

**ORDINANCE NO. 2017-O-06**

**AN ORDINANCE OF THE VILLAGE OF VOLENTE, TEXAS, RELATING TO THE DEPLOYMENT OF NETWORK NODES IN PUBLIC RIGHT-OF-WAY; AUTHORIZING FEES AND PERMITS, PROVIDING FOR SEVERABILITY, COMPLIANCE WITH THE OPEN MEETINGS ACT AND EFFECTIVE DATE.**

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**WHEREAS**, the Village of Volente (hereinafter “Village”), finds that regulating the deployment of network nodes in the public right-of-way in the Village is in the public interest;

**WHEREAS**, the Texas Legislature has recently adopted Chapter 284 to the Texas Local Government Code prescribing the standards for the municipalities in the State of Texas to regulate the location of network node in the public rights-of-way in the State of Texas;

**NOW THEREFORE, BE IT RESOLVED AND ORDERED BY THE VILLAGE COUNCIL OF THE VILLAGE:**

The Village adds to Chapter 4 “Building Regulations”, Article 4.07, Sections 4.07.028 through 4.07.054 to its Code of Ordinances by adopting the following relating to the use of Public Right-of-Way for deploying network nodes.

**USE OF PUBLIC RIGHT-OF-WAY**

Sec. 4.07.028. **APPLICABILITY.** These regulatory provisions apply only to activities related to transport facilities for network nodes, activities of a network provider collocating network nodes in the public right-of-way or installing, constructing, operating, modifying, replacing, and maintaining node support poles in a public right-of-way, and the Village’s authority in relation to those activities.

Sec. 4.07.029. **EXCLUSIVE USE PROHIBITED.** The Village may not enter into an exclusive arrangement with any person for use of the public right-of-way for the construction, operation, marketing, or maintenance of network nodes or node support poles.

Sec. 4.07.030. **ANNUAL PUBLIC RIGHT-OF-WAY RATE.**

(a) A public right-of-way rate for use of the public right-of-way may not exceed an annual amount equal to \$250 multiplied by the number of network nodes installed in the public right-of-way in the Village's corporate boundaries.

(b) At the Village's discretion, the Village may charge a network provider a lower rate or fee if the lower rate or fee is:

- (1) nondiscriminatory;

- (2) related to the use of the public right-of-way; and
- (3) not a prohibited gift of public property.

Sec. 4.07.031. PUBLIC RIGHT-OF-WAY RATE ADJUSTMENT.

(a) In this section, "consumer price index" means the annual revised Consumer Price Index for All Urban Consumers for Texas, as published by the federal Bureau of Labor Statistics.

(b) The Village shall adjust the amount of the public right-of-way rate not more often than annually by an amount equal to one-half the annual change, if any, in the consumer price index. The Village shall provide written notice to each network provider of the new rate, and the rate shall apply to the first payment due to the Village on or after the 60th day following that notice.

Sec. 4.07.032. USE OF PUBLIC RIGHT-OF-WAY AND APPLICABLE RATE.

(a) A network provider that wants to connect a network node to the network using the public right-of-way may:

- (1) install its own transport facilities subject to Subsection (b); or
- (2) obtain transport service from a person that is paying municipal fees to occupy the public right-of-way that are the equivalent of not less than \$28 per node per month.

(b) A network provider may not install its own transport facilities unless the provider:

- (1) has a permit to use the public right-of-way; and
- (2) pays to the Village a monthly public right-of-way rate for transport facilities in an amount equal to \$28 multiplied by the number of the network provider's network nodes located in the public right-of-way for which the installed transport facilities provide backhaul unless or until the time the network provider's payment of municipal fees to the Village exceeds its monthly aggregate per-node compensation to the Village.

(c) A public right-of-way rate required by Subsection (b) is in addition to any public right-of-way rate required under other provisions of this Chapter.

Sec. 4.07.032. COLLOCATION OF NETWORK NODES ON SERVICE POLES.

The Village, subject to an agreement with the Village that does not conflict with this chapter, shall allow collocation of network nodes on service poles on nondiscriminatory terms and conditions and at a rate not greater than \$20 per year per service pole.

Sec. 4.07.033. PROHIBITION ON OTHER COMPENSATION.

The Village may not require a network provider to pay any compensation other than the compensation authorized by this chapter for the right to use a public right-of-way for network nodes, node support poles, or transport facilities for network nodes.

### **ACCESS AND APPROVALS**

#### **Sec. 4.07.034. RIGHT OF ACCESS TO PUBLIC RIGHT-OF-WAY.**

(a) Except as specifically provided by this chapter, and subject to the requirements of this chapter and the approval of a permit application, if required, a network provider is authorized, as a permitted use, without need for a special use permit or similar zoning review and not subject to further land use approval, to do the following in the public right-of-way:

- (1) construct, modify, maintain, operate, relocate, and remove a network node or node support pole;
- (2) modify or replace a utility pole or node support pole; and
- (3) collocate on a pole, subject to an agreement with the Village that does not conflict with this chapter.

(b) A network provider taking an action authorized by Subsection (a) is subject to applicable codes, including applicable public right-of-way management ordinances.

### **GENERAL CONSTRUCTION AND MAINTENANCE REQUIREMENTS.**

Sec.4.07.035 A network provider shall construct and maintain network nodes and node support poles described by these provisions 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 nondiscriminatory applicable codes;
- (d) violate or conflict with the Village's publicly disclosed public right-of-way design specifications; or
- (e) violate the federal Americans with Disabilities Act of 1990 (42 U.S.C. Section 12101 et seq.).

#### **Sec. 47.07.036. GENERAL LIMITATION ON PLACEMENT OF POLES.**

A network provider shall ensure that each new, modified, or replacement utility pole or node support pole installed in a public right-of-way in relation to which the network provider received approval of a permit application does not exceed the lesser of:

(a) 10 feet in height above the tallest existing utility pole located within 500 linear feet of the new pole in the same public right-of-way; or

(b) 55 feet above ground level.

Sec. 47.07.037. INSTALLATION IN MUNICIPAL PARKS AND RESIDENTIAL AREAS.

(a) A network provider may not install a new node support pole in a public right-of-way without the Village's discretionary, nondiscriminatory, and written consent if the public right-of-way is in a municipal park or is adjacent to a street or thoroughfare that is:

(1) Not more than 50 feet wide; and

(2) Adjacent to single-family residential lots or other multifamily residences or undeveloped land that is designated for residential use by zoning or deed restrictions.

(b) In addition to the requirement prescribed by Subsection (a), a network provider installing a network node or node support pole in a public right-of-way described by Subsection (a) shall comply with private deed restrictions and other private restrictions in the area that apply to those facilities.

Sec.47.07.038 INSTALLATION IN HISTORIC OR DESIGN DISTRICTS.

(a) A network provider must obtain advance approval from the Village before collocating new network nodes or installing new node support poles in an area of the Village zoned or otherwise designated as a historic district or as a design district if the district has decorative poles. As a condition for approval of new network nodes or new node support poles in a historic district or a design district with decorative poles, the Village shall require reasonable design or concealment measures for the new network nodes or new node support poles. The Village shall request that a network provider comply with the design and aesthetic standards of the historic or design district and explore the feasibility of using certain camouflage measures to improve the aesthetics of the new network nodes, new node support poles, or related ground equipment, or any portion of the nodes, poles, or equipment, to minimize the impact to the aesthetics in a historic district or on a design district's decorative poles.

(b) This section may not be construed to limit the Village's authority to enforce historic preservation zoning regulations consistent with the preservation of local zoning authority under 47 U.S.C. Section 332(c)(7), the requirements for facility modifications under 47 U.S.C. Section 1455(a), or the National Historic Preservation Act of 1966 (54 U.S.C. Section 300101 et seq.), and the regulations adopted to implement those laws.

Sec. 47.07.039. EQUIPMENT CABINETS.

A network provider shall ensure that the vertical height of an equipment cabinet installed as part of a network node does not exceed the height limitation prescribed by Section 47.07.036, subject to approval of the pole's owner if applicable.

Sec. 47.07.040. COMPLIANCE WITH UNDERGROUNDING REQUIREMENT.

(a) A network provider shall, in relation to installation for which the Village approved a permit application, comply with nondiscriminatory undergrounding requirements, including municipal ordinances, zoning regulations, state law, private deed restrictions, and other public or private restrictions, that prohibit installing aboveground structures in a public right-of-way without first obtaining zoning or land use approval.

(b) A requirement or restriction described by Subsection (a) may not be interpreted to prohibit a network provider from replacing an existing structure.

Sec. 47.07.041. DESIGN MANUAL.

(a) The Village shall adopt a design manual for the installation and construction of network nodes and new node support poles in the public right-of-way that includes additional installation and construction details that do not conflict with this chapter. The design manual may include:

(1) a requirement that an industry standard pole load analysis be completed and submitted to the Village indicating that the service pole to which the network node is to be attached will safely support the load; and

(2) a requirement that network node equipment placed on new and existing poles be placed more than eight feet above ground level.

(b) A network provider shall comply with a design manual, if any, in place on the date a permit application is filed in relation to work for which the Village approved the permit application. The Village's obligations to approve the permit under this Chapter may not be tolled or extended pending the adoption or modification of a design manual.

Sec. 47.07.042. EXCEPTIONS.

Subject to Subchapter D, a network provider may construct, modify, or maintain in a public right-of-way a network node or node support pole that exceeds the height or distance limitations prescribed by this chapter only if the Village approves the construction, modification, or maintenance subject to all applicable zoning or land use regulations and applicable codes.

Sec. 47.07.043. DISCRIMINATION PROHIBITED.

The Village, in the exercise of its administrative and regulatory authority related to the management of and access to the public right-of-way, must be competitively neutral with regard to other users of the public right-of-way.

## **APPLICATIONS AND PERMITS**

### **Sec. 47.07.044. PROHIBITION OF CERTAIN ACTIONS BY THE VILLAGE.**

(a) Except as otherwise provided by this chapter, the Village may not prohibit, regulate, or charge for the installation or collocation of network nodes in a public right-of-way.

(b) The Village may not directly or indirectly require, as a condition for issuing a permit required under this chapter, that the applicant perform services unrelated to the installation or collocation for which the permit is sought, including in-kind contributions such as reserving fiber, conduit, or pole space for the Village.

(c) The Village may not institute a moratorium, in whole or in part, express or de facto, on:

- (1) filing, receiving, or processing applications; or
- (2) issuing permits or other approvals, if any, for the installation of network nodes or node support poles.

### **Sec. 47.07.045. AUTHORITY TO REQUIRE PERMIT.**

(a) Except as otherwise provided by this chapter, the Village shall require a network provider to obtain one or more permits to install a network node, node support pole, or transport facility in a public right-of-way if the permit:

- (1) is of general applicability to users of the public right-of-way;
- (2) does not apply exclusively to network nodes; and
- (3) is processed on nondiscriminatory terms and conditions regardless of the type of entity submitting the application for the permit.

(b) A network provider that wants to install or collocate multiple network nodes inside the territorial jurisdiction of the Village is entitled to file a consolidated permit application with the Village for not more than 30 network nodes and receive permits for the installation or collocation of those network nodes.

### **Sec. 47.07.046. GENERAL PROCESS RELATING TO PERMIT APPLICATION.**

(a) Except as otherwise provided by this section, the Village may not require an applicant to provide more information to obtain the permit than a telecommunications utility that

is not a network provider is required to provide unless the information directly relates to the requirements of this chapter.

(b) As part of the standard form for a permit application, the Village shall require the applicant to include applicable construction and engineering drawings and information to confirm that the applicant will comply with the Village's publicly disclosed public right-of-way design specifications and applicable codes.

(c) The Village shall require an applicant to provide:

(1) information reasonably related to the provider's use of the public right-of-way under this chapter to ensure compliance with this chapter;

(2) a certificate that the network node complies with applicable regulations of the Federal Communications Commission; and

(3) certification that the proposed network node will be placed into active commercial service by or for a network provider not later than the 60th day after the date the construction and final testing of the network node is completed.

Sec. 47.07.047. REVIEW PROCESS BY THE VILLAGE.

(a) The Village shall process each permit application on a nondiscriminatory basis.

(b) Not later than the 30th day after the date the Village receives an application for a permit for a network node or node support pole, or the 10th day after the date the Village receives an application for a permit for a transport facility, the Village shall determine whether the application is complete and notify the applicant of that determination. If the Village determines that the application is not complete, the Village shall specifically identify the missing information.

(c) The Village shall approve an application that does not require zoning or land use approval under this chapter unless the application or the corresponding work to be performed under the permit does not comply with the Village's applicable codes or other municipal rules, regulations, or other law that is consistent with this chapter.

(d) The Village must approve or deny an application for a node support pole not later than the 150th day after the date the Village receives the complete application. The Village must approve or deny an application for a network node not later than the 60th day after the date the Village receives the complete application. The Village must approve or deny an application for a transport facility not later than the 21st day after the date the Village receives a complete application. An application for a permit for a node support pole, network node, or transport facility shall be deemed approved if the application is not approved or denied on or before the applicable date for approval or denial prescribed by this subsection.

(e) If the Village denies a complete application, the Village must document the basis for the denial, including the specific applicable code provisions or other municipal rules, regulations, or other law on which the denial was based. The Village shall send the documentation by electronic mail to the applicant on or before the date the Village denies the application.

(f) Not later than the 30th day after the date the Village denies the application, the applicant may cure the deficiencies identified in the denial documentation and resubmit the application without paying an additional application fee, other than a fee for actual costs incurred by the Village. Notwithstanding Subsection (d), the Village shall approve or deny the revised completed application after a denial not later than the 90th day after the date the Village receives the completed revised application. The Village's review of the revised application is limited to the deficiencies cited in the denial documentation.

#### Sec. 47.07.048. TIME OF INSTALLATION.

(a) A network provider shall begin the installation for which a permit is granted not later than six months after final approval and shall diligently pursue the installation to completion.

(b) Notwithstanding Subsection (a), the Village may place a longer time limit on completion or grant reasonable extensions of time as requested by the network provider.

#### Sec. 47.07.049. APPLICATION FEES.

(a) The Village may charge an application fee for a permit only if the Village requires the payment of the fee for similar types of commercial development inside the Village's territorial jurisdiction other than a type for which application or permit fees are not allowed by law.

(b) The amount of an application fee charged by the Village may not exceed the lesser of:

(1) the actual, direct, and reasonable costs the Village determines are incurred in granting or processing an application that are reasonably related in time to the time the costs of granting or processing an application are incurred; or

(2) \$500 per application covering up to five network nodes, \$250 for each additional network node per application, and \$1,000 per application for each pole.

(c) In determining for purposes of Subsection (b)(1) the amount of the actual, direct, and reasonable costs, the Village may not:

(1) include costs incurred by the Village in relation to third-party legal or engineering review of an application; or

(2) direct payments or reimbursement of third-party public right-of-way rates or fees charged on a contingency basis or under a result-based arrangement.

Sec. 47.07.050. CERTAIN WORK EXEMPTED.

(a) Notwithstanding any other provision of this chapter, the Village may not require a network provider to submit an application, obtain a permit, or pay a rate 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 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.

(b) For purposes of Subsection (a)(2):

(1) a network node or pole is considered to be "substantially similar" if:

(A) the new or upgraded network node, including the antenna or other equipment element, will not be more than 10 percent larger than the existing node, provided that the increase may not result in the node exceeding the size limitations provided by these regulations; and

(B) the new or upgraded pole will not be more than 10 percent higher than the existing pole, provided that the increase may not result in the pole exceeding the applicable height limitations prescribed by regulations;

(2) the replacement or upgrade does not include replacement of an existing node support pole; and

(3) the replacement or upgrade does not defeat existing concealment elements of a node support pole.

(c) The determination under Subsection (b)(1) of whether a replacement or upgrade is substantially similar is made by measuring from the dimensions of the network node or node support pole as approved by the Village.

(d) Notwithstanding Subsection (a):

(1) the Village may require advance notice of work described by that subsection;

(2) a network provider may replace or upgrade a pole only with the approval of the pole's owner; and

(3) the size limitations may not in any event exceed the parameters prescribed by these regulations without the Village's approval, with the Village acting on behalf of the State of Texas as the fiduciary trustee of public property.

## **ACCESS TO MUNICIPALLY OWNED UTILITY POLES**

### **Sec. 47.07.051. USE OF MUNICIPALLY OWNED UTILITY POLES.**

(a) The governing body of a municipally owned utility shall allow collocation of network nodes on municipally owned utility poles on nondiscriminatory terms and conditions and pursuant to a negotiated pole attachment agreement, including any applicable permitting requirements of the municipally owned utility.

(b) The annual pole attachment rate for the collocation of a network node supported by or installed on a municipally owned utility pole shall be based on a pole attachment rate consistent with provisions of the Village's Utility regulations, applied on a per-foot basis.

(c) The requirements of regulations applicable to the installation of a network node supported by or installed on a pole do not apply to a network node supported by or installed on a municipally owned utility pole. .

**Sec. 47.07.052. INCONSISTENT PROVISIONS.** All ordinances or parts of ordinances in force when the provisions of this Ordinance becomes effective which are inconsistent or in conflict with the terms and provisions contained in this Ordinance are hereby repealed only to the extent of such conflict.

**Sec. 47.07.053 SEVERABILITY.** Should any part, sentence or phrase of this Ordinance be determined to be unlawful, void or unenforceable, the validity of the remaining portions of this Ordinance shall not be adversely affected. No portion of this Ordinance shall fail or become inoperative by reason of the invalidity of any other part. All provisions of this Ordinance are hereby declared to be severable.

**Sec. 47.07.054. PROPER NOTICE AND MEETING.** It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public and that public notice of the time, place and purpose of said meeting was given as required by the Open Meetings Act, Chapter 551 of the Texas Government Code.

**Sec. 47.07.055. EFFECTIVE DATE.** This ordinance is effective immediately upon its passage and approval.

**PASSED AND APPROVED** by the Village Council of the Village of Volente by a vote of 5 yay and 0 nay on this 29<sup>th</sup> day of August, 2017.

**Approved:**

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Mayor Ken Beck

**Attest:**

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City Secretary Nicole Vicuña