



DATE: March 2, 2021

TO: Mayor and City Council

FROM: Assistant City Manager

SUBJECT: Municipal Facility License Agreement Template: Adopt a Resolution Approving the Municipal Facility Master License Agreement Template for the Attachment of Wireless Facilities to City-Owned Vertical Infrastructure in the Public Right-of-Way, and Authorizing the City Manager to Execute Master Facility License Agreements with Qualified Companies in Substantial Conformance with the Template and Upon Approval by the City Attorney as to Form

RECOMMENDATION

That the Council adopts a resolution (Attachment II) approving the Municipal Facility License Agreement (MFLA) template (Attachment III) for the attachment of wireless facilities to City-owned vertical infrastructure, such as street lights in the public right-of-way, and authorizing the City Manager to execute MFLAs with qualified companies in substantial conformance with the template and upon approval by the City Attorney as to form.

SUMMARY

Demand for wireless technology continues to grow exponentially. To meet this ongoing demand, further compounded by an increase in residents working or learning from home due to COVID-19, wireless companies desire to install small cell technology to meet the demand and prepare for future needs. In order for wireless companies to install equipment on vertical infrastructure with the City, such as street light poles, a MFLA is needed to protect both the interests of the City as well as the wireless company. The MFLA represents a multi-year effort across multiple public meeting bodies, as well as numerous rounds of negotiation and revisions with interested wireless companies over an eighteen-month span. Outside legal counsel specializing in the area of small cell municipal agreements has assisted the City in the negotiation of the MFLA terms and language to strike a balance between desired terms and what is considered fair and reasonable compared to similar sized municipalities. The template establishes the form of the MFLA for Council approval. The resolution approving the template allows the City Manager to negotiate specific terms with individual carriers in individual MFLAs, such as individualized insurance requirements, as long as overall the individual MFLA substantially conforms with the Council approved MFLA template.

This staff report summarizes the multi-year history leading up to the creation of the MFLA template, as well as discusses key provisions of the MFLA. The process to create this template has involved feedback from internal staff, external vendors, and outside legal counsel to create a document that creates a path forward towards the deployment of small cell technology on City-owned vertical infrastructure within the City's public right-of-way.

BACKGROUND

The demand for wireless services is expected to grow exponentially over the next several years with tremendous increases in the amount of available connected devices. The COVID crisis has compounded this demand as more residents and businesses rely on mobile devices in their homes and offices for communication, education, and online content, which place increased demand on cell phone networks. Traditionally, wireless antennas and equipment were primarily installed on large towers on private land and on the rooftops of buildings that were subject to land use review under a City's zoning code.

To accommodate the increased demand for wireless services, wireless carriers seek to deploy small cell technology in public right-of-way to improve capacity. In addition, small cells are expected to be an important part of the wireless industry's upgrade to 5G networks (fifth generation of cellular mobile communications). 5G technology is expected to use different frequencies cover a smaller radius than previous generations of wireless networks. Street light poles and other municipal poles are considered good opportunities for 5G antenna placement by wireless carriers due to volume and availability of municipal poles within the City.

The main anticipated benefits of 5G over previous generations of wireless networks are higher download speeds, greater capacity to carry data, and the reduction of time it takes to transfer data between devices. These features are desirable for residents and businesses who want to leverage these higher speeds and increased capacity for work from home or schooling from home, but also to leverage potential opportunities with cutting edge technology, such as telehealth services or autonomous vehicles. 5G technology keeps City residents and the business community aligned with current mobile technology trends, which demand increased mobile speeds and the ability to support greater numbers of users simultaneously on mobile networks.

In June 2018, the City entered into an agreement with Magellan Advisors, following a competitive request for proposals process, to develop and update the City's wireless telecommunications regulations, right of way ordinance, and master license agreements with telecommunication companies.

CTAC Feedback - The Council Technology Application Committee (CTAC) reviewed and commented on these updated items at its September 14, 2018 meeting and offered the following feedback, which has been incorporated into the wireless ordinance and MFLA template design.

- **Public Notice Requirements:** The City will be required to notice properties within a 500-foot radius of a cell site antenna location.
- **MFLA Template Design:** The MFLA template will be brought before the City Council for initial approval.
- **Relocation of Infrastructure:** The MFLA has a section dedicated to relocation and displacement of equipment that outlines options for the City to relocate infrastructure that may have a wireless facility leased on it.

Taking into account the feedback from CTAC in September 2018, on January 8, 2019, City Council approved the Public Right of Way Telecommunications Antenna and Facilities Ordinance (“Wireless Ordinance”) and associated amended Master Fee Schedule.

Hayward’s Wireless Ordinance¹ applies to wireless installations on all types of vertical infrastructure in the public right-of-way and requires that new small cell installations must maintain an unobtrusive design and be camouflaged when feasible. It also provides there shall be no signage or advertising logos outside of small identifying information and no facilities may be located immediately in front of, besides, or behind historic resources recognized by the City. The MFLA template does not change this ordinance or the requirement that carriers comply with it. It supplements the Wireless Ordinance by providing the contractual terms and conditions for use of City-owned vertical infrastructure, such as street lights, in a manner similar to the agreements that wireless providers enter into with utility pole owners, such as PG&E, for use of their utility poles and street lights for wireless installations.

As mentioned in the staff report accompanying the adoption of the Wireless Ordinance on January 8, 2019, the concept and framework for establishing a MFLA was the next step outlined in the roadmap. To meet this demand, staff has engaged an outside law firm experienced in negotiating small cell master license facility agreements to collect vendor feedback and create a template for Council approval.

Starting in the summer of 2019, the City sought input from interested providers and received extensive feedback and proposed redlines. Negotiations on the content of the MFLA with interested wireless companies have also been ongoing over this time span and the City has engaged in over fifteen phone calls and meetings, as well as reviewed and revised the MFLA template over five times. City staff reviewed each set of comments in consultation with outside counsel. Not all proposed revisions from the vendor community were incorporated into the MLFA template; however, what is in the MLFA template has been determined to be reasonable based on outside counsel’s review and experience with other cities and the carrier agreements in those communities.

One common public concern with wireless technology is whether it is safe. The Federal Communications Commission (FCC) has the sole authority to set standards for safe levels of RF emissions. Vendors must demonstrate their equipment meets the standards set forth by

¹ **Hayward Wireless Ordinance Visual Impact Guidelines**

https://library.municode.com/CA/hayward/codes/municipal_code?nodeId=HAYWARD_MUNICIPAL_CODE_CH7PUWO_ART4WICOFAPURI-W_S7-4.140VIIMGU

the FCC before they can deploy it. If a vendor is able to demonstrate that their equipment meets the standard set by the FCC, then the vendor may install the wireless technology equipment.

DISCUSSION

To address wireless facilities applications in the public Right-of-Way (PROW), staff recommends that the City Council approve the MFLA template for wireless facilities attaching to City-owned vertical infrastructure in the PROW. The proposed MFLA (Attachment III) reflects revisions requested by the carriers through various rounds of comments and represents a balance of best practices and processes. The proposed MFLA is the City's good faith attempt to reconcile those comments and propose a reasonable agreement template. Staff also recommends that the Council provide the City Manager delegated authority to approve minor carrier-specific changes to the template that do not significantly change the risks and rewards to the City (e.g., insurance provisions and certain definitions).

As the owner of poles in the PROW, the City is responsible for entering into license agreements with wireless carriers in order for those carriers to attach to the City's poles. A wireless carrier will likely apply for multiple locations in the City, and given the short deadlines, known commonly as "shot clocks," by which Federal law requires the City to act on each wireless application, including permits and any contractual approvals (60 days for small cell installations on existing structures and 90 days on new or replacement structures), it is not feasible to take a separate license agreement to the Council for approval for each installation.

Key MFLA Terms

The information below represents the key terms in the MFLA that are commonly of interest. This list is not meant to be exhaustive, but rather provides a high-level overview of common language and terminology.

- **FCC Order & Current Rental Fee.** The MFLA includes an annual rent payment for use of the City poles. Under a FCC declaratory order and regulations that went into effect on January 14, 2019, the FCC declared that all fees (including permit fees and rental fees for use of government-owned infrastructure, such as streetlights in the PROW) must be based on a reasonable approximation of the City's costs, such that only objectively reasonable costs are factored into those fees, and fees are no higher than the fees charged to similarly situated competitors in similar situations. Recurring fees (the rental fee for attachment to municipal infrastructure and use of PROW), are presumed reasonable by the FCC order, if no greater than \$270 per facility/per year.
- **Alternate Rent.** The legal validity of this FCC Order has been challenged, and the Ninth Circuit Court of Appeals recently upheld the FCC's limitation on rental fees discussed above. The litigation is ongoing, but the effectiveness of the FCC Order has not been stayed. Therefore, given the potential that litigation will continue, staff is accounting

for uncertainty in the fee terms of the MFLA template. Staff recommends that for all periods when the FCC Order is in effect, the annual rent per location be the \$270 suggested by the FCC (increased annually by three percent). For any period that the FCC Order is not in effect, meaning that it is stayed by a court of law or it is vacated or invalidated and has not been replaced by the FCC with an alternative provision setting a specific amount as rent, then the rent would increase to the rate of \$1,500 (also increased annually by three percent). This alternative rate reflects the rate in similar agreements in some other cities in California. Street lights and other poles have clear value to wireless service providers that the City may reasonably expect to capture through its lease pricing.

- **Fiber-In-Lieu of Payment.** The MFLA grants the City the discretion to negotiate, as partial consideration for rent, strands of fiber and associated conduit that the licensee owns to support each licensed pole. The licensee does not have to provide fiber in-lieu of paying a rental fee.
- **Term of Agreement and Renewals.** The MFLA contains a standard term of ten years with two five-year renewals, which is consistent with State law.
- **License Termination & Radio Frequency (RF) Emissions.** Termination language exists in the MFLA in Section 6.11 for the City to terminate the license for scenarios such as 60 consecutive days of nonoperation or the interference of the day-to-day operation of the City. Section 6.9 of the MFLA includes language that the carrier cannot replace approved equipment without City consent if the RF emissions differ than the equipment that was previously approved.
- **Relocation.** The MFLA also provides the flexibility for a licensee to add, remove, or relocate locations in the City per Section 6.4.2 of the MFLA.
- **Insurance and Performance Bonds.** The MFLA requires insurance, explains the parties' rights and obligations with respect to use and damage to any City infrastructure, and requires a licensee to provide a performance bond.

These key terms represent the most common areas of the MFLA, which address common questions surrounding the detailed language contained in the MFLA. The goal is to address these key terms in the staff report to provide a general overview of the MFLA template and demonstrate the diversity of topics covered within it.

In sum, staff proposes that the Council adopts the resolution approving the MFLA template and authorizing the City Manager to enter into individual MFLA agreements with wireless carriers and infrastructure providers to allow use of the City's vertical infrastructure, resulting in the needed flexibility to add additional locations over time. That said, each location would still require a permit in compliance with the City's applicable permitting processes and design regulations.

ENVIRONMENTAL REVIEW

The authorization of a MFLA is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act (“CEQA”) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. This agreement sets forth the legal terms and obligations for requesting use of the City infrastructure in the PROW and approval of such use. The authorization for wireless carriers and infrastructure providers to attach antennas to this infrastructure is guided by existing state and federal law and the Hayward Municipal Code. This action does not authorize any specific development or installation on any specific piece of property within the City’s boundaries, most of which will be placed on existing infrastructure, and is mostly a means to streamline the contracting process in accordance with federal shot clocks.

Alternatively, even if the authorization to use this agreement is a “project” within the meaning of State CEQA Guidelines Section 15378, the action is exempt from CEQA on multiple grounds. First, the action is exempt from CEQA because the Council’s action is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. (State CEQA Guidelines, § 15061(b)(3)). This template agreement creates terms for wireless carriers should they apply to place facilities in the public right-of-way, often on existing City infrastructure. Moreover, in the event that the action is interpreted to permit installation of wireless facilities on a particular site, the installation would be exempt from CEQA review in accordance with either State CEQA Guidelines Section 15302 (replacement or reconstruction), State CEQA Guidelines Section 15303 (new construction or conversion of small structures), and/or State CEQA Guidelines Section 15304 (minor alterations to land), as these facilities are allowed under federal and state law, are by their nature smaller when placed in the public right-of-way, and are subject to various siting and design preferences to prevent aesthetic impact to the extent feasible.

ECONOMIC IMPACT

Deployment of 5G wireless technology in the City creates a path towards higher download speeds and the reduction of time it takes to transfer data between devices. 5G wireless technology keeps City residents and the business community aligned with current mobile technology trends, which demand increased mobile speeds and the ability to support greater numbers of users simultaneously on mobile networks, especially in light of the current COVID crisis and current remote school and work situations. As an economic driver, this technology helps keep pace with increased demand of mobile traffic desired by residents and businesses.

FISCAL IMPACT

The approval of new wireless communications facilities located on City infrastructure in the PROW will generate revenue in the form of rent from the MFLA for each installation. As discussed in the staff report, this rate will be set at \$270 per pole annually. The City has contributed approximately \$60,000 towards the creation and review of the wireless ordinance and MFLA template creation process, including opportunities for vendor feedback.

While these efforts have been budgeted and paid for out of the City Manager's Office, the City's intent is to offset some of these costs from the fee required to be paid by carriers at the time they enter into an MFLA with the City.

STRATEGIC ROADMAP

This agenda item promotes the Improve Infrastructure strategic roadmap priority; however, there is not a specific project related to this item outlined in the Council's Strategic Roadmap.

PUBLIC CONTACT

As mentioned previously in the staff report, there have been numerous ongoing discussions with multiple carriers regarding the appropriate MFLA template over the course of the last two years. Additionally, starting in September 2018, the concept and framework for the Wireless Ordinance and MFLA was brought forth to CTAC. Following this, Council approved the Wireless Ordinance in January 2019, which incorporated Council and CTAC feedback.

NEXT STEPS

If Council approves this item, staff will proceed with entering into MFLAs with individual wireless carriers that are in substantial conformance with the MFLA template approved this evening. Once a specific MFLA is entered into with a carrier, they can submit site specific applications through the City's standard processing process, similar to an encroachment permit process. This process is already being incorporated into the City's cloud hosted planning and permitting solution for further ease of access and use internally and externally.

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