

MEMORANDUM
CITY OF SAN MATEO - CITY ATTORNEY'S OFFICE

DATE: April 6, 2018

TO: Steven Machida, Deputy Public Works Director

CC: Brad Underwood, Public Works Director

FROM: Gabrielle Whelan, Assistant City Attorney

RE: City's Ability to Adopt a Moratorium on Small Cell Installations

At its March meeting, the City's Public Works Commission requested additional legal information on 1) the City's ability to adopt a moratorium on "small cell" installations¹ and 2) the ability of telecommunications companies to install "small cells" in public utility easements in backyards. This memo addresses those questions and also summarizes the applicable federal and state laws.

I. Summary of Applicable State and Federal Laws

A. Federal Law

1. Telecommunications Act of 1996

The federal Telecommunications Act of 1996 (47 United States Code section 332) requires that cities approve wireless telecommunications facilities within a "reasonable time." The Federal Communications Commission ("FCC") has adopted standards for what will constitute a "reasonable time."

2. FCC Order 14-153

Per FCC Order 14-153, a "reasonable time" is 90 days for a collocation application and 150 days for any other application. These deadlines are referred to as the "shot clock." FCC Order 14-153, which was established in October of 2014, provides that the "shot clock continues to run regardless of any moratorium." FCC Order 14-153 further provides:

¹ "Small cells" are low-powered radio access nodes that have a range of 10 meters to a few kilometers.

. . . In those instances in which a moratorium may reasonably prevent a . . . municipality from processing an application within the applicable timeframe, the . . . municipality will, if the applicant seeks review, have an opportunity to justify the delay in court.

B. State Law

1. Assembly Bill 57

In 2015, Assembly Bill 57 added Government Code Section 65964.1 to the state Government Code. Section 65964.1 now provides that a collocation or siting application for a wireless telecommunications facility will be “deemed approved” if a city “fails to approve or disapprove the application within a reasonable period of time in accordance with the time periods and procedures established by applicable FCC decisions.” When read together with the FCC Order discussed above, this means that – in California -- “small cell” applications will be deemed approved – regardless of a local moratorium – if a city fails to approve or deny the application within the timeframes set forth in the FCC Order.

II. The City’s Ability to Adopt a Moratorium on “Small Cell” Installations

In most states, cities have the ability to adopt moratoria upon the processing of “small cell” applications. This is because FCC Order 14-153 provides that cities have an opportunity to justify a processing delay in court before an application will be “deemed approved.” However, in California, Assembly Bill 57 provides that applications will be “deemed approved” if the “shot clock” deadline has passed. This is discussed above.

Also, some cities have moratoria against street cuts within a specified number of years after a street has been re-surfaced. These are legally defensible. In some instances, such “street cut” moratoria may affect a telecommunications provider’s ability to do an installation.

III. “Small Cell” Installations in Public Utility Easements in Private Backyards

The Public Works Commission asked under what circumstances a telecommunications provider would be allowed to install a “small cell” facility within the public utility easement in a private backyard. This will depend upon the language of each individual easement. For instance, some older public utility easements are limited to “communications equipment related to the electric distribution business.” This would not be broad enough to encompass a “small cell” installation. Other public utility easements could be written more broadly to allow any public utilities to install equipment within the easement. If allowed by virtue of the public utility easement, a “small cell” installation could be regulated by the City via its Zoning Code. Currently, Section 27.08.030 of the City’s Zoning Code requires Site Plan and Architectural Review for “any building, . . . or an extension, alteration, or addition of or to an existing building” Section 27.04.075 defines a “building” to mean:

any structure with substantial walls and roof securely affixed to the land and entirely separated on all sides from any other structure by space or by walls in which there are no communicating doors, windows, or opening, and which is designed or intended for the shelter, enclosure or protection of persons, animals, chattels or property of any kind.

This definition would encompass sheds or cabinets, but not other elements of a “small cell” installation. Therefore, if the City wishes to regulate all elements of a “small cell” installation in private backyards, the City’s Zoning Code should be amended.