

**WORK SESSION AGENDA OF THE CITY COUNCIL OF HURST, TEXAS
CITY HALL, 1505 PRECINCT LINE ROAD
FIRST FLOOR CONFERENCE ROOM
TUESDAY, NOVEMBER 26, 2019 – 5:00 P.M.**

I. Call to Order

II. Conduct Interviews and discuss Board, Commission and Committee appointments

III. Informational Items

-) **Update and Discussion of John Butler Memorial Senior Banquet**
-) **Update and Discussion of the Christmas Tree Lighting Event**
-) **Update and Discussion of the Hurst Public Facilities Corporation**

IV. Discussion of Agenda Item(s) 3

Conduct a Public Hearing and consider ordering the repair, removal or demolition of property located at 450 E. Hurst Blvd, Hurst, Texas; Lot A3, Block 14, of the Holder Estates subdivision (Dakota Place Apartments) and to consider the possible levying of civil penalties

Michelle Lazo

V. Discussion of Agenda Item(s) 4

Consider approval of Resolution 1753 authorizing the City of Euless to serve as the sponsoring agency to prepare and file the Solid Waste Pass-Through Grant application on behalf of the City of Hurst

David Palla

VI. Discussion of Agenda Item(s) 5

Consider authorizing the city manager to enter into a Lease Agreement and Memorandum of Lease Agreement with Blue Sky Towers III, LLC, for a ground lease and construction of a radio/communications cell tower at 1235 Hurstview Drive

Greg Dickens

VII. Discussion of Agenda Item(s) 5

Consider authorizing the city manager to enter into a letter engagement agreement with Bickerstaff Heath Delgado Acosta, LLP, for representation of the City in SB 1004/SB1152 litigation regarding right-of-way acquisition

Clayton Fulton

EXECUTIVE SESSION in Compliance With the Provisions of the Texas Open Meetings Law, Authorized by Government Code, Section 551.087 deliberation and conducting of economic development negotiations regarding financial

information relative to prospective business expansion in the city and Section 551.071, Consultation with City Attorney to seek advice regarding Pending or Contemplated Litigation or Settlement Offers (Dakota Place Apartments) to reconvene in Open Session at the conclusion of the Executive Session

ADJOURNMENT

Posted by: _____

This the 22nd day of November 2019, by 5:00 p.m., in accordance with Chapter 551, Texas Government Code.

This facility is wheelchair accessible and accessible parking spaces are available. Requests for accommodations or interpretive services must be made 48 hours prior to this meeting. Please contact the City Secretary's office at (817) 788-7041 or FAX (817) 788-7054, or call TDD 1-800-RELAY-TX (1-800-735-2989) for information or assistance.

**REGULAR MEETING AGENDA OF THE CITY COUNCIL OF HURST, TEXAS
CITY HALL, 1505 PRECINCT LINE ROAD
TUESDAY, NOVEMBER 26, 2019**

AGENDA:

5:00 p.m. - Work Session (City Hall, First Floor Conference Room)

6:30 p.m. - City Council Meeting (City Hall, Council Chamber)

CALL TO ORDER

INVOCATION (Mayor Pro Tem Larry Kitchens)

PLEDGE OF ALLEGIANCE

CONSENT AGENDA

1. Consider approval of the minutes for the November 12, 2019 City Council meetings
2. Consider Ordinance 2430, second reading, SP-19-11 Novak Motors, a site plan for signage only on Lot A1, Block 1 Oakwood Park Addition being .30 acre located at 160 W. Bedford Euless Road

PUBLIC HEARING(S) AND RELATED ITEM(S)

3. Conduct a Public Hearing and consider ordering the repair, removal or demolition of property located at 450 E. Hurst Blvd, Hurst, Texas; Lot A3, Block 14, of the Holder Estates subdivision (Dakota Place Apartments) and to consider the possible levying of civil penalties

RESOLUTION(S)

4. Consider approval of Resolution 1753 authorizing the City of Euless to serve as the sponsoring agency to prepare and file the Solid Waste Pass-Through Grant application on behalf of the City of Hurst

OTHER BUSINESS

5. Consider authorizing the city manager to enter into a Lease Agreement and Memorandum of Lease Agreement with Blue Sky Towers III, LLC, for a ground lease and construction of a radio/communications cell tower at 1235 Hurstview Drive
6. Consider authorizing the city manager to enter into a letter engagement agreement with Bickerstaff Heath Delgado Acosta LLP for representation of the City in SB 1004/SB1152 litigation regarding right-of-way acquisition

7. Consider appointments to Boards, Commissions and Committees
8. Review of upcoming calendar items
9. City Council Reports - Items of Community Interest

PUBLIC INVITED TO BE HEARD – A REQUEST TO APPEAR CARD MUST BE COMPLETED AND RETURNED TO THE CITY SECRETARY TO BE RECOGNIZED

EXECUTIVE SESSION in Compliance With the Provisions of the Texas Open Meetings Law, Authorized by Government Code, Section 551.087 deliberation and conducting of economic development negotiations regarding financial information relative to prospective business expansion in the city and Section 551.071, Consultation with City Attorney to seek advice regarding Pending or Contemplated Litigation or Settlement Offers (Dakota Place Apartments) and to reconvene in Open Session at the conclusion of the Executive Session

10. Take any and all action ensuing from Executive Session

ADJOURNMENT

Posted by: _____

This 22nd day of November 2019, by 5:00 p.m., in accordance with Chapter 551, Texas Government Code.

Any item on this posted agenda could be discussed in executive session as long as it is within one of the permitted categories under sections 551.071 through 551.076 and section 561.087 of the Texas Government Code.

This facility is wheelchair accessible and accessible parking spaces are available. Requests for accommodations or interpretive services must be made 48 hours prior to this meeting. Please contact the City Secretary's office at (817) 788-7041 or FAX (817) 788-7054, or call TDD 1-800-RELAY-TX (1-800-735-2989) for information or assistance.

Minutes
Hurst City Council
Work Session
Tuesday, November 12, 2019

On the 12th day of November 2019, at 4:30 p.m., the City Council of the City of Hurst, Texas, convened in Work Session at City Hall, 1505 Precinct Line Road, Hurst, Texas, with the following members present:

Henry Wilson	)	Mayor
Larry Kitchens	)	Mayor Pro Tem
David Booe)	
Bill McLendon)	
Cathy Thompson)	
Cindy Shepard)	
Jon McKenzie)	
Clay Caruthers	)	City Manager
John Boyle	)	City Attorney
Matthew Boyle	)	Assistant City Attorney
Rita Frick	)	City Secretary
Clayton Fulton	)	Assistant City Manager
Malaika Marion Farmer	)	Assistant City Manager
Kyle Gordon	)	Executive Director of Community Services
Michelle Lazo	)	Executive Director of Development
Steve Bowden	)	Executive Director of Economic Development
Greg Dickens	)	Executive Director of Public Works
Robert Wallace	)	Building Official

With the following Councilmembers absent: none, constituting a quorum, at which time, the following business was transacted:

- I. Call to Order** – the meeting was called to order at 4:30 p.m.

- II. Conduct Interviews and discussions of Boards, Commissions and Committees appointments.** Council interviewed applicants for Boards, Commissions and Committees.

EXECUTIVE SESSION in Compliance With the Provisions of the Texas Open Meetings Law, Authorized by Government Code, Section 551.087 deliberation and conducting of economic development negotiations regarding financial information relative to prospective business expansion in the City and Section 551.071, Consultation with City Attorney to seek advice regarding Pending or Contemplated Litigation or Settlement Offers (Dakota Place Apartments) to reconvene in Open Session at the conclusion of the Executive Session.

Mayor Wilson recessed the meeting to Executive Session at 4:55 p.m. in compliance with the provisions of the Texas Open Meetings Law, authorized by Government Code, Section 551.087 deliberation and conducting of economic development negotiations regarding

financial information relative to prospective business expansion in the City and Section 551.071, Consultation with City Attorney to seek advice regarding Pending or Contemplated Litigation or Settlement Offers (Dakota Place Apartments) and reconvened Open Session at 5:24 p.m.

III. Informational Items

- J) **Discussion of City Facility Updates** – City Manager Clay Caruthers briefed Council on security access noting new entry cards should be issued in January. Executive Director of Community Services Kyle Gordon also noted the new city hall roof warranty and changes to holiday decorations installation to ensure the new warranty is not jeopardized.
- J) **Discussion of Hyperloop Certificate Tract** – City Manager Caruthers briefed Council on a recent NCTCOG transportation initiative involving Hyperloop technology, which is part of a full ecosystem to connect various modes of transportation. He explained a pilot program to test the Hyperloop technology and staff's plans to notify NCTCOG of the City's interest in participation. Mr. Caruthers briefly reviewed the technology and infrastructure requirements.

IV. Discussion of Agenda Item(s) 7

Consider authorizing the City Manager to purchase (6) six vehicles and (1) one piece of equipment from approved vendors.

Assistant City Manager Malaika Marion Farmer briefed Council on the proposed fleet purchases noting two (2) SUVs for police patrol, two (2) trucks for utility billing and building inspection, two trucks for Parks and Water Department and one (1) saw for the water department.

V. Discussion of Agenda Item(s) 8 and 9

Conduct a public hearing to consider SP-19-11 Novak Motors, a site plan for signage only on Lot A1, Block 1 Oakwood Park Addition being .30 acre located at 160 W. Bedford Eules Road.

Consider Ordinance 2430, first reading, SP-19-11 Novak Motors, a site plan for signage only on Lot A1, Block 1 Oakwood Park Addition being .30 acre located at 160 W. Bedford Eules Road.

Executive Director of Planning and Development Michelle Lazo briefed Council on SP-19-11 Novak Motors, a site plan for signage only on Lot A1, Block 1, Oakwood Park Addition being .30 acre located at 160 W. Bedford Eules Road reviewing the request for a pole sign due to visibility issues. She stated staff reviewed the options and agreed a pole sign will be the safest option for this location.

VI. Discussion of Agenda Item(s) 10

Consider P-19-03 Northeast Campus Addition, a replat of a portion of Tract A, to Tract D Northeast Campus Addition, being 7.40 acres located at 900 TCC Road.

Executive Director of Community Services Kyle Gordon briefed Council on the proposed plat showing the outline of the property and proposed animal shelter site plan and

conceptual rendering of the building. He reviewed key dates for the project and the easement locations requiring the building placement and parking shift.

VII. Discussion of Agenda Item(s) 11

Consider P-19-06 Provision at Patriot Place, a final plat of Tract TR2A Gulaver Wilson Survey, Abstract 1626 to Lots 1 and 2, Block A Provision at Patriot Place Addition, being 9.49 acres located at 501 W. Hurst Boulevard.

Executive Director of Planning and Development Michelle Lazo briefed Council on P-19-06 Provision at Patriot Place, a final plat of Tract TR2A Gulaver Wilson Survey, Abstract 1626 to Lots 1 and 2, Block A Provision at Patriot Place Addition, being 9.49 acres located at 501 W. Hurst Boulevard noting the site is next to Kelly Moore Paint and is a replat into Lot A for the apartments and Lot B for drainage.

Council discussed work session item IX then VIII.

VIII. Discussion of Agenda Item(s) 13

Consider authorizing the city manager to issue a “Notice to Proceed” to Prime Controls LP, a sole source provider for the Supervisory Control and Data Acquisition (SCADA) upgrade as proposed for the FY19-20 Budget.

Executive Director of Public Works Greg Dickens stated the upgrade for the Supervisory Control and Data Acquisition (SCADA) system is due to the unavailability of the current system parts and noted the sole source provider is Motorola.

IX. Discussion of Agenda Item(s) 14

Consider authorizing the city manager to proceed with the Phase II Post Oak - Parker Cemetery Fence Project.

Executive Director of Community Services Kyle Gordon briefed Council on Phase II Post Oak – Parker Cemetery Fence Project noting the final design plan includes a six-foot wrought iron fence with stone columns along the remaining perimeter of the property; the installation of locking wrought iron gates for the service and pedestrian entrances; a metal archway with the full name “Post Oak – Parker Cemetery” above the pedestrian entrance; an ADA complaint walkway and enhanced stone entrance from Cardinal Drive; and embedding the Historic Texas Cemetery Medallion into a stone column by the entrance. Also reviewed was a completion timeline of March 2020 and a budget of \$143,550, which includes a 10% contingency.

Adjournment – The meeting adjourned at 6:13 p.m.

APPROVED this the 26th day of November 2019.

ATTEST:

APPROVED:

Rita Frick, City Secretary

Henry Wilson, Mayor

City Council Minutes
Tuesday, November 12, 2019

On the 12th day of November 2019, at 6:30 p.m., the City Council of the City of Hurst, Texas, convened in Regular Meeting at City Hall, 1505 Precinct Line Road, Hurst, Texas, with the following members present:

Henry Wilson	)	Mayor
Larry Kitchens	)	Mayor Pro Tem
David Booe	)	Councilmembers
Bill McLendon)	
Jon McKenzie)	
Cathy Thompson)	
Cindy Shepard)	
Clay Caruthers	)	City Manager
John Boyle	)	City Attorney
Matthew Boyle	)	Assistant City Attorney
Rita Frick	)	City Secretary
Clayton Fulton	)	Assistant City Manager
Malaika Marion Farmer	)	Assistant City Manager
Robert Wallace	)	Building Official
Michelle Lazo	)	Executive Director Planning and Development
Kyle Gordon	)	Executive Director Community Services

With the following Councilmembers absent: none, constituting a quorum; at which time, the following business was transacted:

The meeting was called to order at 6:30 p.m.

Councilmember Shepard gave the Invocation.

The Pledge of Allegiance was given. The Texas Pledge was given.

PRESENTATION(S) AND PROCLAMATION(S)

1. Proclamation recognizing Mary Jo Wood's 100th Birthday. Mayor Wilson stated that sadly Ms. Wood has passed away and that the proclamation will be given to her family.

CONSENT AGENDA

2. Considered approval of the minutes for the October 15, 22 and 28, 2019 City Council meetings.
3. Considered Ordinance 2456, second reading, amending Chapter 22, Section 22-1 Bingo Tax.

4. Considered Ordinance 2455, second reading, SP-19-08 Tompkins Townhomes, a site plan for Lot A, Block 1, Taylor Addition, being .784 acre located at 751 Pipeline Court.
5. Considered Ordinance 2457, second reading, providing for increased prior and current service annuities under the act governing the Texas Municipal Retirement System for retirees and beneficiaries of deceased retirees of the City of Hurst, and establishing an effective date for the ordinance.
6. Considered Ordinance 2458, second reading, amending Chapter 12 of the Hurst Code of Ordinances by amending and adding Article XIII, "Convenience Stores".
7. Considered authorizing the City Manager to purchase (6) six vehicles and (1) one piece of equipment from approved vendors.

Councilmember Kitchens moved to approve the consent agenda. Motion seconded by Councilmember Booe. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

PUBLIC HEARING(S) AND RELATED ITEM(S)

8. Conducted a public hearing to consider SP-19-11 Novak Motors, a site plan for signage only on Lot A1, Block 1, Oakwood Park Addition being .30 acre located at 160 W. Bedford Eules Road.

Mayor Wilson announced a public hearing to consider SP-19-11 Novak Motors, a site plan for signage only on Lot A1, Block 1, Oakwood Park Addition being .30 acre located at 160 W. Bedford Eules Road and recognized Executive Director of Development Michelle Lazo who reviewed the request for a 10 foot tall sign with 48 square feet of sign area, which includes a 16 square foot LED changeable message board. Ms. Lazo reviewed the limited visibility triangle at the intersection and stated a monument sign cannot be located on Bedford Eules Road due to easement encroachment.

Mayor Wilson recognized Novak Service Director Terry Collins who stated they are willing to accept the monument sign but it does obstruct the view.

There being no one else to speak, Mayor Wilson closed the public hearing.

9. Considered Ordinance 2430, first reading, SP-19-11 Novak Motors, a site plan for signage only on Lot A1, Block 1, Oakwood Park Addition being .30 acre located at 160 W. Bedford Eules Road.

Councilmember Thompson moved to approve SP-19-11 Novak Motors. Motion seconded by Councilmember McLendon. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

Councilmember McKenzie moved to approve Ordinance 2430 on first reading. Motion seconded by Councilmember Booe. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

PLAT(S)

10. Considered P-19-03 Northeast Campus Addition, a replat of a portion of Tract A, to Tract D Northeast Campus Addition, being 7.40 acres located at 900 TCC Road.

Mayor Wilson recognized City Manager Clay Caruthers who reviewed P-19-03 Northeast Campus Addition, a replat of a portion of Tract A, to Tract D Northeast Campus Addition, being 7.40 acres located at 900 TCC Road. He noted this parcel is under contract with TCC Northeast and is associated with the voter approved bonds for the Animal Shelter. He stated the site is located next to the elevated water tank and is simply a plat to be able to move forward on the property closing.

Councilmember Shepard moved to approve P-19-03 Northeast Campus Addition. Motion seconded by Councilmember McKenzie. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

11. Considered P-19-06 Provision at Patriot Place, a final plat of Tract TR2A Gulaver Wilson Survey, Abstract 1626 to Lots 1 and 2, Block A Provision at Patriot Place Addition, being 9.49 acres located at 501 W. Hurst Boulevard.

Mayor Wilson recognized Executive Director of Development Michelle Lazo who reviewed the proposed plat of Tract TR2A Gulaver Wilson Survey, Abstract 1626 to Lots 1 and 2, Block A, Provision at Patriot Place Addition, being 9.49 acres located at 501 W. Hurst Boulevard noting the site is west of Kelly Moore Paint and is for an apartment complex to be built by Gardner Capital. She stated Lot 1 will be the apartment building and Lot 2 open retainage area for drainage. In response to Council questions, Executive Director of Engineering Greg Dickens stated engineering is in order.

Councilmember Shepard moved to approve P-19-06 Provision at Patriot Place Addition. Motion seconded by Councilmember Kitchens. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

OTHER BUSINESS

12. Considered ordering the repair, removal or demolition of property located at 450 E. Hurst Blvd, Hurst, Texas; Lot A3, Block 14, of the Holder Estates subdivision (Dakota Place Apartments) and to consider the possible levying of civil penalties.

Mayor Wilson recognized City Manager Caruthers who stated the order previously issued by the Council stated there would be a meeting again tonight regarding the progress of repairs to the apartment. He stated staff has been working with the property owner and attorney to continue moving forward. Assistant City Attorney Matthew Boyle provided a brief update and status report noting the public hearing held in September regarding complaints that began in 2014, and continue through today. He stated the Council's previous order required completion by October 24, 2019, and as the City Manager clarified, tonight's meeting was established at that time. Mr. Boyle stated, since then, the owner recently submitted application and obtained an electrical permit. That during the inspection process inspectors examined roofs, which revealed the roofs on building 2 and building 3 showed substantial deterioration. Building Official Robert Wallace exhibited pictures of the deterioration including moisture leaking through decking and corrosion on the support for the decking. Mr. Boyle stated, based on electrical work and application for a roof permit, some progress can be reported, but it was not timely and not sufficient. During the public hearing on the 24th, roof, mold and environmental issues and housing compliance were noted, the most significant issue, being the roof, which is still not in compliance. Mr. Boyle stated the goal of City staff is compliance so the occupants have a safe place to live. He reiterated the owner did not comply with the ordinance or order. Mr. Boyle requested Council consider two motions. The first motion is to call a public hearing regarding the possible levying of civil penalties at the November 26, 2019 City Council meeting and the second motion is to authorize the city attorney to file a Chapter 54 lawsuit against the owner of the Dakota Place Apartments.

Mayor Wilson recognized Dale Williams, 509 Brown Trail, who stated he was not for or against this item, but wanted to speak of his experience in Modesto, California regarding a 312-unit apartment complex. Mr. Wilson explained through the action of the City of Modesto, repairs were made to uninhabitable units through CDBG Funding and information is available on the City of Modesto's website. He stated the improvements appeared to improve the quality of life for the residents and the community as whole.

Mayor Wilson recognized Charles Mercer, owner of Dakota Place Apartments, who stated there were no orders from staff in January, for a permit. He stated of the damage shown in the pictures, 99% of the panels are in good shape, not leaking on tenants. He stated there should have been more cooperation between officials and the owner of the property. He stated these issues were previously inspected and missed by the inspector. Mr. Mercer expressed concern regarding previous inspectors and reiterated that staff should work in cooperation with the owners.

Councilmember Thompson moved to call a public hearing regarding the possible levying of civil penalties, November 26, 2019. Motion seconded by Councilmember McKenzie. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

Councilmember Kitchens moved to authorize the filing of a Chapter 54 lawsuit against the owner of the Dakota Place Apartments. Motion seconded by Councilmember Thompson. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

13. Considered authorizing the city manager to issue a “Notice to Proceed” to Prime Controls LP, a sole source provider for the Supervisory Control and Data Acquisition (SCADA) upgrade as proposed for the FY19-20 budget.

Mayor Wilson recognized Executive Director of Public Works Greg Dickens who reviewed the sole source contract. He stated the SCADA system is a network of computers and remote terminal units that monitor and control the entire water system and provide limited wastewater monitoring. He stated the system was last upgraded in 1999-2000 and replacement parts for this system are no longer available, creating a need to move forward with the upgrade.

Councilmember Thompson moved to authorize the city manager to issue a notice to proceed to Prime Controls, for the SCADA system upgrade, in an amount not to exceed \$85,000. Motion seconded by Councilmember McKenzie. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

14. Considered authorizing the city manager to proceed with the Phase II Post Oak - Parker Cemetery Fence Project.

Mayor Wilson recognized Executive Director of Community Services Kyle Gordon who reviewed the Phase II Post Oak – Parker Cemetery Fence Project noting the final design plan includes a six-foot wrought iron fence with stone columns along the remaining perimeter of the property; installing locking wrought iron gates for the service and pedestrian entrances; a metal archway with the full name “Post Oak – Parker Cemetery” above the pedestrian entrance; and ADA complaint walkway and enhanced stone entrance from Cardinal Drive; and embedding the Historic Texas Cemetery Medallion into a stone column by the entrance. He stated the project budget is \$143,550, which includes a 10% contingency, and reviewed the proposed timeline with an anticipated finish date of March 2020.

Mayor ProTem Kitchens thanked Kyle, staff and the Historical Committee for moving this project forward noting he and his wife, Carolyn's involvement in the cemetery restoration and the importance of preserving the history.

Councilmember Kitchens moved to authorize the city manager to proceed with the Phase II Post Oak – Parker Cemetery Fence Project, for an amount not to exceed \$143,550. Motion seconded by Councilmember Booe. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

15. Considered appointments to Boards, Commissions and Committees.

Councilmember Kitchens moved to appoint Larry Wilson to fill the vacant position on the Planning and Zoning Commission due to the recent death of Joe Fuchs. Motion seconded by Councilmember Booe. Motion prevailed by the following vote:

Ayes: Councilmembers Booe, Kitchens, McKenzie, Thompson, McLendon and Shepard
No: None

16. Council reviewed the following board, commission and committee meeting minutes:

- Ñ Library Board
- Ñ Parks and Recreation Board
- Ñ Planning and Zoning Commission
- Ñ Community Arts and Historic Landmark Committee

17. Review of upcoming calendar items - City Manager Caruthers reviewed calendar items noted in the packet including the November 16, 2019 Bellaire Pop-up event 9:00 a.m. to 4:00 p.m. this Saturday, the Senior Center Banquet, Saturday, December 14, 2019 which is a ticketed event and the City's office holiday hours.

18. City Council Reports - Items of Community Interest – Councilmember Shepard recognized Sirgio Santos and noted his involvement in revitalizing the Bellaire area and Central Arts Hurst, and encouraged people to stop by the Pop-up Event.

PUBLIC INVITED TO BE HEARD – A REQUEST TO APPEAR CARD MUST BE COMPLETED AND RETURNED TO THE CITY SECRETARY TO BE RECOGNIZED.

Mayor Wilson recognized Cindy Ferguson, 1029 Black Street, who expressed her support for cats and NVR vaccination to help stop the wild animal cycle. Mayor Wilson also recognized TCC students in attendance.

EXECUTIVE SESSION in Compliance With the Provisions of the Texas Open Meetings Law, Authorized by Government Code, Section 551.087 deliberation and

conducting of economic development negotiations regarding financial information relative to prospective business expansion in the city and Section 551.071, Consultation with City Attorney to seek advice regarding Pending or Contemplated Litigation or Settlement Offers (Dakota Place Apartments) to reconvene in Open Session at the conclusion of the Executive Session

Mayor Wilson did not recess to Executive Session noting it was held earlier during work session.

19. Take any and all action ensuing from Executive Session.

No action was taken.

ADJOURNMENT

APPROVED this the 26th day of November 2019.

ATTEST:

APPROVED:

Rita Frick, City Secretary

Henry Wilson, Mayor

City Council Staff Report

<p>SUBJECT: SP-19-11 Novak Motors, a site plan for signage only on Lot A1, Block 1, Oakwood Park Addition being .30 acre located at 160 W. Bedford Euless Road</p>	
<p>Supporting Documents:</p>	
<p>Ordinance 2430 Site plan – Exhibit "A" Sign elevations – Exhibit "B-C"</p>	<p>Meeting Date: 11/26/2019 Department: Development Reviewed by: Michelle Lazo City Manager Review:</p>
<p>Background/Analysis:</p>	
<p>An application has been made by Terry Collins with Novak Motors for a site plan, for signage only, on Lot A1, Block 1, Oakwood Park Addition being .30 acre located at 160 W. Bedford Euless Road. The property is zoned MU-PD (Mixed Use Planned Development).</p> <p>The applicant is requesting the site plan in order to install a pole sign on the corner of Bedford Euless Road and Harrison Lane. There was a pole sign at this location previously, but it was removed by a previous owner. The applicant is requesting a pole sign because the required monument sign would encroach in the required visibility triangle at the intersection. The applicant cannot locate a monument sign on Bedford Euless Road because the location would encroach in the City's right-of-way.</p> <p>Engineering has reviewed all of the options and agrees a pole sign would be the safest option for this location. The proposed pole sign is 10 feet in height with 48 sq. ft. of sign area per face. This area includes a 16 sq. ft. LED changeable message board.</p>	
<p>Funding Sources and Community Sustainability:</p>	
<p>There is no fiscal impact. Reviewing the site plan is a direct representation of Council's goal for Redevelopment.</p>	
<p>Recommendation:</p>	
<p>Based upon the Planning and Zoning Commission vote of 3-2 the recommendation is that City Council move to approve SP-19-11 Novak Motors.</p>	

ORDINANCE 2430

ORDINANCE 2430 ADOPTING A SITE PLAN FOR SIGNAGE ONLY ON LOT A1, BLOCK 1, TAYLOR ADDITION, BEING .30 ACRE LOCATED AT 160 BEDFORD EULESS ROAD

WHEREAS, notice of a hearing before the Planning and Zoning Commission was sent to real property owners within 200 feet of the property herein described at least 10 days before such hearing; and

WHEREAS, notice of a public hearing before the City Council was published in a newspaper of general circulation in Hurst at least 15 days before such hearing; and

WHEREAS, notices were posted on the subject land as provided by the Zoning Ordinance; and

WHEREAS, public hearings to change the site plan on the property herein described were held before both the Planning and Zoning Commission and the City Council, and the Planning and Zoning Commission has heretofore made a recommendation concerning the site plan change; and

WHEREAS, the City Council is of the opinion that the site plan herein effectuated furthers the purpose of zoning as set forth in the Comprehensive Zoning Ordinance and is in the best interest of the citizens of the City of Hurst.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HURST, TEXAS:

Section 1. THAT the Comprehensive Zoning Ordinance of the City of Hurst is hereby amended by adopting a site plan for signage only with Exhibits "A-C" for Lot A1, Block 1, Oakwood Park Addition, being .30 acre located at 160 W. Bedford Eules Road.

AND IT IS SO ORDERED.

Passed on the first reading on the 12th day of November 2019 by a vote of 6 to 0.

Approved on the second reading on the 26th day of November 2019 by a vote of _ to _.

ATTEST:

CITY OF HURST

Rita Frick, City Secretary

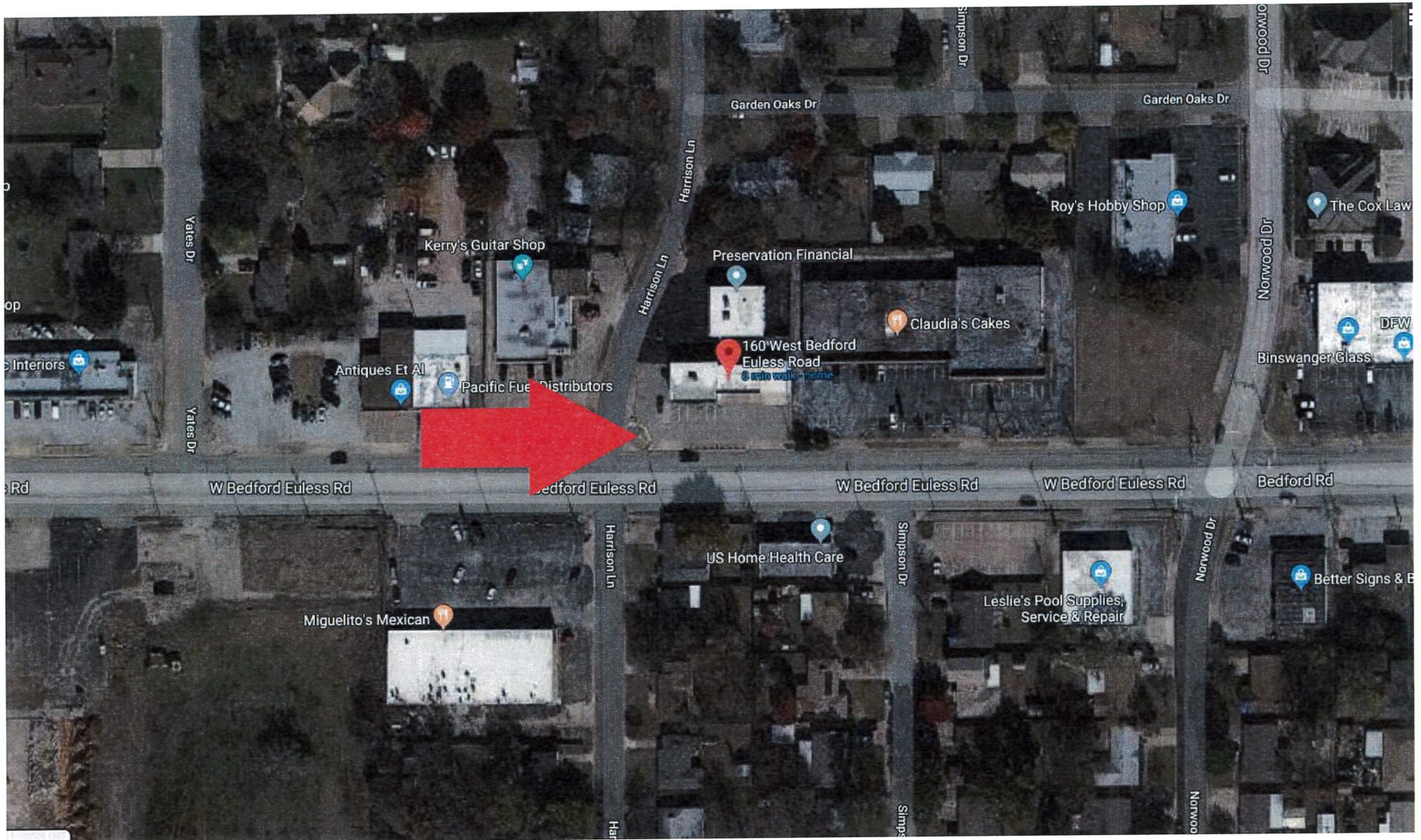
Henry Wilson, Mayor

Approved as to form and legality:

City Attorney

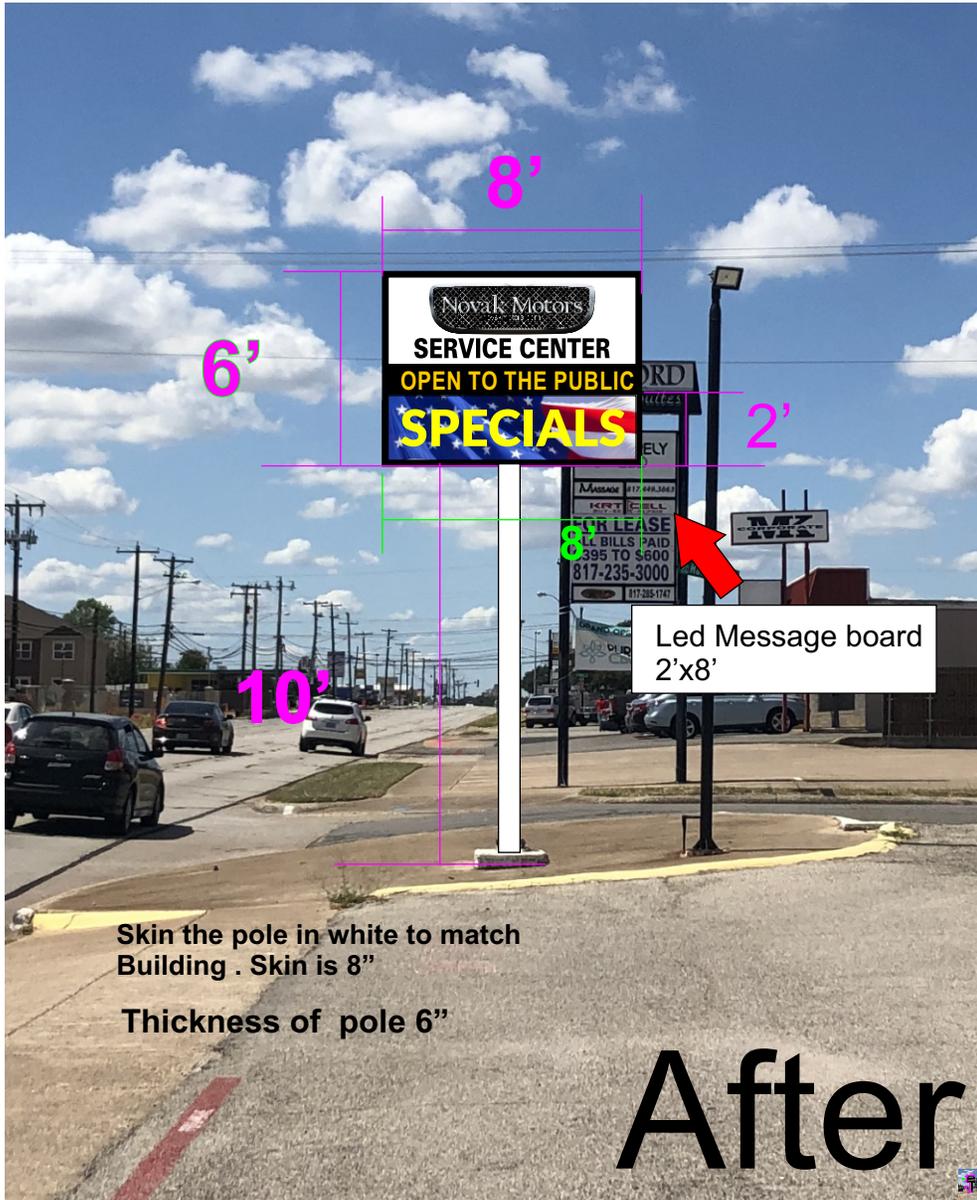
EXHIBIT A

Location where Pole Sign or monument will go



Sign is facing East/West





FUSION
SIGNS & GRAPHICS

P: 817.282.7100 F: 817.282.7100
463 W.Bedford Euless Rd. Hurst, Texas 76053
Email: orders@fusionsignsgraphics.com
Web: www.FusionSignsGraphics.com

CUSTOMER APPROVAL _____
DATE _____
SALES APPROVAL _____
DATE _____

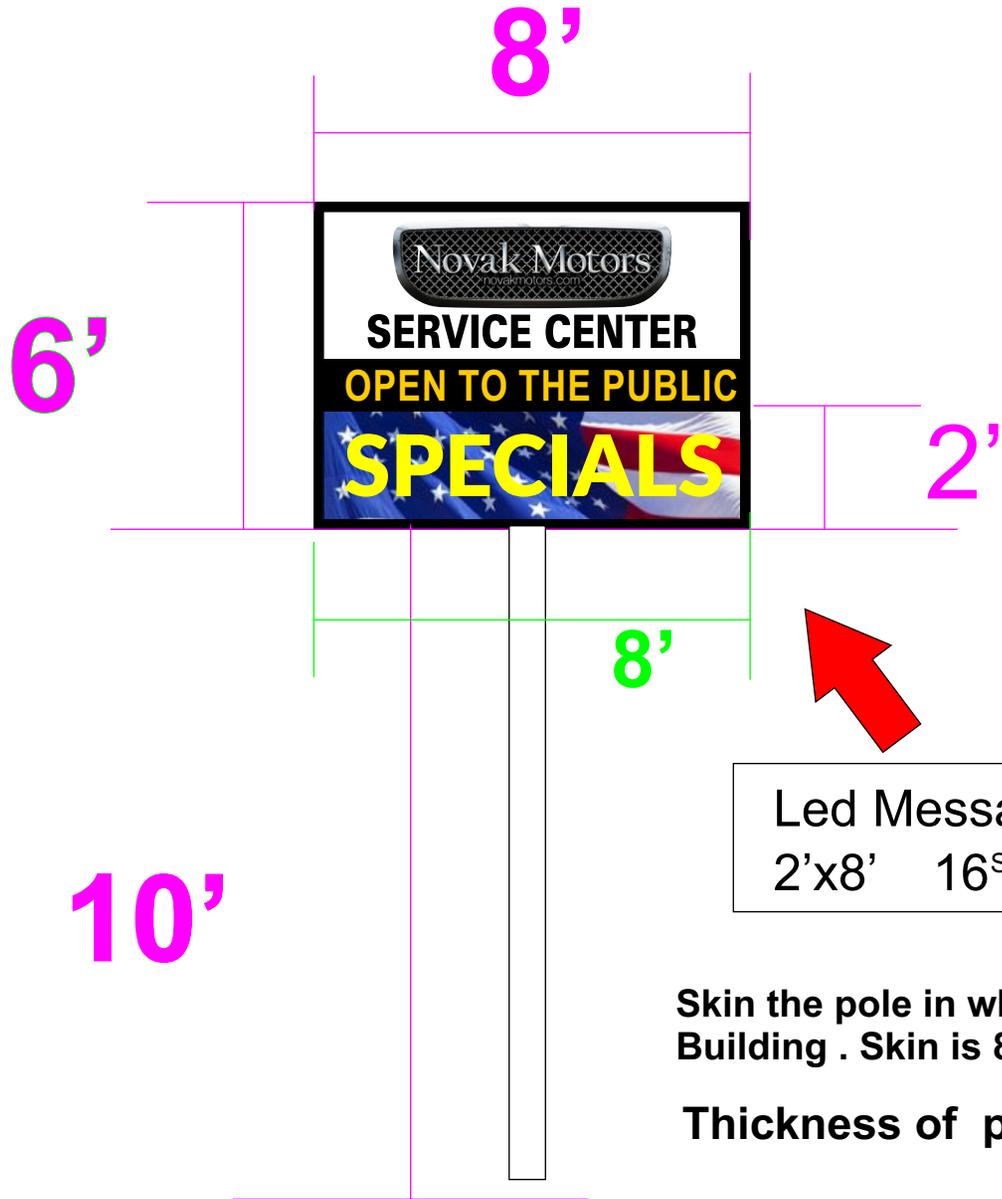
DESIGN NUMBER _____
ADDRESS _____
CITY - STATE _____
DATE _____
SALES PERSON _____
DESIGNER _____ Sheet: _____

Fusion Signs LLC Does not accept responsibility for obtaining accurate code information for sign size allowance. This document is the property of Fusion Signs LLC and may not be copied or distributed with out expressed written consent. Install per NEC.

Proofs are provided to ensure accuracy of printing. If a final product contains an error, that is visible in past proofs, it is the customer's responsibility to pay for the reprint of the product.

Pole Sign •

- Height of pole bottom of sign :** 10'
- Thickness of pole:** 6"
- Skin pole to match Building:** 8"
- Sign Height:** 6'
- Sign Width:** 8'
- Square footage of whole sign:** 48 Sqft
- Led Message board :** 2'x8'
- Led Message board Sqft:** 16 Sqft



Skin the pole in white to match Building . Skin is 8"

Thickness of pole 6"



P: 817.282.7100 F: 817.282.7100
 463 W.Bedford Eules Rd. Hurst, Texas 76053
 Email: orders@fusionsignsgraphics.com
 Web: www.FusionSignsGraphics.com

CUSTOMER APPROVAL

 DATE _____

SALES APPROVAL

 DATE _____

DESIGN NUMBER _____

ADDRESS _____

CITY - STATE _____

DATE _____

SALES PERSON _____

DESIGNER _____ Sheet: _____

Fusion Signs LLC Does not accept responsibility for obtaining accurate code information for sign size allowance. This document is the property of Fusion Signs LLC and may not be copied or distributed with out expressed written consent. Install per NEC.

City Council Staff Report

SUBJECT: Conduct a public hearing and consider ordering the repair, removal or demolition of property located at 450 E. Hurst Blvd, Hurst, Texas; Lot A3, Block 14, of the Holder Estates subdivision (Dakota Place Apartments) and to consider the possible levying of civil penalties

Supporting Documents:

Meeting Date: 11/26/2019
Department: Planning and Development
Reviewed by: Michelle Lazo
City Manager Review:

Background/Analysis:

On September 24, 2019, the City Council held a public hearing and ordered the structures on the property at 450 E. Hurst Blvd. to be repaired, removed, or demolished no later than October 24, 2019. During the November 12, 2019 City Council meeting, the City Council set a public hearing to consider levying civil penalties on November 26, 2019 and authorized the City Attorney to file a Chapter 54 lawsuit against the owner of Dakota Place Apartments.

Staff will provide an update regarding the status of Council's order at the November 26, 2019 City Council meeting.

Funding Sources and Community Sustainability:

There is no funding impact.

Recommendation:

Recommendation will be presented at the meeting.

City Council Staff Report

SUBJECT: Approval of Resolution 1753 authorizing the City of Euless to serve as the sponsoring agency to prepare and file the Solid Waste Pass-Through Grant application on behalf of the City of Hurst

Supporting Documents:

Resolution 1753
 Presentation

Meeting Date: 11/26/2019

Department: Fire

Reviewed by: David Palla

City Manager Review:

Background/Analysis:

Disasters such as tornadoes and severe wind events have a high potential to affect the City of Hurst, potentially impacting the sustainability, safety, quality of life of residents and businesses. One impact of such disasters is the large quantities of storm debris left in the aftermath. The debris consists of trees, construction materials, household materials, etc. The quantity could be difficult to manage by the City and the contracted solid waste carrier. To mitigate the potential and to quickly and legally employ the necessary resources to remove storm debris, a plan can be developed that has contracts in place, with various contractors, to dispose of debris in a timely manner. As disasters do not recognize City boundaries, a multi-jurisdictional approach will help minimize costs and ensure services are available in a timely manner. Creating a plan with negotiated contracts, disposal sites, carriers, etc. is time consuming and difficult for Hurst to perform alone (and would not necessarily take into account neighboring jurisdiction plans). The NCTCOG administers a grant from TCEQ for local and regional projects such as debris management and the funds are collected from landfill "tipping" fees. The Cities of Bedford, Colleyville, Euless, Grapevine and Hurst support a regional approach and individual plans for each city will provide for the efficient disposal of storm debris and accelerate and minimize recovery efforts.

Funding Sources and Community Sustainability:

The NCTCOG administers a grant program that, if awarded, would 100% fund a plan for each of the five Cities providing for an effective and efficient recovery from a disaster. A Disaster Debris Management Plan supports the Council Strategic Plan of Sustainability and Customer Service by supporting an expeditious recovery for residents and businesses.

Recommendation:

Staff recommends Council approve Resolution 1753 authorizing the City of Eules to serve as the sponsoring agency to prepare and file the Solid Waste Pass-Through Grant application on behalf of the City of Hurst.

RESOLUTION 1753

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF HURST, TEXAS, AUTHORIZING THE APPLICATION FOR THE SUBMISSION OF AND RECEIPT OF A GRANT, THE SOLID WASTE PASS - THROUGH GRANT PROGRAM, FROM THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) THROUGH THE NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENTS (NCTCOG), FOR FUNDING TO DEVELOP A DISASTER DEBRIS MANAGEMENT PLAN FOR THE CITIES OF BEDFORD, COLLEYVILLE, EULESS, GRAPEVINE AND HURST, WITH A TOTAL GRANT VALUE OF NO LESS THAN \$125,000.00 THAT IS FULLY FUNDED AND DOES NOT REQUIRE A CITY MATCH; AND AUTHORIZING THE CITY OF EULESS TO EXECUTE ALL DOCUMENTS IN REGARD TO THE REQUESTED FUNDS, WHICH INCLUDES THE POWER TO APPLY FOR, ACCEPT, REJECT, ALTER OR TERMINATE THE GRANT; AND, PROVIDING FOR AN EFFECTIVE DATE

WHEREAS, the City Council for the City of Hurst agrees that in the event of loss or misuse of funds granted to the City of Hurst from the Texas Commission on Environmental Quality Solid Waste Pass - Through Grant Program to the City of Hurst, the City Council assures that funds will be returned in full to the North Texas Central Council of Governments; and

WHEREAS, the City Council for the City of Hurst wishes to designate the City of Euless as the grantee's authorized official. The City of Euless is given the power to apply for, accept, reject, alter or terminate the grant on behalf of the City of Hurst.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF HURST, TEXAS:

SECTION 1. THAT the City Council for the City of Hurst authorizes the City of Euless to submit an application to the Texas Commission on Environmental Quality (TCEQ), the Solid Waste Pass - Through Grant Program, through the North Central Texas Council of Governments (NCTCOG) for funding to develop a Disaster Debris Management Plan for the Cities of Bedford, Colleyville, Euless, Grapevine and Hurst.

SECTION 2. THAT the City Council for the City of Hurst assures that any awarded funds granted to the City of Hurst will be returned to the Texas Commission on Environmental Quality (TCEQ), the Solid Waste Pass - Through Grant Program through the North Central Texas Council of Governments, in full in the event of loss or misuse of the TCEQ funds.

SECTION 3. THAT the City Council for the City of Hurst authorizes the City of Euless to serve as the sponsoring agency and will prepare and file the Solid Waste Pass-Through Grant Program application on behalf of the Cities of Bedford, Colleyville, Euless, Grapevine and Hurst. The City of Euless will administer the potential Solid Waste Pass-Through Grant Program award, will procure and disburse the Regional Disaster Debris Management Plan, and will file for 100% reimbursement under the Solid Waste Pass-Through Grant Program award in the event of approval.

SECTION 4. THAT the City Council for the City of Hurst authorizes the City of Euless, as the authorized agency, to execute all documents in regard to the requested funds, which includes the power to apply for, accept, reject, alter or terminate the grant.

SECTION 5. THAT the City of Hurst City Council assures the City of Hurst will comply with other rules set by the Solid Waste Pass - Through Grant Program.

AND IT IS SO RESOLVED.

Passed by a vote of ___ to ___ this the 26th day of November 2019.

ATTEST:

CITY OF HURST

Rita Frick, City Secretary

Henry Wilson, Mayor

Approved as to form and legality:

City Attorney

**NCTCOG
FY20-21 SOLID WASTE
GRANT APPLICATION**

GRANT FACTS

- Every two years the Texas Commission on Environmental Quality (TCEQ), allocates funds generated by landfill tipping fees to the 24 councils of government (COG) located in the State of Texas.
- The North Central Texas Council of Governments (NCTCOG) allocated a portion of the funding to local and regional implementation grants.
- Approximately \$1.1 million is available across the region for this cycle.



REGIONAL COLLABORATIVE PROJECT

- Includes applications with at least three eligible applicants.
 - Minimum Funding Request: \$125,000
 - Maximum Funding Request: \$500,000
 - No local match is required and this grant is reimbursed at 100%.
- Eligible Project Category: Local Solid Waste Management Plans

Project:

To develop a Disaster Debris Management for the cities of Bedford, Colleyville, Euless, Hurst and Grapevine in the amount of \$125,000.



WHAT IS A DISASTER DEBRIS MANAGEMENT PLAN?

Develops the processes that will be enacted following a natural disaster or other major incident affecting the cities.

This plan is a supporting document to the Emergency Operations Plan.

It provides organization and structure for the field operations.

Provides the ability to pre-qualified contracts in place prior to an event.



WHY DO WE NEED A DISASTER DEBRIS MANAGEMENT PLAN?

- Speeds up response and recovery activities.
- Returns the community to normalcy quickly.
- Reduces the impacts to humans and the environment.
- Ensures the effective use of resources.
- Control and minimize costs.



ALLOWS FOR ADVANCE COMMUNICATION TO THE PUBLIC ON WHAT TO EXPECT.

Debris removal guidelines
In efforts to expedite the debris removal process, please follow these rules

Placing debris **near or on trees, poles or other structures** makes removal difficult. This includes fire hydrants and meters.

Debris separation
Please separate debris into the **six categories**, shown below.

Electronics
Television, computer, stereo, phone, DVD player

Large Appliances
Refrigerator, washer/dryer, air conditioner, stove, water heater, dishwasher

Hazardous waste
Oil, battery, pesticide, paint, cleaning supplies, compressed gas

Vegetative debris
Tree branches, leaves, logs, plants

Construction debris
Building materials, drywall, lumber, carpet, furniture, plumbing

Household garbage
Bagged garbage, discarded food, paper, packaging.

Do not leave doors **unsealed or unsecured**

Debris should be placed curbside

Debris should not **block roadway**

10 feet

FEMA
www.fema.gov

US Army Corps of Engineers
www.usace.army.mil

WHAT THE PROJECT WILL PROVIDE

- Debris Management Plan for each City – Basic Plan and Annexes
- RFP and Procurement for debris haulers (up to 3 contractors)
- RFP and Procurement for debris monitoring contractors (up to 3 contractors)
- Collaborative workshops that include all stakeholders in the cities as well as private contractors.
- A training and exercise plan to build jurisdictional capabilities.
- Tabletop exercises that includes staff from multiple city departments

NEXT STEPS

- Future meeting, you will be asked to approve a Resolution supporting the application for the grant.

Grant Cycle

- Applications due January 6, 2020
- Project Scoring – end of January, 2020
- RCC Meeting – Approve Project Recommendations – February 2020
- NCTCOG Executive Board Approvals – March 26, 2020
- Execution of Inter-local Agreements – April 2020
- Project Implementation – April 2020 – March 2021

City Council Staff Report

SUBJECT: Consider authorizing the city manager to enter into a Lease Agreement and Memorandum of Lease Agreement with Blue Sky Towers III, LLC, for a ground lease and construction of a radio/communications cell tower at 1235 Hurstview Drive

Supporting Documents:

Memorandum of Lease Agreement
 Lease Agreement

Meeting Date: 11/26/2019
 Department: Public Works
 Reviewed by: Greg Dickens
 City Manager Review:

Background/Analysis:

Blue Sky Towers III, LLC, has offered to enter into a lease agreement for a ground lease of a 50' x 50' area on the City of Hurst water plant site located at 1235 Hurstview Drive (one lot south of Bedford-Eules Road, west side of Hurstview Drive) for the installation of a 125' high single-pylon radio and communications cell tower. The existing tower (of approximate 80' height) now located at the site will be removed by Blue Sky and replaced with the cell tower. The existing tower will be removed by Blue Sky Towers.

The lease agreement provides for an initial period of 60 months with option of four successive five-year automatic renewals. The City will receive a one-time \$500 payment upon execution of the agreements. The term of the agreement basically commences upon the start of construction and continues for 60 months thereafter with payments of \$1,200 each month for the term. The agreement provides for an automatic rent escalator of 15% at the start of each successive five-year term.

The agreement allows the City continued access to use the site as it now exists including the ground water storage tank, water wells and pumps, and appurtenant equipment.

The agreement requires the City to add Blue Sky as an additional insured to the general property fire, hazard, and casualty insurance policy.

If the tenant terminates the lease, the City has the right to require the tenant to remove the tower and equipment.

Funding Sources and Community Sustainability:

The agreement provides the City with a continuing revenue of \$14,400 annually. There are no direct costs to the City related to the agreement.

The agreement supports City Council's strategic priority of Financial Sustainability and is consistent with Council's strategic priority of Economic Vitality.

Recommendation:

Staff recommends City Council authorize the city manager to enter into a Lease Agreement and Memorandum of Lease Agreement with Blue Sky Towers III, LLC, for a period of 60 months, with four optional automatic extensions each having a duration of five years.

**Prepared by and for recording,
please forward to:**
Blue Sky Towers III, LLC
352 Park Street, Suite 106,
North Reading, Massachusetts 01864

MEMORANDUM OF LEASE AGREEMENT

This Memorandum of Lease Agreement (the “Memorandum”) is made effective this _____ day of _____, 2019, between the City of Hurst, a municipal corporation, whose mailing address is 1505 Precinct Line Rd., Hurst, TX 76054 (the “Landlord”) and Blue Sky Towers III, LLC, a Delaware limited liability company, whose address is Park Place West, 352 Park Street, Suite 106, North Reading, MA 01864 (the “Tenant”).

WHEREAS, Landlord and Tenant entered into a Lease Agreement dated _____, 2019 (the “Lease”) for a portion of the real property owned by the Landlord (the “Premises”) more particularly described on Exhibit 2 attached hereto and located at 1235 Hurstview Drive, Hurst, Texas, Town of Hurst, County of Tarrant, State of Texas (the “Property”) more particularly described on Exhibit 1 attached hereto; and

WHEREAS Landlord and Tenant have entered into this Memorandum to provide notice thereof as follows:

WITNESSETH

1. Landlord ratifies, restates and confirms the Lease and hereby Leases to Tenant the Premises, subject to the terms and conditions of the Lease. The Lease provides for the Lease by the Landlord to Tenant of the Premises for an initial term of Sixty (60) months with Four (4) renewal terms of an additional Five (5) years each, and further provides:
2. The Premises may be used exclusively by Tenant for all legal purposes, including without limitation, erecting, installing, operating and maintaining radio and communications towers, buildings, and equipment; and

3. Tenant is entitled to sublease and/or sublicense the Premises, including any communications tower located thereon. Each sublease shall be consistent with and bound by the Lease

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK,
SIGNATURES BEGIN ON NEXT PAGE]

EXHIBIT 1

(To Memorandum of Lease)

Description of the Property

(To be updated with metes and bounds survey/plot description)

Shady Oak Addition – Hurst

Block 6 Lot 7R & 8R

NOTICE OF CONFIDENTIALITY RIGHTS: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver's license number.

JOINT USE ACCESS EASEMENT

Date: _____

Owner 1: _____, a _____

**Owner 1's
Mailing Address:** _____
_____, _____ County, _____

Owner 2: _____

**Owner 2's
Mailing Address:** _____
_____, _____ County, _____

Property: (All of the following tracts)

Tract One: *(Insert legal description)*

Tract Two: *(Insert legal description)*

Each owner declares that the Property must be held, sold, and conveyed subject to the following easements and restrictions to assure access to and from the Property for pedestrian and vehicular traffic.

DEFINITIONS

1.01 "Owner" or "Owners" means the record owner, whether one or more persons or entities, his, her or its heirs, successors and assigns, of any right, title, or interest in or to the Property or any part thereof.

- 1.02 “Tract” or “Tracts” means the real property, or a part of the real property, defined above as “Property.”
- 1.03 “Access Tract” means the ____ square feet of land located _____ (where) and described in metes and bounds and accompanying sketch attached and incorporated as **Exhibit A**.
- 1.04 “Improvements” means all driveway; curb and gutter, if any; drainage, if any; and all other access related improvements installed within the Access Tract.

RESERVATION OF EASEMENTS

- 2.01 The Access Tract is reserved for the nonexclusive right for vehicular and pedestrian ingress and egress for all of the Owners of Tracts _____ and _____, and their respective heirs, successors, assigns, tenants, employees, and invitees:
- (1) to and from the adjacent right-of-way (name street);
 - (2) across common boundaries across, between, and among the Tracts.

EACH OWNER MAINTAINS

2.02

Each Owner must maintain its Tract, and that portion of the Access Tract located on its Tract if any, and all Improvements, to allow continuous free vehicular and pedestrian ingress and egress as set out in Section 2.01.

Each Owner will agree on a mutually acceptable mediator and will share the costs of mediation equally. Each right and obligation under this Section inure to each Owner and its respective heirs, successors, and assigns, including future owners of any part of the Property.

ENFORCEMENT

- 3.01 Any Owner or the City of Hurst may enforce, by any proceeding at law or in equity, including specific performance, the easements and restrictions imposed by this Joint Use Access Easement. Failure to enforce any easement or restriction created in this Joint Use Access Easement does not waive the future right to do so.

MODIFICATION OR TERMINATION

- 4.01 This Joint Use Access Easement may be modified, amended, or terminated upon the filing of a written modification, amendment, or termination document in the real property records of the Texas county in which the Property is located, executed, acknowledged, and approved by (a) the Executive Director of Public Works of the City of Hurst, or successor department, (b) all of the Owners of the Property at the time of such modification, amendment, or termination and (c) any mortgagees holding first lien security interests on any portion of the Property.

CONFORMITY WITH ALL APPLICABLE LAWS

- 5.01 Nothing in this Joint Use Access Easement will be construed as requiring or permitting any person or entity to perform any act or omission that violates any local, state or federal law, regulation or requirement in effect at the time the act or omission would occur. Provisions in this agreement which may require or permit such a violation will yield to the law, regulation or requirement.

OBLIGATIONS TO RUN WITH THE LAND

- 6.01 The obligations of each Owner created in this Joint Use Access Easement run with the land defined as the Property.

SEVERABILITY

- 7.01 If any part, or the application of, this Joint Use Access Easement is for any reason held to be unconstitutional, invalid, or unenforceable, the validity of the remaining portions of this Joint Use Access Easement are not affected thereby. All provisions of this Joint Use Access Easement are severable to maintain in full force and effect the remaining provisions of this Joint Use Access Easement.

NON-MERGER

- 8.01 This Joint Use Access Easement shall not be subject to the doctrine of merger, even though the underlying fee ownership of the Property, or any parts thereof, is vested in one party or entity.

(Remainder of page intentionally left blank)

Executed by **Owner 1** on _____, 20__.

OWNER 1

_____,
A _____

By: _____
Name _____
Title: _____

STATE OF _____ §
COUNTY OF _____ §

Before me, the undersigned notary, on this day personally appeared _____ of _____, a _____, known to me through valid identification to be the person whose name is subscribed to the preceding instrument and acknowledged to me that the person executed the instrument in the person's official capacity for the purposes and consideration expressed in the instrument.

Given under my hand and seal of office on _____.

[Seal]

Notary Public, State of _____

Executed by **Owner 2** on _____, 20__.

OWNER 2

_____,
A _____

By: _____
Name _____
Title: _____

STATE OF _____ §
COUNTY OF _____ §

Before me, the undersigned notary, on this day personally appeared _____ of _____, a _____, known to me through valid identification to be the person whose name is subscribed to the preceding instrument and acknowledged to me that the person executed the instrument in the person's official capacity for the purposes and consideration expressed in the instrument.

Given under my hand and seal of office on _____.

[Seal]

Notary Public, State of _____

APPROVED AS TO FORM:
CITY OF HURST, TEXAS

REVIEWED:
CITY OF HURST, TEXAS
PUBLIC WORKS DEPARTMENT

By: _____
Name: _____
Title: City Attorney

By: _____
Name: _____
Title: _____

**AFTER ATTACHING THE REQUIRED EXHIBITS TO THIS INSTRUMENT,
THE FOLLOWING APPROPRIATE DOCUMENTS ALSO NEED TO BE ATTACHED:**

- A. Determine whether the instrument is executed by an individual or a legal entity

Affidavit of No Liens (entity)
Affidavit of No Liens (individual)

- B. Determine whether there is a lien holder by providing an Ownership and Lien search certificate from a Title Company that shows:

1. All owners of record
2. All lienholders of record, which hold current liens OR a statement that there are no liens
3. A property legal description

Lien Holder Consent

- C. Determine whether there is a tenant on the property:

Consent by Tenant

- D. Provide the following recording page:

Recording Page

City Council Staff Report

SUBJECT: Consider authorizing the city manager to enter into a Letter Engagement Agreement with Bickerstaff Heath Delgado Acosta, LLP, for representation of the City of Hurst in SB 1004/SB1152 litigation regarding right-of-way acquisition

Supporting Documents:

Representation Letter
 SB 1004 Summary
 SB 1152 Summary
 Plaintiffs' Third Amendment

Meeting Date: 11/26/2019
 Department: Fiscal Services
 Reviewed by: Clayton Fulton
 City Manager Review:

Background/Analysis:

SB 1004 was passed during the 2017 session of the Texas Legislature and required cities to allow telecom providers to use public right-of-way to install and maintain network cell nodes. The market value for the use of the right-of-way has been determined somewhere between \$1,500 and \$2,500 per node. SB 1004 fixed the compensation at \$250 per node.

SB 1152 was passed during the 2019 session of the Texas Legislature and results in telecom companies, that have more than one franchise fee, to only be required to pay the greater of the two fees. This calculation is done on a statewide basis and could result in municipalities only receiving the lessor of the two franchise fees. We have estimated that Hurst will lose over \$300,000 in franchise fee payments as a result of this bill.

The City of McAllen has filed a law suit challenging the constitutionality of these bills under the premise that paying below market rates results in an unconstitutional gift under the Texas Constitution, article III, section 52. A consortium of cities has joined McAllen in the law suit. Currently, about 51 cities have agreed to participate and includes cities across the state. The City of McAllen and the law firm of Bickerstaff Heath Delgado Acosta, LLP, provided the attached documents that include information on what is required should the City of Hurst join the law suit. This information has been reviewed by the City's legal counsel. The City Attorney and TML's legal advisors are supportive of the City's participation in the suit. The City's costs will be fixed at \$0.15 per resident as shown in the 2010 census. This results in a cost of \$5,600.55 should we elect to participate. If legal fees exceed initial

payments by cities, we may be asked for additional contributions. However, future payments will not be required to continue as a party to the litigation.

Funding Sources and Community Sustainability:

Consistent with Council's Strategic Plan and the priorities of Economic Vitality and the Financial Sustainability component of the Hurst Way, the annual budget includes projected revenues from franchise fees and other use of city owned rights-of-way. Funding is available within the current budget and represents a small investment in preserving our revenue streams and ensuring the City receives compensation for the use of public property.

Recommendation:

Staff recommends the City Council move to authorize the city manager to enter into a Letter Engagement Agreement with Bickerstaff Heath Delgado Acosta, LLP, for representation of the City of Hurst in SB 1004/SB1152 litigation regarding right-of-way acquisition.



November 19, 2019

Via email to cfulton@hursttx.gov

Clayton Fulton
Assistant City Manager
City of Hurst
1505 Precinct Line Rd.
Hurst, Texas 76054

Re: SB 1004/SB 1152 litigation

Dear Mr. Fulton:

Kevin Pagan advises me that the City of Hurst may approve participation, along with several other Texas cities, in a challenge to the constitutionality of SB 1004 (2017), which relates to the deployment of network nodes in municipal rights-of-way and the fees cities may charge for the use of their rights-of-way, and to the constitutionality of SB 1152 (2019), which can preclude cities from receiving payment for use of their rights-of-way for both cable and telecom.

In this matter, the City of McAllen will be the lead client, responsible for receiving and paying monthly billing statements. In order to facilitate the logistics of billing among what is anticipated to be a large number of cities, each city, including McAllen, will send Bickerstaff Heath Delgado Acosta LLP an amount equal to \$0.15 per resident of the city as shown by the 2010 federal census. Those funds along with any other funds earmarked for the prosecution of the suit will be placed in the Bickerstaff Heath Delgado Acosta LLP Trust Account and will be used to pay the law firm's fees and expenses only after those fees and expenses are incurred and billed. If the funds raised by the initial assessments are not sufficient to complete the litigation, it may be necessary for McAllen to make additional contributions and it may seek contributions from cities and other sources; however, your city will not be required to make an additional assessment to continue as a party to the litigation. At the end of the litigation any funds remaining will be returned proportionately to the participating cities, except that if the additional assessment is exhausted and additional funds are obtained above the amount of the initial assessment, any refund will go to McAllen and any other city providing funds above the amount of their initial assessment and will be computed in proportion to their contribution above the amount of their initial assessment.

I will coordinate primarily with Kevin Pagan. I am enclosing a copy of the City of McAllen's Engagement Agreement with the firm. These terms, other than payment, will also apply to representation of your city.

Clayton Fulton
November 19, 2019
Page 2

To document your city's decision to participate in this matter and the firm's authority to represent it, I am enclosing a letter authorizing representation that you should complete and return to me. Along with that letter I am also enclosing a copy of our Conflict of Interest Disclosure and Agreement. It explains the possibility of conflicts arising among the group of cities participating in this matter and states an agreement to waive certain rights that would normally be part of our attorney-client relationship in order to make this joint representation feasible. By executing the letter authorizing representation you are also agreeing to the Conflict of Interest Disclosure and Agreement.

Please feel free to contact me either by telephone or email if you have questions or would like to discuss any of these issues. We look forward to representing the City of Hurst in this matter.

Sincerely,



C. Robert Heath

CRH/bv
Enclosure(s)

Bickerstaff Heath Delgado Acosta LLP
3711 S. MoPac Expy., Building 1, Suite 300, Austin, Texas 78746

ENGAGEMENT AGREEMENT

This agreement sets forth the standard terms of our engagement as your attorneys. Unless modified in writing by mutual agreement, these terms will be an integral part of our agreement with you. Therefore, we ask that you review this agreement carefully and contact us promptly if you have any questions. Please retain this agreement in your file.

Identity of Client. We will be representing the interest of a group of Texas cities, as representation is authorized by each city. The City of McAllen is the first such city and has agreed to receive and pay the statements for legal services rendered by the firm. Such payments will be subject to a cost sharing arrangement with other cities that have authorized the firm to represent them in this matter.

Attorneys. Bickerstaff Heath Delgado Acosta LLP is engaged by you as your attorneys, and I, C. Robert Heath, will be the partner who will coordinate and supervise the services we perform on your behalf. We routinely delegate selected responsibilities to other persons in our Firm when, because of special expertise, time availability or other reasons, they are in a better position to carry them out. In addition, we will try, where feasible and appropriate, to delegate tasks to persons who can properly perform them at the least cost to you.

The Scope of Our Work. You should have a clear understanding of the legal services we will provide. We will provide services related only to matters as to which we have been specifically engaged. Although in the future we may from time to time be employed on other matters, our present relationship is limited to representing the above-named client in the matters described in Exhibit A. We will at all times act on your behalf to the best of our ability. Any expressions on our part concerning the outcome of your legal matters are expressions of our best professional judgment, but are not guarantees. Such opinions are necessarily limited by our knowledge of the facts and are based on the state of the law at the time they are expressed. We cannot guarantee the success of any given matter, but we will strive to represent your interests professionally and efficiently.

Fees for Legal Services. Our charges for professional services are customarily based on the time devoted to the matter, the novelty and difficulty of the questions presented, the requisite experience, reputation and skill requested to deal with those questions, time limitations imposed by the circumstances, and the amount involved and the results obtained. Unless otherwise indicated in writing, our fees for legal services are determined on the basis of the hourly rates of the respective lawyers and other timekeepers who perform the services. These rates vary depending on the expertise and experience of the individual. We adjust these rates annually, increasing them to reflect experience, expertise, and current economic conditions. We will notify you in writing if this fee structure is modified. The initial agreed billing rates for attorneys and other timekeepers engaged on your work are attached as Exhibit B.

Other Charges. All out-of-pocket expenses (such as copying charges, travel expenses, messenger expenses, filing and other court costs, and the like) incurred by us in connection with our representation of you

will be billed to you as a separate item on your statement. A description of the most common expenses is included as Attachment C and agreed to as part of this agreement.

Billing Procedures and Terms of Payment. Our billing period begins on the 16th of the month and ends on the 15th of the following month. We will render periodic statements to you for legal services and expenses. We usually mail these periodic statements on or about the first of the month following the latest date covered in the statement. Each statement is payable within 30 days of its stated date, must be paid in U.S. Dollars, and is considered delinquent if not paid in full within 30 days of its stated date. We will include all information reasonably requested by you on all statements and will reference any purchase order number provided by you. If you have any question or disagreement about any statement that we submit to you for payment, please contact me at your earliest convenience so that we can resolve any problems without delay. Typically, such questions or disagreements can be resolved to the satisfaction of both sides with little inconvenience or formality.

Termination of Services. You have the right at any time to terminate our employment upon written notice to us, and if you do we will immediately cease to render additional services. We reserve the right to discontinue work on pending matters or terminate our attorney-client relationship with you at any time that payment of your account becomes delinquent, subject to Court approval if necessary. In the event that you fail to follow our advice and counsel, or otherwise fail to cooperate reasonably with us, we reserve the right to withdraw from representing you upon short notice, regardless of the status of your matter. No termination, whether by you or by us, will relieve you of the obligation to pay fees and expenses incurred prior to such termination.

Retention of Documents. Although we generally attempt to retain for a reasonable time copies of most documents generated by this Firm, we are not obligated to do so indefinitely, and we hereby expressly disclaim any responsibility or liability for failure to do so. We generally attempt to furnish copies of all documents and significant correspondence to you at the time they are created or received, and you agree to retain all originals and copies of documents you desire among your own files for future reference. Because you will have been furnished with copies of all relevant materials contained in our files during the course of the active phase of our representation, if you ask us to retrieve materials contained in a file that has been closed, you agree that we will be entitled to be paid a reasonable charge for the cost of retrieving the file and identifying, reproducing, and delivering the requested materials. It is our Firm's policy to destroy all copies of materials in connection with the representation six (6) years after the completion of the engagement. Before destroying the materials, we will attempt to contact the client identified in this agreement; however, this document serves as notice to you that if we are unable to contact our client at the most recent address contained in our file, we will destroy the materials without further notice. It is your responsibility to notify us of any change in address or other contact information.

Fee Estimates. We are often requested to estimate the amount of fees and costs likely to be incurred in connection with a particular matter. Our attorneys do their best to estimate fees and expenses for particular matters when asked to do so. However, an estimate is just that, and the fees and expenses required are ultimately a function of many conditions over which we have little or no control, especially in litigation or negotiation situations where the extent of necessary legal services may depend to a significant degree upon the tactics of the opposition. Unless otherwise agreed in writing

with respect to a specific matter, all estimates made by us will be subject to your agreement and understanding that such estimates do not constitute maximum or fixed-fee quotations and that the ultimate cost is frequently more or less than the amount estimated.

Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, United States of America, without giving effect to its choice of laws provisions. Venue of any case or controversy arising under or pursuant to this Agreement will be exclusively in Travis County, Texas, United States of America.

Standards of Professionalism and Attorney Complaint Information. Pursuant to rules promulgated by the Texas Supreme Court and the State Bar of Texas, we hereby advise you that the State Bar of Texas investigates and prosecutes complaints of professional misconduct against attorneys licensed in Texas. Information on the grievance procedures is available from the State Bar of Texas, and any questions you have about the disciplinary process should be addressed to the Office of the General Counsel of the State Bar of Texas, which you may call toll free at 1-800-932-1900.

Questions. If you have any questions from time to time about any aspect of our arrangements, please feel free to raise those questions. We want to proceed in our work for you with your clear and satisfactory understanding about every aspect of our billing and payment policies; and we encourage an open and frank discussion of any or all of the matters addressed in this agreement.

Acceptance of Terms. If this arrangement is acceptable to you and the City of McAllen, please sign the enclosed duplicate original of this agreement and return it and the required retainer to us at your earliest convenience. We truly appreciate the opportunity to be of service to you and look forward to working with you in a mutually beneficial relationship.

AGREED TO AND ACCEPTED

CITY OF McALLEN

BICKERSTAFF HEATH DELGADO ACOSTA LLP

By: 

By: 

Date: 7/25/17

cc: Billing Department

Exhibit A — Scope of Services
Bickerstaff Heath Delgado Acosta LLP

While we agree that in the future we may from time to time be employed on other matters, this agreement provides that our relationship is limited to representing and counseling you in connection with the following:

- Research and litigate the constitutionality of SB 1004, which relates to the deployment of network nodes in the public right-of-way and sets fees that cities may impose for such use of their rights-of-way.
- Other legal services assigned or requested, only if the scope of which is confirmed by you in writing at the time of assignment

Other legal services not assigned or requested, and confirmed in writing, are specifically not within the scope of our representation.

Exhibit B — Billing Rates
 Bickerstaff Heath Delgado Acosta LLP

TIMEKEEPER	BILLING RATE
Acosta, Alex	\$ 385
Caputo, Cobby	\$ 385
Caroom, Doug	\$ 385
Cheney, Denise	\$ 360
Dugat, Bill	\$ 360
Falk, Syd	\$ 400
Fryer, Cathy	\$ 360
Heath, Bob	\$ 435
Katz, Joshua	\$ 300
Kimbrough, Chuck	\$ 300
Maxwell, Susan	\$ 330
Mendez, David	\$ 385
Mendez, Manuel	\$ 385
Rogers, Emily	\$ 330
Russell, Claudia	\$ 330
Seaquist, Gunnar	\$ 325
Than, Catherine	\$ 330
Weller, Steven	\$ 330
Young, Brad	\$ 330
Gonzalez, Vanessa	\$ 300
Lumpkin, Katy	\$ 300
Fuqua, Kelli	\$ 250
Grinnan, Kimberly	\$ 250
Miller, Gregory	\$ 275
Robinson, Lori	\$ 250
Anderson, Mike	\$ 360
Delgado, Hector	\$ 385
Gangstad, John	\$ 360
Pollan, Tom	\$ 360
Legal Assistants/Specialists	\$ 175
Sherry McCall	\$ 225

Exhibit C—Client Costs Advanced
Bickerstaff Heath Delgado Acosta LLP

The firm incurs expenses on behalf of clients only when required by the legal needs of the clients. Some cases or matters require extensive use of outside copy facilities, and other cases may not be so paper-intensive. Standard services handled within the firm are not charged, and client specific expenses are billed to the client needing those services. An explanation of the billing structure is as follows:

Not Charged

Secretarial and word processing time, routine postage, file setup, file storage, local or ordinary long distance charges, fax charges, and computerized legal research data charges.

Delivery Services

Outside delivery services are used for pickup and delivery of documents to the client as well as to courts, agencies, and opposing parties. Outside delivery fees are charged to the client at the rate charged to the firm. Overnight delivery services are also charged at the rate charged to the firm. Firm Office Services Department personnel may provide delivery service in urgent situations and charges for such in-house service will not exceed the charge that would be made by an outside service in a similar situation.

Postage

Our postal equipment calculates exact U.S. postage for all sizes and weights of posted material. The rate charged for postage is the same as the amount affixed to the material that is mailed. We will not charge clients for postage on routine correspondence; however, the cost of large-volume mail, certified mail, or other additional mail services will be charged to the client.

Copies and Prints

Our standard rate for black and white copies and prints made by firm personnel is \$0.15 per page. Color copies and prints are charged at a standard rate of \$0.55 per page. These charges cover paper, equipment costs, and other supplies. If savings can be realized within the required time frame by sending copy jobs to subcontractors, the firm uses only qualified legal services copiers and the cost charged to the client is the same as the amount billed to the firm.

Phone Charges

Only charges for conference calls or international calls are charged, and charges are billed at the same amount billed to the firm by the outside provider.

Travel

Attorney and other timekeeper time spent traveling on behalf of a client is billed to the client. Hotel, meals, local transportation, and similar expenses are charged based on receipts and travel expense forms submitted by the attorney. Documentation is available to the client if requested.

Maps

Maps produced in conjunction with a project will be billed at \$50 for each 34 x 44 inch map and \$20 for each smaller map, plus cost (time fees) for preparation.

Other Expenses

Expenses incurred with outside providers in connection with the client's legal services will be paid by the client directly to the outside provider unless specifically arranged in advance. If the firm agrees to pay outside providers, the cost charged to the client is the same as the amount billed to the firm. Examples of such charges include: court reporter fees, filing fees, newspaper charges for publication notices, expert witness fees, consultants and other similar expenses.

_____, 2019

C. Robert Heath
Bickerstaff Heath Delgado Acosta LLP
3711 S. MoPac Expy., Bldg. 1, Suite 300
Austin, TX 78746

Re: SB 1004/SB 1152 litigation

Dear Mr. Heath:

The City of Hurst has approved your firm's representation of our city, along with other Texas cities, in connection with litigation to challenge the constitutionality of SB 1004 (2017), which relates to the deployment of network nodes and that sets the fees that cities can charge for the use of their right-of-way, and to the constitutionality of SB 1152 (2019), which can preclude cities from receiving payment for the use of their rights-of-way for both cable and telecom. As part of our city's approval, I have reviewed the copy of your firm's Engagement Agreement with the City of McAllen, dated July 25, 2017, and its terms are acceptable to our city.

I understand that in order to facilitate the logistics of billing among what is anticipated to be a large number of cities, each city, including McAllen, will send Bickerstaff Heath Delgado Acosta LLP an amount equal to \$0.15 per resident of the city as shown by the 2010 federal census. Those funds along with any other funds earmarked for the prosecution of the suit will be placed in the Bickerstaff Heath Delgado Acosta LLP Trust Account and will be used to pay the law firm's fees and expenses only after those fees and expenses are incurred and billed. If the funds raised by the initial assessments are not sufficient to complete the litigation, it may be necessary for McAllen to make additional contributions and it may seek contributions from cities and other sources; however, my city will not be required to make an additional assessment to continue as a party to the litigation. At the end of the litigation any funds remaining will be returned proportionately to the participating cities, except that if the additional assessment is exhausted and additional funds are obtained above the amount of the initial assessment, any refund will go to McAllen and any other city providing funds above the amount of their initial assessment and will be computed in proportion to their contribution above the amount of their initial assessment. My city agrees to this procedure and to making its assessment.

I understand that besides group emails, you will be coordinating primarily with Kevin Pagan, and that he will be responsible for coordinating the involvement of the other cities. This is acceptable.

I have read, reviewed, and understand the attached Conflict of Interest Disclosure and Agreement. By my signature below, I represent that I am duly authorized to agree to its terms and conditions on behalf of our city, and thereby to bind our city to those terms and conditions.

Please let me know if you need additional information or we can be of assistance.

Sincerely,

Name

Title

City

CONFLICT OF INTEREST DISCLOSURE AND AGREEMENT

Bickerstaff Heath Delgado Acosta LLP “the Firm” has been requested to represent and plans to represent some or all of the Texas cities and associations listed on Exhibit A, referred to as “the Cities,” in challenging constitutionality of SB 1004 (2017), which regulates the deployment of network nodes in the public rights-of-way and sets fees that can be charged for the use of a city’s right-of-way, and to the constitutionality of SB 1152 (2019), which can preclude cities from recovering reimbursement for the use of their rights-of-way for both cable and telecom. Because the Texas Disciplinary Rules of Professional Conduct require specific disclosures and waivers for joint representation, this waiver provides notice and consents to the waiver of these rights. The Firm will not be able to represent cities that do not execute this waiver.

We are aware of no conflicts of interest between the Cities regarding this matter at this time; however, potential conflicts of interest may arise in the future. For example, one or more of the Cities could withdraw from participation in this matter and actually oppose the remaining cities. In such an instance, without a conflict waiver, the Firm would be unable to continue representing the Cities in this matter. For this reason the Firm is requiring that current or future conflicts of interest regarding continued or future representation of the Cities, listed on Exhibit A, be waived.

This waiver means that information that otherwise would have been protected by attorney-client privilege might no longer be protected from disclosure by a City withdrawing from the representation. Similarly, an attorney owes a fiduciary duty to his clients and withdrawal or opposition between clients could create conflicting fiduciary duties. For this reason, by waiving conflicts of interest you are releasing the Firm from its fiduciary duty to the extent of the conflict.

It is further the agreement of the Firm and the Cities that representation of the Cities in this matter will not limit the Firm’s ability to represent the cities listed on Exhibit A in other or related matters in the future.

You should carefully consider these issues and consult with independent counsel prior to signing the letter authorizing the firm to represent your city in this matter because your agreement expressly waives conflicts and potential conflicts, consents to the Firm’s representation of the Cities and waives fiduciary duty and confidentiality rights in the same matter and for future representation.

Sincerely,

BICKERSTAFF HEATH DELGADO ACOSTA LLP

By: 
C. Robert Heath

SB 1004 Summary

As telecommunications providers move from 4G to 5G technology, they will rely more on small cells rather than the now familiar macro towers located throughout a town to send and receive cell phone wireless signals. Small cells or network nodes are smaller antennas, have a much smaller range, and are located closer to the ground. They can be placed on light poles, street signs, signal light poles, and similar types of poles. They will be fairly numerous, often located only a few hundred feet apart. While the antenna may be relatively small, other associated equipment associated with the network node may consume as much as 28 cubic feet, and ground-based equipment may be as large as 42 cubic feet.

S.B. 1004 gives telecom providers the right to use the public right-of-way to install and maintain network nodes and sets an annual maximum annual rental rate that the city may charge of \$250 per node. The plaintiffs' expert will testify that the market value for the use of the right-of-way is between \$1,500 and \$2,500 per node. TxDOT commissioned an analysis to determine what it should charge for access to the state right-of-way, and that study concluded that the fair market rental value was \$2,640 per year.¹

When the current Texas Constitution was adopted in 1876, the framers adopted at least three separate provisions designed to prohibit the then prevalent practice of local governments donating public money and property to entice the railroads to come to their communities. While designed to address the Nineteenth Century practice relating to railroads, the provisions are not limited to a particular industry or practice, and in the Twenty-first Century, the same issue is presented by legislation such as SB 1004, which mandates a gift of public property to for-profit, private companies through a transfer of public assets at a rental rate of roughly ten cents on the dollar. We believe this is a violation of the Texas Constitution's article XI, section 3 (prohibiting cities from making gifts of public property to corporations), and article III, section 52 (prohibiting the legislature from authorizing cities to make such a gift).

Additionally, while the statute leaves cities with the ability to enforce its ordinances against small cell installations in some circumstances, it gives providers the right to construct and install network nodes "as a permitted use without the need for a special use permit or similar zoning review and not subject to further land use approval." TEX. LOC. GOV'T CODE, § 284.101(a). We believe this is an improper delegation of governmental power to a private entity.

¹ Although TxDOT is not covered by SB 1004, it decided shortly before being called to testify before the Senate Business and Commerce Committee, that it would charge the SB 1004 rates rather the fair market value rate computed by it expert.

SB 1152

While SB 1004 jeopardizes future revenue for cities, SB 1152 eliminates an existing revenue stream. Basically, it says that if a telecom provider and a cable company have common ownership, then, beginning in 2020, instead of paying franchise fees for both telecom and cable, it will only pay the higher of the two. The determination of which is higher is determined on a statewide basis for each carrier, so it may not reflect the reality of which fee is higher in your city. It will mean that for those providers who offer both telecom and cable (or, even if those services are offered by two different companies that have a common owner), the city will receive one franchise fee for the use of its ROW rather than two. According to the fiscal note attached to the bill, the estimated losses to Texas cities would be:

Houston	\$17.1-27.5 million
Dallas	\$9.2 million
San Antonio	\$7.9 million
Austin	\$6.3 million
Arlington	\$2.8 million
Sugar Land	\$1.2 million
Plano	\$0.734 million
Denton	\$0.670 million
Waco	\$0.373 million
The Colony	\$0.235 million

The fiscal note did not address the impact on smaller cities; however, the potential loss, although relatively small compared to a Houston, San Antonio, or Dallas, may well make up a much larger percentage of the city's revenues and can have an extreme impact.

Constitutional Issues Raised by SB 1152

Gift or Grant

We believe that SB 1152 has much the same flaw under the Texas Constitution as SB 1004. Article III, section 52, of the Texas Constitution prohibits the legislature from authorizing cities to grant anything of value to a corporation. This provision was adopted in the 1876 Constitution in response to the post-Civil-War actions of communities offering cash or land to entice the railroad to come to their city.

In earlier statutes the legislature has set a value on the use of the municipal ROW. For cable, the fee is 5% of gross revenue. Utilities Code, § 66.05(a); *see also*, 47 USCA § 542(b). For telecoms, the fee, known as an access line fee, is determined by a statewide formula based in large part on the franchise fees cities received in 1998. Tex. Loc. Gov't Code, §§ 283.051 and 283.055. While the access line fee is not specifically tied to a percentage of revenues, it is indirectly related to revenue generation since the 1998 fees on which the formula is based were often determined as a percentage of the revenue generated by the company in the city.

Under SB 1152, an independent telecom (i.e., one that doesn't have common ownership with a cable provider) pays the full access line charge to the city, and an independent cable company (i.e., one that is not owned by a telecom provider) pays the city 5% of its gross revenues. On the other hand, the larger companies that own both cable and telecom (e.g., AT&T, which owns U-Verse cable) will pay only one fee its use of the ROW and will have the use for the other purpose for free. We believe giving free use of the ROW to a favored group—in this case the larger and more dominant companies—is an unconstitutional gift under article III, section 52.

Velva L. Price
District Clerk
Travis County
D-1-GN-17-004766
Chloe Jimenez

CAUSE NO. D-1-GN-17-004766

CITY OF MCALLEN; CITY OF §
DALLAS; CITY OF PLANO; CITY OF §
GARLAND; CITY OF IRVING; CITY §
OF AMARILLO; CITY OF §
BROWNSVILLE; CITY OF §
MCKINNEY; CITY OF WACO; CITY §
OF SUGAR LAND; CITY OF MISSION; §
CITY OF PHARR; TOWN OF §
FLOWER MOUND; CITY OF SAN §
MARCOS; CITY OF COPPELL; CITY §
OF DUNCANVILLE; CITY OF §
WESLACO; CITY OF SAN BENITO; §
CITY OF WATAUGA; CITY OF §
ALAMO; CITY OF MIDLOTHIAN; §
CITY OF HIGHLAND VILLAGE; CITY §
OF SEAGOVILLE; CITY OF HEWITT; §
CITY OF ALTON; CITY OF §
HIDALGO; CITY OF RED OAK; CITY §
OF BOERNE; CITY OF WEBSTER; §
CITY OF ROMA; CITY OF §
ROCKPORT; CITY OF GRANBURY; §
CITY OF LA FERIA; TOWN OF §
FAIRVIEW; CITY OF BASTROP; §
CITY OF ROANOKE; CITY OF §
LUCAS; CITY OF BALCONES §
HEIGHTS; CITY OF SOUTH PADRE §
ISLAND; CITY OF OLMOS PARK; §
CITY OF AURORA; CITY OF §
ESCOBARES; CITY OF CHINA §
GROVE; CITY OF LINDSAY; TOWN §
OF WESTLAKE; CITY OF §
SIMONTON; and JIM DARLING, in §
both his official capacity as Mayor of the §
City of McAllen and individual capacity, §

Plaintiffs, §

v. §

THE STATE OF TEXAS §
Defendant. §

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

353rd JUDICIAL DISTRICT

**PLAINTIFFS' THIRD AMENDED PETITION AND APPLICATION FOR
TEMPORARY AND PERMANENT INJUNCTIVE RELIEF**

I. INTRODUCTION

The Texas Constitution expressly provides that “the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to . . . grant public money or thing of value in aid of, or to any individual, corporation, association or company.” TEX. CONST., art. III, § 52. Notwithstanding this clear and emphatic prohibition, the Texas Legislature in 2017 and 2019 adopted legislation directing Texas cities to give private, for-profit corporations either free or far-below-market-value use of municipal rights-of-way. This is a gift of a valuable public asset with substantial monetary value. The Legislature also improperly transferred some governmental powers to these private companies. Unless restrained, the legislation will result in an unconstitutional gift of public property with an annual value exceeding \$100,000,000.

Put to the untenable choice of violating the 2017 and 2019 statutes or the state constitution, the named plaintiffs bring this action in which they seek a declaration that both SB 1004, enacted in 2017, and SB 1152, enacted in 2019, are unconstitutional and further seek an injunction against the implementation and enforcement of these provisions because they violate article II, section 1, article III, section 1, article III, section 52, and article XI, section 3, of the Texas Constitution.

II. DISCOVERY CONTROL PLAN

1. Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, Plaintiffs intend that discovery be conducted under Level 3.

III. PARTIES AND SERVICE OF PROCESS

2. Plaintiff City of McAllen is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

3. Plaintiff City of Dallas is a duly incorporated home-rule municipality located in Dallas, Collin, Denton, Kaufman, and Rockwall Counties, Texas.

4. Plaintiff City of Plano is a duly incorporated home-rule municipality located in Collin and Denton Counties, Texas.

5. Plaintiff City of Garland is a duly incorporated home-rule municipality located in Dallas, Collin, and Rockwall Counties, Texas.

6. Plaintiff City of Irving is a duly incorporated home-rule municipality located in Dallas County, Texas.

7. Plaintiff City of Amarillo is a duly incorporated home-rule municipality located in Potter and Randall Counties, Texas.

8. Plaintiff City of Brownsville is a duly incorporated home-rule municipality located in Cameron County, Texas.

9. Plaintiff City of McKinney is a duly incorporated home-rule municipality located in Collin County, Texas.

10. Plaintiff City of Waco is a duly incorporated home-rule municipality located in McLennan County, Texas.

11. Plaintiff City of Sugar Land is a duly incorporated home-rule municipality located in Fort Bend County, Texas.

12. Plaintiff City of Mission is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

13. Plaintiff City of Pharr is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

14. Plaintiff Town of Flower Mound is a duly incorporated home-rule municipality located in Denton and Tarrant Counties, Texas.

15. Plaintiff City of San Marcos is a duly incorporated home-rule municipality located in Hays County, Texas.

16. Plaintiff City of Coppell is a duly incorporated home-rule municipality located in Dallas and Denton Counties, Texas.

17. Plaintiff City of Duncanville is a duly incorporated home rule municipality located in Dallas County, Texas.

18. Plaintiff City of Weslaco is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

19. Plaintiff City of San Benito is a duly incorporated home-rule municipality located in Cameron County, Texas.

20. Plaintiff City of Watauga is a duly incorporated home-rule municipality located in Tarrant County, Texas.

21. Plaintiff City of Alamo is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

22. Plaintiff City of Midlothian is a duly incorporated home-rule municipality located in Ellis County, Texas.

23. Plaintiff City of Highland Village is a duly incorporated home-rule municipality located in Denton County, Texas.

24. Plaintiff City of Seagoville is a duly incorporated home-rule municipality located in Dallas and Kaufman Counties, Texas.

25. Plaintiff City of Hewitt is a duly incorporated home-rule municipality located in McLennan County, Texas.

26. Plaintiff City of Alton is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

27. Plaintiff City of Hidalgo is a duly incorporated home-rule municipality located in Hidalgo County, Texas.

28. Plaintiff City of Red Oak is a duly incorporated home-rule municipality located in Ellis County, Texas.

29. Plaintiff City of Boerne is a duly incorporated home-rule municipality located in Kendall County, Texas.

30. Plaintiff City of Webster is a duly incorporated home-rule municipality located in Harris County, Texas.

31. Plaintiff City of Roma is a duly incorporated home-rule municipality located in Starr County, Texas.

32. Plaintiff City of Rockport is a duly incorporated home-rule municipality located in Aransas County, Texas.

33. Plaintiff City of Granbury is a duly incorporated home-rule municipality located in Hood County, Texas.

34. Plaintiff City of La Feria is a duly incorporated home-rule municipality located in Cameron County, Texas.

35. Plaintiff Town of Fairview is a duly incorporated home-rule municipality located in Collin County, Texas.

36. Plaintiff City of Bastrop is a duly incorporated home-rule municipality located in Bastrop County, Texas.

37. Plaintiff City of Roanoke is a duly incorporated home-rule municipality located in Denton County, Texas.

38. Plaintiff City of Lucas is a duly incorporated home-rule municipality located in Collin County, Texas.

39. Plaintiff City of Balcones Heights is a duly incorporated General Law Type A municipality located in Bexar County, Texas.

40. Plaintiff City of South Padre Island is a duly incorporated home-rule municipality located in Cameron County, Texas.

41. Plaintiff City of Olmos Park is a duly incorporated General Law Type A municipality located in Bexar County, Texas.

42. Plaintiff City of Aurora is a duly incorporated General Law Type A municipality located in Wise County, Texas.

43. Plaintiff City of Escobares is a duly incorporated General Law Type A municipality located in Starr County, Texas.

44. Plaintiff City of China Grove is a duly incorporated General Law Type A municipality located in Bexar County, Texas.

45. Plaintiff City of Lindsay is a duly incorporated General Law Type A municipality located in Cooke County, Texas.

46. Plaintiff Town of Westlake is a duly incorporated General Law Type A municipality located in Tarrant and Denton Counties, Texas.

47. Plaintiff City of Simonton is a duly incorporated General Law Type A municipality located in Fort Bend County, Texas.

48. Plaintiff Jim Darling is the Mayor of McAllen, Texas. He is a party to this proceeding in his official capacity as mayor and in his individual capacity as a citizen and taxpayer.

49. Defendant State of Texas has been served with process.

IV. JURISDICTION AND VENUE

50. The subject matter in controversy is within the jurisdictional limits of this Court, and the Court has jurisdiction over this action pursuant to article V, section 8, of the Texas Constitution and section 24.007 of the Texas Government Code, as well as the Texas Uniform Declaratory Judgments Act. TEX. CIV. PRAC. & REM. CODE § 37.001, *et seq.*

51. This Court has jurisdiction over the parties because all Defendants reside or have their principal place of business in Texas.

52. Plaintiffs seek non-monetary relief.

53. Venue is proper in Travis County because Defendant has its principal office in Travis County. Tex. Civ. Prac. & Rem. Code § 15.002(a)(3).

V. FACTS

A. Municipal Right-of-Way and the Telecommunications Network

54. This case relates to the telecommunications and cable providers' use of the municipal street grid as the location for their communications network.

55. Local telephone service has historically been provided by wires that link the subscriber's home to a network that connects to switches that route calls among different locations within the city and to the national and worldwide networks.

56. This network of wires almost invariably is located on poles placed in the city's right-of-way or in conduit buried beneath the right-of-way. Indeed, because the municipal street system is typically a grid overlaying the city, it is likely impossible to connect the various parts of the city without either crossing or following the city's streets. Further, even if it were physically possible to design the network so it was located entirely on private property, it is much more convenient and efficient for the telephone company or other provider to place its wires along or beneath the city streets since it involves dealing with a single property owner in a city rather than hundreds or thousands of individual owners.

57. As cable became a means of delivering video and computer signals to homes and offices, the cable or fiber was similarly located in the right-of-way.

58. More recently, wireless communication has become ubiquitous. While the signal in a cell phone call travels wirelessly over the relatively short distance between the telephone and

an antenna, the antenna is linked to the wired network, and the remainder of the call's journey is over the wired network found in the city's right-of-way.

59. In short, both cable and telephone communications, whether made on a landline or a cell phone, use and depend on the network of wires, cable, and fiber located in the municipal right-of-way.

60. Further, in the case of small-cell or 5G technology, the antennas that send or receive the wireless signal are generally located in the municipal right-of-way where they can easily connect to the wired network.

61. It has long been recognized that cities are entitled to be compensated for this use of their right-of-way; *e.g.*, *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92 (1893), and that cities are prohibited from giving free use of this public asset to private companies. TEX. CONST., art. III, § 52; art. XI, § 3.

B. Earlier Legislation is Carefully Crafted to Avoid Being a Prohibited Gift or Grant

62. For many years telecommunications service was provided over land lines and was typically provided in a locality by a single provider. Texas municipalities would grant franchises to that company to permit it to use city rights-of-way. This would include the right to construct poles and string wire along the rights-of-way or to bury cable beneath the right-of-way. As the cities were giving the company a valuable property right, the company was required to pay for that right just as it would if it used an easement or other property right of a private landowner.

63. In 1999, in response to the emergence of competition among companies offering local-exchange telephone service, the legislature enacted chapter 283 of the Local Government Code. That chapter was designed to encourage competition in the provision of telecommunications services and to ensure that new entrants were not precluded from gaining

access to the use of municipal rights-of-way due to pre-existing franchise agreements with incumbent carriers. TEX. LOCAL GOV'T CODE, § 283.001(a).

64. Among other things, the statute set up a state system of determining the fees to be paid to a municipality for the use of rights-of-way by new entrants to the market place, but did so by basing the fee on the amount each city collected under its existing franchise fees. TEX. LOCAL GOV'T CODE, §§ 283.053, 283.055. In apparent recognition of the constitutional prohibition on a municipality making a gift or grant to a private corporation, the legislature designed the system to provide the cities with the fees they had previously negotiated or imposed while letting new entrants come into the market on the same basis as existing companies. Essentially, the city received and the new entrants were charged what had previously been established as fair-market value for the use of that city's rights-of-way.

65. This suit challenges two statutes by which the Texas Legislature attempts, in violation of the Texas Constitution, to require cities (1) in the case of SB No. 1152, to excuse favored telecom providers or cable companies from having to pay at all for certain uses of the right-of-way that previously required payment, and (2) in the case of SB No. 1004, to give wireless companies the use of the right-of-way to erect network nodes or small cells at a small fraction of the use's value.

VI. THE CHALLENGED LEGISLATION

A. Senate Bill No. 1152

1. **S.B. 1152, enacted in 2019, is an unconstitutional gift of public property to a favored class of telephone/cable companies.**

66. In 2019, the Legislature enacted S.B. No. 1152, which had the intent and effect of transferring public resources to large, for-profit, corporations. This legislation is an

unconstitutional gift or grant in violation of article XI, § 3, and article III, § 52, of the Texas Constitution.

67. S.B. 1152 relates to wires, cable, or fiber that is strung between poles mounted in the right-of-way or buried beneath the right-of-way.

68. The wires or cables located in the rights-of-way may transmit telephone service, or cable services, or both.

69. To compensate for their use of the right-of-way, cable providers pay a franchise fee of five percent of their gross revenue. The fee is set by state statute and is consistent with federal law. TEX. UTIL.CODE, § 66.005, 47 U.S.C. §§ 541 & 542.

70. Similarly, a certificated telecommunications provider that provides telecommunications services within a city is required to pay a fee for its use of the city right-of-way. TEX. LOC. GOV'T CODE, § 283.051, *et seq.* The amount of the fee is determined by a formula set out in Texas statute and administered by the Public Utility Commission. TEX. LOC. GOV'T CODE, §§ 283.053, 283.055. Although the current fee is not expressed as a percentage of revenue, the fee is based on the franchise fees paid to municipalities by the pre-deregulation incumbent-local-exchange carriers, which had typically been determined as a function of the revenue generated by the activities. The purpose of the state-determined fee was to put competitive-local-exchange carriers entering the market post-deregulation on a nondiscriminatory and competitively neutral footing with the incumbent carriers so that competition would not be unduly impaired. TEX. LOC. GOV'T CODE, § 283.055(e).

71. Here the municipal right-of-way is an income-producing property. The value of the ability to use the right-of-way is a function of the income that the use produces. *E.g., City of Harlingen v. Sharboneau*, 48 S.W.3d 177, 183 (Tex. 2001); Uniform Standards of Professional Appraisal Practice, Appraisal Standards Board, Advisory Opinion 33 (2018-19 ed.).

72. The ostensible rationale behind S.B. No. 1152 is that a company, or more likely two companies that are under common control, should never pay more than one fee even if the company uses the right-of-way for multiple purposes. In other words, if a company uses the right-of-way under two separate grants of authority and produces two separate streams of income from its use of the city property, everything but one income stream is to be ignored when determining the value of the property and the accompanying fee paid for the right to use it. This effectively permits the company to use the city's property to generate income from either telephone service or cable service without any compensation to the city. The value of the right-of-way is a direct function of the income it produces, and by excusing a company from having to pay a fee based on half of the types of income realized from the use of the right-of-way, the statute compels the city to make an unconstitutional gift to these companies.

73. The statute provides that a company that offers both telecommunications and cable services will pay the higher of the two fees for which it otherwise would be liable. The determination of which fee—the cable franchise fee or telecom line-access charge—is higher, though, is made on a statewide, rather than a local, basis. If, on a statewide basis, a company pays more in cable franchise fees than in line-access charges, then the statute requires it to pay the cable franchise fee, and not the telecom line-access charges, in each city in which it offers both cable and telecommunications services without regard to which services are more prevalent in that city. Thus, if in a particular city that company (*i.e.*, the one that paid more cable franchise fees than telecom line-access charges on a statewide basis) was the dominant telecommunications provider but had only a minimal presence in cable, the city's payment for that company's use of its right-of-way would be based on the company's relatively small cable presence. In that scenario, the city would receive only a pittance because the company's mix of revenues on a statewide basis did not conform to the mix in an individual city.

74. This gift of public property is to only one class of companies that use the right-of-way—*i.e.*, those, such as AT&T, for example, that offer both cable and telephone service. These, of course, tend to be the larger, more heavily capitalized providers. The smaller companies who offer only telephone service or only cable service must pay a fee based on 100 percent of their right-of-way usage, while the statute gives the favored companies the gratuity of having to pay for only half of their use of the public’s property. In addition to being a constitutionally prohibited gift of public property, it is diametrically inconsistent with the state’s expressed policy of fostering competition in the provision of telecommunications services. *E.g.*, TEX. LOCAL GOV’T CODE, § 283.001(a).

B. Senate Bill No. 1004

1. The Emergence of Small-Cell and Network-Node Technology

75. Senate Bill 1004, enacted by the 85th Legislature in 2017 and effective beginning September 1, 2017, enacts chapter 284 of the Texas Local Government Code. This new chapter purports to govern the deployment of network nodes in public rights-of-way.

76. A network node is defined in the bill as “equipment at a fixed location that enables wireless communications between user equipment and a communication network.” A network node encompasses multiple pieces of equipment including a radio transceiver, an antenna, a battery-only backup power supply, and coaxial or fiber-optic cable. The term does not include a pole or tower to which the equipment is attached.

77. Network nodes are a component of 5G or small-cell technology, which in turn is part of the cellular network that supports smart phones, tablets, and other mobile devices. The network node is an essential device in the transfer of communication between a smart phone or other wireless device and the wired network.

78. Mobile data traffic, driven by increased sales of smart phones, tablets, and similar devices and by usage demanding greater bandwidth, results in significant growth in the use of mobile data networks and requires increased capacity.

79. Emerging technology will greatly accelerate the demand for increased capacity of wireless networks and for additional network nodes. While small cell technology will make possible greater uses of the internet, currently and in the foreseeable future the predominant use of the network is for streaming video.

80. Small-cell wireless networks using network nodes are a way to increase capacity and capabilities above that provided by the familiar cellular technology provided by larger cell towers, often referred to as macro sites. Rather than being located on tall macro towers, a small cell network node may be located much closer to the ground on a street sign, on a light pole, on a traffic signal pole, on the side of a building, or on a dedicated pole. Because small cells have smaller ranges, there will be many more small cells than the taller macro towers.

81. Small cells complement the existing macro tower system by providing additional capacity and by increasing coverage in those areas where the signal from the macro tower is weak.

2. **Legislative Involvement in Telecommunications Companies' Use of Municipal Right-of-Way to Install and Maintain Network Nodes**

(a) **SB 1004 is designed to transfer municipal property to private companies at a fraction of its fair market value**

82. In 2017, the legislature enacted SB 1004 (chapter 284 of the Texas Local Government Code), which became effective on September 1, 2017.

83. In SB 1004 the legislature seeks to encourage and simplify the use of network nodes and small-cell technology by limiting cities' regulatory powers over the placement and design of network nodes and by below-market fees for the use of the public rights-of-way.

84. The Texas legislation was part of a multi-state push by the wireless industry in conjunction with the American Legislative Exchange Council (ALEC) to achieve a more relaxed regulatory environment and to obtain a public subsidy.

85. In sharp contrast to the approach taken in chapter 283 of the Local Government Code, which was crafted to ensure that the fee for the use of public right-of-way was set at fair market value, SB 1004 (chapter 284) imposes maximum charges that are a small fraction of market value, and thus, gratuitously, conveys public property to private corporations and provide a public subsidy for a private commercial enterprise.

86. SB 1004 (section 284.053) sets an annual maximum fee for the use of a city's right-of-way at \$250 per network node. TEX. LOCAL GOV'T CODE, § 284.053.

87. By contrast, as reflected in the attached affidavit (Exhibit 1), the standard rate for the use of public right-of-way is between \$1,500 and \$2,500 per network node.

88. The fee schedule established by SB 1004 requires cities to permit use of their rights-of-way in return for only 10 to 16.7 percent of the fair market value of the property interest conveyed.

89. This amounts to a gift or grant to the companies maintaining the network of between \$1,250 and \$2,250 per node per year.

90. While significant numbers of small cell nodes are currently being installed, the number of cells is expected to increase by a factor of five or more as carriers convert to 5G technology.

91. At the time the SB 1004 fee structure was adopted, the legislature had before it the Legislative Budget Board fiscal note prepared for the House of Representatives noting that the bill could result in loss of right-of-way and similar fees to municipalities estimated at more than \$800 million annually.

92. Nevertheless, the legislature passed the bill initiating a significant annual wealth transfer from Texas cities to private telecommunications companies of as much as hundreds of millions of dollars each year.

(b) **Earlier legislation is carefully crafted so that municipalities retain legislative powers relating to right-of-way management**

93. Each Texas city is vested with “exclusive control over and under the public highways, streets, and alleys of the municipality.” TEX. LOCAL GOV’T CODE, § 311.001(a). This exclusive authority of right-of-way management is consistent with, and an extension of, municipal land-use and zoning authority, which is exercised through a statutory framework that provides for public participation, due process, and oversight. TEX. LOCAL GOV’T CODE, Chapter 211.

94. Chapter 283 of the Local Government Code, which was designed to accommodate and integrate new entrants to the telecommunications system, expressly recognizes that the management of rights-of-way is a delegated legislative function that typically is vested in the municipalities of the state:

It also declares that it is the policy of this state that municipalities:

. . . retain the authority to manage a public right-of-way within the municipality to ensure the health, safety, and welfare of the public . . .

TEX. LOCAL GOV’T CODE § 283.001 (b).

95. Consistent with this fundamental governmental policy, chapter 283 expressly provides that cities retain such powers in their consideration of applications for use of the right-of-way:

A municipality may exercise those police power-based regulations in the management of a public right-of-way that apply to all persons within the municipality. A municipality may exercise police power-based regulations in the management of the activities of certificated telecommunications providers within a public right-of-way only to the extent that they are reasonably necessary to protect the health, safety, and welfare of the public.

TEX. LOCAL GOV'T CODE § 283.056 (c). And,

In the exercise of its lawful regulatory authority, a municipality shall promptly process each valid and administratively complete application of a certificated telecommunications provider for any permit, license, or consent to excavate, set poles, locate lines, construct facilities, make repairs, affect traffic flow, *obtain zoning or subdivision regulation approvals, or for other similar approvals*, and shall make every reasonable effort to not delay or unduly burden that provider in the timely conduct of its business.

TEX. LOCAL GOV'T CODE. § 283.056(d) (emphasis added).

96. Chapter 283 treats the legislative function of right-of-way management and related permitting processes as necessarily entailing three interrelated aspects: (1) Safety of the structure to be placed within municipal right-of-way with respect to the construction required to install the structure and its operational safety, TEX. LOCAL GOV'T CODE. § 283.056; (2) Receipt of compensation for the use of right-of-way, TEX. LOCAL GOV'T CODE. § 283.051; and (3) Determining the suitability of sites for property in or along right-of-way in terms of the health, safety, and welfare of the public through proper land-use controls, TEX. LOCAL GOV'T CODE. § 283.056.

(c) **SB 1004, in contrast to past legislative practice, is drafted to transfer municipal legislative authority over right-of-way management to private companies**

97. As with chapter 283 of the Texas Local Government Code, SB 1004 expressly recognizes that the management of right-of-way is a delegated legislative function concerning the health, safety, and welfare of the public that typically is vested in the municipalities of the state. TEX. LOCAL GOV'T CODE §§ 284.001(a)(2); (c)(2).

98. Like chapter 283, SB 1004 recognizes that the legislative function of right-of-way management and related permitting processes necessarily entails three interrelated aspects: (1) Safety of the structure to be placed within municipal right-of-way with respect to the construction

required to install the structure and its operational safety, TEX. LOCAL GOV'T CODE §§ 284.102, .108, .110, and 153; (2) Receipt of compensation for the use of right-of-way TEX. LOCAL GOV'T CODE §§ 284.053, .054¹; and (3) Control over zoning and land use, TEX. LOCAL GOV'T CODE §§ 284.001(a)(2), .104, and .105.

99. In contrast with Chapter 283, however, which vests municipalities with authority to apply land-use controls as part of the permitting process, SB 1004 vests decision-making authority with respect to land-use considerations with the wireless provider. In terms of promoting and preserving the health, safety and welfare of the public, a selection of a site for the placement of telecommunications equipment cannot be made properly without due consideration of the land-use aspects implicated in such site selection. SB 1004 delineates certain land-use-related limitations on site selection, *i.e.*, relative proximity of parks and residential areas, and location within historic or design districts. TEX. LOCAL GOV'T CODE §§ 284.104, .105. Beyond that, however, SB 1004 vests ultimate responsibility for the adequate consideration of the public health, safety, and welfare implications of site selection with the telecommunications providers rather than with the municipalities. The providers select their desired sites, and the application review for those sites cannot include municipal-zoning review or land-use approvals. TEX. LOCAL GOV'T CODE §§ 284.101(a).

100. In a word, SB 1004 expressly takes the public right and obligation to manage right-of-way with adequate consideration of zoning and land-use needs from the municipality, and vests such decision making with telecommunications providers, whose applications must be approved without analysis of land-use matters from a public perspective. TEX. LOCAL GOV'T CODE §§ 284.101(a).

¹ As discussed elsewhere, *see e.g.* ¶¶ 70, 85-89, *supra*, the chapter 283 system of market-based compensation is replaced in chapter 284 with a system of merely token compensation.

101. Accordingly, SB 1004 represents an overly broad delegation of legislative authority to private entities, in violation of article II, section 1, and article III, section 1, of the Texas Constitution.

VII. CONSTITUTIONAL FRAMEWORK

A. Prohibition against gifts to private corporations (relating to SB 1152 and SB 1004)

102. In the period following the Civil War many Texas cities gave financial aid to railroads in order to entice the railroad to come through their community and thus to provide those cities with a commercial advantage. The railroads were not always constructed, and, even if they were, the anticipated advantages to the cities did not always materialize. In response to this situation, and to prevent its reoccurrence, the framers of the 1876 Constitution included article XI, section 3, which provides, in part:

No county, city, or other municipal corporation shall hereafter . . . make any appropriation or donation to [any private corporation or association] . . .

TEX. CONST., art. XI, § 3.

103. Additionally, the framers of the 1876 Constitution adopted article III, section 52, which prohibited the legislature from approving legislation such as SB 1004 or SB 1152 that would authorize or direct a city to make a gift or grant to a corporation. That section provides in part:

(a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, . . .

TEX. CONST., art. III, § 52.

104. SB 1004 not only authorizes cities to make a prohibited grant of a thing of value to a private corporation, it requires it. Specifically, the legislation requires cities to permit network providers to use public rights-of-way to locate network nodes, TEX. LOC. GOV'T CODE, § 284.151

(except as permitted by chapter 284, a city may not prohibit, regulate, or charge for the installation or location of network nodes in a public right-of-way and may not institute a moratorium on permitting such nodes), and it limits payment to the city for the use of those rights-of-way to an annual rate of not more than \$250 per node when the negotiated market rate ranges from \$1,500 to \$2,500. In other words, SB 1004 requires Texas cities to permit private corporations to use the public right-of-way for a steeply discounted price between one-tenth and one-sixth of its actual value. This is a grant of public money or thing of value prohibited by article III, section 52. Similarly, it is a prohibited donation under article XI, section 3. This amounts to a massive, multi-million-dollar gift to private corporations from the cities of Texas. With the advent of 5G technology and the increased demand for more small cells, the size of the gift may amount to hundreds of millions of dollars. And the gift continues year after year.

105. Similarly, SB 1152 requires cities to give use of public property to a favored class of for-profit companies without receiving compensation for one category of use. The value of the public property transferred to the favored corporations is a direct function of the revenue the use produces, but the statute requires that half of that revenue stream be ignored when determining the compensation for the use of the property. As a result, the favored companies receive a gratuitous grant of public property in direct violation of article XI, § 3, and article III, § 52, of the Texas Constitution.

106. Texas law has developed to recognize that some public benefits to private corporations are constitutionally permitted if they serve a legitimate public purpose and provide a clear public benefit in return. *E.g.*, *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Compensation Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002) (“*TML*”). “A three-part test determines if a statute accomplishes a public purpose consistent with [article III,] section 52(a).” *Id.* at 384. “Specifically, the Legislature must: (1) ensure that the statute’s predominant purpose

is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment, and (3) ensure that the political subdivision receives a return benefit." *Id.*

107. Neither SB 1004 nor SB 1152 meet the three-part test that might avoid the constitutional prohibition of article III, section 52. Failure to satisfy any one of the three parts of the test is fatal.

108. The challenged statutes do not meet the first prong of the three-part test, which requires that the *predominant* purpose is to accomplish a public purpose rather than to benefit private parties. Section 284.001, enacted by SB 1004, does contain findings that network nodes are instrumental to increasing access to advanced technology and information and that expeditious processes and reasonable terms and conditions for access to the public right-of-way further the interest in having a reliable wireless network. TEX. LOC. GOV'T CODE, § 284.001(1) and (5). While carriers undoubtedly would like to have a statutorily imposed rental rate that is far below fair-market value, there is no legislative finding or evidence that carriers have been prevented from creating their wireless networks by the free-market economy. Indeed, carriers have been installing thousands of cells in cities at the upper end of market rates, which makes it difficult to contend that the necessity of paying fair value is a barrier to the development of the networks. Unless the existing system operates as a barrier, the "predominant" effect, and presumably the purpose, of the establishment of a far-below-fair-market-value is to benefit the private corporations, not the public.

109. Further, even if this gift of public resources were required to spur the development of the network, the Constitution prohibits using public funds "simply to obtain for the community and its citizens the general benefit resulting from the operation of the [private] enterprise." *Barrington v. Cokinis*, 338 S.W.2d 133, 140 (Tex. 1960).

110. While the public right-of-way is a convenient location for network nodes, nodes can generally be placed on private property such as the side of a building located immediately adjacent to the right-of-way. Making a gift of the use of the public right-of-way frees network providers from the operation of the free market and deprives the private property owners of the opportunity to rent space to host network nodes. This public subsidy undermines the free market system and deprives the private landowners of the value of their property, which is not consistent with public policy.

111. With SB 1152, there are no legislative findings or pretense that the removal of the long-recognized right to be compensated for a use of the municipal right-of-way is to benefit the public or to do anything other than to increase the providers' profits.

112. The predominant purpose of both SB 1004 and SB 1152 is to benefit private parties, not to convey a public benefit. Thus, the statute does not meet the first prong of the three-part *TML* test.

113. SB 1004 and SB 1152 also do not meet the second prong of the three-part test, which requires that the local government retain control to ensure that the public purpose is accomplished. While SB 1004 directs maximum rates for use of the public right-of-way and specific deadlines for permitting decisions, all of which benefits the network carriers, there is nothing in the statute to mandate continued oversight to ensure that any public purpose is accomplished. The statute provides great detail on the cities' obligations to the wireless providers, but there is nothing in the Act that provides for the cities' or the state's continued oversight of the carriers' actions to ensure that they act for the public's benefit. Even if we are to assume that development of the wireless system is the predominant purpose and represents the benefit to the public, there is nothing in the Act to establish measurable benchmarks for the development of the system, nothing to ensure that underserved areas rather than simply the most profitable areas are

served, nothing to ensure that the publicly subsidized nodes are available for the public rather than, in some cases, perhaps being reserved for private users, or anything else to ensure that public purpose is accomplished.

114. Similarly, there are no controls in connection with SB 1152. That statute is simply a direct grant to favored companies. There is not—nor in a deregulated environment could there be—even any requirement that the excused rental fees ultimately inure to the benefit of the ratepayer rather than going to the companies’ bottom lines. Further, the compensation that determines which fee a company will pay and which will be excused is delegated to the companies themselves with no meaningful way to verify their conclusions. In the absence of statutorily provided oversight, the statutes do not satisfy the Supreme Court’s test.

115. The third part of the test is to ensure that the political subdivision receives a return benefit. This is often phrased as ensuring that there is adequate consideration. Here, under SB 1004, the cities are limited to roughly ten to sixteen percent of market value with no additional benefit to compensate for the lost revenue. Under SB 1152 the cities receive no benefit at all for the use of the property for the purpose for which fees are excused by the statute.

116. SB 1004 finds that the rates imposed by the statute are “fair and reasonable” and in compliance with the federal law (47 U.S.C. § 253) that prohibits rates that have the effect of prohibiting the ability of any entity to provide telecommunications service. The SB 1004 rates, though, are not only well below the rates that would be charged in a free market environment, they are also a fraction of the rates the state and counties are free to charge for the same services. The legislature was careful to require cities to provide a major subsidy to these private enterprises, while, at the same time, leaving the state and counties free to charge market rates for the use of its rights-of-way. Presumably, if it is fair and reasonable for the state to charge market rates, it is

difficult to understand how limiting cities to a small fraction of those rates can also meet the standard of fairness and reasonableness.

117. SB 1004 and SB 1152, so long as they are not enjoined and not declared to be unconstitutional, direct city officials, such as Mayor Darling, to give away city resources and, by doing so, to violate article XI, section 3, of the Texas Constitution.

118. Similarly, until SB 1004 and SB 1152 are enjoined and declared to be unconstitutional, city taxpayers, such as Jim Darling, in his individual capacity, are injured by the city's gift of public resources to private corporations. Even if the statute is subsequently declared to be invalid, the cities, their officials, and their taxpayers are irreparably injured. The opportunity to negotiate a market rate prior to the installation of any nodes is lost. Further, even if it is possible to recover the difference between the ultimately determined rental rate and the \$250 per node authorized by SB 1004, the recovery will likely be in a subsequent fiscal year so that the opportunity to have an immediate favorable impact on the city's finances and on its taxpayers in current fiscal years is lost. Similar injury results from the operation of SB 1152. The injury from SB 1152 is particularly onerous since it removes a substantial, existing source of revenue so that existing programs will have to be cut. Even if the revenue could be recouped in future years, the loss of the current revenue and the foregone opportunities in the current year cannot be remedied in the future.

119. SB 1004 and SB 1152, by mandating that cities make a gratuitous grant of its property to a private business enterprise, violate the Texas Constitution, and, under Texas law, a violation of constitutionally guaranteed rights inflicts irreparable injury warranting injunctive as well as declaratory relief.

B. Prohibition against certain delegations of legislative power to private corporations (relating to SB 1004)

120. In establishing the government of the state, the people delegated the powers of the government to the legislative, executive, and judicial departments:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted

Tex. Const. art. II, § 1.

121. The Legislature is authorized to delegate legislative powers to local governments, administrative agencies, and private entities. As Texas courts have recognized, delegations of legislative power can be both necessary and proper in certain circumstances, such as, for example, with the delegation of power to private entities to promulgate certain industrial and professional standards.

122. By the same token, Texas courts have also recognized that delegations to private entities raise more troubling issues than do delegations to public bodies and that they are therefore subject to more stringent requirements and less judicial deference than public delegations. As the Supreme Court has stated:

[P]rivate delegations clearly raise even more troubling constitutional issues than their public counterparts. On a practical basis, the private delegate may have a personal or pecuniary interest which is inconsistent with or repugnant to the public interest to be served. More fundamentally, the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government. Thus, we believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.

Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997).

123. Texas courts have developed a balancing test containing eight factors to determine whether a particular delegation of legislative power to a private delegate is constitutional. These factors are stated as follows:

1. Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?
2. Are the persons affected by the private delegate's actions adequately represented in the decision making process?
3. Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?
4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?
5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
6. Is the delegation narrow in duration, extent, and subject matter?
7. Does the private delegate possess special qualifications or training for the task delegated to it?
8. Has the Legislature provided sufficient standards to guide the private delegate in its work?

Texas Boll Weevil Eradication Found. 952 S.W.2d at 472.

124. SB 1004 vests the legislative power of zoning and land use as it applies to right-of-way management with private parties. When considered through the lens of the eight-part balancing test, it is abundantly clear that the delegation to private entities of the legislative authority to manage the right-of-way by making land-use decisions that typically require

application of the processes set out in Local Government Code chapter 211, violates article II, section 1, and article III, section 1, of the Texas Constitution.

125. Specifically, with respect to the zoning and land-use aspects of right-of-way management:

(a) The actions of the telecommunications providers, as private delegates of legislative authority, are not subject to meaningful review by a state agency or other branch of government;

(b) The members of the public that will be most affected by the private delegates' actions are not adequately represented in the decision-making process;

(c) The private delegate is applying the law to its individual, pecuniary interest rather than making rules of general application;

(d) The private delegates have a pecuniary or other personal interest that may conflict with their public functions;

(e) The delegation is not narrow in duration, extent, or subject matter;

(f) The private delegates do not possess special qualifications or training in municipal land planning or right-of-way management; and

(g) The legislature has not provided sufficient standards to guide the private delegate in its work.

126. SB 1004, so long as it is not enjoined and not declared to be unconstitutional directs city officials, such as Mayor Darling, to relinquish properly delegated municipal authority to manage the right-of-way for the health, safety, and welfare of the public to private delegates whose pecuniary interests most likely will conflict with the public's interests, and who do not have the expertise to manage public right-of-way for the benefit of the public. As such, SB 1004 directs city officials, such as Mayor Darling, to violate their obligations to promote and preserve the safety of

the public under their respective city charters, chapter 211 of the Texas Local Government Code, and chapter 311 of the Texas Transportation Code, and, by doing so, affirmatively participate in the violation of article II, section 1, and article III, section 1 of the Texas Constitution.

127. SB 1004 by mandating that municipalities cede their properly delegated authorities that are necessary for right-of-way management in the interest of public health, safety, and welfare of the public violates the Texas Constitution, and under Texas law, is a violation of constitutionally guaranteed rights that inflicts irreparable injury warranting injunctive relief.

VIII. CAUSES OF ACTION

128. Paragraphs 1-127 are incorporated by reference as though fully restated in support of each of the following causes of action.

A. Declaratory Judgment – SB 1004 and SB 1152 Violate the Texas Constitution

129. The Uniform Declaratory Judgments Act (“UDJA”) is remedial, and intended to settle and afford relief from uncertainty and insecurity with respect to rights under a statute, and must be liberally construed to achieve that purpose.

130. The UDJA waives the sovereign immunity of the state and its officials in actions that challenge the constitutionality of a statute and that seek only equitable relief.

131. Pursuant to the UDJA, Plaintiffs request a declaratory judgment of the Court, as follows:

- a. That SB 1004, in its requirement set out in section 284.053 of the Texas Local Government Code that cities permit private corporations to use the public rights-of-way at significantly below market value rates, impermissibly authorizes and requires cities to make a gift or grant in violation of article III, section 52(a), of the Texas Constitution;
- b. That SB 1152 in its requirement in section 283.051(d) of the Texas Local Government Code and section 66.005(d) of the Texas Utilities Code that certain corporations be excused from paying compensation for specified use of public property authorizes and requests cities to make a gift or grant in

violation of article III, § 52(a) of the Texas Constitution;

- c. Cities complying with the statutory direction of SB 1004 and SB 1152 will violate article XI, section 3, of the Texas Constitution as they will be making a prohibited donation to a private corporation;
- d. Section 284.053 of the Texas Local Government Code is unconstitutional and unenforceable;
- e. Section 283.051(d) of the Texas Local Government Code is unconstitutional and unenforceable;
- f. Section 66.005(d) of the Texas Utilities Code is unconstitutional and unenforceable;
- g. SB 1004, in delegating legislative powers of managing right-of-way through proper zoning and land-use controls to private corporations such that the corporations are entitled to make land-use decisions without meaningful guidance, public process, or oversight is an impermissible delegation of legislative power in violation of article II, section 1, and article III, section 1, of the Texas Constitution;
- h. Cities complying with the statutory direction of SB 1004 will violate article II, section 1, and article III, section 1, of the Texas Constitution as they will be affirmatively participating in an unconstitutional delegation of municipal legislative authority.
- i. Sections 284.101(a) and 284.154(c) are unconstitutional and unenforceable.

B. Temporary Injunction

132. For the reasons set forth in paragraphs 1-127, SB 1152 violates the state constitution.

133. Plaintiffs are therefore entitled to a temporary injunction enjoining enforcement of section 66.005(d) of the Texas Utilities Code. Section 66.005(d) is invalid as being enacted in contravention to the express denial of authority to the legislature to permit or require cities to make gifts or grants to private corporations. Accordingly, the statute is void. The state, by enacting SB 1152 and subjecting plaintiffs to its requirements, is forcing plaintiffs to violate the Texas Constitution. The forced transfer of property pursuant to an unconstitutional statute is subject to

being enjoined without regard to whether there is a legal remedy. Being subjected to, and forced to administer, an unconstitutional statute is necessarily and of itself an irreparable injury.

134. Further, there is irreparable injury to the cities and their citizens and taxpayers, which face the grossly inadequately compensated use of their property prior to having an opportunity for a merits decision on the constitutionality of the statute. The resulting reduction in municipal revenues will necessarily require affected cities to increase property tax rates, reduce city services, or both, further damaging municipalities and taxpayers alike. These harms cannot be redressed through an award of money damages or any other adequate remedy at law.

135. Therefore, Plaintiffs respectfully request that, after notice and hearing, this Court issue a temporary injunction against Defendants enjoining the operation and enforcement of SB 1152, as codified in section 66.005(d) of the Texas Utilities Code.

C. Permanent Injunction

136. Plaintiffs are further entitled to a permanent injunction forever enjoining the operation and enforcement of sections 283.051(d) and 284.053 of the Texas Local Government Code and section 66.005(d) of the Texas Utilities Code. Section 284.053, 283.051(d), and section 66.005(d) are invalid as being enacted in contravention to the express denial of authority to the legislature to permit or require cities to make gifts or grants to private corporations. Accordingly, these statutes are void. The state, by enacting SB 1004 and SB 1152 and subjecting plaintiffs to its requirements, is directing plaintiffs to violate the Texas Constitution. The forced transfer of property pursuant to an unconstitutional statute is subject to being enjoined without regard to whether there is a legal remedy. Being subjected to, and forced to administer, an unconstitutional statute is necessarily and of itself an irreparable injury. Further, there is irreparable injury to the cities and their citizens, which potentially face the grossly inadequately compensated use of their property prior to having an opportunity for a merits decision on the constitutionality of the statute.

Plaintiffs are therefore entitled to a permanent injunction against enforcement of the unconstitutional statute.

137. Plaintiffs are entitled to a permanent injunction enjoining enforcement of sections 284.101(a) and 284.154(c) of the Texas Local Government. Sections 284.101(a) and 284.154(c) are invalid as being enacted in contravention to the denial of authority to the legislature to make delegations of legislative authority to private actors such that the private delegates are neither constrained before they act by meaningful standards nor made accountable after they act by administrative, judicial, or popular review. Accordingly, the statute is void. The state, by enacting SB 1004 and subjecting plaintiffs to its requirements, is directing plaintiffs to violate the Texas Constitution. The improper delegation of legislative authority pursuant to an unconstitutional statute is subject to being enjoined without regard to whether there is a legal remedy. Being subjected to, and forced to administer, an unconstitutional statute is necessarily and of itself an irreparable injury. Further, there is irreparable injury to the cities and their citizens, which potentially face the substantial and detrimental consequences of the implementation of land-use decisions in public right-of-way which are made by actors who have pecuniary interests that often most likely will conflict with the promotion of the health, safety, and welfare of the public, and which will not be made by persons or entities with specialized knowledge of public right-of-way management, and which will not be subject to meaningful review. Plaintiffs are therefore entitled to a temporary and ultimately to a permanent injunction against enforcement of the unconstitutional statute.

IX. CONDITIONS PRECEDENT

138. All conditions precedent have been performed or have occurred.

X. ATTORNEY'S FEES

139. As a result of the actions complained of herein, Plaintiffs have had to engage qualified counsel to prosecute this action and has incurred, and will continue to incur, reasonable and necessary attorney's fees. Plaintiffs are therefore entitled to recover these fees pursuant to Chapters 37, of the Texas Civil Practice and Remedies Code.

XI. REQUEST FOR DISCLOSURES

140. Pursuant to Texas Rule of Civil Procedure 194.2, Plaintiffs hereby request that Defendants make the disclosures identified in Tex. R. Civ. P. 194.2(a-i) and (l) within fifty (50) days of the service of this Petition.

PRAYER

FOR THESE REASONS, Plaintiffs request that Defendants be cited to appear and answer and, on final trial that Plaintiffs have judgment against Defendants for:

1. The declaratory relief requested herein;
2. A temporary and permanent injunction;
3. Attorney's fees;
4. Litigation costs;
5. Such other and further relief, at law and in equity, to which the Plaintiffs may show themselves entitled.

Respectfully submitted,

By: /s/ C. Robert Heath
C. ROBERT HEATH
Texas Bar No. 09347500
bheath@bickerstaff.com

GUNNAR P. SEAQUIST
Texas Bar No. 24043358
gseaquist@bickerstaff.com

GREGORY D. MILLER
Texas Bar No. 24046443
gmiller@bickerstaff.com

BICKERSTAFF HEATH
DELGADO ACOSTA LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
Telephone: (512) 472-8021
Facsimile: (512) 320-5638

McALLEN CITY
ATTORNEY'S OFFICE
P.O. Box 220
1300 Houston
McAllen, Texas 78505-0220
Telephone: (956) 681-1090
Facsimile: (956) 681-1099

KEVIN D. PAGAN
City Attorney
Texas Bar No. 15406460
kpagan@mcallen.net

AUSTIN WADE STEVENSON
Assistant City Attorney
Texas Bar No. 24085961
astevenson@mcallen.net

ISAAC J TAWIL
Assistant City Attorney
Texas Bar No. 24013605
itawil@mcallen.net

LAW OFFICES OF SNAPPER L. CARR
816 Congress Avenue, Suite 370
Austin, Texas 78701
Telephone: (512) 637-6020
Facsimile: (512) 637-6021

SNAPPER L. CARR
Texas Bar No. 24035433
Snapper@focusedadvocacy.com

Attorneys for Plaintiffs

DARLING LAW OFFICE
P.O. Box 5489
McAllen, Texas 78502-5489
Telephone: (956) 681-1003
Facsimile: (956) 681-1010

JAMES E. "JIM" DARLING
Texas Bar No. 05386000
jdarling@mcallen.net

*Pro Se for Plaintiff Jim Darling
in His Individual Capacity*

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served via electronic filing service provider and via email to all parties of record on this the 30th day of August, 2019.

DREW L. HARRIS
JEFFREY E. FARRELL
Assistant Attorneys General
General Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4225
Facsimile: (512) 320-0667
drew.harris@oag.texas.gov
jeffrey.farrell@oag.texas.gov

ATTORNEYS FOR DEFENDANT

/s/ C. Robert Heath
C. ROBERT HEATH

EXHIBIT 1

AFFIDAVIT

State of New York)

County of ONADAGA)

The undersigned affiant, Ken Schmidt, being first duly sworn, hereby deposes and says:

1. My name is Ken Schmidt. I reside in the Syracuse, New York, area. I am over the age of eighteen and capable of making this affidavit. The statements in this affidavit are true and correct and within my personal knowledge. To the extent they reflect expert opinion, they are based on facts or data that I have been made aware of, reviewed, or personally observed and reflect facts and data that would reasonably be relied on by experts in the field.
2. Attached as Exhibit A to this affidavit is a true and correct copy of my professional resume that reflects my educational and professional background. To briefly summarize material in the resume, I have worked in the wireless industry for twenty years. From 1997- 2004, I worked at a small tower company, and then provided site acquisition services to wireless companies. In 2004, I started Steel in the Air, Inc. which provides wireless-infrastructure-lease-related services to landowners and small-tower owners across the United States. I am the president and owner of that company. Since 2004, we have advised over 3,500 landowners, including cities, corporations, and individuals, regarding valuation questions related to wireless-infrastructure leases. We have collected lease-rate data on approximately 10,000 wireless leases which include all types of leases in every state in the United States. Steel in the Air and I have been recognized as experts in the field of lease valuation by our peers, in national and local publications, and by courts of law. I am also a Partner in SteelTree Partners, LLC and have provided valuation services and sell-side

advisory service to many clients regarding over \$1.5 billion dollars of communication infrastructure assets.

3. Nearly 20 years ago, I started collecting publicly and privately available tower location and lease data. When I formed Steel in the Air, I believed that strong data was paramount to our being able to advise landowners and tower owners effectively. Over that timeframe, we have collected lease data through news stories, public records requests, industry sources, and client-provided information. We maintain one of the most comprehensive wireless infrastructure databases in the United States which is not owned by a wireless company or tower company.
4. Specifically related to small-cell and Distributed-Antenna-System (DAS) leases, my company has conducted hundreds of hours of research regarding small cell and DAS-node lease agreements including making public records requests to various public entities over the last three years.
5. Earlier this year, I testified as an expert before the Florida Legislature on behalf of the Florida League of Cities and the Florida Association of Counties regarding similar small-cell legislation in Florida. In part through the Florida engagement I became aware of the effort by the industry, led by the Wireless Infrastructure Association in conjunction with the American Legislative Exchange Council (ALEC) to enact legislation in multiple states to provide relatively consistent procedures and fee structures for obtaining the use of public rights-of-way and to require local governments to permit use of their rights-of-way at far-below-market rates.
6. In preparation for making this affidavit, I have reviewed SB 1004, which enacted chapter 284 of the Texas Local Government Code.

7. Section 284.053 of the Texas Local Government Code sets a maximum annual rental rate of \$250 per network node located in a city's right-of-way. The term "network node" is defined so that it includes both small cells and DAS but does not include macrocells or cell towers.
8. A macrocell is what most people think of when considering cellular antennas and cell service. Multiple macrocells may be placed on a single structure such as a cell tower. Cell towers are typically 50' or taller towers containing multiple antennas that have been used to provide cell phone service for more than two decades. Small cells, conversely, as their name suggests, are much smaller in size and coverage area than a macrocell or a cell macro tower, will become much more numerous, and can often be found on poles used for street lights, traffic lights, street signs, and poles of similar height. A small cell typically is utilized exclusively by one wireless company, while a distributed-antenna system or DAS can receive and transmit signals from multiple wireless service providers. As noted above, both small cells and DAS are included in the statute's definition of network node.
9. To determine a fair market value for the use of municipal right-of-way by a wireless provider to locate a small-cell or DAS network node, I looked at data from 50 cities in 25 states. The pole attachment fees went from \$200 to as high as \$13,200 per year. In Texas, the rates ranged from \$1,000 to \$2,400 per year.
10. I tried to make an apples-to-apples comparison by using rates for attachment to an existing pole. For example, in Houston, the Master License Agreement for Wireless Facilities and Poles in the Right-of-Way provides a 2016 annual per pole fee of \$2,700 if the licensee will be placing its own pole in the right-of-way and \$2,000 if it is attaching to an existing utility pole. For Houston, I used the lower \$2,000 fee for attaching to an existing pole.

Similarly, in determining average fees, I looked solely at the fees on a city-by-city basis rather than weighting the fees by the number of cells in each city. Larger cities tend to be on the higher end of the annual rental rates and generally have the highest number of node locations. If I had weighted the average by the number of locations, the average would have been higher.

11. I determined that the average annual per pole rate in the 50 cities in our small cell/DAS data base is \$2,388 per pole per year.
12. The average rate for the six cities in Texas in the data base is \$1,733 per pole per year.
13. Looking at the complete sample and discarding the extremes on both the high and low end, it is my opinion that fair market value for attaching a network node to a pole in a municipal right-of-way will fall within the range of \$1,500 to \$2,500.
14. The \$250/year rate for pole attachments is substantially below fair market value. It is 10.4% of the average rate that was negotiated at arm's length between U.S. cities and counties and wireless service providers in our data, and 14% of the average of Texas public cities.
15. If one considers the \$1,500-\$2,500 range for fair market value, the \$250 rate represents one-tenth to one-sixth of fair market value or 10% to 16.7% of fair market value.
16. Because of the statute's requirement that Texas cities make city-owned poles in their rights-of-way available to the network providers at a rate that is substantially below fair market value, there will be an obvious negative impact on municipal finances. It will also have an impact on other entities.
17. The reduced rental rate for network nodes on poles in municipal rights-of-way would have a negative effect on the ability of private property owners to rent space for small cells and

DAS. These nodes can be and would likely be located on building roofs, the sides of buildings and similar outdoor locations. In my experience, private small cell leases between property owners and wireless companies traditionally range from \$4,200 per year to \$8,400 per year. By establishing such a low and far-below market rate for small cell leases in the public right-of-way, Texas will largely eliminate the use of private property for small cells. In my experience, very few, if any, private property owners would be willing to lease their property to wireless service providers for rates anywhere near \$250/year. Thus, by subsidizing the wireless service providers on public right-of-way, private landowners as a whole in Texas will see significantly less interest for small cells on their land or buildings and as a result, will realize measurably less income.

18. An effect of the requirement that Texas municipalities permit the use of poles within their rights-of-way at extremely low rental rates is likely to be that the residents of Texas cities will be subsidizing the wireless rates paid by consumers in other states that do not have artificial barriers to what can be charged wireless providers. Specifically, the large wireless companies—*e.g.*, AT&T, Sprint, T-Mobile, and Verizon—do not charge geographically based rates. Rates are consistent throughout the United States regardless of what may be higher underlying costs of operating a network in other areas. By setting low rates in Texas that are as much as five or more times lower than what municipalities in other states without similar legislation charge, Texas consumers are fundamentally subsidizing service for customers in other states. Alternatively, Texas cities are subsidizing wireless service provider profits in an already very profitable industry.

19. While the ability to use poles within the public right-of-way at a statutorily set rate that is far below fair market value undoubtedly benefits the wireless service providers, it is

unlikely that the absence of a rate cap on the use of the right-of-way would materially prevent or slow down the expansion of the wireless network. Wireless providers are expanding the small cell network not just because they hope to offer advanced services, but to reduce their operating costs and to increase capacity for more profitable services like consumer video. Additionally, the cost of the use of the right-of-way is minuscule when considered in the context of the revenue currently generated by the network. The wireless industry in 2016 generated \$188 billion in service revenue according to industry trade organization CTIA's 2016 Wireless Industry Survey. Paying fair market value for small cell infrastructure rights would not create a barrier to entry. Assuming \$2,000 per year per pole and 100,000 poles in the State of Texas, the "burden" on the wireless industry would be \$200 million per year, or one-tenth of one percent of the wireless industry's combined service revenue. This assumes that the wireless industry would not be capable of generating additional service revenue from deployment of this infrastructure, which is clearly not the case as demonstrated by numerous comments to the contrary during nearly every wireless company quarterly earnings call. To the contrary, there is every reason to believe that the wireless providers would still generate positive net revenue by paying the level of right-of-way rental rates they were paying before SB 1004. Wireless service providers have deployed over 2,000 small cells in New York City despite New York having rates that are above average at \$3,000 per pole. Even at \$2,000 per pole, the City of Houston still received 700 plus applications for small cells in 2016. There is no reason to believe that paying market rates for the use of public property of Texas cities will delay or hinder the development of the wireless network.

20. SB 1004 does not provide for cities or the state to have continuing control over the use of the subsidized nodes placed in the municipal right-of-way to ensure that the public is being served as such service is contemplated in the lengthy preamble of the legislation. For example, there is nothing in the Act to preclude dedicating some nodes to purely private use by individual customers rather than being available to the public. Similarly, there is nothing to give cities the ability to see that the subsidies to the network are used to bring “reliable wireless networks and services” to areas of greatest public need such as traditionally underserved areas. There is no assurance that the public will be provided cost effective access to “next-generation services” or that the wireless service providers won’t deploy small cells solely to maintain more favorable cost structures for existing generation services. There is no methodology for either the state or cities to ensure that the wireless service providers will deploy infrastructure that will “help ensure that this state remains competitive in the global economy.” Furthermore, there is no ability to confirm over time that the nodes were deployed in a method that “protect and safeguards the health, safety, and welfare of the public”. As written, SB 1004 has almost no checks and balances necessary to assure that wireless service providers don’t simply install network nodes where it is most economically advantageous to them while ignoring the areas where it would be most beneficial to serve the public or that would further Texas’ stated policy objectives in passing this legislation.

Signed this the 22 day of AUGUST, 2017.


KEN SCHMIDT

Sworn to before me this 22 day of August, 2017.



A handwritten signature in blue ink, appearing to be "MKL", written over a horizontal line.

Notary Public

My Commission expires:

EXHIBIT A

Ken Schmidt

16001 Waterleaf Lane, Ft. Myers, FL 33908 Phone: (813) 335-4766

Email: ken@steelintheair.com

PROFESSIONAL EXPERIENCE:

Steel in the Air, Inc.

Fort Myers, FL

01/2004 - Current

President/Owner

- Started Cell Tower Consulting Firm specialized in due diligence, cell tower tenant and ground lease negotiations
- Provided fair market value analysis for cell site leases for over 2,700 clients nationwide in the course of 10 years
- Created online Competitive Analysis GIS mapping service for clients to use in evaluation of potential tower sites and acquisition of cell towers and or ground leases
- Established nationwide database of 250,000 cell site locations and 8,500 cell site leases
- Enlisted to provide due diligence and competitive analysis services by multiple tower companies including projections of potential lease up and document review
- Provide sale side advisory services as a partner in SteelTree Partners for the sale of over \$800,000,000 in tower assets over 10 years
- Retained regularly by Investment Analysts to review and analyze the public tower companies and the current state of the market
- Formulated process for initial evaluation of any tower site in the US to determine its uniqueness/value as a wireless communication facility

Cell Tower Attorney

New York, NY and Fort Myers, FL

01/2007 - Current

Partner

- Started Cell Tower Law Firm specialized in cell tower lease related legal issues.
- Provided legal guidance on cell site lease related issues for over 500 clients nationwide in the course of 6 years

Horizon Site Services, Inc.

Tampa, FL

01/2000 to 01/2004

General Manager (01/2001)

- Responsible for coordinating of due diligence, database accuracy, and general business development for due diligence, site acquisition, and zoning projects
- Developed proprietary GIS (Geographical Information Systems) database of communications towers and established a clientele of tower companies and wireless carriers for custom mapping applications and lease up analysis
- Performed Project Management of site acquisition and zoning for 300 site build for Nextel in Atlanta, Georgia
- Established and maintained of positive working relationship with clients & contractors.

Site Acquisition and Zoning Manager (01/2000)

- Performed Project Management of site acquisition and zoning for 100 site build for Voicestream Wireless in St. Louis, Missouri
- Managed field agents to accomplish the required tasks including preliminary site drives, zoning analysis, construction caravans, leasing and final zoning through permit

Ken Schmidt

16001 Waterleaf Lane, Ft. Myers, FL 33908 Phone: (813) 335-4766

Email: ken@steelintheair.com

Imperial Tower Leasing, Inc.

Tampa, FL

06/2000-01/2003

General Manager/Part Owner

- Performed project management for all development activities related to the identification and development of potential communication towers including identifying corridors for suitable for speculative development, RF design, search ring creation, site acquisition and zoning
- Formulated Process for determining lease-up potential of prospective build sites
- Negotiated development deal for communication towers with large private tower company

Broadcast Tower Leasing, Inc.

Tampa, FL

01/1998 to 01/1999

General Manager

- Developed and executed strategic plan for identification and development of community broadcast towers across the US
- Managed engineering, marketing, and all phases of site development for community broadcast facilities
- Established strategic relationships and joint marketing agreements with national vendors and key consultants for development of towers up to 2000' tall
- Created forecast models for all broadcast tower opportunities including lease-up estimates and cost projections
- Managed all external contractors and marketing agents
- Recruited, interviewed, hired and trained personnel.

Acme Towers, Inc.

Tampa, FL

01/1997 to 01/1998

Site Acquisition Manager

- Managed site acquisition and zoning for Central Florida
- Zoned 15 difficult sites in central Florida
- Developed and maintained client relationships.

EDUCATION & CERTIFICATIONS:

University of Florida School of Law

Gainesville, FL

- Juris Doctorate 1996
Concentration in Construction Law and Bankruptcy

Northeast Missouri State University

Kirkville, MO

- Bachelor of Science- Political Science 1992
Minor in Business Law

Ken Schmidt

16001 Waterleaf Lane, Ft. Myers, FL 33908 Phone: (813) 335-4766

Email: ken@steelintheair.com

INDUSTRY HONORS:

- Spoke at the Tower Summit (Industry Conference) twice- "*Broadcast Tower Opportunities*" and "*Cell Tower Due Diligence*"
- Spoke at 2005 Georgia Association of Assessing Officials Annual Conference – "*Cell Tower Valuation and Assessment*"
- Spoke at 2006 Association of University Real Estate Officials- "*State of the Wireless Industry*"
- Spoke at 2007 Arkansas Appraisers Association Annual Conference- "*Cell Tower Valuation and Assessment*"
- Spoke at 2008 Inside Self Storage Association Conference on "*Cell Site Leases for Self Storage: Long-Term, Reliable Income Opportunities*"
- Spoke at 2009 International Association of Assessing Officials Annual Conference on "*Assessing the Value of Cell Towers*"
- Spoke at 2013 US Navy Appraisers' Annual Appraisal Conference on "*Appraisal of Cell Towers*"
- Retained as Expert Witness in Multiple Cases Involving Cell Tower Valuation and Lease Forecasting Litigation
- Regularly Quoted as Cell Tower Expert in Numerous Newspaper Articles including in the *Wall Street Journal*, *New York Times* and in Industry Trade Magazines including *RCR News* and *AGL Magazine*

COMPUTER SKILLS:

- Microsoft Office 2013- Powerpoint, Excel, Access, Word, Outlook, CRM Dynamics
- MapInfo, ArcInfo- Geographical Information Systems (Mapping Programs)
- Google Earth, Bing Mapping
- All Delorme Mapping Products

City Council Staff Report

SUBJECT: Consider appointments to the boards, commissions and committees

Supporting Documents:

Meeting Date: 11/26/2019
Department: City Secretary
Reviewed by: Rita Frick
City Manager Review:

Background/Analysis:

This item provides for consideration of appointments to the boards, commissions and committees.

Funding and Sources and Community Sustainability:

There is no fiscal impact. The appointments are part of the Council's community value of Inclusiveness, providing opportunity for the public to share in guiding the future direction of Hurst.

Recommendation:

There is no staff recommendation.

Future Event Calendar

November 26, 2019

Regular City Council meetings are held on the second and fourth Tuesday of each month. Following are additional meetings, canceled meetings and public event dates.

<u>DATE AND TIME</u>	<u>ACTIVITY</u>
Wednesday, November 27, 2019	City Hall Closes at Noon in observance of Thanksgiving holiday
Thursday, November 28, 2019	City Hall Closed for Thanksgiving holiday
Friday, November 29, 2019	City Hall Closed for Thanksgiving holiday
Tuesday, December 3, 2019 5:00 p.m.	Christmas Tree Lighting and Santa Hurst Conference Center- 1601 Campus Dr.
Saturday, December 14, 2019 5:00 p.m.	John Butler Memorial Senior Banquet Hurst Senior Citizen Center (Ticketed Event)
December 23, 2019	City Hall Closes at Noon in observance of Christmas Holiday
December 24, 2019	City Hall Closed for Christmas holiday
December 25, 2019	City Hall Closed for Christmas holiday
January 1, 2020	City Hall Closed for New Year's Day