

BEFORE THE TOWN COUNCIL OF THE TOWN OF MORAGA

In the matter of:

**Amending Chapter 8.144, “Wireless
Communications Facilities, Satellite
Dishes and Miscellaneous Antennas” of
Title 8, Planning and Zoning, of the Moraga
Municipal Code, to Reference “Small Cell
Wireless Facilities,” and Amending
Various Sections Within Chapter 8.144 to
Add General Development Standards,
Procedures and Aesthetic Criteria for
Small Cell Wireless Facilities, in Order to
Facilitate Deployment of Small Cell
Wireless Facilities Within the Public Right-
of-Way in Accordance with Federal
Communications Commission Regulations)**

ORDINANCE NO. 282

WHEREAS, on April 28, 1999 the Town Council adopted Ordinance No. 176 establishing Chapter 8.144 – Wireless Communications Facilities, Satellite Dishes and Miscellaneous Antennas (previously codified as Chapter 8-60) of the Moraga Municipal Code, which regulates wireless communications facilities, satellite dishes and antennas to minimize the potential health, safety and aesthetic impacts of such facilities on the community; and

WHEREAS, the Federal Communications Commission (FCC) regularly establishes new and updated regulations aimed at improving wireless broadband communications infrastructure across the nation for the purpose of making available to all the people of the United States rapid, efficient, nationwide, and world-wide wire and radio communication services, as well as for the purposes of national defense and promoting public safety through the use of such communications; and

WHEREAS, on September 26, 2018 the FCC adopted its Declaratory Ruling and Third Report and Order, issued *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79 (the “Order” or “Carr Order”) regarding the regulation of small cell wireless facilities which aims to facilitate the deployment of such facilities across the nation in order to help fulfill the purposes described above by requiring local governments to relax various standards governing the installation and operation of such facilities; and

WHEREAS, the Moraga Municipal Code (including Chapter 8.144) currently does not contain any regulations specifically governing small cell wireless facilities, and regulates such facilities in the same, more rigorous manner as other types of wireless facilities, inconsistent with the provisions of the Carr Order; and

WHEREAS, the Carr Order went into effect on January 14, 2019, but the FCC gave local governments until April 15, 2019 (an additional 180 days after the publication of the Order in the Federal Register) to incorporate certain types of regulations in their zoning ordinances relating to the permitting of small cell wireless facilities, so long as such regulations are reasonable, do not relate to the potential environmental or health impacts of small cell wireless technology, and do not preclude (or have the effect of precluding) the installation of local small cell wireless networks; and

WHEREAS, on March 13, 2019, the Town Council, after a duly-noticed public hearing, directed staff to prepare an Ordinance ahead of the April 15, 2019 deadline, followed by a comprehensive update to MMC Chapter 8.144 to address all inconsistencies between the code and applicable federal regulations regarding small cell wireless facilities; and

WHEREAS, the Town Council finds that revising its zoning ordinances to provide for the permitting of small cell wireless facilities without consideration of the potential environmental or health impacts of small cell wireless technology could be interpreted as being inconsistent with the General Plan, and that because the Carr Order is binding on the Town and makes clear that the Town Council must revise its zoning ordinances in such a manner if the Town wishes to enact any regulations in its zoning ordinances relating to the permitting of small cell wireless facilities, the Town Council proclaims that to the extent it makes any such revisions to its zoning ordinances herein, the Town Council has done so under protest and solely for the purpose of complying with the express and overly burdensome mandates of the Carr Order; and

WHEREAS, the Town Council finds that making amendments to Chapter 8.144 is necessary to preserve the orderly processing of applications for small cell wireless facilities and ameliorate the negative impacts of the Carr Order by helping to ensure the health, safety and welfare of the community to the extent permissible through consistent aesthetic regulations relating to those small cell wireless facilities, and for that reason the making of such amendments are consistent with the General Plan; and

WHEREAS, on April 8, 2019, the Planning Commission held a duly noticed public hearing and took public testimony on the proposed amendments, considered evidence submitted in the form of the staff report, and made a recommendation to the Town Council; and

WHEREAS, on April 10, 2019, the Town Council held a duly noticed public hearing, took testimony on the proposed amendments, considered the text of the proposed amendments and the Planning Commission's recommendations and ultimately voted 5-0 to waive the first reading and introduce the Ordinance for adoption on April 24, 2019.

NOW, THEREFORE, THE TOWN COUNCIL OF THE TOWN OF MORAGA DOES ORDAIN AS FOLLOWS:

SECTION 1: Findings.

The Town Council hereby finds and declares as follows:

- A. The above recitals are true and correct and Town Council hereby adopts them as findings in support of this Ordinance to be incorporated herein as though set forth in this section.
- B. The purpose of the proposed Ordinance being recommended for adoption is to establish reasonable, technically-feasible, aesthetic requirements for small cell wireless facilities proposed for location within the public rights-of-way throughout the Town in a manner compliant with recently-enacted FCC regulations pertaining to the facilitation of small cell wireless broadband deployment nationwide.
- C. Absent this Ordinance, the Town would not be able to preserve the orderly processing of applications for small cell wireless facilities, which would be contrary to the Town's interests. Additionally, absent this Ordinance the Town would not be able to impose aesthetic regulations relating to those small cell wireless facilities, which would also be contrary to the Town's interests. The procedures for processing applications for small cell wireless and the aesthetic regulations are necessary to ensure the peace, health and safety of the community.
- D. The proposed Ordinance is not intended to, nor shall it be interpreted or applied to:
(1) prohibit or effectively prohibit any wireless service provider's ability to provide personal wireless services; (2) prohibit or effectively prohibit any entity's ability to provide any interstate or intrastate telecommunications service, subject to any competitively neutral and nondiscriminatory rules, regulations or other legal requirements for rights-of-way management; (3) unreasonably discriminate among providers of functionally equivalent services; (4) deny any request for authorization to place, construct or modify wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the FCC's regulations concerning such emissions; (5) prohibit any collocation or modification that the Town may not deny under federal or state law; (6) impose any unfair, unreasonable, discriminatory or anticompetitive fees that exceed the reasonable cost to provide the services for which the fee(s) is/are charged; or (7) otherwise authorize the Town to preempt any applicable federal or state law; and
- E. The Town Council further finds that the Municipal Code amendments adopted herein are categorically exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Sections 15301, Existing Facilities and 15303, New Construction of Small Structures because the amendments would only permit the installation of small wireless telecommunication facilities on existing structures such as street lights and utility poles that would result in the minor alteration of such structures, or the creation of small new structures, and CEQA Guidelines, section 15061(b)(3), which provides that the general rule that

CEQA applies only to projects which have the potential for causing a significant effect on the environment.

SECTION 2: Amendment.

Title 8, Planning and Zoning, Chapter 8.144, "Wireless Communications Facilities, Satellite Dishes and Miscellaneous Antennas" of the Town of Moraga Municipal Code is hereby amended as follows:

Section 8.144.010 – Purpose and intent, of Title 8 is hereby amended as follows:

"8.144.010 - Purpose and intent.

The purpose of this article is to regulate wireless communication transmission and/or reception facilities (hereinafter called "wireless communications facilities") to minimize the potential health, safety and aesthetic impacts of such facilities on the community, as follows:

- A. To establish development standards to regulate the placement and design of wireless communication facilities so as to preserve the unique visual character of the town;
- B. To establish development standards of wireless communications facilities in accordance with federal laws, including small cell wireless facilities as defined herein;
- C. To acknowledge the community benefit associated with the provision of wireless communications facilities within the town and to provide incentives for well-designed and well-placed facilities;
- D. To pursue additional benefits from the facilities to the public by encouraging the leasing of publicly owned properties where feasible for the development of wireless communication facilities; and
- E. Encourage the location of wireless communications facilities in commercial districts and generally discourage the location of such facilities in residential districts and visually sensitive areas."

Section 8.144.020 – Definitions, of Title 8 is hereby amended to add the following definition:

"8.144.020 - Definitions.

As used in this article:

[...]

"Small Cell Wireless Facility" is a wireless communications facility that meets the following criteria:

1. The facility-
 - (i) is mounted on a structure 50 feet or less in height including its antennas as defined in Section 1.1320(d) of Title 47 of the Code of Regulations; or

- (ii) is mounted on a structure no more than 10 percent taller than other adjacent structures; or
 - (iii) does not extend the existing structure on which it is located to a height of more than 50 feet or by more than 10 percent, whichever is greater.
2. Each antenna associated with the facility, excluding associated antenna equipment, is no more than three cubic feet in volume.
 3. All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume.”

[...]

Section 8.144.030 – General development standards, of Title 8 is hereby amended as follows:

“8.144.030 - General development standards.

The following development standards shall apply to the development of all new wireless communication facilities except small cell wireless facilities.

- A. Ground Mounted Equipment. All ground mounted wireless communication equipment, antennas, poles, dishes, cabinets, structures, towers or other appurtenances shall be:
 1. Of a minimal functional height or no greater than twenty (20) feet, whichever is less;
 2. Have a nonreflective finish and shall be painted or otherwise treated to minimize visual impacts;
 3. Shall be sited to be screened by existing development, topography or vegetation to the extent consistent with proper operation of the wireless communication facility. Additional new vegetation and its proper irrigation where practical, or other screening may be required as a condition of approval.
- B. Roof and Building Mounted Equipment. Roof and building mounted equipment, including monopoles and antennas shall:
 1. Be located as far away as feasible and aesthetically practicable from the outer edge of a building. Antennas attached to a building shall be painted or treated to match the exterior of the building or background visible beyond the antenna;
 2. Avoid being mounted on the peaks of roofs to the greatest extent possible and all other related equipment shall be screened or hidden from view.
- C. A wireless communication facility shall comply with all applicable FCC standards for radio frequency emissions and shall not adversely affect the public health, safety or welfare.
- D. All new wireless communication facilities shall be collocated with existing and/or with other planned new facilities whenever feasible and aesthetically desirable.

Collocation is discouraged when it will increase visual impacts. Service providers are encouraged to collocate with other facilities such as light standards, utility poles and other structures where the collocation is found to minimize the overall visual impact.

- E. Any exterior lighting shall be manually operated and used only during night maintenance or emergencies. The lighting shall be constructed or located so that only the intended area is illuminated and off-site glare is fully controlled.
- F. Where feasible, the location of commercial wireless communication facilities shall be encouraged to be located on publicly-owned property or public easement or right-of-way.
- G. All equipment associated with a wireless communication facility shall be removed within thirty days of the discontinuation of use and the site shall be restored to its original preconstruction condition in a manner consistent with continued use by any collocated facility. The town shall be given thirty (30) days' notice of intent to discontinue use of the facility prior to discontinuation of use.
- H. All proposals for wireless communications facilities shall include a description of the site selection process undertaken, including coverage objectives and alternative site analysis.
- I. Antennas and equipment buildings shall not be located closer than three hundred (300) feet from a residential structure and one hundred (100) feet from residential property line."

Section 8.144.035 – General development standards and procedures for small cell wireless facilities, is hereby added to Title 8:

"Section 8.144.035 – General development standards and procedures for small cell wireless facilities.

- A. A small cell wireless facility may be constructed in all zoning districts upon issuance of a Small Cell Site Permit in accordance with this section, instead of an issuance of a conditional use permit under section 8.144.080. The following development standards shall apply to the issuance of a Small Cell Site Permit, except for applications for an eligible facilities request as defined in 47 U.S.C. Section 1455(a):
 - 1. Location of small cell wireless facilities:
 - a. Order of preference. The order of preference for the location of small cell wireless facility installations in the Town, from most preferred to least preferred, is:
 - 1. Community Commercial, Planned Development-Commercial, and Research and Development District zones;
 - 2. Limited Commercial, Mixed Commercial, Institutional District (non-school) and Suburban Office District zones;
 - 3. Mixed Commercial and Residential zones; and
 - 4. Residential, Institutional District (schools), MOSO and Non-MOSO Open Space District zones.

- b. Colocation. Colocation of small cell wireless facilities on Approved Structures with compatible pre-existing small cell wireless facilities is encouraged, where feasible, to minimize the visual impacts of small cell wireless facilities upon the public right-of-way. In the absence of compatible pre-existing small cell wireless facilities, small cell wireless facilities are preferred to be located on pre-existing Approved Structures, where possible.
2. All small cell wireless facilities proposed to be installed in the public right-of-way shall require submittal and ministerial design review approval of a Small Cell Site Permit application by the planning director or his or her designee prior to building permit approval for such facility. Additionally, applicants shall obtain any permits required under Chapter 12.06 and Chapter 14.04.
3. Any applicant proposing to install a small cell wireless facility within the public right-of-way shall pay the fee for a Small Cell Site Permit established by Town Council resolution;
4. All proposed installations on existing utility poles, street lights, traffic signals, electric, gas, and other utility structures, and other similar facilities as defined in section 12.06.020 (jointly, "Approved Structures"), located within the public right-of-way shall use the design techniques set forth in this section to minimize visual impacts to the public right-of-way. Antennas and pole-mounted equipment shall be screened, concealed or disguised with shrouding matching the appearance of the existing structure or be integrated into the structure of the proposed facility so as to be hidden from view. Screening/concealing equipment shall be of minimal, functional size necessary to achieve concealment objectives under this subsection. Cabling and conduit shall be hidden from view by integrating such cabling or conduit into existing equipment where technically feasible, and visible spooling of cable shall be prohibited.
5. All cables or wiring associated with a facility shall be concealed within a sleeve between the bottom of the antenna and the mounting bracket.
6. All pole-mounted equipment and antennas shall be painted to match the color of the pole or other type of support structure to which it is attached.
7. All small cell wireless facilities shall include signage that accurately identifies the facility's owner/operator, the site name or identification number, and a phone number to the owner/operator's network operations center. No other signage except that required by law or recommended by FCC, OSHA or other federal government agency for compliance with radio-frequency emissions regulations shall be allowed on any small cell wireless facility.
8. All non-antenna equipment, including equipment which is susceptible to being installed in an equipment cabinet, shall be installed underground unless the installation of such equipment underground is not technically feasible. This undergrounding requirement shall not apply to cabling and conduit necessary to

mount the antenna of a small wireless facility on a new or existing pole, nor apply to non-antenna equipment concealed from public view by being structurally integrated into the construction of a new or existing pole for any utility.

9. All vents, exhausts and similar features for undergrounded equipment shall be flush to grade to the maximum extent feasible.
 10. In no case shall a small wireless facility block any public sidewalk or functionally impede an accessible path of travel.
 11. All disturbed or damaged pavement and/or landscaping within or adjacent to the public right-of-way shall be replaced and areas of bare or disturbed soils must be revegetated upon completion of an installation.
 12. Landscaping shall be required to provide screening to minimize visual impacts where site conditions allow for installation of new landscaping. Landscaping shall not be required where installation shall be entirely on existing paved surfaces. New landscaping shall be drought-tolerant and designed and installed to be natural in appearance.
 13. The Town shall be given thirty (30) days' notice of intent to discontinue use of the facility by the service provider or its designee prior to the discontinuation. All equipment associated with a discontinued facility shall be removed within sixty days of the discontinuation of use and the site shall be restored to its original preconstruction condition in a manner consistent with continued use by any collocated facility. The Town may deem a facility abandoned and discontinued under this subsection if the permittee fails to respond within 30 calendar days to a written notice sent by certified U.S. mail, return receipt requested, from the planning director that states the basis for the planning director's belief that the facility has been abandoned or discontinued for a continuous period of 180 days. A decision of the planning director to deem a facility abandoned shall be provided to the service provider in writing, by certified U.S. mail, return receipt requested, and shall be subject to appeal in accordance with section 1.16.010. A permit shall not be rescinded for discontinuance until the completion of the applicable appeal or the end of the applicable appeal period if no timely appeal is filed.
- B. All applications for small cell wireless facilities shall be subject to the following procedures:
1. Any applicant proposing to install a small cell wireless facility within the public right-of-way shall submit an application to the planning department and pay the fee for a Small Cell Site Permit established by Town Council resolution.
 2. An application for small cell wireless facilities must include:

- a. Detailed site and engineering plans for each proposed small cell installation, including all associated equipment necessary for its operation;
 - b. Documents showing the geographic service area for the proposed small cell installation(s), and all of applicant's existing or proposed installations in the Town;
 - c. Photographs of all proposed small cell wireless facility equipment;
 - d. Certification by a certified radio-frequency engineer that the small cell installation will be in compliance with the FCC standards for RF emissions as they relate to the general public, as to both (i) the individual small cell wireless facility installed by the applicant, and (ii) the total emissions that will be generated by all radio-frequency emitting equipment colocated on the same structure after installation of the new small cell wireless facility;
 - e. Documentation demonstrating the explanation as to the reason(s) for failure to locate any small cell wireless facility in accordance with the preferred installation locations described in Section 8.144.035 A(1) of this chapter to the extent feasible;
3. Within 10 days of submission of any application, the planning director or designee shall determine whether the application is complete, and if not complete, shall provide the applicant notice that the application is incomplete and identify materials or information needed to complete the application;
4. The planning director shall approve an application ministerially and without a public hearing;
5. The planning director may approve an application when he/she finds that:
 - a. The proposed project meets the definition of a small cell wireless facility as defined Section 8.144.020;
 - b. The proposed project complies with all applicable requirements prescribed in Section 8.144.035(A) to the greatest extent possible without resulting in an effective prohibition of service;
 - c. The applicant has demonstrated that the proposed project will comply with all applicable health and safety regulations, which include without limitation the Americans with Disabilities Act and all FCC regulations relating to radio frequency emissions; and
 - d. Conditions of approval imposed by the planning director shall be limited to compliance with requirements set forth in this section, other sections of the Town code applicable to infrastructure deployments, or requirements necessary to comply with applicable state or federal law.
6. Within five calendar days after the planning director acts on an application or before the FCC shot clock expires (whichever occurs first), he/she shall notify the applicant of such action by written notice. If the planning director denies the

application (with or without prejudice), the written notice must contain the reason(s) for the denial.

7. A permit issued for a small cell wireless facility shall be valid for a ten (10) year period following its issuance, and it shall automatically expire on the ten (10) year anniversary of its issuance unless renewed prior to its expiration.
 8. Any decision to approve or deny a small cell wireless facility shall be appealable directly to the Town Council. Appeals shall be filed within five (5) business days of a decision having been rendered. Any such appeal shall include a letter identifying the appellant's name, address and contact information and providing the basis for the appeal. All appeals shall be subject to the appeal fees established in the Town's Master Fee Schedule. Appeals of an approval shall not be permitted to the extent that the appeal is based on the environmental effects of radio frequency emissions, unless the appeal is filed on the basis that the facility does not comply with FCC regulations on radio frequency emissions. Appeals shall be decided in accordance with time periods and procedures established by applicable laws and regulations, including, but not limited to, decisions of the Federal Communications Commission.
- C. The planning director shall review all applications for new small cell wireless facility to determine if the application is for an eligible facilities request for modification of an eligible support structure, as those terms are defined in 47 U.S.C. Section 1455(a). If the planning director determines that the application meets the requirements of an eligible facilities request, the planning director shall ministerially approve the application in accordance with requirements under 47 C.F.R. section 1.40001. The grant or approval of a Small Cell Site Permit to such eligible facilities request shall not be deemed to extend the underlying permit term.
- D. Standard Conditions of Approval for Small Cell Site Permits.
- In addition to any other conditions of approval permitted under federal and state law and this Code that the director deems appropriate or required under this Code, all Small Cell Site Permits under this subsection shall include the following conditions of approval:
1. As-Built Plans. The applicant shall submit to the director an as-built set of plans and photographs depicting the entire small cell wireless facility as modified, including all transmission equipment and all utilities, within ninety (90) days after the completion of construction.
 2. Indemnification. To the fullest extent permitted by law, the applicant and any successors and assigns, shall defend, indemnify and hold harmless the Town, its elected and appointed officials, employees, and agents, from and against any liability, claims, suits, actions, arbitration proceedings, regulatory proceedings, losses, expenses or costs of any kind, whether actual, alleged or threatened, including, but not limited to, actual attorney fees, litigation expenses and court costs of any kind without restriction or limitation, incurred in relation to, as a consequence of, arising out of or in any way attributable to, actually,

allegedly or impliedly, in whole or in part, related to the Small Cell Site Permit and the issuance of any permit or entitlement in connection therewith. The applicant shall pay such obligations as they are incurred by the Town, its employees, agents and officials, and in the event of any claim or lawsuit, shall submit a deposit in such amount as the Town reasonably determines necessary to protect the Town from exposure to fees, costs or liability with respect to such claim or lawsuit.

3. Compliance with applicable laws. The applicant shall comply with all applicable provisions of this code, any permit issued under this code, and all other applicable federal, state, and local laws. Any failure by the Town to enforce compliance with any applicable laws shall not relieve any applicant of its obligations under this code, any permit issued under this code, or all other applicable laws and regulations.
4. Compliance with approved plans. The proposed project shall be built in compliance with the approved plans on file.
5. Violations. The small cell wireless facility shall be developed, maintained, and operated in full compliance with the conditions of the Small Cell Site Permit, any other applicable permit, and any law, statute, ordinance or other regulation applicable to any development or activity on the site. Failure of the applicant to cease any development or activity not in full compliance shall be a violation of these conditions. Any violation of this code, the conditions of approval for the Small Cell Site Permit, or any other law, statute, ordinance or other regulation applicable to any development or activity on the site may result in the revocation of this permit. The remedies specified in this section shall be cumulative and the Town may resort to any other remedy available at law or in equity and resort to any one remedy shall not cause an election precluding the use of any other remedy with respect to a violation.”

SECTION 3: Effective Date. This Ordinance becomes effective thirty (30) days after its final passage and adoption.

SECTION 4: This Ordinance shall be published and posted according to law.

SECTION 5: Severability. If any provision of the Ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the remainder of the Ordinance which can be given effect without the invalid provisions or applications of the Ordinance. To this end, the provisions of this Ordinance are severable.

The foregoing Ordinance was introduced at a regular meeting of the Town Council of the Town of Moraga, California, held on April 10, 2019 and was adopted and ordered published at a regular meeting of the Town Council held on April 24, 2019:

AYES: Vice Mayor Korpus, Councilmembers McCluer, Sos and Woehleke
NOES: None
ABSTAIN: None

ABSENT: Mayor Wykle

AFFIRMED:

Roger N. Wykle, Mayor

ATTEST:

Marty C. McInturf, Town Clerk