

URGENCY ORDINANCE NO. 1546

AN URGENCY ORDINANCE OF THE CITY OF BANNING, CALIFORNIA, REGULATING SMALL WIRELESS FACILITIES CITY WIDE, AMENDING THE BANNING MUNICIPAL CODE, AND DECLARING THE URGENCY THEREOF

THE CITY COUNCIL OF THE CITY OF BANNING ORDAINS AS FOLLOWS:

SECTION 1. Findings:

(a) On September 26, 2018, the Federal Communications Commission ("FCC") adopted its Declaratory Ruling and Third Report and Order ("Report and Order") relating to placement of small wireless facilities in public rights-of-way. The Report and Order went into effect on January 14, 2019.

(b) The Report and Order purports to give providers of wireless services rights to utilize public rights of way and to attach so-called "small wireless facilities" to public infrastructure including infrastructure of the City of Banning, subject to payment of "presumed reasonable", non-recurring and recurring fees. The ability of local agencies to regulate use of their rights-of-way is substantially limited under the Report and Order.

(c) Notwithstanding the limitations imposed on local regulation of small wireless facilities in public rights-of-way by the Report and Order, local agencies retain the ability to regulate the aesthetics of small wireless facilities, including location, compatibility with surrounding facilities, spacing, and overall size of the facility, provided the aesthetic requirements are: (i) "reasonable", i.e., "technically feasible and reasonably directed to avoiding or remedying the intangible public harm or unsightly or out-of-character deployments"; (ii) "objective", i.e., they "incorporate clearly-defined and ascertainable standards, applied in a principled manner"; are (iii) published in advance. Regulations that do not satisfy the foregoing requirements are likely to be subject to invalidation, as are any other regulations that "materially inhibit wireless service", (e.g., overly restrictive spacing requirements.)

(d) Local agencies also retain the ability to regulate small wireless facilities in the public rights-of-way in order to more fully protect the public health and safety, ensure continued quality of telecommunications services, and safeguard the rights of consumers.

(e) It is the intent of the City Council in adopting this urgency Ordinance to supersede regulations of the City that conflict with the Report and Order, and to immediately establish consistent regulations governing deployment of small wireless facilities in order to more fully protect the public health, safety, and welfare. The City Council declares that it adopts this Ordinance with the understanding that the City expressly reserves all rights to re-enact and/or establish new regulations consistent with State and federal law as it existed prior to adoption of the Report and Order in the event the Report and Order is invalidated, modified, or limited in any way.

SECTION 2. The City Council hereby amends Title 12 (Streets, Sidewalks and Public Places) of the Banning Municipal Code by adding a new Chapter 12.56 (City Wide Regulation of Small Wireless Facilities) to read as follows:

“Chapter 12.56 - CITY WIDE REGULATION OF SMALL WIRELESS FACILITIES

12.56.010 - Compliance with the City Wide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities.

Notwithstanding any provision of the Banning Municipal Code to the contrary, all small wireless facilities as defined in 47 C.F.R. § 1.6002(I), as may be amended or superseded, that are proposed to be located within the City, including any City-owned rights of way, are subject to the requirements of the "*City Wide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities*", as adopted and amended from time to time by City Council resolution, and all such small wireless facilities must comply with that Policy.

12.56.020 - Fees. Each applicant/permittee shall pay one-time and recurring fees, per each small wireless facility, in amounts set forth in the *City Wide Policy Regarding Permitting Requirements and Development Standards for Small Wireless Facilities*, or as (i) established by resolution of the City Council that are not less than those amounts deemed presumptively reasonable under the Report and Order or then-in effect federal law or regulations; or that otherwise are determined to be a reasonable, non-discriminatory approximation of the City's costs in processing applications and administering permits for small wireless facilities; or (ii) agreed upon by the City and an applicant or permittee in a site or master agreement.

12.56.030 - Violations. Failure to comply with the *City Wide Policy Regarding Permitting Requirements And Development Standards For Small Wireless Facilities* constitutes a violation of this Chapter and this Code.

12.56.040 - Conflicting provisions superseded. The provisions of this Chapter shall govern and supersede any conflicting provisions of the Banning Municipal Code with respect to the permitting and regulation of small wireless facilities within the City, including small wireless facilities in City rights of way."

SECTION 3. The City of Banning has determined that the adoption of this Ordinance is exempt from review under the California Environmental Quality Act ("CEQA") (California Public Resources Code Section 21000, et seq.), pursuant to Section 15061(b)(3) of the CEQA Guidelines, covering activities with no possibility of having a significant effect on the environment. In addition, the City of Banning has determined that this Ordinance is categorically exempt pursuant to Section 15301 of the CEQA Regulations applicable to minor alterations of existing governmental and/or utility-owned structures.

SECTION 4. The City Council finds and declares that it is adopting this Ordinance in order to more fully protect and preserve the public health and safety with

respect to City rights-of-way in light of the adoption of the Report and Order. Notice is hereby given to any and all wireless providers obtaining a permit pursuant to the Banning Municipal Code as amended herein, that the City expressly reserves any and all rights it possessed prior to the adoption of the Report and Order concerning its authority to regulate its public rights-of-way. In the event the Report and Order is invalidated, modified, or limited in any way, the City Council reserves the right, subject to reasonable notice and due process, to modify the terms and conditions applicable to any permit issued hereunder including, but not limited to, the term, fees charged, and scope of any future wireless deployments within the City's rights-of-way.

SECTION 5. Severability. If any sections, subsections, sentence, clause, or phrase of the Chapter adopted by this Ordinance is for any reason held to be invalid or unconstitutional by the decision or legislation of any court of competent jurisdiction, or by reason of preemptive legislation, such decision or legislation shall not affect the validity of the remaining portions of the Chapter. The City Council declares that it would have passed this Ordinance, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that one or more of the sections, subsections, sentences, clauses, or phrases thereof is declared invalid or unconstitutional.

SECTION 6. Urgency. The City Council finds that, as a result of the regulations adopted by the Federal Communications Commission effective as of January 14, 2019, as more fully described in the Recitals to this Ordinance, some City regulations governing third party use of its public rights-of-way or private property for telecommunication antennas may be invalidated which will result in an absence of standards designed to protect the public. Unless this Ordinance is effective and its regulations are immediately put in place, the public health, safety and welfare will be at risk. Therefore the immediate preservation of the public health, safety and welfare requires that this Ordinance be enacted as an urgency ordinance pursuant to Government Code Section 36937(b) and take effect immediately upon adoption, and its urgency is hereby declared.

SECTION 7. Publication, Effective Date.

The City Clerk shall certify to the passage and adoption of this Ordinance, and shall make a minute order of the passage and adoption thereof in the records and the proceeding of the City Council at which time the same is passed and adopted. The City Clerk shall cause this Ordinance or a summary thereof to be published in a newspaper of general circulation and shall post the same at City Hall, 99 E. Ramsey Street, Banning, California. The City Clerk shall cause the Ordinance to be printed, published, and circulated as required by law.

PASSED, APPROVED AND ADOPTED this 14th day of May, 2019

Arthur L. Welch, Mayor
City of Banning

ATTEST:

Daryl Betancur, Deputy City Clerk
City of Banning

APPROVED AS TO FORM AND LEGAL CONTENT:

Kevin Ennis, City Attorney
Richards, Watson & Gershon

CERTIFICATION:

I, Daryl Betancur, Deputy City Clerk of the City of Banning, California, do hereby certify that the foregoing Urgency Ordinance No. 1546 was duly adopted at a regular meeting of the City Council of the City of Banning held on the 14th day of May, 2019, by the following vote, to wit:

AYES: Happe, Peterson, Wallace, Andrade, & Welch

NOES: None

ABSENT: None

ABSTAIN: None

Daryl Betancur, Deputy City Clerk
City of Banning, California