



## Legislation Text

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**File #:** CPC CA 20-00024, **Version:** 3

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Ordinance No. 20-30 amending Chapter 3 (Public Property and Public Works) of City Code establishing the allowance of small cell facilities in the right-of-way

(Legislative)

**Presenter:**

Morgan Hester, Principal Planner

Peter Wysocki, Director of Planning and Community Development

**Summary:**

The proposed ordinances amend City Code Chapter 7 related to Wireless Communication Facilities (WCF), currently referenced as CMRS (Commercial Mobile Radio Service), and Small Cell Facilities. The ordinances will both amend existing regulations for WCFs and establish regulations specific to Small Cell Facilities. The ordinances also codify requirements that are compliant with the Federal Spectrum Act (47 USC § 1455).

Expansion on the proposed ordinances is found in the following sections of this report. The full language of the proposed ordinance amendments are attached.

**Previous Council Action:**

On August 26, 2019, representatives from the Planning Department, Office of Innovation, and the Office of the City Attorney presented at City Council Work Session to provide an overview on 5G technology including what it is and how it works, what Federal and State regulations are in place and how they impact local municipalities, and information on forthcoming City regulations.

The four proposed ordinances were introduced to City Council at the April 27, 2020 Work Session. As understood by Staff, the following questions came from general discussion at the meeting -

- Question - Will Home Owner's Associations have involvement in the WCF and Small Cell Facility application processes as it pertains to meeting private covenants?
  - Staff Response - The City Attorney's Office has advised against incorporating review by owners' associations. Incorporating review by owners' associations may result in legal challenges due to "shot-clocks" or actions by the association, which may not comply with State or Federal laws or regulations. Additionally, the City may be drawn into disputes between property owners and associations.
- Question - Is there a mechanism in place to avoid issues with the siting of Small Cell Facilities and ensuring proposed infrastructure will aesthetically mimic what is within the immediate vicinity?
  - Staff Response - Design Standards have been established and are publicly published on the Office of Innovation's website. Language in both the Standards and proposed ordinance amendments establish aesthetic criteria that would not allow for the

expressed concerns from coming to fruition (ie - pole types or colors not matching adjacent infrastructure or locating new poles closer than the established separation distance to an existing pole).

- Question - Can homeowners opt out of having Small Cell Facilities near their homes?
  - Staff Response - Pursuant to Federal and State regulations, local jurisdictions cannot preclude the location of new Small Cell Facilities in the public right-of-way unless the proposal does not meet established Federal, State, or local regulations. Homeowners are not able to opt out of the locating of new infrastructure within the public rights-of-way.
- Question - Clarification to Section 7.4.610(K) 'Administrative Waiver' is needed to eliminate the perception that Applicants are able to request non-compliance with proposed regulations without providing clear reasoning as to why they are unable to meet requirements.
  - Staff Response -This section has since been revised to clarify when a waiver can be requested and what stipulations must be met in order for the Manager to consider the granting of a request.
- Question - Can Small Cell Facilities be appealed?
  - Staff Response - Small Cell Facility requests are not proposed as being appealable. The City Attorney's Office is reviewing whether these facilities should be appealable, due to State shot clock regulations.

The first City Council reading of the four ordinances was held on May 12, 2020. Council discussion focused on requiring applicants to submit the same documents that are provided to the FCC with their WCF applications. The Office of the City Attorney has reached out to outside legal counsel who assisted in the drafting of the ordinances for guidance on what is filed with the FCC regarding emissions and how to incorporate the requirement for the site-specific applications. Additionally, the proposed definition of 'Radio Frequency Emissions Letter' was somewhat vague and will be revised to include a requirement for providing their FCC-approved emissions letter. Proposed ordinance language, found in CPC CA 20-00019, will be revised prior to the second reading on May 26, 2020.

Staff was asked to research if facilities, both WCFs on private property and Small Cell Facilities in the public right-of-way, degrade over time and if Providers regularly test their active sites to ensure FCC compliance is maintained throughout the span of the facilities' operation. Research is ongoing and an update will be provided to the Council once information from the telecommunication industry has been received.

### **Background:**

The Land Use Review (LUR) Division of the Planning Department, with assistance from the Office of Innovation and the Office of the City Attorney, have collaborated to bring four ordinance amendments forward to City Council to establish compliance with FCC regulations and state statutes for Wireless Communication Facilities (WCFs) and Small Cell Facilities, specifically Chapter 7, Part 3 of Article 2 and Part 6 of Article 4, of the Zoning and Subdivision Ordinance.

The first amendment, CPC CA 20-00019, repeals and reorganizes CMRS (Commercial Mobile Radio Service) regulations by renaming to WCF (Wireless Communication Facilities) and incorporating standard modifications, including Small Cell Facilities.

The second amendment, CPC CA 20-00020, adds a new Part 7 to Article 4 by establishing Eligible

Facilities Requests, regulations specific to modifications to cellular towers on private property, in accordance with Federal regulations.

The third amendment, CPC CA 20-00023, cleans up references throughout Chapter 7 that will no longer be applicable after the adoption of the proposed ordinances.

The fourth amendment, CPC CA 20-00024, adds language into Chapter 3 permitting Small Cell Facilities in the public rights-of-way and establishing that any associated fees and application process will be established Administratively.

The Telecommunications Act of 1996 establishes that no local government can prohibit an entity from providing telecom service within their jurisdiction. Colorado state law and federal regulations require that municipalities act on applications for deployment within a reasonable period of time - usually 90 or 150 days.

## **Wireless Communications Facilities (WCF) and Small Cell Facilities (Reference - Ordinance\_WCF & Small Cell Facilities)**

### Wireless Communications Facilities (WCF)

Wireless Communication Facilities (WCFs) that are not Small Cell Facilities are typically located on private property and are subject to zoning requirements including dimensional standards. As defined in the proposed ordinance, varying types of WCFs are permitted in residential and non-residential zoning districts.

Regulations specific to WCFs are largely remaining the same aside from minor revisions to provide clarity to existing standards. Notable changes include -

Renaming of the application types (Section 7.4.607 'Processing of WCF Applications') -

- CM1 - Conditional Use request that is heard through City Planning Commission, 1,000' notification radius from proposed WCF
- CM2 - Administrative review in accordance with Development Plan application and review procedures
- CM3 - Expedited administrative review in accordance with Development Plan application and review procedures
- CM4 - Eligible Facilities Requests (new addition)
- CM5 - Small Cell Facilities (new addition)

Changes to 7.2.302 'Definitions of use types' -

- Removal of Commercial Mobile Radio Service (CMRS) Facility and replaced with Wireless Communications Facility (WCF). Facility types have been outlined within the definition for clarity.
- Inclusion of 'Small Cell Facility' as a type of WCF.

WCF Setbacks and Separation -

- Current Code
  - Freestanding facilities shall be located no closer than a distance equal to 5 times their height from residentially zoned properties or used for single-family purposes

- Proposed Changes
  - Towers shall meet the greater of the following minimum setbacks from all property lines
    - Setback for a principal building within the applicable zoning district
    - 25% of the facility height, including WCFs and equipment, or
    - 5 times the town height, including antennas, if the town is in or adjacent to a residential district of school site, unless a conditional use is approved

#### Affidavits

- Required in the event a facility is abandoned or unused for a period of 12 months, outlining that the applicant and property owner are responsible for its removal. Small Cell Facilities will be exempt from this requirement as there are additional requirements in place for those Facilities that meet a similar intent.

Creation of PART 6: WIRELESS COMMUNICATIONS FACILITIES (WCF) REGULATIONS to provide additional clarity by restructuring existing regulations -

7.4.601: PURPOSE AND INTENT:

7.4.602: PERMIT REQUIREMENTS:

7.4.603: DEFINITIONS:

7.4.604: APPLICABILITY:

7.4.605: OPERATIONAL STANDARDS:

7.4.606: ZONES ALLOWED:

7.4.607: PROCESSING OF WCF APPLICATIONS:

7.4.608: REVIEW PROCEDURES AND REQUIREMENTS:

7.4.609: SITE SELECTION REQUIREMENTS:

7.4.610: DESIGN STANDARDS:

#### Small Cell Facilities

As defined through State regulations, a Small Cell Facility is a WCF where the antenna is housed within an enclosure of no bigger than three cubic feet in volume. If not enclosed, all infrastructure must fit within an imaginary enclosure of the same size. Primary enclosures are no larger than seventeen cubic feet in volume.

Pursuant to Colorado law, Telecommunication Providers have the right to locate Small Cell Facilities on light poles and traffic signals within the public Rights-of-Way. Zoning regulations do not apply to Small Cell Facilities. Additionally, local governments must approve Small Cell sites before Providers can deploy. Standards specific to Small Cell Facilities currently do not exist; however, applications for nearly 200 new facilities within the ROW have been reviewed and approved based on existing Code. The ordinances being brought forward are in response to the Federal regulations and provide a way for Staff at the local level to manage applications and deployment of this new technology.

FCC 18-133 requires that local governments with aesthetic standards publish those standards. Section 7.6.610 'Design Standards' establishes the allowance for additional design standards, through administrative regulations, to be enacted. These requirements are required to be objective and posted in advance. Although the standards are not adopted through Ordinance, Design Standards have been published to the newly created Telecommunications website, housed on the Office of Innovation website. The Design Standards establish requirements such as stealth design techniques (color/material/texture match to surrounding infrastructure), no artificial lighting, spacing and height limitations. City and Colorado Springs Utilities Staff worked closely together to ensure all

proposed requirements met existing standards of existing pole inventory and would not be a structural determinant to infrastructure.

Although Staff maintains an internal database of all applications that have been reviewed and approved, Providers will be required to annually provide a map of existing and future facilities through this proposed ordinance amendment.

The application process for Small Cell sites begins with the execution of a Master License Agreement (MLA) between the telecom Provider and the City/CSU through the Office of Innovation. This document outlines standards and expectations that both the City/CSU and the Provider must comply with throughout the time the infrastructure is within the City ROW. To make an application, a Provider will submit a Site Supplement License, as outlined in the MLA, not a Revocable Permit, as the sites are not revocable in nature. In the event a site does need to be revoked, there is specific language outlined in the MLA as to what that process entails. The review process is largely the same as that of the Revocable Permits, specifically how the permit is submitted and reviewed by City divisions/departments. State regulations establish a mandatory shot clock of 90 days, which has been in effect but will now be codified through this proposed amendment. It should be noted that if the shot clock for Small Cell Facilities runs out, this ordinance amendment clarifies that the application is NOT automatically approved.

Appeals specific to Small Cell Facilities are not possible due to review time constraints and the requirement that municipalities must allow for the infrastructure within the right-of-way, echoing what has been established in the Telecommunications Act of 1996. However, through the establishment of published Design Standards and coordination with review Staff, Providers have been able to address concerns due to siting and aesthetics with applications that have been approved thus far. This differs for appeals regarding applications on private property (WCFs) as the land use does not have regulations requiring that local jurisdictions allow WCFs anywhere as they are subject to zoning and dimensional regulations on private property; therefore, appeals are possible for WCFs.

### **Eligible Facilities Requests (Reference - Ordinance\_Eligible Facilities)**

The Eligible Facilities Requests Ordinance provides codified regulations regarding the following - (1) Modifications to non-small cell facility sites in compliance with the Middle Class Tax Relief and Job Creation Act of 2012, Section 6409, (2) defines 'Substantial Change' similarly to what is codified in Section 6409, (3) establishes submittal requirements and the review process, and (4) establishes shot clocks for reviewing applications and associated "tolling".

Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 mandates that a State or local government approve certain siting requests for modifications and collocations of equipment on an existing tower or base station that does not result in a substantial change of the sizing of the tower or base station. A substantial change is defined as a modification that substantially changes the physical dimensions of a support structure.

The shot clock for review is established as 60 days (pursuant to Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012). The review period begins once the application is filed and may be tolled by mutual agreement or in the event, the application is incomplete. 'Tolling' essentially starts and stops the review time; for example, if an application is made and on day 5 review Staff identifies the application is incomplete, the shot clock will pause at 55 days, and will restart once the

submittal is complete. To further elaborate, the jurisdiction must provide written notice within 30 days of receipt of the application if anything is still required. The review period continues running once the application is complete.

Due to the constrained 60-day time frame for Eligible Facilities Requests, appeals are not feasible; therefore, the 'Reconsideration' clause (7.4.703(E) 'Review Procedures and Requirements') has been proposed as an opportunity for applicants to request a denial to be revisited if sufficient evidence that Staff made an error in their review.

Draft language for Eligible Facilities Requests requires that the applicant provide proof of any previous permitting, establishing the allowance for the facility.

### **Cleanup Ordinance (Reference - Ordinance\_Land Use Tables)**

This proposed amendment cleans up all Wireless Communication Facilities, Small Cell Facilities, and Eligible Facilities Request references in the permitted, conditional, and accessory use sections throughout Chapter 7, ensuring the new language is captured throughout the Code.

### **Small Cell in the ROW Allowance (Reference - Ordinance\_Public Property)**

Pursuant to Colorado law, Telecommunication Providers have the right to locate Small Cell Facilities on light poles and traffic signals within the public Rights-of-Way. This proposed amendment establishes that Small Cell Facilities may be located within City rights-of-way, pursuant to requirements of Chapter 7, by creating a new Section to Part 2, Article 2, of Chapter 3 (Public Property and Public Works).

Additionally, this proposed amendment includes language that Administrative fees and processes can be established for Small Cell Facilities to allow for the utilization of the right-of-way.

### **Stakeholder Process**

City Planning, Office of Innovation, and the Office of the City Attorney have worked with Telecommunication Providers in the establishment of clearer telecommunication regulations since early 2019. This includes the three proposed amendments to Chapter 7 and proposed amendment to Chapter 3, a Master License Agreement that must first be executed between the City/CSU and Provider prior to the installation of Small Cell infrastructure, and Small Cell Design Standards.

The language that has been proposed has been tailored to Colorado Springs as permitted through FCC and State regulations. Small Cell Facilities cannot be precluded from locating with the public rights-of-way and the proposed regulations are sensitive to what can and cannot be regulated at the local jurisdiction level.

Ordinance drafts were sent to Providers for review comments.

### **Financial Implications:**

New small cell application fees were brought forward to the Budget Committee on April 14, 2020.

The FCC has established a safe harbor amount for application fees. The amounts are \$1,000 application fee for new poles and \$500/5 sites for new nodes. However, municipalities are not

restricted to setting fees based on the FCC established safe harbor rate, as long as the municipality can demonstrate that fees are based on actual work effort and recovering our costs appropriately. Planning Staff provided the Budget Office with data on what reviewers are involved, how much time it takes them to review, and how many iterations applications go through for reviews. This was used to establish low, high, and average scenarios.

The proposed fee structure allows for Providers to batch applications and an incentive for doing so if the desire is to submit up to 10 sites, as their average cost per site will decrease. This proposal includes \$1,500 per site for up to 5 sites (\$7,500) plus an additional \$1,000 for 5 sites (\$5,000), totaling 10 sites (\$12,500 total if 10 sites are submitted on one application) and was determined based on an average review time, at an average 70% cost recovery for an application with 10 sites, and 84% cost recovery if only up to 5 sites are submitted on one application.

If the vendor submits the full 10 sites allowed on one application (\$1,000 per site additional fee for the 6<sup>th</sup>-10<sup>th</sup> site), the average fee for each site will be \$1,250. The cost recovery scenarios are as follows:

- \$1,500 per site (up to 5 sites) - **84% cost recovery**
- Average of \$1,250 per site (10 sites per application) - **70% cost recovery.**

City Staff is anticipating more applications to be submitted in 2020 than have been in the past year as all necessary components for establishing a clear process will be in place by Summer 2020. With that said, there have been discussions with Providers proposing submitting multiple sites within the City limits. Staff anticipates 300 to 500 new sites being submitted for review, which accounts for a potential of \$375,000 to \$625,000 in revenue, based on the average of \$1,250 per site.

Discussions at the April 14, 2020 Budget Committee resulted in the desire to potentially set a higher fee based on the cost recovery. Because this is an Administrative fee and therefore does not require a Resolution, discussion of the final fee is ongoing. The establishment of any amendments to the Fee Schedule will not prevent any ordinance approval from moving forward as the processes are independent from one another.

**Board/Commission Recommendation:**

The items were presented to City Planning Commission at the February 20, 2020 regular meeting. The Commission unanimously (8-0) recommended the ordinances for approval. Comment was provided by the Commission to remove height limitations as it is addressed through other ordinance language.

**Alternatives:**

The Council may make changes to the proposed draft ordinances as deemed necessary.

Refer the changes to the City Planning Commission for additional vetting and recommendation.

Approve the proposed draft ordinances as presented.

**Proposed Motion:**

CPC CA 20-00024

Adopt an Ordinance amending Part 2 (Use and Occupancy of Public Property) or Article 2 (City

Properties) or Chapter 3 (Public Property and Public Works) of the Code of the City of Colorado Springs, 2001, as amended, permitted to allowing Small Cell Facilities in the right-of-way

**Summary of Ordinance Language**

An ordinance amending Chapter 3 (Public Property and Public Works) of City Code establishing the allowance of small cell facilities in the right-of-way