

CITY OF NEWPORT

ORDINANCE NO. 2176

**AN ORDINANCE ADDING CHAPTER 9.25 TO THE NEWPORT MUNICIPAL CODE
RELATED TO THE PLACEMENT OF SMALL WIRELESS FACILITIES
WITHIN RIGHTS-OF-WAY
(Newport File No. 5-Z-20)**

WHEREAS, in February of 2020 the Newport City Council received testimony from individuals interested in seeing the City update its regulations related to wireless facilities; and

WHEREAS, the City Council was aware that the League of Oregon Cities (“LOC”) was developing a model ordinance for the deployment of 5G small wireless facilities and there was general agreement that the City should evaluate its wireless regulations once the model ordinance was released; and

WHEREAS, LOC released a Small Wireless Facilities Model Ordinance and Design Guidelines in June of 2020, followed by an FAQ on Small Wireless Facilities in August of 2020; and

WHEREAS, the Newport Planning Commission and Commission Advisory Committee held a work session on August 10, 2020 to consider the LOC Model Ordinance and recent Federal Communication Commission rulings and elected to prepare updates to the Newport Municipal Code in two parts, with this first component being focused on establishing a permitting process for small wireless facilities in public rights-of-way; and

WHEREAS, the City of Newport has been approached by companies interested in securing franchise agreements for the deployment of small wireless facilities, so it is timely for the City to put in place a permitting process; and

WHEREAS, the Planning Commission and Commission Advisory Committee met in work sessions on October 12, 2020 and October 26, 2020 to develop a new Chapter 9.25 of the Newport Municipal Code, that is closely aligned with the LOC model ordinance for small wireless facilities; and

WHEREAS, the Planning Commission, at its regular meeting on November 23, 2020 recommended changes to the Newport Municipal Code be circulated to utility providers for comment and presented to the City Council for adoption; and

WHEREAS, the Central Lincoln People’s Utility District (“District”) provided comment on January 21, 2021, which caused the Planning Commission to reconsider and revise a height limitation provision of the draft changes to ensure that the District will not be precluded from allowing small wireless facilities to co-locate on poles in excess of 50-feet in height; and

WHEREAS, the Newport City Council held a public hearing on February 1, 2021 to consider the provisions contained in a new Newport Municipal Code Chapter 9.25, and elected to continue the hearing to February 16, 2021 in response to a request by the District for additional time to review the proposed amendments; and

WHEREAS, the District requested a change to the amendments to make it clear that wireless providers seeking to deploy small wireless facilities in rights-of-way on third-party poles or structures must satisfy the requirements of both the third-party owner and the City; and

WHEREAS, the Newport City Council held a public hearing on February 16, 2021 to consider the provisions contained in a new Newport Municipal Code Chapter 9.25, including the revision requested by the District, and voted in favor of the changes after considering the recommendation of the Planning Commission and evidence and argument in the record; and

WHEREAS, information in the record demonstrates that appropriate public notification was provided for both the Planning Commission and City Council meetings.

THE CITY OF NEWPORT ORDAINS AS FOLLOWS:

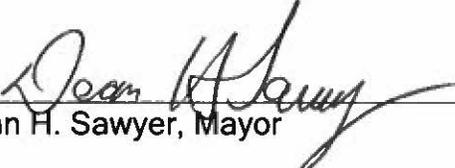
Section 1. The findings set forth above are hereby adopted in support of the amendments to the Newport Municipal Code adopted by Section 2 of this Ordinance.

Section 2. Chapter 9.25 is hereby added to the Newport Municipal Code as set forth in the attached Exhibit "A."

Section 3. This ordinance shall take effect 30 days after its adoption.

Date adopted and read by title only: February 16, 2021.

Signed by the Mayor on February 18, 2021.



Dean H. Sawyer, Mayor

ATTEST:



Margaret M. Hawker, City Recorder

(Note: staff comments in *italics* are provided for context and are not a part of the amendments.)

CHAPTER 9.25 SMALL WIRELESS FACILITIES

9.25.005 Purpose

The purpose of this Chapter is to establish reasonable and non-discriminatory policies and procedures for the placement of small wireless facilities in rights-of-way within the City's jurisdiction, which will provide public benefit consistent with the preservation of the integrity, safe usage, and reasonable aesthetic qualities of the City rights-of-way and the City as a whole. In enacting this Chapter, the City is establishing uniform standards consistent with federal law to address the placement of small wireless facilities and associated poles in the rights-of-way, including without limitation, to manage the public rights-of-way in order to:

- A. prevent interference with the use of streets, sidewalks, alleys, parkways and other public ways and places; and
- B. prevent the creation of obstructions and other conditions that are hazardous to vehicular and pedestrian traffic; and
- C. prevent interference with the facilities and operations of facilities lawfully located in rights-of-way or public property; and
- D. protect against environmental damage, including damage to trees; and
- E. preserve the character of the community, historic districts or areas with decorative poles; and
- F. facilitate technology advancements, such as deployment of small wireless facilities, to provide the benefits of wireless services.

Staff: This Section incorporates the purpose and intent language from the League of Oregon Cities Model Ordinance ("model ordinance"), dated June of 2020.

9.25.010 Definitions

The following definitions apply in this chapter.

Antenna means the same as defined in 47 C.F.R. § 1.6002(b), as may be amended or superseded. The term includes an apparatus designed for the purpose of emitting radio frequencies (RF) to be operated or operating from a fixed location pursuant to Federal Communications Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under 47 C.F.R. Part 15.

Antenna Equipment means the same as defined 47 C.F.R. § 1.6002(c), as may be amended or superseded, which defines the term to mean equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.

Antenna Facility means the same as defined in 47 C.F.R. § 1.6002(d), as may be amended or superseded, which defines the term to mean an antenna and associated antenna equipment.

Applicable codes means uniform building, fire, safety, electrical, plumbing, or mechanical codes adopted by a recognized national code organization or state or local amendments to those codes that are of general application and consistent with state and federal law.

Applicant means any person who submits an application as or on behalf of a wireless provider.

Application means requests submitted by an applicant (i) for permission to collocate small wireless facilities; or (ii) to approve the installation, modification or replacement of a structure on which to collocate a small wireless facility in the rights-of-way, where required.

Collocate means the same as defined in 47 C.F.R. § 1.6002(g), as may be amended or superseded, which defines that term to mean (1) mounting or installing an antenna facility on a preexisting structure, and/or (2) modifying a structure for the purpose of mounting or installing an antenna facility on that structure. "Collocation" has a corresponding meaning.

Day means calendar day. For purposes of the FCC shot clock, a terminal day that falls on a holiday or weekend shall be deemed to be the next immediate business day.

Decorative pole means a pole that is specially designed and placed for aesthetic purposes.

Historic district means a group of buildings, properties, or sites that are either: (1) listed in the National Register of Historic Places or formally determined eligible for listing by the Keeper of the National Register in accordance with Section VI.D.1a.i-v of the Nationwide Programmatic Agreement codified at 47 C.F.R. Part 1, Appendix C; or, (2) a design review district established pursuant to Chapter 14.30, or (3) historic buildings or sites listed in the Newport Comprehensive Plan as being significant

historical resources which should be preserved and regulated pursuant to Chapter 14.23.

Staff: Adjusted the definition to include rights-of-way in design review districts (i.e. Nye Beach) and rights-of-way that may be a part of a historic site regulated under NMC Chapter 14.23.

Permissions means a franchise agreement, building permit, right-of-way permit, business license or other authorization needed for SWF deployment.

Person means an individual, corporation, limited liability company, partnership, association, trust, or other entity or organization, including the City.

Pole means a type of structure in the rights-of-way that is or may be used in whole or in part by or for wireline communications, electric distribution, lighting, traffic control, signage, or similar function, or for collocation of small wireless facilities; provided, such term does not include a tower, building or electric transmission structures.

Rights-of-Way or "ROW" means areas dedicated to the public and administered by the city for use for transportation purposes, including any city street, road, bridge, alley, sidewalk, trail, or path, and all other public ways and areas managed by the city. Rights-of-Way also includes public utility easements to the extent that the easement allows use by the utility operator planning to use or using the public utility easement. "Right-of-way" includes the subsurface under and airspace over these areas.

Staff: Definition aligns with definition in Chapter 9.05 Utilities

Routine Maintenance means inspections, testing, repair, and modifications subject to Section 6409(a) that maintain functional capacity, aesthetic and structural integrity of a small wireless facility and/or the associated pole or structure.

Small wireless facility means a facility that meets each of the following conditions per 47 C.F.R § 1.6002(l), as may be amended or superseded:

- A. The facilities (i) are mounted on structures 50 feet or less in height as measured from adjacent finished ground elevation, including the antennas, or (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or (iii) do not extend existing structures on which they are located to a height of more than 50 feet above the finished ground elevation or by more than 10 percent, whichever is greater; and

Staff: Added finished ground elevation reference to addresses concern raised by Commission members at the 10/12/20 work session, that the baseline point of measurement be called out in the definition.

- B. Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume; and
- C. All other wireless equipment associated with the structure, including wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; and
- D. The facilities do not result in human exposure to radio frequency in excess of the applicable safety standards specified in 47 C.F.R. § 1.1307(b).

Structure means the same as defined in 47 C.F.R. § 1.6002(m), as may be amended or superseded, which defines that term as a pole, tower, or base station, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or comingled with other types of service).

Wireless Infrastructure Provider means any person, including a person authorized to provide communications service in the state, that builds or installs wireless communication transmission equipment, wireless facilities, but that is not a wireless services provider.

Wireless Provider means a wireless infrastructure provider or a wireless services provider.

Wireless Services Provider means a person who provides personal wireless services (whether or not it is comingled with other services).

Staff: Except where staff comments are provided, definitions are verbatim from the model ordinance. "City Structure" is a defined term in the model ordinance that is not included because collocation interest is likely to be limited to City owned poles, and the term "pole" is defined.

9.25.015 Permit Required

Except as otherwise provided in this Chapter, no person shall place any small wireless facility, or a new, modified, or replacement pole for collocation of a small wireless facility, in rights-of-way without first obtaining a permit from the City of Newport.

Staff: This Section addresses the permitted use and permission required components of the model ordinance.

9.25.020 Application Requirements

An application filed pursuant to this Chapter shall be made by the wireless provider or its duly authorized representative on forms provided by the city, and shall contain the following:

- A. The applicant's name, address, telephone number, and e-mail address; and
- B. The names, addresses, telephone numbers, and e-mail addresses of all duly authorized representatives and consultants, if any, acting on behalf of the applicant with respect to the filing of the application; and
- C. A general description of the proposed small wireless facility and associated pole, if applicable. The scope and detail of such description shall be appropriate to the nature and character of the work to be performed, with special emphasis on those matters likely to be affected or impacted by the physical work proposed; and
- D. Site plans and engineering drawings to scale that identify the proposed small wireless facility; and
- E. Written narrative explaining how the application complies with small wireless facility design standards adopted by resolution of the Newport City Council.
- F. A copy of the wireless providers franchise agreement with the City of Newport; and
- G. A statement or other demonstration that the small wireless facility shall comply with all applicable codes, regulations and standards, including applicable FCC regulations for human exposure to RF emissions.

Staff: This Section includes the submittal requirements recommended in the model code. It also includes a requirement that the provider possess a duly executed franchise agreement to operate within City rights-of-way. Added a requirement that applicants explain how a project complies with design standards following 10/12/20 work session. This should minimize potential miscommunication.

9.25.025 Routine Maintenance and Replacement Exemption

An application for a permit pursuant to this Chapter shall not be required for routine maintenance or the replacement of a small wireless facility with another small wireless facility that is the same, or smaller in volume, weight and installed height. The City may require a permit for work within the right of way as set forth in Chapter 9.10 or if the activity is regulated by building codes adopted by the City of Newport pursuant to Section 11.05.080.

Staff: Similar to language in the model code. Removed the language "substantially similar" because its discretionary. Cross reference added to right-of-way permit chapter which lists regulated activities within the right-of-way and building codes to the extent that they are applicable. At the 10/12/20 work session, Commission members felt that the term "volume" is clearer than "size" and that the reference to "height" should be "installed height."

9.25.030 Approval Criteria

An application filed pursuant to this Chapter shall be approved unless the proposed small wireless facility, or new, modified, or replacement pole:

- A. Materially and demonstrably interferes with the safe operation of traffic control equipment; or
- B. Materially and demonstrably interferes with sight lines or clear zones for transportation or pedestrians; or
- C. Materially fails to comply with the Americans with Disabilities Act or similar federal, state, or local laws, standards and regulations regarding pedestrian access or movement; or
- D. Fails to comply with applicable codes, standards and regulations, including the City's design standards for small wireless facilities as adopted by City Council resolution; or
- E. Fails to comply with the provisions in this Chapter.

Staff: Standards are consistent with the model code. Compliance with city adopted design standards is picked up under this Section. Design standards would be established by Council resolution.

9.25.035 Batch Applications

Applicants may include the proposed installation of multiple small wireless facilities, or new, modified, or replacement poles in a single, consolidated permit application.

Staff: The FCC small cell order requires that local governments allow applications to be batched in this manner. This approach is also more efficient.

9.25.040 Decorative Poles and Historic Districts

Small wireless facilities that are proposed to be placed on a decorative pole or any structure within a historic district shall be designed to have a similar appearance, including coloring and design elements, if technically feasible, of the structure upon which it is being installed. New poles required to support the collocation of small wireless facilities shall be designed to have a similar appearance, including coloring and design elements, if technically feasible, of other poles in the rights-of-way within 500 feet of the proposed installation. Concealment measures used to comply with the above requirements shall not be considered part of the small wireless facility for purpose of the size restrictions in the definition of small wireless facility in Section 9.25.010.

Staff: This Section combines a couple of elements of the model code and requires that small cell deployments have a similar appearance, color, and design elements as the structures upon which they are being installed.

9.25.045 Permit Review Procedures

- A. No later than 10 calendar days after receipt of an application filed pursuant to this Chapter, the city shall determine whether or not the permit application is complete and notify the applicant, in writing, of any information that is missing, including the specific rule or regulation creating the obligation that such documents or information be submitted.
- B. Upon receipt of a complete permit application, the city shall either approve or deny the permit in accordance with the following timelines:
 - 1. Applications to collocate a small wireless facility on an existing structure: 60 days.
 - 2. Applications to deploy a small wireless facility using a new structure: 90 days.
- C. Review timelines outlined in this Section begin at the time of application. If an application is determined to be incomplete, then the timeline is tolled (i.e. the clock stops) when the applicant is informed, in writing, that information is missing. The timeline restarts at zero on the date that the missing information is submitted. If an applicant believes they have submitted all required information, they may indicate as much in writing and a decision on the permit application will be rendered considering the information that has been submitted.

Staff: This Section addresses the FCC shot clock review timelines. In response to a question raised by the Commission at the 10/12/20 work session, options 2 and 4 were deleted because they apply to deployment of wireless facilities not regulated by this chapter. Facilities other than

small wireless are typically located outside of rights-of-way. The 30-day review timeline was reduced to 10-calendar days to comply with 47 C.F.R, Section 1.6003, which sets out an expedited review timeline for small wireless facilities. The change indicating that the timeline restarts at zero has also been made to align with the federal regulations.

9.25.050 Maximum Height Limitations for New Poles

New poles installed solely for the purpose of accommodating wireless providers shall not exceed 50-feet in height, as measured from adjacent finished ground elevation.

Staff: Current language was added at the request of the Planning Commission at a January 25, 2021 work session. Central Lincoln PUD had expressed a concern that the prior language might preclude collocates on utility poles that exceed 50-feet in height. The Commission supports collocation and wanted this provision to focus on the height of new, "communication only" poles.

9.25.055 Authority Granted

- A. A permit from the City authorizes an applicant to undertake only certain activities in accordance with this Chapter and does not create a property right or grant authority to the applicant to impinge upon the rights of others who may already have an interest in the rights-of-way.
- B. Compliance with this Chapter does not constitute permission to attach small wireless or any other facilities to poles or structures that are not owned by the City, even if such poles or structures are located in a City right-of-way. Applicants will be solely responsible for complying with all lawful permitting requirements, design standards, and compensation as may be required by such third-party pole or structure owners.

Staff: Subsection (A) is recommended in the model code and reinforces language in the City's franchise code (NMC Chapter 9.05). Subsection (B) is language requested by Central Lincoln PUD, pursuant to a 2/8/21 email, that clarifies that approval by third-party pole or structure owners is required if a vendor seeks to collocate on their infrastructure.

9.25.060 Permit Duration

- A. A permit for construction granted pursuant to this Section shall be valid for a period of 12-months after issuance unless the City agrees to extend this period for circumstances outside of the control of the permittee.
- B. The installed facility is subject to applicable relocation requirements, termination for material non-compliance after notice and a reasonable

opportunity to cure, as outlined in Chapter 9.05. An applicant may terminate a permit at any time.

Staff: The 12-month timeframe is consistent with the period of time that a right-of-way permit is valid (ref: Chapter 9.10). This provides administrative consistency, as a right-of-way permit will almost always be required in conjunction with the deployment of a small wireless facility. Issues under Subsection (B) are addressed in the City's franchise code. The same goes for Section 7 of the League of Oregon Cities Model Ordinance. At the 10/12/20 work session, the Commission requested that the extension language be simplified to "circumstances outside of the control of the permittee."

9.25.065 Collocation on City Owned Poles

- A. Small wireless facilities may be collocated on city owned poles in rights-of-way pursuant to this Chapter. No person will be permitted an exclusive arrangement or an arrangement which excludes otherwise qualified applicants to attach to city owned poles in the rights-of-way. A wireless provider seeking to collocate on a city owned pole is subject to the requirements of this Section.
- B. The City will provide a good faith estimate for any work reasonably necessary to make a specific city owned pole suitable for attachment of the requested small wireless facility ("make-ready work"), including pole replacement if necessary, within 60 days after receipt of a completed request. Make-ready work including any pole replacement shall be completed prior to the installation of the requested small wireless facility.
- C. City's good faith estimate shall be limited to actual and direct costs required to meet applicable codes, or that may be reasonably necessary to avoid interference with other attachments on the pole.
- D. A wireless provider authorized to place a small wireless facility on a city-owned pole will pay to the City compensation for use of the rights-of-way and collocation at a rate established by City Council resolution.
- E. A wireless provider may remove one or more of its small wireless facilities at any time from a city owned pole with the required permits. The wireless provider will cease owing the City compensation, as of the date of removal, for such removed facilities.

Staff: While most poles within rights-of-way are owned by non-city utilities, the City of Newport owns some light poles. They are located along the bayfront, SE 40th and SE Marine Science Drive. This Section was drafted specific to poles because other structures the City owns within the right-of-way, such as signs, will not be suitable for small cell deployment. The City's

franchise code does not clearly address collocation, so this Section is needed. It is closely aligned with the model ordinance. The model ordinance notes that the FCC has established a "safe harbor" limit on use of right-of-way and collocation to an aggregate annual rate that is not to exceed \$270 per small wireless facility. Annual use of right-of-way fees are established in the franchise code at 5% of gross revenue. This "gross revenue" approach to calculating franchise fees, may need to be adjusted for small wireless deployments in order for the city to stay within the safe harbor limits.

9.25.070 Permit Fee

The fee for a permit application submitted in accordance with the provisions of this Chapter shall be due at the time the application is submitted, in the amount established by City Council resolution.

Staff: This is consistent with the model ordinance and how the City establishes permit fees. The model ordinance notes that the FCC has established "safe harbor" limits on the fees local governments can charge. They are as follows: \$500 for up to the first five small wireless facilities in the same application, with an additional \$100 for each small wireless facility beyond five in the same application. A fee resolution will be presented to the Council if these provisions are adopted into the Municipal Code.