

ORDINANCE NO. 4279

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF POMONA, CALIFORNIA, ADDING DIVISION 3 “WIRELESS FACILITIES IN RIGHT-OF-WAY” TO CHAPTER 46 (STREETS, SIDEWALKS AND OTHER PUBLIC PLACES), ARTICLE IV (ENCROACHMENTS) OF THE POMONA CITY CODE

WHEREAS, pursuant to the laws of the State of California, the City of Pomona (“City”) has the authority to adopt such ordinances as it deems necessary and appropriate to assure good government in the City, to protect and preserve the City’s rights, property and privileges, and to preserve peace, safety and good order; and

WHEREAS, the City deems it to be necessary and appropriate to provide for certain standards and regulations relating to the location, placement, design, construction and maintenance of telecommunications towers, antennas and other structures within the City’s public rights-of-way, and providing for the enforcement of said standards and regulations, consistent with federal and state law limitations on that authority.

NOW, THEREFORE, BE IT ENACTED AND ORDAINED by the City Council of the City of Pomona:

SECTION 1: The foregoing Recitals are adopted as findings of the City Council as though set forth in fully within the body of this ordinance.

SECTION 2: That Pomona City Code, Chapter 46, Streets, Sidewalks and Other Public Places, Article IV, Encroachments shall be amended to add a new Division 3, “Wireless Facilities in Public Rights-Of-Way” as follows:

DIVISION 3 WIRELESS FACILITIES IN PUBLIC RIGHTS-OF-WAY

Sec. 46-221. Purpose.

- (a) **The purpose of this Division is to establish a process for managing, and uniform standards for acting upon, requests for the placement of wireless facilities within the public rights-of-way of the City consistent with the City’s obligation to promote the public health, safety, and welfare, to manage the public rights-of-way, and to ensure that the public is not incommoded by the use of the public rights-of-way for the placement of wireless facilities. The City recognizes the importance of wireless facilities to provide high-quality communications service to the residents and businesses within the City, and the City also recognizes its obligation to comply with applicable Federal and State law regarding the placement of personal wireless services facilities in its public rights-of-way. This ordinance shall be interpreted consistent with those provisions.**

Sec. 46-222. Definitions. The terms used in this Division shall have the following meanings:

Application: A formal request, including all required and requested documentation and information, submitted by an applicant to the City for a wireless encroachment permit.

Applicant: A person filing an application for placement or modification of a wireless facility in the public right-of-way.

Base Station: shall have the meaning as set forth in 47 C.F.R. Section 1.6100(b)(1), or any successor provision.

Eligible Facilities Request: shall have the meaning as set forth in 47 C.F.R. Section 1.6100(b)(3), or any successor provision.

FCC: The Federal Communications Commission or its lawful successor.

Municipal Infrastructure: City-owned or controlled property structures, objects, and equipment in the ROW, including, but not limited to, street lights, traffic control structures, banners, street furniture, bus stops, billboards, or other poles, lighting fixtures, or electroliers located within the ROW.

Permittee: any person or entity granted a wireless encroachment permit pursuant to this Division.

Personal Wireless Services: shall have the same meaning as set forth in 47 U.S.C. Section 332(c)(7)(C)(i).

Personal Wireless Services Facility: means a wireless facility used for the provision of personal wireless services.

Public Right-of-Way, or ROW: shall have the same meaning as in Section 30-711 of the City Code, but shall also include any portion of any road or public way which the City has the responsibility to maintain or manage.

Small Cell Facility: shall have the same meaning as “small wireless facility” in 47 C.F.R. 1.6002(l), or any successor provision (which is a personal wireless services facility that meets the following conditions that, solely for convenience, have been set forth below):

(1) The facility—

(i) is mounted on a structure 50 feet or less in height, including antennas, as defined in 47 C.F.R. Section 1.1320(d), or

(ii) is mounted on a structure no more than 10 percent taller than other adjacent structures, or

- (iii) does not extend an existing structure on which it are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
- (2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in 47 C.F.R. Section 1.1320(d)), is no more than three cubic feet in volume;
- (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;
- (4) The facility does not require antenna structure registration under 47 C.F.R. Part 17;
- (5) The facility is not located on Tribal lands, as defined under 36 C.F.R. Section 800.16(x); and
- (6) The facility does not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in 47 C.F.R. Section 1.1307(b).

Support Structure: Any structure capable of supporting a base station.

Tower: Any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities, including structures that are constructed for personal wireless services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site. This definition does not include utility poles.

Underground areas: Those areas where there are no electrical facilities or facilities of the incumbent local exchange carrier in the right of way; or where the wires associated with the same are or are required to be located underground; or where the same are scheduled to be converted from overhead to underground. Electrical facilities are distribution facilities owned by an electric utility and do not include transmission facilities used or intended to be used to transmit electricity at nominal voltages in excess of 35,000 volts.

Utility Pole: A structure in the ROW designed to support electric, telephone and similar utility lines. A tower is not a utility pole.

Wireless Encroachment Permit: A permit issued pursuant to this Division authorizing the placement or modification of a wireless facility of a design specified in the permit at a particular location within the ROW; and the modification of any existing support structure to which the wireless facility is proposed to be attached.

Wireless Facility, or Facility: The transmitters, antenna structures and other types of installations used for the provision of wireless services at a fixed location, including, without limitation, any associated tower(s), support structure(s), and base station(s).

Wireless Infrastructure Provider: A person that owns, controls, operates or manages a wireless facility or portion thereof within the ROW.

Wireless Regulations: Those regulations adopted pursuant to Section 5 and implementing the provisions of this Division.

Wireless Service Provider: An entity that provides personal wireless services to end users.

Sec. 46-223. Scope.

(a) **In general.** There shall be a type of encroachment permit entitled a “wireless encroachment permit,” which shall be subject to all of the same requirements as an encroachment permit would under Article IV in addition to all of the requirements of this Division. Unless exempted, every person who desires to place a wireless facility in the public rights-of-way or modify an existing wireless facility in the public rights-of-way must obtain a wireless encroachment permit authorizing the placement or modification in accordance with this Division. Except for small cell facilities, facilities qualifying as eligible facilities requests, or any other type of facility expressly allowed in the public right-of-way by state or federal law, no other wireless facilities shall be permitted pursuant to this Division.

(b) **Exemptions.** This Division does not apply to:

- (1) The placement or modification of facilities by the City or by any other agency of the state solely for public safety purposes.
- (2) Installation of a "cell on wheels," “cell on truck” or a similar structure for a temporary period in connection with an emergency, but no longer than required for the emergency, provided that installation does not involve excavation, movement, or removal of existing facilities.

(c) **Other applicable requirements.** In addition to the wireless encroachment permit required herein, the placement of a wireless facility in the ROW requires the persons who will own or control those facilities to obtain all permits required by applicable law, and to comply with applicable law, including, but not limited, applicable law governing radio frequency (RF) emissions.

(d) **Pre-existing Facilities in the ROW.** Any wireless facility already existing in the ROW as of the date of this Division’s adoption shall remain subject to the provisions of the City Code in effect prior to this Division, unless and until an extension of such facility’s then-existing permit is granted, at which time the provisions of this Division shall apply in full force going forward as to such facility. The review of any request for a renewal of a permit for such pre-existing facilities shall be conducted pursuant to this Division, rather than the portion(s) of the City Code that it was previously reviewed under.

(e) **Public use.** Except as otherwise provided by California law, any use of the public right-of-way authorized pursuant to this Chapter will be subordinate to the City’s use and use by the public.

Sec. 46-224. Administration.

(a) **Reviewing Authority.** The City Engineer or its designee is responsible for administering this Division. As part of the administration of this Division, the City Engineer may:

- (1) Interpret the provisions of this Division;

- (2) Develop and implement standards governing the placement and modification of wireless facilities consistent with the requirements of this Division, including regulations governing collocation and resolution of conflicting applications for placement of wireless facilities;
- (3) Develop and implement acceptable designs and development standards for wireless facilities in the public rights-of-way, taking into account the zoning districts bounding the public rights-of-way;
- (4) Develop forms and procedures for submission of applications for placement or modification of wireless facilities, and proposed changes to any support structure consistent with this Division;
- (5) Determine the amount of and collect, as a condition of the completeness of any application, any fee established by this Division;
- (6) Establish deadlines for submission of information related to an application, and extend or shorten deadlines where appropriate and consistent with state and federal laws and regulations;
- (7) Issue any notices of incompleteness, requests for information, or conduct or commission such studies as may be required to determine whether a permit should be issued;
- (8) Require, as part of, and as a condition of completeness of any application, notice to members of the public that may be affected by the placement or modification of the wireless facility and proposed changes to any support structure;
- (9) Subject to appeal as provided herein, determine whether to approve, approve subject to conditions, or deny an application; and
- (10) Take such other steps as may be required to timely act upon applications for placement of wireless facilities, including issuing written decisions and entering into agreements to mutually extend the time for action on an application.

(b) **Appeal.**

- (1) Any person adversely affected by the decision of the City Engineer pursuant to this Division may appeal the City Engineer's decision to the Director of Public Works (the "Director"), which may decide the issues *de novo*, and whose written decision will be the final decision of the City. An appeal by a wireless infrastructure provider must be taken jointly with the wireless service provider that intends to use the personal wireless services facility.
- (2) Where the City Engineer grants an application based on a finding that denial would result in a prohibition or effective prohibition under applicable federal law, the decision shall be automatically appealed to the Director. All appeals must be filed within two (2) business days of the written decision of the City Engineer, unless the City Engineer extends the time therefore. An extension may not be granted where extension would result in approval of the application by operation of law.
- (3) Any appeal shall be conducted so that a timely written decision may be issued in accordance with applicable law.

Sec. 46-225. General Standards for Wireless Facilities in the Public Rights-of-Way.

(a) **Generally.** Wireless facilities in the ROW shall meet the minimum requirements set forth in this ordinance and the wireless regulations, in addition to the requirements of any other applicable law.

(b) **Regulations.** The wireless regulations and decisions on applications for placement of wireless facilities in the ROW shall, at a minimum, ensure that the requirements of this section are satisfied, unless it is determined that applicant has established that denial of an application would, within the meaning of federal law, prohibit or effectively prohibit the provision of personal wireless services, or otherwise violate applicable laws or regulations. If that determination is made, the requirements of this Division may be waived, but only to the minimum extent required to avoid the prohibition or violation.

(c) **Minimum Standards.** Wireless facilities shall be installed and modified in a manner that minimizes risks to public safety, avoids placement of aboveground facilities in underground areas, avoids installation of new support structures or equipment cabinets in the public rights-of-way, and otherwise maintains the integrity and character of the neighborhoods and corridors in which the facilities are located; ensures that installations are subject to periodic review to minimize the intrusion on the rights of way; and ensures that the City bears no risk or liability as a result of the installations, and that such use does not inconvenience the public, interfere with the primary uses of the rights-of-way, or hinder the ability of the City or other government agencies to improve, modify, relocate, abandon, or vacate the public rights of way or any portion thereof, or to cause the improvement, modification, relocation, vacation, or abandonment of facilities in the rights of way.

(d) **Design and Location Preferences.** All applicants shall design and locate the wireless facilities in accordance with the aesthetic and location standards set forth and published separately by the City Engineer and, from time to time, amended and updated by the City Engineer.

Sec. 46-226. Applications.

(a) **Submission.** Unless the wireless regulations provide otherwise, applicant shall submit a paper copy and an electronic copy of any application, amendments, or supplements to an application, or responses to requests for information regarding an application to: City Engineer, at 505 S. Garey Avenue, Pomona, CA 91766.

(b) **Pre-application meeting.** Prior to filing an application for a wireless encroachment permit, an applicant is encouraged to schedule a pre-application meeting with the City Engineer to discuss the proposed facility, the requirements of this Division, and any potential impacts of the proposed facility.

(c) **Content.** An applicant shall submit an application on the form approved by the City Engineer, which may be updated from time-to-time, but in any event shall require the submission of all required fee(s), documents, information, and any other materials necessary to allow the City Engineer to make required findings and ensure that the proposed facility will comply with applicable federal and state law, the City Code, and will not endanger the public health, safety, or welfare. If no form has been approved, applications must contain all information necessary to show that applicant is entitled to the wireless encroachment permit requested, and must specify whether the applicant believes state or federal law requires action on the application within a specified time period.

(d) **Fees.** Application fee(s) shall be required to be submitted with any application for a wireless encroachment permit. The City Council is hereby authorized to determine, or cause to be determined, the amount, type, and other terms of such fee(s) from time to time by means of resolution. Notwithstanding the foregoing, no application fee shall be refundable, in whole or in part, to an applicant for a wireless encroachment permit unless paid as a refundable deposit.

(e) **Waivers.** Requests for waivers from any requirement of this section shall be made in writing to the City Engineer or his or her designee. The City Engineer may grant or deny a request for a waiver pursuant to this subsection. The City Engineer may grant a request for waiver if it is demonstrated that, notwithstanding the issuance of a waiver, the City will be provided all information necessary to understand the nature of the construction or other activity to be conducted pursuant to the permit sought. All waivers approved pursuant to this subsection shall be (1) granted only on a case-by-case basis, and (2) narrowly-tailored to minimize deviation from the requirements of the City Code.

(f) **Incompleteness.** For personal wireless facilities and eligible facilities requests, applications will be processed, and notices of incompleteness provided, in conformity with state, local, and federal law. If such an application is incomplete, the City Engineer may notify the applicant in writing, and specifying the material omitted from the application.

Sec. 46-227. Findings; Decisions; Consultants.

(a) Findings Required for Approval.

- (1) Except for eligible facilities requests, the City Engineer or Public Works Director, as the case may be, shall approve an application if, on the basis of the application and other materials or evidence provided in review thereof, it finds the following:
 - (i) The facility is not detrimental to the public health, safety, and welfare;
 - (ii) The facility complies with this Division and all applicable design and development standards;
 - (iii) The facility meets applicable requirements and standards of City, state and federal law; and
- (2) For eligible facilities requests, the City Engineer or Public Works Director, as the case may be, shall approve an application if, on the basis of the application and other materials or evidence provided in review thereof, it finds the following:
 - (i) That the application qualifies as an eligible facilities request; and
 - (ii) That the proposed facility will comply with all generally-applicable laws.

(b) **Decisions.** Decisions on an application by the City Engineer or Director shall be in writing and include the reasons for the decision.

(c) **Independent Consultants.** The City Engineer or Director, as the case may be, is authorized, in its discretion, to select and retain independent consultant(s) with expertise in telecommunications in connection with the review of any application under this Division. Such independent consultant review may be retained on any issue that involves specialized or expert knowledge in connection with an application, including, but not limited to, application completeness or accuracy, structural engineering analysis, or compliance with FCC radio frequency emissions standards.

Sec. 46-228. Conditions of Approval.

(a) Generally. In addition to any supplemental conditions imposed by the City Engineer or Public Works Director, as the case may be, all permits granted pursuant to this Division shall be subject to the following conditions, unless modified by the approving authority:

- (1) *Code Compliance.* The permittee shall at all times maintain compliance with all applicable federal, state and local laws, regulations and other rules, including, without limitation, those applying to use of public rights-of-way.
- (2) *Permit Duration.* A wireless encroachment permit shall be valid for a period of ten (10) years, unless pursuant to another provision of the Code or these conditions, it expires sooner or is terminated. At the end of ten (10) years from the date of issuance, such Permit shall automatically expire, unless an extension or renewal has been granted. A person holding a wireless encroachment permit must either (1) remove the facility within thirty (30) days following the permit's expiration (provided that removal of support structure owned by City, a utility, or another entity authorized to maintain a support structure in the right of way need not be removed, but must be restored to its prior condition, except as specifically permitted by the City); or (2) at least ninety (90) days prior to expiration, submit an application to renew the permit, which application must, among all other requirements, demonstrate that the impact of the wireless facility cannot be reduced. The wireless facility must remain in place until it is acted upon by the City and all appeals from the City's decision exhausted.
- (3) *Timing of Installation.* The installation and construction authorized by a wireless encroachment permit shall begin within sixty (60) days after its approval, or it will expire without further action by the City. The installation and construction authorized by a wireless encroachment permit shall conclude, including any necessary post-installation repairs and/or restoration to the ROW, within thirty (30) days following the day construction commenced.
- (4) *Commencement of Operations.* The operation of the approved facility shall commence no later than one (1) month after the completion of installation, or the wireless encroachment permit will expire without further action by the City.
- (5) *As-Built Drawings.* The Permittee shall submit an as-built drawing within thirty (30) days after installation of the facility. As-builts shall also be in an electronic format acceptable to the City.
- (6) *Inspections; Emergencies.* The City or its designee may enter onto the facility area to inspect the facility upon forty eight (48) hours' prior notice to the permittee. The permittee shall cooperate with all inspections and may be present for any inspection of its facility by the City. The City reserves the right to enter or direct its designee to enter the facility and support, repair, disable, or remove any elements of the facility in emergencies or when the facility threatens imminent harm to persons or property. The city shall make an effort to contact the permittee prior to disabling or removing any facility elements, but in any case shall notify permittee within twenty four (24) hours of doing so.
- (7) *Contact.* The 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.
- (8) *Insurance.* Permittee shall obtain and maintain throughout the term of the permit commercial general liability insurance with a limit of \$1,000,000 per occurrence for

bodily injury and property damage and \$2,000,000 general aggregate including premises operations, contractual liability, personal injury, and products completed operations. The relevant policy(ies) shall name the City, including its elected or appointed officials, officers, directors, employees, agents and volunteers as additional insureds. Permittee shall use its best efforts to provide [thirty (30) days'] prior notice to the City of Pomona as to the cancellation or material modification of any applicable insurance policy.

- (9) *Indemnities.* The permittee and, if applicable, the owner of the property upon which the wireless facility is installed shall defend, indemnify and hold harmless the City, its agents, officers, officials, and employees (i) from any and all damages, liabilities, injuries, losses, costs, and expenses, and from any and all claims, demands, law suits, writs of mandamus, and other actions or proceedings brought against the city or its agents, officers, officials, or employees to challenge, attack, seek to modify, set aside, void or annul the city's approval of the permit, and (ii) from any and all damages, liabilities, injuries, losses, costs, and expenses, and any and all claims, demands, law suits, or causes of action and other actions or proceedings of any kind or form, whether for personal injury, death or property damage, arising out of or in connection with the activities or performance of the permittee or, if applicable, the property owner or any of each one's agents, employees, licensees, contractors, subcontractors, or independent contractors. In the event the city becomes aware of any such actions or claims the city shall promptly notify the permittee and, if applicable, the property owner and shall reasonably cooperate in the defense. The City shall have the right to approve, which approval shall not be unreasonably withheld, the legal counsel providing the City's defense, and the property owner and/or permittee (as applicable) shall reimburse City for any costs and expenses directly and necessarily incurred by the City in the course of the defense.
- (10) *Performance Bond.* Prior to issuance of a wireless encroachment permit, the permittee shall file with the city, and shall maintain in good standing throughout the term of the approval, a performance bond or other surety or another form of security for the removal of the facility in the event that the use is abandoned or the permit expires, or is revoked, or is otherwise terminated. The security shall be in the amount equal to 125% of the cost of physically removing the facility and all related facilities and equipment on the site. The permittee shall reimburse the city for staff time associated with the processing and tracking of the bond, based on the hourly rate identified in the latest fee study adopted by the City Council. Reimbursement shall be paid when the security is posted and during each administrative review.
- (11) *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, and removal of the facility.
- (12) *Noninterference.* Permittee shall not move, alter, temporarily relocate, change, or interfere with any existing structure, improvement, or property without the prior consent of the owner of that structure, improvement, or property. No structure, improvement, or property owned by the City shall be moved to accommodate a permitted activity or encroachment, unless the City determines that such movement will not adversely affect the City or any surrounding businesses or residents, and the

Permittee pays all costs and expenses related to the relocation of the City's structure, improvement, or property. Prior to commencement of any work pursuant to a wireless encroachment permit, the Permittee shall provide the City with documentation establishing to the city's satisfaction that the Permittee has the legal right to use or interfere with any other structure, improvement, or property within the public right-of-way or city utility easement to be affected by Permittee's facilities.

- (13) *No Right, Title, or Interest.* The permission granted by a wireless encroachment permit shall not in any event constitute an easement on or an encumbrance against the public right-of-way. No right, title, or interest (including franchise interest) in the public right-of-way, or any part thereof, shall vest or accrue in Permittee by reason of a wireless encroachment permit or the issuance of any other permit or exercise of any privilege given thereby.
- (14) *No Possessory Interest.* No possessory interest is created by a wireless encroachment permit. However, to the extent that a possessory interest is deemed created by a governmental entity with taxation authority, Permittee acknowledges that City has given to Permittee notice pursuant to California Revenue and Taxation Code Section 107.6 that the use or occupancy of any public property pursuant to a wireless encroachment permit may create a possessory interest which may be subject to the payment of property taxes levied upon such interest. Permittee shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes, fees, and assessments levied against Permittee's right to possession, occupancy, or use of any public property pursuant to any right of possession, occupancy, or use created by this permit.
- (15) *General Maintenance.* The site and the facility, including, but not limited to, all landscaping, fencing, and related transmission equipment, must be maintained in a neat and clean manner and in accordance with all approved plans. All graffiti on facilities must be removed at the sole expense of the permittee within forty eight (48) hours after notification from the City.
- (16) *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. After transmitter and antenna system optimization, but prior to unattended operations of the facility, permittee or its representative must conduct on-site post-installation RF emissions testing to demonstrate actual compliance with the FCC OET Bulletin 65 RF emissions safety rules for general population/uncontrolled RF exposure in all sectors. For this testing, the transmitter shall be operating at maximum operating power, and the testing shall occur outwards to a distance where the RF emissions no longer exceed the uncontrolled/general population limit.
- (17) *Testing.* Testing of any equipment shall take place on weekdays only, and only between the hours of 8:30 a.m. and 4:30 p.m., except that testing is prohibited on holidays that fall on a weekday. In addition, testing is prohibited on weekend days.
- (18) *Modifications.* No changes shall be made to the approved plans without review and approval in accordance with this Division.
- (19) *Agreement with City.* If not already completed, permittee shall enter into the appropriate agreement with the City, as determined by the City, prior to constructing,

attaching, or operating a facility on Municipal Infrastructure. This permit is not a substitute for such agreement.

- (20) *Conflicts with Improvements.* For all facilities located within the ROW, the permittee shall remove or relocate, at its expense and without expense to the city, any or all of its facilities when such removal or relocation is deemed necessary by the city by reason of any change of grade, alignment, or width of any right-of-way, for installation of services, water pipes, drains, storm drains, power or signal lines, traffic control devices, right-of-way improvements, or for any other construction, repair, or improvement to the right-of-way.
- (21) *Abandonment.* If a facility is not operated for a continuous period of three (3) months, the wireless encroachment permit and any other permit or approval therefor shall be deemed abandoned and terminated automatically, unless before the end of the 3-month period (i) the City Engineer has determined that the facility has resumed operations, or (ii) the City has received an application to transfer the permit to another service provider. No later than ninety (90) days from the date the facility is determined to have ceased operation or the permittee has notified the City Engineer of its intent to vacate the site, the permittee shall remove all equipment and improvements associated with the use and shall restore the site to its original condition to the satisfaction of the City Engineer. The permittee shall provide written verification of the removal of the facilities within thirty (30) days of the date the removal is completed. If the facility is not removed within thirty (30) days after the permit has been discontinued pursuant to this subsection, the site shall be deemed to be a nuisance, and the City may cause the facility to be removed at permittee's expense or by calling any bond or other financial assurance to pay for removal. If there are two (2) or more users of a single facility or support structure, then this provision shall apply to the specific elements or parts thereof that were abandoned, but will not be effective for the entirety thereof until all users cease use thereof.
- (22) *Encourage Co-location.* Where the facility site is capable of accommodating a co-located facility upon the same site in a manner consistent with the permit conditions for the existing facility, the owner and operator of the existing facility shall allow co-location of third party facilities, provided the parties can mutually agree upon reasonable terms and conditions.
- (23) *Records.* The permittee must maintain complete and accurate copies of all permits and other regulatory approvals issued in connection with the facility, which includes without limitation this approval, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval and any ministerial permits or approvals issued in connection with this approval. In the event that the permittee does not maintain such records as required in this condition or fails to produce true and complete copies of such records within a reasonable time after a written request from the city, any ambiguities or uncertainties that would be resolved through an inspection of the missing records will be construed against the permittee.
- (24) *Attorney's Fees.* In the event the City determines that it is necessary to take legal action to enforce any of these conditions, or to revoke a permit, and such legal action is taken, the Permittee shall be required to pay any and all costs of such legal action, including reasonable attorney's fees, incurred by the City, even if the matter is not prosecuted to a final judgment or is amicably resolved, unless the City should

otherwise agree with Permittee to waive said fees or any part thereof. The foregoing shall not apply if the Permittee prevails in the enforcement proceeding.

(b) **Eligible Facilities Requests.** In addition to the conditions provided in Section 9(a) of this Division and any supplemental conditions imposed by the City Engineer or Director, as the case may be, all permits for an eligible facility requests granted pursuant to this Division shall be subject to the following additional conditions, unless modified by the approving authority:

- (1) *Permit subject to conditions of underlying permit.* Any permit granted in response to an application qualifying as an eligible facilities request shall be subject to the terms and conditions of the underlying permit.
- (2) *No permit term extension.* The city's grant or grant by operation of law of an eligible facilities request permit constitutes a federally-mandated modification to the underlying permit or approval for the subject tower or base station. Notwithstanding any permit duration established in another permit condition, the City's grant or grant by operation of law of a eligible facilities request permit will not extend the permit term for the underlying permit or any other underlying regulatory approval, and its term shall be coterminous with the underlying permit or other regulatory approval for the subject tower or base station.
- (3) *No waiver of standing.* The city's grant or grant by operation of law of an eligible facilities request does not waive, and shall not be construed to waive, any standing by the city to challenge Section 6409(a) of the Spectrum Act, any FCC rules that interpret Section 6409(a) of the Spectrum Act, or any modification to Section 6409(a) of the Spectrum Act.

(c) **Small Cell Facilities Requests.** In addition to the conditions provided in Section 9(a) of this Division and any supplemental conditions imposed by the City Engineer or Director, as the case may be, all permits for a small cell facility granted pursuant to this Division shall be subject to the following condition, unless modified by the approving authority:

- (1) *No waiver of standing.* The city's grant of a permit for a small cell facility request does not waive, and shall not be construed to waive, any standing by the city to challenge any FCC orders or rules related to small cell facilities, or any modification to those FCC orders or rules.

Sec. 46-229. Breach; Termination of Permit.

(a) **For breach.** A wireless encroachment permit may be revoked for failure to comply with the conditions of the permit or applicable law. Upon revocation, the wireless facility must be removed; provided that removal of a support structure owned by City, a utility, or another entity authorized to maintain a support structure in the right-of-way need not be removed, but must be restored to its prior condition, except as specifically permitted by the City. All costs incurred by the City in connection with the revocation and removal shall be paid by entities who own or control any part of the wireless facility.

(b) **For installation without a permit.** An wireless facility installed without a wireless encroachment permit (except for those exempted by this Division) must be removed; provided that removal of support structure owned by City, a utility, or another entity authorized to maintain a support structure in the right of way need not be removed, but must be restored to its prior condition, except as specifically permitted by the City. All costs incurred by the City

in connection with the revocation and removal shall be paid by entities who own or control any part of the wireless facility.

(c) **Municipal Infraction.** Any violation of this Division will be subject to the same penalties as a violation of Section 1502 of the City Code.

Sec. 46-230. Infrastructure Controlled By City. The City, as a matter of policy, will negotiate agreements for use of Municipal Infrastructure. The placement of wireless facilities on those structures shall be subject to the agreement. The agreement shall specify the compensation to the City for use of the structures. The person seeking the agreement shall additionally reimburse the City for all costs the City incurs in connection with its review of, and action upon the person's request for, an agreement.

Sec. 46-231. Nondiscrimination. In establishing the rights, obligations and conditions set forth in this Division, it is the intent of the City to treat each applicant or public right-of-way user in a competitively neutral and nondiscriminatory manner, to the extent required by law, and with considerations that may be unique to the technologies, situation and legal status of each particular applicant or request for use of the public rights-of-way.

SECTION 3: The City Manager, or his or her delegate, is directed to execute all documents and to perform all other necessary City acts to implement effect this Ordinance.

SECTION 4: Environmental Review. This Ordinance is not a project within the meaning of Section 15378 of the State of California Environmental Quality Act ("CEQA") Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. The Ordinance establishes an application process for permits to install or modify wireless facilities on new and existing structures in the public right-of-way in the City of Pomona. The Ordinance does not authorize any specific development or installation on any specific structure within the City's boundaries. Moreover, when and if an application for installation is submitted, the City will – at that time – conduct preliminary review of the application in accordance with CEQA.

Alternatively, even if the Ordinance is a "project" within the meaning of State CEQA Guidelines section 15378, the Ordinance is exempt from CEQA on multiple grounds. First, the Ordinance is exempt from CEQA because the City Council's adoption of the Ordinance is covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. (State CEQA Guidelines, §15061(b)(3).) That is, approval of the Ordinance will not result in the actual installation of any facilities in the City. In order to install a facility in accordance with this Ordinance, the applicant would have to submit an application for installation of the wireless facility. At that time, the City will have specific and definite information regarding the facility to review in accordance with CEQA. And, in fact, the City will conduct preliminary review under CEQA at that time.

Moreover, in the event that the Ordinance is interpreted so as to permit installation of wireless facilities on a particular site, the installation would be exempt from CEQA review in accordance with either: (1) State CEQA Guidelines section 15302 (replacement or reconstruction) because the wireless facility installations regulated by the Ordinance involve the replacement or

modification of existing structures and facilities in the public right-of-way in the City of Pomona where the replacement support structure will be located in the same spot as the structure that it is replacing and will serve substantially the same purpose and capacity as the structure that it is replacing; and/or (2) State CEQA Guidelines section 15303 (new construction or conversion of small structures) because the wireless facility installations regulated by the Ordinance involve new structures and/or the replacement or modification of existing structures and consist of: (a) the construction and siting of limited numbers of wireless facilities; (b) the installation of associated equipment, not involving the use of significant amounts of hazardous substances; and (3) limited utility extensions to serve such facilities in the public right-of-way where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive. None of the of the exceptions to the Class 2 or 3 Categorical Exemptions found in State CEQA Guidelines section 15300.2 apply because the Ordinance does not present any unusual circumstances; would not damage scenic resources, including any resources in the area of a Scenic Highway; would not be utilized on a hazardous waste site; and would not impact historic resources of any kind. The City Council, therefore, directs that a Notice of Exemption be filed with the Los Angeles County Clerk within five working days of the passage and adoption of the Ordinance.

SECTION 5: Severability. If any section, subsection, provision, sentence, clause, phrase or word of this Ordinance is for any reason held to be illegal or otherwise invalid by any court of competent jurisdiction, such invalidity shall be severable, and shall not affect or impair any remaining section, subsection, provision, sentence, clause, phrase or word included within this Ordinance, it being the intent of the City that the remainder of the Ordinance shall be and shall remain in full force and effect, valid, and enforceable.

SECTION 6: The City Clerk shall certify to the passage of this Ordinance, and shall cause same to be posted as required by law, and this Ordinance shall take effect thirty (30) days after its adoption.

PASSED, APPROVED AND ADOPTED this 1st of February, 2021.

CITY OF POMONA:

Tim Sandoval
Mayor

APPROVED AS TO FORM:

Sonia Carvalho
City Attorney

ATTEST:

Rosalia A. Butler, MMC
City Clerk

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
CITY OF POMONA

I, ROSALIA A. BUTLER, MMC, CITY CLERK of the City of Pomona do hereby certify that the foregoing Ordinance was introduced for first reading at a regular meeting of the City Council of the City of Pomona held on February 1, 2021 and was adopted at second reading at a regular meeting of the City Council of the City of Pomona held on March 1, 2021, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

Rosalia A. Butler, MMC
City Clerk