

ARTICLE XI

Siting of "Small Cell" Telecommunication Infrastructure

§ 187-81: FINDINGS

The Village of Fayetteville hereby finds:

A. The wireless telecommunications industry has expressed interest in submitting applications to lease space within the Village for the installation of "small cell" wireless telecommunications facilities (hereinafter "small cell installations") in the Village.

B. The installation of small cell facilities may have both positive and negative impacts on our community. Multiple installations can impact property values; pose a threat to the public health, safety and welfare; create traffic and pedestrian safety hazards; impact trees where proximity conflicts may require trimming of branches or require removal of roots; create visual and aesthetic blights and potential safety concerns from excessive size, height, weight, noise or lack of camouflaging of wireless facilities including the associated pedestals, meters, equipment and power generators which negatively impact the quality and character of the Village.

C. The Village currently regulates wireless telecommunications facilities through zoning and the special permit process (Article IX, Chapter 187 and Section 187-41). The existing standards have not been updated to reflect current telecommunications trends or necessary legal requirements. Further, the primary focus of zoning regulations has been on wireless telecommunications facilities located on private property, and the existing Code provisions were not specifically designed to address the unique legal and practical issues that arise in connection with multiple small cell installations deployed in the public rights-of-way.

D. Federal regulations have changed substantially since the Village last adopted regulations on wireless telecommunications. A recent FCC Order provides that all local jurisdictions must comply with various restrictions on the exercise of local aesthetic, zoning, public works, and fee restrictions when dealing with wireless installation siting applications by the effective date of the Order which is January 14, 2019. The FCC Order further provides that all agencies should be capable of fully implementing its provisions within 180 days of its adoption which was on September 26, 2018. The Order also include modifications to "shot clocks" which require the Village to approve or deny applications within certain periods of time and may actually deem an application approved when a failure to act occurs. Thus the Village is in clear need of updated regulations for small cell installations given the number of anticipated applications and legal timelines during which the Village must act.

E. The Village recognizes its responsibilities under the Federal Telecommunications Act of 1996 and state law, and believes that it is acting consistent with the current state of the law in ensuring that development activity does not endanger public health, safety, or welfare. The Village intends these code provisions to ensure that the installation, augmentation and relocation of small cell

installations are conducted in such a manner as to lawfully balance the legal rights of applicants under the Federal Telecommunications Act and New York State with the rights, safety, privacy, property and security of residents of the Village.

F. This chapter is not intended to, nor shall it be interpreted or applied to: (1) prohibit or effectively prohibit any personal wireless service provider's ability to provide personal wireless services in the Village; (2) prohibit or effectively prohibit any entity's ability to provide any interstate or intrastate telecommunications service, subject to any competitively neutral and nondiscriminatory rules or regulation; (3) unreasonably discriminate among providers of functionally equivalent services; (4) deny any request for authorization to place, construct or modify personal wireless service facilities on the basis of environmental effects of radio frequency emissions so long as such wireless facilities comply with the FCC's regulations concerning such emissions; (5) prohibit any collocation or modification that the Village may not deny under federal or state law; or (6) otherwise authorize the Village to preempt any applicable federal or state law.

G. Based on the foregoing, the Village Board of Trustees finds and determines that the preservation of public health, safety and welfare requires that this Article XI of Chapter 187 of the Village Code be enacted.

§ 187-82: DEFINITIONS

"Co-Located Small Cell Installation" means a single telecommunication tower, pole, mast or other structure supporting one or more antennas, dishes, transmitters, repeaters, or similar devices owned or used by more than one public or private entity.

"Exempted Telecommunications Facility" includes, but is not limited to, the following unless located within a recognized Historic District:

- a. A single ground or building mounted receive-only radio or television antenna including any mast, for the sole use of the tenant occupying the residential parcel on which the radio or television antenna is located; with an antenna height not exceeding twenty-five feet;
- b. A ground or building mounted citizens band radio antenna including any mast, if the height (post and antenna) does not exceed thirty-five feet;
- c. A ground, building, or tower mounted antenna operated by a federally licensed amateur radio operator as part of the Amateur Radio Service, if the height (post and antenna) does not exceed thirty-five feet;
- d. A ground or building mounted receive-only radio or television satellite dish antenna, which does not exceed thirty-six inches in diameter, for the sole use of the resident occupying a residential parcel on which the satellite dish is located; provided the height of said dish does not exceed the height of the ridgeline of the primary structure on said parcel.

- e. All citizens band radio antenna or antenna operated by a federally licensed amateur radio operator as part of the Amateur Radio Service which existed at the time of the adoption of this chapter.
- f. Mobile services providing public information coverage of news events of a temporary nature.
- g. Hand-held devices such as cell phones, business-band mobile radios, walkie-talkies, cordless telephones, garage door openers and similar personal-use devices.
- h. Government owned and operated receive and/or transmit telemetry station antennas for supervisory control and data acquisition (SCADA) systems for water, flood alert, traffic control devices and signals, storm water, pump stations and/or irrigation systems, with heights not exceeding thirty-five feet.
- i. Municipal-owned and operated antennae used for emergency response services, public utilities, operations and maintenance if the height does not exceed seventy feet.
- j. Telecommunication facilities less than fifty feet in height, in compliance with the applicable sections of this chapter, located on a parcel owned by the Village and utilized for public and/or quasi-public uses where it is found by the Village Board to be compatible with the existing uses of the property and serving the public interest.
- k. Telecommunication facilities, including multiple antennas, in compliance with the applicable sections of this chapter, located on an industrial parcel and utilized for the sole use and purpose of a research and development tenant of said parcel, where it is found by the planning director to be aesthetically compatible with the existing and surrounding structures.
- l. Telecommunication facilities located on a structure recognized as a historic landmark.

"Lessee" means any person, corporation, partnership or other entity entering into a lease for the purpose of constructing, operating or maintaining a small cell installation or co-located small cell installation in the Village

"Major Telecommunications Facility" means telecommunication towers or similar structures greater than 70 feet in height that include other accessory equipment such as transmitters, repeaters, microwave dishes, horns, and other types of equipment for the transmission or receipt of such signals, as well as support structures, equipment buildings and parking areas.

"Public Right of Way" means the area on, below, or above property that has been designated for use as or is used for a public roadway, highway, street, sidewalk, alley or similar purpose, and for purposes of this Article shall include Public Utility Easements, but only to the extent the

Village has the authority to permit use of the area for this purpose. The term does not include a federal interstate highway or other areas that are not within the legal jurisdiction, ownership or control of the Town.

"Small Cell Installation" means all equipment required for the operation and maintenance of so-called "small cell" radio-frequency microwave communications systems that transmit and/or receive signals but are not "major telecommunications facilities," including antennas, microwave dishes, electronics, and other types of equipment required for the transmission or receipt of such signals.

§ 187-83: PERMITTING AND LEASING PROCESS

A. Permit and Lease Required. No small cell installation shall be constructed, erected, modified, operated or maintained within the Village on any property including the public right-of-way, without the issuance of a special permit issued by the Village Planning Board and lease as required by this chapter. No approval granted under this chapter shall confer any exclusive right, privilege, license or franchise to occupy or use the public right-of-way of the Village for delivery of telecommunications services or any other purpose.

B. Application Content. All permit and lease applications must include:

- A. Detailed site and engineering plans;
- B. Photographs of facility equipment;
- C. Visual impact analysis with photo simulations;
- D. Certification by a certified RF engineer demonstrating compliance with the FCC standards for radio frequency emissions as they relate to the general public, including aggregate emissions for all co-located equipment;
- E. Certification that the applicant has a right under state law to install facilities in the public right-of-way if that is the proposed location of the facilities;
- F. Written documentation demonstrating a good faith effort to locate the facility in the least intrusive location and screened to the greatest extent feasible;
- G. Documentation that owners of all properties within 500 feet of the application have been notified;
- H. Indemnification agreement to indemnify the Village in any proceeding to challenge approval of the facility.
- I. Indemnification agreement indemnifying and holding the Village, its elected officials, employees, agents and representatives harmless from any judgment, award, damage or loss, including court costs and attorney's fees, resulting from a successful legal action brought against the Village for loss of property value due to the construction or operation of a small cell installation.
- I. A written description identifying the geographic service area for the subject installation, accompanied by a plan and maps showing anticipated future installations and modifications for the following two years, in addition to the master plan described by this section.

C. Application Fee. The Village shall assess a per-installation fee pursuant to its adopted Fee Schedule to cover the Village's costs for processing, review, commenting upon, evaluation, hearing, and consideration of the application, processing the lease and conducting oversight of the initial construction of the small cell installation to ensure compliance with zoning requirements.

D. Consultant Fee. The Village shall have the right to retain an independent technical consultant to assist the Village in the review of the application. The cost of the review shall be paid by the applicant.

E. Compliance Bond. The Lessee shall be required to post a bond in the amount of \$50,000 for each small cell installation, such bond to be held during the entire period of Lessee's operation of each small cell installation in the Village as a guarantee that no such installation, including any co-located equipment, exceeds or will exceed the allowable FCC limits for RF radiation exposure as determined by a qualified independent RF engineer under Section G.(2) hereof.

F. Indemnification. Lessee shall provide an agreement in the form provided by the Village that Lessee agrees to defend, hold harmless and fully indemnify the Village, its officers, employees, agents, attorneys, and volunteers, from any claim, action or proceeding brought against the Village or its officers, employees, agents, or attorneys to attack, set aside, void, or annul any such approval of the Village. This indemnification agreement shall be in a form acceptable to the Village Attorney and shall include, but not be limited to, damages, fees and/or costs awarded against the Village, if any, and cost of suit, attorney's fees, and other costs, liabilities and expenses incurred in connection with such proceeding whether incurred by the Lessee, the Village and/or the parties initiating or bringing such proceeding. The agreement shall also include a provision obligating the Lessee to indemnify the Village for all of the Village's costs, fees and damages which the Village incurs in enforcing the indemnification provisions of this Section.

G. Annual Re-certification.

(1) Each year on July 1, the Lessee shall submit to the Village an affidavit which shall list all active small cell wireless installations it owns within the Village by location, certifying that (1) each active small cell installation is covered by liability insurance in the amount of \$2,000,000 per installation, naming the Village as additional insured; (2) each active installation has been inspected for safety and found to be in sound working condition and in compliance with all federal safety regulations concerning RF exposure limits;

(2) The Village shall have the right to employ a qualified RF engineer to conduct an annual random test of the Lessee's small cell wireless installations located within the Village to ensure their compliance with all FCC radio-frequency emission limits as they pertain to exposure to the general public. The cost of such tests shall be paid by the Lessee.

(3) In the event that such independent tests reveal that any small cell installation or installations owned or operated by Lessee or its sub-lessees, singularly or in the aggregate, is emitting RF radiation in excess of FCC exposure guidelines as they pertain to the general public, the Village shall notify the Lessee and all residents living within 1500 feet of the small cell installation(s) of the violation, and the Lessee shall have forty-eight (48) hours to bring the small cell installation(s) into compliance. Failure to bring the small cell installation(s) into compliance shall result in the forfeiture of the bond, and the Village shall have the right to (1) terminate the lease and/or (2) require the removal of such installation(s), as the Village in its sole discretion may determine is in the public interest.

(4) The Lessee shall pay an annual re-certification fee pursuant to the Village's Fee Schedule per active small cell installation.

(5) Any small cell wireless installation which is no longer in use shall be removed by the Lessee within 60 days of submission of the annual re-certification affidavit, at the Lessee's expense.

(6) Any small cell wireless installation which is not removed within 60 days after being listed as no longer in use in the annual re-certification affidavit shall be subject to a fine of \$100/day until such installation is removed.

(7) Where such annual re-certification has not been timely submitted, or equipment no longer in use has not been removed within the required 60-day period, no further applications for small cell wireless installations will be accepted by the Village until such time as the annual re-certification has been submitted and all fees and fines paid.

(8) Non-Permitted Installations Any small cell installation constructed, erected, modified or enhanced prior to the issuance of a site-specific permit and lease from the Village shall be removed prior to the submission of an application. No consideration of any application for a small cell installation shall be made, and no so-called "shot clock" for approval shall commence while such unauthorized installations remain.

§ 187-84: LOCATION AND CONFIGURATION PREFERENCES

A. Siting Guidelines. The purpose of this section is to provide guidelines to applicants and the reviewing authority regarding the preferred locations and configurations for small cell installation in the Village, provided that nothing in this section shall be construed to permit a small cell installation in any location that is otherwise prohibited by this ordinance or other existing section of the Village code.

B. Order of Preference - Configurations. The order of preference for the configuration of small cell installations in the Village, from most preferred to least preferred, is

1. Co-location with existing facilities
2. Mounted on an existing utility pole

3. Mounted on a new telecommunication monopole or tower

C. Order of preference - Location. The order of preference for the location of small cell installations in the Village, from most preferred to least preferred, is:

1. Industrial zone
2. Commercial zone
3. Mixed commercial and residential zone
4. Residential zone

§ 187-85: INSTALLATION SPECIFICATIONS

A. The Lessee must construct, install and operate the small cell installation in strict compliance with the plans and specifications included in the application.

B. Where feasible, as new technology becomes available, the Lessee shall replace larger, more visually intrusive facilities with smaller, less visually intrusive facilities, after receiving all necessary permits and approval required by the Village.

C. The Lessee shall submit and maintain current at all times basic contact and site information on a form to be supplied by the Village. The Lessee shall notify the Village of any changes to the information submitted within seven days of any change, including the name or legal status of the owner or operator.

D. At all times, all required notices and signs shall be posted on the site as required by the FCC and State Law, and as approved by the Village. The location and dimensions of a sign bearing the emergency contact name and telephone numbers shall be posted pursuant to the approved plans.

E. The Lessee shall maintain current at all times liability and property insurance for each small cell installation in the Public Right of Way in the amount of \$2,000,000 (Two Million Dollars) naming the Village as additional insureds

F. The proposed small cell installation shall have an adequate fall zone to minimize the possibility of damage or injury resulting from pole collapse or failure, ice fall or debris fall, and to avoid and minimize all other impacts upon adjoining properties.

G. Every effort shall be made to locate small cell installations no less than 1,500 feet away from the nearest other small cell installation, or within 250 feet of any permanent dwelling located in a residential zone.

H. Any single or co-located small cell installation equipment must be connected to an existing utility pole that can support its weight and the weight of any existing co-located equipment. All

new wires needed to service the small cell installation must be located within the width of the existing utility pole so as to not exceed the diameter and height of the existing utility pole.

I. All equipment not to be installed on or inside the pole must be located underground, flush to the ground, within three (3) feet of the utility pole. Each installation is to have its own dedicated power source to be installed and metered separately.

§ 187-86: APPLICABILITY

This Article XI shall apply to all small cell installations and co-located small cell installations in the Village, and shall not apply to any Exempted Telecommunications Facility or Major Telecommunications Facility.