



434 Fayetteville Street
Suite 2800
Raleigh, NC 27601

April 13, 2018

Via Electronic Mail and First Class Mail

Phil Mason
Chapel Hill Planning Department
Development Services, Town Hall – First Floor
405 Martin Luther King Jr. Blvd.
Chapel Hill, NC 27514
pmason@townofchapelhill.org

Re: Comments to Proposed Wireless Communications Initiative Ordinance in the Town of Chapel Hill

Dear Mr. Mason:

As I mentioned in my comments to the Planning Commission during its meeting on March 20, 2018, a group of wireless industry representatives have reviewed the current draft of the proposed Wireless Communications Initiative Ordinance (the "Ordinance"). The collective comments of that group, which includes American Tower, AT&T, Sprint, T-Mobile and Verizon, are attached.

We understand that the Ordinance is on the agenda for public hearing at the Town Council meeting on April 18, 2018. The above-referenced group will have a representative present to speak at that meeting. In the interim, please let us know if you have any questions or wish to discuss.

Thank you.

Sincerely,

Smith Moore Leatherwood LLP

A handwritten signature in blue ink that reads "Katie M. Jobe".

Katie M. Jobe
KMJ/clj

Enclosures (2)

RALEIGH 526896.1

Comments to the proposed Chapel Hill Wireless Communications Initiative Ordinance

By

American Tower, AT&T, Sprint, T-Mobile and Verizon

We have carefully reviewed the proposed Chapel Hill Wireless Communications Initiative Ordinance (“Ordinance”). These are a few of our observations and concerns:

- I. The declared objective of Chapel Hill’s Wireless Communications Initiative Master Plan (the “Master Plan”) – to improve wireless telecommunications in the Town – is commendable, and changes in the ordinance are needed in light of changing technology and increasing consumer expectations and usage. The industry supports Chapel Hill’s efforts in this regard.

Although different technologies, which will be used by different service providers, may invoke different infrastructure requirements, we do not necessarily disagree with the projection of the Master Plan on page 38:

In residential areas, the expectation is that one wireless node will be needed for each 10-12 households, equating to one node every 165-1,650 feet. For this reason dozens to hundreds of smaller nodes will be needed to meet future wireless network traffic.

This expectation (and other discussion in the Master Plan) acknowledges a shift away from traditional, macro-cell “towers,” as the industry works to expand capacity, bandwidth, and speed of wireless services across their networks. That said, the Master Plan correctly recognizes that existing (and some additional) macro-cell towers will still be needed in Chapel Hill (the Master Plan projects an additional ten (10) to twelve (12) needed over the next 10 years at 70 to 120 feet (or fewer, if allowed at greater heights); however, new 5G demands, at different frequencies, and with greater bandwidth, will require a different infrastructure over the next 10 to 20 years than what has been deployed over the past 10 to 20 years – namely “small-cell” systems deployed more densely on existing utility poles and light poles.

These infrastructure needs were recognized by the North Carolina General Assembly in its adoption in 2017 of N.C. Session Law 2017-159 (“House Bill 310”), codified at 160A-400.51 *et seq.* Section 1 of House Bill 310 observes:

- (1) The design, engineering, permitting, construction, modification, maintenance, and operation of wireless facilities are instrumental to the provision of emergency services and to increasing access to advanced technology and information for the citizens of North Carolina.
- (2) Cities and counties play a key role in facilitating the use of the public rights-of-way.
- (3) Wireless services providers and wireless infrastructure providers must have access to the public rights-of-way and the ability to attach to poles and structures in the public rights-of-way to densify their networks and provide next generation services.
- (4) Small wireless facilities, including facilities commonly referred to as small cells and distributed antenna systems, often may be deployed most effectively in the public rights-of-way.

- (5) Expedient processes and reasonable and nondiscriminatory rates, fees, and terms related to such deployments are essential to the construction and maintenance of wireless facilities.
- (6) Wireless facilities help ensure the State remain competitive in the global economy.
- (7) The timely design, engineering, permitting, construction, modification, maintenance, and operation of wireless facilities are matters of statewide concern and interest.

II. The infrastructure needs and deployment of these “small cell” systems are very different from that of the traditional macro-cell towers. Therefore, trying to find a common regulatory framework, with common definitions, and common standards, for small cell systems/ distributive antenna systems and traditional macro-cell towers is like the proverbial comparison of disparate “apples and oranges,” and is generally unworkable. Definitions that may apply to one type of infrastructure are often inapplicable to the other. Standards that are relevant to one are not to the other. Requirements for one, may, in fact, violate federal or state law if required of the other.

Accordingly, many municipalities in North Carolina (e.g. Raleigh, Fayetteville, Winston-Salem, Charlotte, etc.) have adopted, or are in the process of adopting, specific small cell ordinances that will implement the goals of, and be consistent with, House Bill 310, and accommodate the new technologies and infrastructure that will be needed. Attached as Appendix A is a model ordinance, supported by the wireless technology industry, that is being adopted by, or at least considered by, these jurisdictions. The intent of those ordinances is the same as that articulated in the Chapel Hill’s Master Plan, but the solution – a stand-alone small cell ordinance – is an approach that is clearer and easier to both interpret and apply – by both the wireless industry and the municipalities.

III. In this context and with this background, the wireless telecommunication industry participants submitting these comments believe that there is a considerable disconnect between what the Master Plan aspires to do and what the proposed Ordinance actually does. The Master Plan recognizes the evolving technologies and the increased need for small cell deployment in the town, yet, the Ordinance will make antenna deployment difficult (especially for small cell networks) in a number of ways, including the following:

- a. The Ordinance is replete with subjective design standards that could be used to exclude some providers and favor others in the permitting process. Similarly, as applied, the siting preferences could be used to justify the denial of just about any proposed facility. Therefore, the Ordinance creates considerable uncertainty that makes planning and proposed siting very problematic. The capital budgeting and planning for wireless infrastructure often necessitates some level of certainty, or, at least, a predictability of process on which companies can rely. The greater the level of uncertainty, the less likely that resources will be deployed in an area. This reality is the primary reason of the current problems with wireless service in the Town and is reflected in the responses to the survey discussed in the Master Plan.
- b. Section 5.20.6(c) of the Ordinance contains a “preference hierarchy” (i.e. some types of facilities are “preferred” over others), and the burden of proof and evidentiary standards to show that more “preferable” types of facilities are unavailable or unclear. (Who decides what “relevant” evidence is and whether it is “clear and convincing?” What are “diligent efforts?” What does “not technically feasible, practical or justified” mean? “Justified” to whom? Is this an objective or subjective standard?) Also, adjacent

elements of the network must work together, so that a single facility that may be technically feasible in coordination with an adjacent facility in one configuration, may not work in another network configuration.) A hierarchy of preferences may sound good in theory, but in the real-life world of finite budgets, unwilling/unreasonable landowners, and technical/engineering standards, it has generally not been a practical framework that provides clear direction for network planning. We recognize Chapel Hill is likely to implement strict standards, but predictability of process and clarity of standards are necessary to accommodate small cell technology that is needed to allow the industry to effectively serve the residents of Chapel Hill.

- c. Because the Ordinance does not distinguish between small cell systems and traditional cell towers, the Ordinance has an awkward definition of “base station” that appears to include each individual small cell site, does not distinguish between DAS and small cell installations, and does not appear to fully understand the requirements and limitations for small cell system deployment. For example,
 - i. To minimize alleged “adverse visual impacts” (which are neither defined nor illustrated), Section 5.20.9(d)(1)(K) of the Ordinance would require at least 250 feet between small wireless facilities; which contradicts the statement on Page 38 of the Master Plan that “the expectation is that one wireless node will be needed for each 10-12 households, equating to one node every 165 to 1,650 feet over the next ten years.” This requirement is both inconsistent with the Master Plan and with House Bill 310.
 - ii. The Ordinance requires (or at least expresses a preference for) “stealth” or “concealed” small cell antennas, Section 5.20.9(d)(1)(A); 5.20.9(e)(1), which is not clearly defined and has limited applicability (or potential benefit) to small whip antennas that are typically used for small cell systems. In fact, the “concealment” required is likely to have a greater profile and be more noticeable than a simple whip antenna.
 - iii. The Ordinance requires small cell facilities “to be capable of accommodating multiple wireless service providers through the use of a single antenna system,” which is not currently commercially practical for most services or providers. See Section 5.20.9(d)(1)(E) and Section 5.20.9(e)(1)(C) (“Neutral Host”). Even when this type of antenna system may be commercially practical for certain types of technology, the Ordinance should not assume or favor or require one type of technology or wireless service over another.
 - iv. Regarding non-antenna facility equipment in general, Section 5.20.9(d)(1)(F), in its entirety, is unworkable.
 - v. Section 5.20.8(d)(1)(G) & (H) make sense as they apply to “equipment shelters,” but “equipment cabinets” (below a certain cubic size) can (and should) be able to be attached to poles, consistent with the “scale and design” of the pole. There is generally less pedestrian concern with pole mounted equipment. Vaulting each node is cost prohibitive and is often technically impossible, and therefore should only be required in special cases. Additionally, realizing the benefits of next generation wireless technologies will require a continued reduction in latency, which means, among other things, closer proximity between antennas and associated equipment.

- d. Several sections do not distinguish requirements that may be reasonable for conventional “macro-sites,” but are unreasonable (or even nonsensical) for small cell facilities. An example is the Balloon Test requirement in Section 5.20.10(a)(1)(G).
 - e. The requirement of flush mounted antennas 5.20.10(a)(1)(F)(2) [sic] will limit network effectiveness, signal quality, and flexibility. This is contrary to the desire to facilitate high quality wireless service.
- IV. We believe that the Ordinance creates a false “straw man” of public safety concerns to discourage deployment of small cell facilities in the right-of-way and to justify unnecessarily restrictive requirements, in violation of House Bill 310. Working across the country and deploying thousands of small cell sites, we are unaware of actual evidence of public safety concerns of the type stated in the Ordinance.
- V. Wireless service providers are willing to provide an explanation for why antenna sites are necessary, but, in the future, the reasons will more likely be capacity needs to meet customer demand, rather than to fill coverage gaps. Section 5.20.10, subsections “N” and “S” require “signal propagation” maps and “propagation plot indicating the coverage” and subsection “F.2.” also references “the desired coverage area.” When additional antennas or configurations, however, are needed to address capacity demands rather than coverage objectives, these provisions may be unnecessary or difficult to satisfy because they are not relevant to illustrate a capacity need, and are particularly inapplicable to small cell systems.
- VI. With regard to fees, in order to maintain compliance with current state law, including House Bill 310 and § 160A-296 (a)(6), the following express statutory language should be inserted in the ordinance: “No fee or charge for activities conducted in the right-of-way shall be assessed on businesses listed in G.S. 160A-206(b), except the following: a) Fees to recover any difference between a city’s right-of-way management expenses related to the activities of businesses listed in G.S. 160A-206(b) and distributions under Article 5 of Chapter 105 of the General Statutes; b) Payments under agreements subject to G.S. 62-350.” That express statutory provision became effective July 1, 2017, and should be incorporated within the ordinance to avoid confusion regarding entities subject to fees, and the burden of proof which cities must meet before levying any right-of-way fees on businesses listed in G.S. 160A-206(b). That pronouncement is consistent with state law--including the fee exclusions contained in House Bill 310 and its inclusion will help to ensure conformity between the ordinance and state law.
- VII. The Ordinance needs a definition of “poles”, such as that used in the model ordinance. (Model ordinance: “Pole” means a single shaft of wood, steel, concrete, or other material capable of supporting the equipment mounted thereon in a safe and adequate manner and as required by provisions of the Code.)
- VIII. Section 5.20.2(e) of the Ordinance encourages coordination between providers, but contains no substantive provisions regarding how make-ready work will be costed or managed.

For these reasons, we respectfully request that the Town Council vote to refer the draft Ordinance to committee or back to the Planning Commission and allow us to work collaboratively with Staff to modify it so that we can all better implement the commendable aims of the Master Plan and HB 310 in the Town of Chapel Hill.

Appendix A

SMALL WIRELESS FACILITY MODEL ORDINANCE

AN ORDINANCE ESTABLISHING STANDARDS FOR SMALL WIRELESS FACILITIES IN THE RIGHTS-OF-WAY IN THE CITY OF _____

WHEREAS, the City of _____ ("City") desires to encourage wireless infrastructure investment by providing a fair and predictable process for the deployment of small wireless facilities, while enabling the City to promote the management of the rights-of-way in the overall interests of the public health, safety and welfare; and

WHEREAS, the City recognizes that small wireless facilities are critical to delivering wireless access to advanced technology, broadband and 9-1-1 services to homes, businesses, schools within the City; and

WHEREAS, the City recognizes that small wireless facilities, including facilities commonly referred to as small cells and distributed antenna systems, often may be deployed most effectively in the public rights-of-way; and,

WHEREAS, the City intends to fully comply with state and federal law to the extent it preempts local municipal control.

NOW, THEREFORE, BE IT ORDAINED by the _____ that Title _____ of the Municipal Code of the City of _____ shall be amended by adding the following Chapter _____ that will read as follows:

Section 1 – Purpose and Scope

(A) Purpose. The purpose of this Chapter is to establish 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 visual qualities of the City rights-of-way and the City as a whole.

(B) Intent. In enacting this Chapter, the City is establishing uniform standards to address issues presented by small wireless facilities, including without limitation, to:

- (1) prevent interference with the use of streets, sidewalks, alleys, parkways, public utilities, public views, certain city corridors, and other public ways and places;
- (2) prevent the creation of visual and physical obstructions and other conditions that are hazardous to vehicular and pedestrian traffic;
- (3) prevent interference with the facilities and operations of facilities lawfully located in rights-of-way or public property;
- (4) protect against environmental damage, including damage to trees;
- (5) preserve the character of the neighborhoods in which facilities are installed; and

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- (6) facilitate rapid deployment of small cell facilities to provide the benefits of advanced wireless services.

(C) Conflicts with Other Chapters. This Chapter supersedes all Chapters or parts of Chapters adopted prior hereto that are in conflict herewith, to the extent of such conflict.

Section 2 - Definitions

- (A) "Antenna" means communications equipment that transmits or receives electromagnetic radio frequency signals used in the provision of wireless services.
- (B) "Applicable Codes" means The North Carolina State Building Code and any other uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization together with State or local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons.
- (C) "Applicant" means any person who submits an application and is a wireless provider.
- (D) "Application" means a request submitted by an applicant (1) for a Permit to collocate small wireless facilities; or (2) to approve the installation or modification of a utility pole, city utility pole, or wireless support structure.
- (E) "[City / Town / Village]" refers to the [City / Town / Village] of XXXXXX.
- (F) "City Utility Pole" means (1) a utility pole owned by the City in the rights-of-way, including a utility pole that provides lighting or traffic control functions, including light poles, traffic signals, and structures for signage, and (2) a pole or similar structure owned by the City in the ROW that supports only Wireless Facilities.
- (G) "Code" means the [City / Town / Village] of XXXXXX Municipal Code.
- (H) "Collocate" means the placement, installation, maintenance, modification, operation, or replacement of wireless facilities on, under, within, or on the surface of the earth adjacent to existing structures, including utility poles, city utility poles, water towers, buildings, and other structures capable of structurally supporting the attachment of wireless facilities in compliance with applicable codes. The term "collocate" does not include the installation of new utility poles, city utility poles, or wireless support structures. "Collocation" has a corresponding meaning.
- (I) "Day" means calendar day.
- (J) "Emergency" is a condition that (1) constitutes a clear and immediate danger to the health, welfare, or safety of the public, or (2) has caused or is likely to cause facilities in the right-of-way to be unusable and result in loss of the services provided.
- (K) "Existing Structure" is a previously erected support structure or utility pole that is capable of supporting the installation of wireless facilities.

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- (L) "Facility(ies)" means wireless telecommunication facilities.
- (M) "FCC" means the Federal Communications Commission of the United States.
- (N) "Fee" means a one-time charge.
- (O) "Law" means federal, state, or local law, statute, common law, code, rule, regulation, order, or ordinance.
- (P) "Modification" means a change to an existing wireless facility that involves any of the following: collocation, expansion, alteration, enlargement, reduction, or augmentation, including, but not limited to, changes in size, shape, color, visual design, or exterior material. "Modification" does not include repair, replacement or maintenance if those actions do not involve a change to the existing facility involving any of the following: collocation, expansion, alteration, enlargement, intensification, reduction, or augmentation.
- (Q) "Monopole" means a structure composed of a pole or tower used to support antennas or related equipment. A monopole also includes a monopine, monopalm and similar monopoles camouflaged to resemble faux trees or other faux objects attached on a monopole.
- (R) "Permit" means a written authorization required by the City to perform an action or initiate, continue, or complete a project.
- (S) "Pole" means a single shaft of wood, steel, concrete, or other material capable of supporting the equipment mounted thereon in a safe and adequate manner and as required by provisions of the Code.
- (T) "Person" means an individual, corporation, limited liability company, partnership, association, trust, or other entity or organization, including the City.
- (U) "Rate" means a recurring charge.
- (V) "Rights-of-Way" or "ROW" means the right-of-way owned, leased, or operated by a city, including any public street or alley that is not a part of the State highway system.¹
- (W) "Small Wireless Facility" means a wireless facility that meets both of the following qualifications: (1) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the Antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and (2) all other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment,

¹ Which would include the portions of the right-of-way within the City of Charlotte dedicated to light rail operation.

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power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services.

- (X) "Utility Pole" means a structure that is designed for and used to carry lines, cables, wires, lighting facilities, or small wireless facilities for telephone, cable television, electricity, lighting, or wireless services.
- (Y) "Wireless Facility" means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including: (1) equipment associated with wireless communications; and (2) radio transceivers, antennas, wires, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration. The term includes small wireless facilities. The term shall not include any of the following:
- i. The structure or improvements on, under, within, or adjacent to which the equipment is collocated.
 - ii. Wireline backhaul facilities.
 - iii. Coaxial or fiber-optic cable that is between wireless structures or utility poles or city utility poles or that is otherwise not immediately adjacent to or directly associated with a particular antenna.
- (Z) "Wireless Infrastructure Provider" means any person with a certificate to provide telecommunications service in the State who builds or installs wireless communication transmission equipment, wireless facilities, or wireless support structures for small wireless facilities but that does not provide wireless services.
- (AA) "Wireless Provider" means a wireless infrastructure provider or a wireless services provider.
- (BB) "Wireless Services" means any services, using licensed or unlicensed wireless spectrum, including the use of Wi-Fi, whether at a fixed location or mobile, provided to the public using wireless facilities.
- (CC) "Wireless Services Provider" means a person who provides wireless services.
- (DD) "Wireless Support Structure" means a freestanding structure, such as a monopole; tower, either guyed or self-supporting; billboard; or, other existing or proposed structure designed to support or capable of supporting wireless facilities. Such term shall not include a utility pole or city utility pole.

Section 3 – Permitted Use; Application and Fees

- (A) Permitted Use: Collocation of a small cell facility or a new or modified utility pole or wireless support structure for the collocation of a small cell facility that meet the height requirements of § 160A-400.55(c)(2) shall be classified as permitted uses and subject

only to administrative review of Section 4 if they are collocated (1) in a City right of way within any zoning district or (2) outside of rights of way on property other than single family residential property.

- (B) Permit Required. No person shall place a small wireless facility in the rights-of-way, without first filing a small wireless facility application and obtaining a permit therefore, except as otherwise provided in this Chapter.

- (C) Permit Application. All small wireless facility applications for permits filed pursuant to this Chapter shall be on a form, paper or electronic, provided by the City. The applicant may designate portions of its application materials that it reasonably believes contain proprietary or confidential information as "trade secret" by clearly marking each page of such materials accordingly. Trade secret information shall be filed as a separate addendum to permit applications.

- (D) Application Requirements. The small wireless facility permit application shall be made by the wireless provider or its duly authorized representative and shall contain the following:
 - (1) The applicant's name, address, telephone number, and e-mail address;
 - (2) The names, addresses, telephone numbers, and e-mail addresses of all consultants, if any, acting on behalf of the applicant with respect to the filing of the application.
 - (3) A general description of the proposed work and the purposes and intent of the small wireless facility. 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 work proposed.
 - (4) A site plan, with sufficient detail to show the proposed location of items the applicant seeks to install in the right-of-way, including any manholes or poles, the size, type, and depth of any conduit or enclosure.
 - (5) A small wireless facility shall comply with all applicable codes, approved plans, and conditions of approval.
 - (6) An application must include an attestation that the small wireless facilities will be collocated on the utility pole, city utility pole or wireless support structure and that the small wireless facilities will be activated for use by a wireless services provider to provide service no later than one year from the permit issuance date, unless the City and the wireless provider agree to extend this period or a delay is caused by a lack of commercial power at the site, and, in instances where an applicant seeks to construct a new pole, a statement regarding the infeasibility of collocation on existing structures.
 - (7) An applicant seeking to collocate small wireless facilities at multiple locations within the jurisdiction of a city shall be allowed at the applicant's discretion to file a

consolidated application for no more than 25 separate facilities and receive a single permit for the collocation of all the small wireless facilities meeting the requirements of this section. A city may remove small wireless facility collocations from a consolidated applicant and treat separately small wireless facility collocations (1) for which incomplete information has been provided or (2) that are denied. The city may issue a separate permit for each collocation that is approved.

(8) The applicant asserts, to the best of the applicant's knowledge, the truth of the information contained in the application.

- (E) Permit Conditions. A Permit for the collocation of the small wireless facility shall provide that the collocation must commence within six months of approval and that the small wireless facility shall be activated no later than one year from the permit issuance date, unless the City and the wireless provider agree to extend this period or a delay is caused by a lack of commercial power at the site. In addition, the applicant shall be required to obtain all otherwise applicable work permits including, by way of example and not by way of limitation, permits for work that will involve excavation in the right-of-way, affect traffic patterns or obstruct vehicular traffic in the right-of-way.
- (F) Routine Maintenance and Replacement. A city shall not require an application or permit or charge fees for (1) routine maintenance; (2) the replacement of small wireless facilities with small wireless facilities that are the same size or smaller; or (3) installation, placement, maintenance, or replacement of micro wireless facilities that are suspended on cables strung between existing utility poles or city utility poles in compliance with applicable codes by or for a communications service provider authorized to occupy the city rights-of-way and who is remitting taxes under G.S. 105-164.4(a)(4c) or G.S. 105-164.4(a)(6). Nothing in this section shall prevent a city from requiring a work permit for work that involves excavation, affects traffic patterns, or obstructs vehicular traffic in the city right-of-way.
- (G) Information Updates. Any amendment to information contained in a permit application shall be submitted in writing to the City within thirty (30) days after the change necessitating the amendment.
- (H) Fees. The fee for submitting an application shall be one hundred dollars (\$100.00) per facility for the first five small wireless facilities addressed in an application plus fifty dollars (\$50.00) for each additional small wireless facility addressed in the application. In any dispute concerning the appropriateness of a fee, the city shall bear the burden of providing that the fee meets the requirements of this subsection.
- (I) Consulting Fees. The applicant will reimburse the city for the actual and direct cost of any consultant fees necessary for the review of an application up to five hundred dollars (\$500.00) per application. Such consultant fees shall not include travel expenses or direct payments or reimbursements for a consultant or other third party that are based on a contingent fee basis or results-based arrangement.

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- (J) Fee Disputes. In any dispute concerning the appropriateness of a fee, the city shall have the burden of proving that the fee meets the requirements of the foregoing fee Sections.

Section 4 – Administrative Review and Approval Process

This Section applies to applications for permits that meet the requirements specified in Subsection 3(A).

- (A) Review for completeness. A permit application subject to this Administrative Review section shall be deemed complete unless the City provides notice in writing to the applicant within 30 days of submission or within some other mutually agreed upon timeframe. The notice shall identify the deficiencies in the application which, if cured, would make the application complete. The application shall be deemed complete on resubmission if the additional materials cure the deficiencies identified.
- (B) Time Limits for Review of Completed Applications. The permit applications subject to this Administrative Review section shall be processed on a nondiscriminatory basis and shall be deemed approved if the City fails to approve or deny the application within 45 days from the time the application is deemed complete or within some other mutually agreed upon timeframe.
- (C) Denial of Permit. The City may deny an application for a permit subject to this Administrative Review section on the basis that it does not meet the city's applicable codes; local code provisions or regulations that concern public safety. The city shall (1) document the basis for a denial, including the specific code provisions on which the denial was based, and (2) send the documentation to the applicant on or before the day the city denies an application. The applicant may cure the deficiencies identified by the city and resubmit the application within 30 days of the denial without paying an additional application fee. The city shall approve or deny the revised application within 30 days of the resubmittal date. Any subsequent review shall be limited to the deficiencies cited in the prior denial.
- (D) Review of Eligible Facilities Requests. Notwithstanding any other provision of this Chapter, the City shall approve and may not deny applications for eligible facilities requests within sixty (60) days according to the procedures established under 47 CFR 1.40001(c).

Section 5 – Small Wireless Facilities in the ROW; Maximum Height; Other Requirements

- (A) Maximum Size of Permitted Use. A wireless provider may collocate small wireless facilities along, across, upon, and under any city right- of- way. Subject to this section, a wireless provider may place, maintain, modify, operate and replace associated utility poles, city utility poles, conduit, cable, and related appurtenances and facilities along, across, upon, and under any city right- of- way. The placement, maintenance, modification, operation and replacement of utility poles and city utility poles associated with the collocation of small wireless facilities, along, across, upon, and under any city right- of- way shall be classified

as permitted uses and subject only to administrative review or approval under Section 4 if the wireless provider meets the following requirements:

- (1) Each new utility pole and each modified or replacement utility pole or city utility pole installed in the right- of- way shall not exceed 50 feet above ground level.
- (2) Each new small wireless facility in the right- of- way shall not extend more than 10 feet above the utility pole, city utility pole or wireless support structure on which it is collocated.²

(B) Other Requirements. Any wireless provider that seeks to construct or modify a utility pole, wireless support structure or wireless facility shall be subject to the following requirements:

- (1) Collocations of Small Wireless Facilities are preferred on existing poles where feasible.
- (2) Installations of Small Wireless Facilities are preferred at property lines and street corners where feasible.
- (3) Small Wireless Facilities shall be located such that they do not interfere with public health or safety facility, such as, but not limited to a fire hydrant, fire station, fire escape, water valve, underground vault, valve housing structure, or any other public health or safety facility. New facilities shall not be installed directly over any water, sewer, or reuse main or service line.
- (4) New Wireless Support Structures erected for installations of Small Wireless Facilities shall have the same type of material as existing poles in the immediate area. Applicant may request a variance of this provision from the city.
- (5) Any tree disturbing activity necessary for the installation or collocation of Small Wireless Facilities shall comply with the City's [tree ordinance / tree manual].
- (6) Wireless Support Structures shall not be lighted or marked by artificial means, except when mounted on an existing light pole or where illumination is specifically required by the Federal Aviation Administration or other federal, state, or local regulations. Notwithstanding the preceding sentence, the mounting of Small Wireless Facilities on light poles is permitted.
- (7) A city may require a wireless provider to repair all damage to a city right-of-way directly caused by the activities of the wireless provider, while occupying, installing, repairing, or maintaining wireless facilities, wireless support structures, city utility poles, or utility poles and to return the right-of-way to its functional equivalence before the damage. If the wireless provider fails to make the repairs required by the city within a reasonable time after written notice, the city may undertake those repairs and charge the applicable party the reasonable and documented cost of the repairs. The city may maintain an action to recover the costs of the repairs.
- (8) The city shall have authority to enforce historic preservation zoning regulations consistent with grants of authority under State law, the preservation of local zoning authority under 47 U.S.C. § 332(c)(7), the requirements for facility modifications

² Applicable State law permits cities to extend relevant height limitations.

under 47 U.S.C. § 1455(a), or the National Historic Preservation Act of 1996, 54 U.S.C. § 300101, et seq., as amended, and the regulations, local acts, and city charter provisions adopted to implement those laws.

- (9) Small Wireless Facilities and their associated Wireless Facilities shall be camouflaged, disguised, hidden, and/or blended in with the surrounding environment to the extent practicable.
 - (10) No Wireless Facility may bear any signs or advertising devices other than certifications, warnings, or other information as required by federal or state law and/or regulation or by the City Code of Ordinances.
 - (11) Wireless facility owners shall place company identification markers on poles on which their facilities are affixed.
 - (12) New wireless facilities on existing poles shall comply with otherwise applicable rules imposed by the pole owner including, when applicable, the National Electric Safety Code.
- (C) Undergrounding Provisions. Applicant shall comply with nondiscriminatory undergrounding requirements that prohibit electric utilities, telecommunications or cable providers from installing structures in the rights-of-way, provided such requirements shall not prohibit the replacement of existing structures. Applicant may seek a special use permit to place above-ground structures in areas where the undergrounding requirements apply.

Section 6 – Effect of Permit

- (A) Authority Granted; No Property Right or Other Interest Created. 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) Duration. Collocation of the small wireless facility shall commence within six (6) months of approval and shall be activated no later than one year from the permit issuance date, unless the city and the applicant agree to extend this period or a delay is caused by a lack of commercial power at the site.
- (C) Post Construction. The applicant must submit as-built drawings in an acceptable GIS format as determined by city staff as soon as reasonably practicable but no later than one hundred twenty (120) days after the completion of the installation and shall submit and maintain current contact information for the party responsible for the Wireless Facility on a form to be supplied by the city.

Section 7 – Removal, Relocation or Modification of Small Wireless Facility in the ROW

- (A) Notice. Within ninety (90) days following written notice from the City, wireless provider shall, at its own expense, protect, support, temporarily or permanently disconnect, remove, relocate, change or alter the position of any small wireless facilities within the rights-of-way whenever the City has determined that such removal, relocation, change or alteration, is reasonably necessary for the construction, repair, maintenance, or installation of any City improvement in or upon, or the operations of the City in or upon, the rights-of-way.

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- (B) Emergency Removal or Relocation of Facilities. The City retains the right and privilege to cut or move any small wireless facility located within the rights-of-way of the City, as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency. If circumstances permit, the City shall notify the wireless provider and provide the wireless provider an opportunity to move its own facilities prior to cutting or removing a facility and shall notify the wireless provider after cutting or removing a small wireless facility.
- (C) Abandonment of Facilities. The city may require a wireless services provider to remove an abandoned wireless facility within 180 days of abandonment. Should the wireless services provider fail to timely remove the abandoned wireless facility, the city may cause such wireless facility to be removed and may recover the actual cost of such removal from the wireless services provider. A wireless facility shall be deemed abandoned at the earlier of the date that the wireless services provider indicates in any way that it is abandoning such facility or the date that is 180 days after the date that such wireless facility ceases to be used unless the wireless services provider gives the city reasonable evidence that it is diligently working to place such wireless facility back in service.
- (D) Liability. Applicant hereby assumes all risk for liability for damages that may occur to persons or property on account of the proposed work, whether completed by applicant or applicant's agent or contractor completing, installing, or maintaining the work on applicant's behalf. Applicant shall procure and maintain liability insurance to protect the city from liability and damages on account of injuries to workers, as provided by law, and to protect the city from liability and damages occasioned by the proposed work.

Applicant shall procure and maintain in continuous effect, during the pendency of the encroachment, "Certificates of Insurance" or other satisfactory evidence to show applicant carries:

- (1) Commercial General Liability insurance and Commercial Automobile Liability insurance covering the city against claims, injury or damage to persons or property, both real and personal, caused by the proposed work, in amounts of One Million U.S. Dollars (\$1,000,000.00) per occurrence (combined single limit), including bodily injury and property damage, and Two Million U.S. Dollars (\$2,000,000.00) annual aggregate, and Two Million U.S. Dollars (\$2,000,000.00) for each personal injury liability; and
- (2) Statutory workers' compensation and employer's liability insurance of One Million U.S. Dollars (\$1,000,000.00) per accident / per disease, per employee / per disease, policy limits
- (3) All required liability insurance coverages shall include the city as an additional insured. Applicant shall notify the city at least thirty (30) days in advance of any cancellation of any required insurance that is not replaced.
- (4) Applicant shall procure proof that all contractors and all of their subcontractors who perform work on behalf of applicant hereunder shall carry and maintain, in full force and effect, during any period of work in the right-of-way, workers' compensation and employers' liability, commercial general liability and automobile liability insurance coverages of the type that applicant is required to obtain under this Section 7 (d) with the same limits.

(5) Applicant may self-insure any required coverage as long as it or its affiliated parent maintains a net worth of at least \$200 million as evidenced in annual certified financials.

(E) Indemnification. Applicant shall defend, indemnify, and hold harmless the City, its Council, boards, commissions, officials, officers, agents, volunteers, and employees from and against any and all loss, damages, liability, claims, suits, costs and expenses, including court costs and reasonable attorney's fees resulting from the alleged acts or omissions of permittee, Applicant's officers, agents, or employees in connection with the permitted work. This indemnity provision shall be applicable regardless of the merit or outcome of such claim or suit. The indemnification set forth in this subsection shall commence upon the issuance of a permit to applicant.

Section 8 – ROW Rates

(A) Annual Rate. A city may only charge a wireless provider for the use of a city right-of-way to construct, collocate, install, mount, maintain, modify, operate, or replace a utility pole, wireless facility or wireless support structure if the city charges other communications service providers or publicly, cooperatively or municipally owned utilities for similar uses of the right-of-way, to the extent allowed under § 160A-296. Charges authorized by this section shall meet all of the following requirements:

- (1) The right-of-way charge shall not exceed the direct and actual cost of managing the right-of-way and shall not be based on the wireless provider's revenue or customer counts;
- (2) The right-of-way charge shall not exceed that imposed on the other users of the right-of-way, including investor, city or cooperatively owned entities; and
- (3) The right-of-way charge shall not be unreasonable, discriminatory, or violate any applicable law.

(B) Cease Payment. A wireless provider is authorized to remove its facilities at any time from the rights-of-way and cease paying the City compensation for use of the rights-of-way.

Section 9 – Attachment to City Utility Poles in the ROW

(A) Exclusivity. Any arrangement with any person for the right to collocate on city utility poles shall not be exclusive.

(B) Collocation on City Utility Poles. Any wireless provider may collocate on city utility poles at just, reasonable, and nondiscriminatory rates, terms, and conditions. A request to collocate under this section may be denied only if there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering principles, and those limitations cannot be remedied by rearranging, expanding, or otherwise reengineering the facilities at the reasonable and actual cost of the city to be reimbursed by the wireless provider.

(C) Rates, Terms, and Conditions. Following receipt of the first request from a wireless provider to collocate on a city utility pole, the City Manager or the City Manager's designee shall, within 60 days, establish the rates, terms, and conditions for the use of or attachment to the

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city utility poles that it owns. Notwithstanding anything else in this section, the rate for collocation of small wireless facilities on city utility poles shall not exceed fifty dollars (\$50.00) per city utility pole per year.

- (D) Make Ready Work. The city will provide a good faith estimate for any make-ready work necessary to enable the city utility pole to support the requested collocation, including pole replacement if necessary, within 60 days after receipt of a complete application. Make-ready work, including any pole replacement, shall be completed within 60 days of written acceptance of the good-faith estimate by the applicant. For purposes of this section, the term "make-ready work" means any modification or replacement of a city utility pole necessary for the city utility pole to support a small wireless facility in compliance with applicable safety requirements, including the National Electrical Safety code, that is performed in preparation for a collocation installation.

Section 10 – Effective Date

This Ordinance shall take effect ten (10) days after its passage, approval and publication.