



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: January 15, 2019
TO: Christine Daniel, City Manager
FROM: Charles S. Bryant, Community Development Director
SUBJECT: **Wireless Telecommunications Facilities Regulations Amendments (CEQA Determination: Exempt Pursuant To CEQA Guidelines Sections 15311, 15303, and 15061(b)(3))**

An Urgency Ordinance Of The City Council Of The City Of Emeryville Amending Article 17 Of Chapter 5 Of The Planning Regulations And Other Associated Provisions Of The Planning Regulations To Make Approvals Of Wireless Communications Facilities Subject To The Zoning Compliance Review Process

Introduction And First Reading Of An Ordinance Of The City Council Of The City Of Emeryville Amending Article 17 Of Chapter 5 Of The Planning Regulations And Other Associated Provisions Of The Planning Regulations To Make Approvals Of Wireless Communications Facilities Subject To The Zoning Compliance Review Process

Resolution Of The City Council Of The City Of Emeryville Amending the City of Emeryville Master Fee Schedule For Fiscal Year 2018-2019 Effective On January 16, 2019

RECOMMENDATION

The Planning Commission and staff recommend that the City Council amend regulations concerning wireless telecommunication facilities outlined in Article 17 of Chapter 5 of the Planning Regulations to conform with the recent Federal Communications Commission (FCC) Ruling. In order to protect the public peace, health, and safety, an urgency ordinance is necessary as the Ruling is effective January 14, 2019. A revision to the Master Fee Schedule is needed in order to amend the current fee for a small cell antenna facility on a City pole (\$2,500 per pole per year) to bring it in conformance with the federally mandated maximum that cities are permitted to charge (\$270 per pole per year).

BACKGROUND

Both federal and state law govern how the City may regulate wireless communication facilities. Under the federal Telecommunications Act, both states and local governments are preempted from prohibiting wireless communication facilities. (47 U.S.C. § 253.) However, the Telecommunications Act purportedly preserves cities' authority over the placement, construction, and modification of these facilities, subject to certain constraints. (47 U.S.C. § 332(c)(7).) Under this authority, cities have sought to regulate wireless communication facilities by adopting ordinances that regulate the use and design of such facilities, and to charge fees for access to the public right of way. The industry has sought

to curtail local government discretion, and recently, has had success in convincing the Federal Communications Commission (“FCC”) to issue rulings designed to preempt local government authority over wireless communication facilities.

On September 26, 2018, the FCC adopted the Declaratory Ruling and Third Report and Order in the *Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (FCC 18-133, WT Docket No. 17-79, 85 FR 51867) (the “Ruling”). The Ruling impacts the City’s ability to regulate wireless facilities in several ways. First, the Ruling limits local government’s authority to impose local aesthetic standards. Under the Ruling, local aesthetic standards must be reasonable, no more burdensome than those standards applied to other infrastructure, and published in advance. Second, the Ruling shortens the “shot clock”, the time by which the local government has to approve or deny an application. Previously, local governments had between 90 and 150 days to take action on small wireless devices on existing structures, and now, the shot clock has been reduced to 60 days in many instances. This 60-day period covers all local actions, including both planning approvals and building permit issuance, and is measured from the time that an application is submitted. Furthermore, the shot clock is not expanded, even if the application is for multiple small wireless devices at multiple locations. The Ruling becomes effective January 14, 2019.

In anticipation of the Ruling becoming effective, staff is recommending several modifications to Article 17 of Chapter 5 of Title 9 (Planning Regulations) of the Emeryville Municipal Code, “Telecommunications Facilities”, and to the Use Table in Article 2 of Chapter 3 of the Planning Regulations (Table 9-3.202), to ensure that the City’s regulations are compliant with the Ruling.

DISCUSSION

The proposed modifications outlined in the attached ordinances are to ensure compliance with the Ruling described above. The proposed changes would allow approval of wireless facilities through the Zoning Compliance Review process in Article 3 of Chapter 7 of the Planning Regulations, similar to the process for Accessory Dwelling Units, rather than the current Planning Commission approval process.

Given that the application deadline for Planning Commission meetings is 52 days prior to the meeting, it would be virtually impossible for the City to process all necessary permits for Wireless Telecommunications Facilities within a 60-day “shot clock” under the current discretionary process. Under the Zoning Compliance Review process, staff will be able to process applications “over the counter”, or within a short period of time.

Under the Ruling, approval of Wireless Telecommunication Facilities must be based on measurable, objective standards. If the standards are met, the application is approved; if not, the application is denied and the applicant is advised as to how the application could be brought into compliance. The City’s existing regulations for Wireless Telecommunication Facilities are already mostly measurable, objective standards. To make the regulations fully consistent with the Ruling, the attached amendments include the following:

- The Use Table in Section 9-3.202 has been modified to make Wireless Communications Facilities permitted in those zoning districts where they had previously been conditionally permitted. Transmission Towers would continue to be prohibited in all zones except the INL Light Industrial, INH Heavy Industrial, and P Public zones.
- The approval procedure (new Section 9-5.1703) has been replaced with Zoning Compliance Review language similar to that for Accessory Dwelling Units. A waiver of regulations procedure has been included in case the applicant contends that denial of the application would violate federal or other applicable law. If approved by the Director, any such waiver would be granted only on a case-by-case basis, and would be narrowly tailored to minimize deviation from City requirements.
- The provision allowing for a third-party technical study to resolve disputes about “good faith efforts” for co-location has been deleted.
- A requirement has been added for the applicant to provide evidence to establish that the Wireless Telecommunication Facility is necessary to fill a gap in coverage.
- A requirement has been added for the application to furnish evidence of the property owners’ permission to install, construct, and maintain the proposed Wireless Telecommunication Facility. For facilities proposed to be located in the public right of way, the applicant must submit a signed copy of the applicable City standard encroachment agreement.
- A requirement has been added that overhead components of Wireless Communications Facilities must be installed on existing utility poles if available, to preclude the installation of new poles.
- A requirement has been added that overhead components of Wireless Communications Facilities must match the color of the pole or other structure to which they are attached.
- Provisions have been added to clarify that any work in the public right-of-way requires an encroachment permit, that the applicant must have a valid encroachment agreement with the City at all times that the Wireless Communications Facility is in the public right of way, and that the applicant is responsible for repairing any damage to the right of way at its own expense, including but not limited to sidewalks and street surface.
- A provision has been added authorizing the Community Development Director to adopt regulations to implement the development requirements and standards set forth in this Article, and that Wireless Communications Facilities must comply with these additional regulations at all times.

- The provision requiring a cash or surety bond to cover costs of removal in the event that the Wireless Communication Facility is abandoned has been changed from a condition of approval to a submittal requirement prior to issuance of a building permit.

ENVIRONMENTAL REVIEW

This project is exempt from environmental review under State CEQA Guidelines Section 15311, which applies to accessory structures; Section 15303, which applies to construction of new, small facilities and the conversion of existing small structures from one use to another; and the “general rule” at Section 15061(b)(3) because it can be seen with certainty that there is no possibility that the proposal may have a significant effect on the environment. The proposed amendments to the Planning Regulations do not involve a change in zoning districts where wireless facilities are permitted nor do they modify standards for their approval.

FINDINGS:

In order to approve an amendment to the Planning Regulations, the City Council must be able to make the findings listed in the Amendment Procedure at Section 9-7.1305. The Planning Commission recommends these findings can be made as follows:

- (a) The proposed amendment is consistent with the General Plan.

The General Plan contains no provisions on Wireless Telecommunication Facilities, nor provisions that explicitly identify uses that should be allowed by right and those that should be conditionally permitted in any zoning district or area of the City. The proposed amendments seek to be in compliance with the FCC Ruling to make approval of wireless facilities subject only to a zoning compliance action instead of a discretionary action.

- (b) The proposed amendment is necessary for public health, safety, and general welfare or will be of benefit to the public.

The amendment only changes the City’s permitting action for telecommunications facilities that are already permitted in certain zoning districts. They do not significantly change any standards for such facilities, nor do they change the locations where they are permitted. Therefore, the proposed amendments will preserve the public health, safety, and general welfare of the community.

- (c) The proposed amendment has been reviewed in compliance with the requirements of the California Environmental Quality Act.

The proposed amendments to the Planning Regulations do not involve a change in zoning districts where wireless facilities are permitted nor do they modify standards for their approval. Therefore, the proposal is exempt from exempt from environmental review under State CEQA Guidelines Section

15311, which applies to accessory structures; Section 15303, which applies to construction of new, small facilities and the conversion of existing small structures from one use to another; and the “general rule” at Section 15061(b)(3) because it can be seen with certainty that there is no possibility that the proposal may have a significant effect on the environment.

- (d) For a change to the Zoning Maps, that the subject property is suitable for the uses permitted in the proposed zone in terms of access, size of parcel, relationship to similar or related uses, and other relevant considerations, and that the proposed change of zoning district is not detrimental to the use of adjacent properties.

No changes to the Zoning Maps are proposed.

RESOLUTION AMENDING MASTER FEE SCHEDULE

Attached for the City Council’s consideration is a resolution revising the Master Fee Schedule to amend the current fee for a small cell antenna facility on a City pole from \$2,500 per pole per year to bring it into conformance with the Ruling, which mandates a maximum of \$270 per pole per year that cities are permitted to charge.

URGENCY ORDINANCE

Regular ordinances require two readings and take effect 30 days after final passage. Thus, if the attached regular ordinance is introduced on January 15, 2019 and passed at the next City Council meeting on February 5, 2019, it will take effect 30 days later, on March 7, 2019. However, the FCC Ruling becomes effective on January 14, 2019. To protect the public peace, health, and safety by bringing the Emeryville Planning Regulations in line with the FCC Ruling, staff recommends the amendments to the Planning Regulations take effect as soon as possible after the Ruling takes effect. Thus staff recommends the City Council make the finding that the public peace, health, and safety make it necessary to adopt an urgency ordinance, which will take effect immediately, as well as a regular ordinance to take effect on March 7, 2019. Urgency Ordinances must be adopted by a four-fifths vote of the Council (Government Code section 36936(b)).

FISCAL IMPACT

Adoption of the amendments to the Planning Regulations will have no direct fiscal impact on the City. There are currently no small cell antenna facilities that are paying the existing fee of \$2,500 per pole per year. This fee was adopted by the City Council on February 20, 2018 in anticipation of receiving a number of applications for small cell antenna facilities; however, no such applications have yet been submitted. Therefore, the proposed revision of the fee will not have any adverse fiscal impact, but the City will receive reduced fees for such facilities in the future.

PLANNING COMMISSION ACTION

The Planning Commission unanimously recommended that the City Council approve the proposed amendments at their December 13, 2018 meeting. (Vote: 6-0; Commissioner Thomas had an excused absence.)

CONCLUSION

The Planning Commission and staff recommend that the City Council take the following actions:

1. Urgency Ordinance amending the Planning Regulations:
 - a. Introduce the Ordinance after a motion to read by title only.
 - b. Take public testimony regarding the Urgency Ordinance.
 - c. Adopt the Urgency Ordinance by a four-fifths vote.
2. Regular Ordinance amending the Planning Regulations:
 - a. Introduce the Ordinance after a motion to read by title only.
 - b. Take public testimony regarding the Ordinance.
 - c. Adopt the first reading of the Ordinance.
3. Resolution amending the Master Fee Schedule:
 - a. Take public testimony regarding the Resolution.
 - b. Adopt the Resolution.

PREPARED BY: Miroo Desai, Senior Planner

**APPROVED AND FORWARDED TO THE
CITY OF EMERYVILLE CITY COUNCIL:**



Christine Daniel, City Manager

ATTACHMENTS:

- Draft Urgency Ordinance amending the Wireless Telecommunications Facilities regulations
- Draft Regular Ordinance amending the Wireless Telecommunications Facilities regulations
- Draft Resolution amending the Master Fee Schedule, including Exhibit A, Amendment to the City of Emeryville Master Fee Schedule for Fiscal Year 2018-2019