

Resolution

No. 22-6

REFERRING TO THE PLANNING COMMISSIONS A PROPOSED BILL TO AMEND TITLE 19, MAUI COUNTY CODE, RELATING TO WIRELESS COMMUNICATIONS FACILITIES

WHEREAS, the Council is considering a proposed bill entitled “A BILL FOR AN ORDINANCE AMENDING TITLE 19, MAUI COUNTY CODE, RELATING TO WIRELESS COMMUNICATIONS FACILITIES”; and

WHEREAS, the bill’s purpose is to establish a chapter in Part IV, Title 19, Maui County Code, to regulate wireless communications facilities, including through the issuance of wireless permits by the Planning Director or the applicable Planning Commission; and

WHEREAS, the bill is modeled after Ordinance 484 (2021) from the City of Malibu, California, colloquially known as the “Malibu 5G ordinance,” which regulates various types of wireless communication facilities, consistent with Federal law; and

WHEREAS, in article dated April 14, 2021, entitled “Rules Tightened For Cell Towers After Months of Resident Complaints,” *The Malibu Times* reported that residents testified to the Malibu City Council in support of the Malibu 5G ordinance based on concerns about public safety, aesthetics, and maintaining the City’s rural character; and

WHEREAS, Maui County residents have expressed similar concerns to County officials; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That it refers the proposed bill entitled “A BILL FOR AN ORDINANCE AMENDING TITLE 19, MAUI COUNTY CODE, RELATING TO WIRELESS COMMUNICATIONS FACILITIES,” a copy of which is attached as Exhibit “1,” to the Lanā‘i Planning Commission, Maui Planning Commission, and Moloka‘i Planning Commission for appropriate action, in accordance with Sections 8-8.4 and 8-8.6 of the Revised Charter of the County of Maui (1983), as amended;

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2. That it respectfully requests that the Lanāʻi Planning Commission, Maui Planning Commission, and Molokaʻi Planning Commission transmit its findings and recommendations to the Council as expeditiously as possible; and
3. That certified copies of this Resolution be transmitted to the Mayor, the Planning Director, Lanāʻi Planning Commission, Maui Planning Commission, and Molokaʻi Planning Commission.

Resolution No. 22-6

INTRODUCED BY:

Kelly T. King

paf:jbf:21-073b

ORDINANCE NO. _____

BILL NO. _____ (2022)

A BILL FOR AN ORDINANCE AMENDING TITLE 19, MAUI COUNTY CODE,
RELATING TO WIRELESS COMMUNICATIONS FACILITIES

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Article IV, Title 19, Maui County Code, is amended by adding
a new chapter to be designated and to read as follows:

“Chapter 19.55

WIRELESS COMMUNICATIONS FACILITIES

Sections:

19.55.010	Purpose and objectives.
19.55.020	Scope.
19.55.030	Administration.
19.55.040	Definitions.
19.55.050	Health and safety.
19.55.060	General standards.
19.55.070	Standard conditions.
19.55.080	Application requirements.
19.55.110	Findings for approval.
19.55.120	Permit review, renewal, and revocation procedure.

19.55.010 Purpose and objectives. A. This chapter’s purpose is to provide a uniform and comprehensive set of standards for the development, siting, and installation of wireless communication facilities and antennas.

B. This chapter’s standards are designed to:

1. Protect and promote the County’s public health, safety, and community welfare and the County’s aesthetic quality and value.

2. Further the general plan’s objectives and policies, including to protect the natural environment, improve public

physical infrastructure, and promote sustainable land use and growth management.

3. Provide for managed development of wireless communications infrastructure.

C. Recognizing the County's roles as regulator, service provider, facilitator, and user, the council intends that the County apply this chapter regulations in furtherance of the following goals and policy objectives:

1. To retain control of private and public property within the confines of State and federal legislation to regulate wireless communications services.

2. To facilitate the creation of an advanced wireless communications infrastructure for residents, businesses, industries, and schools.

3. To protect the County from potential adverse effects of wireless communications facility development.

4. To ensure that the wireless communications infrastructure is designed to enhance and not interfere with the County's emergency response network.

19.55.020 Scope. A. There is established a type of permit called a wireless permit, which is subject to this chapter's requirements. Unless exempted, every person who seeks to place or modify a wireless communications facility must obtain a wireless permit authorizing the placement or modification under this chapter. The wireless permit must be obtained in one of the following ways, based on facility type:

1. Type 1: The installation or modification of a facility that qualifies as a small cell facility, or eligible facilities request, or collocation of a non-small cell facility.

2. Type 2:

a. The installation or modification of all wireless facilities that do not qualify as type 1.

b. Any wireless permit application that includes a waiver request under subsection 19.55.060(D).

B. Installation of the following antennas or appurtenant equipment that comply with all applicable requirements and standards pertaining to radio frequency emissions are exempted from the requirement of a wireless permit:

1. Antennas designed to receive video programming signals from direct broadcast satellite (DBS) services, residential fixed wireless communications, multi-channel multi-point distribution providers (MMD), or television

broadcast stations in all zoning districts if all of the following conditions are met:

a. The antenna will be accessory to an existing use and measures thirty-nine inches or less in diameter.

b. The antenna will be installed in a location where it is not readily visible from the public right-of-way.

c. The antenna will not be located within a required setback area, driveway, or parking space.

2. Amateur radio antenna, including ham and short wave, if the antenna does not exceed the maximum base building height for the zoning district in which it is located by more than fifteen feet.

3. Communications facilities exempt from this chapter by State or federal law.

4. Wireless communication facilities in the public right-of-way.

5. The placement or modification of facilities by the County or State solely for public-safety purposes.

6. Installation of a "cell on wheels," "cell on truck," or a similar structure for a temporary period in connection with an emergency or event if that installation does not involve excavation, movement, or removal of existing functional facilities.

C. The determination of whether a proposed facility meets the requirements for an exemption must be made by the director.

D. In addition to a wireless permit, the person who will own or control the facility must comply with applicable laws, including applicable laws governing radio frequency emissions, the Americans with Disabilities Act (ADA), the electrical code, and the building code.

19.55.030 Administration. A. For type 1 applications, the planning director is responsible for acting on the application. For type 2 applications, the applicable planning commission is responsible for acting on the application.

B. Type I applications other than eligible facilities requests proposing installations in the following areas must be processed as type 2 applications: all residential districts.

C. Type 2 applications must meet the findings required in subsections 19.55.110(A) and (B). Applications qualifying as eligible facilities requests must meet the findings in subsection 19.55.110(C). All other applications must meet the findings required in subsection 19.55.110(A).

D. The director may:

1. Extend or shorten deadlines where necessary to be consistent with State and federal laws and regulations.

2. Issue any notices of incompleteness, requests for information, or conduct or commission any studies that may be required to determine whether a permit should be issued.

3. Take any other steps that may be required to timely act upon applications for placement of wireless communications facilities, including entering into agreements to mutually extend the time for action on an application.

E. Any person adversely affected by a decision of the director on a type 1 application may request in writing the director's reconsideration. If the reconsideration is denied, the person may appeal to the board of variances and appeals.

F. Any person adversely affected by a decision of the planning commission on a type 2 application may request in writing the commission's reconsideration. If the reconsideration is denied, the person may appeal to the board of variances and appeals.

19.55.040 Definitions. When used in this chapter, unless the context clearly indicates a different meaning, the following words and terms are defined as follows:

"Antenna" means a typically metallic device used for radiating or receiving radio waves.

"Application" means a formal request, including all required and requested documentation and information, submitted by an applicant to the County for a wireless permit.

"Applicant" means a person filing an application for placement or modification of a wireless communications facility in the County of Maui.

"Eligible facilities request" has the same meaning as in 47 C.F.R. section 1.6100(b)(3), or any successor provision.

"FCC" means the Federal Communications Commission or its lawful successor.

"Personal wireless services" has the same meaning as in 47 U.S.C. section 332(c)(7)(c)(i).

"Public right-of-way" means any public street, public way, or public place within the County.

19.55.050 Health and safety. A. No wireless communications facility may be sited or operated in a manner in which it poses, either by itself or in combination with other facilities, a potential threat to public health, safety, or welfare. All wireless communications facilities must be designed by qualified, licensed persons to provide the maximum protection that is technically feasible to prevent electrical and fire hazards. All wireless facilities

must be proactively monitored and maintained to continue and improve the safety design.

B. No facility or combination of facilities may produce at any time power densities or exposure levels in any general population area that exceed the applicable FCC standards for radio frequency emissions.

19.55.060 General standards. A. Wireless communications facilities must meet this chapter's minimum, in addition to the requirements of any other applicable law, unless a waiver is required to avoid a denial of an application. Waivers must only be granted on a case-by-case basis and must be narrowly tailored so that the requirements are waived only to the minimum extent required to address the request.

B. Wireless communications facilities must be installed and modified in a manner that does not interfere with the use of public or private property or the use of the public right-of-way, in that it minimizes risks to public safety, avoids above-ground facilities in underground areas, avoids installation of new support structures or equipment, makes facilities stealth by using concealment elements, otherwise maintains the integrity and character of the neighborhoods in which the facilities are located, and does not impede views; ensures that installations are subject to periodic review to minimize the intrusion on public and private property; and ensures that the County bears no risk or liability as a result of the installations and that the use does not inconvenience the public or cause personal or economic harm, interfere with the primary uses of public or private property or the rights-of-way, or hinder the ability of the County or other government agencies to improve, modify, relocate, abandon, or vacate facilities or public property.

C. The council may adopt by resolution the engineering, design, and location standards, conditions of approval, and basic application requirements for wireless communications facilities on land other than public right-of-way. All applications must comply with the engineering, design and location standards for wireless communications facilities in this chapter and any applicable resolution.

D. Requests for waivers from any requirement of this chapter or any applicable resolution must be made in writing to the director. A waiver may be requested: (1) to avoid a denial of an application that would, within the meaning of federal law, prohibit or effectively prohibit the provision of personal wireless services, or otherwise violate applicable laws or regulations; or (2) for the technical or design reasons specified in the resolution described in subsection 17.46.060(C). A waiver may be granted only if applicant

demonstrates through clear and convincing evidence that the standard for the waiver has been met. All waivers approved under this subsection must be:

1. Granted only on a case-by-case basis.
2. Narrowly tailored so that the requirements are waived only to the minimum extent required to address the request.

19.55.070 Standard conditions. Each wireless permit is subject to the conditions of approval in the applicable resolution that adopted the engineering, design, and location standards and conditions of approval for wireless communications facility on land other than public right-of-way.

19.55.080 Application requirements. A. Applicants must submit applications on the forms and in the manner approved by the director.

B. Prior to filing an application to install or modify a wireless communications facility subject to this chapter, the applicant is encouraged to schedule a voluntary pre-application meeting with the department to discuss the proposed facility, this chapter's requirements, and any potential impacts of the proposed facility. Conducting a voluntary pre-application meeting does not initiate any applicable "shot clock" or other deadlines.

C. In addition to any other noticing requirements, within seven calendar days after an application is submitted to the County, the applicant must:

1. Post notice at the proposed project site in a location visible to the public.

2. Provide the County with evidence that the notice has been posted. The applicant must maintain and replace the posted notice as necessary during the entire application review process until the director or planning commission, as applicable, acts on the application and all appeals have been exhausted. The posted notice must be composed from durable quality and weather-resistant materials that will not deteriorate under normal circumstances for at least one hundred eighty calendar days. The posted notice must be at minimum seventeen inches wide by eleven inches tall. The posted notice must not be placed in any location where it would obstruct travel or visibility for vehicles, bicycles, or pedestrians. The County encourages applicants to consult with the department on placement locations to avoid any potential hazards.

D. Within five business days from the date on which an application is determined to be complete, the director must notify in

writing of the filing of the application to all property owners and residents of property within a one-thousand-foot radius of the proposed project. The purpose of the notice is to inform the surrounding property owners and residents of the filing of the application and provide an opportunity for comment on the application prior to the director's or planning commission's decision. The notice must describe the request, provide a map showing the specific location of the proposed project, describe the review process and time frames, and state how to contact the applicant and staff planner assigned to the application.

E. After submittal by the applicant, the application materials must be transmitted to the department of fire and public safety for its review and any recommended conditions.

19.55.110 Findings for approval. A. For all wireless communications facilities subject to this chapter, other than eligible facilities requests, the director or planning commission must approve the proposed project if the following are found:

1. The facility is not detrimental to the public health, safety, and welfare and will not pose an undue fire risk.
2. The facility complies with this chapter and all applicable design and development standards.
3. The facility complies with State and federal law.
4. For all type 2 applications, other than eligible facilities requests, that are proposed to be located in the R-1, R-2, or R-3 zoning districts, the facility could not feasibly be located within any other zoning district except for one of the residential districts.

B. All eligible facilities requests subject to this chapter must be approved on the basis of the application and other materials or evidence provided in review of the application, if the director or planning commission makes the following findings:

1. The proposed collocation or modification meets each and every one of the applicable criteria for an eligible facilities request stated in 47 C.F.R. 1.6100(b)(3)-(9), or any successor provisions, after application of the definitions in 47 C.F.R. 1.6100(b). The director or planning commission must make an express finding for each criterion.
2. The proposed facility complies with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, except that this limitation only applies to any modification that would not exceed the thresholds identified in 47 C.F.R. 1.6100(b)(7)(i) through (iv), or any successor provisions.

3. That the proposed facility will comply with all generally applicable laws, including the building code, the electrical code, and other laws codifying objective standards reasonably related to health and safety.

19.55.120 Permit review, renewal, and revocation procedure.

A. The County finds that the technology associated with communications equipment is subject to rapid changes and upgrades as a result of industry competition and customer demands and anticipates that communications antennas and related equipment with reduced visual impacts will be available from time to time with comparable or improved coverage and capacity capabilities. There may also be advancements and enhancements in design, practice, operations, and structural safety. The County further finds that it is in the interest of the public health, safety, and welfare that communications providers be required to replace older facilities with newer equipment of equal or greater capabilities, reduced visual impacts, and improved safety enhancements as technological improvements become available. Therefore, any modifications, other than eligible facilities requests, requested to an existing facility for which a permit issued under this chapter authorizing establishment of a wireless communications facility must permit the director to review the carrier's existing facility to determine whether requiring updates to concealment elements and screening techniques that reduce visual impacts is appropriate if technically feasible, and the director may require updates as a condition of approval of the modification.

B. At any time, the director may initiate proceedings to hold a public hearing before planning commission to revoke a wireless permit issued under this chapter. Notice of the hearing must be the same as that required for a new wireless permit. Grounds for revocation are limited to a finding of one or more of the following:

1. The owner or operator has abandoned the facility.
2. The facility is no longer in compliance with either the general requirements or design standards of this chapter in effect at the time of approval.
3. The facility no longer complies with the conditions of approval and the owner or operator has failed to bring the facility into compliance within ninety days after the director sends a notice requiring the facility to be brought into compliance.
4. The facility does not comply with applicable FCC or FAA regulations, including those related to radio frequency emissions.

5. The wireless permit was obtained in a fraudulent manner.

6. The director determines that the facility poses a threat to the public health, safety, or welfare or is creating a nuisance.”

SECTION 2. This Ordinance takes effect on approval.

INTRODUCED BY:

Kelly T. King

paf:jbf:21-073c