

**STAFF REPORT**

## MEETING

DATE: October 8, 2019

TO: City Council

FROM: Vicki Parker, Community Development Director

PRESENTER: Brett Walker, Senior Planner

SUBJECT: **TELECOMMUNICATIONS URGENCY ORDINANCE– SMALL  
WIRELESS FACILITIES (“5G”)**

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**REQUEST**

Conduct a public hearing; and consider adoption of an urgency ordinance establishing application submittal, review, and approval procedures for installation of small wireless facilities (“5G”), and finding that urgency ordinance is exempt from CEQA pursuant CEQA Guidelines sections 15061(b)(3), 15301, 15303, and/or 15305.

**DISCUSSION***Background*

The City’s Wireless Communications Facilities Ordinance, codified in Novato Municipal Code (NMC) Division 19.38, was last updated in October 2012. Since 2012, a number of technological advances and changes to Federal and State laws regarding wireless communication facilities have been implemented, resulting in an outdated City ordinance. The City’s existing Wireless Ordinance includes regulations for large wireless facilities (macro-cells), which are the traditional cell towers and antennas located on private property. The Wireless Ordinance does not include regulations for small cell wireless facilities, which, because of lesser coverage area inherent in the technology, will likely be located predominately within the public right-of-way in a denser pattern.

A wireless facility is considered a “small wireless facility” if it meets the following requirements, as defined by the 47 C.F.R § 1.6002(1), as may be amended, and that meets the following requirements:

- a. Meet one of the following mounting requirements:
  1. are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or

2. are mounted on structures no more than 10 percent taller than other adjacent structures, or
  3. 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;
- b. Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;
  - c. All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume.

On September 26, 2018, the Federal Communications Commission (FCC) adopted a [Declaratory Ruling and Third Report and Order](#) intended to speed the implementation of small wireless facilities in the public right-of-way. Additionally, recent federal rule-making includes the *Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (47 CFR Part 1)*, published October 15, 2018, and the *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (47 CFR Part 51)*, published December 26, 2018. These actions significantly reduced local agencies discretionary authority to permit these facilities and imposed mandatory processing times and fee limitations.

### Urgency Ordinance

The purpose of the attached urgency ordinance is to establish application, review, and approval procedures for the installation of small wireless facilities, which are often referred to as “5G.” Because the City cannot enforce a moratorium due to federal law, the urgency ordinance is intended to guide the review and approval of small wireless facility installations until the City has permanent regulations in place. Thereafter, City staff would amend the City’s Wireless Communications Facilities Ordinance (Wireless Ordinance), through our typical drafting and public review process. Staff has identified the following tentative timeline to complete more permanent changes to the NMC:

1. Secure a telecomm equipment/technology expert to ensure a full understanding of options. Staff has proposals from multiple consultants and the cost of this work was included in CDD’s FY 19/20 budget (**Fall 2019**);
2. Develop draft principles for siting equipment (**early Spring 2020**);
3. Hold public workshop(s) (**early to mid-Spring 2020**);
4. Develop draft ordinance (**late Spring 2020**);
5. PC hearing (**late Spring 2020**);
6. CC hearings (**early Summer 2020**)

### Analysis

Staff has prepared the attached urgency ordinance (including objective aesthetic standards) for administering small wireless facilities. These regulations are intended to guide the review and approval of small wireless facility applications consistent with FCC regulations.

Government Code Section 36937(b) authorizes a city council to adopt, at a single meeting, an “urgency” ordinance that will take effect immediately, in cases where the council 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 city council. Staff is recommending that the Council adopt the attached ordinance as an urgency ordinance pursuant to this statute. Therefore, the proposed ordinance, if adopted by a four-fifths (4/5) vote of the City Council, would go into effect immediately.

Typically, urgency ordinances are approved by City Council to establish a moratorium of a specific activity until the City has adequate time to draft regulations regarding said activity or land use. In this case, the City cannot place a moratorium prohibiting new small cell wireless facilities due to pre-emption by the FCC requiring that the City approve small cell wireless facilities.

It is important to note that the City’s current regulations are insufficient to properly address these emergent technologies or the federal mandatory timelines. It is critical that interim regulations be in place prior to the City receiving small cell applications.

#### Key Components of Urgency Ordinance

1. **Location Requirements** (Section 6). Staff has drafted a hierarchy of most preferred to least preferred locations for the siting of small cell wireless. The intent is to encourage the placement of these facilities in industrial and commercial areas, and along arterials streets whenever possible, with residential areas being the least preferred locations.
2. **Definitions** (Section 2). The urgency ordinance includes numerous definitions specific to small cell wireless facilities, infrastructure, and federal regulations.
3. **Application requirements** (Section 3). The urgency ordinance includes a list of application submittal requirements to ensure that the City has adequate information to make an informed decision regarding permit approval, including provisions for deeming applications incomplete and requirements for a substantive response from applicants when an application is deemed incomplete. If an application is incomplete for 60 days, said application is deemed withdrawn.
4. **Approvals and Appeals** (Section 4). The Community Development Director (CDD) would be the Review Authority for small wireless application. Due to “shot clock” time limitations (60 or 90 days), staff believes that an administrative review is the only feasible manner to review and approve applications, along with an allowance for an appeal, within these limited timeframes. An appeal would need to be filed within 5 days of notification of a decision, and said appeal would be directed to the City Council. Appeals of approval based on environmental effects from RF emissions that comply with all applicable FCC regulations would not be permitted.
5. **Performance Bond** (Section 5). As a condition of approval, the City would require a performance bond in an amount adequate to cover the cost of removal of small wireless equipment and restoration of the site/facilities.
6. **Undergrounding** (Section 7). In areas where existing utilities are placed underground, all accessory equipment would be required to be placed underground. Where existing utilities

are not placed underground, the City would require that accessory equipment be integrated into the base of the pole or support structure (preferred) or placed on the pole or support structure. Accessory equipment would not be allowed in ground-mount cabinets. A condition of approval would also require accessory equipment be placed underground in the future if other utilities are placed underground.

### Environmental Review

Pursuant to California Environmental Quality Act (“CEQA”) Guidelines Sections 15301, *Existing Facilities*; 15303, *New Construction or Conversion of Small Structures*; and 15305 *Minor Alterations in Land Use Limitations*, the adoption of the urgency ordinance is categorically exempt from CEQA because any new proposed additions of equipment on existing poles, structures, or buildings, replacement poles, or new poles will not have a significant effect on the environment. Additionally, the urgency ordinance also falls within the common sense exemption pursuant to CEQA Guidelines Section 15061(b)(3), *Review for Exemptions*, which states that as a ‘general rule’ CEQA applies only to projects which have the potential to cause a significant, physical environmental effects. Regarding health hazards and review of individual small wireless facility applications, the City is not precluded from requiring CEQA review. However, the City cannot make radio frequency-based (RF) decisions under CEQA to the extent that RF emissions comply with the FCC’s RF regulations.

### **FISCAL IMPACT**

The City will collect fees for the review of small wireless facilities, as permitted by the FCC. The FCC has determined that the following fees are considered fair and reasonable:

- \$500.00 for non-recurring fees<sup>1</sup>, including a single, up-front application for up to five small wireless facility sites, with an additional \$100.00 for each additional small wireless facility site beyond the initial five sites;
- \$1,000 for non-recurring fees for a new pole to support one or more small wireless facility;
- \$270.00 per year for all recurring fees<sup>2</sup> including any right-of-way access fee (e.g., encroachment permit) or fee for attachment to a municipality-owned structure in the public right-of-way.

The FCC ruling states that, in limited circumstances, a state or local agency can charge fees higher than the above fees provided that: a) they are a reasonable approximation of the costs; b) the costs themselves are reasonable; and c) they are not discriminatory.

The “non-recurring” fees that are presented in the FCC survey (discussed above) are not sufficient to fully recover the staff costs for the Planning review process or the one-time, construction-related Encroachment Permit (administered by Public Works). The current wireless communication deposit fees for a use permit (new wireless facility) charged by the City is \$2,661.00 (staff time to process and administer the application). The Engineering Division non-recurring encroachment permit is \$150 plus a percentage of the engineer’s cost estimate of the valuation of work performed. Additionally, the City charges a recurring utility company annual encroachment fee of \$2,770.

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<sup>1</sup> A non-recurring fee is a one-time fee such as Planning application fees for entitlements.

<sup>2</sup> A recurring fee is an annual fee, such as a fee for the encroachment into the public right-of-way.

The Planning Division currently collects fee deposits for processing wireless communication facilities that require a use permit. The fee is a deposit to cover staff time required to process a use permit application for a wireless facility. The deposit is replenished from time-to-time if costs exceed the amount of the initial deposit. Upon a decision and construction of the wireless facility, any remaining unused balance would be refunded to the applicant. Therefore, it is recommended that, for at least the term of the urgency ordinance, this current use permit cost reimbursement program be administered for all small wireless facility applications requiring: a) a \$2,661 deposit; and b) a signed written statement that acknowledges that the applicant will be required to reimburse the City of reasonable cost of processing the application. Unused deposit amounts would continue to be reimbursed to the applicant. This cost reimbursement program is also suitable in the event an independent contractor is hired by the City to review small wireless facility applications. To ensure that applications can be processed within the time limits established by the FCC and the proposed equipment falls within all federal safety guidelines, it may be necessary for the City to hire an independent consultant to review these applications.

#### *Small Cell Wireless Ordinance (Non-urgency)*

The City anticipated the need to update its Wireless Ordinance during the budgeting process and included funds in the FY 2019/2020 budget for this purpose. A tentative timeline for updating the Wireless Ordinance is identified above in this staff report.

### **ALIGNMENT WITH STRATEGIC PLAN GOALS / OBJECTIVES**

This item is brought to the City Council as an important regulatory tool to ensure the health and safety of Novato residents and visitors; however, it does not directly relate to the City's stated Goals and Objectives within the Strategic Plan.

### **RECOMMENDATION**

Adopt the attached urgency ordinance.

### **ALTERNATIVES**

1. Adopt the attached urgency ordinance;
2. Amend and adopt the attached urgency ordinance;
3. Provide direction to staff; or
4. Take no action.

### **ATTACHMENT**

1. Urgency Ordinance for small wireless facilities.