

ORDINANCE NO. 13 , 2018

**AN ORDINANCE ESTABLISHING REGULATIONS FOR SMALL CELL FACILITIES
AND WIRELESS SUPPORT STRUCTURES WITHIN THE RIGHT-OF-WAY**

WHEREAS, the State of Ohio has adopted comprehensive regulations to control local regulation of small cell wireless facilities and related wireless facilities; and

WHEREAS, while the City supports the State's public policies outlined in R.C. § 4939.02 to in part promote advancing technology, the Home Rule Amendment of the Ohio Constitution, Article XVIII, Section 3, provides that "Municipalities shall have authority to exercise all powers of local self-government," and the municipal regulation of the right-of-way is one of such powers of local self-government delegated by the people of the State to the people of municipalities and should not be preempted by the State.

NOW THEREFORE, BE IT ORDAINED by the Council of the City of Montgomery, Hamilton County, Ohio, that:

SECTION 1. As appropriate, this Ordinance and the Sections adopted herein shall be codified under Chapter 52, *Regulation of the Right-of-Way* consistent with the State's mandate that such regulations shall not be administered under the Land Use or Zoning Code. Therefore, the following separate Sections are hereby enacted.

§ 52.01 PURPOSE AND INTENT

- (A) The purpose of this chapter is to establish general procedures and standards, consistent with all applicable federal and state laws, for the siting, construction, installation, collocation, modification, operation, and removal of small cell wireless communications facilities in the right-of-way.

(B) The intent of this chapter is to:

- (1) Establish basic criteria for applications to locate small cell facilities and wireless support structures in the right-of-way and to authorize the City Manager to develop, publish, and from time to time amend applications and other associated materials to provide clear guidance to applicants;
- (2) Ensure that small cell facilities and wireless support structures are carefully designed, constructed, modified, maintained, and removed when no longer in use in conformance with all applicable health and safety regulations;
- (3) Preserve the character of the Montgomery Heritage District and supporting districts by minimizing the potentially adverse visual impact of small cell facilities and wireless support structures through careful design, siting, landscaping and camouflaging techniques to blend these facilities into their environment to the maximum extent practicable;
- (4) Enhance the ability of wireless communications carriers to deploy small cell facilities and wireless support structures in the City quickly, effectively, and efficiently so that residents, businesses, and visitors benefit from ubiquitous and robust wireless service availability;
- (5) Establish an application process and structure for payment of fees and charges to be uniformly applied to all applicants and owners of small cell facilities and wireless support structures for such facilities;
- (6) Comply with, and not conflict with or preempt, all applicable state and federal laws, including without limitation Section 101(a) and Section 704 of the Telecommunications Act, Pub. L. 104- 104,101 Stats. 56, 70 (Feb. 8, 1996) (codified as 47 U.S.C. §§ 253(a), 332(c)(7)), as may be amended or superseded, and Section 6409(a) of the Middle Class Tax Relief and Job Creation Act, Pub. L. 112-96,126 Stat. 156 (Feb. 22, 2012) (codified as 47 U.S.C. § 1455(a)), as may be amended or superseded, and all FCC rules and regulations to interpret and implement applicable federal statutes.

(C) All right-of-way permits granted hereunder shall be non-exclusive and no property right of any nature shall be created, nor presumed by the granting of a permit under this Chapter.

§ 52.02 APPLICABILITY

The following general rules and exclusions shall apply:

- (A) Subject to R.C. § 4939.0314, and approval of an application under this chapter, an operator may, as a permitted use not subject to zoning review or approval, collocate a small cell facility and construct, maintain, modify, operate, or replace

wireless support structures in, along, across, upon, and under the City right-of-way. Provided that:

- (1) An operator shall comply with generally applicable standards that are consistent with this chapter and adopted by the City for construction and public safety in the right-of-way.
 - (2) All structures and facilities shall be constructed and maintained so as not to impede or impair public safety or the legal use of the right-of-way by the City, the traveling public, or other public utilities.
- (B) Except as provided in this chapter as well as any franchise, pole attachment, or other agreements between the City and a cable operator or public utility, the City shall not require any zoning or other approval, consent, permit, certificate, or condition for the construction, replacement, location, attachment, or operation of a small cell facility in the right-of-way, or otherwise prohibit or restrain the activities as described in this Chapter, except as otherwise provided in R.C. § 4939.0311(B).
- (C) Exceptions for prior franchises or agreements are as outlined in R.C. § 4939.08.
- (D) Exclusions.
- (1) *Amateur radio facilities.* This chapter shall not govern the installation of any amateur radio facility that is owned or operated by a federally licensed amateur radio station operator or is used exclusively for receive-only antennas.
 - (2) *Certain over-the-air receiving devices (OTARD).* This chapter shall not govern the installation of any OTARD antennas covered under FCC regulations codified in 47 C.F.R. §§ 1.4000 et seq., as may be amended or superseded. OTARD antennas include, without limitation, direct-to-home satellite dish antennas less than one meter in diameter, television antennas and wireless cable antennas.
 - (3) *Handsets and user equipment.* This chapter shall not govern the use of personal wireless devices (e.g., cell phones) or other consumer-grade mobile user equipment used in the right-of-way.
- (E) The permitting procedures and authorizations set forth in the amendments made to R.C. §§ 4939.01 to 4939.09 by H.B. 478 of the 132nd General Assembly shall apply only to the placement of small cell facilities and wireless support structures in the right-of-way, and do not authorize the construction and operation of a wireline backhaul facility.

- (F) This chapter shall supersede all conflicting requirements of other titles and chapters of this Code regarding the locating and permitting of small cell facilities and wireless support structures in the right-of-way.
- (G) Nothing in this chapter precludes the City from applying its generally applicable health, safety, and welfare regulations when granting consent for a small cell facility or wireless support structure.

§ 52.03 DEFINITIONS

(A) *General use of terms.*

- (1) The terms, phrases, words, and their derivations used in this chapter shall have the meanings given in this section.
- (2) When consistent with the context, words used in the present tense also include the future tense; words in the plural number include the singular number; and words in the singular number include the plural number.
- (3) All terms used in the definition of any other term shall have their meaning as otherwise defined in this section.
- (4) The words "shall" and "will" are mandatory and "may" is permissive.
- (5) Words not defined shall be given their common and ordinary meaning.

(B) *Defined terms.*

ABANDONED. Small cell facilities or wireless support structures that are unused for a period of Three Hundred Sixty-Five (365) days without the operator otherwise notifying the City and receiving the City's approval.

AFFILIATE. When used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

AGENT. A person that provides the City written authorization to work on behalf of a public utility.

ANTENNA. Any transmitting or receiving device used in communications that radiate or capture electromagnetic waves, digital signals, analog signals, radio frequencies, wireless communications signals, or other communication signals.

APPLICANT. Any person that submits an application to the City to site, install, construct, collocate, modify, and/or operate a small cell facility or wireless support structure in the right-of-way according to the requirements of this chapter.

CABLE OPERATOR. Any person or group of persons:

- (1) Who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or
- (2) Who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

CABLE SERVICE

- (1) The one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
- (2) Subscriber interaction, if any, which is required for the selection of such video programming or other programming service;

CABLE FRANCHISE An initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to 47 U.S.C. 522 Section 546), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system.

CLEAR ZONE. The unobstructed, traversable area provided beyond the edge of the through traveled way for the recovery of errant vehicles. The clear zone includes shoulders, bike lanes, and auxiliary lanes, except those auxiliary lanes that function like through lanes. As defined in the ODOT Location and Design Manual, Volume 1, Section 600 - Roadside Design.

COLLOCATION or COLLOCATE. To install, mount, maintain, modify, operate, or replace wireless facilities on a wireless support structure.

DECORATIVE POLE. A pole, arch, or structure other than a street light pole placed in the public way specifically designed and placed for aesthetic purposes and on which no appurtenances or attachments have been placed except for any of the following:

- (1) Electric lighting;
- (2) Specially designed informational or directional signage;
- (3) Temporary holiday or special event attachments.

ELIGIBLE FACILITIES REQUEST. Means the same as defined by the FCC in 47 U.S.C. 1455 (a)(2), as may be amended, which defines that term as "any request for

modification of an existing support structure that does not substantially change the physical dimensions of such support structure, involving:

- (1) Collocation of new small cell facilities;
- (2) Removal of small cell facilities; or
- (3) Replacement of small cell facilities.

FRANCHISE AUTHORITY. See CABLE FRANCHISE.

FCC The U.S. Federal Communications Commission and any legally appointed, designated, or elected agent or successor.

GENERAL REQUIREMENTS. Means those requirements established in §52.06 of this Chapter for the design, construction, and installation of small cell facilities and wireless support structures in the right-of-way, which are supplemented by Design Guidelines, and which are effective insofar as they do not conflict with state or federal law, including without limitation any applicable FCC rules and regulations.

HISTORIC DISTRICT. Means the Heritage District which is an historical district within the City.

MICRO WIRELESS FACILITY. A small cell facility that is not more than twenty-four inches in length, fifteen inches in width, and twelve inches in height and that does not have an exterior antenna more than eleven inches in length suspended on cable strung between wireless support structures.

OHIO MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES or OMUTCD. The uniform system of traffic control devices promulgated by the Ohio Department of Transportation.

OCCUPY OR USE. With respect to the right-of-way, to place a tangible thing in the right-of-way for any purpose, including, but not limited to, constructing, repairing, positioning, maintaining, or operating lines, poles, pipes, conduits, ducts, equipment, or other structures, appurtenances, or facilities necessary for the delivery of public utility services or any services provided by a cable operator.

PERSON. Any individual, firm, partnership, association, corporation, company, or other legal entity, private or public, whether for profit or not-for-profit.

PUBLIC UTILITY. A facilities-based provider of wireless service to one or more end users in this state, or any company described in R.C. § 4905.03 except in divisions (B) and (I) of that section, which company also is a public utility as defined in R.C. § 4905.02; and includes any electric light company as defined in R.C. § 4905.03, including

electric light companies organized as nonprofit corporations, but not including municipal corporations or other units of local government that provide electric service.

RIGHT-OF-WAY FEE. A fee levied to recover the costs incurred by the City and associated with the occupancy or use of right-of-way.

RIGHT-OF-WAY. The surface of and the space above and below the paved or unpaved portions of any public street, public road, public highway, public freeway, public lane, public path, public bikepath, public way, public alley, public court, public sidewalk, public boulevard, public parkway, public drive and any other land dedicated or otherwise designated for the same now or hereafter held by the City.

RIGHT OF WAY PERMIT. A permit issued by the City that must be obtained in order to perform any work in, on, above, within, over, below, under, or through any part of the public right-of-way, including, but not limited to, the act or process of digging, boring, tunneling, trenching, excavating, obstructing, or installing, as well as the act of opening and cutting into the surface of any paved or improved surface that is part of the public right-of-way.

RIGHT OF WAY PERMIT, SMALL CELL. Means a small cell facility or wireless support structure right-of-way occupancy permit as further defined in §52.04.

SMALL CELL DESIGN GUIDELINES. Means those detailed design guidelines, specifications and examples promulgated by the City Manager for the design and installation of small cell facilities and wireless support structures in the right-of-way, which are effective insofar as they do not conflict with FCC rules and regulations or the General Small Cell Requirements established in §52.06 of this Chapter.

SMALL CELL FACILITY. A wireless facility that meets both of the following requirements:

- (1) Each antenna is located inside an enclosure of not 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 enclosure of not more than six cubic feet in volume.
- (2) All other wireless equipment associated with the facility is cumulatively not more than twenty- eight cubic feet in volume. The calculation of equipment volume shall not include electric meters, concealment elements, telecommunications demarcation boxes, grounding equipment, power transfer switches, cut-off switches, and vertical cable runs for the connection of power and other services.

SMALL CELL FACILITY OPERATOR or OPERATOR. A wireless service provider, or its designated agent, or cable operator, or its designated agent, or a video service provider, or its designated agent that operates a small cell facility and provides wireless

service as defined herein. For the purpose of this chapter, "operator" includes a wireless service provider, cable operator, or a video service provider that provides information services as defined in the "Telecommunications Act of 1996," 110 Stat. 59, 47 U.S.C. 153(20), and services that are fixed in nature or use unlicensed spectrum.

TOLLING or TOLL PERIOD. The pausing or delaying of the running of a required time period.

UTILITY POLE. A structure that is designed for, or used for the purpose of, carrying lines, cables, or wires for electric or telecommunications service. "Utility pole" excludes street signs and decorative poles.

VIDEO SERVICE PROVIDER. A person granted a video service authorization under R.C. §§ 1332.21 to 1332.34.

WIRELESS FACILITY.

- (1) Equipment at a fixed location that enables wireless communications between user equipment and a communications network, including all of the following:
 - (a) Equipment associated with wireless communications;
 - (b) Radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration.
- (2) The term includes small cell facilities.
- (3) The term does not include any of the following:
 - (a) The structure or improvements on, under, or within which the equipment is collocated;
 - (b) Coaxial or fiber-optic cable that is between wireless support structures or utility poles or that is otherwise not immediately adjacent to or directly associated with a particular antenna.

WIRELESS SERVICE. Any services using licensed or unlicensed wireless spectrum, whether at a fixed location or mobile, provided to the public using wireless facilities.

WIRELESS SERVICE PROVIDER. A person who provides wireless service as defined herein.

WIRELESS SUPPORT STRUCTURE. A pole, street light pole, traffic signal pole, a fifteen-foot or taller sign pole, or utility pole capable of supporting small cell facilities,

excluding utility poles or other facilities used to supply traction power to public transit systems, including railways, trams, streetcars, and trolleybuses.

WIRELINE BACKHAUL FACILITY. A facility used for the transport of communications service or any other electronic communications by coaxial, fiber-optic cable, or any other wire.

§ 52.04 APPLICATION REQUIRED

- (A) *General Requirements.* The following requirements shall apply to all small cell facilities and wireless support structures proposed within the right-of-way.
- (1) No person shall occupy or use the right-of-way except in accordance with the law.
 - (2) In occupying or using the right-of-way, no person shall unreasonably compromise the public health, safety, and welfare.
 - (3) No person shall occupy or use the right-of-way without first obtaining, under this Chapter or R.C. § 1332.24 or 4939.031, any requisite consent of the City.
- (B) *Pre-Application Conference.*
- (1) *Purpose.* Applicants are strongly encouraged to contact the City and request a pre-application conference. This meeting will provide an opportunity for early coordination regarding proposed small cell facilities and wireless support structure locations, design, and the application submittal, and the approval process in order to avoid any potential delays in the processing of an application and deployment of small cell facilities and wireless support structures in the City.
 - (2) *Appointment Required.* An appointment is required for all pre-application conferences. Applicants must contact the designated City staff member as noted on the application form, who will provide applicants an appointment with all applicable City representatives in a timely manner.
- (C) *Application Required.* Anyone seeking to site small cell facilities in the right-of-way shall first duly file a written application with the Department of Public Works, in accordance with the requirements in this section and additional detailed requirements set forth in the Design Guidelines as modified from time to time by the City Manager.
- (D) *Categories of Small Cell Applications.* In accordance with FCC regulations and state law, the Department of Public Works shall classify every application to locate small cell facility in the right-of-way as one of the following types:

(1) *Eligible Facilities Request:*

- (a) Involves collocation, replacement, modification, or removal of small cell facilities on an existing wireless support structure; and
- (b) Does not substantially change the physical dimensions of the existing wireless support structure.

(2) *Collocation with Substantial Modifications:*

- (a) Involves collocation, replacement or modification of small cell facilities on an existing wireless support structure; and
- (b) Substantially changes the physical dimensions of the existing wireless support structure.

(3) *New Wireless Support Structure:*

- (a) Involves the construction, modification, or replacement of a wireless support structure associated with a small cell facility within the right-of-way.

(4) *Wireless Support Structure Removal:*

- (a) Involves the removal of a wireless support structure installed within the right-of-way in association with a small cell facility.

(E) *Required Small Cell Application Materials.* The applicant shall submit to the City the following materials and information associated with each small cell facility application type in order for the application to be considered complete:

- (1) Completed application form and fee as specified on the application.
- (2) A scaled and dimensioned site plan (not smaller than one inch equals 50 feet) clearly indicating the following:
 - (a) Proposed location within the right-of-way including nearest cross street intersections);
 - (b) For adjacent parcel(s) perpendicular to the proposed small cell facility location, property ownership, including current ownership;
 - (c) All existing conditions within 400 feet of the proposed location, including but not limited to, buildings, utilities within the right-of-way and associated above grade structures, location of electric service and fiber optic cable, all other underground and overhead utilities,

small cell structures and facilities, sidewalks/shared-use paths, back of adjacent curb/edge of pavement, driveways and street trees;

- (d) Dimensions shall be provided from the proposed small cell facility to existing wireless support structures and equipment, utility structures, back of curb/edges of pavement including driveways, sidewalks and shared-use paths;
- (e) Dimensions shall be provided between proposed wireless support structures and associated ground mounted equipment;
- (f) Scaled and dimensioned elevations/profiles and sections (not smaller than 1 inch equals 5 feet) of existing wireless support structures and/or new wireless support structures clearly indicating the following, as applicable:
 - (1) Height from established grade at the base of the wireless support structure to the highest point of the wireless support structure and the height to the highest point of proposed antenna or antenna enclosures, as applicable (overall height).
 - (2) Height from established grade at the base of the wireless support structure to the lowest point of all proposed small cell equipment to be installed on the wireless support structure.
 - (3) The distance from the outer edge of the wireless support structure parallel to the outer edge of all equipment associated with the small cell facility to be installed on the support structure.
- (g) Scaled and dimensioned details of proposed small cell facilities, including elevations/profiles, plans and sections (not smaller than 1 inch equals 5 feet) clearly indicating the following, as applicable:
 - (1) Height, width, depth and volume in cubic feet of all proposed antenna and exposed elements and/or proposed antenna enclosures.
 - (2) Height, width, depth and volume of all other wireless equipment associated with the facility, with all electric meters, concealment elements, telecommunications demarcation boxes, grounding equipment, power transfer switches, cut-off switches, and vertical cable runs for the connection of power and other services clearly labeled.

- (3) Method of installation/connection to pole or ground, as applicable.
 - (4) Color specifications for all small cell support structures and associated exposed equipment, cabinets and concealment elements.
 - (5) Electrical plans and wiring diagrams.
 - (6) Footing and foundation drawings and structural analysis sealed and signed by a professional engineer in the State of Ohio.
 - (h) Manufacturer's specification sheets for all small cell facility equipment proposed, including poles, equipment cabinets, shrouds, or concealment devices, antennas, meters, radios, switches, telecommunications demarcation boxes, and grounding equipment.
 - (i) Scaled and dimensioned landscape plans associated with required screening of ground mounted small cell equipment (where applicable), including a planting plan with proposed plant species, quantities, spacing, height at installation, and planting details.
- (F) *Required Application Materials for Small Cell Facilities Removal.* For applications involving the removal of small cell facilities under an Eligible Facilities Request, the following materials and information shall be provided:
- (1) Completed application form and fee as specified on the application.
 - (2) A scaled and dimensioned site plan (not smaller than one inch equals 20 feet) clearly indicating the following:
 - (a) Location within the right-of-way including nearest cross street intersection;
 - (b) Adjacent parcel(s) perpendicular to the existing small cell facility location property ownership, including current ownership.
 - (c) All existing conditions within 50 feet of the existing small cell facilities locations to be removed, including but not limited to, buildings, utilities within the right-of-way and associated above grade structures, location of electric service and fiber optic cable, all other underground and overhead utilities, small cell structures and facilities, sidewalks/shared-use paths, back of adjacent curb/edge of pavement, driveways, street trees and plant material.

- (3) Scaled and dimensioned site and/or structure remediation details in accordance with Small Cell Design Guidelines requirements (not smaller than 1 inch equals 5 feet) clearly indicating the following:
 - (a) Proposed remediation plan for modifications made to City-owned wireless support structures and other areas of the right-of-way associated with collocation of small cell wireless facilities and ground mounted equipment after the removal of these facilities.
 - (b) Proposed restoration of electric and fiber optic connections after removal of small cell facilities, as applicable.
- (G) Required Application Materials for Wireless Support Structure Removal. For applications involving the removal of a wireless support structure installed in association with a small cell facility, the following materials and information must be provided:
 - (1) Right-of-Way Permit application and fee as specified.

§ 52.05 APPLICATION REVIEW TIMEFRAMES AND PROCESS

(A) *Permit Application Review Timeframes.*

- (1) *Eligible Facilities Request.* Notwithstanding R.C. §§ 4939.01 to 4939.037, the City shall grant or deny its consent for an Eligible Facilities Request under 47 C.F.R. 1.40001 not later than Sixty (60) days after the date of filing by an entity of a completed application.
 - (2) *Collocation with Substantial Modifications.* The City shall grant or deny its consent for requests to collocate, or to replace or modify a small cell facility on an existing wireless support structure where substantial modifications are required to the wireless support structure not later than Ninety (90) days after the date of filing by a person of a completed application.
 - (3) *New Wireless Support Structure.* The City shall grant or deny its consent for requests to construct, modify, or replace a wireless support structure associated with a small cell facility not later than Ninety (90) days following the date of filing of a complete application by an entity.
 - (4) *Wireless Support Structure Removal.* The City shall grant or deny its consent for requests to remove wireless support structures associated with small cell facilities from the right-of-way typical to the review timeframes for the Right-of-Way Permit required for this activity.
- (B) *Failure to grant or deny within prescribed timeframes.* If the City fails to approve or deny a request for consent under this section or a request for a relevant work

permit within the required time period, provided the time period is not tolled under §52.05(F), the request shall be deemed granted upon the requesting entity providing notice to the City that the time period for acting on the request has lapsed.

(C) *Application denials.*

- (1) The City shall not unreasonably withhold or deny consent for small cell facilities and wireless support structures within the right-of-way.
- (2) If a request for consent is denied, the City shall provide in writing its reasons for denying the request, supported by substantial, competent evidence, and such information as the applicant may reasonably request to obtain consent. The denial of consent shall not unreasonably discriminate against the entity requesting the consent.
- (3) Except in the case of a public utility subject to the jurisdiction and recognized on the rolls of the Public Utilities Commission or of a cable operator possessing a valid franchise awarded pursuant to the "Cable Communications Policy Act of 1984," 98 Stat. 2779,47 U.S.C.A. 541, the City, for good cause shown, may withhold, deny, or delay its consent to any person based upon the person's failure to possess the financial, technical, and managerial resources necessary to protect the public health, safety, and welfare.

(D) *Tolling of required timeframes.*

- (1) The time periods required in §52.05(A) may be tolled only:
 - (a) By mutual agreement between the entity requesting consent and the City;
 - (b) In cases where the City determines that the application is incomplete; or
 - (c) If the number of requests for consent for small cell facilities or wireless support structures received is likely to result in difficulty processing applications within the time limits set forth in §52.05(A) due to the lack of resources of the City, then the City may toll the time limits as follows:
 - (1) The time period may be tolled for up to Twenty-One (21) days for the first fifteen small cell facility or wireless support structure requests received by the City above the threshold of 15 applications within any consecutive thirty-day period:

- (2) Further, for every additional fifteen requests that the City receives above the thresholds provided herein, the City may toll the time period for those requests for up to fifteen days in addition to the time period provided in division (I)(c)(I) of this section.
 - (3) In no instance shall the City toll the time period for any small cell facility or wireless support structure request by more than ninety consecutive days. Upon request, the City shall provide an operator written notice of the time limit for a small cell facility or wireless support structure request
 - (2) To toll the time period for incompleteness, the City shall provide written notice to the person requesting consent not later than thirty days after receiving the request clearly and specifically delineating all missing documents or information. The missing documents or information shall be reasonably related to determining whether the request meets the requirements of applicable federal and state law. Any notice of incompleteness requiring other information or documentation, including information of the type described in R.C. § 4939.0313 or documentation intended to illustrate the need for the request or to justify the business decision for the request, does not toll the time period.
 - (3) The time period for granting or denying consent resumes when the entity makes a supplemental submission in response to the City's notice of incompleteness.
 - (4) If a supplemental submission is inadequate, the City shall notify the entity not later than ten days after receiving the supplemental submission that the supplemental submission did not provide the information identified in the original notice delineating missing documents or information. The time period may be tolled in the case of second or subsequent notices under the procedures identified in divisions (1) to (3) of this section. Second or subsequent notices of incompleteness may not specify missing documents or information that was not delineated in the original notice of incompleteness.
- (E) *Timeframe for completion of permit.*
- (1) Permits granted for an Eligible Facilities Request, Collocation with Substantial Modifications and New Wireless Support Structure shall be completed by the operator or its agent within one hundred eighty days after issuance of the permit, unless:
 - (a) The City and the operator agree to extend this period; or

- (b) A delay is caused by make-ready work for a City-owned wireless support structure or decorative pole or by the lack of commercial power or backhaul availability at the site, provided that:
 - (1) The operator has made a timely request within sixty days after the issuance of the permit for commercial power or backhaul services; and
 - (2) The additional time to complete installation does not exceed three hundred sixty days after issuance of the permit.
 - (2) If divisions (l)(a) and (b) of this section cannot be met the permit shall be void unless the City grants an extension in writing to the operator.
- (F) *Consolidated application for multiple small cell facilities and/or support structures.*
 - (1) Applicants seeking to construct modify, collocate, or replace more than one small cell facility or more than one wireless support structure may file at the applicants discretion, a consolidated application for up to 30 small cell facility requests or up to 30 wireless support structure requests in a single application and receive a single permit for the construction, modification, collocation, or replacement of the small cell facilities or wireless support structures subject to the following:
 - (a) This single application may be filed for multiple small cell facilities or multiple wireless support structures only if they are of substantially the same type.
 - (b) The City may separately address small cell facility collocations or wireless support structures for which incomplete information has been received or which are denied.
 - (2) In the case of a consolidated application, the fees provided for in R.C. § 4939.0316 and §52.04 may be cumulative. However, the City, at its discretion may opt to reduce such fees in order to encourage consolidated application submittals.
 - (3) In the case of a consolidated application, each small cell facility or wireless support structure proposed to be constructed, modified, collocated on, or replaced shall constitute a separate request for consent for purposes of tolling the response deadline as authorized under R.C. § 4939.036. A request by a single operator for a new or replacement support structure and associated small cell facility constitutes one request.
- (G) *Small Cell and Wireless Support Structure activities not requiring consent.*

- (1) City consent shall not be required for either of the following activities conducted in the right-of-way:
 - (a) Routine maintenance of wireless facilities;
 - (b) The replacement of wireless facilities with wireless facilities that are consistent with the City's current design requirements and guidelines and that are either
 - (1) Substantially similar to the existing wireless facilities; or
 - (2) The same size or smaller than the existing wireless facilities.
- (2) The City may require a Right-of-Way Permit for any activity described in division (1) of this section and for any activity for which consent is authorized herein and under R.C. § 4939.031. Any such permit shall be subject to any applicable State law.
- (3) Notwithstanding the amendments made to R.C. §§ 4939.01 to 4939.09 by H.B. 478 of the 132nd General Assembly, a cable or video service provider shall not be required to obtain permits from the City or to pay fees, with the exception of work permits and associated fees, to place, operate, maintain, or replace micro wireless facilities pursuant to an existing franchise or video service authorization under R.C. Chapter 1332; nor shall a holder of an existing franchise or video service authorization be required to obtain additional authorizations or to pay additional fees for the placement of micro wireless facilities already covered under an existing franchise or video service authorization under R.C. Chapter 1332.

§ 52.06 GENERAL SMALL CELL REQUIREMENTS

(A) *Existing Wireless Support Structures*

- (1) *Structural Integrity of Existing Support Structures.*
 - (a) The City shall not authorize any attachments to City-owned infrastructure that negatively impacts the structural integrity of the support structure.
 - (b) The City may condition approval of the collocation on replacement or modification of the wireless support structure at the operator's cost if the City determines that replacement or modification is necessary for compliance with the City's written construction and/or safety standards. A replacement or modification of the wireless support structure shall conform to the applicable design guideline(s) and the City's applicable specifications for the type of structure being

replaced. The City may retain ownership of a replacement wireless support structure.

- (2) *Maximum Permitted Height.* For an existing wireless support structure, the antenna and any associated shroud or concealment material are permitted to be collocated at the top of the existing wireless support structure and shall not increase the height of the existing wireless support structure by more than five feet, unless otherwise specified in the Small Cell Design Guidelines based on the specific context and characteristics of the wireless support structure.
- (3) *Right to reserve space on wireless support structure or pole.* The City may reserve space for future public safety or transportation uses in the right-of-way or on a wireless support structure or pole owned by the City in a documented and approved plan in place at the time an application is filed.
 - (a) A reservation of space shall not preclude placement of a pole or collocation of a small cell facility.
 - (b) If replacement of the City's pole or wireless support structure is necessary to accommodate the collocation of the small cell facility and the future use, the operator shall pay for the replacement of the pole or wireless support structure, and the replaced pole or wireless support structure must accommodate the future use.

(B) *New Wireless Support Structures/Poles*

- (1) *Maximum Permitted Height*
 - (a) For a new wireless support structure, the overall height of the wireless support structure and any collocated antennas shall not be more than forty feet in height above established grade measured at the base of the wireless support structure.
 - (b) The City shall limit the maximum permissible height of wireless support structures to not less than thirty-five feet in height above established grade measured at the base of the structure in areas meeting the following criteria:
 - (1) The area is within three hundred feet of the proposed site for a new wireless support structure in the same right-of-way or a connecting right-of-way, and where there are no wireless support structures or utility poles taller than thirty feet in height above ground level; and

- (2) The maximum allowable height for building construction in the underlying or adjacent zoning district is thirty-five feet in height above ground level or less.
- (2) *Multiple requests for wireless support structures in violation of spacing requirements.* If multiple requests are received by the City to install two or more poles that would violate applicable spacing requirements outlined in the Small Cell Design Guidelines, or to collocate two or more small cell facilities on the same wireless support structure, notwithstanding division (1) of R.C. § 4939.0313, the City may resolve conflicting requests through whatever reasonable and nondiscriminatory manner it deems appropriate.
- (3) *City directed alternate location for wireless support structures.* The City may propose an alternate location to any proposed location of a new wireless support structure, subject to the following:
 - (a) That the alternate location is within one hundred feet of the proposed location or within a distance that is equivalent to the width of the right-of-way in or on which the new wireless support structure is proposed, whichever is greater, and
 - (b) The operator shall use the alternate location if it has the right to do so on reasonable terms and conditions and the alternate location does not impose technical limits or additional costs.
- (4) *Waiver to City directed alternate wireless support structure location or undergrounding requirements.*
 - (a) Small cell operators may seek a waiver of the undergrounding or alternative location requirements for the placement of a new wireless support structure to support small cell facilities if the operator is unable to achieve its service objective using a small cell facility under the following circumstances:
 - (1) From a location in the right-of-way where the prohibition does not apply;
 - (2) In a utility easement the operator has the right to access; or
 - (3) In or on other suitable locations or structures made available by the City at reasonable rates, fees, and terms.
 - (b) The City shall process waivers in a reasonable and nondiscriminatory manner that does not have the effect of prohibiting the provision of wireless service.

(C) *Antenna*

- (1) *Size.* Each antenna shall be located entirely within an enclosure of not 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 enclosure of not more than six cubic feet in volume.

(D) *Small Cell Facilities Installed on Wireless Support Structures*

- (1) *Size.* Exclusive of the antenna, all wireless equipment associated with the facility shall not cumulatively exceed twenty-eight cubic feet in volume. The calculation of equipment volume shall not include electric meters, concealment elements, telecommunications demarcation boxes, grounding equipment, power transfer switches, cut-off switches, and vertical cable runs for the connection of power and other services.
- (2) *Equipment Enclosures Required.* All small cell facilities mounted to wireless support structures or located on the ground shall be fully contained within enclosures or cabinets.

(E) *Power and Fiber Optic Supply.*

- (1) *Independent Power Source Required.* Small cell facilities located on City-owned support structures may not use the same power source providing power for the existing facilities original to the purposes of the support structure. Independent power source must be contained within a separate conduit inside the existing support structure.
- (2) Applicant shall coordinate, establish, maintain and pay for all power and communication connections with private utilities.

§ 52.07 SMALL CELL DESIGN GUIDELINES

- (A) The City Manager shall promulgate additional detailed Small Cell Design Guidelines with objective, technically feasible criteria applied in a non-discriminatory manner that reasonably match the aesthetics and character of the immediate area regarding all of the following, which the City shall consider in reviewing an application:

- (1) The location of any ground-mounted small cell facilities;
- (2) The location of a small cell facility on a wireless support structure;
- (3) The appearance and concealment of small cell facilities, including those relating to materials used for arranging, screening, and landscaping;

- (4) The design and appearance of a wireless support structure including any height requirements adopted in accordance with §52.06.
- (B) The Small Cell Design Guidelines will accord with §52.06 but will provide greater detail, description, and examples of acceptable small cell facilities including visual depictions.
- (C) The Small Cell Design Guidelines shall provide administrative and procedural guidance to applicants, such as a list of minimum application requirements.
- (D) The provisions in this section shall not limit or prohibit the City Manager's discretion to promulgate and make publicly available other information, materials or requirements in addition to, and separate from, the Small Cell Design Guidelines which do not conflict with state or federal law.
- (E) The City Manager shall have authority to update or supplement the Small Cell Design Guidelines to address relevant changes in law, technology, or administrative processes. In the event of any conflict between the Small Cell Design Guidelines and the standards articulated in this chapter of the City of Montgomery Code of Ordinances, the language of this chapter takes precedence over the language of the Small Cell Design Guidelines.

§ 52.08 STANDARD CONDITIONS OF PERMIT APPROVAL

- (A) *Standard conditions of approval.* Permission to site small cell facilities and wireless support structures in the right-of- way shall be conditioned on compliance with the standard conditions of approval provided in §52.08. The Department of Public Works or Community Development may add or modify conditions of approval as necessary or appropriate to protect and promote the public health, safety, and welfare.
- (B) *Small Cell Facility Permit duration.* The City's approval term of an attachment to a wireless support structure shall be for a period of not less than ten years, with presumption of renewal for successive five-year terms, subject to terms providing for early termination or nonrenewal for cause or by mutual agreement and unless otherwise agreed to by both the operator and the City, except for generally applied permitting to safeguard the public health, safety, and welfare. An operator may remove its small cell facilities at any time subject to applicable permit requirements and may stop paying annual charges or fees under §52.08(N).
- (C) *Compliance with all applicable laws.* Permittee shall at all times maintain compliance with all applicable federal, state and local laws, regulations, ordinances, or other rules.
- (D) *Inspections; emergencies.* The City or its designee may inspect small cell facilities and wireless support structures in the right-of-way upon reasonable notice to the

permittee. The permittee shall cooperate with all inspections. The City reserves the right to support, repair, disable, or remove any elements of the facility in emergencies or when the facility threatens imminent harm to persons or property.

- (E) *Relocation or adjustment as requested by City.* If requested by the City, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety, and welfare of the public, an operator shall relocate or adjust its facilities within the right-of-way at no cost to the City, as long as such request similarly binds all users in or on such public way. Such relocation or adjustment shall be completed in accordance with local law.
- (F) *Contact information for responsible parties.* Permittee shall at all times maintain accurate contact information for all parties responsible for the facility, which shall include a phone number, street mailing address, and email address for at least one natural person. All such contact information for responsible parties shall be provided to the Department of Public Works.
- (G) *Indemnification.* Any operator who owns or operates small cell facilities or wireless support structures in the right-of-way shall indemnify, protect, defend, and hold the City and its elected officials, officers, employees, agents, and volunteers harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees to include reasonable attorney fees and costs of defense, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury or death, property damage or other harm for which recovery of damages is sought, to the extent that it is caused by the negligence of the operator who owns or operates small cell facilities and wireless service in the right-of-way, any agent, officer, director, representative, employee, affiliate, or subcontractor of the operator, or their respective officers, agents, employees, directors, or representatives while installing, repairing, or maintaining facilities in the right-of-way.
- (H) *Interference with public safety radio services.* In the event that the City has reason to believe that permittee's radio communications operations are causing interference with the City's radio communications operations, then the permittee shall, at its cost, immediately cooperate with the City to either rule out permittee as the interference source or eliminate the interference. Cooperation with the City may include, but shall not be limited to, temporarily switching the small cell facilities on and off for testing.
- (I) *Adverse impacts on adjacent properties.* Permittee shall undertake all reasonable efforts to avoid undue adverse impacts to adjacent properties and/or uses that may arise from the construction, operation, maintenance, modification, or removal of the small cell facility and/or wireless support structure.
- (J) *Good condition required.* Small cell facilities and support structures shall at all times be kept and maintained in good condition, order, and repair by qualified

maintenance and construction personnel, so that the same shall not menace or endanger the health, safety or welfare of any person or property.

- (K) *Graffiti abatement.* Permittee shall remove any graffiti on the small cell facility at permittee's sole expense.
- (L) *RF exposure compliance.* All facilities must comply with all standards and regulations of the FCC and any other state or federal government agency with the authority to regulate RF exposure standards.
- (M) *Relocation for public improvement projects.* Permittee shall remove and relocate the permitted small cell facility and/or support structure at permittee's sole expense to accommodate construction of a public improvement project by the City.
- (N) *Removal of small cell facilities if use discontinued or abandoned.*
 - (1) In the event that the use of a small cell facility is discontinued, the owner shall submit an Eligible Facilities Request as required by §52.04(F), as written notice to the City of its intent to discontinue use and the date when the use shall be discontinued. If a small cell wireless facility is not removed within 365 days of discontinued use, the small cell facility shall be considered abandoned and the City may remove it at the owner's expense.
 - (2) In the event that a wireless support structure is discontinued, the owner shall submit a Right-of-Way Permit, as written notice to the City of its intent to remove the wireless support structure from the right-of-way. If a wireless support structure is not removed within 365 days of discontinued use, the wireless support structure shall be considered abandoned and the City may remove it at the owner's expense.
 - (3) Small cell facilities and wireless support structures determined by the City to be abandoned without application notice from the owner may be removed by the City at the owner's expense to ensure the public health, safety, and welfare.

§ 52.09 SAFETY REQUIREMENTS

- (A) *Prevention of failures and accidents.* Any person who owns a small cell wireless facility sited in the right-of-way shall at all times employ ordinary and reasonable care and install and maintain in use nothing less than the best available technology for preventing failures and accidents which are likely to cause damage, injury, or nuisance to the public.
- (B) *Compliance with fire safety and FCC regulations.* Small cell facilities, wires, cables, fixtures, and other equipment shall be installed and maintained in substantial compliance with the requirements of the National Electric Code, all

FCC, state, and local regulations, and in such manner that will not interfere with the use of other property.

- (C) *Surety bond or equivalent financial tool for cost of removal.* All owners must procure and provide to the City a bond, or must provide proof of an equivalent financial mechanism, to ensure compliance with all provisions of this section. The bond or equivalent financial method must specifically cover the cost of removal of unused or abandoned small cell facilities or damage to City property caused by an operator or its agent of each small cell facility which the owner installs in the right-of-way in case the City has to remove or pay for removal of the wireless facility. Two acceptable alternatives to a bond include a funds set-aside and a letter of credit.

§ 52.10 RECOVERY OF COSTS

- (A) *Application processing fee.* For processing an application for consent, the City may charge a fee for each small cell facility and wireless support structure requested as prescribed under R.C. § 4939.031 and as listed on the associated application forms. The City may adjust this fee ten per cent every five years, rounded to the nearest five dollars.
- (B) *Tax liabilities and assessments not applicable.* Placement of small cell facilities in the right-of-way or attachment of small cell facilities to a wireless support structure and any fees associated therewith shall not subject a municipal corporation to any state or local tax liabilities or assessments.

§ 52.11 SEVERABILITY

The provisions of any part of this chapter are severable. If any provision or subsection, or the application of any provision or subsection to any person or circumstances is held invalid, the remaining provisions, subsection, and applications of such ordinance to other persons or circumstances shall not be made invalid as well. It is declared to be the intent of this section that the remaining provisions would have been adopted had such invalid provisions not been included in this chapter when originally adopted by Council.

§ 52.99 PENALTY

- (A) In addition to any other penalties set forth in this chapter, any person or permittee violating any section in this chapter shall be guilty of a minor misdemeanor. Each day the violation continues shall be deemed a separate offense.
- (B) Nothing herein shall prevent the City from taking any other lawful action, including civil actions at law or equity, including temporary restraining orders, preliminary injunctions and permanent injunctions, as is necessary to prevent or remedy any violations.

SECTION 2. All Ordinances or parts of Ordinances, including all or any part of the current Code of Ordinances, inconsistent herewith is hereby superseded and repealed.

SECTION 3. This Ordinance shall take effect the earliest opportunity as allowable by law.

PASSED: October 3 2018

ATTEST: Connie M. Gaylor
Connie M. Gaylor, Clerk of Council

Christopher P. Dobrozsi
Christopher P. Dobrozsi, Mayor

APPROVED AS TO FORM:

Terrence M. Donnellon
Terrence M. Donnellon, Law Director