

ORDINANCE 2019-12

AN URGENCY ORDINANCE OF THE CITY OF ENCINITAS, CALIFORNIA, AMENDING ENCINITAS MUNICIPAL CODE CHAPTER 9.70 FOR THE REGULATION OF SMALL WIRELESS FACILITIES AND OTHER INFRASTRUCTURE DEPLOYMENTS IN THE PUBLIC RIGHTS-OF-WAY

WHEREAS, pursuant to the California Constitution, Article XI, section 7; California Government Code section 37100 and other applicable law, the City Council of the City of Encinitas ("City Council") may make and enforce within its limits all local, police, sanitary and other ordinances, resolutions and other regulations not in conflict with general laws;

WHEREAS, California Government Code sections 36934 and 36937 authorize the City Council to adopt an urgency ordinance for the immediate preservation of the public peace, health, or safety;

WHEREAS, on September 12, 2001, the City Council adopted Ordinance No. 2001-11, which added Chapter 9.70 to the Encinitas Municipal Code to regulate wireless communication facilities;

WHEREAS, since the City adopted chapter 9.70, significant changes have occurred in federal and state laws that affect local authority over personal wireless service facilities and other related infrastructure deployments, which includes, without limitation, the following:

- On November 18, 2009, the Federal Communications Commission ("FCC") adopted a Declaratory Ruling in the proceeding titled *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, 24 FCC Rcd. 13994 (rel. Nov. 18, 2009) (the "2009 Declaratory Ruling"), which imposed procedural restrictions on state and local permit application reviews such as presumptively reasonable times for action. After a petition for judicial review, the U.S. Supreme Court in *City of Arlington v. FCC*, 569 U.S. 290 (2013), upheld the FCC's authority to issue these rules;
- On February 22, 2012, Congress adopted Section 6409(a) of the Middle Class Tax Relief and Job Creation Act, codified as 47 U.S.C. § 1455(a), which amended the Communications Act to mandate approval for certain "eligible facilities requests" to collocate and/or modify existing wireless towers and/or base stations;
- On October 17, 2014, the FCC adopted a Report and Order in the rulemaking proceeding titled *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865 (rel. Oct. 21, 2014) (the "2014 Infrastructure Order"), which implemented regulations for "eligible facilities requests" and imposed new procedural restrictions on application reviews. The U.S. Court of Appeals for the Fourth Circuit in *Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015), denied petitions for review;
- On October 9, 2015, Governor Edmund Brown signed into law Assembly Bill No. 57 (Quirk), codified as California Government Code § 65964.1, which creates a "deemed-approved" remedy for when a local government fails to act on applications

for certain wireless facilities within the presumptively reasonable times established in the 2009 Declaratory Ruling and 2014 Infrastructure Order;

- On August 2, 2018, the FCC adopted a Third Report and Order and Declaratory Ruling in the rulemaking proceeding titled *Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 7705 (rel. Aug. 3, 2018) (the "Moratorium Order"), that formally prohibited express and de facto moratoria for all personal wireless services, telecommunications services and their related facilities under 47 U.S.C. § 253(a) and directed the Wireless Telecommunications Bureau and Wireline Competition Bureau to hear and resolve all complaints on an expedited basis;
- On September 26, 2018, the FCC adopted a Declaratory Ruling and Third Report and Order in the same rulemaking proceeding, --- FCC Rcd. ---, FCC 18-133 (rel. Sep. 27, 2018) (the "Small Cell Order"), which, among many other things, creates a new regulatory classification for small wireless facilities, alters existing "shot clock" regulations to require local public agencies to do more in less time, establishes a national standard for an effective prohibition that replaces the existing "significant gap" test adopted by the United States Court of Appeals for the Ninth Circuit and provides that a failure to act within the applicable timeframe presumptively constitutes an effective prohibition;

WHEREAS, in addition to the changes described above, local authority may be further impacted by other pending legislative, administrative and/or judicial proceedings, which includes, without limitation, the following:

- The "STREAMLINE Small Cell Deployment Act" (S. 3157) proposed by Senator John Thune that, among other things, would apply specifically to "small wireless facilities" and require local governments to review applications based on objective standards, shorten the shot clock timeframes, require all local undertakings to occur within the shot clock timeframes and provide a "deemed granted" remedy for failure to act within the applicable shot clock;
- Further orders and/or declaratory rulings by the FCC from the same rulemaking proceeding as the Moratorium Order and Small Cell Order;
- Multiple petitions for reconsideration and judicial review filed by state and local governments against the Moratorium Order and Small Cell Order, which could cause the rules in either order to change or be invalidated;

WHEREAS, the City has received a substantial number of applications for so-called "small wireless facilities" to be installed within the public rights-of-way, and has been informed by several wireless service providers and infrastructure providers that more such facilities will be necessary for their deployments;

WHEREAS, given the rapid and substantial changes in applicable law, the active and effective federal prohibition on reasonable moratorium ordinances to allow local public agencies to study these changes and develop appropriate responses and the significant adverse consequences for noncompliance with these changes in applicable law, the City Council desires to amend the Encinitas Municipal Code to allow greater flexibility and responsiveness to new

federal and state laws in order to preserve the City's traditional authority to the maximum extent practicable; and

WHEREAS, on August 21, 2019, the City Council held a duly noticed public hearing on the proposed urgency ordinance, reviewed and considered the staff report, other written reports, public testimony and other information contained in the record.

NOW THEREFORE, the City Council of the City of Encinitas, California, does ordain as follows:

SECTION ONE:

The City Council finds that:

- A. The facts set forth in the recitals are true and correct and incorporated herein by this reference. The recitals constitute findings in this matter and, together with the staff report, other written reports, public testimony and other information contained in the record, are an adequate and appropriate evidentiary basis for the actions taken in this urgency ordinance.
- B. State and federal law have changed substantially since the City last adopted regulations for wireless facilities in the City.
- C. State and federal law requires local governments to act on permit applications for wireless facilities within a prescribed time period. Failure act within the prescribed timeframes may result in either an automatic approval or significant legal presumptions against the City that render legal defenses significantly more difficult and costly.
- D. Federal law requires state and local agencies to cite their own local authority and substantial evidence for any denial. Failure to provide such authority or evidence may result in a reversal and/or mandates to approve applications by a federal court.
- E. The City lacks regulations for small wireless facilities in the public right-of-way and lacks procedures that complete review of applications within the shot clocks that govern the time in which the City must approve or deny a wireless facility application.
- F. The expeditious adoption of wireless facilities regulations are necessary to protect the City's visual character from potential adverse impacts or visual blight created or exacerbated by telecommunications infrastructure and promote access to high-quality, advanced telecommunication services for the City's residents, businesses and visitors.
- G. The adoption of this urgency ordinance is necessary to preserve the public health, safety, and welfare as, without such adoption, wireless facilities approved without updated regulations could create: (1) land use conflicts and incompatibilities between comparable facilities; (2) visual and aesthetic blight and public safety concerns arising from the excessive size, noise or lack of

camouflaging of wireless facilities; and (3) traffic and pedestrian safety hazards due to the potentially unsafe nature of unregulated siting of wireless facilities in the public rights-of-way.

- H. This urgency ordinance is consistent with the General Plan, Encinitas Municipal Code and applicable federal and state law.
- I. This urgency ordinance will not be detrimental to the public interest, health, safety, convenience or welfare.

SECTION TWO:

Pursuant to California Public Resources Code § 21065 and the California Environmental Quality Act ("CEQA") Guidelines § 15378, the City Council finds that this urgency ordinance is not a "project" because its adoption is not an activity that has the potential for a direct physical change or reasonably foreseeable indirect physical change in the environment. Accordingly, this urgency ordinance is not subject to CEQA.

Even if this urgency ordinance qualified as a "project" subject to CEQA, the City Council finds that, pursuant to CEQA Guidelines § 15061(b)(3), there is no possibility that this project will have a significant impact on the physical environment. This urgency ordinance merely amends the Encinitas Municipal Code to authorize the City Council to regulate small wireless facilities and other infrastructure deployments. This urgency ordinance does not directly or indirectly authorize or approve any actual changes in the physical environment. Applications for any new small wireless facility or other infrastructure deployment, and/or change to an existing small wireless facility or other infrastructure deployment, would be subject to additional environmental review on a case-by-case basis. Accordingly, the City Council finds that this urgency ordinance would be exempt from CEQA under the general rule.

SECTION THREE:

Section 9.70.020 of the Encinitas Municipal Code is amended to read as follows:

9.70.020 Applicability

A. This chapter applies to all wireless communications facilities existing and proposed to be located within the corporate limits of the City of Encinitas California. Including personal wireless services as defined by the TCA and licensed by the Federal Communications Commission, including, but not limited to, the types commonly known as cellular, personal communications services ("PCS"), specialized mobile radio ("SMR"), enhanced specialized mobile radio ("ESMR"), paging, land based repeaters for satellite broadcast services, micro-cell antennae and similar systems which exist now or may be developed in the future and exhibit technological characteristics similar to them.

B. Wireless communications facilities proposed to be located in Encinitas may be constructed only pursuant to a permit issued by the City in accordance with this chapter and shall comply with Municipal Code Title 30 "Zoning" and all other applicable laws and regulations.

C. This chapter does not apply to hand held mobile phones, satellite dishes, amateur radio facilities, receiving antennae for AM and FM radio and television, which may be governed by other law including, but not limited to, Encinitas Municipal Code Chapters 28.08, 30.16 and 30.48.

D. Notwithstanding any other provision of this chapter, all "small wireless facilities" as defined by the FCC in 47 C.F.R. § 1.6002(l), as may be amended or superseded, are subject to a permit as specified in a City Council Policy, which may be adopted, amended and/or repealed by a resolution of the City Council. All small wireless facilities shall comply with the City Council's policy. If the City Council policy is repealed and not replaced, an application for a small wireless facility shall be processed pursuant to this chapter.

SECTION FOUR:

If the provisions in this urgency ordinance conflict in whole or in part with any other City regulation or ordinance adopted prior to the effective date, the provisions in this urgency ordinance will control.

SECTION FIVE:

If any section, subsection, paragraph, sentence, clause, phrase or term (each a "Provision") in this urgency ordinance, or any Provision's application to any person or circumstance, is held illegal, invalid or unconstitutional by a court of competent jurisdiction, all other Provisions not held illegal, invalid or unconstitutional, or such Provision's application to other persons or circumstances, shall not be affected. The City Council declares that it would have passed this urgency ordinance, and each Provision therein, whether any one or more Provisions be declared illegal, invalid or unconstitutional.

SECTION SIX:

This urgency ordinance is enacted pursuant to the authority conferred upon the City Council by Government Code Section and shall be in full force and effect upon its adoption by a four-fifths (4/5) vote of the City Council.

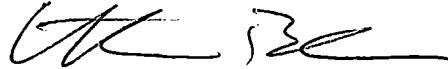
SECTION SEVEN:

No later than 15 days after its adoption, this urgency ordinance (or a summary) together with the names of each City Council members who voted for or against this urgency ordinance shall be published in the manner required by law.

* * *

PASSED AND ADOPTED this 21st day of August, 2019, by the following vote, to wit:

AYES: Blakespear, Hinze, Hubbard, Kranz, Mosca
NAYS: None
ABSENT: None
ABSTAIN: None



Catherine S. Blakespear, Mayor
City of Encinitas, California

ATTEST AND CERTIFICATE:

I certify that this is a true and correct copy of Ordinance 2019-12, which has been published pursuant to law.



Kathy Hollywood, City Clerk