

**Small Cell Wireless Facility
Frequently Asked Questions (FAQ)
*Updated November 14, 2022***

Thank you to residents who addressed your questions and concerns to the City of Monterey about the proposed installation of small cell wireless facilities in Monterey neighborhoods and the proposed ordinance. We developed this FAQ to explain the small cell wireless facility application process.

Q: What is a “small cell” wireless facility, and what is it for?

A: A small cell wireless facility is cell site designed to provide cell phone service coverage and capacity in areas where traditional “macro” wireless facilities either cannot reach users or cannot meet the demands of users with broadband-level services. These facilities are able to reuse licensed spectrum bands more frequently, with lower output power and a shorter distance between the cell phone user and the network access point. The “small” in small cell refers to the service area covered by the antennas and not necessarily the equipment size. For example, the Federal Communications Commission (FCC) defined a small cell as a cell site with up to 28 cubic feet of non-antenna equipment, whereas the small cells proposed by ExteNet have approximately 9.047 cubic feet in volume without conduit, and 11.147 cubic feet in volume with conduit.

Q: Where can they be located?

A: Small cell wireless facilities can be located anywhere but most small cells are installed on existing or replacement utility infrastructure in the public rights-of-way, such as utility poles or street lights. Small cell wireless facilities can also be located on new, freestanding poles in the public rights-of-way, but the City strongly disfavors these installations when existing infrastructure is technically feasible. Given their smaller service area as compared to macro wireless facilities, most small cells generally serve cell phone users within approximately 300 to 1,000 feet from the installation.

Q: What is a public right-of-way (ROW)?

A: A public right-of-way is a type of nonexclusive and nonpossessory real property right granted or reserved over the land for public purposes. The most common example of a public right-of-way is a public street. Both federal and California state courts have recognized that the public purposes served by a public right-of-way encompass not just transportation and utilities, but aesthetic, social and expressive purposes as well.

Q: What laws regulate small cell wireless facilities?

A: Small cell wireless facilities, like any other wireless facility in the public right-of-way, are subject to various federal, state and local laws. Federal laws include, without limitation, Section 704 of the Telecommunications Act of 1996, codified as 47 U.S.C. § 332(c)(7); Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, codified as 47 U.S.C. § 1455; and various regulations by the FCC to

interpret and implement these statutes. California state laws include, without limitation, Public Utilities Code §§ 7901 and 7901.1; and Government Code §§ 65964 and 65964.1. Small cell wireless facilities are also subject to City Code §§ 38-112.4 *et seq.*

Q: Can the City of Monterey deny wireless facility applications based on environmental impacts from RF emissions?

A: Not if the emissions are compliant with all applicable FCC regulations. Under federal law, State and local governments cannot regulate personal wireless facilities (which includes small cell wireless facilities) based on the environmental effects from RF emission to the extent that the emissions from the proposed facility are compliant with the FCC’s regulations. Congress also gave the FCC exclusive authority to determine the standards for compliance. The City cannot set its own standards, whether higher, lower or even the same. The City can and does require applicants to demonstrate that the proposed facility will be in compliance with the FCC’s regulations.

Q: Does the City of Monterey have any discretion over small cell wireless facilities in the public right-of-way?

A: Yes, but the City’s authority is not absolute and is limited by laws and regulations adopted by both federal and state regulators. Neither federal nor California statutes completely displace traditionally local police powers, but both regulatory frameworks override local discretion to some degree.

Notably, state and federal law both generally preserve local authority to regulate aesthetics. For example, California law authorizes cities and counties to deny applications for placement in the public right-of-way when the proposed facility would “incommode” the public’s use of the public right-of-way, and this includes considering aesthetics. However, in 2018, the FCC placed new limits on local aesthetic regulations for small cell wireless facilities, requiring such regulations to be (1) reasonable and (2) published in advance. To be “reasonable,” aesthetic regulations must be technically feasible and reasonably directed at mitigating aesthetic harms. In its 2018 Small Cell Order, the FCC also said that local aesthetic regulations had to be no burdensome than those applied to other infrastructure deployments and objective, but in response to a court challenge in which the city was a party, the Ninth Circuit struck down these other two requirements.

Federal law does not allow local regulations and decisions to prohibit or effectively prohibit the provision of personal wireless services. This means that, under some circumstances, local zoning regulations will be preempted and a local government will be compelled to approve a facility that does not comply with local design or location rules. In its same 2018 Small Cell Order, the FCC interpreted federal law to establish a “materially inhibits” standard for determining if a regulation or decision creates an effective prohibition of service for small cell wireless facilities . It also expanded the scope of protected rationales for deployment beyond simply filling a coverage gap to also include such actions as

densifying a network, improving existing wireless services, and providing new wireless services. The Ninth Circuit upheld the Small Cell Order’s discussion of the “material inhibition standard.”

Both federal and California law also preserve local management authority over the public right-of-way, which includes the authority to impose reasonable time, place and manner restrictions on construction and installation activities. However, the CPUC has established detailed rules for safe construction of utility infrastructure including wireless facilities placed on utility poles, which can override local requirements.

The applicable City Code provisions have been designed to help the City determine whether and to what extent the City may exercise its discretion over a given application. City Code § 38-112.4.J.2 sets forth required findings for all applications, which, for public right-of-way applications, includes a consideration of whether the proposed facility “incommodes” the public’s use of the public right-of-way. If the findings cannot be made, the applicant may seek a limited exception under City Code § 38-112.4.J.2.c, but only if they can convince the City that a denial would result in an effective prohibition. If the City finds that a denial would cause an effective prohibition, any exception granted cannot be any broader than necessary to maintain compliance with law.

Q: What is the City’s process when an application is received?

A: When small cell wireless applications are received, the Planning Office considers them for a use permit.

Subject to the applicable provisions in the City Code, the Zoning Administrator or Planning Commission have the authority to approve, approve with conditions or deny the permits.

Federal law requires State and local governments to act on applications within a “reasonable” time; the FCC defines a “reasonable” time to act on a small cell wireless application as either 60 days for facilities placed on existing structures or 90 days for facilities placed on new or replacement structures. Other types of wireless applications have to be acted upon within 60, 90 or 150 days depending on the nature of the application. The FCC also imposes a complicated set of procedural rules for handling incomplete applications, and may run out the clock and require the city to act on applications, even if the applications are missing key materials. If the applications are denied, the denial must be in writing, the reasons for the denial must be supported by substantial evidence in the written record and the reasons for the denial must be contemporaneously available in a written form with the written denial.

The City can and does require a public hearing process for each new or for some existing modifications of a cell facility. The public hearing process can involve public outreach meetings, followed by the applications going before the Zoning Administrator, or upon referral, to the Planning Commission. Any

appeals of a Zoning Administrator decision would be addressed by the Planning Commission, and any appeals of a Planning Commission decision would be addressed by the City Council.

Q. What happens if the City doesn't act on a wireless application within the FCC-established time frame?

A: Wireless applications that are not acted on within the FCC's timeline, may be "deemed granted" either under state law (Government Code § 65964.1) or federal law (47 CFR § 1.6100), depending on the type of application. The applicant must notify the city if it wants to claim a deemed grant of its application, and the dispute may end up in court if the city challenges the validity of the applicant's deemed grant claim.

For small cell wireless facilities, there is also an "enhanced remedy" under federal law. That is, a failure to act on a small cell application (including all necessary authorizations) within the applicable time period is presumptively an effective prohibition of the provision of personal wireless services, entitling the applicant to expedited judicial review.

Q: What should someone do if they want to participate in the application review process and/or communicate with the City about the use of small cell wireless facilities in Monterey?

A: There are several ways for interest parties to engage in the application review process. Anyone interested in participating can email suggest@monterey.org, call (831) 646-3799, fill out a comment form - <https://www.monterey.org/About-Monterey/Citizen-Comment-Form>, subscribe to Planning and Community Development news at monterey.org/subscribe and watch monterey.org or monterey.org/planning for information and meeting schedules. The City appreciates and encourages public input, especially on fact-specific issues that may be difficult or impossible for the City to ascertain without the public's participation. Persons interested in submitting comments and questions should be advised that communications received by the City may be considered a public record subject to disclosures under California law.

Q: What should a citizen do if they want changes to the existing federal or California laws that preempt cities?

A: Federal - Citizens should contact the FCC at 1 (888) 225-5322. They should also contact Congressman Jimmy Panetta's Office (<https://panetta.house.gov/>), and Senators Feinstein and Padilla. (http://www.senate.gov/senators/contact/senators_cfm.cfm?State=CA).

State - State Senate District 17 – John Laird, (<http://sd17.senate.ca.gov/>).