



# Wireless

## Proposed Ordinance

Planning Commission  
September 13, 2022



THE CITY OF  
**MONTEREY**

## Recommendation

That the Planning Commission adopt a resolution recommending an Ordinance to the City Council repealing and replacing City Code Chapter 38, Article 17 Section 112.4 related to wireless communication facilities and recommending a finding that same is exempt from CEQA.



# Most Recent Project Background

August 9, 2022 Planning Commission meeting:

continue the item to a date certain of September 13, 2022 to allow staff to do an analysis of the Subcommittee draft in comparison to the current proposal to respond to recommendations on a point-by-point basis and explain which recommendations were added to the ordinance and why

Attachment 2 compares Subcommittee draft to the ordinance presented to the Planning Commission on August 9<sup>th</sup>. (90 footnotes that explain why changes were made)



## Most Recent Project Background

After PC Motion on August 9<sup>th</sup>, Commissioner Brassfield indicated that he would like to send the city staff additional questions on the ordinance and obtain specific answers. The Commission concurred and allowed Commissioner Brassfield to independently submit comments.

Attachment 3 contains written responses to Commissioner Brassfield's comments.



# Key Responses

## Wind Safety Test

Both the subcommittee draft and the proposed ordinance require structural analyses by qualified and licensed engineers to be submitted as one of the application requirements.

Specific mention of wind load analysis was removed in proposed ordinance because it need not be mentioned specifically. All analyses required to demonstrate that the WCF/support structure will be safe will have to be performed.



# Key Responses

## Noise Creating Equipment Post Application

Subcommittee draft and the proposed ordinance require applications to include a noise study to ensure compliance with the city's noise regulations. The only exception is if the proposed facility does not contain equipment that generates noise.



## Key Responses

### RF Report Requirements

The RF Compliance Report application submittal requirements in the proposed ordinance are the same as in the subcommittee draft, except the proposed ordinance **added a requirement that the report be signed under penalty of perjury**. This was added in response to a comment by MVNA.

Verizon objected to that addition, stating that it was excessive and should be deleted because the section already requires that each report be prepared by a licensed engineer, who would affix their professional engineer stamp, which serves as a declaration that a proposed design complies with applicable regulations.



# Key Responses

## RF Report Requirements

FCC has produced guidelines (OET Bulletin No. 65) that form the basis for the proposed report requirements.

We reviewed and compared the language in the MVNA comments to the proposed ordinance and determined the MVNA language is not more stringent, and as compared to the proposed ordinance's broad requirement to include the calculations and information on which the engineer relied, the additional detail proposed by MVNA would not materially change the report and may actually limit its content.





# Key Responses

## Drive Test Data Be Required to Substantiate a Claim of Prohibition/ Effective Prohibition/Significant Coverage Gap

Planning Commission will weigh evidence.

The basis for an effective prohibition claim may vary, and so too will the evidence submitted in an attempt to support the claim.

This is recognized in the subcommittee draft and the proposed ordinance which do not mandate the type of proof but rather require the applicant to “provide all facts that it relies upon for that claim.”

Additionally, under federal law (Ninth Circuit decision upholding the FCC Small Cell Order on effective prohibition), an applicant for a small wireless facility may choose to submit proof of a significant coverage gap, but the City may not mandate proof of significant coverage gap for that application type. In the subcommittee draft/proposed ordinance, applicants are encouraged to provide coverage maps and other listed information.



Applicants who claim that denial would be a “prohibition” or “effective prohibition” are encouraged to address at least the following:

- i. If it is contended that compliance with an **aesthetic standard** is not reasonable, **explain why in detail, and describe alternatives** considered in determining whether service objectives for the wireless service provider could be reasonably satisfied by other means.
  
- ii. **What existing or planned personal wireless services** the affected wireless service provider **would be effectively prohibited** from providing if the application is denied.



- iii. **The factual basis** for any claim that denial will substantially impair a wireless service provider's ability to provide a personal wireless service, and **the information relied upon in support of that claim.**
  
- iv. The **factual basis** for any claim that denial would result in a prohibition or effective prohibition under applicable precedent in the **United States Court of Appeals for the Ninth Circuit**, and the information relied upon in support of that claim.



v. **Current signal coverage** by providing maps showing existing coverage in the area to be serviced by the proposed facilities (including areas outside the City, if applicable). In order to be treated as probative, maps shall be dated, and based on data collected within the prior six months or less, to reflect all facilities installed inside and outside of the City as of the date of the application that may affect coverage.



## Key Responses

Campanelli YouTube video recommends more detailed and stringent language.

Mr. Campanelli's advice on significant gap test is principally directed to jurisdictions in the Second Circuit and is not pertinent to jurisdictions in the Ninth Circuit (which includes California) where the court upheld the FCC's interpretation of effective prohibition in the FCC Small Cell Order. No other topics Mr. Campanelli discussed merited changes to the proposed ordinance.



## Key Responses

Website Posting - Both Subcommittee and Proposed Ordinance require website posting.

See Section 38-112.4(E)(6). Applications Available Online. Except where good cause has been shown, as determined by the Director, applications will be posted on the City website **within five working days of filing or as soon thereafter as practical**, along with communications between the City and the applicant regarding those filings (including additions and modifications to the filing). The City shall post notice promptly when the application is deemed “complete.” The City’s failure to post the applications by the time required shall not affect the validity of any application submitted under this Section.



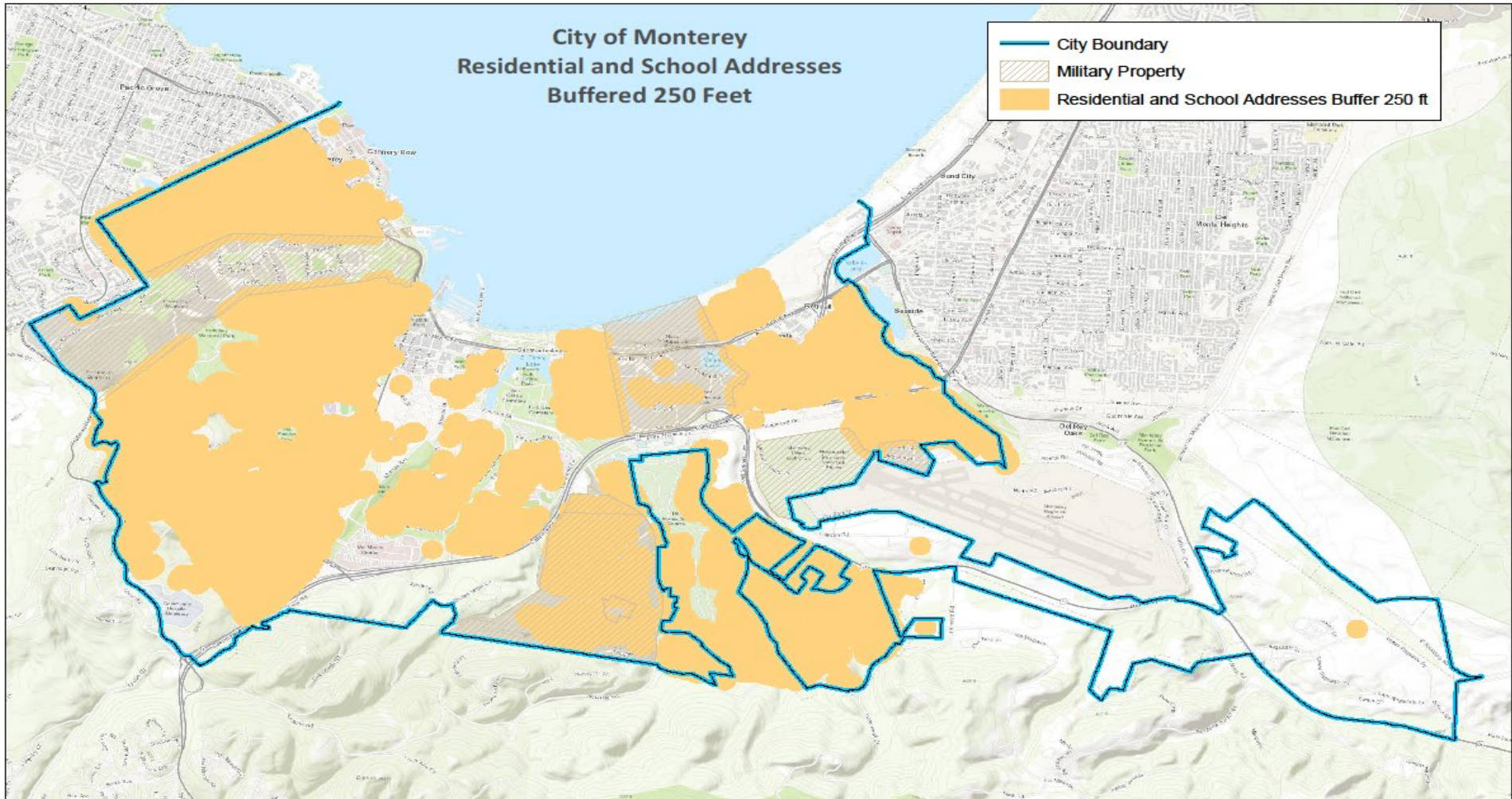
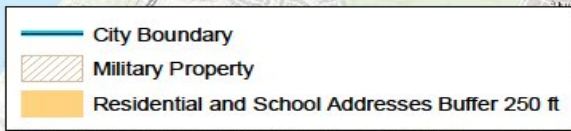
## Key Responses

### Minimum setbacks from residences and schools – Mapping Analysis

Based on the mapping analysis, if the city were to impose a 250 ft or greater buffer from schools and residential properties for wireless facilities in the public right-of-way, this would **eliminate large portions of the city's streets from any wireless placements even in areas where placement in the public right-of-way is otherwise preferred** (See ranking in Section 38-112.4(F)(9)). That could pose legal risks to city.



# City of Monterey Residential and School Addresses Buffered 250 Feet



Sources: Esri, HERE, Garmin, Intermap, increment P Corp., GEBCO, USGS, FAO, NPS, NRCAN, GeoBase, IGN, Kadaster NL, Ordnance Survey, Esri Japan, METI, Esri China (Hong Kong), (c) OpenStreetMap contributors, and the GIS User Community



## Key Responses

### Setbacks between cell tower facilities (at least 300 feet up to 1000 ft.)

The FCC has recognized that spacing and setbacks based on a concern about **aesthetics may be justified if they are reasonable**. No mapping analysis was performed of the spacing *between* wireless facilities in the public right-of-way. However, the Commission may want to consider a modest spacing requirement to spread out facilities to avoid clutter.



## Other – Recommended Ordinance

Redlines mainly reflect corrections to typos and cross-references.

Two substantive changes:

1. Section 38-112.4(E)(3)(h): Staff recommends modifying the submittal requirement for a site survey.
2. Section 38-112.4(E)(3)(p): Staff recommends deleting the text referring to noise studies for modifications to existing facilities and adding a new condition of approval as Section 38-112.4(L)(7) making it more clear that modifications require a permit application (which includes a noise study unless the facility or modification creates no noise).



## Wrap-up

### City Council Action:

Direct the Planning Commission to:

- 1) Consider Options for Strengthening the City's Wireless Application Requirements; and
- 2) Make a Recommendation to the City Council that is Consistent with Federal Regulations

Staff's conclusion is that the City is regulating to the fullest extent based on aesthetics and public health and safety allowed under the law.



## Recommendation

That the Planning Commission adopt a resolution recommending an Ordinance to the City Council repealing and replacing City Code Chapter 38, Article 17 Section 112.4 related to wireless communication facilities and recommending a finding that same is exempt from CEQA.



# Back Up Slides



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# Project History

## March 15, 2018: PC Meeting

Staff recommendation to the Planning Commission to deny 10 of the 13 small cell applications. The applicant (ExteNet) then withdrew 12 of the 13 applications. The one that was not withdrawn (277 Mar Vista Drive @ 7 Cuesta Vista Drive) was recommended for approval by the staff. Public comment was received from 38 members of the public in opposition and the Planning Commission denied the application.



# Project History

- April 4, 2018: Susan Nine forwarded the MVNA ordinance
- April 17, 2018: CC directed PC to:  
Direct the Planning Commission to: 1) Consider Options for Strengthening the City's Wireless Application Requirements; and 2) Make a Recommendation to the City Council that is Consistent with Federal Regulations
- June 26, 2018: PC recommended wireless subcommittee
- July 17, 2018: CC received report on risks of moratorium



# Project History

August 7, 2018: CC appointed Wireless Subcommittee

August 23, 30, September 6, 12, 13, 19, October 1, October 19, October 26, October 29, November 2, November 9, November 16, November 19, November 30, December 7, December 10, December 17, December 21, July 9, September 5, 6, December 4, 5,

September 18, 2018: City Council authorized joining a coalition of communities represented by Best, Best & Krieger (Joe VanEaton, Esq.) to challenge the FCC proposed orders that will, among other things, limit local control over small cell facilities and drastically reduce wireless permitting timelines





## Project History

- September 19, 2018: recommended ordinance changes to the PC
- September 25, 2018: ordinance changes considered by the PC
- October 18, 2018: City Council adopts ordinance changes
- November 27, 2018: PC approved wireless checklist
- May 17, 2019: encroachment ordinance introduction
- July 8, 2019: further encroachment ordinance discussion and changes to wireless ordinance



## Project History

September 6, 2019: Wireless Subcommittee 4-1 vote to recommend ordinance to the PC

October 15, 2019: staff request Council dissolve subcommittee

December 17, 2019: the City Council dissolved the subcommittee

February 4, 2020: Council passes encroachment ordinance



# Project History

August 12, 2020: 9th Circuit ruling in the Portland matter.

September 28, 2020: Coalition of Cities (including Monterey) Petition for the full appellate court to review the ruling in the Portland litigation.



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## Project History

- October 22, 2020:** 9th Circuit denied request to review ruling in the Portland litigation
- March 22, 2021:** Coalition of Cities petition the U.S. Supreme Court for review of the ruling in the Portland litigation.
- June 28, 2021:** U.S. Supreme Court denies request to review 9th Circuit decision in the Portland litigation.
- April 26, 2022:** Planning Commission meeting on the wireless subcommittee's draft ordinance.
- June 28, 2022:** Planning Commission meeting was cancelled because, sadly, Joe VanEaton, Esq. died.
- August 9, 2022:** Planning Commission meeting

