



COMMUNITY DEVELOPMENT AGENCY

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Marin County Board of Supervisors
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SUBJECT: Adoption of Urgency Ordinance to update regulations and permitting procedures for small cell wireless facilities in public roads

Dear Supervisors,

Building and Safety
Environmental Health Services
Planning
Environmental Review
Housing
Sustainability
Code Enforcement
GIS
Federal Grants

RECOMMENDATION:

Staff recommends the Board review and approve: 1) an urgency ordinance to recognize and allow small cell wireless facilities; and 2) adopt a resolution approving a new Board Policy for the purpose of regulating the permitting, design, and location of small wireless facilities within public roads.

SUMMARY:

In order to comply with recent changes in federal laws that affect local authority over small cell wireless facilities, the Board is being asked to review and adopt an urgency ordinance to recognize small cell wireless facilities on public roads and adopt a policy establishing objective standards for these facilities that staff developed with assistance of the Board's subcommittee, comprised of Supervisors Connolly and Rodoni.

www.marincounty.org/cda

BACKGROUND:

On September 26, 2018, the Federal Communications Commission (FCC) adopted new rules that further limit local authority to regulate "small cell wireless facilities" as that term is defined in 47 C.F.R. § 1.6002(l). The FCC rules would require the County to review and make decisions on small cell wireless applications faster and consistent with the FCC's national standard for permissible local regulations. These rules are part of a larger rulemaking that aims to reinterpret the federal Telecommunications Act of 1996 and prohibit actual and effective local moratoria on infrastructure deployments. The September 2018 Order has been challenged by several coalitions of municipalities, including Marin County, and that litigation is pending in the Ninth Circuit Court of Appeals. In January 2019, the courts denied a request by the municipalities to "stay" the FCC order until the litigation was resolved. The FCC order therefore went into effect on January 14, 2019. More recently, federal Representative Anna Eshoo from California has introduced legislation in Congress (HR 530) to halt the FCC Order.

Small cell wireless facilities generally include the smaller scale antennas and associated facilities (as compared to early generation macro facilities) that are part of

the next generation of wireless technology, known as 5G. 5G operates at significantly faster speeds than the existing technology, using higher frequency and directional radio waves over shorter distances. 5G technology requires smaller, more frequently-placed antennas than current technology, which lend themselves to placement on light poles and similar existing infrastructure.

Under the new rules, the FCC defines the presumptively reasonable time for review and action (also known as shot-clocks) as 60 days for small cell attachments to existing structures and 90 days for attachments to new structures. The shot clocks include license or franchise agreements to access rights-of-way, building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, and design/aesthetic approvals. Any administrative appeal must also occur within the applicable shot clock. If the County fails to issue a timely final decision, the County's failure to act presumptively constitutes an effective prohibition of service and the applicant may file a claim in federal court for an injunction to issue permits.

In addition, the FCC provides that a local small cell regulation causes an effective prohibition in violation of federal law unless the regulation is (1) reasonable; (2) no more burdensome than regulations imposed on similar infrastructure deployments; and (3) objective and published in advance. Reasonable regulations are those that are technically feasible and reasonably directed to avoiding or remedying the "intangible public harm" (as it is described by the FCC) of unsightly or out-of-character deployments.

At the workshop of February 5, 2019, the Board was provided a report covering the Federal Communications Commission (FCC) ruling, the County's current regulations for wireless communication facilities and potential approaches for addressing small cell wireless facilities. Following public comment and deliberation, the Board directed staff to continue to work with the Board's subcommittee on small cell wireless facilities to: 1) evaluate possible policy and procedure options for the Board to consider; and 2) return to the Board with draft policy regulations.

On March 7, the subcommittee met with representatives from Verizon, AT&T and independent wireless permitting firms to discuss 5G technology and industry requirements for deployment of small cell wireless systems. At the meeting, the industry representatives stated that deployment of 5G is not expected anytime soon in the County, no specific locations for 5G have been selected or identified at this time, and that their immediate goal in the next 3 to 5 years is to increase and consolidate the current wireless technology (4G).

On March 25, the subcommittee met to discuss various policy options brought up at the Board meeting of February 5, 2019. The subcommittee reviewed various development standards discussed at the Board workshop.

On April 30, 2019, the subcommittee met with members of the public and five health experts in the area of electromagnetic field (EMF). At the meeting, the participants made detailed presentations about health effects caused by the use of cellular phones, health risks posed by exposure to electromagnetic fields (EMF) including

biological and psychosocial impairments as well as damage to the caused by EMF and the wireless technology. Participants also recommended minimum requirements for permitting, spacing, prohibitions, and suggested sample ordinances for considerations.

On May 15, 2019, the subcommittee reviewed the draft regulations. On June 3, 2019, the draft regulations were released to the public for review.

Although the FCC ruling significantly diminishes the County's decision-making power, it does not eliminate that power altogether. By establishing new policies and procedures, the County can continue to retain some degree of local control over the deployment of small cell sites.

ANALYSIS:

Government Code sections 25123(d) and 25131 authorize the Board to adopt at a single meeting an "urgency" ordinance that will take effect immediately, in cases where the Board makes findings that it is required "for the immediate preservation of the public peace, health or safety" and the ordinance is passed by a four-fifths (4/5) vote of the Board. Staff is recommending that the Board adopt the attached draft regulation as an urgency ordinance pursuant to these statutes. Therefore, the proposed ordinance contains findings of fact setting forth why an urgency ordinance is necessary, and if adopted by a four-fifths (4/5) vote of the Board, the ordinance will go into effect immediately.

Because small cell wireless technology is relatively new, the County's existing Telecommunications Facilities Policy Plan (TFPP), which was first adopted in 1990 and comprehensively updated in 1998, does not explicitly address small cell wireless facilities. Similarly, the telecommunications facilities ordinance, Section 22.32.165, also does not include explicit standards applicable to small cell wireless facilities.

The purpose of the Board's Small Cell Wireless Facilities Policy (Policy) is to establish reasonable and comprehensive standards and procedures for the permitting of small cell wireless facilities within public roads in the unincorporated areas of the County, including but not limited to the siting of facilities, aesthetics, construction, operation, modification, and removal. The Policy is intended to build upon the County's existing telecommunications regulations by promoting the community interest of protecting the County's visual character from potential adverse impacts from small cell wireless facilities while providing access to high quality advanced wireless technology for the residents, businesses, and visitors. Installation of small cell wireless facilities within private properties and private roads would continue to be subject to the objective standards outlined in the TFPP.

The Policy is proposed to be adopted by resolution to facilitate periodic updates and potential repeal in the event the September 2018 Order is modified or invalidated. The standards would go into effect immediately upon adoption of the attached resolution.

Key provisions

1. Application Requirements
Applicants would be required to submit a variety of items, including but not limited to, a project narrative, construction drawings, a radio frequency (“RF”) report certifying compliance with federal standards, photo simulations, and review/permitting fees.
2. Location Preferences and Design Standards
New freestanding poles or similar structures are the least preferred and require the applicant to demonstrate why no more preferred location within a reasonable distance from the site is technically feasible.
3. Design Standards
The proposed draft ordinance includes various design and installation standards including limitation to one small cell wireless facility per pole; prohibition on ornamental streetlight and pedestrian light poles or on sites with historical buildings; a minimum of 1,000 feet distance from the nearest small cell wireless facilities, 1,500 feet distance from schools would be required; where possible, to disguise equipment behind signage; encourages use of similar colors as the pole; and other requirements.
4. Reviewing Authority, Noticing, Decision and appeal
The Community Development Agency Director, or his/her designee, would be authorized to review all applications and approve, conditionally approve or denying the application. In accordance with federal law, decisions are ministerial action and solely based on objective standards. Public notice would be provided in compliance with public notice requirements for discretionary applications contained in Chapter 22.118 (Notices, Public Hearings, and Administrative Actions).

Due to the extremely short shot clocks, interested persons will have the opportunity to appeal the decision directly to the Board of Supervisors. The entire process will be fast-tracked to ensure adequate time for public participation in the appeal process.

OTHER ISSUES:

The lack of specific design regulations on the development and/or establishment of wireless telecommunication facilities in the public rights-of-way at this time places the County in a position to approve applications without design considerations and could lead to an unorderly installation of small cell wireless facilities. Therefore, staff recommends adoption of design standards and permitting procedures specific to 5G.

Some cities have adopted regulations that do not permit installation of small cell wireless facilities in residential zones. The examples staff has reviewed all contain provisions permitting an applicant to request exceptions to the extent the regulations would violate federal law, for example, by prohibiting, or effectively prohibiting the provision of personal wireless services in those zones. In that regard, these ordinances do not establish an absolute prohibition, but rather a process by which

case by case exceptions may be considered. Staff believes a similar approach in County could result in a large number of exception requests and may ultimately reduce the County’s ability to exercise local control, as an applicant would have a relatively easier task in establishing the need for an exception if it is effectively prohibited from siting facilities in broad swaths of the County.

Further, on August 2, 2018, the FCC issued *Third Report and Order and Declaratory Ruling* 185-111 (FCC Ruling), which is in full force and in effect. The FCC Ruling declares that enactment of urgency ordinances that have the effect of *express* moratoria or *de facto* moratoria violate 47 USC §253(a). Given the legal framework currently in effect, adoption of a moratorium ordinance that would either outright ban or materially inhibit the wireless industry’s ability to introduce new services or otherwise improve its service capabilities would be unlawful. Therefore, staff does not recommend adoption of a moratorium.

Throughout the course of preparation of the draft regulations, staff has received voluminous public correspondence on the draft regulations. Recurring themes include concerns over health effects of radiofrequency (RF)/electromagnetic fields (EMF) exposure, desire to prohibit installation of 5G in residential and mixed-use areas, and to adopt a moratorium banning 5G from Marin County. In addition, industry representative (Verizon) submitted correspondence suggesting that the County’s proposed standards are too restrictive, exceed the County’s authority under federal law, and should include additional design options. Correspondences Received since the Board Workshop of February 5, 2019 have been provided as Attachment No. 3.

Notice of this meeting was mailed to a list of stakeholders 10 days prior to this meeting. Through the course of research on the FCC ruling and small cell technology, there have been several avenues of outreach that have been implemented. This outreach has included (1) directly reaching out to interested parties through an e-mail campaign; (2) creation of a website dedicated to small cell wireless facilities and a focused survey; and (3) reaching out to the general public through the official County communication channels. To date, over 733 people participated in the survey. Survey resulted are provided as Attachment No. 4.

FISCAL/STAFFING IMPACT:

These code amendments are not expected to have fiscal or staffing impact. Although the FCC regulations create new presumptively reasonable fees for small cell wireless facilities, the County is entitled and will continue to collect the full amount of its objectively reasonable costs for application processing.

REVIEWED BY:

- | | |
|--|------------------------------|
| <input type="checkbox"/> Department of Finance | <input type="checkbox"/> N/A |
| <input checked="" type="checkbox"/> County Counsel | <input type="checkbox"/> N/A |
| <input type="checkbox"/> Human Resources | <input type="checkbox"/> N/A |

SIGNATURE:



Immanuel Bereket
Senior Planner



Brian C. Crawford
Director

Attachments:

1. Proposed (urgency) Ordinance to become effective immediately
2. Resolution adopting Board of Supervisors Policy regulating small cell wireless facilities with proposed Policy as Exhibit A
3. Correspondences Received since the Board Workshop of February 5, 2019
4. Open Marin survey Results