




TOWN OF FAIRFAX

STAFF REPORT

October 25, 2018

TO: Planning Commission

FROM: Garrett Toy, Town Manager 

SUBJECT: Consideration of an ordinance of the Town of Fairfax to consolidate Titles 19 & 20 ("Telecommunications") of the Fairfax Municipal Code into a revised Title 19 which establishes uniform and comprehensive regulations for wireless telecommunication facilities including the regulation of the installation, operation and maintenance of wireless telecommunications within the Town on private property and within the Town's public rights-of-way; CEQA exempt Section 15060(c)(2), Section 15378, Section 15061(b)(3), Section 15305, and Section 15303

RECOMMENDATION

Adopt a resolution recommending the Town Council adopt an ordinance consolidating Title 19 & 20 into a revised Title 19 ("Telecommunications") of the Fairfax Municipal Code to establish uniform and comprehensive regulations for wireless telecommunication facilities.

BACKGROUND

Wireless telecommunications facilities (WCF) are regulated by federal, state, and local laws. Federal law significantly limits the Town's ability to regulate WCF's. Under federal law, a local agency's decisions cannot have the effect of prohibiting the provision of wireless service or unreasonably discriminating among wireless service providers. In addition, under federal law, *the Town may not regulate the placement, construction, or modifications of wireless communications facilities based on the environmental effect of radio frequency (RF) emissions, so long as the facilities comply with the Federal Communication Commission (FCC) regulations concerning such emissions.* State law grants a statutory franchise to telephone companies that allows them to place facilities in the public rights of way (including wireless providers and wireless facilities) provided that such use does not "incommode the public use" of the public rights of way. Despite state and federal limitations, towns have historically retained the ability to regulate development standards (e.g., aesthetics, safety, ADA) and locational preferences.

There is increased demand for new wireless antennas and equipment by wireless providers. In October 2017, Governor Jerry Brown vetoed SB 649, "small-cell" bill, which would have further limited local authority over siting smaller WCFs. There is currently a similar bill (S. 3157), which the Town has opposed, being discussed by Congress which would further preempt local discretion over wireless facilities. The Federal Communications Commission (FCC) recently issued a broad declaratory order banning local governments from adopting express or de facto moratoria on processing permits for communications facilities deployments and on September 26, is expected to take further action to preempt local authority (discussed further below).

In addition to the actions currently being contemplated at the federal level, there have been a number of state and federal laws and regulations adopted since 1999, including Federal Communications Commission orders establishing "shot clocks" for local decisions on wireless applications, a federal law adopted in 2012 (Spectrum Act) that requires applications for certain types of modifications to existing wireless facilities to be approved, and a state law adopted in 2015 (AB 57) that can operate to "deem approved" applications that are not acted on before the applicable federal "shot clock" expires. With all the changes in technology and state and federal

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law, the Town will need to revise and update the existing code which would include addressing small cell attachments.

The Town's current wireless telecommunications facility regulations were adopted in 1999 and are contained in Title 19: Telecommunications of the Town's municipal code. This section of the Code has not been modified since its adoption and was adopted to address large cell phone towers.

At its September 5, 2018 meeting, the Council discussed the general policy issues regarding small cell facilities, received public comment, and referred the matter to the Planning Commission (PC) to develop development standards, application requirements, permitting process, and locational and configuration preferences.

On September 26, 2018, the FCC approved a Declaratory Ruling and Report and Order to clarify the scope and meaning of Sections 253 and 332(c)(7) of the Communications Act, establish shot clocks for state and local approvals for the deployment of small wireless facilities, and provide guidance on streamlining state and local requirements on wireless infrastructure." The ruling will significantly preempt local authority to regulate certain aspects of wireless telecommunications facilities, by among other things, imposing new shorter shot clocks on the processing of "small wireless facilities" and requiring aesthetic requirements to be (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) published in advance.

In response to this FCC action, the increased industry interest in construction of small-cell facilities in the public right-of-way, and the lack of clear criteria to process applications for small wireless telecommunications facilities in a consistent and expeditious manner and within the limits of federal and state law, the Council adopted Urgency Ordinance No. 819, at a special Council meeting on September 26th, to immediately establish standards for WCF to ensure that the Town's regulations reflected current federal and state law and recent trends in wireless facilities deployment. The urgency ordinance provided an extensive and comprehensive list of procedures and regulations that allow the community, applicant and Town staff to understand how facilities are regulated, installed, maintained and operated within the Town.

DISCUSSION

The urgency ordinance is an interim ordinance until the Town can adopt a permanent ordinance through the regular ordinance approval process which requires Planning Commission review and recommendation to the Town Council. At the September 26th Council meeting, staff reported we would take a similar ordinance to the Planning Commission for consideration. It should be noted that the FCC's Declaratory Ruling and Report and Order *will not take effect until January 14, 2019*. This should provide sufficient time for the Council to adopt a permanent ordinance prior to the effective date of the FCC Ruling.

Proposed Ordinance

The proposed ordinance provides uniform and comprehensive regulations for the permitting, development, siting, installation, design, operation and maintenance of wireless telecommunications facilities in the Town. The ordinance is similar to recent regulations enacted in Mill Valley, which is modeled after those of San Anselmo and Ross. In essence, staff and the

Town Attorney modified the Mill Valley ordinance to reflect Fairfax's zoning code and to clarify some provisions, otherwise the ordinances are almost identical in content.

The ordinance also imposes some additional requirements on telecommunications facilities that are pole mounted to the existing public utility infrastructure (known as "small cell wireless facilities"), based on community interest and recent regulations established in Petaluma.

At its September 26th meeting, the Council did make some revisions to the urgency ordinance to strengthen certain provisions. One significant revision was that the Council created a new Title 20 as a companion ordinance to the existing Title 19 ("Telecommunications") in the Fairfax municipal code. While Title 20 would control in the event of any conflicts with Title 19, the Council did not want to exclude any existing provisions of Title 19 that perhaps should have been included in the new Title 20. As clarification, the Town adopted Title 19 in 1999 to address cell towers. This code section has never been amended. Please note that smartmeters did not exist at that time. Chapter 8.68 of the Town's municipal code addresses smartmeters and related equipment.

The proposed ordinance consolidates Titles 19 and 20 into a new Title 19. The intent of Title 20 was to replace in its entirety Title 19. However, at the Council's direction, staff was to evaluate if there were any sections of Title 19 that should have been included in Title 20. In addition, the Council requested the Planning Commission review the attached letter submitted at the meeting.

To facilitate the PC's review, we created a redline of the proposed ordinance. The "base" document is the urgency ordinance adopted by the Council. The redline document reflects staff and the Town Attorneys' revisions, primarily made to: a) reformat into a new Title 19, b) clarify issues, c) correct typos/grammar, d) strengthen provisions, e) prevent a legal conflict with state and/or federal laws, f) eliminate references to an urgency ordinance, and g) include any provisions of the existing Title 19 that should be included in the new version. Staff did try to note the reasons for some of the revisions in the margins of the redline. We also included a table to reference old Title 19 provisions to new Title 19 provisions. Janet Coleson, Town Attorney, and Gail Karish from BBK, will be present at the meeting to "walk" the PC thru the revisions and to answer any questions.

The key regulations contained in the proposed ordinance are as follows (note: these provisions are also included in the Mill Valley ordinance):

1. Ensures that the FCC standards regulating radio frequency emissions are strictly followed. The conditions of approval will require annual documentation demonstrating compliance with current FCC regulatory and operational standards including, but not limited to, radio frequency emissions. The Town may retain a consultant, at the sole expense of the permittee, to perform the required testing.
2. Establishes an application process for a conditional use permit and design review, with additional specific conditions for those use permits in the public right-of-way. The CUP expires in 10 years unless a renewal is requested and approved by the Town. Projects in the public right-of-way are also required to obtain encroachment permits.
3. Prescribes the content for an application for a wireless telecommunications facility permit. The application requires the submission of detailed site and engineering plans,

photographs of facility equipment, a visual impact analysis with photo simulations, a noise study, and certification that the applicant has a right under state law to install facilities in the public right of way if that is the proposed location of the facilities. Also, the Town may retain a technical consultant to assist the Town in the review of the application at the expense of the applicant.

4. *Prohibits wireless facilities in residential zones and public right-of-way in residential zones.*
5. Limits the location of new or updated wireless facilities to private property within commercial (except for the CR- commercial recreation zone) and public domain (e.g., library and town hall) zoning districts and the adjacent public rights-of-way with an order of preference in terms of location within commercial areas and configuration aimed toward existing facilities.
6. Limits the installation of new wireless facilities in the public right-of-way to existing poles *that must be at least 1,500 feet away from the nearest facility.* Similar to Mill Valley, we did not include a buffer zone from residential units. However, the Planning Commission can further evaluate if such a provision would be legally feasible to include in a regular ordinance.
7. Establishes design standards for the appearance and maintenance of facilities, including, but not limited to, limiting the height and bulk of facilities, concealing/hiding accessory equipment to the extent feasible such as undergrounding, setting preferences in collocating facilities, and complying with ADA standards.
8. Imposes strict noise standards pursuant to Town Code.
9. Where feasible, requires upgrades to existing facilities as new technology becomes available to replace larger more visually intrusive facilities with smaller facilities.
10. Requires the relocation of any facility in the public right-of-way that would interfere with a future public project or improvements.
11. Requires a performance bond to ensure that facilities are promptly removed when they are no longer permitted or needed.
12. Requires the permittee to defend and indemnify the Town from any liabilities arising from the permits issued by the Town and the installation, operation and maintenance of the facilities.
13. As required, the proposed ordinance allows an applicant to request an exception from the standards in the event that denial of a permit would violate federal or state law. The applicant has the burden of providing sufficient facts to support the request.
14. Based on existing provisions of the Town's Zoning Code, initial wireless facility CUP applications will be heard by the Planning Commission. Smaller subsequent amendments to wireless facility CUPs, such as modifying or collocating equipment, will undergo Zoning Administrator (Planning Director) approval. Amendments to CUPs that involve significant

design review issues or are deemed as significant projects by the Planning Director will be heard by the Planning Commission.

15. Provides an expedited approval process for those wireless telecommunications facility applications that qualify as "eligible facilities requests" under federal law, and therefore must be approved within sixty (60) days. These applications are evaluated and acted on by the Zoning Administrator, with the opportunity for appeal to the Town Council.
16. Please note the ordinance does not discuss the actual FCC "shot clocks" and/or timeframes. Instead the shot clock and timeframes would be addressed as part of the application and informational handouts.

EFFECTIVE DATE/NEXT STEPS

As stated above, the urgency ordinance is an interim ordinance until the Town can process a permanent ordinance through the regular ordinance approval process which requires Planning Commission review and recommendation to the Town Council. Should the Planning Commission make a recommendation this evening, staff will take the ordinance to the Council at its November 7th meeting.

ENVIRONMENTAL REVIEW

The proposed Ordinance is exempt from the California Environmental Quality Act ("CEQA"). Adoption of this Ordinance will enact only minor changes in land use regulations, and it can be seen with certainty that its adoption will not have a significant effect on the environment because it will not allow for the development of any new or expanded wireless telecommunication facilities anywhere other than where they were previously allowed under existing federal, state and local regulations. The proposed Ordinance does not constitute a "project" within the meaning of the California Environmental Quality Act of 1970 (CEQA) Guidelines Section 15060(c)(2) because there is no potential that small cell facility regulations will result in a direct or reasonably foreseeable indirect physical change in the environment and CEQA Guidelines Section 15378 because they have no potential for either a direct physical change to the environment, or a reasonably foreseeable indirect physical change in the environment. Moreover, even if the proposed Ordinances and Resolution comprise a project for CEQA analysis, the ordinance falls within the "common sense" CEQA exemption set forth in CEQA Guidelines Section 15061(b)(3), excluding projects where "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." Finally, the wireless facilities themselves are exempt from CEQA pursuant to CEQA Guidelines Section 15305, which exempts minor encroachment permits, and Section 15303, which exempts the installation of small equipment and facilities in a small structure.

FISCAL IMPACT

Once the regulations are approved and implemented, the application fees for a Conditional Use Permit and Design Review would cover the cost of the discretionary approvals.

ATTACHMENT (Not included for 01-16-19 Town Council meeting)

Attachment A - Resolution 2018-18

Attachment B - Redline of Proposed Ordinance

Attachment C - Table

Attachment D - Letter received at 9/26/18 Town Council special meeting

Attachment E - Citizen comments