



DATE: January 8, 2019

TO: Mayor and City Council

FROM: Deputy City Manager
Director of Information Technology
Interim Director of Public Works

SUBJECT: Introduction of an Ordinance of the City of Hayward, Adding Article 4 of Chapter 7 to the Hayward Municipal Code for Regulating Wireless Communication Facilities in the Public Right of Way and Adoption of a Resolution Amending the Master Fee Schedule for Related Program Fees.

RECOMMENDATION

That the City Council reviews, comments on, and approves the proposed Public Right of Way Telecommunications Antenna and Facilities Ordinance (“Wireless Ordinance”) and Master Fee Schedule Resolution.

SUMMARY

The City’s existing regulations for telecommunications antenna and facilities were passed in July of 1997. Over the past two years, telecommunication companies have signaled their intention to deploy small cell sites to expand 5G coverage. To complicate matters, the State and Federal legislatures have considered legislation that would constrict the ability of the City to regulate and charge lease revenue for small-cell wireless sites within the Public Right of Way.

This item includes a proposed updated Wireless Ordinance (Attachment II) to accommodate the anticipated requests from telecommunication providers as well as a Master License agreement to ensure the City receives fair compensation for use of the Public Right of Way and that said use is done in a consistent and equitable manner across telecommunication providers. It also includes a resolution amending the Master Fee Schedule for related program fees.

BACKGROUND

The City’s existing regulations for telecommunications antenna and facilities were passed in July of 1997. Over the past two years, telecommunication companies have signaled their intention to deploy small cell sites to expand 5G coverage. 5G technology is designed to densify coverage within a given community by placing a cell site in intervals of 800 feet,

where feasible. Understanding this, the City is anticipating an increase in applications for small cell facilities in the public right of way (PROW). These telecommunication companies have begun this process with municipalities throughout the state.

Telecommunication companies prefer to install wireless facilities in the PROW since installations on private property will oftentimes be more expensive, or less viable for the buildout of a robust network. The City owns and maintains upwards of 4,500 streetlight poles throughout the community, which present themselves as the prime opportunity for telecommunication companies to complete their 5G networks.

In addition to telecommunication companies beginning to deploy this new technology throughout the State, they have been lobbying the State and Federal government to reduce any barriers or regulations that slow their ability to build out a 5G network. Specifically, these companies have lobbied the State and Federal government to implement laws that severely constrict an individual city's home rule authority in the regulation and assessment of fees for these small cell sites.

Last year, SB649 attempted to eliminate local discretionary review of small cell sites, treating their installation as a use by-right in all zones. This year, the United States Senate is considering S.3157 (Thune & Schatz). In its current form, this bill would force local governments to lease out publicly owned infrastructure, eliminate reasonable local environmental and design review, and eliminate the ability for local governments to negotiate fair leases or public benefits for the installation of small cell wireless equipment.

Recent Federal Communications Commission Rulemaking

In September, the Federal Communications Commission (FCC) adopted the *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Declaratory Ruling and Third Report and Order (Small Cell Order)*. The order sets new regulations and restrictions over state and local governments authority to regulate the deployment of small cell wireless facilities. Attachment IV provides a summary of this order for reference.

This order establishes a 60-day shot clock for approving applications to attached wireless equipment to any preexisting structure regardless of its design or suitability for attaching such equipment.

Section 253 of the order allows state or local governments to recover the costs associated with permitting and allowing wireless facilities within the PROW. This set amounts for fees a City may charge for non-recurring application fees and recurring ROW access fees in the amount of \$500 and \$270 respectively. However, a locality may charge a fee in excess of these amounts as long as they can prove that the fees are "...reasonable approximation of costs; those costs themselves are reasonable; and are non-discriminatory." A summary of this order can be found in Attachment IV.

This order will be in effective on January 14, 2019. The City of San Jose along with a number of other cities and organizations have filed a lawsuit to overturn the preemptive order, while Sprint and AT&T have filed lawsuits claiming the order does not protect their business interests enough.

The proposed ordinance is a framework for the City to regulate the rollout of small cell wireless communication facilities in the public right-of way. Furthermore, the proposed regulations as described below provide clarity and certainty for telecommunications companies while protecting the public's interests. These regulations provide a path for the City to address the anticipated rollout, helping to speed the deployment of cutting-edge wireless technology. All of these activities will lead to more robust broadband services for the City's business community as well as for residents.

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.

The Council Technology Application Committee (CTAC) reviewed and commented on the proposed ordinance at its September 14, 2018 meeting. These comments are incorporated in the Discussion section below.

Representatives from Magellan Advisors will be present at this meeting to answer any questions the Council may have.

Small Cell Definitions

Small cells are antenna and related equipment that telecommunication providers deploy to increase their overall network capacity and to extend wireless coverage. They are considerably smaller than their counterpart, macrocells, which usually take the form of a much larger cell tower site, antenna, or mast. Given their size, small cells lend themselves toward deployment on utility poles, streetlights, and other exterior structures. Small Cells base station equipment can range in sizes upwards of eight cubic feet while antennas can range in size upwards of three cubic feet. They can be easily camouflaged on the top of standard street light poles.

They are a vital component to the deployment of new highspeed wireless networks. Demand for quality, reliable wireless networks is increasing rapidly due in part to the "Internet of Things" where everyday items and services from cars, home appliances, real-time arrivals for buses, and basic fundamental items such as cell phones and computers on a connection to the internet and Wi-Fi. The deployment of a robust smart cell network is required for the continued growth and use of these items.

DISCUSSION

Current Policy and Procedure

Hayward Municipal Code, Chapter 10, Article 13 establishes the standards for the appropriate siting and change in location of any telecommunication antenna or related facility. The regulations aim to protect the city from adverse effects of telecommunications facilities including any negative environmental impacts, any related visual blight, and ensure a competitive and broad range of telecommunication services and infrastructure.

The City's current regulations cover three classes of antenna ranging from residential satellite dishes to telecommunication towers of varying heights, with many of these sites existing on private property. Depending on class, a permittee would have to receive approval of a Site Plan Review application from the Director of Development Services, an Administrative Use Permit from the Director of Development Services, or a Conditional Use Permit from the Planning Commission. The regulations do not provide a reasonable level of clarity on small cell sites, as this technology is new, and the ordinance was last revised in 1997.

Telecommunications are rapidly expanding their wireless networks through the buildout of 5G networks, largely through small cell installations on infrastructure in the PROW. Given this, it is prudent for the City to adopt current and relevant regulations to govern the deployment of small cell sites throughout the City. Doing so will ensure the public's interest is met while accommodating the business interests of telecommunication companies.

Proposed Policy and Procedure

The proposed ordinance (Attachment II) would govern all telecommunication antennas and related facilities within the PROW. It would be separate from the existing Antenna and Telecommunications Facilities Ordinance of the Planning Code.

The proposed ordinance intends to manage the short and long-term use of the PROW and City infrastructure within the PROW. Under these regulations, all applications for a Wireless Communication Facility PROW permit (WCF PROW Permit) will be submitted to and ultimately approved by the Public Works Department.

Applications may be for a single facility, modification to an existing facility, co-location facility, aerial mounted wireless/wi-fi equipment, and carrier/cell on wheels (COW). For each of these, the applicant will need to provide a site plan, load calculations, details on the specific equipment to be installed, photo or computer simulations of the proposed facility before and after installation.

Public Noticing

The City will be required to notice properties within a 300-foot radius for macro and micro cell sites, per feedback from the CTAC.

Discretionary Review

WCF PROW Permit applications will be subject to discretionary review by the Public Works Department if they are for:

1. New installation of any form of WCF at any location where there is not currently a WCF
2. New installation of any form of WCF where there is a WCF for another carrier
3. Modification to an existing WCF
4. Addition of a new wireless carrier to an existing and eligible WCF that do result in substantial changes
5. Existing wireless projects that do result in a change to the existing site, substantial or not, that add new antennas or increase output of the WCF.

Discretionary review requires public noticing of 300-foot radius and include a 14-day public comment period. The ordinance provides the criteria for approval under Discretionary Review. Following Discretionary Review and approval, the applicant will need to secure the applicable building and encroachment permits.

Administrative Review

WCF PROW permit applications will be subject to Administrative Review by the Public Works Department if they are for:

1. Routine maintenance to an existing WCF
2. Minor modification to an existing WCF
3. Optional pre-submittal applications (which include a tolling of the shot clock)
4. Co-location involving the addition of a new wireless carrier to an existing and eligible WCF on an existing base station that will not result in a substantial change to the existing facility
5. Existing wireless projects that replace existing equipment with like kind, number, and size equipment and do not increase the output of the WCF.

Administrative Review does not require public noticing and will be treated as an “over-the-counter” permit and will be approved by the Public Works Director or their designee.

Pre-Submittal Review

The Ordinance provides applicants the opportunity to request pre-submittal consultations where the applicant can ask questions, receive guidance and verbal feedback on a proposal. These reviews will include “tolling agreements” where the applicant agrees that the pre-submittal review does not constitute formal review of their application and that any applicable “shot-clock” review time limits will not begin until a formal application is submitted.

Appearance Regulations

Sections 7-4.140 and 7.4.145 provide the design standards and guidelines for all wireless facilities within the PROW. New small cell installations must maintain an unobtrusive design

and be camouflaged when feasible. There shall be no signage or advertising logos outside of small identifying information. Lastly, no facilities may be located immediately in front of, besides, or behind historic resources recognized by the City.

Term and Appeals

Permits will be issued for a term of ten (10) years with two five (5) year extensions. Extensions will be contingent on the applicant maintaining compliance with the original permit(s).

Applicants may appeal a decision by the Public Works Director to the City Manager.

Proposed Master License Agreement

In order to address the anticipated rollout of 5G technology and existing demands from 4G within the City, staff has developed an updated Master License Agreement (MLA) to provide a consistent and comprehensive approach to any requests from telecommunication providers. These MLAs will help the City align its own infrastructure within the PROW with the demands for access from telecommunication providers.

The MLA will not grant rights to any individual City streetlight or pole. They will, however, establish the guiding procedures, terms, and conditions for which the City will require of a telecommunication provider during their deployment of small cell sites. These providers will need to execute permits for their individual sites as described in the proposed Wireless Ordinance.

Each MLA will be brought before the City Council for initial approval, however any other addendums to those agreements will be approved by the City Manager with notice to the City Council, as requested by the CTAC.

Term

MLA's will have a minimum term of ten (10) years with two five (5) year option extensions.

Lease Rate

Under the MLA, the telecommunication lessee will have to pay an initial base annual rent ranging from \$1,500 to \$2,500 per pole based on location, with an increase at a rate of 4% each year thereafter. This initial base annual rent is in line with what cities like Concord (\$1,800-2,500), Vallejo (\$1,200), Santa Monica (\$2,500), and Carlsbad (\$1,500 + 4-6 fibers) charge. Furthermore, the agreement includes a "Favored Nations Clause" that states that if the telecommunications entity pays an annual rent greater than the City's rate range within the Counties of Alameda (less Oakland), Santa Clara (less San Jose), and Santa Cruz, that the City's lease rate will automatically increase to that higher amount.

Processing Payments

The telecommunication provider will have to pay a base fee plus time and materials for the staff costs associated with processing their MLA and associated pole licenses.

Fiber-In-Lieu of Payment

The MLA grants the Public Works Department the discretion to negotiate, as partial consideration paid to the City, a minimum of six strands of fiber and associated conduit that licensee owns to support each licensed pole. The agreement also stipulates that at the end of the term of the MLA, the licensee shall grant to the City by quitclaim or bill of sale title to any fiber strands, conduits, and pull boxes owned by Licensee that the City desires to use at no cost to the City.

Municipal Preference

The MLA requires that in situations where the Licensee has the option to install equipment to either City owned poles or similar third-party poles, that the licensee shall use good faith efforts to attach to City poles.

Commencement of Installation

All installations under a given MLA shall be completed within one year following the mutual execution of an applicable Encroachment Permit.

Security Deposits

Licensee shall pay a security deposit of \$25,000 for the life of the agreement to cover any fees and costs to remedy any default by the licensee over the term of the MLA.

Relocation of Infrastructure

Per CTAC feedback, each Master License Agreement will include provisions to ensure the City retains its flexibility to relocate infrastructure that may have a wireless facility leased on it.

ECONOMIC IMPACT

The proposed regulations will improve the City's ability to address the anticipated increase in small cell applications. This will in-turn result in a quicker deployment of cutting-edge wireless technology leading to more robust wireless broadband services and technologies for the community. Making it easier for telecommunications to complete this work will result in better service to businesses and residents. Additionally, the fiber-in-lieu opportunities will increase the City's municipal fiber goals by helping to build out the "last mile" connections identified in the Fiber Master Plan.

FISCAL IMPACT

There is no immediate fiscal impact associated with implementing this ordinance and MLA. However, given the rent and in-lieu considerations within the MLA, the City has the potential to earn upwards to \$2,500 annually on each of the leased City-owned light poles or gain new conduits and fiber to further the goals of the Fiber Master Plan.

Attachment III is a resolution amending the Master Fee Schedule for this program's fees. The WCF PROW Permit Fee of \$2,500 refundable deposit is based on similar fees other California cities charge. The renewal of these permits is the same rate and any appeals will be \$1,000. MLA's will require a \$4,000 refundable deposit. Each subsequent pole license application fee will be \$2,500 refundable deposit. These refundable deposits will cover the City's reasonable and actual costs incurred in processing the PROW WCF applications, MLAs and pole license applications. Should this deposit be exhausted, the applicant will pay the City for these costs on a staff time and materials basis.

STRATEGIC INITIATIVES

This agenda item supports the Complete Communities Strategic Initiative. The purpose of the Complete Communities Strategic Initiative is to create and support structures, services, and amenities to provide inclusive and equitable access with the goal of becoming a thriving and promising place to live, work and play for all. This item supports the following goals and objectives:

Goal 1: Improve quality of life for residents, business owners, and community members in all Hayward neighborhoods.

Objective 4: Create resilient and sustainable neighborhoods.

Goal 3: Develop a regulatory toolkit for policy makers.

Objective 1: Update, streamline, and modernize zoning & codes.

NEXT STEPS

The second reading of this item is scheduled for the January 15, 2019 City Council meeting. Should the Council adopt the ordinance and resolution, staff will begin to establish the wireless ordinance's program.

Prepared by: Fred Kelley, Transportation Manager
Jay Lee, Associate Planner
John Stefanski, Management Analyst II

Recommended by: Jennifer Ott, Deputy City Manager
Adam Kostrzak, Director of Information Technology
Alex Ameri, Interim Director of Public Works

Approved by:

A handwritten signature in black ink, appearing to read 'K. McAdoo', written in a cursive style.

Kelly McAdoo, City Manager