



City Council Staff Report

From: City Manager

Report Type: CONSENT CALENDAR

Lead Department: Planning and Development Services

Meeting Date: December 16, 2024

Report #:2411-3758

TITLE

FIRST READING: Adoption of a Temporary Ordinance Amending Section 18.42.110 (Wireless Communications Facilities) of Title 18 (Zoning) to Require Architectural Review Board Review for Tier 2 and Tier 3 Wireless Communications Facilities in the Public Rights-of-Way and Repeal the Objective Aesthetic, Noise, and Related Standards for Wireless Communication Facilities in the Public Rights-of-Way. CEQA Status: Exempt Pursuant to CEQA Guidelines Sections 15301, 15302, and 15303.

RECOMMENDATION

Adopt a Temporary Ordinance amending Section 18.42.110 (Wireless Communications Facilities) of Title 18 (Zoning) to require Architectural Review Board (ARB) review for Tier 2 and Tier 3 Wireless Communications Facilities in the public rights-of-way to and repeal the Objective Aesthetic, Noise, and Related Standards for Wireless Communication Facilities in the Public Rights-of-Way.

EXECUTIVE SUMMARY

The proposed temporary ordinance responds to City Council direction from October 21, 2024, to amend Section 18.42.110 of the Zoning Code, reinstating Architectural Review Board (ARB) review for Tier 2 and Tier 3 Wireless Communications Facilities (WCF) in public rights-of-way and repealing objective aesthetic standards adopted in response to the FCC's 2018 Small Cell Order. This ordinance complies with Federal and State requirements and shifts review of certain WCF applications from a more expedient, objectives-based, review to a subjective, discretionary review to consider aesthetics and neighborhood context. This change is expected to increase application processing times and staff workload, potentially impacting at times agenda management for the ARB and City Council depending on the number of qualifying applications the City receives. The ordinance, set to expire in two years, will allow for additional input and review by the Planning and Transportation Commission (PTC) and other stakeholders to determine long-term approaches to WCF regulation.

BACKGROUND

On September 26, 2018, the Federal Communications Commission (FCC) adopted a Declaratory Ruling and Third Report and Order (FCC 18-133), known as the “Small Cell Order,” directing, among other things, that local aesthetic regulation of Small Wireless Facilities are not preempted by Federal law if they are, “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.” (FCC 18-133, ¶ 86) These terms were further defined and clarified in this and following orders issued by the FCC.

In response to the Small Cell Order, on April 15, 2019, the City Council adopted its first objective standards for wireless communications facilities (WCFs) in the public rights-of-way in Resolution 9825, along with a first reading updating the zoning code to incorporate those standards (Ordinance 5465, adopted May 13, 2019). These added to the required findings and Generally Applicable Development Standards already in effect for all WCFs in Palo Alto Municipal Code (PAMC) Section 18.42.110(i) (Attachment B). The ordinance revisions provided that certain categories of WCFs would no longer be subject to site-specific review and approval by the ARB under PAMC Section 18.76.020, and installations in the public rights-of-way (PROW) would instead be required to comply with the Council-adopted objective standards. Additionally, the initial review and approval of all types of WCF applications would be performed by the Director of Planning & Development. In the April 15, 2019 Council Staff Report adopting the objective standards, staff noted policy considerations supporting this shift:

“Although the City’s effort to draft these standards is driven largely by need to comply with the September 2018 Order, the adoption of objective standards also represents an opportunity for the City. First, the standards allow the City to proactively define the types of WCF installations it deems appropriate in the PROW, rather than simply reacting to designs proposed by an applicant. Standards would also promote greater uniformity of WCF designs throughout the City. While carriers could still apply for alternative designs, they would face the difficult task of showing that a network is not feasible using the City’s standards or that the strict application of the standards would otherwise violate federal law. Second, adoption of objective standards would allow for more efficient review and help to alleviate the significant burden on staff resources and ARB agendas created by the influx of WCF applications. In the past, the City has struggled to schedule multi-departmental reviews, ARB hearings, and a potential City Council appeal within a 150-day shot clock. Even in the absence of the new 60-day shot clock for “small wireless facilities,” the City would likely need to explore ways to streamline its review.”¹

After several iterations and clarifications of the objective standards, on December 16, 2019, the City Council adopted the current objective standards in Resolution 9873 amending and consolidating objective aesthetic, noise, and related standards for WCFs on streetlights and

¹ Staff Report, dated April 15, 2019: <https://www.cityofpaloalto.org/files/assets/public/v/1/agendas-minutes-reports/reports/city-manager-reports-cmrs/year-archive/2019/9959.pdf>

wood utility poles in the public rights-of-way. Further details of the steps of this process are available online.²

As of 2019, the Small Cell Order was being challenged in a lawsuit brought by numerous municipalities against the FCC—a lawsuit the City Council supported. Because of this legal challenge, Ordinance 5465 provided for the possibility that some FCC regulations might be struck down by noting, “[i]f the City Council repeals all objective standards, an application [for a Tier 2 or 3 WCF] shall not be granted unless, in addition to the other requirements of this section, all of the architectural review findings in Section 18.76.020(d) can be made.” (See PAMC 18.42.110 (g) and (h))

On August 12, 2020, the Ninth Circuit issued its decision in *City of Portland v. Federal Communications Commission*, 969 F.3d 1020, ruling that the Small Cell Order’s requirement that local regulations must be “objective” and not be “more burdensome than regulations imposed on functionally equivalent services” exceeded the FCC’s authority and “must be vacated.” (A link to the Ninth Circuit’s ruling was included in the Colleagues’ Memo of October 21, 2024.³) However, the Court upheld the FCC’s requirements that local standards be “reasonable” and “published in advance,” and upheld the FCC’s definition of “reasonable” to mean “‘technically feasible and reasonably directed’ at remedying aesthetic harms.” (*Id.*, at 1041-43, citing FCC 18-133 at ¶ 86-87).

On October 21, 2024, City Council received and discussed a Colleague’s Memo recommending that the Council repeal the existing objective-only aesthetic standards for the siting and design of WCFs in the public rights-of-way to restore subjective aesthetic standards under the City’s architectural review findings, as well as requiring review of Tier 2 and 3 applications in the public rights-of-way by the ARB at public hearings prior to a decision by the Director of Planning and Development Services. The proposed temporary ordinance incorporates these requested procedural revisions to the City’s WCF ordinance.

ANALYSIS

As directed by City Council on October 21, 2024, staff has prepared an ordinance (Attachment A) to modify the WCF permit review process for Tier 2 and Tier 3 facilities in the public right-of-way, to repeal the Objective Aesthetic, Noise, and Related Standards and to require review of such applications by the ARB. Below, staff has addressed Council’s requests for further information on what the WCF review process and standards would be if this ordinance change is adopted. Because the Council is proposing these modifications on its own initiative and the PTC has yet to conduct its review, the proposed modifications are temporary and automatically expire two years from the effective date of the ordinance. Planning staff will present the

² City of Palo Alto Website (Wireless Communication Facilities):

<https://www.cityofpaloalto.org/Departments/Planning-Development-Services/Current-Planning/Ordinances-Maps-Guidelines-Standards/Wireless-Communication-Facilities>

³ <https://www.cityofpaloalto.org/files/assets/public/v/1/city-clerk/misc/18-72689.pdf>

proposed modifications to the PTC for review and further modifications and/or recommendations to the City Council during this interim period.

Explanation of Tiers

The existing wireless ordinance classifies project applications into three “Tiers”, which align with FCC definitions and regulations. Each project type has its own application checklist maintained by Planning and Development Services, and is subject to the City’s WCF ordinance conditions of approval, along with any other applicable findings (such as the development standards, objective standards, or architectural review findings).

- “Tier 1” projects are for any “eligible facilities requests”: requests to replace, co-locate, or remove existing WCF components where the modification falls under the FCC’s streamlined review requirements. Such projects will continue to be reviewed by the Director of Planning and Development, since Federal law requires approval as long as the applicant meets the criteria (See PAMC Section 18.42.110(f)).
- “Tier 2” projects include any requests to modify existing facilities that involve a “substantial change” in the physical dimensions of the facility’s components, or collocations of new equipment that are not eligible under the Tier 1 process for any other reason (See PAMC Section 18.42.110(g)).
- “Tier 3” projects are for any new sitings of WCFs (including collocations that are not eligible for Tier 1 or 2 review), and must also meet the City’s findings for a conditional use permit (See PAMC Section 18.42.110(h)).

The City’s objective standards for the public rights-of-way apply only to applications for WCFs installed in the public right-of-way, or PROW. The City also receives applications to modify facilities on private property, which are reviewed under the other ordinance conditions and findings depending on WCF type; these will not be subject to ARB review.

The number and complexity of the projects received each year can vary. On average the City has received approximately 25 applications per year over the last 25 years (617 applications total since the beginning of 2000); 29 of these applications were received since the beginning of 2024. But complexity of these applications can vary significantly depending on a number of factors including but not limited to: private property vs. public right-of-way, number of antennae proposed, and Tier level. To provide more detailed breakdown of the applications received staff would require additional time to analyze the records.

Standards For Review

If adopted, the proposed ordinance would repeal the Objective Aesthetic, Noise, and Related Standards for Wireless Communication Facilities in the Public Rights-of-Way on Streetlight Poles and Wood Utility Poles, as adopted on December 16, 2019. In their place, the review of Tier 2 and 3 Wireless Communication Facilities would be based on standard findings for architectural

review and, for Tier 3 projects, conditional use permit findings. All projects would continue to be subject to the Conditions of Approval in PAMC Section 18.42.110 (j) and the Generally Applicable Development Standards in PAMC Section 18.42.110 (i). Attachment B provides the full text of the Municipal Code standards that may apply depending on project Tier.

The colleagues' memo further proposed requiring the City to hire a consultant to review an application's technical feasibility, however, this was not included in the proposed ordinance since it is preempted by Federal law. The Ninth Circuit's decision in *City of Portland* invalidated the FCC requirement that all aesthetic regulations be "objective" but it does not open the door to additional City regulations on technical feasibility or functionality because such regulations are not "reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments." (FCC 18-33 at ¶ 87; See 969 F.3d 1020, 1042.)

A return to a subjective review process may impact the quality of applications received, since there will be less guidance for project applicants on the City's standards for review. It would also increase the likelihood of applicant appeals or requests for judicial review if the City does not approve a project. The ARB may find the objective standards remain a helpful reference for making their findings in some cases, even if they are repealed as required findings for all PROW facilities.

State and Federal Required Application Review Timelines

The proposed ordinance implements the City Council request to revert the WCF review process back to what was in place in prior to 2019. However, since that time there have been new State and Federal laws that provided additional restrictions on the City's process, including prescribed timelines for review. These timelines—referred to as “shot clocks” —limit the review time to 60, 90, or 150 days depending on the type of project proposed. Initial application review for completeness is also limited, either 10 days or 30 days depending on project type. After that, the City cannot request any additional information from applicants that was not identified in the first review for completion. Because of the ARB requirement for public noticing, staff report preparation, and availability of two public ARB hearings a month, the initial review/incompleteness letter for new applications in the PROW will need to be produced prior to review by ARB, and will therefore not include their comments.

Past experience shows that even with objective standards and staff-level process, meeting a 60 or 90-day timeline has sometimes required a tolling agreement with the project applicant. Further revisions in State and Federal law since 2019 include “deemed approved” remedies for all project types, in which projects without a formal decision by the shot-clock deadline are approved by operation of law in accordance with the initial application (See Cal. Gov. Code Section 65964.1, Title 47 Code of Fed. Regs. Section 1.6100(c)(4)). As a result, applicants have reduced incentive to enter a tolling agreement with the City. Since tolling agreements cannot be mandated or relied upon for application processing, staff will have to presumptively process applications based on established shot clock timeframes. Adding one or more public hearings

before the ARB and potentially a Council appeal is expected to severely impact the City's ability to comply with these legal requirements and likely require final decision made by the City Council at a noticed public hearing.

FISCAL/RESOURCE IMPACT

Modifying the design standards and review process poses additional resource impacts. Potentially the most significant impact would be to the ARB and City Council agenda management. Switching from the current process for applications in the public rights-of-way, in which the Planning and Development Services Director reviews the project's compliance with the objective standards and applies more subjective standards to any requests for exceptions, to a fully discretionary review including a hearing by the ARB will increase the amount of time it takes to process those applications (as discussed above in regards to mandatory "shot clock" application review timelines). Staff would need to anticipate potential appeals on every such project and schedule final action hearings prior to the ARB review hearing, in order to meet the mandated shot clock requirements. While the colleagues' memo authors suggest an extension for application review or appeals can be granted if agreed upon by the parties, this approach cannot be mandated or relied upon for application processing. Applicants are unlikely to choose this approach when presently, State or Federal law (or both) provides "deemed granted" approvals for all types of wireless projects if the City fails to approve or deny it within the limited shot clock period. In short, wireless communications facility applications are expected to require time on the Council's agenda to make final subjective determinations on any appeal from the ARB's project decision. This may impact the scheduling of other City Council priority projects or other City business.

In addition, changing the standards and review process has the potential to impact staff resources from Planning, Utilities, Public Works, Urban Forestry, and the City Attorney's Office. These departments participate in the application review process and may need to be available for ARB and City Council meetings. While staff can engage professional service agencies to respond to application processing and review, administrative and overhead staff support will be required to review work products, reports, and to schedule meetings. Initial training on the review process and legal framework for wireless project findings would also be required for ARB members, for work currently performed and coordinated by Planning staff. Public meetings before the ARB may require attendance from all departments contributing to wireless project review. The extent of impact depends on the number of qualifying applications submitted, which is not a variable the City controls.

Finally, the Municipal Code requires that changes to zoning regulations initiated by the Council first be reviewed by the PTC. Therefore, additional resources are anticipated from various City departments to prepare a comprehensive review of the Wireless Communications Facilities ordinance for the PTC's consideration.

STAKEHOLDER ENGAGEMENT

The City Council discussed its intention to modify the WCF ordinance on October 21, 2024.

ENVIRONMENTAL REVIEW

The recommended action is exempt from the California Environmental Quality Act (CEQA) in accordance with CEQA Sections 15301, 15302, and 15303, since the regulation changes would affect existing facilities, replacement or reconstruction of existing structures or facilities, or new construction or conversion of small structures.

ATTACHMENTS

Attachment A: Proposed Ordinance

Attachment B: WCF review standards (Municipal Code excerpts)

Attachment C: WCF Objective Standards (proposed for repeal)

APPROVED BY:

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