BILL NO. 18-211 **ORDINANCE NO. 8528**

AN ORDINANCE AMENDING CHAPTER 26. STREETS, SIDEWALKS AND OTHER PUBLIC PLACES, OF THE CITY CODE OF THE CITY OF LEE'S SUMMIT, MISSOURI, TO PROVIDE CONSISTENT MANAGEMENT OF THE RIGHTS-OF-WAY WITH RESPECT TO SMALL WIRELESS FACILITIES.

WHEREAS, the City of Lee's Summit ("City") owns rights-of-ways and is responsible for the management and care of this finite resource; and,

WHEREAS, the City is desirous of allowing use and consistent access of the rights-of-way to vehicular and pedestrian traffic and use by utility service companies under State and federal law; and,

WHEREAS, new technologies, users and service providers seek access to and use of this finite resource in number and space not requested previously; and,

WHEREAS, 2018 General Assembly of the State of Missouri adopted the Uniform Small Wireless Facility Deployment Act as set forth in House Bill 1991 and the Federal Communications Commission issued Order 18-133 preempting the City's authority to regulate the rights-of-way and other City structure with regard to small wireless facilities; and,

WHEREAS, House Bill 1991 requires the City to adopt an ordinance to make available to wireless providers rates, fees, and other terms that comply with RSMo. §§ 67.5110-67.5121, and,

WHEREAS, the City desires to adopt Code provisions that comply with the law while preserving its authority over the right-of-way through terms and conditions that protect use of the right-of-way for its original intended purpose and ensure that use by utility service providers is consistent, safe, appropriate, nondiscriminatory and competitively neutral and protect the public health, safety, and welfare.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF LEE'S SUMMIT, MISSOURI, as follows:

SECTION 1. Sections 26-211, Insurance, 26-212 Bonding, and 26-213 Indemnification, of Division 10, Insurance, Bonding and Liability, of Article III, Right-of-Way Management, of Chapter 26, Streets, Sidewalks and Other Public Places, of the Code of Ordinances, are here by amended to read as set out in Exhibit A, attached and incorporated by reference as if fully set forth herein, to this Ordinance, wherein deletions and additions of language are shown.

SECTION 2. The City Council hereby adopts the *City of Lee's Summit's Standard Terms and Conditions for the Placement Of Wireless Facilities in the Right-Of-Way*, attached as Exhibit B and incorporated by reference as if fully set forth herein, and does hereby amend the Code of Ordinances by enacting a new subsection D to Section 26-134, Permit Conditions, to provide reference and reflect the adopted above referenced standards. The new subsection D to Section 26-134 shall read as follows:

D. Terms and Conditions for Small Wireless Facilities

1. The *City of Lee's Summit's Standard Terms and Conditions for the Placement Of Wireless Facilities in the Right-Of-Way*, and its most current edition, as approved by the City of Lee's Summit City Council is hereby adopted and incorporated in this chapter as fully as if set forth herein.

2. Three (3) copies of the *City of Lee's Summit's Standard Terms and Conditions for the Placement of Wireless Facilities in the Right-Of-Way* and any amendments thereto are on file in the office of the City Clerk.

SECTION 3. Nothing in this Ordinance shall be construed to affect any suit or proceeding now pending in any court or any rights acquired or liability incurred nor any cause or causes of action occurred or existing, under any language, act or ordinance repealed hereby. Nor shall any existing right or remedy of any character be lost, impaired, or affected by this ordinance.

SECTION 4. All ordinances or parts of ordinances in conflict with this Ordinance are hereby repealed.

SECTION 5. Should any section, sentence or clause of this Ordinance be declared invalid or unconstitutional, such declaration shall not affect the validity of the remaining sections, sentences, or clauses.

SECTION 6. This Ordinance shall be in full force and effect on January 1, 2019.

PASSED by the City Council of the City of Lee's Summit, Missouri, this 18th day of December, 2018.

Mayor *William A. Baird*

ATTEST:

City Clerk *Trisha Fowler Arcuri*

APPROVED by the Mayor of said City this 20th day of December, 2018.

Mayor *William A. Baird*

ATTEST:

City Clerk *Trisha Fowler Arcuri*

APPROVED AS TO FORM:

Chief Counsel of Management and Operations
Daniel R. White

The underlined language is being added and the struck-through language is being deleted.

DIVISION 10. - INSURANCE, BONDING AND LIABILITY

Sec. 26-211. - Insurance.

A. Unless a ROW-user has twenty-five million dollars ($25,000,000.00) in net assets in the State of Missouri and does not have a history of noncompliance, or permitting noncompliance, within the City, then the ROW-user shall file with the City evidence of liability insurance with ~~a~~an reputable, qualified and financially sound insurance company licensed to do business in Missouri, and unless otherwise approved by the City in writing, with a current A.M. Best ROW User, Inc., rating of not less than A.

1. The ROW-user shall provide all information to the City necessary to determine the amount of net assets of the ROW-user.

2. The amount of insurance shall be in amounts sufficient to protect the City against all liabilities not protected by the State of Missouri's sovereign immunity statute and the City shall be named and endorsed as an additional ~~named~~ insured and ROW-user shall provide an endorsed waiver of subrogation against the City for all such policies, unless prohibited by law. The City shall not have a deductible for its coverage, the intent being that the City shall not pay any amounts towards its defense or damages arising out the ROW-user's use of the ROW and any condition the ROW-user creates or contributes to create on the ROW or on abutting property. The insurance will protect the City from and against all claims by any person whatsoever for loss or damage from personal injury, bodily injury, death, or property damage arising out of or alleged to have arisen out of the negligent or willful acts or omissions of the ROW-user. The ROW-user agrees it does not have a cause of action or claim against the City for any action that such insurance would provide coverage for.

3. If the ROW-user is self-insured, it shall provide the City proof of compliance regarding its ability to self-insure and proof of its ability to provide coverage in the above amounts, but self-insurance shall only be permitted by consent of the City Council and the execution of an agreement separate from any agreement created under this article which shall be in full force and effect until such time as the ROW-user's facilities, structures and use are removed or cease from or on the ROW.

4. A copy of the liability insurance certificate and all required endorsements must be on file with the City Clerk.

B. No liability insurance will be required of any residential property owner excavating or working in the right-of-way adjacent to his/her residence who does not utilize a contractor to perform the excavation or work and who does not require a temporary traffic control permit. However, said residential property owner shall be required to demonstrate proof of a homeowner's policy with coverage and limits acceptable to the City Engineer.

C. For purposes of this section, "history of noncompliance, or permitting noncompliance, within the City", shall mean the ROW-user, or any persons acting on the behalf of the ROW-user, including contractors or subcontractors, has failed to return the public right-of-way to its previous condition under a previous right-of-way permit or temporary traffic control permit.

D. ROW-users who are installing facilities that are not a part of a distribution system as outlined in Section 26-134.B. shall also comply with the security provisions in said section.

E. In addition to the insurance provisions above, the following insurance provisions shall apply to ROW Users who do not have a franchise or license agreement with the City that contains insurance provisions and who intend to have facilities in the ROW for more than 60 days:

1. Insurance Required. Prior to any access in the ROW, ROW User shall procure and maintain insurance against claims for: A) bodily injury, personal injury, sickness or disease, or death of any or more persons other than ROW User's employees; B) damages insured by usual personal and advertising injury liability coverage; C) damages because of injury to or destruction of tangible property, including loss of use resulting from; D) products/completed operations; and E) damages involving liability insurance applicable to ROW User's indemnity obligations under Division. Such insurance shall cover claims as may be occasioned by the operations, acts, errors, omissions, or negligence of ROW User or its officers, agents, representatives, employees, lessees, or Contractors during all times that occupies the ROW. Insurance limits may be met by the combination of primary and umbrella or excess coverage.

2. Limits of Insurance. ROW User shall:

2.1 Commercial General Liability. Carry and maintain commercial general liability insurance limit of One Million Dollars ($1,000,000) per occurrence, Five Million Dollar ($5,000,000) Products and Completed Operations Annual Aggregate, and a Five Million Dollar ($5,000,000) general aggregate limit. The policy shall be primary, non-contributory and include coverage for bodily injury, property damage, personal injury, personal and advertising injury, products, completed operations, and blanket contractual liability, which coverage will be at least as broad as Insurance Services Office Inc. policy form CG 00 010 93 or equivalent thereof, including but not limited to, separation of insured's clause, severability of interests and waiver of subrogation clauses. If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be "follow form" equal or broader in coverage scope than underlying insurance.

2.2 Worker's Compensation. Carry and maintain worker's compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction of ROW User employees engaged in the performance of services; and employer's liability insurance of not less than One Million Dollars ($1,000,000) for each accident, One Million Dollars ($1,000,000) disease for each employee and One Million Dollars ($1,000,000) disease policy limit.

2.3 Automobile Liability. Carry and maintain commercial business automobile liability insurance with a combined single limit for bodily injury and property damages of One Million Dollars ($1,000,000) each accident covering all owned, hired, and non-owned vehicles assigned to or used in performance of the ROW User's work. Coverage will be at least as broad as ISO coverage code "1" "any auto" policy form CA 00 01 12 93 or equivalent thereof. If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be "follow form" equal or broader in coverage scope than underlying insurance.

3. Additional Insured. All insurance coverage and self-insured retention or deductible portions, except for workers compensation shall name and endorse the City, its agents, representatives, directors, officials, employees, and officers, as additional insureds, and shall specify that insurance afforded the ROW User shall be primary insurance, and that any self-insured retention

and/or insurance coverage carried by City or its employees shall not contribute to the coverages provided by ROW User. This provision and the naming of the City as an additional insured shall in no way be construed as giving rise to responsibility or liability of the City for applicable deductible amounts under such policy(s).

4. Coverage Term. All insurance required herein shall be maintained in full force and effect while any license, franchise, agreement, permit, approval, or similar permission is in effect and until the ROW User has all removal and restoration obligations hereunder.

5. Primary Coverage. ROW User's insurance shall be, or endorsed to be, primary, non-contributory insurance to the City, and any insurance or self-insurance maintained by the City shall not contribute to it. Such coverage shall be at least as broad as ISO CG 20 01 04 13.

6. Claim Reporting. Any failure of the ROW User to comply with the claim reporting provisions of the policies or any breach of a policy warranty shall not affect coverage afforded under the policy to protect the City. ROW User shall promptly furnish City's Risk Management Division with copies of any accident or incident report(s) sent to ROW User's insurance carriers covering accidents/incident occurring in connection with and/or as a result of use of the ROW.

7. Waiver. To the fullest extent permitted by law, all policies, including workers' compensation, shall contain a waiver of transfer rights of recovery (subrogation) against the City, its agents, representatives, directors, officers, and employees for any claims arising out of ROW User's acts, mistakes, omissions, work or services. ROW User shall arrange to have such subrogation waivers incorporated into each policy via formal written endorsement.

8. Certificates of Insurance. Prior to the commencement of any work in the ROW, ROW User shall furnish to the City certificates of insurance, and additional insured and waiver of subrogation endorsements as required by this Section, issued by ROW User's insurer(s) as evidence that policies providing the required coverages, conditions, and limits required by this Section are in full force and effect and obtain approval of such certificates from the City's Risk Manager, which reasonable approval may not be withheld. The City may reasonably rely upon the certificates of insurance and declaration page(s) of the insurance policies as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Section. Notwithstanding the foregoing, ROW User may not perform any work until an approved certificate of insurance is provided to the City. Such certificates shall identify the name of the license, franchise, agreement, permit, approval, or similar document authorizing ROW User to remain the ROW and will include the required endorsement(s). If a policy expires during the term of ROW User's occupation of the ROW, a renewal certificate(s) must be sent directly to the City's Risk Management prior to the expiration date.

8.1 Such certificates and all subsequent renewals that are required shall name the City of Lee's Summit as the certificate holder and be sent directly to:

	With a copy to:
City of Lee's Summit	City of Lee's Summit
City Attorney's Office	City Engineer
220 SE Green St	220 SE Green St
Lee's Summit, MO 64063	Lee's Summit, MO 64063

9. Copies of Policies. The City shall not be obligated, however, to review same or to advise ROW User of any deficiencies in such policies and endorsements, and such receipt shall not relieve ROW User from, or be deemed a waiver of, the City's right to insist on strict fulfillment of ROW User's obligations under this Section.

10. Policy Limit Escalation. By written notice to ROW User, City may elect to increase the amount or type of any insurance to account for inflation, changes in risk, or any other factor that City reasonably determines to affect the reasonable amount of insurance to be provided, but in no instance less than the individual and combined sovereign immunity limits established by RSMo § 537.610.

11. Policy Deductibles and/or Self-Insured Retentions. The policies set forth in these requirements may provide coverage that contains deductibles or self-insured retention amounts. Such deductibles or self-insured retention shall not be applicable with respect to the policy limits provided to the City. ROW User shall be solely responsible for any such deductible or self-insured retention amount.

12. Indemnification and Sovereign Immmunity Unaffected. Nothing containing in Section shall be construed as limiting the extent of ROW User's obligation to indemnify, defend, and hold harmless the City as set forth in the Indemnification requirements these Standard Ts and Cs. Nothing containing in these insurance requirements is to be construed to waive the City's sovereign or any other immunity or defense available to the City, its officers, employees, agents, or elected officials.

13. Notice of Claim; Change in Coverage. ROW User shall upon receipt of notice of any claim in connection with this Agreement promptly notify the City, providing full details thereof, including an estimate of the amount of loss or liability. All policies shall contain an endorsement providing that the coverage afforded under such policies shall provide thirty (30) days' prior written notice of cancellation, except for non-payment of premium, will be given to City. ROW User shall be responsible for ensuring that the City is notified within thirty (30) days of the occurrence of any reduction in the insurance coverage amounts, cancellation, or expiration of any of the polices as required by this Standard Ts and Cs that are not replaced.

14. Contractor Insurance. ROW User will require any of its contractors to obtain and maintain substantially the same coverage with substantially the same limits as required of ROW User, including the City being an additional insured.

Sec. 26-212. - Bonding.

A. If a ROW-user has twenty-five million dollars ($25,000,000.00) in net assets and does not have a history of noncompliance, or permitting noncompliance, as determined by the City Engineer, within the City, then the ROW-user shall not be required to maintain a performance or maintenance bond. The burden of requesting and proving any exemption from bonding requirements under this article shall be on the ROW-user to the satisfaction of the City, and upon request from time to time by the City Engineer the ROW-user shall establish a continued right to exemption from a bonding requirement whether the exemption exists under local, state or federal law.

1. The ROW-user shall provide all information to the City necessary to determine the amount of net assets of the ROW-user.

2. For purposes of this section, "history of noncompliance, or permitting noncompliance, within the City," shall mean the ROW-user, or any persons acting on the behalf of the ROW-user, including contractors or subcontractors, has failed to return the public right-of-way to its previous condition under a previous right-of-way permit or temporary traffic control permit on at least one (1) occasion as determined by the City Engineer.

B. If it is determined pursuant to subsection A of this section that a ROW-user does not have twenty-five million dollars ($25,000,000.00) in net assets or does have a history of noncompliance, or permitting noncompliance, or is installing any facility that individually would require more than ten thousand dollars ($10,000.00) to remove and return the right-of-way to its previous condition within the City, then the ROW-user shall:

1. Maintain a performance bond in a form approved by the City Attorney. The amount of the bond unless prohibited by valid, constitutional law, will be five thousand dollars ($5,000.00) or the value of the restoration, whichever is greater, as determined by the City Engineer, for a term consistent with the term of the applicable right-of-way permit or temporary traffic control permit, conditioned upon the ROW-user's faithful performance of the provisions, terms and conditions conferred by this article.

2. Maintain a maintenance bond in a form approved by the City Attorney. The amount of the bond, unless prohibited by valid, constitutional law, will be five thousand dollars ($5,000.00) or the value of the restoration, whichever is greater, as determined by the City Engineer, for a term consistent with the term of the applicable right-of-way permit or temporary traffic control permit plus four (4) additional years, conditioned upon the ROW-user's faithful performance of the provisions, terms and conditions conferred by this article.

3. For facilities that extend above and below the ground and are permanent in nature and would require demolition similar in nature to a building or monopole tower to remove, the ROW-user shall provide to the City a bond in the amount of the then cost to remove or demolish such a facility or the right through a recordable document to execute on a piece of real estate in a fashion similar to the manner in which the City may place a lien on property when a structure is removed by the City.

4. For facilities that are attached, collocated, placed, or installed on City property or in the ROW, ROW User shall maintain a payment bond in a form approved by the City Attorney in favor of City up to an amount permitted by valid, constitution law to recoup unpaid rates or fees by ROW User. Said bond shall be acknowledged by ROW User, as principal, and shall be issued by a surety with an AM Best rating of A-VII or better for the last four quarters.

C. In the event the City shall exercise its right to revoke the right-of-way permit or the temporary traffic control permit as permitted herein, then the City shall be entitled to recover under the terms of said bonds or against any real estate under B.3. of this section the full amount of any loss occasioned. A copy of the maintenance and performance bonds or recorded instrument must be on file with the City Clerk. No maintenance or performance bond will be required of any residential property owner excavating or working in the right-of-way adjacent to his/her residence, who does not utilize a contractor to perform the excavation or work and who does not require a temporary traffic control permit. Because such work is done by a private property owner against whose property the City may place a lien under the law, no recorded instrument giving the City additional rights to place a lien and foreclose on such lien shall be required.

D. All bonds required in this Section shall be acknowledged by ROW User, as principal, and shall be issued by a surety with an AM Best rating of A-VII or better for the twelve (12) months immediately preceding the bond issuance date.

(Ord. No. 8347, § 1, 2-15-2018)

Sec. 26-213. - Indemnification.

A. Any person operating under the provisions of this article or performing any temporary traffic control, excavation, or work in the right-of-way shall fully indemnify, release, defend and hold harmless the City and agents of the City when acting in their capacity as municipal officials, employees, elected officials, attorneys, and agents, for, from and against any and all claims, demands, suits, fines, losses, injuries, proceedings, and actions, liability and judgment by other persons for damages, losses, costs, and expenses, including attorney fees, to the extent caused by or arising out of the acts, errors, directives, or omissions of the person, or its agents, contractors, or subcontractors, in the performance of the permitted temporary traffic control, excavation, or work. Nothing in this article shall be construed to waive the City's sovereign or any other immunity or defense available to it, its officers, employees and agents.

B. Nothing herein shall be deemed to prevent the City, or any agent, from participating in the defense of any litigation by its own counsel at their own expense. Such participation shall not under any circumstances relieve the person from its duty to defend against liability or its duty to pay any judgment entered against the City, or its agents.

C. All ROW-users shall be responsible for promptly correcting acts or omissions by any contractor or subcontractor performing permitted temporary traffic control, excavation or work for such ROW-user hereunder. Failure to do so within the time set by the City Engineer shall be cause to revoke any ROW permit and to eject the ROW-user from the City's rights-of-way by any means available including seeking a declaratory judgment action, injunction or in the event of emergency self-help.

D. Nothwithstanding anything to the contrary in this Division, in accordance with RSMo. § 67.5121(2), a ROW-user's indemnification obligations set forth this Division, but only with respect to the ROW User's operation of a "Small Wireless Facility", as defined in the Uniform Small Wireless Facility Deployment Act, within the ROW, shall only be required to indemnify and hold the City, its officers and employees, harmless against any damage or personal injury caused by the negligence of the ROW User, its employees, agents, or contractors. This exception shall only apply to the ROW User's "Small Wireless Facilities" and shall not otherwise alter the obligations of a ROW User to indemnify the City for all of ROW User's other activities or operations.

Sec. 26-214. - Indemnification for contractual or economic loss damages.

Any person operating under the provisions of this article or performing any temporary traffic control, excavation, or work in the right-of-way shall fully indemnify, release, defend and hold harmless the City and agents of the City when acting in their capacity as municipal officials, employees, elected officials, attorneys, contractors, and agents, from and against any and all claims, demands, suits, proceedings, and actions, liability and judgment by other persons for contractual or economic losses, damages, losses, costs, and expenses, including attorney fees, to the extent caused by failure of a ROW-

user, or its agents, contractors, or subcontractors, to relocate or adjust its facilities pursuant to the provisions of this article.

(Ord. No. 8347, § 1, 2-15-2018)

Sec. 26-215. - Indemnification for damage to facilities.

A. Any person operating under the provisions of this article or performing any excavation or work in the right-of-way shall be liable for any damages to facilities due to excavation or work performed by the person, including damage to underground facilities that have been properly identified prior to commencement of excavation or work.

B. Any person operating under the provisions of this article or performing any excavation or work in the right-of-way shall fully indemnify, release, defend and hold harmless the City and agents of the City when acting in their capacity as municipal officials, employees, elected officials, attorneys, contractors, and agents, from and against any and all claims, demands, suits, proceedings, and actions, liability and judgment by other persons for damages, losses, costs, and expenses, including attorney fees, associated with damage to the facilities of other ROW-users by a person, or its agents, contractors, or subcontractors.

(Ord. No. 8347, § 1, 2-15-2018)

Sec. 26-216. - Other agreements—Satisfaction of this article.

A. Any ROW-user may satisfy the insurance, bonding, and indemnification provisions of this article through a valid franchise agreement with the City provided such insurance, bonding and indemnification equals or exceeds those required under this article and Chapter. Any requirements thus satisfied shall be indicated on the ROW-user's registration and shall not be required for each right-of-way permit and temporary traffic control permit.

B. This section shall not apply to an applicant acting on behalf of a ROW-user, unless the applicant is listed as an additional insured on the ROW-user's insurance policy and is covered by the surety. The applicant must submit evidence of the satisfaction of these requirements prior to issuance of a right-of-way permit or a temporary traffic control permit.

(Ord. No. 8347, § 1, 2-15-2018)

Secs. 26-217—26-220. - Reserved.