



Legislation Text

File #: 18-035-O, **Version:** 1

AN ORDINANCE GRANTING VERIZON WIRELESS A CONCURRENT USE PERMIT FOR A SMALL WIRELESS TELECOMMUNICATION FACILITY ON CITY OF DULUTH UTILITY POLES IN THE PLATTED STREET RIGHT OF WAY NEAR 250 CANAL PARK DRIVE AND 688 WEST RAILROAD STREET.

CITY PROPOSAL:

The city of Duluth does ordain:

Section 1. Under the authority of Section 100 of the 1912 Home Rule Charter of the city of Duluth, as amended, and subject to the conditions, limitations and restrictions hereinafter set forth, permission is granted to Verizon Wireless and its successor(s) in interests, referred to herein as the permittee, to construct and maintain the following:

Two small wireless telecommunication facilities on City of Duluth utility poles, one in the platted right of way of South Lake Avenue near the northeast intersection of Railroad Street and South Lake Avenue, and one the platted right of way of Railroad Street approximately 100 feet to the northeast of the center line of the vacated 7th Avenue West right of way, as shown by Attachment 1, and in conformance with the engineering drawings approved by the city engineer and on file in the office of the city engineer as City Project No.1699. Said drawings shall include the provision of a new poles complying with the city's standard bolt pattern and a new foundation, all of which shall comply with standard city specifications therefore.

Section 2. Before this ordinance shall be effective for any purpose whatsoever, the permittee shall have filed with the planning division a certification of insurance approved as to form by the city attorney evidencing that the permittee has in force a policy of insurance meeting the following requirements:

- (a) Comprehensive general liability insurance in an amount not less than \$1,500,000 for bodily injuries and in an amount not less than \$500,000 for property damage or \$1,500,000 single limit coverage; and
- (b) Insurance coverage shall include all permittee's activities occurring upon or within public right of way or easement occupied pursuant to this ordinance whether said activities are performed by the permittee or its agents, representatives or contractors; and
- (c) The insurance policy shall be approved by the city attorney; and
- (d) The policy shall contain a condition that it may not be canceled without 30 days written notice to the city of Duluth and directed to the attention of the city attorney; and
- (e) The city of Duluth shall be named as an additional insured; and
- (f) The certificate shall also reference this ordinance by its ordinance number.

Section 3. Subject to Minn. Stat. § 237.163, Sub.5, the permit granted by this ordinance may be terminated at any time by the city's Director of Public Works and Utilities (the "Director") if the

Director determines that the use of the area occupied by the permittee or of any city-owned facilities therein interferes with any public purpose for which the city needs said area or facility. Terminations for other reasons are governed by Section 7 of this Ordinance.

The permit granted by this ordinance may be terminated at any time by the city's Director of Public Works and Utilities (the "Director") if the Director determines that the use of the area occupied by the permittee or of any city-owned facilities therein interferes with any public purpose for which the city needs said area or facility. Terminations for other reasons are governed by Section 7 of this Ordinance.

Unless the Director determines that a shorter notice period is necessitated by emergency circumstances, city shall give permittee 30 days written notice of such a termination of the permit granted pursuant to this ordinance, delivered to the electronic address, facsimile number, or mailing address provided by the permittee pursuant to Section 9(f) below. In the event of emergency, a shorter notice period shall be set forth in the notice.

Upon termination permittee shall cause all private improvements other than city's replacement pole and light fixture installed or placed pursuant to this permit to be removed by the deadline provided in termination notice unless extended or waived by the Director in writing. Permittee shall be responsible for all costs incurred to remove said improvements, including any costs associated with repairing damage caused to the public utility pole by the removal. As a condition of accepting this ordinance, permittee waives any and all claims against the city of Duluth, or any of its officers, agents or servants, for any compensation or reimbursement for damages of any kind whatsoever related to any such removal by city following termination.

Section 4. By accepting the terms of this ordinance, the permittee agrees to defend, indemnify, and hold harmless the city of Duluth from all liability or claims of liability for bodily injury or death to persons, or for property damage, in which the claim: A. alleges a negligent or otherwise wrongful act or omission of the permittee or its employee, agent, or independent contractor in installing, maintaining, repairing, or removing the permittee's facilities; and alleges that the local government unit is liable, without alleging any independent negligent, or otherwise wrongful, act or omission on the part of the local government unit; or B. is based on the local government unit's negligent or otherwise wrongful act or omission in issuing the permit or in failing to properly or adequately inspect or enforce compliance with a term, condition, or purpose of the permit granted to the permittee.

Section 5. The permittee shall, at its expense, protect, support, temporarily disconnect, remove, or relocate from the public utility pole the private improvements, when required by city officials by reason of snow removal, traffic conditions, public safety, street vacation, freeway and street construction, change or establishment of street grade, sidewalks, installation of sewers, drains, water pipes, power lines, signal lines and tracks, and the installation or repair of any type of structures or utility improvements by governmental agencies.

Section 6. This concurrent use permit, and all rights thereunder, may not be sold, assigned, or transferred without the written consent of the city, such consent not to be unreasonably withheld, conditioned or delayed, unless such transfer shall be made to (i) any entity in which the Permittee holds a controlling or similar interest; (ii) any entity which holds a controlling equity or similar interest in the Permittee; (iii) any entity under common control with the Permittee, or (iv) any entity which acquires all or substantially all of the Permittee's assets in the market defined by the FCC in which the small wireless telecommunications facility is

located by reason of a merger, acquisition or other business reorganization. Upon the sale, assignment or transfer of permittee's interest in the permit granted by this ordinance and any required written consent, the permittee shall provide written notice to the city's planning division within ten days of such transfer. The permittee's successor in interest shall file with said planning division within ten days of such transfer a duly executed and acknowledged written acceptance of the terms of this ordinance and the certificate of insurance required in Section 2 above.

Section 7. Subject to Minn. Stat. § 237.163, Sub.5, the permit granted by this ordinance is subject to termination by the Director upon permittee's material violation of any of the terms and conditions of this permit or Minn. Stat. § 237.163, Sub. 4(c). Notice of such failure shall be, delivered to permittee as provided in Section 3 above. Permittee shall have 30 days from the date of sending such notice to correct such failure and to fully comply with the requirements of this ordinance. If permittee shall fail to so correct and comply, this ordinance shall be deemed terminated. Provided, however, that in the event that the Director determines that such failure constitutes an emergency endangering public health or safety, the notice may establish a shorter period for such correction. Upon termination, permittee shall remove the private improvements. Permittee shall within 30 days after termination remove its equipment, conduits, fixtures and all personal property and restore all portions of the right-of-way to its original condition, reasonable wear and tear excepted. City agrees and acknowledges that all of the equipment, conduits, fixtures and personal property of the applicant shall remain the personal property of the permittee and the permittee shall have the right to remove the same at any time during the term of the permit. All poles, underground conduit and pole boxes are and shall remain the property of the city. All rents paid prior to said termination date shall be retained by the city.

Section 8. Permittee shall not install a replacement pole or use any city light or signal poles unless structural analysis has been completed by a professional engineer licensed in the state of Minnesota indicating the sufficiency of the wireless support structure, or pole, to support the telecommunications equipment, including stamped design calculations and engineering drawings.

Section 9. The permittee shall observe the following conditions:

(a) Permittee's use of the public right of way or easement shall be limited to the designated area described in Section 1 above and further shown on the attached exhibit and on the engineering drawings on file; and

(b) Permittee agrees that the private improvements shall be constructed and maintained in such a manner so as in no way interfere with or damage any portion of any existing or future public improvement; and

(c) Permittee shall provide notice of work two working days in advance of any work permitted under this permit or any other permitted related to such work and shall schedule such work to coordinate with any required inspections. Permittee shall notify City Engineer at 218- 730-5200 at least two working days prior to the installation of any telecommunication equipment or cabling so we can perform inspection of final installation; and

(d) Permittee shall obtain all other permits as may be required by the city, other governmental agencies and Minnesota Power, including, but not limited to obstruction, excavation, electrical, and stormwater; and

(e) Permittee shall not connect any permitted facilities to any power source owned, controlled, or

paid for by the city. Permittee shall identify all power sources, and indicate connection to and ownership of said sources, and provide evidence of approval by said entities. Permittee shall indicate the location of any new required meters or electrical cabling; and

(f) Permittee shall provide the name and telephone number of a contact person for the city's use in case of emergency. The contact person should be available at that phone number 24 hours per day, 7 days a week. Permittee shall also provide contact and telephone number for non-emergency notifications; and

(g) City retains the right to shut off power to the permitted facilities in any and all cases of emergency; to repair, maintain, alter or improve the right-of-way in connection with the city's operations including painting, reconditioning of the poles, or otherwise improve or repair the support structure in a substantial way, including excavation of any areas where conduit is associated with the facility. Except in cases of emergency, prior to commencing repair or maintenance or work in the right-of-way, the city shall provide the permittee not less than 30 days' prior written notice thereof. City will send notice to the address provided at time of application. Permittee shall be solely responsible to protect or relocate their facilities to their satisfaction from any consequences of such maintenance activities; provided that nothing herein shall relieve permittee from the obligation to secure any permits required for such work. City reserves the right to require the permittee to remove or relocate or both any and all facilities from the pole for maintenance work. Permittee may request a mobile site on the right-of-way during the maintenance work. If the site will not accommodate mobile equipment, it shall be the permittee's responsibility to relocate to an auxiliary site; and

(h) Permittee will locate any underground items in accordance with Gopher State One Call rules. The city will bear no responsibility for locating any facility related to the permittee's concurrent use permit except as it is responsible under the Gopher State One Call rules; and

(i) Permittee must repair or replace at their expense any damage to anything in the right-of-way caused by the Permittee's permitted installation or operations to the city's reasonable satisfaction; and

(j) Permittee must submit record drawings within 30 days of activation of the small wireless facility installed on each permitted location, showing the actual location of any wiring or conduit runs below grade. Record drawings shall be in accordance with the city of Duluth Public Works and Utilities' "Engineering guidelines for Professional Services and Developments"; and

(k) Permittee after 30 day notice of termination as outline in section 3 above, shall remove its equipment, conduits, fixtures and all personal property and restore all portions of the right of way to its original condition at the permittee's expense, reasonable wear and tear excepted. City agrees and acknowledges that all of the equipment, conduits, fixtures and personal property of the Permittee shall remain the personal property of the Permittee and the Permittee shall have the right to remove the same at any time during the term of the permit. All underground conduit and pole related fixtures are and shall remain the property of the city; and

(l) Permittee shall implement all measures at the transmission site as required by FCC regulations, including but not limited to posting signs and markings. The city shall cooperate with the Permittee to fulfill its Radio Frequency exposure obligations. Permittee agrees to install only equipment of the type and operating frequency which will not cause harmful interference which is measurable in accordance with then existing industry standards to any equipment of the city or other users of the structure which exist on the structure prior

to the date the permit was issued or to any equipment operated by the city. In the event any of the Permittee's equipment causes such interference, and after the city has notified Permittee in writing of such interference, the Permittee will take all steps necessary to eliminate the interference, including but not limited to the Permittee powering down its equipment for intermittent testing; and

- (m) The permittee shall maintain the small wireless facility in a good and safe condition, and in compliance with all applicable fire, health, building or other codes or permits as applicable; and
- (n) No open cutting shall be allowed on pavement that has been placed or installed within 15 years;
- (o) The City bears no responsibility for accidents or damages to the Permittees above or below ground facilities, including the electric meter; and
- (p) The Permittee will be the permittee on backhaul facilities serving the permittee's small wireless communication facilities.

Section 10. The following events shall automatically cause the termination of the term of this ordinance:

- (a) The failure by the permittee to have on file the required insurance certificate 60 days after this ordinance takes effect, and maintain the same level of insurance as long as their facilities are operating under this permit, as specified in Section 2; and
- (b) The failure of the permittee to commence the improvements authorized by this ordinance within 365 days after this ordinance takes effect; and
- (c) The failure to pay rent, maintenance costs, or other applicable fees, as allowed by State Statute 237.163 or as established by the city council.

Section 11. That this ordinance shall take effect and be in force 30 days from and after its passage and publication.

STATEMENT OF PURPOSE: This ordinance grants CommNet Cellular Inc., d/b/aVerizon Wireless, a concurrent use permit for small wireless facilities on two new utility poles that are replacing an existing older poles in approximately the same location. This is one of three concurrent use permit applications for four sites in Duluth submitted for review on May 8, 2018. These poles will be subsequently owned and operated by the City of Duluth within the dedicated public right of way.

The wireless facilities will not be stealthed or camouflaged; the equipment will be visibly attached to the exterior of the pole. The attachments will include between 3 to 6 exterior mounted panel antennas or power converters mounted between at least 22 to 32 feet above the ground, with electric meters at about 5 feet from the ground and underground wire connections.

On June 12, 2018, the planning commission held a public hearing on the proposal as shown in Attachment 1, and voted 8 yeas, 0 nays, 0 abstentions, to recommend that the city council approve the request for a concurrent use of streets.

Petition received: May 8, 2018
Action deadline: August 6, 2018