

ORDINANCE NO. 3498 C.S.

AN ORDINANCE OF THE COUNCIL OF THE CITY OF MONTEREY

AMEND MONTEREY CITY CODE SECTION 38-112.4 TO COMPLY WITH CHANGES TO
FEDERAL LAW

THE COUNCIL OF THE CITY OF MONTEREY DOES ORDAIN, as follows:

SECTION 1:

WHEREAS, the City's Personal Wireless Services Facilities Ordinance (PWS) is intended to use the City's power to regulate the use of land under federal and state law, but not to exceed the scope of the City's authority. The ordinance is to be construed to supplement, rather than contradict, federal and state law;

WHEREAS, in an effort to remove perceived barriers to broadband deployment, Section 6409(a) of the Middle Class Tax Relief Act and Job Creation Act of 2012 (47 U.S.C. §1455) requires approval of changes to existing eligible wireless facilities that do not substantially change the physical dimension of the tower or base station;

WHEREAS, in January 2013 the FCC released its Guidance, interpreting what it means to "substantially change the physical dimensions" of a tower or base station, and these definitions have been incorporated into the ordinance;

WHEREAS, the FCC's Guidance does not make clear that the "substantial change" analysis should be measured from the original dimensions of the PWS facility, and not based on successive modifications. The City intends that the definition: "Substantially change the physical dimensions" means, as measured from the original dimensions of the PWS facility in order to prevent "tower creep," a scenario where a wireless service provider could achieve whatever size facilities it desires through a series of successive changes to its wireless tower or base station;

WHEREAS, Federal law is silent regarding the process required for review and approval of applications that are eligible for review under 47 U.S.C. §1455 (existing facilities). The plain language of the regulation evidences Congress' intent to facilitate approval of "minor" modifications of existing PWS facilities. In addition, the FCC requires the City to approve or deny PWS facility applications for collocation proposals within 90 days. This ordinance authorizes the Zoning Administrator to administratively review these applications which will be noticed and listed on the agenda as "Public Appearance" items;

WHEREAS, the 9th Circuit has confirmed that the City may regulate the aesthetics of PWS facilities so long as the regulations do not effectively prohibit the provision of PWS;

WHEREAS, the City may not regulate PWS facility placement based on the “environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emission.” (47 USC §332(c)(7)(B)(iv).) The City is preempted from regulating on this ground; and

WHEREAS, the City of Monterey determined that the proposed action is not a project as defined by the California Environmental Quality Act (CEQA)(CCR, Title 14, Chapter 3 (“CEQA Guidelines), Article 20, Section 15378). In addition, CEQA Guidelines Section 15061 includes the general rule that CEQA applies only to activities which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. Because the proposed action and this matter have no potential to cause any effect on the environment, or because it falls within a category of activities excluded as projects pursuant to CEQA Guidelines section 15378, this matter is not a project. The action simply recognizes the limitations on City jurisdiction over these types of facilities. Because the City has no jurisdiction to deny these facilities based on alleged health effects, it does not have any discretion to require modifications to, or to deny approval of, these facilities on those grounds. Thus, it is not a “project” under CEQA. Furthermore, there is no evidence that such minor modifications do, in fact, pose a risk of health or other environmental effects. Because the matter does not cause a direct or any reasonably foreseeable indirect physical change on or in the environment, this matter is not a project. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

NOW THEREFORE, the Monterey City Council declares as follows:

SECTION 2: Monterey City Code, Section 38-112.4, is hereby amended to read as follows:

38-112.4 Personal Wireless Service Facilities

A. Purpose. This section is enacted pursuant to 47 U.S.C. Section 332(c)(7), also known as the Telecommunications Act of 1996, to provide standards for the placement, design, construction, and modification of personal wireless service (PWS) facilities. These regulations are designed to protect and promote public safety, community welfare, and the visual quality of the City, while at the same time recognizing the benefit of PWS to the community. This section is intended to use the City’s power to regulate the use of land under federal and state law, but not to exceed the scope of the City’s authority. This section is to be construed to supplement, rather than contradict, federal and state law. This section applies to all PWS facilities located within the City, whether on private or public property, including the public right-of-way.

B. Exempt Facilities. These regulations shall not apply to the following facilities:

1. Amateur (including ham and short-wave) radio frequencies on private or public property; provided, that the antenna does not exceed the height limit prescribed by the regulations for the district in which the facility is located.
2. Direct-to-home satellite services smaller than two feet in diameter.
3. Preexisting PWS facilities shall not be required to meet the requirements of this section unless such PWS facility is modified, meaning new construction other than routine maintenance. A modification may include, but is not limited to, adding antennas

to an existing site, relocating antennas, adding new equipment, or relocating existing equipment.

C. Prohibited Facilities. PWS facilities that do not comply with the most current regulatory and operations standards, including but not limited to, radio frequency (RF) emission standards adopted by the FCC, are prohibited. Applicant is required to affirm, under penalty of perjury, that the proposed installation will be FCC compliant, in that it will not cause members of the general public to be exposed to RF levels that exceed the levels deemed safe by the FCC. Documentation must be submitted proving that the permit applicant has whatever certificate or license the FCC requires to operate the PWS facility.

D. Planning Applications and Approvals Required. Installation of a new PWS facility or modification of an existing PWS facility shall first require an application for a use permit under City Code Section 38-156 et seq. and approval, then architectural review and approval under City Code Section 38-187.

1. Exception. Applications for modifications to existing PWS facilities determined by the Zoning Administrator to be facilities eligible for administrative review under 47 U.S.C. §1455 do not require a new use permit or architectural review.
 - a. Eligible Facilities. Facilities eligible for administrative review means any request for modification of an existing wireless tower or base station that involves: (1) removal of transmission equipment; (2) collocation of new transmission equipment that does not substantially change the physical dimensions of such tower or base station; or (3) replacement of transmission equipment, that does not substantially change the physical dimensions of such tower or base station. "Substantially change the physical dimensions" means, as measured from the original dimensions of the PWS facility:
 - (i) The mounting of the proposed antenna on the tower would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or
 - (ii) The mounting of the proposed antenna would involve the installation of more than the standard number of new equipment cabinets for the technology involved, not to exceed four, or more than one new equipment shelter; or
 - (iii) The mounting of the proposed antenna would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the great tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable; or
 - (iv) The mounting of the proposed antenna would involve excavation outside the current tower site, defined as the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site.
 - b. Administrative Review. The use permit for existing facilities will be reopened for review by the Zoning Administrator. The approval may contain conditions to

ensure compliance with design and development standards contained in Section 38-112.4(F)(7), (9), (10), and (12). Written notices shall be sent by U.S. Mail at least 10 days prior to the administrative decision to all owners of property located within 300 feet of the perimeter of the project site. At the specific request of any interested party or staff, any application for modifications to existing PWS facilities under this Section may be referred to the Planning Commission. The Planning Commission's review is limited to whether the PWS facility is eligible for review under 47 U.S.C. §1455.

E. Submittals. Submittal requirements for PWS facilities shall be developed, maintained, and adopted by the Planning, Engineering and Environmental Compliance Division, shall be made available to the public at City Hall, and shall be subject to review and oversight by the Planning Commission on an annual basis, or as requested by the public or the Planning Commission.

F. Design and Development Standards.

1. Number of Antennas and Facilities Permitted. The number of antennas allowed per site shall be determined on a case-by-case basis by the City with the goal of minimizing adverse visual impacts.
2. Location Preference. (a) The applicant shall meet with the City to determine if any City-owned sites meet the service needs. City-owned sites are preferred if design standards are satisfied; (b) co-location sites; (c) industrial sites; (d) commercial sites; and (e) other.
3. Co-Location. A new PWS facility shall be co-located with existing facilities and with other planned new facilities whenever technically feasible, and whenever determined by the City to be visually desirable. A service provider shall co-locate a new PWS facility with noncommunications utility facilities (e.g., light standards, water tanks, and other utility structures) where the City determines that this co-location will minimize the overall visual impact. In order to facilitate co-location, use permit conditions of approval for a new facility shall require each service provider to cooperate in the siting of equipment and antennas to accommodate the maximum number of operators at a given site.
4. Disfavored Locations. PWS facilities are disfavored in the following zoning districts:
 - a. Open Space Districts (O).
 - b. Residential Districts (R).
 - c. Historic sites, overlay zones (H1, H2 and HD).
5. Setbacks and Height. PWS facilities shall comply with all applicable setback and height regulations of the zoning district in which they are situated with the exception of underground equipment shelters or cabinets that adjoin property lines, if approved by the building official.
6. Noise. All PWS facilities shall be constructed and operated in such a manner as to minimize the amount of noise impacts to adjacent uses and activities, and shall be in conformance with General Plan and Zoning Ordinance noise exposure standards. Noise attenuation measures for air-conditioning units shall be required. Backup generators shall only be operated during power outages and for testing and maintenance purposes.
7. Lighting. Exterior lighting shall be manually operated and used only during night maintenance checks and emergencies unless specifically required by the Federal Aviation Administration or other government agency. Facility lighting shall be designed so as to meet but not exceed minimum requirements for security and safety and in all

instances be designed so as to avoid glare and minimize illumination onto adjacent properties.

8. Biotic Resources. Project proposals shall consider the surrounding vegetation and wildlife impacts. The City's goal is to preserve trees and native vegetation. Tree removals and habitat modifications can be considered but mitigated in accordance with City policy.

9. Signs. The design, materials, colors, and location of the identification signs shall be subject to review and approval pursuant to City Code Section 31-1 et seq. No sign shall be greater than two square feet in size. If at any time a new PWS facility provider takes over operation of an existing PWS facility, the required and approved signs shall be updated within 30 days to reflect the name and phone number of the new PWS provider. The colors, materials, and design of the updated signs shall match those of the approved signs.

10. Design. The PWS facility shall be designed to visually blend into the surrounding area, in a manner compatible with the local community character. All facilities shall be designed to be resistant to and minimize opportunities for unauthorized access, climbing, vandalism, graffiti, and other conditions that would result in hazardous conditions, visual blight, or attractive nuisances. The City may require the provision of warning signs, fencing, anti-climbing devices, or other techniques to prevent unauthorized access and vandalism when, because of their location or accessibility, antenna facilities have the potential to become a nuisance. The design of the fencing and other access control devices shall be subject to Architectural Review Committee review. The use of chain-link fencing is discouraged and the use of razor wire, barbed wire, or similar hazardous fence material is prohibited.

11. Mounting Techniques. The following PWS facility and mounting techniques are listed in order of preference: Wall-mounted facilities, roof-mounted facilities, ground-mounted facilities, and freestanding monopole facilities. The City may require an independent review of the PWS facility necessity through a supplemental report, paid for by the applicant, to evaluate the applicant's request. Factors to be considered are: whether another site exists where a preferable method of installation could be met; whether the future addition of another PWS facility could affect the future height of the proposed facility; and whether there is any other technically feasible method of siting the facility that would reduce the overall proposed height.

a. Wall-Mounted Personal Wireless Service Facilities.

- i. Integrate wall-mounted facilities with the style and character of the structure to be as unobtrusive as possible.
- ii. Locate antennas entirely upon an existing or newly created architectural feature so as to be completely screened from view.
- iii. Paint and texture all visible elements to match the wall surface on which they are to be mounted.
- iv. Avoid locating on the front or most prominent facade of a structure.
- v. Locate out of the pedestrian line-of-sight unless camouflaged to reasonably eliminate visual impacts and appear as an integral part of the structure.

b. Roof-Mounted Personal Wireless Service Facilities.

- i. Locate facilities in an area of the roof where the visual impact is minimized.
- ii. Paint facilities with a nonreflective matte finish using an appropriate color

that blends with the backdrop or install screening panels that blend with the building's architecture in terms of scale, material and color.

iii. Set back facilities to avoid visibility from adjoining public rights-of-way.

iv. Locate equipment cabinets, cables, and other appurtenant equipment to avoid visibility from adjoining public rights-of-way. Roof screening in compliance with this section may be required in cases where equipment is considered a visual impact.

c. Ground-Mounted Personal Wireless Service Facilities.

i. Paint facilities using nonreflective matte-finished shades designed to blend with the backdrop. For equipment that cannot be painted provide screening that blends with the predominant architectural design of adjacent buildings, including material, finish, and texture.

ii. Provide landscaping as necessary to minimize visual impacts.

iii. Round-mounted antennas and related equipment shall not extend over a sidewalk, street, or other public right-of-way, except that ground-mounted antennas and related equipment on streetlight poles, traffic signals, and existing telephone poles may extend over a sidewalk or street, subject to City Manager or designee approval.

d. Freestanding Monopole Personal Wireless Service Facilities.

i. Site facilities to maximize natural screening such as in a grove of trees.

ii. In high visibility locations incorporate facility into a piece of art or sculpture, a clock tower, flag pole, or other appropriate and compatible visual form.

iii. Design at the minimum functional height required.

12. Landscaping. Landscaping may be required to visually screen PWS facilities from adjacent properties or public view or to provide a backdrop to camouflage the facilities. All proposed landscaping is subject to review pursuant to architectural review.

Landscaping shall include but is not limited to the following:

a. Preserve existing on-site vegetation to the extent feasible and minimize disturbance of the existing topography.

b. Plant additional trees and other vegetation around the facility, in the vicinity of the site, and along access roads in appropriate situations where such vegetation is deemed necessary to provide screening of PWS facilities and related access roads.

c. Protect existing trees and other screening vegetation in the vicinity of the proposed facility and associated access ways shall be protected from damage both during and after construction.

13. Views. Facilities shall be sited to avoid or minimize obstruction of views from adjacent properties and designated scenic corridors.

G. Cessation and Transfer of Ownership.

1. Cessation of Operation On-Site.

a. PWS providers shall provide the City with a written notice of intent to vacate a site a minimum of 30 days prior to the vacation.

b. A new use permit shall be required if a site is to be used again for the same purpose as permitted under the original use permit if a consecutive period of six months has lapsed since cessation of operations.

- c. All equipment associated with a PWS facility shall be removed by the owner after cessation of said use for more than six consecutive months, and the site shall be restored to its original pre-construction condition by the PWS facility provider. An exception to this may be made by the City for one extension of up to 12 months if the property owner continues to make a good faith attempt to sell or lease the property as a PWS facility site, as certified by a licensed real estate broker who is under contract with a right to sell or lease the property.
 2. Transfer of Ownership.
 - a. Any PWS facility provider that is buying, leasing, or considering a transfer of ownership of an already approved facility shall submit a letter of notification of intent to the City.
 - b. In the event that the original permittee sells its interest in a PWS facility, the succeeding carrier shall assume all responsibilities concerning the project and shall be held responsible to the City for maintaining consistency with all project Conditions of Approval. A new contact name for the project shall be provided by the succeeding carrier to the City within 30 days of transfer of interest in the facility.

H. Findings.

1. Use Permit Findings. In addition to the findings required by City Code Section 38-161, the Zoning Administrator shall approve an application for a use permit if supported by substantial evidence, and on the basis of the application, plans, materials, and testimony submitted, the Zoning Administrator finds:
 - a. The facility is not detrimental to the public health, safety and welfare.
 - b. The applicant considered City facilities as a high priority during site selection.
 - c. The facility is co-located with existing facilities and planned new facilities whenever feasible and when it is visually desirable.
 - d. The facility is designed, constructed and operated in such a manner to minimize the amount of noise impacts to adjacent uses and activities and shall be in conformance with the General Plan and Zoning Ordinance noise exposure standards.
 - e. The facility is designed to be resistant to and minimize opportunities for unauthorized access, climbing, vandalism, graffiti, and other conditions that would result in hazardous conditions, visual blight or attractive nuisances.
 - f. The facility does not impair or diminish views of and vistas from adjacent properties and designated scenic corridors.
 - g. The PWS facility is necessary or desirable for, and compatible with, the neighborhood or community. The City may consider a number of factors, for example, the height of the PWS facility, the proximity of the PWS facility to residential structures, the nature of uses on adjacent and nearby properties, the surrounding topography, the surrounding tree coverage and foliage, and other valid public goals such as safety and aesthetics.
2. Denials.
 - a. A use permit for a PWS facility may not be denied if the PWS provider has demonstrated: (1) the proposed PWS facility would eliminate or substantially reduce one or more significant gaps in the PWS provider's network; and (2) that the PWS provider has proposed the least intrusive means to close the gap, that is, the PWS provider has the burden of showing the lack of available and

technologically feasible alternatives. The City may rebut the PWS provider's showing of a lack of available and feasible alternative sites.

b. The City may not deny the placement, construction, and/or modification of a PWS facility based on concerns about the health effects of radio frequency emissions if the facility in question complies with FCC regulations concerning such emissions. No appeal may be taken under City Code section 38-203 et seq. based on concerns about the health effects of radio frequency emissions if the facility complies with FCC regulations concerning such emissions.

c. The City may not deny a request to modify eligible PWS towers or base stations that do not substantially change the physical dimensions of such tower or base station. For purposes of this Section, a "substantial change in physical dimensions" is defined in Section 38-112.4(D)(1)(a), above. 3. Architectural Review Findings. In addition to the findings set forth in Section 38-192, the ^{CR} Architectural Review Commission shall find:

- a. The facility avoids glare and minimizes illumination onto adjacent properties.
- b. The facility is visually integrated with the surrounding environment as recommended in the mounting techniques section.
- c. The site is appropriately landscaped to screen the facility.
- d. PWS facility preserves character of the neighborhood to the greatest extent possible. (Ord. 3443 § 1, 2010)

SECTION 3: All ordinances and parts of ordinances in conflict herewith are hereby repealed.

SECTION 4: This ordinance shall be in full force and effect thirty (30) days from and after its final passage and adoption.

PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF MONTEREY this 15th day of April, 2014, by the following vote:

AYES:	4	COUNCILMEMBERS:	Downey, Selfridge, Sollecito, Della Sala
NOES:	1	COUNCILMEMBERS:	Haffa
ABSENT:	0	COUNCILMEMBERS:	None
ABSTAIN:	0	COUNCILMEMBERS:	None

APPROVED:

ATTEST:



Mayor of said City



City Clerk thereof

