

**CITY OF FORNEY, TEXAS**

**ORDINANCE NO. 19- \_\_\_\_\_**

**AN ORDINANCE OF THE CITY OF FORNEY, TEXAS, AMENDING CHAPTER 3, ARTICLE 3.08 OF THE CODE OF ORDINANCES OF THE CITY OF FORNEY, TEXAS, BY ADDING DIVISION 4, “NETWORK NODES AND NODE SUPPORT POLES,” TO REGULATE THE PHYSICAL USE, OCCUPANCY AND MAINTENANCE OF CITY RIGHTS-OF-WAY BY WIRELESS NETWORK PROVIDERS; PROVIDING A PENALTY CLAUSE; PROVIDING SAVINGS, REPEALING AND SEVERABILITY CLAUSES; AND PROVIDING AN EFFECTIVE DATE.**

**WHEREAS**, the City of Forney, Texas is a home rule city acting under its charter adopted by the electorate pursuant to Article XI, Section 5 of the Texas Constitution and Chapter 9 of the Texas Local Government Code; and

**WHEREAS**, Chapter 284 of the Texas Local Government Code (the “Code”) allows certain wireless network providers to install in the City’s public rights-of-way their wireless facilities, described and defined in Section 284.002 of the Code as “Micro Network Nodes,” “Network Nodes,” and “Node Support Poles;” and

**WHEREAS**, as expressly allowed by Section 284.108 of the Code and pursuant to its police power authority reserved in Sec. 284.301 of the Code, the City has enacted a Wireless Services Design Manual (the “Design Manual”) in order to meet its fiduciary duty to the citizens of the City, and to give assistance and guidance to wireless telecommunications network providers to assist such companies in the timely, efficient, safe and aesthetically pleasing installation of technologically competitive equipment; and

**WHEREAS**, the City Council of the City of Forney (the “City Council”) desires to regulate the installation of Network Nodes and Network Support Poles pursuant to chapter 284 of the Code in a way that is fair, reasonable and nondiscriminatory and deems it necessary to amend its existing comprehensive regulations for managing the public rights-of-way to conform to state law and regulate the installation and maintenance of Network Nodes and Network Support Poles in a manner consistent with and in conformance with state law; and

**WHEREAS**, the City Council hereby finds and determines that the regulations and amendments set forth herein are in the best interests of the public and are adopted in furtherance of the public health, safety, morals and general welfare.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FORNEY, TEXAS, THAT:**

**Section 1. FINDINGS INCORPORATED**

All of the above premises are found to be true and correct factual and legislative determinations of the City of Forney and are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

## **Section 2. AMENDMENT OF CODE OF ORDINANCES**

From and after the effective date of this Ordinance, Chapter 3, Article 3.08, of the Code of Ordinances of the City of Forney, Texas, is hereby amended to add Division 4, which shall read in its entirety as follows:

### **Division 4. Network Nodes and Node Support Poles**

#### **Sec. 3.08.100 Generally**

This division shall be construed in accordance with Chapter 284 of the Texas Local Government Code to the extent not in conflict with the Constitution and laws of the United States or the State of Texas. To the extent of any conflict between this division and the remainder of Chapter 3 of this code, this division controls.

#### **Sec. 3.08.101 Definitions**

For purposes of this division, the definitions found in the City Wireless Services Design Manual (the "Design Manual") are hereby incorporated into this division and shall apply unless the context clearly indicates or requires a different meaning. The following definitions as found in the Design Manual are specifically applicable to this division:

*Applicable codes.* Applicable codes means:

- (A) the City uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization; and
- (B) local amendments to those codes to the extent not inconsistent with Chapter 284.

*Chapter 284.* Chapter 284 of the Texas Local Government Code.

*Code.* The Texas Local Government Code.

*Collocate and collocation.* The installation, mounting, maintenance, modification, operation, or replacement of Network Nodes in a public right-of-way on or adjacent to a pole.

*Decorative pole.* A streetlight pole specially designed and placed for aesthetic purposes and on which no appurtenances or attachments, other than specially designed informational or directional signage or temporary holiday or special event attachments, have been placed or are permitted to be placed according to nondiscriminatory City codes and ordinances.

*Design District.* An area that is zoned, or otherwise designated by municipal code, and for which the City maintains and enforces unique design and aesthetic standards on a uniform and nondiscriminatory basis and shall include, but is not limited to, the term "Overlay District" as defined in the City's zoning code.

*Easement.* Any public easement or other compatible use created by dedication, or by other means, to the City for public utility purposes or any other purpose whatsoever. An Easement shall include a private easement used for the provision of utilities.

Federal Communications Commission or FCC. The Federal Administrative Agency, or lawful successor, authorized to oversee cable television and other multi-channel regulation on a national level.

Highway right-of-way. The right-of-way adjacent to a state or federal highway.

Historic district. An area that is zoned or otherwise designated as a historic district under municipal, state, or federal law.

Local. The geographic boundaries of the City.

Location. The City-approved and lawfully permitted location for the Network Node.

Micro network node. A Network Node that is not larger in dimension than 24 inches in length, 15 inches in width, and 12 inches in height, and that has an exterior antenna, if any, not longer than 11 inches.

Municipal park. An area that is zoned or otherwise designated by the City as a public park for the purpose of recreational activity.

Network Node. Equipment at a fixed location that enables wireless communications between user equipment and a communications network. The term:

(A) includes:

- (i) equipment associated with wireless communications;
- (ii) a radio transceiver, an antenna, a battery-only backup power supply, and comparable equipment, regardless of technological configuration; and
- (iii) coaxial or fiber-optic cable that is immediately adjacent to and directly associated with a particular collocation; and

(B) does not include:

- (i) an electric generator;
- (ii) a pole; or
- (iii) a macro tower

Network Provider.

(A) a wireless service provider; or

(B) a person that does not provide wireless services and that is not an electric utility but builds or installs on behalf of a wireless service provider:

- (i) Network Nodes; or
- (ii) Node Support Poles or any other structure that supports or is capable of supporting a network node.

Node support pole. A pole installed by a network provider for the primary purpose of supporting a Network Node.

Permit. A written authorization for the use of the public right-of-way or collocation on the service pole required from the City before a network provider may perform an action or initiate, continue, or complete a project over which the municipality has police power authority.

Pole. A service pole, City-owned utility pole, node support pole, or utility pole.

Private easement. An easement or other real property right that is only for the benefit of the grantor and grantee and their successors and assigns.

Provider. This term shall have the same meaning as “Network Provider.”

Public right-of-way. The area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the City has an interest. The term does not include:

- (A) a private easement; or
- (B) the airwaves above a public right-of-way with regard to wireless telecommunications.

Service pole. A pole, other than a City-owned utility pole, owned or operated by the City and located in a public right-of-way, including:

- (A) a pole that supports traffic control functions;
- (B) a structure for signage;
- (C) a pole that supports lighting, other than a decorative pole; and
- (D) a pole or similar structure owned or operated by a municipality and supporting only network nodes.

Street. The paved portion of the right-of-way used for vehicular travel, being the area between the inside of the curb to the inside of the opposite curb, or the area between the two parallel edges of the paved roadway for vehicular travel where there is no curb. A “Street” is generally part of, but smaller in width than the width of the entire right-of-way, while a right-of-way may include sidewalks and utility easements. A “Street” does not include the curb or the sidewalk, if either are present at the time of a permit application or if added later.

Traffic Signal. Any device, whether manually, electrically, or mechanically operated by which traffic is alternately directed to stop and to proceed.

Transport facility. Each transmission path physically with a public right-of-way, extending with a physical line from a Network Node directly to the network, for the purpose of providing backhaul for network nodes.

User. A person or organization which conducts a business over facilities occupying the whole or a part of a public street or right-of-way, depending on the context.

Utility pole. A pole that provides:

- (A) electric distribution with a voltage rating of not more than 34.5 kilovolts; or
- (B) services of a telecommunications provider, as defined by Chapter 284, Section 51.005, Utilities Code.

Wireless service. Any service, using licensed or unlicensed wireless spectrum, including the use of Wi-Fi, whether at a fixed location or mobile, provided to the public using a Network Node.

Wireless service provider. A person that provides wireless services to the public.

Wireless facilities. This term shall mean “Micro Network Nodes,” “Network Nodes,” and “Node Support Poles” as defined in Texas Local Government Code, Chapter 284.

### **Sec. 3.08.102 Use and Occupancy of Public Rights-of-way**

Pursuant to this division and subject to the Design Manual and the Code, a wireless network provider has the nonexclusive right to use and occupy the public rights-of-way in the City for the purpose of constructing, maintaining, and operating its facilities used in the provision of Wireless facilities. The terms of this division shall apply to all wireless network providers’ facilities used, in whole or part, in the provision of wireless services throughout the City, including any annexed areas upon the effective date of annexation or the date the City provides the company written notice, whichever date occurs later.

### **Sec. 3.08.103 Compliance with this division, the Design Manual, applicable codes, and Chapter 284**

All wireless network providers shall comply with the terms of this right-of-way management ordinance, City applicable codes, and the terms and conditions of the City’s Design Manual.

### **Sec. 3.08.104 General Construction and Maintenance Requirements**

A network provider shall construct and maintain Network Nodes and Network Support Poles described in the Code in a manner that does not:

- (A) Obstruct, impede, or hinder the usual travel or public safety on a public right-of-way;
- (B) Obstruct the legal use of a public right-of-way by other utility providers;
- (C) Violate the nondiscriminatory applicable codes;
- (D) Violate or conflict with the City’s publicly disclosed public right-of-way design specifications;
- or
- (E) Violate the federal Americans with Disabilities Act of 1990 (ADA).

### **Sec. 3.08.105 Permit Applications**

(A) Except as otherwise provided in Chapter 284 of the Code, a network provider shall obtain a permit or permits from the City to install a Network Node, Node Support Pole, or Transport Facility in a City public right-of-way.

(B) As required by Chapter 284 of the Code, the City shall not require a network provider to perform services for the City for which the permit is sought.

(C) A network provider that wants to install or collocate multiple Network Nodes inside the municipal limits of the City is entitled to file a consolidated permit application with the City for not more than 30 Network Nodes and upon payment of the applicable fee(s), receive a permit or permits for the installation or collocation of those Network Nodes.

(D) The network provider shall provide the following information in its permit applications:

- (1) Applicable construction and engineering drawings and information to confirm that the applicant will comply with the City’s Design Manual and applicable codes;
- (2) Any additional information reasonably related to the network provider’s use of the public rights-of-way to ensure compliance with the Design Manual and this division.

- (3) A certificate that the Network Node(s) complies with the applicable regulations of the Federal Communications Commission; and certification that the proposed Network Node(s) will be placed into active commercial service by or for the network provider not later than the 60<sup>th</sup> day after the date of construction and final testing of each Network Node is completed.
- (4) A certificate of insurance that provides that the Network Provider and its contractor has at least \$1,000,000.00 in general liability coverage.
- (5) Geographic Information System (GIS) data for the location of each proposed wireless facility and/or new node support pole in the form required by the City.

(E) Exception: As provided in Section 284.157 of the Code, a network provider is not required to apply, obtain a permit, or pay a rate to the City for:

- (1) Routine maintenance that does not require excavation or closing of sidewalks or vehicular lanes in a public right-of-way;
- (2) Replacing or upgrading a Network Node or Network Pole with a node or pole that is substantially similar in size or smaller and that does not require excavation or closing of sidewalks or vehicular lanes in a public right-of-way; or
- (3) The installation, placement, maintenance, operation, or replacement of Micro Network Nodes that are strung on cables between existing poles or Node Support Poles in compliance with the National Electrical Safety Code;
- (4) The network provider or its contractors shall notify the City at least 24 hours in advance of work described in this subsection (E).

### **Sec. 3.08.106 Installation in Historic Districts or Design Districts**

A network provider must obtain advance written consent from the City Council before collocating new Network Nodes or installing new Node Support Poles in an area of the City that has been zoned or otherwise designated as a historic district or as a design district if the district has decorative poles. The network provider shall be required to comply with the General Aesthetic Requirements described in the City's Design Manual. The City has the authority to designate new historic districts and design districts at a future date.

### **Sec. 3.08.107 Installation in Municipal Parks and Residential Areas**

A network provider may not install a new Node Support Pole in a public right-of-way without the City Council's discretionary, nondiscriminatory and written consent if the public right-of-way:

- (1) Is a municipal park; or
- (2) Is adjacent to a street or thoroughfare that is:
  - i. Not more than 50 feet wide; and
  - ii. Adjacent to single-family residential lots or other multifamily residences or undeveloped land that is designated for residential use by zoning or deed restrictions.
- (3) In addition to the above, a network provider installing a Network Node or Node Support Pole in a public right-of-way shall comply with private deed restrictions and other private restrictions in the area that apply to those facilities.
- (4) The network provider shall be further required to comply with guidelines set out in the City's Design Manual.

### **Sec. 3.08.108 Municipal Review Process by the City**

(A) **Determination of Application Completeness:** The City shall determine whether the permit application is complete and notify the applicant of that determination:

- (1) *For Network Nodes and Node Support Poles:* no later than 30 days after the date the City receives the permit application.
- (2) *For a Transport Facility:* no later than 10 days after the date the City receives the permit application.

(B) **Approval or Denial of Application:** The City shall approve or deny a completed application after the date it is submitted to the City:

- (1) *For Network Nodes:* No later than 60 days after the date the City receives the complete application.
- (2) *For Network Support Poles:* No later than 150 days after the date the City receives the complete application.
- (3) *For Transport Facilities:* No later than 21 days after the City receives the complete application.

(C) **Basis for Denial of Application:** If an application is denied by the City, it shall document the basis for the denial, including the specific applicable City code provisions or other City rules, regulations, or other law on which the denial is based. The documentation for the denial must be sent by electronic mail to the applicant on or before the date the City denies the application.

(D) **Resubmission of Denied Application:** The applicant may cure the deficiencies identified in the denial application.

- (1) The applicant has 30 days from the date the City denies the completed application to cure the deficiencies identified in the denial documentation without paying an additional application fee, other than any fee for actual costs incurred by the City.
- (2) The City shall approve or deny the revised completed application after a denial not later than the 90<sup>th</sup> day after the City receives the revised completed application. The City's review shall be limited to the deficiencies cited in the denial documentation.

(E) **Nondiscriminatory Review:** Each completed application shall be processed by the City on a nondiscriminatory basis.

### **Sec. 3.08.109 Time of Installation**

A network provider shall begin installation for which a permit is granted not later than six months after final approval of the application and shall diligently pursue installation to completion. The City Mayor may in his/her sole discretion grant reasonable extensions of time as requested by the network provider.

### **Sec. 3.08.110 Applicable Fees and Rental Rates to the City**

(A) As completion for the network provider's use and occupancy of the City public rights-of-way, the network provider shall pay application fees and annual public right-of-way rental rates as set forth below, which shall be in lieu of any lawful tax, license, charge, right-of-way permit, use,

construction, street cut or inspection fee; or other right-of-way related charge or fee, whether charged to the network provider or its contractor(s) within the City, except the usual general ad valorem taxes, special assessments and sales tax levied in accordance with state law and equally applicable to all general businesses in the City.

**(B) Network Nodes:**

- (1) **Application Fee:** The application fee shall be \$500.00 for each Network Node for up to but not more than 5 Network Nodes and \$250.00 for each additional Network Node on a permit.
- (2) **Annual Public Right-of-Way Rate Fee:** The annual public right-of-way rate shall be \$250.00 per Network Node installed in the City public rights-of-way.
- (3) **Public Rights-of-Way Rate Adjustment:** As provided in Section 284.054 of the Code, the City may adjust the amount of the annual public right-of-way rate not more than annually by an amount equal to one-half the annual charge, if any, in the Consumer Price Index (CPI). The City shall provide written notice to each network provider of the new rate; and the rate shall apply to the first payment due to the City on or after the 60<sup>th</sup> day following the written notice.

**(C) Node Support Poles:**

- (1) The application fee for each Node Support Pole shall be \$1,000.00.

**(D) Transfer Facilities:**

- (1) The application fee for each Transfer Facility shall be \$500.00.
- (2) The annual Transfer Facility rental rate shall be \$28.00 monthly for each Network Node site located in a public right-of-way. However, no rate is required if the network provider is already paying the City an amount equal to or greater than the amount of other City right-of-way fees for access lines under Chapter 283 of the Code or cable franchise fees under Chapter 66 of the Texas Utility Code.

**(E) Micro Network Nodes:**

- (1) No application fee is required for a Micro Network Node if the installation is attached on lines between poles or Node Support Poles.

**(F) Collocation of Network Nodes on Service Poles**

- (1) Subject to the City's Pole Service Agreement, the collection of Network Nodes on City service poles shall be at a rate of \$20.00 per year per service pole.

**(G) City-Owned Municipal Utility Poles:**

- (1) A network provider shall pay an annual pole attachment rate for the collection of a Network Node supported by or installed on a City-owned utility pole based upon the pole attachment rate consistent with Section 54.024 of the Texas Utilities Code, applied on a per-foot basis.



(H) The City shall not seek or accept in-kind services in lieu of or as additional payment or consideration from any network provider for use of the public rights-of-way for wireless facilities or transport facilities for network nodes.

**Sec. 3.08.111 Indemnity**

As provided in Section 284.302 of the Code, a wireless Network Provider shall indemnify, defend, and hold the City harmless from and against all liability, damages, cost, and expense, including reasonable attorney's fees, arising from injury to a person or property proximately caused by the negligent act or omission of the Network Provider. The City shall promptly notify the Network Provider of any claims, demands, or actions ("claims") covered by this indemnity after which the Network Provider shall defend the claims. The Network Provider shall have the right to defend and compromise the claims. The City shall cooperate in the defense of the claims. The foregoing indemnity obligations shall not apply to claims arising solely from the negligence of the City; however, they shall apply in the case of all claims which arise from the joint negligence of the Network Provider and the City; provided that in such cases, the amount of the claims for which the City shall be entitled to indemnification shall be limited to that portion attributable to the Network Provider. Nothing in this section shall be construed as waiving any governmental immunity available to the City under state law or waiving any defenses of the parties under state law.

**Sec. 3.08.112 Effect on other Utilities and Telecommunication Providers**

Nothing in this Ordinance shall govern attachment of Network Nodes on poles and other structures owned or operated by investor-owned electric utilities, electric cooperatives, telephone cooperatives, or telecommunication providers.

**Sec. 3.08.113 - 3.08.125 Reserved**

**Section 3. SEVERABILITY CLAUSE**

It is hereby declared to be the intention of the City Council that the phrases, clauses, sentences, paragraphs and sections of this Ordinance are severable, and if any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Ordinance, since the same would have been enacted by the City Council without the incorporation of this Ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section.

**Section 4. REPEALER CLAUSE**

Any provision of any prior ordinance of the City, whether codified or uncodified, which is in conflict with any provision of this Ordinance, is hereby repealed to the extent of the conflict, but all other provisions of the ordinances of the City, whether codified or uncodified, which are not in conflict with the provisions of this Ordinance shall remain in full force and effect.

**Section 5. PENALTY CLAUSE**

Any person, firm, association of persons, corporation, or other organization violating any provision of this ordinance shall be deemed to be guilty of a misdemeanor and, upon conviction,

shall be fined an amount not to exceed \$2,000.00. Each day that a violation continues shall be deemed a separate offense.

**Section 6. EFFECTIVE DATE**

This Ordinance shall become effective immediately upon its passage and publication as required by law.

**PASSED, APPROVED AND ADOPTED** by the City Council of the City of Forney, Texas, on this the \_\_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
**Mary Penn, Mayor**

**ATTEST:**

\_\_\_\_\_  
**Dorothy Brooks, City Secretary**

**APPROVED AS TO FORM AND LEGALITY:**

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**Jon Thatcher, City Attorney**