

ORDINANCE NO. 667

AN ORDINANCE ESTABLISHING STANDARDS FOR WIRELESS FACILITIES IN PUBLIC RIGHTS-OF-WAY IN THE CITY OF CUNNINGHAM, KANSAS.

WHEREAS:

- The City of Cunningham, Kansas wishes to encourage the development of wireless infrastructure in order to extend mobile communication coverage, improve mobile data capacity, and enable Internet-based applications.
- The City recognizes that the deployment of Small Wireless Facilities (also known as Small Cell or Distributed Antenna Systems) in public rights-of-way may be necessary to achieve this goal.
- The City is responsible for the management, protection and maintenance of property in public rights-of-way for the public health, safety and welfare of its citizens.
- The Federal Telecommunications Act of 1996 authorizes cities to regulate wireless communication facilities in the public right-of-way, so long as the city's regulations do not effectively prohibit the provision of wireless telecommunication facilities or discriminate among providers.
- The City wishes to provide a fair and predictable process for the deployment of Small Wireless Facilities, including radios, pole-top antennas, pole-mounted enclosures and other equipment in public rights-of-way.

THEREFORE, BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF CUNNINGHAM, KANSAS:

Section 1. Purpose and Intent.

The purpose of this Ordinance is to establish reasonable and uniform standards and procedures for wireless facilities deployment, modification and removal within public rights-of-way in Cunningham, Kansas.

This Ordinance is intended to provide for the public health, safety and welfare; ensure the appropriate use of public rights-of-way; and balance the benefits of robust wireless service with the value our community places on maintaining the aesthetic character of Cunningham.

This Ordinance is intended to comply with all applicable federal and state regulations, including the following.

1. Federal Telecommunications Act of 1996 *et seq.*
2. Title VI, subtitle D, section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012.
3. Sections 253 and 332 of the Communications Act (47 U.S.C. § 253 and 47 U.S.C. § 332).
4. FCC Declaratory Ruling and Third Report and Order FCC 18-133.
5. Kansas statute K.S.A. 66-2019, *et seq.*

Section 2. Definitions.

Unless otherwise expressly stated or the context clearly indicates a different intention, the following definitions apply to terms used in this Ordinance. Undefined words have the meanings assigned to them in 47 U.S.C. § 153 as amended, or their ordinary meanings. In the event that any definition in this section conflicts with any federal or state-mandated definition, the federal or state-mandated definition will control.

1. **ACCESSORY EQUIPMENT.** Any equipment serving or being used in conjunction with a wireless facility or wireless support structure, including but not limited to utility or transmission equipment, power supplies, generators, batteries, cables, equipment buildings, cabinets and storage sheds, shelters or similar structures.
2. **AESTHETIC CORRIDOR.** Any public right-of-way within the City of Cunningham in which existing utilities are all underground.
3. **ANTENNA:** Communications equipment that transmits or receives electromagnetic radio signals used to provide wireless services.
4. **BASE STATION.** A station that includes a structure that currently supports or houses an antenna, transceiver, coaxial cables, power cables or other associated equipment at a specific site that is authorized to communicate with mobile stations, generally consisting of radio transceivers, antennas, coaxial cables, power supplies and other associated electronics. (See FCC 47 C.F.R. § 1.40001(b)(1).)
5. **COLLOCATION.** The practice of attaching antennas or other transmission equipment from more than one wireless service provider to an eligible support structure, for the purpose of transmitting or receiving radio frequency signals for communication purposes.
6. **DISTRIBUTED ANTENNA SYSTEM (DAS):** A network that distributes radio frequency signals and consists of:
 - a. Remote communications or antenna nodes deployed throughout a desired coverage area, each including at least one antenna for transmission and reception;
 - b. A high capacity signal transport medium that is connected to a central communications hub site; and
 - c. Radio transceivers located at the hub's site to process or control the communications signals transmitted and received through the antennas to provide wireless or mobile service within a geographic area or structure.
7. **FACILITY.** Any utility lines, conduits, wires, fiber optic wires, cables, pipes, pipelines, towers, wireless or cellular facilities, including small wireless facilities, antennas, vaults or appliances, or related facilities or appurtenances thereto.
8. **FCC.** The Federal Communications Commission.
9. **Occupant.** Any person, firm, corporation, association, utility, or entity which enters upon the public right-of-way in the City of Cunningham, or in any manner establishes a physical presence on, upon, in or over the right-of-way for the purpose of installing, constructing, maintaining or operating any utility facility.
10. **PUBLIC RIGHT-OF-WAY:** The area on, below, or above real property that has been designated for use as, or is used for, a public roadway, highway, street, sidewalk, alley or similar purpose.
 - a. For the purposes of this Ordinance, the term "public right-of-way" **does not include** the following:
 - (1) Federal interstate highways or other areas which are not within the legal jurisdiction, or within the legal maintenance responsibility, of the City.
 - (2) Easements obtained by utilities, or private easements in platted subdivisions or tracts.
 - (3) The airwaves above a right-of-way with regard to wireless communications or other nonwire telecommunications or broadcast service.

11. **SHOT CLOCK:** Time limits established by the FCC, within which a state or local government is required to process an application to deploy a wireless Infrastructure facility. (See *FCC Declaratory Ruling and Third Report and Order FCC 18-133*.)
12. **SMALL WIRELESS FACILITY:** Any small wireless facility as defined under Sections 253 and 332 of the Communications Act (47 U.S.C. § 253; 47 U.S.C. § 332). Also known as a **Small Cell Facility**.
 - a. A Small Wireless Facility typically consists of a small cell antenna and an associated equipment box.
 - b. Small Wireless Facilities are typically used in urban areas with high demand for wireless services. They are often mounted on either dedicated poles or existing utility poles in the public right-of-way, where they have access to both fiber optic cables and electric power. Sometimes multiple Small Wireless Facilities are clustered on or around one support structure.
 - c. According to the 2018 FCC Declaratory Ruling and Third Report and Order FCC 18-133, a SMALL WIRELESS FACILITY must satisfy the following conditions:
 - (1) Each antenna must be 3 cubic feet or less in volume.
 - (2) All associated equipment must be 28 cubic feet or less in volume.
 - (3) **Maximum height.** A Small Wireless Facility must meet at least one of the following height restrictions.
 - (a) Must be mounted on a structure which is 50 feet or less in height.
 - (b) Must be mounted on a structure which is no more than 10 percent taller than adjacent structures.
 - (c) When mounted on an existing structure, must not extend the height of that structure by more than 10 feet or by more than 10 percent, whichever is greater.
13. **SUBSTANTIAL MODIFICATION:** A proposed modification to an existing wireless support structure or base station that will substantially change the physical dimensions of the wireless support structure or base station under the objective standard for substantial change, as established by the FCC in [FCC 47 C.F.R. 1.40001](#).
14. **TRANSMISSION EQUIPMENT:** Equipment that facilitates transmission for a wireless service licensed or authorized by the federal communications commission including, but not limited to, radio transceivers, antennas, coaxial or fiber optic cable and regular and backup power supply.
 - a. Transmission equipment includes equipment associated with wireless services including, but not limited to, private, broadcast and public safety services such as wireless local area network services, and services utilizing a set of specifications developed by the institute of electrical and electronics engineers for interface between a wireless client and a base station or between two wireless clients, as well as unlicensed wireless services and fixed wireless services, such as microwave backhaul.
15. **WIRELESS FACILITIES** are equipment at a fixed location that enables wireless communications between user equipment and a communications network, including but not limited to:
 - a. Equipment associated with wireless services such as private, broadcast and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul; and
 - b. Radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies and comparable equipment, regardless of technological configuration.
 - c. "Wireless facility" does **not** mean any wired connections from a wireless support structure or base station to a hub or switching location.

16. **WIRELESS INFRASTRUCTURE PROVIDER:** Any person that builds or installs transmission equipment, wireless facilities or wireless support structures, but that is not a wireless services provider.
17. **WIRELESS SERVICES:** "Personal wireless services" and "personal wireless service facilities" as defined in 47 U.S.C. § 332(c)(7)(C), including commercial mobile services as defined in 47 U.S.C. § 332(d), provided to personal mobile communication devices through wireless facilities or any fixed or mobile wireless services provided using wireless facilities.
18. **WIRELESS SERVICES PROVIDER:** A provider of wireless services.
19. **UTILITY POLE:** A structure owned or operated by a public utility as defined in K.S.A. 66-104, and amendments thereto, a municipality as defined in K.S.A. 75-6102, and amendments thereto, or an electric cooperative as defined in K.S.A. 2016 Supp. 17-4652, and amendments thereto, that is designed specifically for and used to carry lines, cables or wires for telecommunications, cable, electricity or to provide lighting.

Section 3. Applicability.

With the exception of amateur radio facilities and wireless facilities owned and operated by the City for public purposes, this Ordinance applies to all existing wireless facilities within the City's public rights-of-way, and to all applications to deploy, operate, modify, reconstruct, or relocate wireless facilities within the City's public rights-of-way.

Section 4. Authorization from the City Required.

No person, firm, corporation, association, utility, or entity must enter upon City right-of-way, or in any manner establish a physical presence on, upon, in or over City right-of-way, for the purpose of installing, constructing, maintaining or operating facilities without the express written permission of the City.

1. The City's permission may be given by a franchise granted under the provisions of Kansas law, or by other agreement, as determined by the **Governing Body** to best protect the public interest in the right-of-way, and subject to the provisions of the Cunningham Municipal Code.

Section 5. Shot Clocks.

Shot Clocks are time limits established by the FCC, within which a state or local government is required to process an application to deploy a wireless Infrastructure facility.

1. **Shot Clock Start.** A shot clock begins running (tolling) on the day the application is submitted — except if an application is submitted on a holiday, the shot clock starts running on the next business day.
2. **Shot Clock Applicability.**
 - a. Shot clocks apply to all authorizations necessary for the deployment of personal wireless service, including:
 - (1) License or franchise agreements to access public rights-of way.
 - (2) Required pre-application procedures, public notices, and meetings.
 - (3) Site Plan Review and approval procedures.
 - (4) Building permits, electric permits, and road closure permits.
 - b. Shot clocks apply to applications submitted in batches.
 - (1) Section 332 of the Communications Act prohibits localities from refusing to accept batched applications. (See 47 U.S.C. § 332).
3. **Shot clocks for small wireless facilities**, as determined by the *FCC Declaratory Ruling and Third Report and Order FCC 18-133* of 2018:
 - a. To review a small wireless facility application for completeness, and notify the Applicant of missing information in order to reset the shot clock — **10 calendar days** [47 C.F.R. §1.6003(d)(1)].

- b. To act on an application to collocate a small wireless facility on an existing structure (does not have to be a telecommunications structure) — **60 calendar days** [47 C.F.R. §1.6003(c)(1)(i)].
- c. To act on an application for a small wireless facility using a new structure — **90 calendar days** [47 C.F.R. §1.6003(c)(1)(iii)].

Section 6. Pre-application Conference.

A pre-application conference between the Applicant and designated City staff is required before filing an application for modification or replacement of an existing wireless facility, or construction of a new wireless facility.

1. The pre-application conference may be waived by the Zoning Administrator.
2. The purpose of the pre-application conference is to ensure the Applicant understands all requirements, to address issues that will expedite the review and approval process, and to establish a tentative timeline.
3. The pre-application conference **does not toll applicable shot-clocks** under federal or state law.

Section 7. Application Procedures.

1. **Approval Deadlines.** If the Zoning Administrator does not issue a final decision on a wireless facility application within the shot clock time limits specified in Section 5 above, then the Applicant may provide notice to the Zoning Administrator that the time period has lapsed, and the Application is then **deemed to be approved.** (*See K.S.A. 66-2019.*)
2. **Incomplete Applications.** If the application is materially incomplete, the Zoning Administrator must notify the Applicant that more documents or information are required **within 30 calendar days** after the application was submitted.
 - a. The **notification** must identify the missing documents or information, and also specify the rule or regulation that requires their submission.
 - b. The **shot clock will restart at zero** on the day the Applicant provides a **supplemental application** containing the required information.
 - (1) If the **supplemental application** does not provide the missing documents or information identified in the original notice, the Zoning Administrator must notify the Applicant **within 10 days** after the **supplemental application** was submitted.
 - (2) The **shot clock will be paused** on the day the notice of an incomplete supplemental application is provided to the Applicant, and **will resume** on the day the Applicant provides a completed **supplemental application** containing the required information.
3. **Consolidated Application for Small Wireless and DAS Facilities.** An Applicant may file a single consolidated application for a small wireless network of up to 25 individual small wireless facilities of a substantially similar design in both appearance and function.
(*See K.S.A. 66-2019(g).*)
4. **Zoning Administrator Approval.** The Zoning Administrator may approve applications for small wireless facilities in the public right-of-way.
 - a. A final decision on an application for a new antenna or a new small wireless or DAS facility on an existing base station must be issued **within 60 calendar days** after a **complete** application is filed.
 - b. A final decision on an application for a new antenna on an existing base station, which substantially changes the physical dimensions of the base station, must be issued **within 90 calendar days** after a **complete** application is filed
5. **Denial of Application.** If an application is denied, the Zoning Administrator will notify the Applicant in writing of the reasons for the denial.

- a. **Within 30 days** of the notice, a party aggrieved by the City's denial of an application may bring an action for review in any court of competent jurisdiction.

Section 8. Application Contents.

The Applicant must include the following information in an application for a permit for any small wireless facility in the public right-of-way in Cunningham.

1. **Site plan.**
2. **Elevation drawings** of the proposed wireless facility. Show all base stations, antennas, transmission equipment, accessory equipment, cabinets, lighting, and other improvements related to the facility, including information on specific colors and materials.
3. **Digital before and after photo simulations** of the site, demonstrating the visual impact of the proposed wireless facility on the surrounding environment.
 - a. The Zoning Administrator may require photo simulations from any specific vantage point.
4. **Engineer's Report.** A report from a licensed engineer registered in Kansas which:
 - a. Describes the wireless facility's height and design, including a cross section and elevation.
 - b. Describes the wireless facility's structural capacity, and its ability to safely accommodate antennas and other equipment.
 - c. Includes the engineer's seal and license number.
5. An application for Zoning Administrator **approval of antenna placement on roofs, walls, and existing wireless infrastructure** must include a final site and building plan.

Section 9. Application Fee.

The application must include payment of the application fee, to be paid by the Applicant to the City Clerk. The fee, as determined in a fee schedule approved by a resolution of the Governing Body, must not exceed statutory maximums as required by K.S.A. 66-2019(c).

1. The fee must reflect the actual costs of processing the application.
2. Total charges and fees assessed by the City must not exceed:
 - a. \$500 for a collocation application which is not a substantial modification, for a small wireless application, or DAS facility application; or
 - b. \$2,000 for an application for a new wireless support structure, or for a collocation application that is a substantial modification of a wireless support structure.

Section 10. General Design and Construction Standards.

1. **Compliance.** The installation, construction, operation, maintenance, and repair of facilities in the right-of-way must be in accordance with applicable health, safety and construction codes, including structural standards and wind loading requirements, as well as FCC Guidelines for wireless infrastructure, and any City standards that may be approved by the Governing Body.
 - a. Compliance must be certified by a licensed engineer registered in Kansas.
2. **Damage and Interference.** Facilities must not damage or interfere with the use or operation of previously installed facilities, or obstruct or hinder other utilities serving residents and businesses in the City.
 - a. Avoid interference with the use of streets, sidewalks, alleys, parkways, poles, and other public ways and places.
 - b. Avoid creating visual and physical obstructions, or other conditions which may be hazardous to vehicular or pedestrian traffic.
 - c. Avoid damage to drainage structures, or interference with drainage ways.

- d. Avoid environmental damage, including damage to trees and shrubbery.
- 3. **Property Owners.** Facilities must be installed and located with due regard for minimizing interference with the rights and convenience of property owners, including the City.
 - a. With the exception of public electric and communications service and connection lines, no part of any wireless facility or its associated equipment must at any time extend over a property line.
 - b. Preserve the character of historic structures and neighborhoods, including but not limited to structures listed on the National or State Register of Historic Places.
- 4. **Facility Wiring.** All low energy conductors extending horizontally above the ground between a wireless facility or antenna and an accessory facility, or between wireless infrastructure, must either be buried underground, or be at least 8 feet above the ground at all points.
 - a. Facility wiring should not cross over, under, or through private property.
- 5. **Utilities.** With the exception of emergency power systems, all utilities for a wireless facility site must be installed underground and in compliance with applicable codes.
(See K.S.A. 66-2019(f)(19).)
- 6. **Equipment Cabinets.** No more than two equipment cabinets are permitted per wireless facility.

Section 11. Design and Construction Standards in Aesthetic Corridors.

- 1. Within Cunningham's designated aesthetic corridors, antennas for small wireless facilities may be installed, maintained, and operated in the public right-of-way only so long as they meet the following requirements:
 - a. They must be installed only on existing lightpoles or traffic signal poles, or on a similar replacement pole. Any wire or fiber connecting such an antenna and the ground or facilities buried underground must be inside the pole or firmly attached along the outside of the pole. No wires or fiber must be attached from pole to pole above ground.
 - b. They must conform with the following aesthetic standards:
 - (1) Their width must not exceed the diameter of the pole at its base, except for necessary above-ground service boxes essential to their operation.
 - (2) As nearly as possible, they must match the color of the poles to which they are attached.
- 2. Within Cunningham's designated aesthetic corridors, all other small wireless facilities and their appurtenances, except for antennas, must be installed and constructed underground.

Section 12. Wireless Facility Inspections.

- 1. Wireless facilities must meet operational standards established by the FCC and other applicable federal regulatory agencies.
 - a. If standards are revised, the wireless facility must be brought into compliance **within 6 months** of the effective date of the revised standards.
 - b. Failure to comply with federal standards constitutes grounds for removal of the facility at the owner or provider's expense.
- 2. All wireless facilities may be inspected by the Zoning Administrator or their designee, to determine compliance with original construction standards.
 - a. Deviation from original construction standards constitutes a code violation.
 - b. If the City inspection determines that the wireless facility does not comply with City building codes, and constitutes a danger to persons or property, the Zoning Administrator will notify the wireless facility owner or property owner in writing.

- (1) The wireless facility owner or property owner must bring the wireless facility into compliance **within 30 days** following written notice, or the City may order the removal of the wireless facility, or have the wireless facility removed at the owner or property owner's expense.

Section 13. Removal of Abandoned Facilities.

Any wireless facility that is not operated for 12 continuous months will be considered abandoned and a nuisance.

1. The Zoning Administrator will provide written notice to the wireless facility owner or the landowner, that the wireless facility must be removed **within 90 days** of receipt of the notice.
2. The wireless facility owner may be allowed to demonstrate whether the wireless facility has been in operation during the time period in question. The burden of proof is on the owner.
3. If the wireless facility is not removed **within 90 days** after receipt of the notice, the City may have the wireless facility removed at the wireless facility owner or landowner's expense.

Section 14. Invalidity of A Part.

Any provision of this Ordinance which is declared to be unconstitutional or otherwise invalid must not affect the validity and authority of any other sections of this Ordinance.

Section 15. Effective Date

This Ordinance must take effect upon publication once in the official city newspaper.

PASSED BY THE CITY COUNCIL
this 25th day of March, 2019.

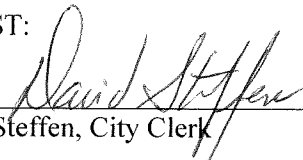
APPROVED BY THE MAYOR
this 25th day of March, 2019.

/S/ 
Aaron Murphy, Mayor

(S E A L)



ATTEST:

/S/ 
David Steffen, City Clerk

(Published in the Cunningham Courier, the official City newspaper, Thursday, March 28, 2019)

ORDINANCE NO. 667 SUMMARY

On March 25, 2019, the City of Cunningham, Kansas, adopted Ordinance No. 667 in order to establish standards for wireless facilities in public rights-of-ways in the City of Cunningham, Kansas. A complete copy of this ordinance is available at www.cunninghamks.net or at City Hall, 119 N. Main, Cunningham, Kansas, 67035. This summary certified by Greg Graffman, City Attorney.