Bill 10 (2022)
Testimony

MISC. COM. 351

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Crown Castle
150 Hamakua Drive, #703
Kailua, HI 96734

August 24, 2022

City Council
City and County of Honolulu
Honolulu, Hawaii

Via Electronic Submittal at https://hnldoc.ehawaii.gov/hnldoc/testimony

RE: Crown Castle Comments
Bill 10 (2022), CD1

Dear City Council:

Crown Castle USA Inc. ("Crown Castle") appreciates the opportunity to review Bill 10 (2022), CD1 currently under City Council's consideration. We applaud the Council's attention to this important matter. No doubt, the continued focus on broadband connectivity has highlighted the increasing importance of telecommunications infrastructure to the residents, businesses, and government of the City and County. Crown Castle, as the nation's largest provider of shared communications infrastructure, is committed to building, operating, and maintaining safe, compliant infrastructure that meets these important connectivity needs of customers and jurisdictions.

We are proud of our work to partner with both local government and our customers to maximize the efficient use of existing infrastructure through collocation of wireless equipment. As the owner and operator of wireless infrastructure, Crown Castle occupies a unique and important role at the intersection of connectivity and responsible land use policy. To further these goals, we provide the following comments on the pending version of Bill 10 (2022), CD1 in the hope of accelerating the City and County's policy objectives and meeting the needs of its residents.

Eligible Facilities Requests under Section 6409.

Crown Castle supports the proposed exemption of Eligible Facilities Requests ("EFR") from land use permitting in Sections 21-5.60-2(b)(2)(E) and 21-5.60-2(c)(2)(D). This exemption furthers the nationwide policy goal to speed deployment of minor modifications on existing structures. These policies are reflected in a provision of the Spectrum Act[1] and the regulations adopted by the Federal Communications Commission ("FCC")[2] (collectively, "Section 6409").

[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409 (2012) (codified at 47 U.S.C. § 1455).
[2] *Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies*, 29 FCC Rcd. 12865 (2014) (codified at 47 CFR § 1.6100); *Implementation of State & Local Governments' Obligation to Approve*

Section 6409 streamlined local review and approval of any application qualifying as an EFR. To do so, it implemented deadlines for governmental review and approval, provided important rights and remedies for those deadlines and limited the scope of review for EFR applications. The enclosed 1-page summaries provide general guidance to some of Section 6409's key components.

Given the clear regulatory framework, Crown Castle strongly recommends the Council align the amendments proposed in Bill 10 (2022) with Section 6409 to the greatest extent possible. To that end, Crown Castle would recommend carving out a specific procedural path for all EFR applications, including those in special districts, and clarifying that the procedural and substantive requirements for non-EFR applications will not apply to EFR applications.

The EFR path should incorporate the Section 6409 deadlines and only require application material necessary to determine whether a proposal qualifies as an EFR. Furthermore, the amendment should not distinguish EFR applications within special districts, but, instead, should include all EFR within a single EFR permitting category. Crown Castle believes that harmonizing Bill 10 (2022) with these principles will benefit staff and applicants by significantly reducing the risk of confusion and delay in processing EFR applications.

Subjective Criteria for Non-EFR Applications.

In addition to clarifying the treatment of EFR applications, Crown Castle strongly encourages the Council to clarify the delineation between its regulation of modifications of existing infrastructure and its regulation of construction of new infrastructure. Regarding newly constructed infrastructure, as drafted, Bill 10 (2022), CD1 includes a few subjective standards for "communication towers" and "communication tower alternative support structures." It would be hard, if not impossible, to prove compliance with these standards in an application. For example, proposed Section 21-5.60-2(b)(2)(D) requires:

> All communication towers must be designed to structurally accommodate the maximum number of additional uses technically practicable, while using the smallest, least visually intrusive components.

This requires an applicant to guess the correct balance between the technical practicability of additional users and the level of visual intrusion in hopes of obtaining approval. Without an objective standard, one reviewer may want a lower level of "visual intrusion" while another would like to see a higher capacity, leaving an applicant to aim at a moving target.

Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012, WT Docket No. 19-250 (June 10, 2020); and *Accelerating Wireless and Wireline Deployment by Streamlining Local Approval of Wireless Infrastructure Modifications*, WT Docket No. 19-250, RM-11849; FCC 20-153 (Nov. 3, 2020).

As another example, Section 21-5.60-2(b)(2)(F(i), requires the following to be submitted as part of an application for a communication tower:

> A quantitative description of the additional tower capacity anticipated, including the approximate number and types of antennas.

Tower capacity depends on a variety of factors, like equipment specifications and wind loads. Equipment, and the resulting capacity, will vary among carriers and the types of service provided. As such, anticipated *additional* tower capacity can be impossible to quantify or predict in an application. Again, this requirement creates a moving target for an applicant.

Crown Castle certainly understands and supports Council's goals in encouraging new infrastructure with capacity for collocation. However, subjective requirements like those above are impossible to verify and implement. Instead, Crown Castle requests the proposed language be revised to include objective, verifiable standards that relate to a project as proposed.

Crown Castle is excited to be a part of responsible deployment in Honolulu and values this opportunity to contribute to Council's efforts. We look forward to working with you and will be in touch to schedule a meeting to discuss aligning Bill 10 (2022), CD1 with these principles and other ways to advance responsible land use policy for telecommunications infrastructure.

Regards,

Kathy Putt

Kathy Putt
Government Affairs Manager
Crown Castle
Kathy.Putt@crowncastle.com

cc: *All via e-mail*

Eligible Facilities Requests for Modification to Existing Wireless Facilities Under Section 6409

On February 22, 2012, Congress enacted "collocation-by-right" legislation preempting delays in the process of zoning or permitting the collocation of transmission equipment on existing wireless communications facilities ("**Section 6409**"), and the Federal Communications Commission has adopted federal regulations to implement and enforce the provisions of Section 6409.[1] Section 6409 mandates that local governments must approve "eligible facilities requests" or "EFRs" within a sixty day shot clock or they are deemed granted.

What is an EFR? An EFR is a request to collocate, replace or remove transmission equipment on an existing tower or base station that does not "substantially change" the physical dimensions of that tower or base station, as defined under federal law.

A local government may establish a process for approving EFR, subject to the federal rules:

- **Shot Clock**. Under Section 6409, a 60-day shot clock for reviewing the request starts when (1) the applicant takes the first procedural step that the local jurisdiction requires as part of its review process; and (2) the applicant submits documentation showing the modification is an eligible facilities request.
- **Scope of Review**. A state or local jurisdiction may require an application process, subject to the federal limitations. When an applicant asserts that a request is an EFR, a local government must approve the request and issue all permits that are required within the shot clock, unless it finds that the request is not covered by the federal rule.
- **Application Requirements**. When an applicant asserts that a request is an EFR, the local government may only require documentation or information that is reasonably related to whether the request meets the requirement the federal law under Section 6409.
- **Tolling and Incomplete Applications**. A local government may toll (pause) the shot clock by sending written notice of missing information within the first 30 days of the shot clock, which clearly and specifically delineates any additional information that is reasonably related to determining whether the request is covered by Section 6409.
- **Deemed Granted**. If a local government does not either approve an EFR or determine that it does not meet the federal criteria, then the request for approval is deemed granted as a matter of law once the shot clock expires. The deemed granted is effective once an applicant sends written notice to the local government.

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[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409 (2012) (codified at 47 U.S.C. § 1455(a); *Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies*, 29 FCC Rcd. 12865 (2014) (codified at 47 CFR § 1.6100); and *Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 (June 10, 2020).

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Substantial Change Criteria Under Section 6409[1]

Under Section 6409, there are six criteria that are defined as a "substantial change" to an existing tower or base station. If a proposed modification does not meet one of the six criteria, then the change is *not* substantial, and a local government is required to approve the request within the 60-day shot clock or it is deemed granted.

A modification is a substantial change if:

- **Height**: It increases the height of the structure by:
  - For towers outside the right-of-way: More than the greater of (a) 10% or (b) the height of one additional antenna array, plus up to 20 feet of separation from the nearest existing array.
  - For towers inside the right-of-way and base stations: More than the greater of 10% or 10 feet.
- **Width**: It involves adding an appurtenance to the body of the tower:
  - For towers outside the right of way: That would protrude from the edge of the tower more than 20 feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater.
  - For towers inside the right-of-way or base stations: That would protrude from the edge of the structure by more than six feet.
- **Cabinets:** It involves installation of more than four cabinets as part of that modification. For towers inside the right of way or base stations, it is also a substantial change if it involves installation of ground cabinets where there are none, or that are more than 10% larger in height or overall volume than any existing ground cabinets.
- **Site:** It involves excavation or deployment outside of the current site, except for towers outside of the right-of-way, it involves excavation or deployment outside of the current site by more than 30 feet in any direction, not including any access or utility easements.
- **Concealment**: It would defeat the concealment elements of the eligible support structure. This only applies to a structure that is designed and originally permitted to look like something other than a wireless facility.
- **Siting Conditions**: It does not comply with the conditions in the siting approval of the eligible support structure, unless this non-compliance meets the other thresholds under Section 6409.

[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409 (2012) (codified at 47 U.S.C. § 1455(a); *Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies*, 29 FCC Rcd. 12865 (2014) (codified at 47 CFR § 1.6100); *Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 (June 10, 2020); and *Accelerating Wireless and Wireline Deployment by Streamlining Local Approval of Wireless Infrastructure Modifications*, WT Docket No. 19-250 (November 3, 2020).

Shot Clock and Review Times Under Section 6409

On February 22, 2012, Congress enacted "collocation-by-right" legislation preempting delays in the state and local process of zoning or permitting the removal, replacement, or collocation of transmission equipment on existing wireless communications facilities ("**Section 6409**"), and the Federal Communications Commission has adopted federal regulations to implement and enforce the provisions of Section 6409.[1] Section 6409 mandates that local governments may not deny "eligible facilities requests" or "EFRs" within a sixty-day shot clock, or they are deemed granted.

Application Process. Under Section 6409, a state or local government may require an application and review whether a request is covered by the federal law, provided that its local process is consistent with federal law. The information and documentation that may be required for an EFR review is limited to that which is "reasonably related" to determining whether the request is covered under Section 6409.

Start of the Shot Clock. The 60-day review period starts when the applicant takes the first procedural step that the local government requires as part of its regulatory review process under Section 6409 and provides written documentation showing that a proposed modification is an EFR. If a local jurisdiction does not have a specific process for EFRs, then the first step of a standard zoning or siting review for that approval will start the shot clock.

Tolling. The Section 6409 review period, tolling, and shot clock operate independently of all other state, local, or federal tolling and review periods. Once the shot clock starts, it may only be tolled by the agreement of the parties or a written notice that:

- Is provided by the reviewing authority within 30 calendar days of the start of the shot clock;
- Clearly delineates all missing documents or information and specifies the publicly-available code, ordinance, instruction or procedures requiring the information; and
- Is limited to information reasonably related to whether the request meets Section 6409 requirements.

If the shot clock is properly tolled, the timeframe for review begins running again (and does not start the clock over at the beginning of the 60 days) when the applicant makes a supplemental submission. There is no restriction on the applicant's response time. A local jurisdiction, however, has 10 calendar days from the applicant's supplemental response to notify the applicant that the supplemental submission did not provide the information identified in the original notice delineating missing information.

Deemed Granted. If the 60-day shot clock, accounting for any tolling, expires without an approval by the local jurisdiction or a finding that the request does not meet the federal requirements, the request is deemed granted.

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[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409 (2012) (codified at 47 U.S.C. § 1455(a); *Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies*, 29 FCC Rcd. 12865 (2014) (codified at 47 CFR § 1.6100); *Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250 (June 10, 2020); and *Accelerating Wireless and Wireline Deployment by Streamlining Local Approval of Wireless Infrastructure Modifications*, WT Docket No. 19-250 (November 3, 2020).

August 24, 2022

Honorable Brandon J.C. Elefante
Councilmember, 9th District
Chair, Zoning & Planning Committee
City and County of Honolulu, Hawaii
Via hand delivery and email

Re: Item #9 Zoning & Planning Committee, City & County of Honolulu, Hawaii
Comments to Land Use Ordinance Amendment Related to Use Regulations by T-Mobile to Proposed CD1 to Bill 10 (2022)

Honorable Chairman Elefante:

On behalf of T-Mobile, we thank you for the opportunity to provide feedback on important revisions to the City and County of Honolulu's Land Use Ordinance, specifically to provisions governing communications under Bill 10. The Covid-19 pandemic and the ongoing slew of its variants highlights the importance of maintaining robust and resilient communication networks for safety, work, health, education, and daily life. Of critical importance to this goal is the ability to efficiently build communications networks through addition and upgrade of equipment on previously approved, existing wireless sites. T-Mobile supports and applauds the efforts of Proposed CD1 to Bill 10 to take the first steps to address this important goal. We would suggest, however, that measures are needed. We recommend that the City and County set up a framework within its land use ordinance that addresses the unique aspects of modifying existing communications sites, followed up by enactment of administrative processes that are efficient and compliant with federal law. T-Mobile stands ready to advise and assist on the legal and practical aspects of this endeavor.

There are three key steps to achieving the above goal. First, the City and County must conceptually recognize the non-discretionary nature of review and approval of certain wireless modifications under federal law and provide for that in its use ordinance. Second, the City and County must provide a distinct and separate efficient pathway in its ordinance for such modifications that is compliant with federal law. Third, the City and County must follow up its ordinance by establishing and forms and guidance and enforcing process consistent with its ordinance and federal law.

The conceptual key to the above is the recognition and creation of a separate process for the City and County's review and approval of a specified class of modifications to existing wireless sites known as "eligible facilities requests" under federal law known as Section 6409.[1] Under Section 6409 and the FCC rules[2] implementing this law, a state or local government may not deny and shall approve the collocation,

[1] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, codified at 47 U.S.C. § 1455(a) (2012).

[2] *In re Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies*, FCC 14-153, 29 FCC Rcd. 12865 (rel. Oct. 21, 2014) ("Infrastructure Order"); *In re Implementation of State & Local Governments'*

replacement, and removal of equipment on existing sites that meets certain federal criteria of not "substantially changing" the existing site.[3] Of critical importance is that eligible facilities requests are, by definition, modifications to sites where the state or local government *has previously approved the siting and use* of the property for wireless equipment.[4] Thus, we would submit that *no discretionary review land use approval is required to add, replace, or remove equipment to these sites*.[5] **Accordingly, T-Mobile first recommends and requests that Bill 10 reflects this type of wireless application by making eligible facilities requests a permitted use in all zoning districts.[6]**

Second, T-Mobile recommends that Bill 10 establish a separate and clear administrative review and approval process for eligible facilities requests that is compliant with federal requirements. Section 6409 limits the scope of the review but leaves the application process to state and local governments to determine.[7] **Proposed CD1 establishes several categories of uses in Section 21-5.60-2, and as a second step, we recommend that the City and County revise CD1 to create a new category solely addressing eligible facilities requests, including the definition, standards, and application requirements.**

Of particular note are the following procedural requirements of Section 6409:

- *Commencement of Shot Clock*. A state or local government may establish an application process for Section 6409. Once an applicant takes the first step under its control, a 60-day review period commences, and the jurisdiction has that amount of time to complete multi-departmental review and issue and outcome determination.

Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012, FCC 20-75, 35 FCC Rcd. 5977 (rel. June 10, 2020) ("5G Upgrade Order"); *In re Accelerating Wireless and Wireline Deployment by Streamlining Local Approval of Wireless Infrastructure Modifications*, FCC 20-153, 35 FCC Rcd. 13188 (rel. Nov. 3, 2020) ("Site Expansion Order") (together the "FCC Orders") (codified at 47 CFR § 1.6100).

[3] *See* 47 C.F.R. § 16100.

[4] *See* 47 C.F.R. § 1.6100(b)(5) defining "existing" site as a constructed tower or base station that has been reviewed and approved under the applicable zoning or siting process, or other applicable state and local regulatory review process.

[5] It appears that Proposed CD1 is taking steps toward recognizing this in sections 21-5.60-2(b)(2)(e) and (c)(2)(D) by noting that "once an eligible facilities request is approved," that "no other land use permits are required" unless it is located in a special district. These provisions, however, fail to provide a local process for initially approving an eligible facilities request, and further seem to require a discretionary land use approval within special districts, which is prohibited under federal law.

[6] Designating that an eligible facilities request is a permitted use in all zoning districts does not remove any discretion from the City and County for siting of new facilities nor for major modifications to existing sites. An eligible facilities request is, by definition, only authorized on previously approved, existing site. The City and County is mandated by federal law to approve such request on a previously approved wireless site, regardless of location or zoning district, and may not, as part of an eligible facilities request approval, change the design or aesthetics of the site that was previously approved. Since an eligible facilities request is, under federal law, allowed on *any* existing site, regardless of zoning district, making it a permitted use merely codifies the law and reduces confusion and delay.

[7] *See* Infrastructure Order at paragraph 211.

- *Limited Review*. Thus, a state or local government is required, within the 60-day "shot clock" to either approve the request or make a determination that the request is not covered under federal law.

- *Limited Documentation*. An application may only require, and the shot clock is only tolled by a timely request for information that is reasonably related to the determination of federal requirements.

- *No Conditional Approval*. No new requirements or conditions may be placed on an eligible facilities request, even in contained in a local ordinance, including aesthetic or design conditions.[8] Only conditions in the original siting approval that are not preempted apply to eligible facilities requests.

- *Deemed Granted*. At the expiration of the shot clock period, an eligible facilities request is deemed granted, effective upon the applicant sending a notice to the reviewing authority, and this deemed grant includes all approvals needed for construction.

Although the City and County may currently be attempting to comply with federal standards and timeframes, in practice, it is largely noncompliant with federal law. Based on industry review, it appears that applications submitted as eligible facilities requests are not reviewed and approved under federal standards, not approved within the mandated time frames and are at times conditioned in violation of federal law. Enactment and enforcement of a clear, specific, and federally compliant process in the City and County of Honolulu will put staff and applicants on the same page, providing regulatory certainty and eliminating unnecessary confusion and discussion regarding expectations and the law.

Thus, the third and critical step for the City and County is, once a federally compliant framework is established by ordinance in Bill 10, to work to examine and modify the practical systems in place for review of eligible facilities requests, including education of staff and development and publication of specific forms and guidance that ensure efficient and clear pathways for all parties involved.

Streamlining the review and approval processes for the upgrade and addition of equipment on existing wireless facilities will provide regulatory certainty the building of critical networks providing valuable services to the community and will also eliminate inefficiencies that will allow City and County staff to better utilize limited resources. Please let us know how T-Mobile can be of assistance in identifying aspects of the existing review process that may be inadvertently causing undue delay and to help identify best practices. Additionally, T-Mobile is enclosing a redlined copy of relevant sections of Proposed CD1 to Bill 10 and would be glad to further discuss these suggestions and answer any questions.

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[8] A reviewing authority may require an eligible facilities request to comply with generally applicable building, structural, electrical, and safety codes or other laws codifying objective standards reasonably related to health and safety. *See* Infrastructure Order at paragraph 202.

We appreciate the consideration and time of the City and County of Honolulu and look forward to providing additional input and assistance.

Yours very truly,

DocuSigned by:
Eamon O'Leary
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Eamon O'Leary
Sr Director, Network Engineering & Ops

cc: City Council of City and County of Honolulu, Committee on Zoning and Planning
Esther Kia'āina
Radiant Cordero
Calvin K.Y. Say

Enclosure

including after the commencement of the meeting facility use.

(cc) Owners, operators, and representatives of the meeting facility are precluded from filing nuisance complaints against any industrial use operating in compliance with applicable laws.

(iv) In the I-2 zoning district, no small or medium meeting facility may be located within 1,000 feet of another meeting facility of any size in the same or another industrial zoning district. Includes meeting facilities that are permitted uses and nonconforming uses.

(v) Under no circumstances may the meeting facility adversely impact the surrounding area due to increased traffic or parking demand, noise, smells or fumes, or the presence of dangerous or noxious activities.

(B) Meeting facility, large: As required by the conditional use permit.

Sec. 21-5.60-2 Communication.

Uses for transmitting radio waves or wireless services. Uses in the communication category consist of the following subcategories in Table 21-5.1:[1]

(a) Dish antenna.

(1) Defined: A receiver or transmitter of electromagnetic energy, especially microwaves or radio waves, consisting of a reflector shaped like a shallow dish larger than one meter in size.

(2) Standards: To the extent feasible, Aall dish antennas must be located or screened to minimize visual impacts, especially from public rights-

[1] We suggest that Table 21-5.1 should be modified to show eligible facilities requests as permitted uses in all zoning districts. An eligible facilities request is, by definition, a collocation, replacement, or removal of transmission equipment on a pre-approved, existing wireless site, that does not substantially change the physical dimensions of that existing site as defined by the FCC. *See* 47 C.F.R. § 1.6100. *See* 47 C.F.R. § 1.6100(b)(5) (defining "existing" as a constructed tower or base station that has been reviewed and approved under the applicable zoning or siting process, or, if not in a zoned area, was lawfully constructed when built). As a result, an eligible facilities request should be treated as a permitted use wherever there is already a lawfully constructed wireless facility in existence, wherever located.

Please see footnotes for further explanation of redlined proposed revisions.

of-way or public places.

(b) Communication tower.

(1) Defined: Any structure constructed for the sole or primary purpose of supporting any Federal Communications Commission-licensed or authorized antennas and associated facilities, including:

Please see footnotes for further explanation of redlined proposed revisions.

(A) Structures constructed for wireless communications services, including but not limited to private, broadcast, and public safety services;

(B) Structures constructed for unlicensed wireless services and fixed wireless services such as microwave backhaul and the associated cell site;

(C) Radio, television, microwave, common carrier, and other similar communication tower facilities; and

(D) Monopalm, monopine, and other communication towers with partial camouflage that are integrated within a facility.

(2) Standards:

(A) Communication towers that are freestanding must be set back from all property lines a minimum of 1 foot for every 5 feet of height.

(B) AM broadcast communication towers must be set back a minimum of 500 feet from any adjoining property within the country, residential, apartment, or apartment mixed use zoning districts.

(C) FM and TV communication towers must be set back a minimum of 2,500 feet from any adjoining property within the country, residential, apartment, or apartment mixed use zoning districts.

(D) All communication towers must be designed to structurally accommodate the maximum number of additional users technically practicable, while using the smallest, least visually intrusive components.

(E) The standards above shall not apply to eligible facilities requests as defined in Section 21-5.60-2(e)(1).[2] ~~Once an eligible facilities request for a communication tower is approved as required by 47~~

[2] To avoid confusion and delay, we suggest making it clear that an eligible facilities request application to modify an existing communication tower may not be denied if the site is legally nonconforming as a result of setback requirements. *See In re Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies*, FCC 14-153, 29 FCC Rcd. 12865 at paragraph 201 (rel. Oct. 21, 2014), which provides that legal non-conforming sites are eligible for modification under Section 6409, so long as the modification does not constitute a substantial change under the federal rules.

Please see footnotes for further explanation of redlined proposed revisions.

~~U.S.C. § 1455 (2018), as may be amended or superseded, no other land use permits are required for the communication tower unless it is within a special district.[3] For purposes of this paragraph, an eligible facilities request means the same as defined in 47 C.F.R. § 1.6100(b) (2019), as may be amended or superseded.~~

[3] The provision in CD1 seems to contemplate that no discretionary land use approval is required for an eligible facilities requests. The ordinance should make clear, however, what procedural path is to be followed for submitting an eligible facilities request. We suggest creating a separate category and path for submission, as set forth below. Further, there is no legal distinction for review of an eligible facilities request based on location or district. We suggest that all eligible facilities requests, regardless of zoning district, follow the same procedural path to provide regulatory certainty to staff and applicants. *See* note 1, above, regarding "existing" sites.

Please see footnotes for further explanation of redlined proposed revisions.

(F) The following must be submitted as part of any application for a communication tower, other than an eligible facilities request:[4]

(i) A quantitative description of the additional tower capacity anticipated, including the approximate number and types of antennas;

(ii) If the communications tower does not satisfy the requirements of paragraph (D), a description of any limitations on the ability of the tower to accommodate other uses such as radio frequency interference, mass, height, or other characteristics; and

(iii) Evidence of a lack of space to locate the proposed antenna on existing communication towers that meet the setback requirements of this subsection and are located within 0.5 miles of the proposed communications tower site.

(G) Communication towers must be enclosed by fencing a minimum of 6 feet in height, and towers must be equipped with an anti-climbing device. For eligible facilities requests, however, no new fencing requirements shall be imposed as part of the approval, provided that a modification that proposes changes to existing fencing shall comply with the conditions of the siting approval of the of the construction or modification of the existing site.[5]

(H) All requests for communication towers must be accompanied by a landscape plan, which must be approved by the director. In the industrial zoning districts, screening, such as solid walls, may be used instead of landscaping if the communication tower zoning lot is not adjacent to any zoning lot in the residential, apartment, or apartment mixed use districts. Special emphasis will be placed on minimizing visual impacts from public rights-of-way and public places. For eligible facilities requests, no landscape plan shall be

[4] Pursuant to 47 C.F.R. § 1.6100(c)(1), when an applicant asserts that a modification is an eligible facilities request "a State or local government may require the applicant to provide documentation or information only to the extent reasonably related to determining whether the request is meets the requirements of [47 CFR 1.6100]."

[5] This provision makes clear the fact that an eligible facilities request is a minor modification to an existing site that cannot require a legal nonconforming site to be brought into compliance as part of the approval. *See* note 2, above.

Please see footnotes for further explanation of redlined proposed revisions.

required for submission unless the modification involves disturbance to existing landscaping on the site.[6]

(I) Monotree installations must be designed to be similar to surrounding trees, including appropriate species and heights, to blend in with the surrounding environment. All communication towers in the residential zoning districts must use monotree or other stealth design to minimize visual impacts. Provided, however, that no design changes to eligible facilities requests may be required other than those consistent with conditions associated with the siting approval of the construction or modification of the existing communications tower that are allowable under 47 CFR § 1.6100(b)(7)(vi), as may be amended.[7]

(J) Other than for eligible facilities requests,[8] ~~I~~in the industrial zoning districts, a conditional use permit (minor) is required if the zoning lot for the communication tower is adjacent to any zoning lot in the residential, apartment, or apartment mixed use zoning districts.

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[6] *See* notes 4 and 5, above.

[7] This provision makes clear the fact that an eligible facilities request is a minor modification to equipment on an existing site, and is a non-discretionary, mandatory approval under federal law that cannot be conditioned beyond the allowable prior siting approval conditions. Further, concealment elements as well as other aesthetic criteria for eligible facilities requests are governed primarily by the underlying siting approval for an existing site, rather than by current ordinance requirements. *See generally*, *In re Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, FCC 20-75, 35 FCC Rcd. 5977, par. 32-40 (rel. June 10, 2020) (clarifying treatment of concealment elements for eligible facilities requests); and par. 41-44 (discussing conditions associated with siting approval for eligible facilities requests).

[8] *See* note 3, above.

Please see footnotes for further explanation of redlined proposed revisions.

(c) Communication tower alternative support structure.

(1) Defined: A facility such as a rooftop structure, facade-mounted concealed structure, clock tower, campanile, steeple, light structure, or other wireless communication structure that supports or conceals an antenna.

(2) Standards:

(A) At-grade equipment shelters must be surrounded by a minimum 10-foot wide buffer.

(B) Communication tower alternative support structures must:

(i) To the extent feasible, ~~B~~be concealed to minimize visual impacts, especially when integrated into an existing building façade. Integration with existing structures or with existing uses must be accomplished through the use of architecture, landscape, and site solutions.

(ii) When located on the roof of an existing structure, to the extent feasible, be set back or located to minimize visual impacts, especially from public rights-of-way and public places.

(C) The communication tower alternative support structure must comply with all applicable State and city laws, including but not limited to building and safety codes.

(D) The above standards in subsection (B) shall not apply to eligible facilities requests unless such standards are required by conditions associated with the siting approval of the construction or modification of the communication tower alternative support structure as allowable for eligible facilities requests under 47 C.F.R. § 1.6100(b)(7), as may be amended or superseded.[9] ~~Once an eligible facilities request for a communication tower alternative support structure is approved as required by 47 U.S.C. § 1455 (2018), as may be amended or superseded, no other land use permits are required for the communication tower facility unless it is within a special district. For purposes of this paragraph, an eligible facilities request means the same as defined in 47 C.F.R. §~~

[9] *See* note 7, above.

Please see footnotes for further explanation of redlined proposed revisions.

~~1.6100(b) (2019), as may be amended or superseded.~~

(d) Accessory communication structure.

(1) Defined: Any communications structure or system not regulated by the Federal Communications Commission, including a satellite dish up to 1 meter in size and an amateur (ham) radio antenna.

Please see footnotes for further explanation of redlined proposed revisions.

(2) Standards:

(A) Antennas must not be located in the required yards.

(B) All antennas must be set back from all property lines 1/3 of the height of the antenna or the setback requirements for the underlying zoning district, whichever is greater.

(C) The antenna must be located at a distance equal to or greater than the antenna height from the nearest residential dwelling, excluding the owner's primary dwelling or structure.

(D) Antennas must not be illuminated.

(E) All antennas must be equipped with safety devices to prevent them from being climbed, and must be securely fastened.

(F) All guy wires must be anchored onsite and outside of any right-of-way.

(G) When mounted on the ground, receive-only antennas must be screened by walls, earth berms, or landscaping a minimum of 4 feet in height.

(e) Eligible Facilities Request

(1) Defined: An eligible facilities request means the same as defined in 47 U.S.C. § 1455(a) and 47 CFR § 1.6100, as may be amended or superseded.

(2) Standards.

(A) An eligible facilities request is a permitted principal use in all zoning districts on existing communications towers, communications tower alternative support structures, or accessory communication structures that constitute eligible support structures as defined in 47 C.F.R. § 1.6100(b)(4), as may be amended.[10]

[10] An eligible facilities request is a request for approval equipment modifications as defined by the FCC on previously approved, pre-existing sites, wherever located. *See* 47 C.F.R. § 1.6100. A State or local government "may not deny and shall approve" a collocation, replacement, or removal of transmission equipment that does not substantially change the physical dimensions of the existing structure under the FCC definitions. This is true regardless of the location of the

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Please see footnotes for further explanation of redlined proposed revisions.

(B) The following must be submitted as part of any application for approval of an eligible facilities request:[11]

(i) A written description of all modifications to the existing site;

(ii) A checklist of applicable substantial change criteria[12] as defined in 47 C.F.R. § 1.6100, as may be amended;

(iii) A completed building permit application.

(C) Upon submission of required documents as set forth in above, the sixty-day review period as set forth in 47 C.F.R. § 1.6100 shall

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previously approved existing support structure. As a result, it is most efficient to provide an administrative or non-discretionary path for an eligible facilities request, such as a building or construction permit.

[11] In 2020, the FCC clarified its rules to provide that the start of the 60-day review period in which a reviewing authority must act on an eligible facilities request starts upon the applicant taking the first procedural step that the local jurisdiction requires as part of its applicable regulatory review process under Section 6409(a), and the applicant submits written documentation showing that a proposed modification is an eligible facilities request. *In re Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, FCC 20-75, 35 FCC Rcd. 5977 at par. 16 (rel. June 10, 2020).

We recommend that the ordinance make clear the first step of the process, as well as request all information that the City and County will need to make a determination as to whether the request meets the federal criteria.

[12] Section 1.6100(b)(7) of 47 C.F.R. outlines six criteria that constitute a "substantial change" to the physical dimensions of an existing wireless structure. Any modification that does not trigger one of these criteria is not a "substantial change" for purposes of Section 6409 and eligible facilities requests. The six criteria are that constitute a substantial change are a modification to a tower that: (i) increases the height of a tower by more than the greater of 20% or the height of the tower or the height of an additional antenna array plus 20 feet; (ii) adds an appurtenance to the tower that increases the width by more than the greater of 20 feet or the width of the tower at the level of the appurtenance; (iii) adds more than four new equipment cabinets; (iv) involves excavation or deployment more than 30 feet in any direction from the current site boundaries; (v) defeats the concealment elements of a stealth-designed structure; or (vi) violates the siting conditions (other than by allowable height, width, cabinet or current site criteria). For towers in the right of way or base stations (i.e., water tanks, rooftops, billboards, etc.), there are slightly different calculations for height, width, cabinet, and current site thresholds for substantial change that are also set forth in 47 C.F.R. § 1.6100(b)(7).

commence.[13]

(D) Approvals of eligible facilities requests may not be conditioned, other than conditions requiring compliance with generally applicable building, structural, electrical, and safety codes or other laws codifying objective standards reasonably related to health and safety.[14]

Sec. 21-5.60-3 Education.

Uses that educate students. Uses in the education category consist of the following subcategories in Table 21-5.1:

(a) School, K-12.

(1) Defined: A facility educating students enrolled in pre-kindergarten through 12th grade, operated by a private institution using a curriculum equivalent to the Hawaii public school curriculum for the same grade level.

(2) Standards:

(A) All structures and facilities must be set back a minimum of 20 feet from any adjoining zoning lot in the country, residential, apartment, or apartment mixed use zoning district. The director may waive this

[13] Under federal law, an eligible facilities request that is not granted within the 60-day review period (accounting for any tolling as allowed under the FCC rules), is deemed granted upon expiration of the review period, effective upon notice sent by the applicant. 47 C.F.R. § 1.6100(c)(4).

[14] A state or local government "may not deny and shall approve" a modification that meets the federal criteria. The only allowable conditions set forth by the FCC are generally applicable and codified health and safety conditions. *See In re Acceleration of Broadband Deployment by Improving Wireless Facility Siting Policies*, FCC 14-153, 29 FCC Rcd. 12865 at paragraph 202 (rel. Oct. 21, 2014).