



# City of Rialto

## Legislation Text

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For City Council Meeting [April 9, 2019]

TO: Honorable Mayor and City Council

APPROVAL: Sean Grayson, Interim City Administrator

FROM: Fred Galante, City Attorney

Request that the City Council **(i)** Adopt **Urgency Ordinance No. 1617**, entitled “An Urgency Ordinance of the City Council of the City of Rialto, California Adding Chapter 11.20 of the Rialto Municipal Code Relating to Wireless Telecommunications Facilities within the Right-of-Way”; **(ii)** Introduce for First Reading **Ordinance No. 1618**, entitled “ An Ordinance of the City Council of the City of Rialto, California Adding Chapter 11.20 of the Rialto Municipal Code Relating to Wireless Telecommunications Facilities within the Right-of-Way”; and **(iii)** Approve **Resolution No. 7494**, entitled “A Resolution of the City Council of the City of Rialto, California, Approving a City Council Policy for Small Wireless Facilities In the Public Right-Of-Way And Corresponding Design Standards”.

### **POWERPOINT (ACTION)**

#### **BACKGROUND:**

In prior decades, wireless antennas and equipment were primarily installed on large towers or “macro -cells” on private property. These deployments are subject to conditional use permit approval under Chapter 18.111 (Wireless Telecommunications Facilities) of the Rialto Municipal Code and are currently prohibited in residential zones.

In recent years, however, wireless communications providers and carriers increasingly seek to place wireless facilities in the City’s public right of way (ROW) on utility poles, streetlights, and new poles. The demand for such wireless installations, particularly small wireless facilities (or “SWFs”), is expected to grow exponentially over the next several years, given the expansion of home streaming video, social media, drones, self-driving cars and the Internet of Things (IoT) serving homes and businesses. To accommodate this expansion, the telecommunications industry is starting to look for small cell 5G (fifth generation) technology. 5G technology is distinguished from the present 4G service by use of low power transmitters with coverage radius of approximately 400 feet. 5G thus requires close spacing of antennas and more of them. ROW street light poles and other poles are, therefore, suited for 5G SWFs.

In addition, Chapter 18.111 of the Rialto Municipal Code, which was codified in 2009, contains outdated standards for dealing with SWFs. This is particularly true in light of significant changes in law implemented by the Federal Communications Commission (FCC). On September 27, 2018, the FCC released a Declaratory Ruling and Third Report and Order (the “FCC Order”) significantly limiting state and local management of SWFs in the ROW (and, in a limited way, SWFs on private

property). In short, the FCC Order does the following:

- Defines SWFs as up to 50 feet in height, including antennas, or mounted on structures no more than 10% taller than other adjacent structures; or that do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; each antenna is no more than 3 cubic feet in volume, and the total associated wireless equipment on one structure is no more than 28 cubic feet in volume.
- Caps all fees that local governments can charge to the actual and reasonable cost of providing service. This limitation applies to fees for SWFs located on private property as well.
- Imposes shot clocks of **60 days** for SWFs added to existing structures (regardless of whether the structure already supports a wireless service) and **90 days** for SWFs proposing a new structure. The shortened shot clocks also apply to applications for SWFs on private property. A clock begins at the time an application is deemed complete for processing and ends when the permits are issued. That means the **entire entitlement process** (including public noticing, public hearings, possible appeal hearings, and engineering review) **must be completed before the clock ends** (unless the applicant is willing to issue a tolling agreement extending the clock).
- Preempts all aesthetic requirements for SWFs in the ROW unless they are (1) reasonable; (2) no more burdensome than those applied to other types of infrastructure deployments; (3) objective; and (4) published in advance. (Effective April 14, 2019.)

This report introduces an ordinance (**Attachment 1**) to provide the regulatory framework and standards for permitting the installation of SWFs within the City's ROW. Due to the impending April 14, 2019 deadline, an urgency ordinance is also being proposed. The proposed ordinance and corresponding design standards have been revised in response to the FCC Order. The proposed ordinance also addresses "eligible facilities requests"-a category of "by-right" installations that were established by the FCC several years ago, but never acknowledged in the City's current version of its Municipal Code. To the extent carriers and providers request new construction of or modifications to macro-cells and towers on **non-ROW property**, however, the provisions of Chapter 18.111 of the Rialto Municipal Code will still apply, to the extent they do not conflict with the proposed ordinance.

This report also proposes a policy for aesthetic standards for SWFs. Per the FCC Order, if such a policy is not adopted and posted on the City's website by April 14, 2019, the City may not impose aesthetic requirements.

#### **ANALYSIS/DISCUSSION:**

The Federal Telecommunications Act is intended to ensure that the public has sufficient access to telecommunication services. Based on this Federal law, a local government cannot prohibit or have the effect of prohibiting the provision of personal wireless services. Further, a local government cannot consider wireless telecommunication facility (WTFs) entitlements based on "the environmental (health) effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions." So the City's role in the siting and design of WTFs is generally limited to aesthetics.

In addition, wireless telecommunications providers are treated as telephone companies under their State franchise conferred in California Public Utilities Code Section 7901, and are entitled to use the public right-of-way (ROW) to deploy their equipment. However, Section 7901 allows the City to condition a wireless permit on (i) aesthetic concerns, (ii) restricting the location of proposed facilities due to public safety reasons or other local concerns or even deny applications in appropriate circumstances, and (iii) to exercise reasonable control over the time, place and manner of “when, where, and how telecommunications service providers gain entry to the public rights-of-way,” including the need for encroachment permits.

The new FCC Order significantly changes Federal law to shorten time frames and other requirements on local review of SWFs in the ROW. Now, if a city does not render a decision on a SWF application within a specified time period (60 days for installations on existing structures, and 90 days for new structures), ***the failure to meet the deadline for action will be presumed to violate federal law.***

On aesthetics, spacing restrictions and undergrounding requirements, the FCC declares that such requirements will not be preempted if they are reasonable, no more burdensome than those applied to other types of infrastructure deployments, and objective and published in advance. In essence, this new standard for aesthetic conditions means that cities can impose aesthetic requirements to the extent they are “technically feasible” for the provider. This is a significant departure from the “least intrusive means” analysis that developed in the Ninth Circuit over the last few decades. The FCC Order purports to overturn the “least intrusive means” standard entirely, with the new standards taking effect on April 15, 2019.

Aesthetic standards implementing the FCC Order must be reasonable, objective, and published ahead of time. If a city does not have “published” its design standards, then it does not appear that any standards can be enforced. It is therefore important that the City update its ordinance with new standards and procedures by April 14, 2019 or shortly thereafter. Thus, staff is proposing the adoption of an urgency ordinance concurrently with the introduction of a matching regular ordinance on the new standards.

#### Proposed Ordinance to Add Chapter 11.20 to the Rialto Municipal Code

The proposed ordinance seeks to balance the community’s need for wireless services, the industry’s need to deploy quickly, and the City’s obligation to maintain safety and protect the aesthetic qualities of our neighborhoods. As drafted, the proposed ordinance would:

- Add a new Chapter 11.20 to the Rialto Municipal Code, Wireless Telecommunications Facilities in the Public Right of Way. For all wireless facility installations in the ROW, the ordinance provides, among other regulations, the permit and review procedures as well as the operation and maintenance standards. The ordinance treats wireless installations in the ROW similar to other installations in the ROW by requiring an encroachment permit. Once the encroachment permit is issued, the carrier may still need to obtain traffic control plans, construction permits and if necessary, a license to attach to City infrastructure.
- The substantially shorter “shot clocks” established by the FCC Order render discretionary review by the planning commission (or any other hearing body) much more difficult, if not logistically impossible. To this end, the proposed ordinance presents an entirely new administrative review process for SWF applications, with public works taking the lead of

administratively reviewing SWF and WTF applications. Pursuant to this new review process, the following types of wireless telecommunications facilities permits (WTFP) are being proposed:

- Administrative WTFP - Applies to SWFs, which are wireless facilities that meet certain requirements including, but not limited to, location, height and size limits, and to proposals that are determined to be an eligible facilities request, which is generally defined as any request for modification to an existing eligible support structure that does not substantially change the physical dimensions of such structure. An administrative WTFP will be processed by the Public Works Department (but can be forwarded to the Planning Commission by the Public Works Director).
- Major WTFP - Applies to any WTF project that does not qualify as an administrative WTFP and allows the Public Works Director to refer any WTFP that does not meet the Administrative WTFP criteria to the Development Services Director for consideration by the Planning Commission at a duly noticed public hearing.
- The new ordinance recognizes, and establishes procedures and standards for, “eligible facility requests” pursuant to Federal law. These are ministerial modifications and collocations that must be approved by right, which provisions were not included in the current the Municipal Code, despite being required by law since 2012.
- Given the short time that the City has to act on these applications under Federal law, having two days to process appeals, staff recommends that the appeals be heard by an independent hearing officer, who can hold hearings on short notice within the short time frame. Doing so also provides an independent level of oversight over the decisions before they become final and subject to challenge.
- The ordinance contains a comprehensive list of permit conditions that will apply to wireless encroachment permits, including insurance requirements, indemnity, performance bond for removal upon abandonment, and maintenance and inspection requirements. The permits are in effect for a term of 10 years, which stems from a State law that allows the City to limit the permits to 10 years; compared to utility poles, for example, which are erected in perpetuity.
- The ordinance requires applicants to provide mailed notices to owners, occupants and multi-family building property managers within 300 feet of proposed SWFs and major facilities before they are approved.
- Finally, the ordinance allows the flexibility needed in the face of rapidly changing wireless laws and technology. Rather than publish SWF design standards in the ordinance, staff proposes that such standards should be adopted as administrative regulations that may be readily and quickly adapted given the frequency and magnitude of changes in law and technology surrounding wireless installations.

#### Policy for Design Standards for SWFs

To accompany the new ordinance, staff has also prepared a separate City Council Policy (**Attachment 5**) that will provide the industry direction on the City’s aesthetic, location and design

requirements for SWFs. For example, the proposed design standards recommend that when there is a choice in location, carriers should choose to site on a pole or street light that is between structures and not immediately adjacent to a structure, that paint and design should blend with surrounding structures, that signage should be limited, and that lighting be prohibited unless required by the Federal Aviation Administration. Once approved, the policy will be promptly published by staff on the City's website as required by the FCC Order.

#### Urgency Ordinance

The City Council is being asked to adopt an urgency ordinance (in addition to introducing the matching non-urgency ordinance) due to the time constraint to enact legislation prior to the April 14, 2019 deadline. Government Code § 36937 states that an ordinance becomes effective immediately if the City Council finds, by a four-fifths vote, that the ordinance is for the immediate preservation of the public peace, health, or safety and contains a declaration of the facts constituting the urgency.

In this case, the urgency is the fact that if a city does not have "published" design standards prior to April 14, 2019, then it does not appear that any standards can be enforced. The City must have an ordinance in place by that date to ensure that the updated design standards can be enforced. The City Council can make findings that allowing the permitting of WTFPs without regulations and limitations specifically crafted to further the City's particular needs and character, constitutes a threat to the health, safety, and welfare of the City's residents.

If the City Council adopts the urgency ordinance (**Attachment 2**), the regular ordinance (**Attachment 3**) will return for the second reading at the next meeting on April 23, 2019. This process ensures that (1) the City will have an ordinance in effect prior to April 14, 2019; and (2) the City will also have ordinances in effect through the standard process (two readings plus 30 days) in the unlikely event of a successful challenge to the validity of the urgency ordinance.

It is important to note that it is highly likely that the regulations may change in the coming months for various reasons including technology changes and any outcome on the legal validity of the FCC orders that are currently being litigated. Therefore, the proposed ordinance may be subject to further amendments later this year.

#### **ENVIRONMENTAL IMPACT:**

The requested action does not constitute a "Project" as defined by the California Environmental Quality Act (CEQA). Pursuant to Section 15378(a), a "Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. According to Section 15378(b), a Project does not include: (5) Organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment. Additionally, pursuant to Section 15061(b)(3), the proposed policy is exempt from CEQA review as there is no possibility that the policy may have a significant effect on the environment, insofar as the terms and scope of city discretion are guided by existing State and Federal law. The policy does not authorize any specific development or installation on any specific piece of property within the City's boundaries.

The installation of SWFs will 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 ROW, and subject to various siting and design preferences to prevent aesthetic impact to the extent feasible.

### **GENERAL PLAN CONSISTENCY:**

Approval of this action complies with the following City of Rialto Guiding Principles, General Plan Goals and Policies:

*Goal 2-11: Design streetscapes in Rialto to support and enhance the City's image as a desirable place to live, work, shop, and dine.*

*Goal 2-12: Design new streets to be pedestrian friendly.*

*Goal 2-21: Ensure high-quality planned developments in Rialto.*

*Goal 3-6: Require that all developed areas within Rialto are adequately served with essential public services and infrastructure.*

### **LEGAL REVIEW:**

The City Attorney has prepared and approved the staff report, Ordinances, Resolution and City Council Policy for Small Wireless Facilities.

### **FINANCIAL IMPACT:**

No fiscal impacts are associated with the proposed ordinance and policy. However, installation of wireless communications facilities would be subject to fees and yield a small potential lease revenue. A resolution to adopt fees related to the wireless communications facilities is being prepared and will be brought back to the City Council for consideration and approval at a later time.

### **RECOMMENDATION:**

Staff recommends that the City Council:

- Adopt an Urgency Ordinance, entitled "An Urgency Ordinance of the City Council of the City of Rialto, California Adding Chapter 11.20 of the Rialto Municipal Code Relating to Wireless Telecommunications Facilities within the Right-of-Way" (**Attachment 2**);
- Introduce for first reading an Ordinance, entitled "An Ordinance of the City Council of the City of Rialto, California Adding Chapter 11.20 of the Rialto Municipal Code Relating to Wireless Telecommunications Facilities within the Right-of-Way" (**Attachment 3**); and
- Adopt a Resolution Approving a City Council Policy for Small Wireless Facilities In the Public Right-Of-Way And Corresponding Design Standards" (**Attachment 4**).