

Small Cell Wireless Facility Frequently Asked Questions (FAQ)

Thank you to residents who addressed your questions and concerns to the City of Monterey about the proposed installation of small cell facilities in Monterey neighborhoods. We developed this FAQ to explain the small cell wireless facility application process.

Q: What is a “small cell” wireless facility, and what is it for?

A: A small cell wireless facility is cell site designed to provide service coverage and capacity in areas where traditional “macro” wireless facilities either cannot reach or cannot provide users with broadband-level services. These facilities are able to reuse licensed spectrum bands more frequently, with lower output power and a shorter distance between the user and the network access point. Small cells come in many different shapes and sizes, but are generally deployed on existing and replacement utility poles and street lights in the public rights-of-way. The “small” in small cell refers to the service area covered by the antennas and not necessarily the equipment size. For example, the legislation recently vetoed by Governor Brown would have defined a small cell as a cell site with up to 41 cubic feet of non-antenna equipment, whereas the small cells proposed by ExteNet have approximately 9.047 cubic feet in volume without conduit, and 11.147 cubic feet in volume with conduit.

Q: Where can they be located?

A: Small cell wireless facilities can be located in public rights-of-way. Most small cells are installed on existing or replacement utility infrastructure. Small cell wireless facilities can be located on new, freestanding poles in the public rights-of-way, but the City strongly disfavors these installations when existing infrastructure is technically feasible. Given their smaller service area as compared to macro wireless facilities, most small cells generally need to be within approximately 500 to 1,000 feet from the location to be served by the installation.

Q: What is a public right-of-way (ROW)?

A: A public right-of-way is a type of nonexclusive and nonpossessory real property right granted or reserved over the land for public purposes. The most common example of a public right-of-way is a public street. Both federal and California state courts have recognized that the public purposes served by a public right-of-way encompass not just transportation and utilities, but aesthetic, social and expressive purposes as well.

Q: What is the purpose of a small cell facility?

A: Small cell facilities are intended to address higher demand by subscribers of the cell company service, in terms of both coverage gap and capacity.

Q: What laws regulate small cell facilities?

A: Small cells, like any other wireless facility in the public right-of-way, are subject to various federal, state and local laws. Federal laws include, without limitation, Section 704 of the Telecommunications Act of 1996, codified as 47 U.S.C. § 332(c)(7); Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012, codified as 47 U.S.C. § 1455; and various regulations by the Federal Communications Commission to interpret and implement these statutes. California state laws include,

without limitation, Public Utilities Code §§ 7901 and 7901.1; and Government Code §§ 65964 and 65964.1. Small cell wireless facilities are also subject to City Code §§ 38-112.4 *et seq.*

Q: Can the City of Monterey deny wireless facility applications based on environmental impacts from RF emissions?

A: Not if the emissions are compliant with all applicable FCC regulations. Under federal law, State and local governments cannot regulate personal wireless facilities (which includes small cells) based on the environmental effects from RF emission to the extent that the emissions from the proposed facility are compliant with the FCC’s regulations. Congress also gave the FCC exclusive authority to determine the standards for compliance. The City cannot set its own standards, whether higher, lower or even the same. The City can and does require applicants to demonstrate that the proposed facility will be in compliance with the FCC’s regulations.

Q: Does the City of Monterey have any discretion over small cell wireless facilities in the public right-of-way?

A: Yes, but the City’s authority is not absolute and is shared with both federal and state regulators. Neither federal nor California statutes completely displace traditionally local police powers, but both regulatory frameworks preserve local discretion to the extent that its exercise does not effectively prohibit the provision of personal wireless services. This means that, under some circumstances, local zoning regulations will be preempted and a local government will be compelled to approve a facility that does not comply with local design or location rules.

However, wireless applicants cannot build whatever facilities they want wherever they want to build them. For example, a permit denial will be upheld under federal law when the applicant fails or refuses to adopt the “least intrusive means” to achieve their technical service needs, even if there’s a proven significant gap in the applicant’s service. Likewise, California law authorizes cities and counties to deny applications for the right-of-way when the proposed facility would “incommode” the public’s use of the right-of-way. Both federal and California law also preserve local management authority over the public right-of-way, which includes the authority to impose reasonable time, place and manner restrictions on construction and installation activities.

The applicable City Code provisions have been designed to help the City determine whether and to what extent the City may exercise its discretion over a given application. City Code § 38-112.4.H.2 sets forth required findings for all applications, which, for right-of-way applications, includes a consideration of whether the proposed facility “incommodes” the public’s use of the right-of-way. If the findings cannot be made, the applicant may seek a limited exception under City Code § 38-112.4.H.3, but only if they can convince the City that a denial would result in an effective prohibition. If the City finds that a denial would cause an effective prohibition, any exception granted cannot be any broader than necessary to maintain compliance with law.

Q: What is the City’s process when an application is received?

A: When small cell applications are received, the Planning Office considers them for a use permit.

Subject to the applicable provisions in the City Code, the Zoning Administrator or Planning Commission have the authority to approve, approve with conditions or deny the permits.

Federal law requires State and local governments to act on applications within a “reasonable” time; the FCC defines a “reasonable” time as either 150, 90 or 60 days, depending on the nature of the application; and California law deems the applications automatically approved if a city or county fails to approve or deny the application within the FCC’s prescribed timeframes. The FCC also imposes a complicated set of procedural rules for handling incomplete applications, and may deem the applications automatically complete for a technical violation, even if the applications are missing key materials. If the applications are denied, the denial must be in writing, the reasons for the denial must be supported by substantial evidence in the written record and the reasons for the denial must be contemporaneously available in a written form with the written denial.

The City can and does require a public hearing process for each new or existing modification of a cell facility. The public hearing process can involve public outreach meetings, followed by the applications going before the Zoning Administrator, or upon referral, to the Planning Commission. Any appeals of a Zoning Administrator decision would be addressed by the Planning Commission, and any appeals of a Planning Commission decision would be addressed by the City Council.

Q: What should someone do if they want to participate in the application review process and/or communicate with the City about the use of small cell wireless facilities in Monterey?

A: There are several ways for interest parties to engage in the application review process. Anyone interested in participating can email suggest@monterey.org, call (831) 646-3799, fill out a comment form - <https://www.monterey.org/About-Monterey/Citizen-Comment-Form>, subscribe to Planning and Community Development news at monterey.org/subscribe and watch monterey.org/planning for information and meeting schedules. The City appreciates and encourages public input, especially on fact-specific issues that may be difficult or impossible for the City to ascertain without the public’s participation. Persons interested in submitting comments and questions should be advised that communications received by the City may be considered a public record subject to disclosures under California law.

Q: What should a citizen do if they want changes to the existing federal or California laws that preempt cities?

A: Federal - Citizens should contact the FCC at 1 (888) 225-5322. They should also contact Congressman Jimmy Panetta’s Office (<https://panetta.house.gov/>), and Senators Feinstein and Harris. (http://www.senate.gov/senators/contact/senators_cfm.cfm?State=CA). **State** - State Senate District 17 - Bill Monning, (<http://sd17.senate.ca.gov/>)

Addition made on Jan. 3, 2018:

Q: Can these facilities be used for 5G service?

A: No, the proposed facilities do not support “5G” services. The technical standards for 5G services are still in development and testing phases. Although Verizon announced earlier last year that it would test 5G in 11 U.S. cities by mid-2017, Monterey is not among them and current estimates are that nationwide deployment will not commence until 2021. If these locations were to be used for 5G in the future, the facilities would need to be almost entirely replaced, which would require a separate application and review process.

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