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Title:	CONSIDERATION OF ORDINANCE NO. 19-1929U AND INTRODUCTION OF ORDINANCE NO. 19-1930 TO ALLOW AND REGULATE WIRELESS TELECOMMUNICATION FACILITIES IN THE PUBLIC RIGHT-OF-WAY AND CORRESPONDING DESIGN STANDARDS (CITY COUNCIL)				
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Report to Mayor and City Council

Tuesday, April 02, 2019

Discussion

SUBJECT:

CONSIDERATION OF ORDINANCE NO. 19-1929U AND INTRODUCTION OF ORDINANCE NO. 19-1930 TO ALLOW AND REGULATE WIRELESS TELECOMMUNICATION FACILITIES IN THE PUBLIC RIGHT-OF-WAY AND CORRESPONDING DESIGN STANDARDS (CITY COUNCIL)

I. SUMMARY

On September 26, 2018, the Federal Communications Commission (FCC) approved a Declaratory Ruling and a Third Report and Order, collectively referred to as the "FCC Order." These rules are part of a larger rulemaking that aims to reinterpret the federal Telecommunications Act of 1996 that prohibit actual and effective prohibitions on wireless infrastructure deployments. The FCC Order implements industry demands to remove barriers and accelerate the deployment of wireless-communication facilities, specifically "small-wireless facilities" (SWFs). On December 10, 2018, the FCC clarified the effective dates for the FCC Order, stating that the "shot clock" (local review period) and fee regulations go into effect on January 14, 2019, and the aesthetic regulations go into effect on April 15, 2019.

II. RECOMMENDATION

Staff recommends that the City Council:

1. **INTRODUCE** for first reading Ordinance NO. 19-1930 (Exhibit A) to amend Municipal Code, Article VII to regulate wireless telecommunication facilities in the public right of way, and determine the project is not subject to the California Environmental Quality Act;
2. **ADOPT** Urgency Ordinance NO. 19-1929U;
3. **ADOPT** the attached Resolution to approve the corresponding City Council Policy for design standards applicable to SWFs in the public right of way and direct staff to promptly post the Policy on the City's webpage;
4. **DIRECT** Public Works staff to bring back an amendment to the master fee schedule to establish application fees and penalty fees.

III. ALTERNATIVES

1. Take such other action, as the City Council deems appropriate, consistent with the requirement of the law.

IV. BACKGROUND

In prior decades, wireless antennas and equipment were primarily installed on large towers or "macro-cells". These deployments are subject to conditional use permit approval under the Zoning Code and are currently prohibited in residential zones.

In recent years, however, carriers increasingly seek to place wireless facilities in the City's public right of way ("PROW") on utility poles, streetlights and new poles. The demand for such wireless installations, particularly small wireless facilities (or "SWFs"), is expected to grow exponentially over the next several years given the expansion of home streaming video, social media, drones, self-driving cars and the Internet of Things (IoT) serving homes and businesses. To accommodate this expansion, the telecommunications industry is starting to look for small cell 5G (fifth generation) technology. 5G technology is distinguished from the present 4G 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. PROW street light poles and other poles are, therefore, suited for 5G SWFs.

The City's existing Municipal Code contains outdated standards for dealing with SWFs. This is particularly true in light of significant changes in law implemented by the Federal Communications Commission ("FCC"). On September 27, 2018, the FCC released a Declaratory Ruling and Third Report and Order (the "FCC Order") significantly limiting state and local management of SWFs in the PROW (and, in a limited way, SWFs on private property). In short, the FCC Order does the following:

- Defines SWFs as up to 50 feet in height, including antennas, or mounted on structures no more than 10% taller than other adjacent structures; or that do not extend existing structures on which they are located to a height of more than 50 feet or by more than

10 percent, whichever is greater; each antenna is no more than 3 cubic feet in volume, and the total associated wireless equipment on one structure is no more than 28 cubic feet in volume.

- Caps all fees that local governments can charge to the actual and reasonable cost of providing service. This limitation applies to permit fees for SWFs located on private property as well.
- Imposes shot clocks of 60 days for SWFs added to existing structures (regardless of whether the structure already supports a wireless service) and 90 days for SWFs proposing a new structure. The shortened shot clocks also apply to applications for SWFs on private property.
- Preempts all aesthetic requirements for SWFs in the PROW unless they are (1) reasonable; (2) no more burdensome than those applied to other types of infrastructure deployments; (3) objective; and (4) published in advance. (Effective April 14, 2019.)

This report introduces an ordinance to provide the regulatory framework and standards for permitting the installation of SWFs within the City's PROW. Staff has been working with the City Attorney's office to draft such ordinance. The proposed ordinance and corresponding design standards have been revised in response to the FCC Order.

DISCUSSION:

City's current rules and regulations:

The City's existing Wireless Communications Facility Ordinance, Carson Municipal Code Section 9138.16, was established about 16 years ago. On June 17, 2003, the City Council adopted Ordinance No. 03-1284 approving Wireless Telecommunications Ordinance of the Carson Municipal Code (CMC). The ordinance established a two-tiered process:

- Minor Facility (example: stealth and building-mounted) is subject to the approval of a development plan in accordance with the site plan and design review (DOR) procedures as provided in CMC 9172.23. The Planning Division is the approval authority except if the property is located within 100 feet of residential zone.
- Major Facility (stealth free-standing structures and other facilities that are not stealth) is subject to the approval of a development plan in accordance with the site plan and design review procedures as provided in CMC 9172.23 and conditional use permit procedures as provided in CMC 9172.21. The Planning Commission is the approval authority.

On December 8, 2010, Ordinance No. 10-1460 amended the code incorporating requirements for wireless communication facilities located in the public right of way and on City-owned properties; and making these facilities subject to the Major Facility standards of CMC Sect. 9138.16 with concurrent review by Engineering Division. As such, SWFs currently require a DOR and CUP approved by the Planning Commission.

Federal and state law and recent changes:

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 dictate, or even consider, wireless entitlements 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.” A zoning authority’s mere 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 facility. The City’s role in the siting and design of WCFs is generally limited to aesthetics.

Wireless telecommunications providers are treated as telephone companies under their State franchise conferred in California Public Utilities Code Section 7901, and thus are entitled to use the PROW to deploy their equipment. However, even with their right to occupy the PROW, under Section 7901 providers may *not* “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.” These limitations on Section 7901 have been interpreted broadly enough to include concerns related to the appearance of a facility,” and thus Section 7901 allows cities to condition a wireless permit on (i) aesthetic concerns, (ii) restricting the location of proposed facilities due to public safety reasons or other local concerns or even deny applications in appropriate circumstances, and (iii) to exercise reasonable control over the time, place and manner of “when, where, and how telecommunications service providers gain entry to the public rights-of-way,” including the need for encroachment permits. (See, Pub. Util. Code § 7901.)

The new FCC Order significantly changes Federal law to shorten time frames and other requirements on local review of SWFs in the PROW. Now, if a city does not render a decision on a SWF 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 cause an effective prohibition of wireless service in violation of federal law.*

On aesthetics, spacing restrictions and undergrounding requirements, 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. In essence, this new standard for aesthetic conditions means that cities can impose aesthetic requirements to the extent they are “technically feasible” for the provider. This is a significant departure from the “least intrusive means” analysis that developed in the Ninth Circuit over the last few decades. The FCC Order purports to overturn the “least intrusive means” standard entirely, with the new standards taking effect on April 15, 2019.

While the legal validity of both of these FCC orders is being litigated, the effectiveness of the orders has not been stayed. Further, another FCC order that was released in August 2018 prohibits cities from imposing a moratorium on wireless installations, which means that there can be no pause in accepting or processing applications to allow a city to study and address potential issues.

Aesthetic standards implementing the FCC Order must be reasonable, objective, *and published ahead of time*. If a city does not have “published” design standards, then it does not appear that any standards can be enforced. It is therefore important that the City update its ordinance with new standards and procedures by April 14, 2019 or shortly thereafter. Staff therefore recommends the Council adopt an ordinance setting out the permitting procedures for SWFs in the PROW.

The proposed ordinance and policy:

The proposed ordinance seeks to balance 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. As drafted, the proposed ordinance would:

- Add a new Chapter 3 to Article VII to the Municipal Code, Wireless Facilities in the Public Right of Way. For all small wireless facility installations in the PROW, the ordinance authorizes the City to adopt, among other regulations, the permit and review procedures as well as the design, operation and maintenance standards by resolution.
- The substantially shorter “shot clocks” established by the FCC Order render discretionary review by the planning commission (or any other hearing body) much more difficult, if not logistically impossible. To this end, the proposed policy adopted by resolution presents an entirely new administrative review process for SWF applications, with public works taking the lead of administratively reviewing SWF applications.
- The policy adopted by resolution 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.
- Staff sensed the importance of public awareness and involvement for wireless facilities. The ordinance thus requires applicants to provide mailed notices to owners, occupants and multi-family building property managers within 300 feet of proposed SWFs before they are approved.
- Finally, the ordinance allows the flexibility needed in the face of rapidly changing wireless laws and technology. Rather than publish SWF design standards in the ordinance, staff proposes that such standards should be adopted as administrative regulations that may be readily and quickly adapted given the frequency and magnitude of changes in law and technology surrounding wireless installations. This policy adopted by resolution will also provide the industry direction on the City’s aesthetic, location and design requirements. For example, the proposed design standards recommend that when there is a choice in location, carriers should choose to site on a pole or street light that is between structures and not immediately adjacent to a structure, that paint and design should blend with surrounding structures, that signage should be limited, and that lighting be prohibited unless required by the Federal Aviation Administration. This draft document is provided as an attachment to this report and once approved by the Council, will be promptly published by staff on the City’s website

as required by the FCC Order. The proposed Council Policy is attached to this report for City Council consideration or approval; staff recommends that the City Council adopt the design standards with the ordinance.

GENERAL PLAN CONSISTENCY: The ordinance amendment is consistent with the General Plan land use designation for the City of Carson.

COMMISSION REVIEW: This ordinance has not been reviewed by any commissions appointed by the City.

ENVIRONMENTAL: The 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. The ordinance creates an administrative process to process requests for wireless facilities in the PROW 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. Alternatively, 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, § 15061(b)(3)). Installations, if any, would further 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 PROW and subject to various siting and design preferences to prevent aesthetic impact to the extent feasible.

V. FISCAL IMPACT

No fiscal impacts are associated with the ordinance. However, installation of wireless facilities would be subject to fees and yield potential lease revenue. Staff will bring to City Council a proposed Master License Agreement for use of City infrastructure in the ROW and a fee resolution for any fees associated with these applications at a later date.

VI. EXHIBITS

1. Ordinance No. 19-1929U (pgs. 7-13)
2. Ordinance No. 19-1930 (pgs. 14-19)
3. Resolution No. 19-072 (pgs. 20-24)
4. City Council Policy (SWF Regulations) (pgs. 25-53)

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