

## **Background and Summary**

### **1. Introduction & Background**

This draft ordinance arises from significant changes in federal laws that govern local authority over wireless facilities deployment. On February 22, 2012, Congress enacted Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, which generally provides that State and local governments “shall approve, and may not deny” a request to collocate on or modify wireless transmission equipment on an existing wireless tower or base station so long as the proposal does not substantially change the physical dimension of that wireless tower or base station.

On December 17, 2014, the Federal Communications Commission adopted new regulations to accelerate wireless infrastructure deployment and implement Section 6409(a). These regulations generally (1) impose new limits on wireless permit applications and how municipalities review them, (2) define a “substantial change” with a one-size-fits-all cumulative limit on physical size increases, and (3) deem a permit granted when a municipality fails to act on the application within 60 days after submittal. The new regulations also included new procedural rules for sites not subject to Section 6409(a).

Given the broad changes at the federal level, the current wireless facilities standards and procedures in the Ojai Municipal Code no longer effectively regulate wireless deployments in a manner consistent with law. In response, staff, working with outside counsel, Telecom Law Firm, PC, has prepared a draft ordinance and this summary for consideration of the Planning Commission, City Council, and the public.

### **2. Summarized Ordinance Provisions**

#### **2.1. Definitions.**

New federal regulations include several new legally operative terms that municipalities must understand for compliance purposes. This section in the ordinance has been updated to reflect legally operative terms in accord with the FCC rules, and provide a reference for future staffers, officials, commissioners, and councilmembers.

#### **2.2. Applicable facilities.**

Section \_\_.030 is intended to broadly apply to all structures and equipment used to provide wireless services. The exemptions in subsection (c) follow from standard exemptions for cities, and special federal regulatory treatment afforded to amateur radios and certain over-the-air-receiving-devices (*e.g.*, home satellite dishes).

#### **2.3. Application procedures in general.**

Section \_\_.040 requires a permit for all wireless facilities and changes to facilities, and establishes basic application review procedures that govern all permits contemplated in the ordinance.

### **2.3.1. Subsection (a)**

Subsection (a) divides all potential projects into two categories that depend on whether Section 6409(a) mandates approval or not. The ordinance requires a conditional use permit when Section 6409(a) does not mandate approval, and a design review permit when it does.

### **2.3.2. Subsection (b)**

Subsection (b) requires applicants to submit the initial permit application at a prior-scheduled appointment with staff from each department that will require an approval for the project. This procedure, adopted in several other California cities, helps to organize permit application intake, coordinate efforts between departments, and spot potential issues as soon as possible.

### **2.3.3. Subsection (c)**

Subsection (c) articulates the recently updated federally-mandated procedures to deem a wireless permit application incomplete. This provision provides practical guidance intended to assist planners understand somewhat complex rules.

## **2.4. Regulations for facilities subject to a conditional use permit.**

Section \_\_.050 sets out standards and procedures for a conditional use permit review under this ordinance. This section articulates location and design preferences that guide this discretionary review.

### **2.4.1. Subsection (a)**

Subsection (a) sets out detailed permit application content requirements. Under new federal rules, a permit application cannot be deemed incomplete based on materials or information not “publically-stated” before submittal. In essence, permit applications must explain the required information in explicit detail. This provision also allows the Director to expand or waive any requirement.

### **2.4.2. Subsection (b)**

Subsection (b) articulates location and design guidelines and standards for all facilities subject to the ordinance. In general, the ordinance expresses a preference for collocated facilities over new facilities, stealth or concealed facilities over visible facilities, and for facilities in industrial or commercial zones over facilities in open space and residential zones. Facilities must also conform to the generally applicable regulations (such as zone height, setbacks, and noise) for the proposed zone, and all applicable building and public safety regulations.

### **2.4.3. Subsection (c)**

Subsection (c) articulates specific design preferences for wireless towers. The ordinance expresses a local value for wireless towers that blend with the natural and man-made backdrops in Ojai with the lowest feasible visual profile.

### **2.4.4. Subsection (d)**

Subsection (d) articulates specific design preferences for base stations (*i.e.*, wireless antennas mounted on non-tower structures). The ordinance expresses a local values for base stations that architecturally integrate with the support structure, or that use the natural building features to conceal the transmission equipment.

### **2.4.5. Subsection (e)**

Subsection (e) articulates specific design preferences for facilities in the public rights-of-way. Under California Public Utilities Code section 7901.1, as interpreted in *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, the municipal power to exercise “reasonable time, place and manner control” over how wireless providers access the rights-of-way includes aesthetic controls. The ordinance prefers facilities on arterial and collector streets over residential streets, undergrounded equipment over above-ground equipment, and for equipment mounted as close to the pole or tower as feasible.

### **2.4.6. Subsection (f)**

Subsection (f) restates factors from the former Section 10-2.1712(c)(4) that the planning commission may consider when it evaluates whether to grant a conditional use permit. However, the ordinance includes revisions to allow the planning commission to consider other factors articulated in the ordinance, and does not require the planning commission to specifically find that it need not consider a listed factor. Given that no two wireless sites always involve the same considerations, a more flexible approach is intended to benefit the City and the applicants alike.

## **2.5. Regulations for facilities subject to a design review permit.**

Section \_\_.050 deals exclusively with design review permits (*i.e.*, permits submitted for review under Section 6409(a)). Unlike projects subject to a conditional use permit, federal law preempts local discretion over these projects so long as certain criteria are met. This section sets out standards and procedures—consistent with federal law—to determine whether a project submitted for design review qualifies for mandatory approval. Further procedures are included for cases in which those projects should be approved, and in cases when those projects should be denied.

### **2.5.1. Subsection (a)**

Subsection (a) provides a top-level overview to explain the need for the regulations in this section. These provisions are also intended to provide context and primary source citations to

future planners, officials, commissioners, and councilmembers that must read, understand, and apply these regulations.

### **2.5.2. Subsection (b)**

Subsection (b) explains the shorter, 60-day time for review for Section 6409(a) projects. This provision also underscores that *all other permits and approvals from all other departments* must be approved or denied within 60 days or federal regulations deem the permits granted.

### **2.5.3. Subsection (c)**

Subsection (c) exists because federal regulations impose new limits on permit application content when Section 6409(a) applies. These provisions are designed to solicit only permitted information under the new federal rules. At the same time, subsection (c) requires applicants to disclose the relevant information needed to determine whether a proposed collocation or modification qualifies for mandatory approval under Section 6409(a).

### **2.5.4. Subsections (d), (e) and (f)**

Subsections (d), (e) and (f) each set out the findings of approval for a design review permit based on new federal regulations. Section 6409(a) mandates approval for an “eligible facilities request” to collocate with or modify an existing wireless facility, so long as the proposal does not “substantially change the physical dimensions of the existing wireless tower or base station.” The FCC recently set out a relatively complex test for what constitutes a substantial change that depends on the structure type and location. These subsections break down these complex regulations into a checklist format that allows the Director (or a designee) to determine whether federal law mandates approval.

The substantive provisions track the language used in the FCC rules, and the checklist format is intended to provide clear guidance to both applicants and reviewers.

The provisions use the phrase “may not deny” rather than “shall approve” so that the Director does not technically violate the Code in the event that, for some unforeseen reason, the Director fails to affirmatively approve the application. This deviation from the statutory language in Section 6409(a) does not raise a legal concern because the FCC rules “deem granted” any project subject to Section 6409(a) that a local government does not affirmatively approve within 60 days from submittal.

### **2.5.5. Subsection (g)**

Subsection (g) provides self-executing conditions of approval that attach to all design review permits under this ordinance. These “default” conditions are intended to protect the City in the event that a design review permit becomes deemed-granted. In the normal case where the Director (or designee) will affirmatively approve a design review permit, additional conditions may be added so long as such conditions do not violate state or federal law.

### **2.5.6. Subsection (h)**

Subsection (h) establishes a procedure to ensure that no controversies arise over projects submitted for a design review permit, but that should have been submitted for a conditional use permit. The primary concern is an open question about whether a permit application became deemed granted after 60 days passed without an approval or denial. The “denial without prejudice” closes the issue because a denied permit cannot possibly become deemed-granted. The grounds for denial derive from the FCC’s own criteria for projects that do not qualify for mandatory approval under Section 6409(a).

The fact that the denial comes without prejudice to the application is critical. After such a denial, the applicant can immediately resubmit the permit application—either under the conditional use permit process for the proposed site or under the same design review permit process but with a modified design to qualify for that process.

### **2.6. Independent consultant review.**

This provision allows the Director to retain outside help when needed and passes the reasonable costs onto the applicant. Costs are recovered through a deposit, and the applicant must pay all costs to the City before it may receive a permit.

### **2.7. Maintenance; Removal of abandoned facilities.**

These maintenance provisions provide general maintenance provisions common to other wireless ordinances in California. The removal provisions come from the current ordinance.

### **2.8. Ownership transfers.**

This provision requires the permit holder to provide written notice to the City after it transfers site ownership to a new transferee. The City has a legitimate interest in this information for code-enforcement purposes.

### **2.9. Permit terms; permit conditions.**

Section \_\_.110 establishes a maximum permit term and provides procedures for permit renewals. Subsection (a) complies with California Government Code Section 65964, which provides that public agencies must grant permits for at least ten years unless a public safety or substantial land use reasons justify a shorter term. Subsections (b) and (c) provide procedures for permit renewals and allows the City to attach reasonable conditions to permit renewals to promote the purposes in the ordinance.

### **2.10. Exception from standards.**

This provision creates a general exception to all standards in the ordinance, and operates as a “safety valve” to protect the ordinance as a whole from a facial or as-applied challenge. Under the Telecommunications Act of 1996, local governments cannot explicitly or effectively prohibit

personal wireless communications services. In the Ninth Circuit, an ordinance violates this statute when it prevents a wireless provider from mitigating a “significant gap” in its own service coverage through the “least intrusive means.”

The “exception from standards” is a mechanism that allows a wireless provider to build a site that does not conform to the standards in the ordinance, but only when it demonstrates that it qualifies for the exception under the conditions established by the Ninth Circuit, and only to the extent that it needs to deviate from those standards.

**2.11. Conflicts with other ordinances or regulations; Severability.**

Sections \_\_.130 and \_\_.140 contain standards provisions for newly adopted ordinances. Section \_\_.130 ensures that more recent regulations control over older regulations. Section \_\_.140 protects the ordinance as a whole in the event that any court determines that an individual provision violates or conflicts with a State or federal law.

**3. Conclusion**

The purpose of the workshop is to review the regulatory framework within which the City must operate, and to review the provisions of proposed new wireless communication facilities ordinance for the City of Ojai.