development or installation on any specific piece of property within the City's boundaries, most of which would be placed on existing infrastructure. Alternatively, even if the Ordinance or Resolution were considered a "project" within the meaning of State CEQA Guidelines Section 15378, the Resolution is exempt from CEQA on multiple grounds. First, both the Ordinance and the Resolution are exempt from CEQA because the City Council's adoption of them 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, § 15061(b)(3)). The Resolution creates design standards for wireless carriers to place facilities in the ROW, often on existing infrastructure. Moreover, in the event that the Resolution 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 these various siting and design preferences to prevent aesthetic impact to the extent feasible.

LEGAL REVIEW:
The City Attorney has reviewed this report and determined that no additional legal analysis is necessary.

ATTACHMENTS:
1. Urgency Ordinance No. 19-0012-U
2. Draft Ordinance No. 19-0012
3. Resolution No. 19-0044