

BILL NO. 4470

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE TO AUTHORIZE THE MAYOR TO EXECUTE AN AGREEMENT WITH CUNNINGHAM, VOGEL & ROST, P.C. TO PROVIDE LEGAL SERVICES AND CONSULTATION FOR THE CITY OF WEST PLAINS, MISSOURI.

NOW THEREFORE, be it resolved by the City of West Plains as follows:

Section 1: That the Mayor is hereby authorized to execute the agreement between Cunningham, Vogel & Rost, P.C. for legal services and consultation. (EXHIBIT A).

Section 2: That this Ordinance shall be in full force and effect from and after its day of passage and approval.

PASSED AND APPROVED THIS 21<sup>ST</sup> DAY OF NOVEMBER 2016.

CITY OF WEST PLAINS, MISSOURI

BY: \_\_\_\_\_  
MAYOR JACK PAHLMANN

ATTEST:

\_\_\_\_\_  
CITY CLERK MALLORY HAWKINS

# CUNNINGHAM, VOGEL & ROST, P.C.

*legal counselors to local government*

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October 24, 2016

City of West Plains  
Tom Stehn, City Administrator  
1910 Holliday Lane  
West Plains, MO 65775

Re: Agreement to Provide Legal Services

Dear Tom:

Thank you for the opportunity to provide legal counsel to the City of West Plains, Missouri. This letter will confirm discussions regarding our engagement and will describe the basis for providing these services.

**1. Client; Scope of Representation.** The client in this matter will be the City of West Plains (the "City"). We will provide special legal services and consultation relating to right-of-way and telecommunications law and such other special counsel legal work as may be requested by the City from time to time. Other supplementary terms of our engagement in this matter are set forth below and are attached to this letter as ADDITIONAL TERMS OF ENGAGEMENT.

**2. Fees and Expenses; Billing.** Actual fees for professional services are based upon the amount of time expended in accomplishing the work and the regular hourly billing rates for each attorney or legal assistant devoting time to this matter, which may be changed by the firm from time to time. Our billing rates for attorneys currently range from \$145 to \$190 for associates, \$195 to \$335 for principals, and \$80 to \$135 for legal assistants. Any bond counsel services requested will be charged based on such fee arrangement as is agreed to with the City and approved by separate City action. Consistent with our policy, we will bill the City on a monthly basis for professional fees and expenses incurred on your behalf and bills will be addressed to the City for payment. We will include in our statements separate charges for photocopying, messenger and delivery service, computerized research, travel, long distance telephone, and telecopy expenses. Other fees and expenses (such as accountants, consultants, or other professionals, if required) generally will not be paid by us, but will be billed directly to the City.

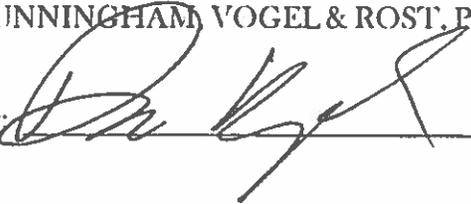
**3. Conflicts.** As you may know, Cunningham, Vogel & Rost, P.C. represents many governmental entities throughout the region, including municipalities and other governmental clients in Missouri, Illinois, and elsewhere, and you agree we may share public information among clients or others to promote municipal client interests. In the event a conflict exists that is deemed not to be subject to any waiver by applicable ethical rules, we shall withdraw as counsel for the City. Although we are not aware of any current representation in which we would be adverse to your interests in this matter, it is possible that some of our present or future clients may have disputes with you during the time we are representing you. We ask, then, that you

agree that our firm may continue to represent or undertake to represent existing or new clients in those matters which are not substantively related to our work for you, even if the interest of such clients in those matters is directly adverse to you. Except as provided herein, we agree that your prospective consent to conflicting representation as set forth above shall not apply where, as a result of our representation of you, we have obtained sensitive, proprietary or other confidential information of a non-public nature that, if known to any such other client of our firm, could be used in any such other matter by such client to your material disadvantage.

If you are in agreement with the above, please sign the enclosed copy of this letter and return an executed copy to me. Once again, we are pleased to have this opportunity to work with you. Please feel free to call me if you have any questions or concerns during the course of our representation.

Very truly yours,

CUNNINGHAM VOGEL & ROST, P.C.

By: 

Attachment

AGREED TO AND ACCEPTED:  
CITY OF WEST PLAINS, MISSOURI

By: \_\_\_\_\_

Date: \_\_\_\_\_, 2016

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## ADDITIONAL TERMS OF ENGAGEMENT

**Our Client.** The person(s) or entity(ies) who are the client in this engagement are limited to those specifically stated in the accompanying engagement letter. In order to avoid misunderstandings and/or inadvertent conflicts of interest in the future, it is understood that, in the absence of written agreement to the contrary, neither this engagement nor our work in connection with this engagement shall be understood or taken to create an attorney-client relationship with other, including related or affiliated (e.g., parent, subsidiary, shareholder, partner, joint venture, etc.), persons or entities.

**Provision of Legal Services, Generally.** This engagement is for the provision of professional legal services and not for the provision of business, personal, accounting, technical, financial, or other advice not constituting legal services. It is agreed that the client is not relying upon counsel in this engagement for advice in areas other than professional legal services, even if such matters should be discussed in connection with the engagement.

**Bond Counsel Services.** If legal services involve bond/note counsel services, including the rendering of an approving opinion of bond or note counsel: except as expressly provided in the foregoing letter, such services do not include assisting in the preparation or review of an official statement, private placement memorandum or other form of offering or disclosure document to be disseminated in connection with the sale of the obligations or any other disclosure document with respect to the obligations, or performing an independent investigation to determine the accuracy, completeness or sufficiency of any such document or rendering advice regarding the official statement or other disclosure document. Other than preparation and delivery of transcripts, such services do not include providing continuing advice to you or to or any other party after closing on the obligations. Customarily, an approving opinion is delivered on the date the obligations are exchanged for their purchase price. An approving opinion will be based on and issued subject to facts and law existing as of its date. In rendering our approving opinion, we will rely upon the certified proceedings and other certifications of public officials and other persons furnished to us without undertaking to verify the same by independent investigation, and will assume continuing compliance by the issuer of the obligations with applicable laws relating to the obligations. During the course of this engagement, we will rely on you or other applicable parties to provide us with complete and timely information on all developments pertaining to any aspect of the obligations and their security. It is hereby acknowledged that the various legal opinions delivered concurrently with the delivery of bonds or notes express the professional judgment of the attorneys rendering the opinions as to the legal issues explicitly addressed therein. By rendering a legal opinion, the opinion giver does not become an insurer or guarantor of that expression of professional judgment, of the transaction opined upon, or of the future performance of parties to such transaction, nor does the rendering of an opinion guarantee the outcome of any legal dispute that may arise out of the transaction.

**Entire Agreement.** The accompanying engagement letter, together with these Additional Terms of Engagement, shall constitute the entire agreement between us concerning the engagement and shall not be modified or supplemented, except in a subsequent writing signed by the parties.

**Periodic Billings for Legal Services.** Unless other arrangements have been made, it is our policy to render periodic statements for legal services on a monthly basis. We normally base these interim statements on hourly rates of lawyers and legal assistants working on the matter. Statements will be due upon presentation and are to be paid by check, EFT or ACH transfer no later than thirty (30) days following the invoice date. Payments by wire transfer shall be subject to an additional charge equal to applicable banking fees incurred. The amounts paid on our interim billings are applied to the total final fee. If any statement amount remains unpaid sixty (60) days after the invoice date, the firm reserves the right to terminate its services, consistent with applicable Rules of Professional Conduct.

**Determining the Fee.** Generally, fees are primarily based on hourly rates for the respective lawyer or legal assistant involved. These rates vary depending on expertise and experience. We adjust these rates from time to time, as lawyers gain experience and expertise, and with economic conditions. When agreed to by engagement letter, fees are sometimes fixed irrespective of the hours involved. Circumstances, including those set out below may require departure from the application of hourly rates. Determination of the total final fee may await conclusion of each specified case or matter so that all relevant factors may be considered.

The firm has clients in multiple states. Our lawyers are subject to rules governing the professional conduct of lawyers in those states. In addition to time spent, these rules list other factors that can be considered in determining

a reasonable fee. These include: reputation, the skill and experience required to complete the services properly; the extent to which the acceptance of the particular matter will preclude other employment; the amount involved; the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; and whether the fee is fixed or contingent. In the absence of agreement with you, those factors will not be used to increase our billings for fees above the charge resulting from application of hourly rates.

**Paralegals/Legal Assistants/Document Clerks.** Certain work will be done by paralegals, sometimes called "legal assistants." Such persons, although not lawyers, have undergone training to perform certain kinds of services at lower rates. In matters involving significant quantities of document management, document clerks may be used to perform tasks at lower rates than those of legal assistants. All such work is supervised by lawyers. The use of such persons allows us to deliver legal services to you at a lower cost.

**Client Disbursements.** Matters may require, from time to time, certain monetary advances to be made on your behalf by the firm. Some "client disbursements" represent out of pocket charges we advance, others represent internal costs (including costs such as fees for service of process, court filing fees, deliveries, copying charges, travel expenses, computer assisted legal research, etc.). It is understood that while acting as your lawyers, we have the authority to use our best judgment in making such expenditures on your behalf. Unless we have made prior arrangements with you, we will send you monthly billings for client disbursements incurred during the preceding month. If the nature of the matter is such that we anticipate substantial advances, we may require a separate deposit for such purpose. Substantial individual items in excess of \$250, such as expert witness fees, the costs of deposition transcripts, printing costs, etc., may be billed directly to you by the vendor of such services. In many matters when lawyers must examine legal authorities, it is more economical to accomplish the task using computer databases of legal precedents (instead of the traditional method of manual retrieval). In such instances, the special charges assessed by the provider of these services are shown on client disbursement billings as "Electronic Research."

**Client Files.** During the course of client representation, this firm retains electronic and paper records relating to the professional legal services we provide so that we are better able to assist you with your legal needs and, in certain situations, to comply with professional guidelines. We employ physical, electronic, and procedural safeguards to preserve client confidentiality and to protect your non-public information. This firm agrees to retain and securely store your client files (which include documents generated by this firm, by the client, and by others) for a period of six (6) months after completion or termination of the representation, absent other written agreement between this firm and you regarding disposition of your files. You may request, in writing, the return of your client files at any time within such six (6) month period. Absent such a written request, your files will be deemed abandoned. In such case, you hereby authorize this firm to destroy your files at any time after expiration of such six-month period. All such client files will be destroyed unless this firm is otherwise required to retain same pursuant to the Code of Professional Responsibility or the Ethical Rules promulgated thereunder.

**E-mail Confidentiality.** This firm often communicates using e-mail. Any attorney or legal assistant e-mail could contain attorney-client, confidential, or other privileged communications. While the firm endeavors to ensure that our e-mail and server are secure, Missouri lawyers are required by the Missouri Bar Disciplinary Counsel to notify prospective recipients of e-mail that (1) e-mail communication is not a secure method of communication, (2) any e-mail that is sent to you or by you may be copied and held by various computers it passes through as it goes from the firm to you or vice versa, and (3) persons not participating in our communication may intercept our communications by improperly accessing your computer or the firm's computer or even some computer unconnected to either you or the firm that the e-mail passes through. Unless you otherwise instruct us in writing, this firm will assume you have consented to receive communications via e-mail. If in the future you change your mind and want future communications to be sent by a different method, please contact the firm in writing immediately.

**Public Information.** The firm represents many governmental entities throughout the region and undertakes pro bono and other actions in order to protect the interests of our municipal clients. By this engagement you agree we may share public information among our municipal clients in furtherance of your interests, for educational purposes, to establish qualifications or experience, or otherwise to allow our lawyers to provide service to local governments or otherwise promote municipal interests, provided that the firm's sharing of public information does not authorize disclosure of confidential information unless deemed impliedly or expressly authorized in furtherance of your specific representation.

# Comparison of Federal and State Wireless Telecom Laws

FEDERAL - 1996 Act/Spectrum Act/FCC Rules	MISSOURI - SB650 (§67.5090-.5103)	Notes:
<b>Application Requirements</b>		
	<b>Must attach property consent</b> §§ 67.5096, 67.5098, 67.5100 RSMo	Apply MO
	Limits on Application Fees: 1. Must be charged on similar commercial developments 2. Limited to "actual, direct and reasonable" admin costs 3. No travel or contingent fees 4. Not to exceed \$500-COLO and \$1500 New/SM	Apply MO
Subject to building, safety codes etc. FCC Order 14-153	Subject to building, safety codes etc. § 67.5100 RSMo.	Same requirement
COLO apps limited to nonpreempted questions (e.g., building code) 47 C.F.R. §1.40001(e)(1)	NEW, SM, COLO (non-utility pole) General prohibitions on application questions (§67.5094)	Apply Both
<b>Shot Clock Rules: (starts on "submission")</b> NEW = 150 days FCC Orders 09-99 ¶11/14-153 ¶47 SM = 150 days FCC Orders 09-99 ¶71/14-153 ¶47 COLO <sup>1</sup> 96 Act = 90 days FCC Order 14-153 ¶277 COLO Spectrum Act = 60 days 47 C.F.R. §1.40001(e)(2)	<b>Shot Clock Rules: (starts on "submission")</b> NEW = 120 days § 67.5096 RSMo. SM = 120 days § 67.5098 RSMo COLO/Replace = 45 days § 67.5100 RSMo	Apply MO
W/30 days notify of <b>specific</b> deficiencies/citations (NEW & SM) FCC Order 09-99 ¶53, FCC 14-153 ¶260. W/30 days notify of <b>specific</b> deficiencies/citations-COLO 47 C.F.R. §1.40001(e)(3)(i), FCC 14-153 ¶260/217	W/30 days notify of deficiencies (NEW & SM) §§ 67.5096, 67.5098 RSMo. W/15 days for COLO § 67.5100 RSMo	Apply Federal Apply Both
W/10 days of response, notify applicant if still deficient (NEW, SM, COLO) FCC Order 14-153 ¶259; 47 C.F.R. §1.40001(e)(3)(ii)		Only Federal
<b>Limitations on Authority</b>		
All (NEW, SM, COLO) - no "prohibition" of service: no discrimination - §332(c)(7)(B)(i)	All (NEW, SM, COLO) (non-utility pole?) subject to 19 prohibitions § 67.5094 RSMo	Apply Both
COLO - Most zoning impliedly Preempted - (Camouflage exception)	COLO - All Zoning expressly Preempted - Pole exception?	Apply Both
<b>Spectrum Act SM: (tower - ROW)</b> 47 C.F.R. §1.40001	<b>RSMo. §67.5092/98 SM:</b>	Apply Both <sup>ii</sup>
Application is <u>NOT</u> Collocation IF: <b>Towers outside ROW</b> (1) Inc. height: ↑ 10% or 20' (2) Width: ↑ 20ft edge or level of appurtenance  (3) Site: ANY excavation or deployment outside tower site "site" = leased/owned area + access  (tower in ROW & base in or out ROW) (1) Inc. height: ↑ 10% or 10' (2) Increases in width for base stations: if appurt. protrudes 6+ ft (3) Equip: ↑ ANY ground equip if none or 10%+ height or volume (4) Site: ANY excavation or deployment outside tower site (site def. further restricted existing equipment "proximity")  (ALL towers and base) (1) Equip: 4+ cabinets (2) Defeats concealment elements (3) Noncompliance w/ prior approval (except height/width/etc.) (4) Site: ANY excavation or deployment outside tower site (5) SM STATUS Measured as of (1) approved status as of 2/2/2012 (height), (2) last zoning approval (all else) (6) SM IF App. defeat concealment features  <b>96 Act SM: (affects only shot clock rules)</b> (1) Inc. height (tower): ↑ 10% or 20' (2) Equip: 4+ cabinets or new equip shelter (3) Width: ↑ 20ft from edge (except inclement weather) (4) Site: excavation outside tower site 47 C.F.R. Pt. 1, App. B	Application is <u>NOT</u> Collocation IF: <b>Not in ROW</b> (1) Inc. height (tower): ↑ 10% or 20' (2) Width: ↑ 20ft edge or level of appurtenance - "weather" and cabling expansions not counted (3) ↑ 1250 sq ft "compound" expansion = "area surrounding or near" WSS  <b>IN ROW or base station - (no separate ROW rules)</b> (1) ? (2) ? (3) ? (4) ↑ 1250 sq ft "compound" expansion; compound  (ALL towers and base) (1) Equip: 4+ cabinets (2) ? (3) ? (4) Site: + 1250 sq ft compound expansion (5) Measured "as originally constructed" (6) Missouri law silent  Missouri Shot Clock Rules above apply as more restrictive	Federal law may provide significantly greater expansion on this issue
Spectrum Act COLO - <u>Must</u> approve - no zoning 47 U.S.C.A. § 1455	COLO - <u>Must</u> approve - no zoning § 67.5100 RSMo.	Apply Both
96 ACT COLO - (COLO that is substantial under Spectrum but not sub. under FCC 09-99*) -preserves zoning §332(c)(7)	COLO - <u>Must</u> approve - no zoning § 67.5100 RSMo.	Apply Both
<b>Decision Requirements</b>		
1. <b>Denial</b> in writing - §332(c)(7)(B)(iii) 2. <b>Substantial evidence</b> for "denials" §332(c)(7)(B)(iii)	1. <b>"Decision"</b> In writing (NEW, SM, COLO) §§ 67.5096, 67.5098, 67.5100 RSMo.	Apply Both
Abbreviations: (Red = may be more restrictive) NEW - new towers SM - substantial modifications COLO- collocations	NOTES: (Chart conflicts and differences not exhaustive; see sources for precise language) * See 47 C.F.R. Pt. 1, App. B for definition * (example = exposed antenna added to concealed tower) ii Note: MO law could be interpreted as less restrictive in some situations ↑ = increase	

**Summary MO General Prohibitions (see § 67.5094 RSMo. for precise language)**

**Authority SHALL NOT:**

- 1) Require application information relating to services provided § 67.5094(1) RSMo.
- 2) Evaluate based on other available sites (may only require statement that they looked) – **Requiring Collocation prohibited!** § 67.5094(2) RSMo.
- 3) Dictate type of wireless facility, infrastructure, or technology § 67.5094(3) RSMo.
- 4) Require removal of existing facilities as condition of application § 67.5094(4) RSMo.
- 5) Review for or condition based on environmental RF concerns § 67.5094(5)-(8) RSMo.
- 6) Impose airspace restrictions greater than FAA § 67.5094(9) RSMo.
- 7) Prohibit generators § 67.5094(10) RSMo.
- 8) Charge application fee different from other “commercial developments”; capped at **\$500 for collocations and \$1500 for new or substantial modification (unless otherwise agreed)** § 67.5094(11) RSMo.
- 9) Impose Surety requirement for abandonment (unless imposed for other types of “land uses”) § 67.5094(12) RSMo.
- 10) Require applicant:
  - a. to allow City use of applicant’s facilities § 67.5094(19) RSMo.
  - b. to use City facilities or services § 67.5094(17) RSMo.
  - c. to provide services at less than market value § 67.5094(13) RSMo.
- 11) Limit duration of approval (no timed CUP) § 67.5094(14) RSMo.
- 12) Discriminate based on ownership (public v. private or otherwise) § 67.5094(15) RSMo.
- 13) Impose any unreasonable appearance requirements § 67.5094(16) RSMo.
- 14) Require indemnification/insurance for City (non-lease situations) § 67.5094(18) RSMo.
- 15) No consideration or preference based on ownership or public control § 67.5094(15) RSMo.
- 16) Approve certified historic structures (RSMo. §253.545) without 30-day delay for hearing 67.5094(2) RSMo.

**Political Subdivision Shall require:**

- 1) Property owner consent attached to application (lease or other documentation)