



City Council Agenda Item

City Council Meeting Date: April 2, 2019

TO: Jim Throop, City Manager

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SUBJECT: First Reading of Ordinance No. 1667(19) and Consideration of Urgency Ordinance No. 1668(19), Adding Lompoc Municipal Code Chapter 12.38 Regulating Installation of Wireless Telecommunication Facilities in the Public Rights of Way; Adoption of Resolution No. 6247(19) Establishing a Policy for Approving Small Wireless Facilities

Recommendation:

Staff recommends the City Council:

- 1) Introduce for first reading, by title only with further reading waived, Ordinance No. 1667(19) (Attachment 1) to add Chapter 12.38 to the Lompoc Municipal Code (LMC), to regulate wireless telecommunication facilities in the public rights-of-way (PROW), and determine the project is not subject to the California Environmental Quality Act; and
- 2) Adopt Urgency Ordinance No. 1668(19) (Attachment 2) to add Chapter 12.38 to the Municipal Code, to regulate wireless telecommunication facilities in the PROW, and determine the project is not subject to the California Environmental Quality Act; and
- 3) Adopt Resolution No. 6247(19) (Attachment 3) to approve the corresponding Policy for design standards applicable to small wireless facilities (SWFs) in the PROW and direct staff to promptly publish the Policy on the City's webpage; or
- 4) Provide alternate direction.

Background:

A. Wireless Technology

In prior decades, wireless antennas and equipment were primarily installed on large towers or “macro-cells”. In recent years, however, carriers increasingly seek to place wireless facilities in the City’s PROW on utility poles, streetlights and new poles. The demand for such wireless installations, particularly small wireless facilities (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 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.

B. FCC Order and the April 14, 2019 Deadline

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 (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%, 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 fees for SWFs located on private property as well.
- Imposes mandatory timelines for processing and considering applications (“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.) It is currently unclear whether the preemption applies to applications for SWFs on private property and this issue is the subject of ongoing litigation.

C. Urgency Ordinance and Regular Ordinance

This report introduces an ordinance to provide the regulatory framework and standards for permitting the installation of wireless telecommunications facilities within the City's PROW. The report also includes the same ordinance in the form of an urgency ordinance, which requires a 4/5ths vote for adoption and will become effective immediately if adopted. The urgency ordinance is presented to ensure the City's regulations become effective before April 14, 2019. The regular ordinance is presented to provide a "backstop" in the event that there are issues with the urgency ordinance, but the regular ordinance will not become effective until after April 14, 2019. Staff recommends that the City Council adopt both the urgency ordinance *and* the regular ordinance.

D. Aesthetics Regulations and Eligible Facilities Requests

Finally, this report includes a resolution that would adopt aesthetics requirements and other regulations applicable to SWFs that comply with the FCC Order. Staff has been working with the City Attorney's office to draft these ordinances and the resolution. The proposed ordinance also addresses "eligible facilities requests"—a category of "by-right" installations that were established by the FCC several years ago, but are not acknowledged in the current Municipal Code.

Discussion:

The City does not currently have a comprehensive ordinance regulating wireless telecommunications facilities in the PROW. Chapter 17.164 of Lompoc Municipal Code regulates Wireless Communications Facilities, but explicitly states that it does not apply to facilities in the PROW. (See LMC § 17.164.030(D).)

The Federal Telecommunications Act is intended to ensure the public has sufficient access to telecommunication services. Based on that 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.” Those limitations in 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 Public Utilities Code § 7901.)

The new FCC Order significantly changes Federal law to shorten timeframes 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 violate federal law.*

Regarding 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 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, 2019.¹

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 very important that the City update its ordinance with new standards and procedures by April 14, 2019, or shortly thereafter. Staff therefore recommends the City Council adopt an ordinance setting out the permitting procedures for SWFs in the PROW. 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 City neighborhoods. As drafted, the proposed ordinance would:

- Add a new Chapter 12.38 to the Municipal Code entitled “Wireless Telecommunications Facilities in the Public Rights-of-Way.” For all wireless facility installations in the PROW, the ordinance provides, among other regulations, the permit and design review procedures as well as the operation

¹ While the legal validity of the FCC Order is being litigated, the effectiveness of the order has not been stayed. Further, another FCC order released in August 2018 prohibits cities from imposing a moratorium on wireless installations, which means there can be no pause in accepting or processing applications to allow a city to study and address potential issues.

and maintenance standards. Prior to construction, design review is required and the Planning Division would facilitate and coordinate with various City departments prior to approval of a Wireless Telecommunication Facility. The ordinance treats wireless installations in the PROW similar to other installations in the PROW by requiring an encroachment permit following the approval of design review permit. Once the encroachment permit is issued, the carrier may still need to obtain traffic control plans, construction (building) permits and if necessary, a license to attach to City infrastructure.

- 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 ordinance presents an entirely new administrative review process for SWF applications, with Community Development taking the lead of administratively reviewing SWF applications through design review.
- The new ordinance recognizes, and establishes procedures and standards for, “eligible facility requests” pursuant to Federal law. These are ministerial modifications and collocations that must be approved by-right, which provisions are not included in the current the Municipal Code, despite being required by law since 2012.
- Given the short time the City has to act on these applications under Federal law, staff recommends the appeals be heard by the City Manager or an independent hearing officer appointed by the City Manager, 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 design review 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 500 feet of proposed SWFs and major facilities 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 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.

To accompany the new ordinance, staff has also prepared a separate Policy [attachment to Resolution No. 6247(19)] that will provide the industry with direction on the City's aesthetic, location, and design requirements. For example, the proposed design standards recommend, when there is a choice in location, that carriers should choose to site on a pole or street light located 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. Once the Policy is approved by the City Council, it will be promptly published by staff on the City's website as required by the FCC Order.

Fiscal Impact:

No fiscal impacts are associated with the ordinances or resolution. However, installation of wireless telecommunication 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 PROW and a fee resolution for any fees associated with these applications at a later date.

Environmental Impact:

The ordinances are not projects 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 ordinances create 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 ordinances are exempt from CEQA because the City Council's adoption of the ordinances 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.

Conclusion:

The ordinance and design standards will bring the City into compliance with laws governing wireless telecommunication facilities and allow the City to impose aesthetic and other design requirements on such facilities.

Respectfully submitted,

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APPROVED FOR SUBMITTAL TO THE CITY COUNCIL:

Jim Throop, City Manager

- Attachments: 1) Ordinance No. 1667(19)
2) Urgency Ordinance No. 1668(19)
3) Resolution No. 6247(19)