POST PACKET
PUBLIC COMMENT

[redacted]

From: Bob Kiss <[redacted]
Sent: Wednesday, October 23, 2024 12:31 AM
To: Sustainability & Infrastructure Commission
Subject: Feedback on Draft Small Wireless Devices Updated Ordinance
Attachments: RKiss Review Feedback on SM Small Cell Updated Ordinance Draft Oct 2024.pdf

Dear S and I Commission,

Please see the attached for my feedback on the draft ordinance update.

Thank you to our city staff who have worked hard on this draft.

Please let me know if you need anything further from me on this topic. I appreciate your time on this topic and as city commissioners.

Please confirm receipt of this transmission. Thank you.

Sincerely,

Robert Kiss
[redacted]
San Mateo, CA 94403
[redacted]

October 22, 2024

(Via Email Transmission)

Sustainability &Infrastructure Commission (SIC)
Chair Susan Rowinski
Vice Chair Kimiko Narita
Commissioners
City of San Mateo

Re: Draft Policy for Small Wireless Facilities in the Public Right-of-Way

Dear Chair Rowinski, Vice Chair Narita, and Commissioners,

I am writing as a San Mateo homeowner directly affected by the Crown Castle small cell device project. I submitted an appeal of the approval of permit application WC61 in May of 2023, and my appeal was denied by SIC. While I am writing as an individual San Mateo resident, I am also the president of the Sugarloaf Homeowners Association. My comments on the draft policy are based on my review plus informal feedback I have received from multiple Sugarloaf residents, and I have the support of our Board of Directors in submitting this review feedback.

The following are my comments and recommendations on the draft policy, with specific recommendations shown in **bold** print:

General

1) The overall policy seems strong in many places, and much stronger than the predecessor ordinance. My thanks to the city staff who have worked hard on this draft update. That said, within this draft I see many requirements and restrictions that are very detailed and specific. Given the track record of Crown Castle for not following ordinances and not complying with city mandates, it gives me pause on the likelihood of Crown Castle complying with these requirements, and also pause on the question of whether the city has the resources to monitor and control applicants and installations. **I believe it will be important for the city to assess the resource requirements for implementing this updated ordinance, and budget accordingly.**

2) I appreciate the change in appeals submittal timeline from 5 to 10 calendar days after permit approval. This was one of the strongest recommendations I made as part of my appeal process.

Section 6

3) Section 6(b)(15) – Alternate Site Analysis – One of the main elements of my appeal was the inadequacy of the alternate site analysis. Another site located in between two of

the considered locations was the preferred location in my view, yet it was ruled out simply because of the presence of a small tree located on private property. In this instance, the removal of the tree by the private property owner would have met the objectives of both Crown Castle (performance) and resident (distance from home, reduced visual blight). However, the SIC refused to challenge Crown Castle's objection to even consider the proposed approach. In my view, this was a failure of the SIC to act in the best interests of San Mateo residents. **I recommend that this section be amended to indicate that the City/Director reserves the right to ask for re-analysis (or other suitable language), which would be consistent with the content of Section 10(g) (Preferred Structure).**

Section 9

4) Section 9(a)(16) – Affirmation of RF Standards Compliance – I find this very useful, though I have some questions for clarify and **potential modification of the language:**
    a. Will the public have access to the affirmation info and data? Including Appendix A? I think this would be desired and only fair, and **should be indicated if so.**
    b. It is unclear if this requires the permittee to perform measurements each year to meet this requirement, or is otherwise allowed to only submit manufacturer's specifications and affirmation that the equipment has not been modified or replaced. **This should be clarified.**

5) Section 9(a)(17) – Interference – Why does this section call out only interference with city communications? Why is there no consideration of interference with any communication, such as communications within residences or businesses in impacted areas? **I recommend that this section, or another appropriate section, be amended to provide protection also for residences and businesses.** As a specific example, it is my understanding that these small wireless devices will operate in the vicinity of 28,000 MHz (28 GHz). It is also my understanding that Satellite Television distribution occurs over a range of frequencies that include the Ka-band at 26-40 GHz. While I am not an expert in RF interference, I think this observation warrants documented evidence that there is low risk of interference with Satellite Television signals, especially in residential areas.

Section 10

6) 10(a) – Location Preferences – The detail is appreciated, but is hard to follow, especially coming before 10(b) and 10(c). **Recommend moving 10(a) to be after defining restricted and preferred.**

7) 10(a)(b)(c) – Locations Discussion
    a. What is the city's basis for 300 feet? **Why not 500 feet, which has been successfully implemented in other municipalities? I believe it is clear that residential occupants would prefer 500 feet.**

b. There does not appear to be a clear definition of how the 300 foot distance is measured. The wording "from an existing residential dwelling unit" is not clear enough for all parties involved in this topic going forward. Confusion is sure to occur. Does this mean to the dwelling unit property line? From the closest structural point of the dwelling? How is it measured if there are height changes? **Please add further information either in Section 10 or in a new entry in the Definitions Section.**

Section 12

8) 12(d) – Modified Review Process
   a. **Recommend that this section explicitly call out the section defining preferred locations, i.e., 10(c).**
   b. Strongly disagree with the applicant relief from notice requirements or any potential appeals for preapproved designs proposed for Preferred Locations!! This is simply unfair to affected city residents/businesses to *a priori* have no opportunity for their voices to be heard. It is also inconsistent with the allowance for applicants to apply for exemptions to this ordinance. It is not possible to know in advance that there will never be any specific nuances to a selected location, regardless of it being generally identified as being Preferred. Those that live/work in those locations will know best of such nuances. Their voices should be heard. **I strongly recommend that this section be deleted.**

Once again, thank you to the city staff who have labored to generate this comprehensive draft. It definitely moves this topic in a more favorable direction for San Mateo.

Sincerely,

Robert Kiss
[redacted]
San Mateo, CA 94403
[redacted]

[redacted]

From: astrauss[redacted]
Sent: Wednesday, October 23, 2024 8:25 AM
To: Sustainability & Infrastructure Commission
Cc: Prasanna Rasiah; Linh Nguyen; Matt Fabry; 'Tripp May, Esq.'; 'Jessica Blome'
Subject: Response to Verizon Letter re Small Wireless Facility in PROW Policy for 10/23 Meeting
Attachments: 2024-10-23- No Cell Outs Comments to S&I on Verizon Letter.pdf

Good morning Chair Rowinski and members of the Sustainability & Infrastructure Committee:
On behalf of No Cell Outs, attached, please find a public comment responding to the letter from Verizon Wireless objecting to elements of the Draft Policy.
Sincerely,
Ariel Strauss

[redacted]
Greenfire Law, P.C.
[redacted]
Berkeley, CA 94703

From: astrauss[redacted]
Sent: Monday, October 21, 2024 3:37 PM
To: SandICommission@cityofsanmateo.org
Cc: 'Prasanna Rasiah' <prasiah@cityofsanmateo.org>; 'Linh Nguyen' <lnguyen@cityofsanmateo.org>; 'Tripp May, Esq.' [redacted]; mfabry@cityofsanmateo.org; 'Jessica Blome' [redacted]
Subject: Comments on Small Wireless Facility in PROW Policy Changes for 10/22 Meeting

Good afternoon Chair Rowinski and members of the Sustainability & Infrastructure Committee:
On behalf of No Cell Outs, attached, please find comments on the proposed policy and ordinance governing small wireless facilities in the public right-of-way. We appreciate staff using the Encinitas policy as a starting point, and the many improvements reflected in the draft, especially the new preferred location standards in Section 10. Additional modifications are still necessary to ensure appropriate City authority over the public right-of-way and public participation.
For convenience and clarity, I have made changes directly to the draft Policy. Because track-changes sometimes shows inconsistently on different computers, the edits are provided both in PDF and Word format though the substance of both are identical.
Sincerely,
Ariel Strauss

[redacted]
Greenfire Law, P.C.
[redacted]
Berkeley, CA 94703

GREENFIRE LAW, PC

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October 22, 2024

By Electronic Mail
Sustainability and Infrastructure Commission Chair Susan Rowinski, Vice Chair Kimiko Narita, Commissioner Edward Kranz, Commission Sigalle Michael and Commissioner Cliff Robbins (SandICommission@cityofsanmateo.org)

RE: No Cell Outs' Response to Verizon Objections to Draft Policy for Small Cell Facilities in the Public Right of Way

Dear Chair Rowinski, Vice Chair Narita and Commissioners Kranz, Michael and Robbins:

On behalf of No Cell Outs, I am providing the following response to the several of the objections raised by Paul Albritton of Mackenzie & Albritton, LLP, counsel for Verizon Wireless. The Commission should be aware that these are the same boiler-plate arguments that Verizon raises whenever a city seeks to exercise its permitting authority. I expect that the City's special counsel, Tripp May, has seen dozens of these letters. The Draft Policy is very similar to Encinitas' policy, which was enacted in 2020 and, as noted in the Staff Report, has never been challenged.

Section 6(b)(3): Planned Future Deployments

No Cell Outs requests that the City retain the requirement that applicants report all planned deployments in the coming 12 months. While Verizon is correct that the information in a report would not typically be germane to approval or denial, this narrow, hyper-legalistic perspective misses the point. The application process is intended to facilitate and foster engagement between the applicant and City staff and the neighboring public. The plan for future deployments is very relevant to residents' opinion of the propriety or suitability of a specific site, and it is appropriate that staff and the public provide input based on this broader context. These conversations are worthwhile and applicants should be expected to take these concerns into consideration when making siting decisions, even if they are not a basis for denial.

Additionally, the data could be relevant to determining whether an applicant has demonstrated federal preemption by showing that denying this specific application would have an "effective prohibition" on providing personal wireless services. (This comment is also responsive to Verizon's objection to Draft Policy Section 6(b)(17).)

Section 6(b)(13): Timing of Exception Requests

It is entirely fair for the City to require an applicant to make any exception request at the time of submitting an application and then deem any later request as a new application. There are at least three reasons for this. First, the City can set in advance what constitutes a complete application and reject incomplete applications. The City has given fair notice that applications for an exception requires certain factual showings that will not typically be included in an initial submittal and, as a result, the application standards are different.

Second, contrary to Verizon's claim, "effective denial of an application" is not any type of violation of any state or federal law. Only an effective denial of the wireless carrier's *ability to provide personal wireless services in the relevant area* is unlawful. (*See MetroPCS, Inc. v. San Francisco*, 400 F. 3d 715, 735-36 (9th Cir. 2005) ("whatever a locality's judgment as to the need for a facility at a given site, such a determination may not effectively prohibit service or reflect favoritism for one provider over another. . . if a single siting denial does not create significant gaps in provider coverage and reflects no unreasonable discrimination among providers, market dynamics and FCC authority are not threatened in the first place.").) Therefore, if the City denies a single application but expresses a willingness to approve a subsequent application, provided it contains the relevant material, no violation of federal law has occurred.

Third, and most important, under the federal shot clock regulations, the City has only 10 days from receipt of an application to notify the applicant if it is incomplete. After the point, the City has no authority to unilaterally halt the shot clock—it must approve or deny the application. It would be unfair for the deadlines imposed on the City to remain unchanged despite the very material change in the nature and level of review that a late-disclosed exception request would necessitate. For this reason, it is critical that the City obtain, up-front, all the *foreseeable* information needed to determine whether the application is complete for the *type of request* that is being made. That way, staff can promptly review the packet, obtain necessary legal and technical assistance, and ensure it is complete so the City can meet the federal shot clock processing deadlines. Many cities have this same provision. (These comments also apply to Verizon's contentions regarding Section 13(c).)

Section 6(h): Deeming Incomplete Applications Withdrawn

Verizon's attorney claims that "The City cannot terminate an application if an applicant does not respond to a notice of incomplete application within 90 days (or any period of time)."

This is shocking and obviously wrong. The City can, and should, deny (i.e., terminate) an application that is incomplete and, which, the applicant refuses to promptly rectify. Otherwise, if the City does not make a determination, the shot clock will expire and incomplete application will be deemed approved under state law!

This exact issue was adjudicated by the federal district court in Massachusetts when the City of Cambridge denied incomplete application for small cells in its right-of-way and the applicant sued. The court ruled for the city declaring: "[the applicant] has cited no authority suggesting that denying an application based on incompleteness is a shot clock violation." (*ExteNet Systems, Inc. v. City of Cambridge*, 481 F. Supp. 3d. 41, 52 (D. Mass. 2020).)

Section 6(k): Consultants

Verizon baselessly asserts that consultant fees will be "exorbitant." This provision, as drafted, provides the Director with discretion to hire a consultant in appropriate situations. There is no reason to assume that consultants will be used wastefully. Moreover, in many instances, experienced consultants can review permits *more efficiently* and even at lower cost. Presumably, Verizon's real problem is not that consultants are costly but that they will find all the mistakes and missing and incomplete documents, which are often not signed or dated. Earlier in its letter, Verizon even argues that it's representatives "cannot be held responsible for the information prepared by third parties" that it submits to the City. The City's experience earlier this year with Crown Castle failing to construct facilities as promised and operating them without final inspections, and then even refusing to shut them down when ordered, demonstrates that it is irresponsible for the City to simply trust applicants. No Cell Outs urges the City to hire an experienced and not-industry-aligned expert to review applications and advise staff.

Section 9(a)(21): Indemnification

Verizon's counsel writes as though unfamiliar with the essential purpose of indemnification. The counsel speculates about whether or not the City would have liability in various situations. The entire point of indemnification, however, is that the applicant bears all responsibility for any cost of defending against any suit regardless of its merits or foreseeability. Verizon's attorney cannot anticipate and protect the City from all the future claims that unknown people may bring against the City for any reason, or no reason at all, in connection with the permit that a business obtained for its own commercial purpose. The permittee, not the public, should bear these costs and litigation risks. Verizon's objection itself is also somewhat suspect. If Verizon

is correct that the suits will never materialize, then it is unclear why Verizon should object to indemnification.

Verizon's citation to Attorney General Decision No. 01-701 is misleading. Verizon suggests that the decision has some bearing on the maximum allowable scope of indemnification that the City can demand. This is not so. Rather, the decision merely confirmed that a municipality "may require an applicant for a coastal development permit to agree to defend, indemnify, and hold harmless the county in any action by a third party to void the permit."[1] The decision does not prevent the City from also requiring a broader indemnification. The Attorney General even quoted *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 166, stating "it is proper and reasonable to take into account not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licenses." These indemnification terms are standard practice and Verizon's argument against it is frivolous.

Sections 10(b) and (h)(1): Location Priorities

Verizon's assertion that the location preference requirements violate Public Utilities Code, section 7901, was already considered and rejected by the California Supreme Court five years ago in *T-Mobile West v. San Francisco* (2019) 6 Cal.5th 1107. The Court held that, regardless of franchise rights under Section 7901, with respect to standards for antennas on utility poles, a "City has inherent local police power to determine the appropriate uses of land within its jurisdiction. That power includes the authority to establish aesthetic conditions for land use." This is precisely what San Mateo is doing here.

Section 11(j)(1): Undergrounding Equipment

The undergrounding of accessory equipment is necessary to avoid many inconvenient and unsightly obstructions along sidewalks. The provision already allows applicants an exception when undergrounding is "technically infeasible." Commercial radio appliances add clutter and are "out of character" on the side of streetlight poles; Verizon may not see it that way but most residents do.

Section 13: Exception Review Process

[1] https://oag.ca.gov/system/files/opinions/pdfs/01-701.pdf.

Verizon's insistence that the exception process is illegal is absurd. Virtually all cities have a process where certain areas are off limits unless federal or state law forces the city to allow installations there. The approach in the City's Draft Policy is not novel or unique. Contrary to Verizon's assertion, there is also nothing unlawful about "placing the Director in a quasi-judicial position to make subjective legal determinations[.]"City officials make subjective, fact specific judgements every day, such as for Planning Department special use or conditional use permits. The Public Works Director has equivalent authority to engage in such decision-making within his or her area of expertise. Verizon may wish that these subjective decisions were "best left to courts" but the residents of San Mateo expect that City staff will exercise their discretion confidently in the in furtherance of the community's values— not outsource this obligation to applicants or judges.

Verizon is also plainly incorrect that requiring exceptions violates the FCC rule that standards be "published in advance," and it is sophisticated enough to know this. The FCC explicitly addressed the level of detail that it intended to be required for a rule to be considered "published in advance." The FCC explained that the purpose of the requirement was to prohibit "'secret' rules" so that providers can "predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site." (Small Cell Declaratory Order, FCC 18-133, ¶ 88 37 (Sept. 26, 2018).) The City's draft Policy is not "secret" and certainly allows applicants to do this. In response to cities' concern that aesthetic rules for historic districts might not comply with the rule, the FCC further clarified "the aesthetic requirements to be published in advance need not prescribe in detail every specification to be mandated for each type of structure in each individual neighborhood. Localities need only set forth the objective standards and criteria that will be applied in a principled manner at a sufficiently clear level of detail as to enable providers to design and propose their deployments in a manner that complies with those standards." (Id., fn. 247.) The Policy meets this standard too.

If this was not enough, in 2020, the Ninth Circuit declared the FCC requirement "that all aesthetic regulations be 'objective' is arbitrary and capricious" and void. (*City of Portland v. FCC,* 969 F. 3d 1020, 1041-42 (9th Cir. 2020). A district judge recently concluded that the Ninth Circuit ruling also did away with the "published in advance" requirement. (*See T-Mobile South LLC v. City of Roswell,* 662 F. Supp. 3d 1269, 1281 (N.D. Ga. 2023).) But even if the "published in advance" requirement formally exists, the fact that even subjective aesthetic standards are now

allowed means that cities can review applications case-by-case, in a manner far less foreseeable than the Section 13 exception process.

At its core, Verizon is telling the City that federal preemption means not only that the City cannot do what is preempted but it cannot even have a process where it requires the applicant to show preemption applies before granting a permit. The exception process proposed by the Director of the Public Works Department, the City Attorney and their experienced outside counsel is lawful and appropriate.

No Cell Outs greatly appreciates the Commission's attention to the intricacies of this issue. I hope you do read Verizon's attorney's letter closely because I think you will see that it actually showcases why it is essential that the City develop robust, detailed and demanding application requirements and also employs an expert consultant to review applications skeptically. Verizon's perspective on the role it believes the City ought to play in regulating the public right-of-way contrasts sharply with how the Commission and City staff should view their own function. What you will see in the Verizon letter is an entitled, large corporation using bluster and obfuscation to try to intimidate you and get its way inexpensively. We thank you for standing up for the residents of San Mateo.

Sincerely,

Ariel Strauss

CC: Matt Fabry, Director, Public Works (electronic mail only)
Prasanna Rasiah, City Attorney (electronic mail only)
Linh Nguyen, Assistant City Attorney (electronic mail only)
Tripp May, Esq. (electronic mail only)

[redacted]

From: David Witkowski [redacted]
Sent: Tuesday, October 22, 2024 2:49 PM
To: Small Cell Ordinance and Policy Update
Subject: JVSV Comments on Proposed Wireless Ordinance Update
Attachments: JVSV Comments on Proposed Wireless Ordinance.docx.pdf

City of San Mateo,

Please find attached my comments regarding the proposed updates to the city's wireless ordinance. I'm available to discuss if needed, please let me know.

Best regards,

...dtw

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David Witkowski
Executive Director, Civic Technology Initiatives
Joint Venture Silicon Valley
www.jointventure.org
[redacted]
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Chair, Deployment Working Group, IEEE Future Networks
Member, International Committee on Electromagnetic Safety, IEEE
Member, Committee on Man and Radiation, IEEE
Member, RF Safety Committee, ARRL
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22-Oct-2024

Sustainability & Infrastructure Commission
City of San Mateo
330 W. 20th Avenue
San Mateo, CA 94403

Subject: Comments on the Proposed Small Cell Ordinance Update

Dear Members of the Sustainability & Infrastructure Commission,

My name is David Witkowski, and I am the Executive Director of the Wireless Communications Initiative at Joint Venture Silicon Valley (JVSV). Throughout my career, I have focused on bridging the gap between technology innovation and public policy, working closely with cities, telecommunications providers, and regulators. At JVSV, I lead efforts to modernize telecommunications infrastructure across Silicon Valley, with an emphasis on digital equity, public safety, and regulatory compliance.

First, I would like to commend the City of San Mateo for its diligent efforts in developing the **Proposed Small Cell Ordinance Update**. Your work in balancing the integration of small wireless facilities with community aesthetics and safety demonstrates a strong commitment to enhancing local telecommunications infrastructure. This proactive approach will benefit residents, businesses, and emergency services alike.

The importance of cellular infrastructure, including small cells, cannot be overstated—especially in terms of public safety. According to NENA, as cited in the **JVSV Wireless Public Safety White Paper**, cellular networks support over 80% of 9-1-1 calls nationwide, underscoring the critical role they play in emergency response. Additionally, small cells are essential for improving network capacity and coverage in dense urban environments, ensuring reliable connectivity for first responders and the public. The **NIH CDC Wireless Substitution Report** highlights that (nationally) 76.0% of adults and 86.8% of children lived in wireless-only households as of late 2023, indicating a strong reliance on cellular networks for communication and safety. The wireless-only rate is higher in western US states. This data emphasizes the necessity of robust cellular infrastructure, including small cells, to meet the growing demands of wireless communication and emergency responsiveness.

While I am not a lawyer and do not intend to offer legal advice, I must express caution regarding elements of the **Proposed Small Cell Ordinance Update** that may conflict with federal regulations, Congressional acts, and the Ninth Circuit Court of Appeals ruling in *City of Portland vs. FCC*. Ensuring compliance with regulatory precedent and legal rulings is critical to avoid legal challenges against the city and preemption by federal authorities.

Here are specific areas of potential conflict:

1. **Arbitrary Setbacks from Residential and Daycare Facilities**:
   - The proposed ordinance sets fixed distances for small cell deployments near residential units and daycare centers. This approach may conflict with **FCC OET Bulletin 65**, which stipulates that RF exposure compliance should be evaluated through professional measurements and analysis, rather than using arbitrary distance requirements. The FCC and federal law (e.g. 47 CFR § 1.1310) mandates a scientific approach to RF exposure, considering factors such as antenna type, radio power output, and antenna patterns, to ensure accurate safety assessments. Defining an arbitrary setback of 300 feet, without considering the engineering specifics, could be viewed as **material inhibition to deployment**, risking preemption under **Sections 253(a) and 332(c)(7)** of the Telecommunications Act (City of Portland v FCC).
2. **Fee Structure**:
   - The proposed fee structure must be limited to actual costs associated with processing permits and managing rights-of-way, as established by the FCC's guidelines and confirmed by the Ninth Circuit ruling (FCC-18-133A1). Any fees exceeding cost recovery could be viewed as a **material inhibition to deployment** (City of Portland v FCC).
3. **Deployment Timeline (Shot Clocks)**:
   - The ordinance must adhere to the **federally mandated shot clocks** of 60 days for collocations and 90 days for new structures (City of Portland v FCC). Any procedural delays or ambiguities in the approval process may expose the City to legal challenges, potentially undermining the ordinance's enforceability (City of Portland v FCC).

I understand that local regulations must balance public interest, safety, and technological advancement. However, ensuring compliance with federal guidelines is essential to avoid litigation and regulatory risks. JVSV is committed to supporting the City of San Mateo in crafting a revised ordinance that aligns with federal law while addressing local priorities. We offer our expertise to assist in this effort, ensuring a framework that reduces regulatory and legal risk while enhancing connectivity and public safety.

Thank you for considering these comments. I am available at your convenience for further discussion.

Sincerely,

David Witkowski

David Witkowski
Executive Director, Wireless Communications Initiative
Joint Venture Silicon Valley

[redacted] • [redacted] • San Jose, California 95113

GREENFIRE LAW, PC

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October 21, 2024

By Electronic Mail
Sustainability and Infrastructure Commission Chair Susan Rowinski, Vice Chair Kimiko Narita, Commissioner Edward Kranz, Commission Sigalle Michael and Commissioner Cliff Robbins (SandICommission@cityofsanmateo.org)

RE: No Cell Outs' Comments on Small Cell Facilities in the Public Right of Way Ordinance & Policy Update

Dear Chair Rowinski, Vice Chair Narita and Commissioners Kranz, Michael and Robbins:

I am writing on behalf of No Cell Outs, a grassroots organization composed of citizens dedicated to the smart planning of telecommunications infrastructure in the City of San Mateo. I previously provided comments for the Commission's December 2023 information session and also on the City Council's May 2024 study session. No Cell Outs greatly appreciates that staff took into consideration many of the previous comments and made significant strides to improve existing policies.

As with any new proposal, however, some corrections and adjustments are still required. The four principal recommendations are detailed below. Attached to this letter is a list of further edits and, for convenience, a redline of the Policy directly implanting the recommended changes.

A. Consultant Review Must be Automatic, Particularly for Sites Proposed in "Restricted" Locations

Section 6(k) of the draft Policy authorizes the Director to hire a consultant to assist in processing applications. However, the Director has to exercise *discretion* on each case and does not clarify situations where consultant review is automatic. Many cities, such Hercules, have simply outsourced review to a consulting expert. This is the best approach because staff lack the technical expertise to review wireless applications and it frees up staff to do other work. It also simplifies ensuring that applicants bear the full cost of permit review—the amount charged by the consultant to the City is passed on to the applicant, which is simpler than estimating the cost

of staff time and overhead. I have heard from many cities that they believe they currently undercharge for permit processing.

More importantly, under the proposed Policy, appropriately, many more applications will undergo searching review compared with existing policy. Going forward, any application in a "restricted" location (i.e., near a residence) will require the applicant to demonstrate that denial of the application would violate federal or state law. Federal law is violated if denial will "have the effect of prohibiting the ability" to provide "telecommunications" or "personal wireless services" to the applicant's customers. (47 U.S. Code § 332(c)(7).) To determine whether this is the case will require understanding the current level of service customers receive, the nature and significance of the service proposed, the availability of technically feasible alternative means of providing the service and review of technical radiofrequency propagation maps and forecasts prepared by applicant engineers. (*See Sprint PCS Assets v. City of Palos Verdes Estates*, 583 F. 3d 716, 727 (9th Cir. 2009) (discussing many factors).) Plainly, this is a job for a specialist consultant.

The Encinitas Policy, from which the City's draft is largely based, provides that "Due to the technical nature of issues likely to be raised, independent consultant review will generally be appropriate when considering an exception request." (Encinitas Reso. 2020-38, § 13(d).) However, San Mateo should simplify the process further and give applicants fair notice that *all applications for sites in restricted locations will require third-party consultant review*. New language has been added to Section 6(k) to include this requirement.

B. Applicants Must Present Pole Alternatives for Consideration by the Public and Staff

Unlike a large macro tower built on private property where it may be difficult to find a willing landlord, for small cells in the public right of way, there are usually multiple poles or sites that will be feasible. The applicant should be required to identify all technically feasible poles within a relevant radius (i.e. 500 feet instead of 300 feet). This way, the community or staff can have some input on which best balances the community's priorities.

In San Franciso when an applicant wants to put up a new stand-alone small cell in the right of way, it must identify any technically feasible alternative locations, present a ranked preference list of feasible options, hold a community meeting and then allow the City to select the site staff believe is most suitable. This approach makes sense. After all it is the public's property this is being used and the public's aesthetic experience that will be affected. (*See* SF

Public Works Code, §§ 2703-06.)[1] San Mateo could use a similar approach. However, even if the City does not adopt this exact method of allowing staff to pick from among all feasible options, it should ensure that applicants identify alternative poles and hold a mandatory meeting to discuss these alternatives. This more limited approach is added to Section 6.

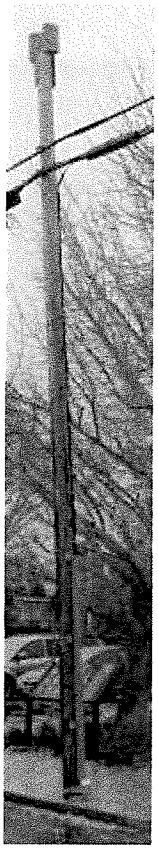
C. The City Must Think Ahead to Prevent Uncontrolled "Modifications" or "Co-Locations"

The proposed Policy includes requirements to reduce the visual impact of wireless facilities (*see* Section 11). However, unless the City is careful, all these conditions can readily be undermined and disregarded after a permit issued. This is because the Policy does not require applicants to make the facilities "stealth." Under federal law, a "stealth" facility is one that "look[s] like something other than a wireless tower or base station," such as a "pine tree, flag pole, or chimney." (2020 FCC Ruling, 35 FCC Rcd. at 5994, 5996.) In addition to the immediate aesthetic value of making facilities "stealth", there is a more important reason. If the site is not "stealth", future applicants that wish to add antennas on to ("co-locate") or "modify" the existing antenna by replacing them with others are granted a federal right to override virtually all San Mateo design and planning standards, and even conditions in the issued permit itself.

FCC regulations dictate that a service provider may add to a non-stealth facility more antennas 10 feet upward and horizontally outward by six feet, as well as install ground cabinets for auxiliary telecommunications equipment. (47 C.F.R. § 1.6100(b)(7).) It does not matter whether it is in a restricted area. It does not matter if the new antennas will now be in front of someone's window. It does not matter if it blocks views. It does not matter if it exceeds the maximum height of the zone so it is extra conspicuous. It does not matter if it is much larger than the approved design. For any other type of installation, this conduct would be a clear code violation and subject the owner to severe civil and even criminal penalties. But for wireless facilities, basically, the FCC has requisitioned the public street and given it to a wireless carrier.

[1] *See* https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_publicworks/0-0-0-47228; the Public Works Department Order implementing the Code can be accessed here: https://www.sfpublicworks.org/sites/default/files/Order206293.docx.pdf.

Here are examples of the photo simulations of the two most common approved small cell designs for streetlights and wooden utility poles in San Mateo:



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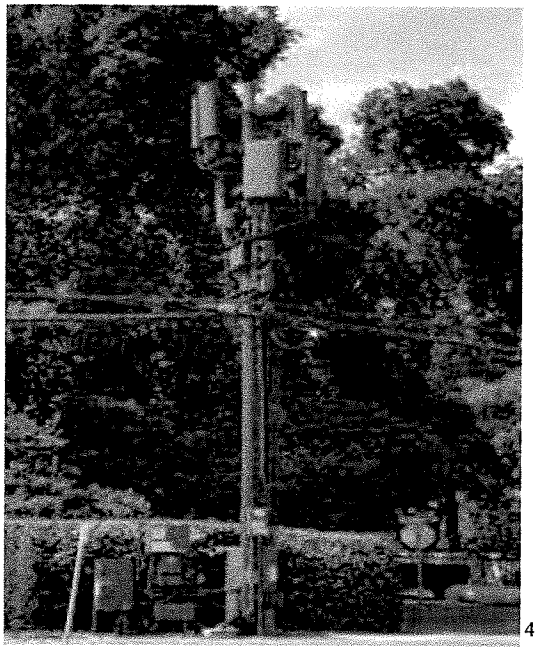
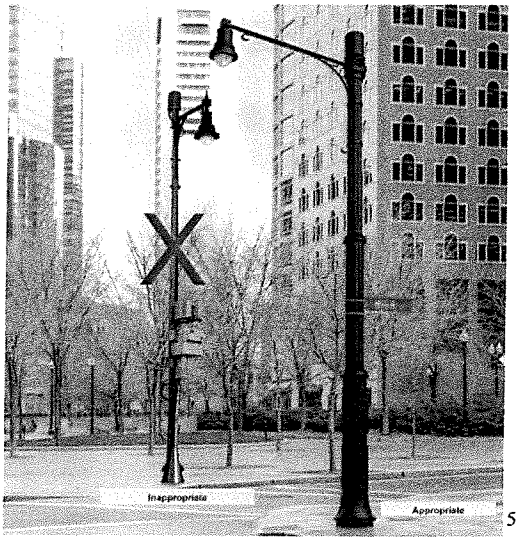
While these installations may appear "small", they are clearly not *hidden* or appearing as "something other than" a wireless facility. As a result, they are not "stealth" and, if a future applicant insisted, there is virtually nothing that the City could do to stop the pole from looking similar to this example from Los Altos:

[2] 29 Grant St. (WC-2023-000138).
[3] 341 N. Delaware St. (WC-2022-000054).

 [4]

In contrast, here is a stealth design from the Fort Worth, Texas, design standards:



[5]

It is unlikely that applicant would be able to attach additional antennas to a pole like the Fort Worth example without new City review and approval. As a result, the City should add several requirements to prevent hideous and uncontrolled future proliferation.

[4] https://www.losaltosca.gov/publicworks/page/small-cell-nodes
[5] Fort Worth Tex. Muni. Code, Chap. 30, App'x A, Ex. 9, https://codelibrary.amlegal.com/codes/ftworth/latest/ftworth_tx/0-0-0-58357.

First, applicants should be required to identify all technically feasible options for co-location on an existing wireless facility to meet the service objective. With foresight, co-location, can be the best option because it allows the City more control over how sites develop and limits the number of new sites over which the City loses control. The applicant should be required to provide photo simulations of a co-location at that alternative site. Co-location can provide an opportunity to update an older site to be more visually appealing and streamlined. If feasible, collocation should be requ(a)ired unless the applicant demonstrates that a new site is visually superior or more compliant with Policy requirements. New language has been added to Section 10(d) and elsewhere to include this requirement.

Second, an applicant should be required to demonstrate that it is technically infeasible to design a facility in a "stealth" manner, such as by fully integrating the antenna into an existing pole. New language has been added to Section 11 as new subsection (q) to include this requirement.

Third, in the event that alternative sites are available, the applicant should be required to provide photo simulations of the maximum potential buildout of the proposed site allowable by federal law so that the City can decide if an alternative offer reduced risk of inappropriate future development. New language has been added to Section 6(b)(5) to include this requirement.

D. The Commission Should Hear Appeals, Not a Hearing Officer

The draft Ordinance (Section 17-10-070(g)) would eliminate appeals to the Commission and instead have appeals heard by a hearing officer. Given that the hearing officer is an individual hired by the Department, this keeps all review largely under the control of the Public Works Director. Since one point of the appeal is to allow a means of disputing the Director's interpretation, this approach is not likely to address resident concerns. The involvement of elected or appointed officials is important to ensure that the policy is periodically reviewed and applied appropriately.

Many other cities allow appeals of small cell permits in the right of way to appointed or elected boards. For instance, Carmel-by-the-Sea, Encinitas, Malibu, Martinez, Mill Valley, Novato, Orinda, Pinole, San Rafael, Santa Cruz, allow appeals to all the way to the city council. In other cities, appeals are to a commission, such as in Calabasas, Petaluma and San Francisco. Some municipalities have developed approaches to quickly dispense with certain types of appeals so that appeals to the highest level are automatically put on the consent agenda and additional votes

are needed to take them up for discussion.[6] While it is true that the FCC "shot clocks" put pressure on staff, other cities have found a way to do it and San Mateo should too.

In practice, the 60-90 day shot clocks are extended frequently—often because the applicant itself needs more time to get its own application organized and complete internal engineering or planning related to trenching and fiberoptic backhaul design. Moreover, so long as the City makes a Director-level decision before the shot clock period ends, it will have complied with the FCC regulations. (47 CFR § 1.6003(a).) The impact of the shot clocks expiring after this decision is made will only be to cut off any subsequent right to appeal, if the applicant does not agree to an extension.

Voluntary shot clock tolling also goes both ways. As provided in Policy Section 6(h), if the City is approaching the end of the shot clock and does not have the information needed to approve the application, the City will deny the application to avoid blowing the shot clock. In those instances, the applicant needs the City's approval to extend the shot clock. As the regulations say, a tolling agreement to stop the shot clock requires "a written agreement between the applicant and the siting authority [i.e, the City]." (47 C.F.R. § 1.6003(d).) Caselaw confirms that denying an incomplete application, without offering the applicant further opportunity to remedy it, is lawful. (*ExteNet Sys. v. City of Cambridge*, 481 F. Supp. 3d 41, 51 (D. Mass. 2020).)

For example, earlier this year, AT&T agreed to extend the shot clock to allow a resident in Santa Cruz County to appeal a macro tower because the county requested this extension so that their process can play out as intended in their ordinance. Similarly, Verizon has informed me that it would agree to a shot clock extension to allow an appeal of a small cell to the San Francisco board of appeals. Applicants want to have a good relationship with the City and typically are confident in the ability of their applications to withstand appeal so prefer to wait a short while longer and have an application approved on its merits. Appeals should continue to be allowed to the Commission, or even expanded to the City Council level. Relevant edits to the draft Ordinance are proposed on the attached page.

E. Additional Changes and Edits

These four changes are considered highest priority. However, others are also important and are briefly detailed in the attached list and shown in redline.

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[6] *See, e.g.,* Palo Alto Code, § 18.77.070(f) (Design review appeals go straight on to the city council consent calendar and require three out of seven votes to take it up for discussion).

No Cell Outs greatly appreciates staff's work to improve the City's policies and the Commission's close attention to this issue. We look forward to providing comments and seeing further progress at the Commission hearing.

Sincerely,

Ariel Strauss

Attachments:
List of Additional Proposed Changes
Redline Recommended Changes to Draft Policy

CC: Matt Fabry, Director, Public Works (electronic mail only)
Prasanna Rasiah, City Attorney (electronic mail only)
Linh Nguyen, Assistant City Attorney (electronic mail only)
Tripp May, Esq. (electronic mail only)

LIST OF ADDITIONAL PROPOSED CHANGES

Recommended Changes to Draft Ordinance

Section 17.10.050(d): For simplicity and consistency, the ordinance should designate that notice be provided as required by the policy. If the notice requirements remain in the ordinance, the applicant should be required to submit notices within one (1) business day of filing the application.

Section 17.10.070(g):

- Any person affected by the site should have a right to appeal, not just residents within 500 feet.
- Appeals should remain to the Sustainability and Infrastructure Committee, not a hearing officer.
- Fees should be waived or limited for members of the public. Many cities have this policy while others charge thousands of dollars, which creates an unfair barrier for some residents to protect their rights.

17.10.080(b): Appeals should remain to the Sustainability and Infrastructure Committee, not a hearing officer.

Summary of Changes to Draft Policy Shown in Attached Redline

Section 6(a)(3): Require applicant to report feedback from community and confirm that there is a bona fide plan to use the proposed site.

Section 6(a)(5): Require photo simulations of feasible alternatives and potential expansion of proposed site.

Section 6(a)(11): Facilities that support public safety agencies must comply with applicable engineering standards.

Section 6(a)(15): More detailed alternative pole and co-location potential analysis is needed.

Section 6(d): Community meetings must be required, particularly since there are no public hearings prior to approval.

Section 6(k): Consultant review is required for Restriction Locations.

Section 7(a): City will post applications on website.

Section 7(c): Applicant must mail notice faster to ensure sufficient time for feedback and compliance before the lapse of the City's 10-day deadline to identify an application as incomplete.

Section 8(b): Add requirement to make findings identified in Section 13, demonstrate no feasible co-location, that facility cannot be stealth and applicant has actually obtained all required approvals in advance. Also expand comparison radius to 500 feet from 300 feet.

Section 9(a)(1): Reduce permit term from 10 years to 5 years for facilities supporting public safety agencies.

Section 9(a)(11): Require final post-installation review to include redline of specs.

Section 9(a)(21): Require indemnification from facility operator.

Section 9(a)(22)(v): Clarify that pollution liability coverage includes RF.

Section 9(b): Provide that permits can be modified in the event of change in federal law (this is in the Encinitas policy).

Section 10(a): Expand comparison radius from 300 feet to 500 feet.

Section 10(d): Require co-location if feasible and no less visually intrusive.

Section 11(h)(6): Prohibit unsightly on-strand antennas.

Section 11(n)(4): Clarify restriction on using non-functional wooden poles.

Section 11(q): Require facilities to be stealth when technically feasible.

Section 13(a): Add clarification that the objective is maintain maximum local authority.