Winston-Salem

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Memorandum

TO: Dan Besse, Southwest Ward, Chairman, Public Works Committee
Members of the Public Works Committee
Members of the City Council

FROM: Angela I. Carmon, City Attorney
Marilena Jensen-Guthold, Assistant City Attorney

DATE: Tuesday, January 16, 2017

SUBJECT: Small Wireless Facility Encroachments

CC: Lee D. Garrity, City Manager
Greg Turner, Assistant City Attorney

On Tuesday, January 9, 2017, the Public Works Committee of the City Council considered a resolution to approve encroachment agreements with Fiber Technologies Networks, LLC. During the discussion of that resolution, the Committee raised five main questions, to which the City Attorney's Office now responds. The questions and responses appear below.

1. Does the City assume liability when it approves a small wireless facilities encroachment? Does the City secure disclaimers? What protection does the City have if a truck hits a small wireless facility or lightning strikes it?

§ 79- 7(d) of the City's small wireless facilities ordinance says that, by applying for and accepting a permit to encroach in the City's right-of-way, the applicant agrees to assume all risk of liability for damages to people, businesses, and property that arises in connection with the collocation, installation, occupation, presence, existence, operation, maintenance, modification, repair, replacement, relocation, or removal of the facilities covered by the permit, or the proposed work, therefor. The applicant must also secure and maintain an insurance policy in continuous effect for the duration of the encroachment, to protect the City from liability for all the above. The applicant must similarly provide the City insurance certificates for any subcontractors the applicant engages to perform work on the facilities, and both the applicant's and its subcontractors' insurance certificates must name the City an additional insured.

§ 79- 7(e) of the City's small wireless facilities ordinance says that, by applying for and accepting a permit to encroach in the City's right-of-way, the applicant also agrees to release, indemnify, defend, and covenant not to sue the City for damages pertaining to the applicant's acts or omissions, in connection with the permitted work or the collocation, installation, occupation, presence, existence, operation,

maintenance, modification, repair, replacement, relocation, or removal of the facilities covered by the permit.

The encroachment agreement that applicants must sign once they receive City Council's approval for an encroachment permit says that the applicant agrees to release, indemnify, and defend the City for damages relating to the presence, construction, installation, operation, use, inspection, maintenance, alteration, repair, reconstruction, removal, or relocation of the facilities, by either party, the breach by the applicant of any provision of the encroachment agreement, or the introduction or exacerbation by either party of any environmental contaminant or condition in connection with the exercise by either party of its rights or responsibilities under the agreement. The indemnification obligation survives the termination of the agreement and removal of the encroachment. The agreement also requires the applicant to secure and maintain an insurance policy in continuous effect, during the pendency of the encroachment and for 1 (one) year thereafter, naming the City an additional insured.

Furthermore, the encroachment agreement requires applicants to comply with the North Carolina State Building Code, other uniform building, fire, electrical, plumbing, and mechanical codes, and state and local amendments, thereto, concerning imminent threats of property damage and personal injury. The encroachment agreement requires applicants to install, operate, and maintain the encroaching facilities in safe and proper condition, to inspect the facilities and make necessary repairs, to perform the permitted activities in such a manner that neither the facilities nor the permitted activities will interfere with or endanger travel or City infrastructure, and to provide proper signs, signal lights, flagmen, and other warning devices during the conduct of the permitted activities, as specified by the Manual on Uniform Traffic Control Devices for Streets and Highways. The City may require the removal or relocation of facilities which violate the aforementioned codes or safety requirements. In the event of an emergency or in the event that the City determines an imminent threat exists to the right-of-way, property, or the public, the City grants itself the right to immediately alter, remove, or relocate the encroaching facilities, without liability or obligation for resulting damage. If the City deems it necessary to inspect, maintain, repair, reconstruct, or replace the encroaching facilities, the applicant must reimburse the City its costs. The same pertains if the applicant fails to remove facilities the City has directed be removed, or if the City removes the facilities to avert a threat or in response to an emergency. The City's right to order or perform inspections, maintenance, alterations, repair, reconstruction, relocation, or removal does not, however, confer an obligation on the City to do so, and the City expressly disclaims any such responsibility.

The City may also require the applicant, via the encroachment agreement, to repair and restore any property the applicant damages and to perform any work necessitated by the encroachment which the City deems necessary to ensure the public's safety or to protect the integrity of the right-of-way or the City's improvements, therein.

The agreement conditions the applicant's right to encroach on the applicant's adherence to all the above requirements and the City reserves the right to suspend work or to revoke the encroachment permit for non-compliance.

2. Can the City require or request that applicants install City fixtures, such as streetlights, on applicants' small wireless facilities/structures?

§ 160A-400.54(d)(1) of the North Carolina General Statutes forbids a city from requiring an applicant to reserve pole space for the city on the applicant's wireless facilities. The City could request that the applicant do so, but cannot make it a condition of approval.

3. Is there a cap on the number of small wireless facilities permitted in the City? Can the City control the proximity of one to the other?

There does not appear to be a cap on the number of small wireless facilities permitted in the City. The only language in the North Carolina General Statutes that addresses the number of small wireless facilities is that in § 160A-400.54(d)(7) which permits an applicant seeking to collocate facilities at multiple locations within the jurisdiction to file a consolidated application for up to/no more than 25 (twenty-five) separate facilities.

However, the City can control the proximity of small wireless facilities to one another. § 160A-400.54(d)(5) and § 160A-400.55(i) allow the City to deny applications that do not comport with public safety and reasonable spacing requirements concerning the location of ground-mounted equipment in the right-of-way.

4. On what grounds can the City deny an application?

According to § 160A-400.54(d)(5), § 160A-400.51(1a), and § 160A-400.55(h), the City may deny an application only on the basis that it fails to meet (1) the North Carolina State Building Code and any other uniform building, fire, electrical, plumbing, or mechanical code adopted by a recognized national code organization, as well as any state or local amendments to those codes, which are enacted solely to address imminent threats of destruction of property or injury to persons, (2) local code provisions or regulations that concern public safety, objective design standards for decorative poles, or reasonable and non-discriminatory stealth and concealment requirements, including screening or landscaping for ground-mounted equipment, (3) public safety and reasonable spacing requirements concerning the location of ground-mounted equipment in a right-of-way, or (4) historic preservation zoning regulations that are consistent with Part 3C of Article 19 of Chapter 160A of the North Carolina General Statutes, concerning historic districts and landmarks, the preservation of local zoning authority under 47 U.S.C. § 332(c)(7), the requirements for facility modifications under 47 U.S.C. § 1455(a), or the National Historic Preservation Act of 1966, 54 U.S.C. § 300101, et seq., as amended, and the regulations, local acts, and City charter provisions adopted to implement those laws. The City must document the basis for a denial, including the specific code provisions on which the denial is

based and send the applicant the documentation on or before the day that the City denies the application.

5. How long does the City have to review an application?

According to § 160A-400.54(d)(4), the City has 45 (forty-five) days from the date an application is deemed complete to review an application, or some other timeframe to which the City and the applicant agree. If the City fails to approve or deny an application within 45 (forty-five) days from the date the application is deemed complete, the application is deemed approved.

Per § 160A-400.54(d)(3), an application is deemed complete, unless the City notifies the applicant within thirty (30) days of submission, or some other timeframe to which both parties agree, that the application is deficient, and in what respect. The application is deemed complete on resubmission of additional materials that cure the identified deficiencies.

Thus, if the City does not notify the applicant that its application is deficient, the application can be deemed complete on the date of submission, and the City has 45 (forty-five) days, thereafter, to approve or deny the application.