ORDINANCE NO. 2019-08

AN ORDINANCE OF THE ALBANY CITY COUNCIL ENACTING A NEW SECTION 14-7 "SMALL WIRELESS FACILITIES" WITHIN CHAPTER XIV "WORK ON PUBLIC PROPERTY" OF THE ALBANY MUNICIPAL CODE

WHEREAS, the City has adopted regulations for work on public property in the form of Chapter XIV of the Albany Municipal Code; and

WHEREAS, on May 5, 2015, the City Council adopted Ordinance No. 2015-03 to accommodate the proliferation of small cells and distributed antenna system (DAS) on public and private property; and

WHEREAS, on September 26, 2018, the Federal Communication Commission (FCC) adopted “Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment” (WT Docket No. 17-79; WC Docket No. 17-84) as part of 5G deployment nationwide, which pertains to small cell facilities for wireless carriers; and

WHEREAS, in 2018, the FCC issued a declaratory ruling and report (FCC 18-133) to clarify the intent of the Telecommunications Act of 1996 with respect to local regulations for small wireless facilities; and

WHEREAS, this ruling requires local governments to comply within specified time periods (so-called “shot clocks”) and allows local governments to impose clear, reasonable, and feasible regulations with respect to regulations for small wireless facilities in the public right-of-way; and

WHEREAS, according to California’s Public Utilities Code (PUC 7901), companies defined as telephone corporations are allowed to have installations in the public right-of-way, but
municipalities "shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed”; and

WHEREAS, it is inferred that the City of Albany may control height, appearance, location/placement, and safety issues for wireless facilities in the public right-of-way; and

WHEREAS, this ruling is effective as of January 14, 2019; and

WHEREAS, the City of Albany may expect applications to place small wireless facilities in the public right-of-way in the future and would benefit from having regulations in place to clarify requirements and expectations for City staff, decision-makers, and applicants; and

WHEREAS, the City Council held a public hearing on October 21, 2019 and continued the item to a date certain; and

WHEREAS, the City Council held a public hearing on November 18, 2019 and considered all public comments received, the presentation by City staff, the staff report, and all other pertinent documents regarding the proposed request;

NOW, THEREFORE, THE ALBANY CITY COUNCIL ORDAINS AS FOLLOWS:

SECTION 1: THE FOLLOWING SECTION IS HEREBY ENACTED WITHIN CHAPTER XIV “WORK ON PUBLIC PROPERTY” OF THE ALBANY MUNICIPAL CODE AS FOLLOWS:
14-7 SMALL WIRELESS FACILITIES IN PUBLIC RIGHT OF WAY

14.7-1 Purpose

The purpose of this section is to acknowledge and achieve the following:

a. The City has an interest in promoting public health, safety, welfare and convenience by ensuring that persons may reasonably use the public streets, sidewalks, rights-of-way and other public property without interference with such use.

b. The City has an interest in promoting equitable access to high-quality reliable wireless coverage for the City’s residents, visitors, and businesses.

c. The City has an interest in creating attractive streets, sidewalks, and public rights-of-way, which can be accomplished by minimizing visual clutter and promoting a consistent design aesthetic for wireless facilities.

d. The regulation of small wireless facilities in this section provides the least intrusive and least burdensome means for ensuring that the purposes stated in this section are carried out while still providing ample opportunities for wireless coverage.

A reasonable accommodation of these competing interests can be achieved by adoption of this section.

14.7-2 Definitions

In addition to the definitions contained in Section 20.08.020 of the Albany Municipal Code, the following definitions shall also provide clarity.

a. “Small wireless facilities” means the same as defined by the FCC in 47 CFR § 1.1312(e)(2), as may be amended or superseded, which defines the term to mean facilities mounted on structures 50 feet or less in height or which are no more than 10 percent taller than adjacent structures, with each antenna no more than three cubic feet in volume, and all associated equipment with no more than 28 cubic feet in volume.
Where there is a discrepancy between definitions in Section 20.08.020 and definitions in the FCC in 47 CFR, the latter shall apply.

b. “Director” means the director of the Albany Community Development Department.

14.7-3  Applicability

The provisions in this section shall apply to all existing small wireless facilities, and all applications and requests for authorization to construct, install, attach, operate, collocate, modify, relocate or otherwise deploy small wireless facilities within the public right-of-way within the City’s boundaries.

14.7-4  Application Requirements

Application submittal requirements shall be established and amended from time to time by resolution of the Albany City Council.

14.7-5  Notice Procedures for Ministerial Applications

For projects subject to ministerial review, the City shall provide written notification of any proposed installation in the public right-of-way to all owners and tenants within 300 ft. of the proposed location, prior to project approval. The notice shall include a description of the proposed installation, including the proposed dimensions, design, color, type of facility, and proposed location.

14.7-6  Permit Approval Process

An encroachment permit is required for any small wireless facility proposed on an existing, new or replacement antenna support structure, and shall be subject to the following permit requirements:

a. Ministerial Approval. At the discretion of the Director, an application for a small wireless facility may be considered ministerial where the proposed facility will be collocated on an existing pole, monopole, or similar support structure located in the public right of way other than a building that has been approved by the City as a
wireless communication site. The notification procedures contained in 14.7-5 shall apply.

b. **Commission Approval.** All small wireless facilities which are not eligible for consideration for ministerial approval shall be considered by the Planning and Zoning Commission in a noticed public hearing and may be approved subject to clear, reasonable, and feasible conditions, as may be adopted by resolution and amended from time to time by the Commission or City Council.

c. **Building Permit.** Unless otherwise specifically exempted, a Building Permit shall be required for all small wireless facilities.

d. **Zoning Clearance.** For existing small wireless facilities where wireless carriers seek to replace antennas and equipment and where there is no facility expansion and negligible size difference (maximum increase of ten (10%) percent surface area) in antennas and related equipment, the carrier shall be subject to a zoning clearance according to procedures and standards stated in subsection 20.100.020. The zoning clearance shall be reviewed and approved by staff prior to building permit issuance.

### 14.7-7 Design and Location Criteria

a. **Development Regulations.** Small wireless facilities shall be subject to the development requirements and standards defined in Section 20.20.100.E, including Section 20.20.100.E.4 which pertains to Microcell Facilities and Distributed Antenna Systems (DAS), except:

1. **Height.** Notwithstanding, Section 20.20.100.E.4, the highest portion of an antenna comprising the small wireless facility shall extend no more than six (6) feet above the highest point of the antenna support structure.

2. **Screening.** Notwithstanding, Section 20.20.100.E.1.d, screening shall be subject to the standards for screening by enclosures indicated by Section 14.7-7.b.
b. **Enclosures.** Enclosures and related security measures, such as locks and anti-climbing devices, must be graffiti-resistant and painted a flat, non-reflective color to match the underlying support structure.

1. All antennas and associated mounting equipment, hardware, cables, and other connectors must be completely concealed within an opaque enclosure.

2. Accessory equipment shall be installed in an underground environmentally controlled vault or pole-mounted at least 10 feet above grade, flush to the pole, if technically feasible, to minimize visibility. All cables, wires, and other connectors must be routed through conduits within the pole and concealed from public view. Where infeasible, cables, wires, and other connectors shall be routed through a single external conduit shroud that has been finished to match the underlying support structure. Accessory equipment may be located at the base of the support structure if installed within a shroud, enclosure, or pedestal that is integrated into the base of the support structure.

c. **Antenna Locations.** Applicants shall install antennas above the pole unless the applicant demonstrates that this location would be technically infeasible. Side-mounted antennas on a stand-off bracket or extension arm must be concealed with a shroud. All cables, wires, and other connectors must be concealed within the side-arm mount or extension arm.

d. **Lights.** Small wireless facilities shall not include any lights that would be visible from publicly accessible areas, except as may be required under the Federal Aviation Administration, FCC, or other applicable regulations for health and safety. All equipment with lights (such as indicator or status lights) must be installed within enclosures or in locations that minimize visibility from publicly accessible areas.

e. **Undergrounding.** The undergrounding of small wireless facilities in the public right-of-way is encouraged, except for antenna and other accessory equipment that cannot functionally be placed underground. In any event, small wireless facilities that are
not required to be above-ground to function, shall be installed underground, at applicant’s cost, where utilities are already underground or when new undergrounding projects are undertaken.

f. **Encroachments over Private Property.** Small wireless facilities may not encroach onto any private or other property outside the public right-of-way without the property owner’s express written consent.

g. **Obstructions.** Small wireless facilities shall not physically interfere with or impede access to:

1. Any worker access to above-ground or underground infrastructure for traffic control, streetlight or public transportation, including but not limited to signage, parking meters, traffic signs or signals;
2. Access to any public transportation vehicles, shelters, street furniture, or other improvements at a public transportation stop;
3. Worker access to above-ground or underground infrastructure owner or operated by any public or private utility agency;
4. Fire hydrant or water valve;
5. Access to any doors, gates, sidewalk doors, passage doors, stoops or other ingress and egress points to any building appurtenant to the rights-of-way;
6. Access to any fire escape.

h. **Electric Meters.** Small wireless facilities shall use flat-rate electric service or other method that obviate the need for a separate above-grade electric meter, where feasible. If flat-rate service is not available, the applicant may install a shrouded smart meter, consistent with the design criteria referenced in this subsection.

i. **Street Trees.** To preserve existing landscaping, all work performed in connection with small wireless facilities shall not cause any street trees to be trimmed, damaged,
or displaced. If any street trees are damaged or displaced, the applicant shall be responsible, at its sole cost and expense, to plant and maintain replacement trees, consistent with City standards.

14.7-8 Operation, Maintenance, Certification, and Revocation

a. Standards. Operation and maintenance requirements are as follows:

1. Small wireless facilities shall be subject to the operation, maintenance, signage, monitoring, and certification standards defined in Section 20.20.100.G and Section 20.20.100.H;

2. Small wireless facilities shall maintain radio frequency thresholds in compliance with FCC radio frequency exposure standards;

3. If the Community Development Director at any time finds that there is good cause to believe that a wireless communication antenna is not in compliance with applicable FCC radio-frequency standards, he/she may initiate appropriate enforcement actions, including revocation procedures identified in Section 14.7-8(e);

b. Lease Agreement on City-Owned Facilities. A lease agreement shall be executed by the operator and the City for any small wireless facility located on a City-owned facility.

c. Post-Installation Certification. Within 60 days after the permittee commences full unattended operations of a small wireless facility, the permittee shall provide the Director with documentation that the facility has been installed and/or constructed in strict compliance with the approved construction drawings and photos simulations. Except where categorically exempt by federal law, documentation shall also be provided that verifies, through testing, that the radio frequency emissions do not exceed FCC exposure standards.
d. **Removal.** The operator shall be responsible for removal when facility is no longer needed by the operator or operational; if such facilities are not removed within 90 days of facility ceasing operations, the site shall be deemed to be a nuisance and the City may call the bond for removal or take such other action as it deems appropriate.

e. **Revocation of Permit.** The process for revocation of an encroachment permit is as follows:

1. This encroachment permit may be revoked at the option of the Director whenever:
   
   i. It appears that continuing allowance of the permitted work, whether because of changed conditions or otherwise, interferes with full, adequate or safe public use of the right-of-way involved; or
   
   ii. The permittee fails to comply with or violates any city ordinance, city standard, safety regulations, or any condition of the issuance of the permit.

2. In a non-emergency situation, the Director shall inform the permittee of violations and provide the permittee a reasonable timeline to correct such violations. If the violations are not rectified to the satisfaction of the Director within the timeline allotted for corrections, the permittee shall have the opportunity to request a hearing with the Planning & Zoning Commission. The Commission shall review the violation and determine whether revocation is warranted;

3. Upon revocation of the permit, the permittee shall immediately restore the public right-of-way to a condition as required by the Director. If the restoration is not completed within the time specified by the Director, the City may take any and all necessary action so required to restore the right-of-way. Any and all costs incurred by the City will be deducted from any deposits posted by the permittee and if necessary recovered by legal action.
### 14.7-9 Findings

The approving body may approve an encroachment permit for small wireless facilities only upon making written findings based on substantial evidence in the record.

1. That the proposed project meets the definition for “small wireless facilities”;
2. That the applicant has demonstrated that the proposed project will be in compliance with all applicable health and safety regulations, which include but are not limited FCC regulations and guidelines for human exposure to radio frequency emissions; and
3. That all applicable development standards in subsection 14.7-7 above have been met.

### 14.7-10 Appeals

a. **Appeals.** Any party aggrieved by a decision to grant or deny a permit taken by the Community Development Department or the Planning & Zoning Commission subject to the provisions of this Chapter, may appeal such action to the Albany City Council.

b. **Appeal Filing.** To initiate an appeals process, the appellate must file a Notice of Appeal form within ten (10) days of the date of action.

c. **Grounds for Appeal.** The application shall state the specific grounds for appeal. See Section 20.20.080 (D) (1) “Grounds for Appeal.”

d. **Procedures.** The appeal hearing shall be scheduled within five (5) days of receipt of the appeal and the hearing shall be held within twenty (20) days of the date of filing.

### 14.7-11 Severability

If any provision of this Chapter, in whole or in part, is declared by a court of competent jurisdiction to be unconstitutional, invalid, or inoperative for any reason, or is preempted by legislative enactment, such court decision or legislative enactment shall not affect the
validity of the remaining provisions of this Chapter. The Albany City Council hereby declares that it would have adopt this Ordinance and every provision herein, regardless of the fact that any provision(s) might subsequently be declared invalid by a court decision or be preempted by a legislative enactment.

SECTION 2: PUBLICATION AND EFFECTIVE DATE.

This ordinance shall be posted at three public places within the City of Albany and shall become effective 30 days after the date of its posting.

PASSED AND ADOPTED by the City Council of the City of Albany at its meeting on the 2nd day of December 2019, by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

ROCHELLE NASON, MAYOR