

ORDINANCE 18 - 10

SMALL WIRELESS FACILITY SITING ORDINANCE

**AN ORDINANCE ESTABLISHING STANDARDS FOR NETWORK NODES AND
NODE SUPPORT POLES IN THE PUBLIC RIGHT-OF-WAY IN THE CITY OF
COMMERCE**

WHEREAS, the City of Commerce (“City”) seeks to encourage wireless infrastructure investment by providing a fair, reasonable, and predictable process for the deployment of network nodes and node support poles, while managing the public right-of-way in the overall interests of the public health, safety and welfare; and

WHEREAS, the City intends to fully comply with and implement Chapter 284 of the Texas Local Government Code and comply with federal law to the extent it preempts local control.

NOW, THEREFORE, BE IT ORDAINED by the City of Commerce City Council that Chapter 22- Buildings and Building Regulations of the Municipal Code of the City of Commerce shall be amended by adding the following Article XIV 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 node support poles in the right-of -way and network nodes in the public right-of-way and on service poles within the City’s jurisdiction, which will provide public benefits and will be consistent with the preservation of the integrity, safe usage, and visual qualities of the City public right-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 network nodes, including without limitation, ensuring that network nodes or node support poles do not adversely affect,

- (1) use of streets, sidewalks, alleys, parkways and other public ways and places;
- (2) vehicular and pedestrian traffic;
- (3) the operation of facilities lawfully located in public right-of-way or public property;
- (4) the ability of the City to protect the environment, including the prevention of damage to trees;
- (5) the character of residential and historic areas, and city parks, in which network nodes may be installed; and
- (6) the rapid deployment of network nodes to provide the benefits of wireless services.

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

Section 2 – Definitions

All terms used in this Chapter, not specifically defined herein, have the meaning provided in Chapter 284 of the Texas Local Government Code.

(A) “City Code” means those ordinance provisions relevant to use of the public right-of-way where compliant with applicable law.

(B) “Applicable Law” means Chapter 284 of the Texas Local Government Code.

(C) “Applicant” means any person who submits an application and is a network provider.

(D) “Application” means a request submitted by an applicant (i) for a permit to collocate network nodes; or (ii) to install a transport facility; or (iii) approve the installation, replacement or modification of a pole.

(E) “Day” means calendar day.

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

(G) “Routine Maintenance” means (i) work in the public right-of-way that does not require excavation or closing of sidewalks or vehicular lanes in a public right-of-way; (ii) replacing or upgrading a network node or pole with a node or pole that is substantially similar in size or smaller and that does not require excavation or closing of sidewalks or vehicular lanes in a public right-of-way; or (iii) the installation, placement, maintenance, operation, or replacement of micro network nodes that are strung on cables between existing poles or node support poles, in the public right-of-way.

(H) “Technical Grounds” means, in light of prevailing industry and engineering standards, reasons of insufficiency of capacity, safety, reliability and/or generally applicable engineering purposes consistent with applicable law and City Code.

Section 3 – Permitted Use; Application and Fees

(A) Permitted Use: Collocation of network nodes and the placement of node support poles, meeting the parameters set forth in Section 5 below and in applicable law, shall be a permitted use. No zoning or land use review shall apply, subject to the requirements in Section 5.

(B) Permit Required. No person shall place a network node, transport facility or node support pole in the public right-of-way, without first filing a permit application and obtaining a permit therefore, except as otherwise provided in this Chapter.

(C) Permit Application. All permit applications 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 “proprietary” or “confidential” by clearly marking each page of such materials accordingly.

- (D) Application Requirements. The permit application shall be made by the network 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) Construction and engineering drawings and information confirming that the construction will be consistent with City Code.
- (E) Routine Maintenance and Replacement. A permit application shall not be required for: (i) routine maintenance; or for (ii) the replacement of a node with another node that is substantially similar.
- (F) Information Updates. Any amendment to information contained in a permit application shall be submitted in writing to the City within 30 days after the change necessitating the amendment.
- (G) Application Fees. All applications for permits pursuant to this Chapter shall be accompanied by a fee of \$500 for up to five network nodes addressed in the same application, \$250 for each additional node in the same application; and a fee of \$1000 for each node support pole.

Section 4 – Action on Permit Applications

- (A) Review of Applications. The City shall review applications for network nodes, node support poles and transport facilities in light of their conformity with applicable law and City Code and shall issue such permits on nondiscriminatory terms and conditions subject to the following requirements:
- (a) Within 30 days of receiving an application for a network node or node support pole, or 10 days for a transport facility, the City shall determine and notify the Applicant whether the application is complete; or if incomplete, the City must specifically identify the missing information in such notification. There shall be no fee charged for completion and resubmittal of an application.
 - (b) The City shall make its final decision to approve or deny a complete application no later than (i) 21 days after receipt of a complete application for a transport facility, (ii) 60 days after receipt of a complete application for a network node; and (iii) 150 days after receipt of a completed application for a new node support pole.
 - (c) The City shall advise the Applicant in writing of its final decision, and, if denied, the basis for that denial, including specific provisions of City Code or applicable law on which the denial was based, and send the documentation to the Applicant on or before the day the City denies the 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 90 days of receipt of the amended application. The subsequent review by the City shall be limited to the deficiencies cited in the original denial.

- (d) If the City fails to act on an application within the review period specified in this Section 4, the application shall be deemed approved.
- (e) An applicant seeking to collocate network nodes may, at the Applicant's discretion, file a consolidated application and receive permits for up to 30 network nodes. Provided however, the City's denial of any node within a single application shall not affect other nodes submitted in the same application. The City shall grant permits for any and all nodes in a single application that it does not deny, subject to the requirements of this Section.

(B) 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 – Network Nodes in the Public right-of-way; Maximum Height; Other Requirements

(A) Maximum Size of Permitted Use. Collocation of permitted use network nodes in the public right-of-way shall be subject to the size limitations specified in Chapter 284.003 of the Local Government Code.

(B) Undergrounding Provisions. A network provider shall comply with nondiscriminatory undergrounding requirements, including Code sections Article 2, Section 9 of the City Charter, zoning regulations, state law, private deed restrictions, and other public or private restrictions, that prohibit installing aboveground structures in a public right-of-way without first obtaining zoning or land use approval. This requirement or restriction shall not be interpreted to prohibit a network provider from replacing an existing structure.

(C) Historic Areas and Design Districts. Subject to the permit application approval time frames in Section 4, a network provider must obtain advance approval from the City before collocating new network nodes or installing new node support poles in any areas zoned or designated as a historic district or as a design district if the district has decorative poles. Such installations shall be subject to the design and aesthetic standards of such areas.

(D) Installation in Municipal Parks and Residential Areas. A network provider may not install a new node support pole in a public right-of-way without the City's discretionary, nondiscriminatory, written consent of the Building Official or the City Manager if the public right-of-way is located in a municipal park or is adjacent to a street or thoroughfare that is 1) not more than 50 feet wide; and 2) adjacent to single-family residential lots or other multifamily residences or undeveloped land that is designated for residential use by zoning or deed restrictions. A network provider shall comply with private deed restrictions and other private restrictions when installing network nodes in parks and residential areas.

- (E) Zoning. A network provider seeking to construct, replace or modify a pole or node in the public right-of-way that exceeds the height or size limits contained in this section, shall be subject to applicable zoning requirements.

Section 6 – Effect of Permit

- (A) Authority Granted. 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 public right-of-way.
- (B) Time of Installation. A network provider shall begin the installation for which a permit is granted not later than six months after final approval and shall diligently pursue the installation to completion. Provided, however, the City may place a longer time limit on completion or grant reasonable extensions of time as requested by the network provider.
- (C) Right to Occupy. Once a network provider has collocated a network node or placed a node support pole pursuant to a permit, the provider shall be permitted to continue to maintain such collocation or such pole unless required to remove or relocate under the terms of this Chapter.
- (D) Interference with network nodes. City will not grant a permit to any Person to install any network node or other wireless facility if the City knows or has reason to know that such Person's use of such network node or other wireless facility may in any way adversely affect or interfere with the use and operation of an existing and operational network node for which the City has previously issued a permit.

Section 7 – Removal, Relocation or Modification of Network Nodes in the ROW

- (A) Notice. Within 90 days following written notice from the City, a network provider shall, at its own expense, protect, support, temporarily or permanently disconnect, remove, relocate, change or alter the position of any network node or node support pole within the public right-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 public right-of-way.
- (B) Emergency Removal or Relocation of Facilities. The City retains the right and privilege to disconnect or move any network node located within the public right-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 network provider and allow the network provider an opportunity to move its own facilities prior to the City disconnecting or removing a facility and shall notify the network provider after disconnecting or removing a network node or node support pole.
- (C) Abandonment of Facilities. Upon abandonment of a network node or node support pole within the public right-of-way, the network provider shall notify the City within 90 days. Following receipt of such notice, the City may direct the network provider to remove all or any portion of a network

node or node support pole if the City, or any of its departments, determines, subject to City Code, that such removal is necessary to protect public health, safety and welfare.

Section 8 – Public Right-of-Way Rate

- (A) Annual Rate. Once a network provider has installed and made operational a network node in the public right-of-way, network provider shall pay to the City compensation for use of the public right-of-way in the amount of \$250 annually per node in the City public right-of-way.
- (B) Cease Payment. A network provider is authorized to remove its facilities at any time from the public right-of-way and cease paying the City compensation for use of the public right-of-way following removal and notification to the City of such removal.

Section 9 – Attachment to Service Poles in the Public Right-of-Way

A network provider shall be permitted to attach network nodes to city-owned service poles, consistent with applicable law and City Code and subject to the requirements specified herein.

- (A) Permits. A network provider shall obtain a permit, pursuant to the terms of this Chapter, prior to collocating network nodes on service poles.
- (B) Make Ready. Network Provider shall be responsible for costs for make ready work on City service poles to which provider seeks to place a network node.
- (C) Technical Limitations. In the event the City determines, based upon technical grounds, that inadequate space exists on a service pole to accommodate the proposed network node, such pole may be replaced by network provider, at the network provider's expense, with a service pole with adequate space to accommodate the proposed network node.
- (D) Facilities Rearrangements. If another provider would have to rearrange or adjust any of its facilities to accommodate a new network node, the City shall use reasonable efforts to work with the affected providers to coordinate such activity. All make ready work shall comply with NESC, and other applicable codes. The Applicant shall not be responsible for any third-party costs, including those of other network providers, to adjust existing attachments that are non-compliant with the NESC and other applicable codes at the time of the application.
- (C) Service Pole Attachment Fee. The rate to collocate a network node on a service pole in the public right-of-way shall be \$20 per pole per year. Subject to the provisions of Section 10, such compensation together with the application fee and the public right-of-way rate specified in Section 8 shall be the sole compensation that the network provider shall be required to pay to the City.
- (D) Cease Payment. A network provider is authorized to remove its facilities at any time from a service pole in the public right-of-way and cease paying the attachment fee to the City upon notification to the City that the facilities have been removed.

Section 10 – Transport Facilities

Installation of transport facilities, including applicable compensation to the City for such facilities, shall be governed by Chapter 284.055 of the Texas Local Government Code.

Section 11 - Design Manual

A network provider shall comply with the City's design manual, if any, in place on the date a permit application is filed in relation to work for which the City has approved a permit application. The City's design manual may not conflict with applicable law and must be competitively neutral.

Section 12 -- Effective Date

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

PASSED AND APPROVED on the first reading at a regular meeting of the City Council of the City of Commerce, Texas on this the 20th day of November 2018.

PASSED AND APPROVED on the second reading at a regular meeting of the City Council of the City of Commerce, Texas on this the 18th day of December 2018.

ATTEST:

CITY OF COMMERCE:

Molly Jacobsen, City Secretary

Wyman Williams, Mayor

(seal)

Approved as to Form:

Patricia Adams, City Attorney

I, Molly Jacobsen, City Secretary of the City of Commerce, Texas, do hereby certify that the above is a true and correct copy of a Resolution, and that the same has not been repealed and is in full force and effect.

(Seal)

Molly Jacobsen, City Secretary

Sworn to and subscribed before me, on this the _____ day of October, 2018 to certify which witness my hand and seal of office.

Notary Public, State of Texas

(Seal)