



CITY ATTORNEY

DATE: June 18, 2018
FROM: Jannelle Combs, City Attorney
ITEM: Ordinance 6343 regarding Wireless Telecommunication Facilities

REQUEST

Consider introduction and call for a public hearing on Ordinance 6343 to add City Ordinance 10-05.2-01 regarding Wireless Telecommunication Facilities in the Public Right-Of-Way

Please place this item on the June 26, 2018 City Commission meeting.

BACKGROUND INFORMATION

The City was approached by Bismarck MSA Limited Partnership d/b/a Verizon Wireless to obtain a license to operate small cells on the public right-of-way. Small cells are low-powered radio access base stations that have a smaller coverage range but can alleviate network congestion for cellular providers by transmitting data via fiber optic communication lines fed to the equipment. While working on reaching an agreement for the Master Attachment Agreement, the City has been working to draft the attached ordinance for this and future requests from telecommunication providers. The ordinance allows for attachment to City infrastructure through a review and approval process on a site by site basis. This ordinance needs to be considered by the Commission prior to taking action on the Master Attachment Agreement. The wireless facility guidelines are also attached as a companion to the ordinance that would be approved by commission concurrent with the ordinance with future revisions to these guidelines approved by commission to reflect changes in industry trends in the future.

RECOMMENDED CITY COMMISSION ACTION

First reading and introduction of Ordinance 6343 and call for a public hearing.

STAFF CONTACT INFORMATION

Jannelle Combs, City Attorney

CITY OF BISMARCK
Ordinance No. 6343

<i>First Reading</i>	_____
<i>Second Reading</i>	_____
<i>Final Passage and Adoption</i>	_____
<i>Publication Date</i>	_____

AN ORDINANCE TO ENACT SECTIONS 10-05.2-01, 10-05.2-02, 10-05.2-03, 10-05.2-04, 10-05.2-05, 10-05.2-06, 10-05.2-07, 10-05.2-08, 10-05.2-09 AND 10-05.2-10 OF THE BISMARCK CODE OF ORDINANCES (REV.) RELATING TO WIRELESS TELECOMMUNICATION FACILITIES IN THE PUBLIC RIGHT-OF-WAY.

BE IT ORDAINED BY THE BOARD OF CITY COMMISSIONERS OF THE CITY OF BISMARCK, NORTH DAKOTA:

Section 1. Enacted. Section 10-05.2-01 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to Purpose is hereby enacted to read as follows:

10-05.2-01. Purpose. To ensure that 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, the city desires to accommodate the deployment of wireless communications facilities and services within the public right-of-way. The city also desires to minimize potential negative impacts of wireless facility placement within the public right-of-way. This article applies only to installation in the public right-of-way. All other installations are governed by Title 4 and Title 14 of this Ordinance, and all other applicable laws and regulations. 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.

Nothing in this chapter affects the city's right to regulate users of the public right-of-way in a competitively neutral and nondiscriminatory manner. 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.

Section 2. Enacted. Section 10-05.2-02 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to Definitions is hereby enacted to read as follows:

10-05.2-02. Definitions. For purposes of this chapter, the following definitions apply. References to "sections" are, unless otherwise specified, references to sections in this article.

"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.

"Applicant" means any person who applies for a permit under this article.

"Attachment" includes any wireless communication facility affixed to, contained in, or placed on or in a structure within the city's public right-of-way.

"City" means the city of Bismarck.

"City Engineer" means the Bismarck City Engineer or his or her designee.

"City-Owned Structure" means an existing structure owned by the city that is located in the city's public right-of-way. It does not mean State, County or other 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 or on right-of-way which the city does not control.

"Collocation" means the mounting or installation of new wireless communication facilities on or within an existing wireless support structure.

"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 on the same side of the roadway and within fifty (50) feet of such wireless facility or wireless support structure unless a different distance is specified by the city engineer; (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.

"EMF" means electromagnetic frequency.

"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.

"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.

"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 article. An existing structure includes a replacement of an existing structure that is proposed to accommodate the collocation of a wireless communication facility, as long as the replacement structure is substantially similar in appearance to the existing structure and is no taller than the existing height of the structure to be replaced.

"Ground Mounted equipment" means any equipment that is affixed to the ground and extends above the natural grade.

"Guidelines" or "Wireless 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 Facilities Guidelines shall be consistent with this article.

"Interference" means any material and harmful impairment, physically or electronically of the operation, views, signals or functions of city property or third party property.

"Laws" means any and all applicable federal and state laws and applicable local ordinances, resolutions, regulations, administrative orders or other legal requirements.

"Land Development Code" means the Titles 4 and 14 of the Ordinances for the City of Bismarck.

"MAA" means a master attachment agreement between the city and a lessee that defines the general terms and conditions which govern their relationship with respect to particular sites at which the city agrees to permit lessee to install, maintain, and operate communications equipment on existing or new city owned infrastructure.

"Installation Permit Holder" means any person that has obtained permission through the issuance of an installation permit from the city under this article to locate, install or place wireless facilities in the public right-of-way.

"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.

"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.

"RF" means radio frequency.

"Site" or "Premises" 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.

"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 and accessory equipment. A wireless communications facility does not include an underlying wireless support structure.

"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.

Section 3. Enacted. Section 10-05.2-03 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to Locating Wireless Communication Facilities is hereby enacted to read as follows:

10-05.2-03. Locating Wireless Communication Facilities. The location of any new wireless communication facility in the public right-of-way shall be, when possible, on existing structures, such as utility poles through agreement with the pole owner, or street lights, or the replacement of an existing 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 Section 10-05-08 and the applicant must have a franchise with the city for the use of the public right-of-way, or MAA, or an encroachment agreement for that specific location and an installation permit.

Section 4. Enacted. Section 10-05.2-04 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to Installation Permit Required is hereby enacted to read as follows:

10-05.2-04. Installation Permit Required.

a. No person may construct, install or modify a wireless communication facility within the public right-of-way without having first done one of the following:

1. Having entered into an MAA with the city, if the wireless communication facility will be installed on city owned existing or new infrastructure.

2. Having obtained a franchise from the city allowing use of the public right-of-way.

3. Having obtained an encroachment agreement allowing the specific occupation of the public right-of-way.

4. Having entered into an agreement to co-locate with an entity with infrastructure in the right-of-way pursuant to a current franchise.

In each case, the person must also obtain an installation permit from the city engineer as set forth in this chapter.

b. Installation Permit Issuance. Before a Site License, if applicable, is agreed upon and an installation permit is issued, a written application for each site must be filed with the city engineer containing such information as may be required by the city engineer. The application shall include the following:

1. Information required to be provided by a registrant for public right-of-way use and occupancy under this chapter.

2. 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.

3. 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.

4. A detailed statement of the location of all proposed facilities for which the permit is sought.

5. A construction plan, if applicable.

6. Other information required by this article.

c. Fees. The city may require payment of a nonrefundable installation permit application fee at the time an installation permit application is submitted, as approved by the Board of City Commission and adopted in the Wireless Facilities Guidelines, which shall not exceed \$250. Such fees 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 an installation 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 applicants for installation permits and a fee for their use of the public right-of-way to the extent that such charges are allowed under state law. All such fees shall be described in the Wireless Facility Guidelines and may be in addition to any fee charged for or cost associated with attachment to city-owned structures.

d. Where the city 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, in an amount not to exceed \$200 per site, shall be reimbursed to the city by the applicant 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.

e. Time 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. Specific timeframes shall be described in Wireless Facility Guidelines.

f. Nondiscrimination. The city shall evaluate, issue, and deny permit applications under this article on a competitively neutral basis, with no unreasonable discrimination among similarly situated applicants and installations.

g. The city engineer may impose additional reasonable conditions on any installation permit issued under this article relating to time, place and manner.

h. The city shall not impose environmental testing, sampling, or monitoring requirements or other compliance measures for RF emissions on wireless communication facilities that are categorically excluded under the FCC's rules for radiofrequency remissions pursuant to 4 CFR 1.1307(b)(1).

i. Scope and Duration.

1. Any installation 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.

2. The installation 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.

3. Within sixty (60) days following completion of facility installation as described in the permit application, the permit holder shall submit as-built diagrams in digital format and digital photographs of the Site to the city engineer.

4. MAAs issued under this article are valid for a period of fifteen (15) years. To extend the MAA 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.

j. Conditional Upon Related Agreements. The city engineer may cause a permit under this article to be made temporary or conditional upon the execution of a finalized permit application or attachment agreement further addressing the proposed installation.

k. Proximity to Other Facilities. The city reserves the right to deny, but is not obligated to deny, any siting permit application under this article that proposes to install a new wireless support structure within three hundred (300) feet of any other existing 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.

l. Denial of Permit. Any denial of permit shall be made in writing, supported by substantial evidence that the proposed installation would be inconsistent with one or more of the provisions of this Code of Ordinances or with the health, safety and welfare of the city.

Section 5. Enacted. Section 10-05.2-05 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to General Conditions is hereby enacted to read as follows:

10-05.2-05. General Conditions. The city engineer may approve a permit for the installation of a wireless communication facility in the public right-of-way, provided the applicant certifies compliance with the following general conditions, and subject to other use-specific conditions and other requirements set forth in this article and in any Wireless Application 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. For installations in areas zoned Downtown Core or Downtown Fringe, all designs of wireless communication facilities must comply with

zoning requirements, to be approved by the Downtown Design Review Committee.

2. The height of any wireless communication facility shall be comparable to nearby structures of similar type and not more than 50 feet above normal grade unless otherwise approved by the city engineer in the installation permit.

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.

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. Wireless communication facilities in historic areas shall comply with any special requirements applicable to such areas, and may be subject to additional city review.

b. Minimizing Impacts on Adjacent Property Owners.

1. A permit holder must design and install a wireless communication facility so as to minimize any impact on the adjacent property owners, and must actively mitigate any unreasonably 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 unreasonable and 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.

Section 6. Enacted. Section 10-05.2-06 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to Wireless Communications Facilities Upon Existing Structures is hereby enacted to read as follows:

10-05.2-06. Wireless Communications Facilities Upon Existing Structures. In addition to the general conditions described in section 10-05.2-06 and any specification contained in the Wireless Facility Guidelines, any wireless communication facility for which an installation permit is requested under this chapter shall meet the following requirements:

a. The wireless communication facility shall not increase total existing height, including the wireless support structure, by more than 10% over other public utility 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.

b. The wireless communication facility shall not impair nighttime visibility in the area that result from light emanating from a utility structure and shall not otherwise interfere with the original purpose of an existing structure.

c. Electrical power. Unless otherwise provided in the applicable Site License, franchise, or encroachment agreement the acquisition of electrical power shall be the sole responsibility of the applicant.

Section 7. Enacted. Section 10-05.2-07 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to Attachments to City-Owned Structures is hereby enacted to read as follows:

10-05.2-07. Attachments to City-Owned Structures. In addition to the requirements set forth in this chapter and the Wireless Facility Guidelines, the following conditions will apply to a wireless communication facility attached to a city-owned structure:

a. The city engineer shall require an applicant for a wireless communication facility attachment to a city-owned structure to execute a separate MAA with the city addressing such attachment.

b. The management of attachments to city-owned structures is governed by the MAA between the city and the applicant. The MAA does not waive any zoning, building code or other public right-of-way management requirements that may also apply.

c. The city may require payment of rental fee, permit fee, application fee or other compensation, as set forth in the Wireless Facility Guidelines.

d. 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.

e. Training. At the request of the city, the permit holder shall host on-site training for city maintenance staff. The training will be offered semiannually or as otherwise agreed between the parties. The training shall include occupational safety, personal protection, proximity limits, emergency procedures and contact information.

Section 8. Enacted. Section 10-05.2-08 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to Replacement of City-Owned Structures or Addition of City-Owned Structures is hereby enacted to read as follows:

10-05.2-08. Replacement of City-Owned Structures or Addition of City-Owned Structures. In addition to the general conditions described in this chapter and the Wireless Facility Guidelines, the proposed replacement of an existing city-owned structure or placement of a new city owned structure shall be subject to the following requirements.

a. The replacement of a city-owned structure or the addition of a new city owned structure shall be entirely at the reasonable discretion of the city engineer and at a minimum, must be able to co-locate at least one additional similar facility.

b. Before installing a new structure in the right-of-way or replacing an existing structure, the applicant must demonstrate the following, to the satisfaction of the city engineer:

1. 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.

2. 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.

3. In order to place a new city owned 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 facility serves a public purpose other than wireless communication, and that placement of the facility outside of the right-of-way on private property would be unduly burdensome.

c. Ownership. A replacement structure or a new structure under this section shall be dedicated to and owned by the city upon completion, to the satisfaction of the city. Unless otherwise provided in the applicable MAA, Site License, franchise, or encroachment agreement, the permit holder shall provide city a Bill of Sale, free and clear of all liens and encumbrances.

d. Unless otherwise provided in the applicable Site License, franchise, or encroachment agreement, acquisition and use of electrical power to serve a wireless communication facility on a replacement wireless support structure or facility shall be the sole responsibility of the permit holder.

e. Stocked Poles. To enable prompt replacement in the event of a knockdown or structural compromise, a permit holder shall provide the city with an inventory of poles to be kept by the city. The inventory shall consist of, for each type/style of pole, one pole substantially identical to the

initial city owned replacement pole. For each set of five additional replacement poles of any particular type/style, an additional pole of that type/style.

f. facilities placed in the right-of-way shall be maintained in accordance with the terms of this article and as provided for in a separate agreement.

g. 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.

Section 9. Enacted. Section 10-05.2-09 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to Equipment is hereby enacted to read as follows:

10-05.2-09. Equipment.

a. Equipment other than ground-mounted equipment shall be mounted in one of the manners described below, or as prescribed by the city engineer.

1. Equipment shall be mounted in a base shroud of approved design. The base shroud should be coated or painted an approved color to match the pole.

2. Equipment shall be mounted directly to the pole a minimum of twelve (12) feet above the existing grade and be coated or painted with an approved color to match the pole.

3. Equipment shall be mounted to the pole in an equipment box a minimum of twelve (12) feet above the existing grade. The equipment box shall be coated or painted an approved color to match the pole.

4. Equipment shall be attached to the wireless support structure in a manner as approved by the city engineer.

b. Ground-Mounted Equipment.

1. A permit for a wireless communication facility that involves ground-mounted equipment will be issued if the city engineer finds the following:

a. The ground mounted equipment will not disrupt traffic or pedestrian circulation;

b. Space exists in the public right-of-way to accommodate the ground mounted equipment;

c. The ground mounted equipment will not create a safety hazard;

d. The location of the ground mounted equipment minimizes impacts on adjacent property;

e. In any historical area, that the ground mounted equipment does not detrimentally affect the historical nature of the area, to the satisfaction of the city engineer;

f. 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

g. The ground mounted equipment will not adversely impact the health, safety or welfare of the community.

2. Underground equipment. The city engineer may require, at his or her discretion, that utilities be placed underground, and may prohibit the installation of ground mounted equipment unless technically infeasible or otherwise cost prohibitive.

c. Any excavation required for installation of ground-mounted or underground equipment shall be performed in accordance with chapter 10-04.

Section 10. Enacted. Section 10-10.2-10 of the City of Bismarck Code of Ordinances (1986 Rev.) relating to Attachment to City-Owned Buildings is hereby enacted to read as follows:

10-05.2-10. Attachment to City-Owned Buildings. The city may permit the attachment of a facility to a city owned building upon the recommendation of the city engineer and the approval of a lease by the city commission. An installation permit shall be required for such installations.

Section 11. Severability. If any section, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

Section 12. Effective Date. This ordinance shall take effect following final passage, adoption and publication.