

(b)

ORDINANCE NO. 5462

AN ORDINANCE REPEALING SECTION 28-3 AND 28-3.1 OF ARTICLE I OF CHAPTER 28 AND ENACTING ARTICLE VII, DIVISIONS 1, 2, AND 3 OF CHAPTER 28 OF THE CODE OF ORDINANCES, CITY OF MINOT, NORTH DAKOTA RELATING TO ENCROACHMENTS ON PUBLIC RIGHT-OF-WAYS

WHEREAS, the electorate of the City of Minot has adopted a home rule charter in accordance with Chapter 40-05.1 of the North Dakota Century Code; and

WHEREAS, section 40-05.1-06 of the North Dakota Century Code provides that the City shall have the right to implement home rule powers by ordinance; and

WHEREAS section 40-05.1-05 of the North Dakota Century Code provides that said home rule charter and any ordinances made pursuant thereto shall superseded state laws in conflict thereto and shall be liberally construed for such purposes; and,

WHEREAS, the City of Minot deems it necessary and appropriate to implement such authority to regulate encroachments on public right-of-ways in the City of Minot;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MINOT:

§ 1 That the text of section 28-3 and 28-3.1 of Article I of Chapter 28 of the Code of Ordinances, City of Minot, North Dakota are hereby repealed and the section numbers reserved and retained for future use; and

§ 2 That Article VII, Divisions 1, 2, and 3 of Chapter 28 of the Code of Ordinances, City of Minot, North Dakota is hereby enacted and said Article and Divisions shall read as follows:

ARTICLE VII. – ENCROACHMENTS

DIVISION 1 – ENCROACHMENTS IN THE PUBLIC-RIGHT-OF-WAY

Sec. 28-134. - Permanent encroachment in public right-of-way; council approval required; street vacation fee.

(a) No person shall construct or maintain any permanent encroachment within the public right-of-way except as specifically allowed by the city council. The city council may grant permission for permanent encroachment by grant of a permanent license or revocable permit and in either instance subject to such terms and conditions, including the imposition of a reasonable fee or rent, as the council chooses to impose.

The term "permanent encroachment" as used in this Division does not mean those improvements within the public right-of-way which are constructed pursuant to the grant of a franchise by the city council and which are ordinarily located within the public right-

of-way as part of the carrying on of the franchised activity, such as, for example, the erection of telegraph lines or poles or the burying of underground cable. Neither does the term apply to the construction of city utility services or the construction of curbs, sidewalks, or the planting of boulevard trees.

- (c) Subsection (b) is not to be read as repealing other sections of this Code of Ordinances which require permission from city authorities for the conduct of certain activities within the public right-of-way, such as, for example, section 29-4 of the Code of Ordinances which requires a permit from the city forester in order to plant a tree in the boulevard.
- (d) An applicant for the vacation of a street, alley, or other public way shall pay to the city clerk an administrative fee of one hundred dollars (\$100.00) at the time of application. In addition, at his own expense, he shall furnish the city clerk with such title memoranda as the city clerk may require in order to verify the status of persons purporting to be landowners adjoining the area sought to be vacated. The city clerk shall defer processing the application until the requirements of this subsection have been met.
- (e) Notwithstanding anything to the contrary in subsections (a) through (d) of this Division, a landowner may, without a permit, construct and maintain an underground watering system within the public right-of-way abutting or crossing over his property. However, no part thereof (other than one supply lateral running from the watermain in the right-of-way to the underground watering system) shall be located in or under the paved portion or traveled portion of the public right-of-way (whichever is the more restrictive). As used herein, the "paved portion" shall not include sidewalks. Further, the landowner's interest in such an underground watering system is hereby declared, as a matter of positive law, to be subordinate to the interest of the public in the right-of-way, with the following consequences:
 - (1) No claim or cause of action shall lie against the City of Minot (including its employees, agents, or contractors), or against any of its franchisees (or their employees, agents, or contractors), for any damage to or loss of the underground watering system (or any part thereof), caused or occasioned by such persons acting within the scope of their duties or authority in respect to the public right of way, saving and excepting only acts done with malice or with extreme recklessness; and
 - (2) The City of Minot and its franchisees shall have the right to make further improvements, or to modify existing improvements, in the public right of way, in such a manner as to displace or to cause the removal of the underground watering system, or parts thereof, without being required to pay compensation to the landowner, even though such forced displacement or forced removal is undertaken merely as a matter of convenience to the city or to its franchisee (as the case may be), and not as a matter of necessity.

Editor's note— Prior to the adoption of Ord. No. 2616, § 1, on Oct. 17, 1983, § 28-3 prohibited the construction of sewers and wells in public ways without permission and was derived from Rev. Gen. Ords. 1962, § 18-0319

Sec. 28-135 – 28-137. – Reserved.

DIVISION 2 – OUTDOOR DINING ENCROACHMENTS

Sec. 28-138. - Outdoor dining areas; permits; applications; encroachment agreements.

- (a) *Outdoor dining areas.* No person may own, set up or operate an outdoor dining area without first obtaining a permit. The planning director is hereby authorized to issue a permit for an outdoor dining area that extends no more than forty-two (42) inches beyond the property boundary adjacent to a public sidewalk. An outdoor dining area that extends more than forty-two (42) inches beyond the property boundary adjacent to a public sidewalk; includes placement of a fence, rope or similar structure, as may be necessary for the serving of alcoholic beverages, or a canopy or similar structure on the sidewalk; or which is placed at a location other than immediately adjacent to the appurtenant building shall not be allowed without the owner or operator first obtaining a permit in the form of an encroachment agreement pursuant to the provisions of this Division.

All permit holders for outdoor dining areas and their employees shall meet the following:

- (1) The permit holder shall set up the outdoor dining area, including but not limited to, the furniture, canopies, fencing and/or other accessories used for the outdoor dining area, only in the area designated by the city in the encroachment agreement or on the permit, specifically excluding roadways. The outdoor dining area shall not impede, endanger or interfere with pedestrian or vehicular traffic.
- (2) Furniture, canopies, fencing and/or other accessories used for the outdoor dining area shall be located so that a minimum clearance of forty-four (44) inches of unobstructed clearance within the pedestrian way, or the minimum required by the International Building Code (IBC) (as amended by section 9-2 of the City of Minot Code of Ordinances) or the Americans with Disabilities Act, whichever is more restrictive, shall be provided at all times.
- (3) The permit holder shall provide proper containers or some other means for the collection of waste and trash within the outdoor dining area permitted. The permit holder shall keep the immediate area around the outdoor dining area and the outdoor dining area clean of garbage, trash paper, cups, cans or litter associated with the operation of the outdoor dining area. All waste and trash shall be properly disposed of by the permit holder.
- (4) The permit holder shall comply with all health and other applicable regulatory agency requirements, including, but not limited to, the requirements for food service. The permit holder shall display a conspicuous location all such required permits and/or licenses and shall provide copies of those permits and/or licenses to the city prior to issuance of a permit for an outdoor dining area by the city. The permit holder shall continuously maintain the required approvals, permits and/or licenses and, upon request, provide evidence to the city of the continuous maintenance of them.
- (5) The permit holder shall be responsible for the maintenance, upkeep and security of the furniture and accessories of the outdoor dining area and the city shall not be responsible for the same.

- (6) The permit holder shall not have on the premises any bell, siren, horn, loudspeaker or any similar device to attract the attention of possible customers nor shall the permit holder use any such device to attract attention.
 - (7) Employees of the permit holder for the outdoor dining area shall not consume alcoholic beverages while working in the outdoor dining area.
 - (8) For any outdoor dining area where alcoholic beverages are served, the permit holder shall comply with all state and local regulations for the sale, possession and/or consumption of alcoholic beverages and shall provide the city with a copy of any and all required permits or licenses for the sale, possession and/or consumption of alcoholic beverages and the diagram and/or plans showing the location of the outdoor dining area which were submitted for the permit or license. In addition, the area where alcoholic beverages are sold, possessed and/or consumed must be effectively partitioned by rope, temporary fence, or other device designed, at least thirty-six (36) inches in height, and intended to separate the outdoor dining area from passersby.
 - (9) The permit holder shall comply with the prohibitions on disturbing, annoying and unnecessary noises set forth in chapter 23 of the City of Minot Code of Ordinances.
 - (10) Design of the furniture and accessories for an outdoor dining area to be located in the Central Business District must be approved by the planning director prior to a permit being issued for their use in the Central Business District. The applicant must provide a photograph, drawing or sketch of the design of the furniture and accessories to be used for the outdoor dining area as part of the application for a permit.
 - (11) Tables, chairs, ropes, fences and any other structure or item placed on the sidewalk must be removed from the sidewalk at the end of the business day, at business closure, or in the event of inclement weather, unless arrangements for assembly and storage of such items on a part of the sidewalk are approved in an encroachment agreement.
 - (12) Cooking, food preparation or self-service food shall not be allowed in such outdoor dining areas.
 - (13) No canopy may be placed over a building exit.
- (b) *Planning director to issue permits.* The planning director shall be authorized to issue a permit for an outdoor dining area that extends no more than forty-two (42) inches beyond the property boundary adjacent to a public sidewalk under this Division for a term of up to one (1) year. Such permits may be extended for additional periods of up to one (1) year per extension. The denial of a permit by the planning director may be appealed to the city council by delivery of notice of appeal within five (5) business days of the date notice of decision is mailed to the applicant whose application has been denied. The planning director may designate one (1) or more city employees to exercise the planning director's functions under this article.
- (c) *Application.* Businesses or property owners are eligible to obtain a permit under this Division for an outdoor dining area. Each application for a permit for an outdoor dining area shall be filed with the planning director and shall include, but not be limited to, the following:

- (1) The name, address and telephone number of the applicant.
 - (2) The application shall include a site plan showing the proposed location of furniture, canopies, fencing and other accessories for the outdoor dining area; a description, drawing, sketch, or photograph showing the design of all furniture, fencing, canopies and accessories to be used in the outdoor dining area; location for the outdoor dining area; and other pertinent information related to the use of the outdoor dining area.
 - (3) The applicant shall provide and maintain a certificate of insurance for comprehensive general liability and products and complete operations coverage in a minimum amount of one million dollars (\$1,000,000.00) per occurrence and in the aggregate, provided that those certificates may be furnished as evidence of such coverage purchased for the applicant's principal place of business for serving food, food products and/or beverages, so long as such certificates meet the minimum acceptable requirements established in this Division. All certificates shall be issued by an insurance company authorized to do business in North Dakota, shall name the city as additional insured and shall provide that the policy shall not terminate or be canceled prior to the expiration date without thirty (30) days' advance written notice to the city. The permit holder or encroachment agreement party shall continuously maintain the insurance required by this Division and shall continuously provide the city with evidence of the insurance required by this Division.
 - (4) The permit holder shall execute a statement on the permit application wherein the applicant holds harmless and indemnifies the city from any claims or causes of action arising out of or related to the permitted activity, including, but not limited to, compliance with the Americans with Disabilities Act, the IBC (as amended by section 9-2 of the City of Minot Code of Ordinances), and all other health and safety laws and regulations.
 - (5) Written approval from the health department and/or other applicable regulatory agency showing that the outdoor dining area has been inspected and is in compliance with current requirements for food handling establishments or sale of other product.
 - (6) Such additional information as may be requested by the planning director or city council which may be necessary to determine compliance with this article.
 - (7) Payment of the permit fee and/or encroachment fee set by resolution of the city council.
 - (8) The planning director shall have the same remedies and enforcement powers as are set forth in the City of Minot Zoning Ordinances.
- (d) *Encroachment agreements.* The planning director is hereby authorized to execute encroachment agreements only in the Central Business District, as defined by the City of Minot Zoning Ordinances, after notice, a hearing before the city council, and approval by vote of the majority of the members of the city council.
- (e) *Procedure.* The procedure for obtaining an encroachment agreement authorizing a structure or merchandise on the sidewalk or other public place shall be as follows:
- (1) Written application shall be made to the planning director or his/her designee. If the property is being leased, the lessee shall also sign the application.

- (2) The application shall include those items described in subsection (c) of this Division.
- (3) The application shall state the reason the encroachment is being requested.
- (4) Before approving an encroachment agreement, a hearing must be held by the city council, after notice of the application and of the hearing is given. The decision of the city council is final for purposes of the legal doctrine which requires exhaustion of administrative remedies as a prerequisite for judicial review.
- (5) An encroachment agreement with property owners (and lessees, where applicable) may only be executed by the planning director after a hearing on the application and approval by vote of a majority of the members of the review committee in attendance. An application for an encroachment agreement with property owners (and lessees, where applicable) may only be approved if the city council determines that the encroachment can be allowed without detriment to the health, safety and welfare of the general public. In determining what constitutes detriment to the health, safety and welfare of the general public, the following factors, among others not specifically enumerated, shall be considered:
 - a. The location, type and size of the encroachment, including the encroaching structure(s) or merchandise.
 - b. The proximity of the encroaching structure(s) or merchandise to a traveled road, whether public or private.
 - c. Whether the encroaching tables, chairs or other structure(s) will unreasonably interfere with pedestrian or vehicular passage or safety.
 - d. Whether the encroaching tables, chairs, or other structure(s) will interfere with an existing water or wastewater line, storm water facility or other utility.
- (6) The city council shall set forth the reason for granting or denying an encroachment pursuant to this Division. The terms of an encroachment agreement shall include, but not be limited, to the following:
 - a. The agreement shall be subject to termination upon thirty (30) days' notice at such time as the city council may deem the encroachment, including activities associated with the encroachment, to create a safety hazard to pedestrians or vehicular traffic or other safety hazard or a public nuisance or otherwise not be in keeping with the health, safety and welfare of the general public.
 - b. The owner (and lessee, where applicable) obtaining the encroachment agreement shall agree that, upon such termination, if the owner (or lessee, where applicable) shall fail to remove the encroachment within thirty (30) days following the giving of the notice by the city in accordance with subsection (6)a. of this Division, the city shall be authorized to remove the encroaching structure(s) and recover all costs associated therewith from the property owner.
 - c. The property owner (and lessee, if applicable) shall agree to indemnify and hold harmless the city from any and all liability that may arise by virtue of the encroachment, including, but not limited to, compliance with the Americans with Disabilities Act, the IBC and all other health and safety laws and regulations. The applicant shall provide and maintain a certificate of insurance for comprehensive

general liability and products and complete operations coverage in a minimum amount of one million dollars (\$1,000,000.00) per occurrence. All certificates shall be issued by an insurance company authorized to do business in North Dakota, shall name the city as additional insured and shall provide that the policy shall not terminate or be canceled prior to the expiration date without thirty (30) days' advance written notice to the city.

- d. If the property is sold or, where applicable, if the lease is terminated after execution of the encroachment agreement, the encroachment agreement shall be null and void and a new encroachment agreement with the new property owner and, where applicable, with the lessee, shall be required prior to the encroachment being permitted to continue.
 - e. The length of the term of the encroachment agreement, which term may not exceed three (3) years. Upon filing and review of a renewal application, an encroachment agreement may be extended for additional periods of up to three (3) years per extension.
- (7) No structure may be affixed to the sidewalk, or any street or other public property, without an encroachment agreement approved by the city council. The planning director does not have the authority to approve or enter into encroachment agreements for any such fixture without city council approval.

Sec. 28-139 – 28-141. – Reserved.

DIVISION 3 – WIRELESS TELECOMMUNICATION FACILITY ENCROACHMENTS

Sec. 28-142. – Wireless Telecommunication Facilities in the Public Right-of-Way – Purpose, Intent, Rules of Construction, and Definitions.

- (a) *Purpose and Intent.* The purpose of this ordinance is to establish regulations that ensure residents, businesses, and public safety operations in the city have reliable access to wireless telecommunications network technology and state of the art mobile broadband communications services, while also minimizing potential negative impacts of wireless facility placement within the public right-of-way.

The city intends to exercise its authority with respect to the regulation, placement, construction and modification of wireless facilities in the public right-of-way to the fullest extent permitted by applicable law. While the city desires to accommodate the deployment of wireless communications facilities and services within the public right-of-way, nothing in this Division shall be construed to affect the city's right to regulate users of the public right-of-way in a competitively neutral and nondiscriminatory manner. The impact of wireless facilities can be reduced by maintaining standards and objectives for location, visual impact, structural integrity, compatibility, collocation, and the like, which do not unreasonably discriminate among similar users.

This Division applies only to installation in the public right-of-way. All other installations are governed by the Zoning Supplement to the City of Minot's Code of Ordinances, and all other applicable laws and regulations.

- (b) *Rules of Construction in Relation to Other Code Provisions.* Nothing in this Division shall be construed to repeal or amend Section 28-3 or the Zoning Code, which shall apply to applicants and permittees under this section to the extent not addressed in this Division. In the event of a conflict between Section 28-3 and this Division, this Division shall control.
- (c) *Compliance with Applicable Law and Regulations.* This Division is not intended to be the exclusive means of regulating installation of facilities in the public right-of-way and nothing herein is intended to waive any other applicable city requirements, including but not limited to building permit requirements, storm water runoff requirements, business license requirements, and undergrounding regulations. The applicant or permit holder must obtain all permits, licenses, and similar authorizations that are required by other governmental entities for the installation of its facilities. The permit holder must also be and remain in compliance with all applicable statutes, ordinances, rules, regulations, orders, and decisions issued by any federal, state or local governmental body or agency, including without limitation those issued by the North Dakota Public Service Commission and the Federal Communications Commission. The facility and its operation shall comply with all applicable laws, including all federal EMF and RF emissions standards. A permit holder shall comply with all applicable public safety requirements described in federal, state or local law, not interfere with public safety communications, and shall meet all requirements set forth in the Zoning Code.
- (d) *Definitions.* For purposes of this Division, the following definitions apply. References to "sections" are, unless otherwise specified, references to sections in this Division.
- (1) "Antenna" means a device used to transmit and/or receive radio or electromagnetic waves for the provision of communication services including, but not limited to, cellular, paging, personal communications services and microwave communications. Such devices include, but are not limited to small wireless facility antennas, small cell antennas, remote radio heads, directional antennae, such as panel antennas, microwave dishes, and satellite dishes; omnidirectional antennae; and wireless access points (Wi-Fi), including strand-mounted wireless access points.
 - (2) "Applicant" means any person who applies for a Permit under this section.
 - (3) "Application" means a written request for a Permit under this section, on a form provided by the city.
 - (4) "Attachment" includes any wireless communication facility affixed to, contained in, or placed on or in a wireless support structure within the city public right-of-way.
 - (5) "City" means the city of Minot, a North Dakota municipal corporation.
 - (6) "City Engineer" means the city engineer or his or her designee.
 - (7) "City-Owned Structure" means an existing structure owned by the city that is located in the public right-of-way. It does not mean State, County or other

municipally or government entity owned infrastructure within the public right-of-way. It does not mean infrastructure owned by a public utility. It does not mean infrastructure located outside of the public right-of-way.

- (8) "Collocation" means the mounting or installation of new wireless communication facilities on or within an existing wireless support structure or equipment that currently houses or supports wireless communication facilities.
- (9) "Communications Service" means cable service, as defined in 47 U.S.C. § 522(6); information service, as defined in 47 U.S.C. § 153(24); or telecommunications service, as defined in 47 U.S.C. § 153(53).
- (10) "Construction Plan" means a written plan, and a collection of documents, for construction that: (i) demonstrates to the satisfaction of the city engineer that the aesthetic impact and physical structure of the wireless communication facility is comparable to prevailing standards of similar structures in the immediate area; (ii) includes the identity and qualifications of each person directly responsible for the design and construction; (iii) includes signed and sealed documentation to proportional scale from a professional engineer licensed in North Dakota describing the proposed wireless communication facilities in detail, including (a) the proposed location of the wireless support structure and all easements, property boundaries, and existing structures within two hundred (200) feet of such wireless facility or wireless support structure; (b) a structural, loading, and wind-speed analysis for existing, proposed, and reserved loading, and (c) a schematic describing the communications properties of the facility, including EMF and RF propagation and off-site data connections; and (iv) includes such other information as the city engineer may require.
- (11) "Decorative Wireless Support Structure" means a wireless support structure that is specifically designed and placed for aesthetic purposes.
- (12) "EMF" means electromagnetic frequency.
- (13) "Equipment" means accessory equipment serving or being used in conjunction with an antenna or wireless communication facility. Equipment includes, but is not limited to, utility or transmission equipment, power supplies, generators, batteries, cables and conduit, equipment buildings, cabinets, storage sheds, shelters, and vaults.
- (14) "Existing Height" means the height of a structure, including wireless communications facilities, as originally approved or as of the most recent approved modification. Height shall be measured from natural grade to the top of all appurtenances.
- (15) "Existing Structure" means a structure located in the public right-of-way and capable of supporting wireless communication facilities, erected prior to the Application for collocation or substantial modification under this section.
- (16) "FCC" means the Federal Communications Commission of the United States.
- (17) "Ground Mounted Equipment" means any equipment that is affixed to the ground and extends above the natural grade.
- (18) "Guidelines" or "Wireless Telecommunication Facility Guidelines" means any procedure or description from the city engineer, which may be modified and amended from time to time, concerning wireless facility Application process and

siting requirements. Any such Wireless Telecommunication Facilities Guidelines shall be consistent with this section.

- (19) "Interference" means physically or electronically affecting the operation, views, signals or functions of city property or third party property.
- (20) "Laws" means any and all applicable federal and state laws and applicable local ordinances, resolutions, regulations, administrative orders or other legal requirements.
- (21) "Permit" means a written authorization (in electronic or hard copy format) to install, at a specified location in the Public Right-of-Way, a Wireless Communications Facility, associated Wireless Support Structures, and required telecommunications and electrical wiring to support a Wireless Communications Facility.
- (22) "Permittee" means an Applicant that has received a Permit under this section.
- (23) "Permit Holder" means any person that has obtained permission through the issuance of a Permit from the city under this section to locate, install or place wireless communications facilities in the public right-of-way.
- (24) "Person" means any natural or corporate person, business association or other business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a utility, a successor or assign of any of the foregoing, or any other legal entity.
- (25) "Provider" means a Communications Service Provider or a Wireless Services Provider, and includes any Person that owns and/or operates within the Public Right-of-Way any Wireless Communications Facilities, Wireless Facilities, Poles built for the sole purpose of supporting Communications Facilities or Towers.
- (26) "Public Right-of-Way" means the area on, below, or above a public roadway, highway, street, cart way, bicycle lane and public sidewalk in which the city has an interest, including other dedicated rights-of-way for travel purposes and utility easements of the city. A right-of-way does not include the airwaves above a right-of-way with regard to cellular or other non-wire telecommunications or broadcast service.
- (27) "Replace" or "Replacement" means, in connection with an existing Pole, Support Structure, or Tower, to replace (or the replacement of) the same with a new structure, substantially similar in design, size, and scale to the existing structure and in conformance with this section and any other applicable federal, state, and local laws, in order to address limitations of the existing structure and to structurally support Collocation of a Wireless Communications Facility.
- (28) "RF" means radio frequency.
- (29) "Site" means the area occupied by the wireless support structure, the wireless communications facility, accessory equipment, ground-mounted equipment, and the path of the wire or conduit connecting to an off-site network.
- (30) "State" means State of North Dakota.
- (31) "Stealth Facility" means a city owned wireless support structure with antenna(s) with a primary function of serving a public purpose that is located and designed in such manner so as to also provide a wireless support structure, but that such secondary purpose of providing a wireless support structure is not readily apparent, including but not limited to utility poles, light poles, traffic signals, adornment or

banner poles, information kiosks, bus waiting areas or similar structures that exist elsewhere in the city right-of-way.

- (32) "Wireless Communication Facility" means any fixed tangible asset usable for the purpose of providing wireless transmission of voice, data, images or other signals or information including, but not limited to, telecommunications, cellular telephone service, personal communications service and paging service. A wireless communications facility includes antennas, radio transceivers, coaxial, fiber-optic or other cabling and accessory equipment, and power supply (including backup batteries) and comparable equipment, regardless of technological configuration. A wireless communications facility does not include an underlying wireless support structure.
- (33) "Wireless Infrastructure Provider" means any Person, including a Person authorized to provide telecommunications service in the State, that builds or installs and/or operates Wireless Communications Facilities or Wireless Support Structures that are intended to be used for Collocation, but that is not a Wireless Services Provider."
- (34) "Wireless Provider" means a Wireless Infrastructure Provider or a Wireless Services Provider.
- (35) "Wireless Services" means any wireless services including, without limitation, personal wireless services as that term is defined in 47 U.S.C. § 332(c)(7)(C)(i), fixed wireless and other wireless services.
- (36) "Wireless Services Provider" means a Person who provides Wireless Services.
- (37) "Wireless Support Structure" means any fixed, above-grade structure in the public right-of-way used to house or support wireless communications facilities and equipment.
- (38) "Zoning Code" means the Zoning Supplement to the City of Minot's Code of Ordinances.

Sec. 28-143. – Location and Placement of Wireless Communication Facilities.

- (a) *Locating Wireless Communication Facilities.* The location of any new wireless communication facility shall be, when possible, on existing structures in the public right-of-way, such as utility poles or street lights, or the replacement of an existing such structure as provided herein. Installation of additional wireless support structures for the purpose of supporting a wireless communication facility within the public right-of-way will be permitted only as provided for in this Division.

Sec. 28-144. – Wireless Communication Facility Permit Required.

- (a) No person may construct, install, or modify a wireless communication facility within the public right-of-way without having first obtained a permit from the city engineer as set forth in this section.
 - (1) *Application Required.* Before a permit is issued, a written application must be filed with the city engineer containing such information as may be required by the city engineer. The Application shall include, but not necessarily be limited to, the following:

- a. Applicant's name, North Dakota One-Call registration certificate number, address and e-mail address if applicable, telephone and facsimile numbers.
- b. The name, address and e-mail address if applicable, and telephone and facsimile numbers of a local representative. The local representative and designee must be available at all times and current information regarding how to contact the local representative in an emergency must be provided in the application.
- c. If the applicant is a corporation, the City may require a copy of the certificate of incorporation as recorded and certified by the Secretary of State to be attached to the application.
- d. The City may require a copy of the applicant's order granting a certificate of authority from the North Dakota Public Service Commission or other applicable state or federal agency, where the applicant is lawfully required to have such a certificate from said commission or other state or federal agency.
- e. The name and address of any retail communications service provider for which the facilities are intended to be used, if this is different than the applicant.
- f. Evidence that the applicant has obtained all state permits and other licenses, as well as insurance, performance and payment bonds as may be required by the city engineer.
- g. A detailed statement of the location of all proposed facilities for which the permit is sought.
- h. A construction plan, if applicable, signed and sealed by a professional engineer registered in the State of North Dakota.
 1. The construction plan must contain a structural engineering analysis by the professional engineer certifying that the requested action meets all applicable federal, state, and/or local code requirements and that the wireless support structure proposed to support the attachment can reasonably support the proposed attachment considering the conditions of the street, the anticipated hazards from traffic to be encountered at the location, and considering the wind, snow, ice and other conditions that can be reasonably anticipated at that location.
- i. A certificate of insurance or self-insurance verifying the following:
 1. That the applicant has been insured by an insurance company licensed or authorized to do business in the State of North Dakota or a form of self-insurance acceptable to the city;
 2. That the applicant is insured against claims for personal injury, including death, as well as claims for property damage arising out of (i) the use and occupancy of the right-of-way by the registrant, its officers, agents, employees, and permittees, and (ii) the placement and use of facilities in the right-of-way by the applicant, its officers, agents, employees and permittees, including but not limited to, protection against liability arising from completed operations, damage of underground facilities and collapse of property;
 3. That the city is included as an additional insured as their interest may appear pursuant to this Division and as to whom the coverages required herein are required, and that defense shall be provided to the city as to all causes and

claims of action that could arise as a result of the encroachment in the public right-of-way;

4. That the city will be notified 30 days in advance of any cancellation or material modification of any term of the insurance policies required by this section;
 5. That comprehensive liability coverage, automotive liability coverage, workers compensation and umbrella coverage are established in amounts sufficient to protect the city and the public and to carry out the purposes and policies of this article.
 6. The city may request and require copies of all insurance certificates to be attached to the application.
 - j. A certification that the request, device, installation of device, placement of device, and construction plan is in compliance with any and all applicable FCC orders, rules, and regulations.
 - k. Other information required by this Division, the city engineer, the detailed permit application, and the Wireless Telecommunication Facilities Guidelines ("Guidelines") adopted by the city council.
 - l. The applicant shall keep all of the information provided in the application current at all times by providing to the city engineer information as to changes within 15 days following the date on which the applicant has knowledge of any change.
- (2) *Wireless Telecommunication Facility Guidelines.* Due to rapidly changing technology and regulatory requirements, the city council may adopt Wireless Telecommunication Facility Guidelines ("Guidelines") by Resolution to serve as further regulatory guidance and clarification, consistent with this Division and applicable law, and further may designate the city engineer with such authority as necessary to develop, revise and enforce Application criteria and design requirements. The Guidelines may be amended and updated by Resolution to adjust for new technologies, regulations, and city objectives. All permit holders shall comply with such Guidelines for any new facility installations subject to this Division.
- (3) *Fees.* The city may require payment of a nonrefundable permit application fee at the time a permit application is submitted, as approved by the city council and adopted in the Guidelines. Such fee shall be set to recoup some or all of the cost of permit review, processing and issuance, and will be in addition to any other applicable fee or any separate payments that may be required in the event a Permit is granted for use of the public right-of-way or the use of city-owned structures. The city reserves the right to charge permit holders a fee for their use of the public right-of-way to the extent that such charges are allowed by federal, state, and local laws. All such fees shall be described in the Guidelines and may be in addition to any fee charged for attachment to city-owned structures.
- a. *Applicant must finance any required expert assistance.* Where the city engineer determines that it requires expert assistance in evaluating an Application, the city may procure technical and other specialized consulting services that may be

necessary to promptly and thoroughly review the application. Reasonable fees charged by the consultant shall be reimbursed to the city by the applicant in the form of a permit fee, regardless of whether the application is, or is not, ultimately approved and a permit issued. The city shall be authorized to require the applicant to deposit a sum equal to the reasonable estimated amount of consultant fees to be paid.

- (4) *Timeframe for Review.* The city engineer shall comply with applicable federal, state, and local law concerning the time period for review following receipt of a completed application to install or modify a wireless communications facility or wireless support structure in the public right-of-way.
 - a. The city engineer and all other city officials or departments have ninety (90) days after the date a WCF permit application is filed to issue or deny the permit, or the permit shall be automatically issued to the applicant. To toll the ninety (90) day statutory clock, the city engineer or other city official involved in the permit application review must provide a written notice of incompleteness to the applicant within thirty (30) days of receipt of the application, clearly and specifically delineating all missing documents or information. Information delineated in the notice is limited to documents or information required to be submitted by this ordinance as of the date of the application and must be reasonably related to the city's determination of whether the proposed equipment falls within the definition of a wireless communications facility and whether the proposed deployment satisfies all health, safety, and welfare regulations applicable to the WCF Permit request.
 - i. Upon an applicant's submittal of additional documents or information in response to a notice of incompleteness, the City has ten (10) days to notify the applicant in writing of any information requested in the initial notice of incompleteness that is still missing. Second or subsequent notices of incompleteness may not specify documents or information that were not delineated in the original notice of incompleteness. Requests for information not requested in the initial notice of incompleteness do not toll the ninety (90) day clock.
 - b. The City and applicants can mutually agree in writing to toll the ninety (90) day clock at any time.
 - c. For purposes of this section, "toll the ninety (90) day clock" means to halt the progression of days that count toward the ninety (90) day deadline.

Sec. 28-145. – Approval of Wireless Communication Facility Permits

In processing and approving a wireless communication facility permit, the city engineer shall condition its approval on compliance with (1) generally applicable and reasonable health, safety, and welfare regulations consistent with the city's public right-of-way management; (2) reasonable accommodations for decorative wireless support structures of signs; and (3) any reasonable restocking, replacement, or relocation requirements when a new wireless support structure is placed in a public right-of-way, and provided the applicant certifies compliance with

the following conditions listed in this Section, and subject to other use-specific conditions and requirements set forth in this Division and in the Guidelines.

(a) General Design Standards.

- (1) The installation shall be unobtrusive, harmonious with its surroundings, and streamlined in appearance. The city engineer may require camouflage or concealment efforts.
- (2) The height of any wireless communication facility shall be comparable to nearby structures of similar type and not more than 40 feet above normal grade.
- (3) Antennas shall be as small as possible. To address the physical and aesthetic impact on the public right-of-way, the city engineer may limit the physical size of the antenna as provided by law.
- (4) All riser cabling and wiring must be contained in conduit, affixed directly to the face of the structure, or enclosed within the hollow interior of the pole, for as long as it is technically feasible. No exposed slack or extra cable will be allowed.
- (5) No signage or advertising will be permitted, except as required by law or as specifically permitted or required by the city engineer.
- (6) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, shall be as small as possible, but no more than as permitted by law.

(b) Minimizing Impacts on Adjacent Property Owners.

- (1) A permit holder must design and install a wireless communication facility so as to minimize any substantial impact on the adjacent property owners, and must actively mitigate any adverse impact relating to visibility from the adjacent property; access to and from the adjacent property; intrusion of light, sound, or smell; in addition to any other cognizable substantial impact made known by an adjacent property owner.
- (2) No antenna shall be within five (5) feet of a door, balcony, or window nor placed in front of any window within 20 feet and located at a similar height to the antenna unit on the adjacent public right-of-way, unless otherwise restricted by the right-of-way width.
- (3) An installation shall not interfere with city operations, or the operations of preexisting third-party installations in the public right-of-way. The city will reasonably cooperate with the applicant and/or permit holder to permit activities and modifications that may effectively avoid or correct the interference.
- (4) The city engineer shall have the discretion to impose conditions upon and amend the permit to address concerns and conflicts voiced by adjacent property owners. As part of the permit application process, the applicant shall provide prior notice to all adjacent property owners concerning any equipment to be placed in the public right-of-way, and provide adequate proof of notice and responses to the city engineer in advance of permit issuance.

- (c) *Nondiscrimination.* The city shall evaluate, issue, and deny permit applications under this section on a competitively neutral basis, with no unreasonable discrimination among similarly situated applicants and installations.
- (d) *Time, Place, and Manner Restrictions.* The city engineer may impose additional reasonable conditions on any permit issued under this section relating to time, place, and manner.
- (e) The city shall not impose environmental testing, sampling, or monitoring requirements or other compliance measures for RF emissions on wireless communication facilities provided the facility is in compliance with the FCC's rules for radiofrequency emissions.
- (f) *Scope and Duration.*
 - a. Any permit granted pursuant to such application shall be limited in scope to the description submitted in a completed application, as modified by any further agreed-upon conditions or subsequently approved modification.
 - b. The permit shall be voidable by the city unless in the city's determination the work is commenced within one hundred eighty (180) days from the date of issuance of the permit, unless extended by the city engineer. If the facility is not used for its intended use within twelve (12) months from the date of permit issuance, the city may revoke the permit.
 - c. Within sixty (60) days following completion of facility installation as described in the permit application, the permit holder shall submit as-built diagrams and digital photographs of the Site to the city engineer.
 - d. Permits issued under this section are valid for a period of ten (10) years from the date issued. To extend the permit for an additional period of ten (10) years, the permit holder shall provide proof that it continues to have the legal authority to occupy and use the public right-of-way for the purpose set forth in its Permit; shall affirm that its site as it exists at the time of the renewal is in full compliance with the applicable city permit or permits issued for the site, and is in compliance with FCC regulations; and shall pay any permit processing fee required for renewal. Failure to submit such proof of legal authority or affirmation of compliance shall be grounds for non-renewal of the permit. The burden is on the permit holder to demonstrate that the site complies with the requirements herein.
- (g) *Conditional Upon Related Agreements.* The city engineer may cause a permit under this section to be made temporary or conditional upon the execution of a finalized permit application or attachment agreement further addressing the proposed installation.
- (h) *Proximity to Other Facilities.* The city reserves the right to deny, but is not obligated to deny, any wireless communication facility permit application under this section that proposes to install a wireless support structure within three hundred (300) feet of any other wireless support structure. It is the intent of this provision to encourage the collocation of wireless communication facilities on the same wireless support structure or

on existing buildings or other structures, and to sensibly limit the overall visual impact of wireless communications in the public right-of-way.

- (i) *Wireless Communications Facilities Upon Structures Not Owned by the City.* In addition to the general conditions described in the previous subsection (f), any wireless communication facility for which a permit is requested under this section shall meet the following requirements, in addition to applicable specifications within any current Guidelines.
 - (1) The wireless communication facility shall not increase the total height of the the wireless support structure by more than 10% over other public utility or light poles in the area, unless in the city engineer's discretion an alternative height is accepted, depending on the type and structure of the existing facility and the proposed location.
 - (2) The wireless communication facility shall not block light emanating from a utility structure and shall not otherwise interfere with the original purpose of an existing structure.
 - (3) *Electrical power.* The acquisition of electrical power shall be the sole responsibility of the applicant.
- (j) *Attachments to City-Owned Structures.* In addition to the requirements set forth in subsections (f) and (g) of this Section, the following conditions will apply to a wireless communication facility attached to a city-owned structure.
 - (1) The grant of attachment rights does not waive any zoning or other public right-of-way management requirements that may also apply.
 - (2) The city engineer shall require an applicant for a wireless communication facility attachment to a city-owned structure to execute a separate attachment or license agreement with the city addressing such attachment.
 - (3) The city may require payment of an attachment fee or other compensation, which may be in addition to any application fee, permit fee, or right-of-way use fee.
 - (4) In the event a city-owned wireless support structure is compromised or knocked down, the city and an affected wireless communication facility permit holder will cooperate to reinstall or replace the pole and restore the wireless communication facility.
 - (5) *Training.* At the request of the city, the permit holder shall host on-site training for city maintenance staff at the permit holder's expense. The training will be offered for each wireless communication facility project on one or more city-owned structures. The training shall include occupational safety, personal protection, proximity limits, emergency procedures and contact information.
- (k) *Replacement of City-Owned Structures or Addition of City Owned Structures by Stealth or the Addition of a New Wireless Support Structure.* In addition to the general conditions described in subsection (f) and applicable provisions in subsections (g) and (h) of this Section, the proposed replacement of an existing city-owned structure or placement of a new stealth city owned structure or the addition of a new wireless support structure shall be subject to the following requirements.
 - (1) The replacement of a city-owned structure or the addition of a new stealth city owned structure or the addition of a new wireless support structure shall be

considered a discretionary function of the city engineer in conformance with this section and the Guidelines.

- (2) At a minimum, the applicant must demonstrate the following, to the satisfaction of the city engineer:
 - a. That the facility is not able to be placed on existing infrastructure. The applicant shall provide a map of existing infrastructure in the service area and describe why each such site is not feasible.
 - b. That the structure to be replaced is structurally unsuitable for the proposed use, and that the proposed use cannot be modified or minimized to enable use of an existing structure.
 - c. That city functions for which the original structure was used will be preserved, improved or enhanced, as part of any replacement structure, at the applicant's expense. Replacement of lighting, electrical power, network connectivity, and any other functional purpose of, on or within the original structure shall be done to the satisfaction of the city engineer.
 - d. In order to place a new city owned stealth facility, the applicant must establish to the satisfaction of the city engineer that there are no existing or replacement structures that would provide the necessary capabilities, that the new stealth facility serves a public purpose other than wireless communication.
 - e. In order to place a new wireless support structure, the applicant must first establish that there are no existing or replacement structures that would provide the necessary capabilities, and that a new stealth facility is not feasible.
 - f. The city may require payment of an encroachment fee or other compensation, which may be in addition to any application fee, permit fee, or right-of-way use fee.
- (3) *Ownership.* A replacement structure or a new stealth structure under this section shall be dedicated to and owned by the city upon completion, to the satisfaction of the city engineer. The permit holder shall provide city a Bill of Sale, free and clear of all liens and encumbrances.
- (4) Acquisition and use of electrical power to serve a wireless communication facility on a replacement wireless support structure, stealth facility, or wireless support structure shall be the sole responsibility of the permit holder.
- (5) *Stocked Poles.* To enable prompt replacement in the event of a knockdown or structural compromise of a city owned replacement structure or stealth structure, a permit holder shall provide the city with stock poles substantially identical to the initial city owned replacement pole, as required by the Guidelines. The permit holder, at their cost, shall provide the city with at least one spare pole for every five sites, for each type of replacement or stealth structure, and as the spare poles are used, restock the spare pole so that the city shall always have at least one replacement structure or stealth structure for every five sites on hand at all times.

- (6) Stealth facilities and new wireless support structures placed in the right-of-way shall be maintained in accordance with the terms of this section and as provided for in a separate attachment agreement.
- (7) An applicant may be required to enter into such license and other agreements with the city or third parties as the city may require to effect the replacement, consistent with this section.

(1) *Equipment.*

- (1) Equipment other than ground-mounted equipment shall be mounted in one of the manners described below, or as prescribed by the city engineer.
 - a. Equipment shall be mounted in a base shroud of approved design to be retrofitted to an existing standard. The base shroud should be coated or painted an approved color to match the existing pole.
 - b. Equipment shall be mounted directly to the pole a minimum of eight (8) feet above the existing grade and be coated or painted with an approved color to match the existing pole.
 - c. Equipment shall be mounted to the pole in an equipment box a minimum of eight (8) feet above the existing grade. The equipment box shall be coated or painted an approved color to match the existing pole.
 - d. Equipment shall be attached to the wireless support structure using rigid steel clamping mounts or stainless steel banding to the exterior of any metal pole.

(2) *Ground-Mounted Equipment.*

- a. A permit for a wireless communication facility that involves ground-mounted equipment will be issued if the city engineer finds the following:
 1. The ground mounted equipment will not disrupt traffic or pedestrian circulation;
 2. Space exists in the public right-of-way to accommodate the ground mounted equipment;
 3. The ground mounted equipment will not create a safety hazard;
 4. The location of the ground mounted equipment minimizes impacts on adjacent property;
 5. The ground mounted equipment does not detrimentally affect the aesthetics of the area, as provided for in the Guidelines, to the satisfaction of the city engineer;
 6. That no reasonable alternative exists that is more favorable to adjacent property owners and to effective use and management of the public right-of-way; and
 7. The ground mounted equipment will not adversely impact the health, safety or welfare of the community.
- b. *Underground equipment.* The city engineer may require that equipment and utilities be placed underground when aesthetically appropriate and as provided for in the Guidelines, necessary for public safety and compliance with state and

federal laws, and may prohibit the installation of ground mounted equipment unless technically infeasible or otherwise cost prohibitive.

- (3) Any excavation required for installation of ground-mounted or underground equipment shall be performed in accordance with the city's standard specifications relating to excavation within the right-of-way.

(m) Modifications to Facilities.

- (1) Modifications to existing wireless communication facility installations that replace existing equipment with like kind, number, and size of the existing equipment and do not increase the EMF output of the wireless communication facility are permitted as of right.
- (2) Except as provided in section 28-145(m)(1), and subject to applicable federal and state law, any modification of a wireless communication facility or equipment shall require the prior approval of the city engineer following submission of a detailed description of the modification, which shall include modified plans, photographs, and other information sufficient to enable the city engineer to evaluate the modification's impact on the public right-of-way, and the proposed timeframe for completion of the work.

- (n) Inspection and Reporting.* When directed by the city engineer, the permit holder for a wireless communication facility must perform an inspection of the facility and submit a report to the city engineer on the condition of the wireless communication facility, to include any identified concerns and corrective action taken.

(o) Network Diagram Submission.

- (1) Commencing on the first January 1 following the enactment of this section and on January 1st of each subsequent year, each permit holder with facilities in the city shall submit an updated diagram in a format acceptable to the city engineer of all facilities owned or controlled by such permit holder and located in the public right-of-way. Such diagrams shall show, but not be limited to showing, the number, size, and locations of antennas, wireless communications facilities and equipment, vaults, pedestals, and conduit and fiber optic cable serving such facilities.
- (2) If a permit holder's facility diagram has not changed from the diagram submitted in a previous year, in lieu of submitting a new diagram, a permit holder may, at its election, provide a statement to the city certifying that the previous year's map has not changed. The certification shall also include the date that the previous map was submitted to the city.
- (3) To ensure the security of installations, network diagram submissions shall be considered proprietary information, and shall be deemed confidential and not subject to public disclosure, except to the extent required by applicable law, except that applicants requesting a permit under this section may request, and the city

engineer may share, portions of submitted diagrams affecting their proposed installations.

- (p) *Maintenance.* A permit holder shall maintain all facilities installed in the public right-of-way in a condition that maintains the safety, integrity, and aesthetics of the public right-of-way. Cabinets, facilities, and other equipment shall not appear to be unkempt. Maintenance concerns or conditions not in compliance with this section that are discovered by or made known to the city will be reported to the permit holder, which shall then have 30 days to correct the identified issue. If the issue is not corrected within such period, the city reserves the right to take any action it deems necessary, including revocation of the permit. In the case of an emergency involving an imminent threat to life or property, the city may take any corrective action that it deems reasonable at the permit holder's expense. Maintenance and replacement of wireless communication facilities shall be performed by the permit holder or an approved contractor at permit holder's sole cost.

Sec. 28-146. – Permit Denial or Revocation.

- (a) *Denial of Permit.* Any denial of permit shall be in writing, supported by substantial evidence that the proposed installation would be inconsistent with one or more of the provisions described in this Division or the health, safety and welfare of the city.
- (1) The City engineer may deny an application if he or she determines based upon reasonable engineering judgment that the proposed attachment is of excessive size or weight or otherwise would, in the reasonable engineering judgment of the City engineer, subject city-owned infrastructure to unacceptable levels of stress.
- (b) *Revocation or Modification.* Proceedings to revoke or modify a permit issued under this section may be initiated by the city engineer.
- (1) *Required Findings.* The city engineer may revoke or modify the permit if it makes any of the following findings:
- a. The permit holder obtained the approval by means of fraud or misrepresentation of a material fact.
 - b. The permit holder substantially expanded or altered the use or structure of a wireless communication facility or wireless support structure beyond what is set forth in the permit.
 - c. The permit holder has failed to comply with any material condition of a permit issued.
 - d. A substantive change of law has occurred affecting the permit holder's authority to permit, occupy, or use the public right-of-way, or the city's ability to regulate such occupation or use.
 - e. The facility interferes with a city project.
 - f. The facility interferes with vehicular or pedestrian use of the public right-of-way.
 - g. The permit holder has failed to make a safe and timely restoration of the public right-of-way.
 - h. The facility has not been employed for its intended use within twelve (12) months of the date of permit issuance.

- i. After initial activation, the facility has not been employed for its intended use for any six (6) month period.
 - j. Revocation or modification is necessary to protect the health, safety and welfare of the inhabitants of the city.
- (2) *Notice of Action.* A written determination of revocation or modification shall be sent via certified mail to the permit holder within ten (10) days of such determination.
 - (3) A permit holder whose permit has been revoked or modified may have the revocation or modification reviewed, upon written appeal as follows:
 - a. Within 14 days of the revocation or modification, a written appeal shall be filed with the city engineer. The appeal must contain a statement of any reasons why the permit holder believes that the revocation or modification should be reviewed. The city engineer shall render a decision within 21 days of receipt.
 - b. If the city engineer denies the appeal, the permit holder may file a written notice of appeal with the city engineer to be presented to the city council within 21 days of notification of the appeal denial. In addition to containing a statement of any significant factors or hardships as well as alternatives explored, the appeal must contain a response to the findings of the city engineer that resulted in the denial.
 - (4) Any costs incurred as a result of revocation or modification of a permit under this section shall be the responsibility of the applicant.
- (q) *Reservation of Authority.* The city at all times reserves the right to take any action it deems necessary, in its sole discretion, to repair, maintain, alter, or improve any wireless support structure, wireless communication facility, or site, as may be necessary and in keeping with the health, welfare and safety of the public. Such actions may temporarily interfere with the operation of a wireless communication facility. The city will give the applicant thirty (30) days written notification of such planned, non-emergency actions. In the event of an emergency, the city shall give the owner notice within twenty-four (24) hours of such action.
- (r) *Duty to Remove and Relocate Facilities.*
- (1) The city engineer may revoke or modify the permit and may order a permit holder to remove and relocate its wireless communication facility and wireless support structure in the public right-of-way, including all related equipment, at the permit holder's expense, if the facility or wireless support structure interferes with the use of the public right-of-way or city facilities or services.
 - (2) Following revocation or modification of a permit, a wireless communication facility shall be removed by the permit holder within ninety (90) days of such city order. The permit holder must attain all required permits to effect the removal.
 - (3) If the wireless communication facilities and all equipment are not removed voluntarily pursuant to notice, the city may remove such facilities at that permit holder's expense without further notice.
 - (4) If the city removes facilities and the owner does not claim the property within sixty (60) days of its removal, the city may take whatever steps are available under the law to declare the property abandoned or surplus, and may sell it with the proceeds of such sale going to the city as permitted by law.

- (5) When a permit holder removes its facilities from the public right-of-way, the permit holder shall at its own expense and in the manner prescribed by the city, replace and restore such public right-of-way in accordance with the City's Standard Specifications, which will be made available by the Engineering Department.
- (s) *Deemed Granted.* In the event that an application for permit under this section is deemed granted by rule of law, all conditions and design parameters under this section are applicable and required for the installation.
- (t) *Exemption Procedures.*
- (1) An applicant may apply to the city engineer for an exemption from any of the requirements of this section on the grounds that such requirement (a) is not feasible or (b) constitutes an undue hardship.
 - a. An application shall include information necessary for the city to make its decision, including but not limited to reports or studies showing the factual support for the claimed exemption. The city engineer may require the applicant to provide additional information to permit the city engineer to determine facts regarding the exemption application.
 - b. Following a review of the application, the city engineer may approve the exemption, in whole or in part, with or without conditions, provided all of the following findings of fact are made:
 1. The subject requirement is not feasible or constitutes an undue hardship;
 2. The facility will serve a community benefit;
 3. The requirements of this section are met, except for the requirement sought to be waived; and
 4. The proposed facility can be mitigated so that its impacts do not result in a material change to the character or the location and relate harmoniously with the surrounding neighborhood.
 - c. The city engineer's decision shall become effectively immediately, is final and shall not be appealable.
- (u) *Insurance.* An applicant and permit holder shall obtain and comply with insurance coverage requirements in accordance with the terms of a separate attachment agreement, as provided for herein.
- (v) *Indemnification and Liability.*
- (1) *Limitation of liability.* By reason of the acceptance of a permit for a wireless communication facility in the public right-of-way, permit holder assumes all liability for injuries to persons, damage to property or loss of service claims by any party and for claims or penalties of any sort resulting from the installation, presence, maintenance or operation of equipment or facilities by registrants or permit holders or activities of registrants or permit holders.
 - (2) *Indemnification.* By reason of acceptance of a permit, permittee shall indemnify, keep and hold the city, its officials, employees and agents, free and harmless from

any and all costs, liabilities and claims for damages of any kind arising out of the construction, presence, installation, maintenance, repair or operation of its equipment and facilities, or out of any activity undertaken in or near a right-of-way, whether or not any act or omission complained of is authorized, allowed or prohibited by a right-of-way permit. The foregoing does not indemnify the city for its own negligence except for claims arising out of or alleging the city's negligence in issuing the permit or in failing to properly or adequately inspect or enforce compliance with a term, condition or purpose of a permit. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the registrant, permit holder or the city and the registrant or permit holder, in defending any action on behalf of the city, shall be entitled to assert in any action every defense or immunity that the city could assert on its own behalf.

- (3) *Permit holder must obtain consent of City before any settlement of litigation.* If the registrant or permit holder is required to indemnify and defend, it shall thereafter have control of the litigation, but the registrant or permit holder may not settle the litigation without the consent of the city. Such consent will not be unreasonably withheld.

Sec. 28-146. – Penalty.

- (1) A person who willfully violates this Division is guilty of an infraction, which is punishable by a fine not to exceed \$1,000; the court to have power to suspend said sentence and to revoke the suspension thereof.
- (2) Each period of ten (10) days that a person violated the provisions of this section after notice shall constitute a separate offense.
- (3) The application of the above penalty provisions shall not be held to prevent the enforced removal of prohibited conditions.
- (4) The permit of any person violating any of the provisions of this section may be revoked, as provided in this section.

§ 3 This Ordinance shall become effective upon final passage and approval.

PASSED FIRST READING: February 18, 2020

PASSED SECOND READING: _____

ATTEST:

APPROVED:

Kelly Matalka, City Clerk

Shaun Sipma, Mayor