

WIRELESS REGULATION OVERVIEW

MONTEREY CITY COUNCIL MEETING

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Background

- The City can exercise its police power to regulate wireless siting, except to the extent that police power is preempted or limited by federal or state law.
- Currently, the City's main regulations applicable to wireless siting are in Zoning Code Chapter 38, Article 17, Section 112.4 (personal wireless service facilities).
- After an extensive public consultation process, the Planning Commission adopted a resolution recommending an Ordinance to the City Council repealing and replacing Sec. 112.4 which will be presented at the City Council's Feb. 7 meeting.
- Today's presentation is intended to provide context with an overview of applicable federal and state law.

BRIEF OVERVIEW

Federal and State Law

National Policy On Wireless

- **National deployment policy** – no local decision or regulation can prohibit or have the effect of prohibiting the provision of personal wireless service
- **National RF emissions guidelines** – FCC sets the RF emissions safety standards; localities cannot regulate placement based on RF emissions except to ensure applicant has shown it will comply with FCC guidelines
- **Timely action required** – deadlines for action on applications (known as “shot clocks”) between 60 and 150 days and remedies for failure to timely act on applications
- **Written Denials** – must be in writing and based on substantial evidence in the record
- **Non-discrimination** – no unreasonable discrimination among providers of functionally equivalent services
- **Expedited appeals**
- **Some mandatory approvals** – modifications to existing wireless facilities that qualify as Eligible Facilities Requests (EFRs) must be approved and there is a deemed granted remedy for failing to timely act

State Law Limitations (General)

- Deemed Approved Remedy for FCC's shot clocks, except the EFR shot clock which has a federal deemed granted remedy
 - Note: this state remedy is not available for proposed placements on fire dept. facilities
- Wireless permit may not be less than 10 years (unless "public safety" or "land use" reasons)
- Cannot require escrow deposit for removal of a facility (bonds ok)
- Cannot require all facilities to be located on sites owned by particular parties
- State law recognizes federal authority over RF emissions regulation and prohibits localities from taking into account RF emissions in evaluating proposed wireless facilities, except to the extent authorized by federal law.
- AB 2421 temporarily imposes 60 day shot clock and mandatory approval of qualifying emergency generators at macro cell sites; does not apply to small cells, distributed antenna systems, or rooftop facilities. Sunsets on Jan. 1, 2024.

State Law Limitations (Wireless in ROW)

Concerning ROW placements:

- **Cal. Pub. Util. Code § 7901** –Telephone corporations including wireless companies have a to construct facilities along and upon any public road or highway. . . in such manner and at such points as not to “incommode the public use of the road or highway”
 - *T-Mobile W., LLC v. City & Cnty. of. San Francisco (2019)* – Discretionary review considering aesthetics ok’d under state law by California Supreme Court
- **Cal. Pub. Util. Code § 7901.1** – Power to reasonably regulate “time, place, and manner” in which roads are accessed. Must be applied to all entities in an “equivalent” manner.
- **Cal Pub. Util. Code § 2902** – regulate use and repair of public streets, location of poles, wires, mains, or conduits of any public utility, on, under, or above any public streets (to the extent not preempted by CPUC regulation)
- **CPUC** regulates safety of electric and communications utility infrastructure in ROW, eg. General Order 95

SELECTED TOPICS

Effective Prohibition, RF Emissions, Shot Clocks and Deemed Granted Remedies

Federal “Effective Prohibition” Standard

- To facilitate the deployment of national wireless networks, federal law provides that no local decision or regulation can “prohibit or have the effect of prohibiting” the provision of personal wireless services.
- Interpreting federal law, the Ninth Circuit developed a test to determine whether a decision by a local government constitutes an “effective prohibition”
 - The Ninth Circuit test requires the showing of (1) a “significant gap” in the carrier’s service coverage and (2) the proposed facility is “the least intrusive means” of filling the significant gap, having considered the feasibility and availability of alternative facilities or site locations.
 - The “least intrusive” determination looks to find an alternative that comes closest to meeting local design and siting standards for placement of wireless facilities.

FCC's 5G "Effective Prohibition" Standard

- In 2018, the FCC adopted the Small Cell Order which established a different "effective prohibition" standard:
- "...an effective prohibition occurs where a state or local legal requirement *materially inhibits* a provider's ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities...an effective prohibition includes materially inhibiting additional services or improving existing services." (Para. 37)
- "Decisions that have applied solely a "coverage gap"- based approach...reflect both an unduly narrow reading of the statute and an outdated view of the marketplace. ...the current wireless marketplace is characterized by a wide variety of offerings with differing service characteristics and deployment strategies. As Crown Castle explains, coverage gap-based approaches are 'simply incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage.' Moreover, a critical feature of these new wireless builds is to accommodate increased in-building use of wireless services, necessitating deployment of small cells in order to ensure quality service to wireless callers within such buildings." (Para.40)
- "...we reject both the version of the "coverage gap" test followed by the First, Fourth, and Seventh Circuits (requiring applicants to show "not just that this application has been rejected but that further reasonable efforts to find another solution are so likely to be fruitless that it is a waste of time even to try") and the version endorsed by the Second, Third, and Ninth Circuits (requiring applicants to show that the proposed facilities are the "least intrusive means" for filling a coverage gap) (FN 94)

FCC's 5G Effective Prohibition Standard Upheld by Ninth Circuit



- In 2020, the Ninth Circuit upheld the FCC Small Cell Order's materially inhibits standard:
 - The differences in the FCC's new approach are reasonably explained by the differences in 5G technology. The FCC has explained that it applies a little differently in the context of 5G, because state and local regulation, particularly with respect to fees and aesthetics, is more likely to have a prohibitory effect on 5G technology than it does on older technology. The reason is that when compared with previous generations of wireless technology, 5G is different in that it requires rapid, widespread deployment of more facilities.

Small Cell Order Aesthetic Regulation Partially Overturned by Ninth Circuit

- FCC Small Cell Order had determined that aesthetic regulations for small wireless facilities must not prohibit or effectively prohibit the provision of personal wireless services
- Aesthetic requirements for small wireless facilities must be:
 - *Reasonable* (“technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments”); and
 - ~~No more burdensome than those applied to other types of infrastructure deployments;~~
 - ~~Objective and published in advance~~
- Spacing, separation, and setback requirements for small cells are subject to same federal standards
- Strike outs reflect Ninth Circuit decision.

Small Cell Order Fee Limits Upheld by Ninth Circuit

- The FCC Small Cell Order found that unreasonable fees on the deployment of small cells could create an effective prohibition, and established that fees must be cost-based and reasonable. The FCC also established a safe harbor amount for small cell applications that was deemed conclusively reasonable: \$500 (for up to 5 small cell sites in 1 application; \$100 being reasonable for each additional). The safe harbor for any and all recurring annual fees for placements on local government-owned poles was established at \$270 per small cell.
- Cal. Gov. Code 50030 limits the permit fees that can be charged to telephone corporations for the placement, installation, repair, or upgrading of telecommunications facilities including wireless, to the reasonable costs of providing the service for which the fee is charged and may not be levied for general revenue purposes.

RF Emissions – FCC Authority

- Telecommunications Act of 1996, Pub. L. No. 104-104, § 704(b), 101 Stat. 56, 152 (directing FCC to “prescribe and make effective rules regarding the environmental effects of radio frequency emissions”)
- 47 USC §3332(c)(7)(B)(iv):

“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.”

RF Emissions Notice of Inquiry

- Status of FCC guidelines:

Proposed Changes In The Commission's Rules Regarding Human Exposure To Radiofrequency Electromagnetic Fields Reassessment Of Federal Communications Commission Radiofrequency Exposure Limits And Policies Targeted Changes To The Commission's Rules Regarding Human Exposure To Radiofrequency Electromagnetic Fields, 34 FCC Rcd. 11687 (2019) (“RF Order”)

- In 2013, the FCC inquired whether it should reevaluate its RF exposure limits and policies in light of recent scientific opinions, authoritative expert views, changes in RF devices, and/or the prevalence and usage patterns of RF devices
- FCC took various actions in this Order
- Resolution of Notice of Inquiry terminated inquiry into possible amendments to FCC’s existing RF emission exposure limits

Court Challenge to End of FCC Inquiry

- *Environmental Health Trust et al. v. FCC et al.*, (case no. 20-1025), D.C. Circuit Court of Appeals (2021) majority held the FCC’s decision to end the inquiry was arbitrary and capricious
 - *The Court did not overturn the existing FCC guidelines or comment on their merits*
 - *The Court did not order the FCC to change the guidelines but said the FCC must provide a “reasoned explanation” for deciding no changes were warranted*
 - *The existing FCC guidelines remain in effect*

Court Challenge to End of FCC Inquiry

- U.S. Court of Appeals (2021) majority stated:
“To be clear, we take no position in the scientific debate regarding the health and environmental effects of RF radiation – we merely conclude that the Commission’s cursory analysis of material record evidence was insufficient as a matter of law. As the dissenting opinion indicates, there may be good reasons why the various studies in the record, only some of which we have cited here, do not warrant changes to the Commission’s guidelines.”

RF Emissions and ADA/FHA

ADA and FHA Claims

Wolf v. City of Millbrae, 2021 WL 3727072 (N.D. Cal)

- Plaintiff claimed that RF emissions from a cell tower above his housing complex caused him to suffer from "electromagnetic hypersensitivity" (EHS), and requested that City order accommodations be made under the ADA and FHA by either turning the tower off or requiring the company to relocate the tower site
- Court held that Plaintiff's claims against the City for violation of the ADA and FHA were unreasonable because his requests would require the City to violate § 332(c)(7)(B)(iv).
 - Court found that "it would be improper under the ADA to subject a defendant to the threat of litigation for the purpose of accommodating a plaintiff under the ADA."
 - Court applied the same reasoning for Plaintiff's FHA claim—"granting Plaintiff's accommodation request would require the City to regulate RF emissions in violation of the TCA and its implementing regulations. This accommodation would require the City to face liability for violating federal law and is thus not reasonable."

Summary of Wireless Shot Clocks & Deemed Granted Remedies



FCC Category		Applicable Shot Clock	Deemed Granted Remedy
Eligible Facilities Requests (EFR) Must involve modification to existing wireless facility (tower or base station) and meet size and other requirements to qualify as EFR		60 days	Federal
Small Wireless Facility (SWF) Must be personal wireless services facility that meets size and other requirements to qualify as SWF.	Placement on existing structure (need not be existing wireless facility)	60 days	California (effective 1/1/22)
	New	90 days	California (effective 1/1/22)
Collocations Must involve placement of personal wireless services facility (that does not qualify as EFR or SWF) on existing structure which need not have wireless facility already on it		90 days	California
Other Personal wireless services facility that does not fall in any other category		150 days	California
California Category		Applicable Shot Clock	Deemed Granted Remedy
Gov. Code 65850.75 State Generator Law (in effect only until 1/1/2024) Must involve qualifying emergency standby generator for macro cell tower site		60 days	California

Summary of Notice of Incompleteness Deadlines



Category	NOI Deadlines
<u>Eligible Facilities Requests (EFR)</u>	Initial Submission: 30 days Resubmissions: 10 days
<u>Small Cells (Small Wireless Facility (SWF))</u>	Initial Submission: 10 days* Resubmissions: 10 days *First NOI resets shot clock
<u>Collocations</u>	Initial Submission: 30 days Resubmissions: 10 days
<u>Other</u>	Initial Submission: 30 days Resubmissions: 10 days
<u>CA Emergency Generator (AB 2421)</u>	Initial Submission: 10 days* Resubmissions: 10 days* *All NOIs reset shot clock

Thank you.

Questions?