

AN ORDINANCE OF THE BOROUGH OF SPRING LAKE, COUNTY OF MONMOUTH NEW JERSEY, AMENDING AND SUPPLEMENTING CHAPTER 330 ENTITLED "STREETS AND SIDEWALKS" BY ADDING ARTICLE VII ENTITLED "RIGHT-OF-WAY PERMITS."

WHEREAS, the Borough of Spring Lake ("Borough") is aware that certain technological developments have made access to its Municipal Rights-of-Way desirable by certain telecommunications companies for the placement of small cell wireless facilities ("Small Cells"); and

WHEREAS, it is "axiomatic that municipal corporations are required to exercise ordinary care to maintain their streets and sidewalks...[n]or may a municipality in any way surrender or impair its control over the streets." *McQuillan Mun. Corp. (3rd Ed)*, Section 30.73; and

WHEREAS, the Borough acknowledges that its streets "are used for the ordinary purposes of travel and such other uses as customarily pertain there-to which, in recent years, are numerous and various. It thus follows that these public ways must be kept free from obstruction, nuisances, or unreasonable encroachments which destroy, in whole or in part, or materially impair, their use as public thoroughfares." *Id.*; and

WHEREAS, the Borough has determined that its public Rights-of-Way, such as they are or may be, themselves constitute a valuable resource, finite in nature, and which exists as a common right of the public to pass and repass freely over and across said lands without unreasonable obstruction or interference, and which therefore must be managed carefully; and

WHEREAS, the Federal Telecommunications Act preserves local government's ability to "manage the public Rights-of-Way...on a competitively neutral and non-discriminatory basis." 47 U.S.C. 253(c); and

WHEREAS, the Federal Telecommunications Act preserves local government's authority over the, "placement, construction and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A); and

WHEREAS, the Federal Telecommunications Act makes it unlawful for local government to prohibit or have the effect of prohibiting the provision of personal wireless service. 47 U.S.C. 332(c)(7)(B)(i)(II); and

WHEREAS, the Federal Telecommunications Act provides that municipalities "shall not unreasonably discriminate among providers of functionally equivalent services;" 47 U.S.C. 332(c)(7)(B)(i)(I); and

WHEREAS, recent developments in wireless technology, specifically the development of 5G, involve the placement of Small Cells and Cabinets in the Municipal Right-of-Way. Fitzgerald, Drew *Wireless Companies to Offer 5G Plans at Mobile Forum*, Wall Street Journal (February 28, 2018); and

WHEREAS, New Jersey municipalities must give consent before a Small Cell, i.e. a small antenna, can be placed on existing poles pursuant to N.J.S.A. 48:3-19 and for the erection of new poles within the public Rights-of-Way pursuant to N.J.S.A. 48:17-10; and

WHEREAS, the Federal Communications Commission (FCC) has recently adopted an order entitled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment" WT Docket No. 17-79; WC Docket 17-84, which places a shot clock on municipal approval for the placement of Small Cells on Existing Poles and the placement of New Poles in the Municipal Right-of-Way; and

WHEREAS, the erection of New Poles and Ground Level Cabinets in the Municipal Right-of-Way raise significant aesthetic and safety concerns; and

WHEREAS, the FCC in its recent order provides that municipalities can impose aesthetic requirements on Small Cells where said requirements are: 1) reasonable; 2) no more burdensome than those applied to other types of infrastructure deployments; and 3) published in advance; and

WHEREAS, the FCC in its recent order further clarified what it considers "reasonable" aesthetic requirements by stating that "in assessing that this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment;" and

WHEREAS, the FCC's requirement that, in order to protect the aesthetics of the Borough's Municipal Right-of-Way, it must treat like infrastructure in a like manner, necessitates the introduction of broader aesthetic requirements that apply to all Poles and Antennas and Cabinets in the Municipal Right-of-Way and not just Small Cells; and

WHEREAS, the Borough has determined that the most efficient way to handle this process is to create a Right-of-Way Permit system for all new Poles, Cabinets and Antennas in the Municipal Right-of-Way; and

WHEREAS, the Borough's 2010 Master Plan Review raised concerns related to the negative aesthetic impacts of above ground utilities on the Borough; and

WHEREAS, to wit, Section 225-27(B) of the Code of the Borough of Spring Lake requires that all utility service to new developments must be underground; and

WHEREAS, in addition, Ground Level Cabinets attached to small cells trigger certain collocation requirements pursuant to Section 6409(a) of the Middle Class Tax Relief and Jobs Creation Act of 2012 which raises serious concerns as to the ability of local government to protect the public's interest in the Borough's rights-of-way when it comes to aesthetics and the ability of the public to pass and repass over same; and

WHEREAS, New Poles also raise concerns as to the public's interest in the Borough's rights-of-way about aesthetics and the public's ability to pass and repass over same; and

WHEREAS, New Poles and Ground Level Wireless Cabinets also raise concerns related to sight triangles and other safety related issues related to the use of roadways by the public; and

WHEREAS, the Federal Highway Administration has acknowledged this problem by stating, "[as] demand for the finite space in existing ROW increases, the difficulty and cost of adding new utility facilities and relocating existing utility facilities also increases. Just as significant is how utility service interruptions may add to public discontent with overall highway construction. It is therefore essential for planners, designers, and builders of street and highway projects to avoid unnecessary utility relocations..." Federal Highway Administration, Avoiding Utility Relocations, <https://www.fhwa.dot.gov/utilities/utilityrelo/2.cfm> (accessed March 26, 2019); and

WHEREAS, the Borough has determined that it is necessary to set forth clear standards in relation to the siting of Poles, Cabinets and Antennas for the benefit of its citizens and any utilities which use or will seek to make use of said Municipal Rights-of-Way.

FOR THE FOREGOING REASONS, it is hereby ordained by the Borough Council of the Borough of Spring Lake, in the County of Monmouth and State of New Jersey as follows:

Section 1. Chapter 330 entitled "Streets and Sidewalks" is hereby amended and supplemented through the addition of Article VII entitled "Right-of-Way Permits" as follows:

330-69 DEFINITIONS

- a. "Anticipated Municipal Expenses" mean the cost of processing an application for a Right-of-Way Permit including, but not limited to, all professional fees such as engineer and attorney costs to the Borough.
- b. "Cabinet" shall mean a small box-like or rectangular structure used to facilitate utility or wireless service from within the Municipal Right-of-Way.
- c. "Electric Distribution System" shall mean the part of the electric system, after the transmission system, that is dedicated to delivering electric energy to an end user.
- d. "Existing Pole" shall mean a pole that is in lawful existence within the Municipal Right-of-Way.
- e. "Ground Level Cabinets" shall mean a Cabinet that is not attached to an existing pole and is touching the ground.
- f. "Municipal Right-of-Way" shall mean the surface of, and the space above or below, any public street, road, place, public way or place, sidewalk, alley, boulevard, parkway, drive, and the like, held by the Borough as an easement or in fee simple ownership. This term also includes rights-of-way held by the County of Monmouth where the Borough's approval is required for the use of same pursuant to N.J.S.A. 27:16-6.
- g. "Pole" shall mean a long, slender, rounded piece of wood or metal.

- h. "Pole Mounted Antenna" shall mean a device that is attached to a Pole and used to transmit radio or microwave signals and shall include, but not be limited to, small cell equipment and transmission media such as femtocells, picocells, microcells, and outside distributed antenna systems.
 - i. "Pole Mounted Cabinet" shall mean a Cabinet that is proposed to be placed on an Existing or Proposed Pole.
 - j. "Proposed Pole" shall mean a Pole that is proposed to be placed in the Municipal Right-of-Way.
 - k. "Right-of-Way Agreement" shall mean an agreement that sets forth the terms and conditions for use of the Municipal Right-of-Way and includes, but is not limited to, municipal franchise agreements.
 - l. "Right-of-Way Permit" shall mean an approval from the Borough setting forth applicant's compliance with the requirements of this Chapter.
 - m. "Surrounding Streetscape" shall mean Existing Poles within the same right-of-way which are located within five hundred (500) feet of the Proposed Pole.
 - n. "Borough Council" shall mean the Borough Council of the Borough of Spring Lake.
 - o. "Utilities Regulated by the Board of Public Utilities" shall mean companies subject to regulation by the New Jersey Board of Public Utilities under Chapter 48 of the Revised Statutes.
 - p. "Utility Service" shall mean electric, telephone, or cable service.
- 330-70 POLE MOUNTED ANTENNAS, ACCESS TO RIGHT-OF-WAY, RIGHT-OF-WAY AGREEMENTS
- a. No person shall operate or place any type of Pole Mounted Antenna within the Municipal Right-of-Way without first entering into a Right-of-Way Agreement pursuant to the provisions of this Section.
 - b. The terms of said Right-of-Way agreement shall include:
 - i. A term not to exceed 15 (fifteen) years;
 - ii. Reasonable insurance requirements;
 - iii. Fine for unauthorized installations;
 - iv. A reference to the siting standards set forth in this Section; and
 - v. Any other items which may reasonably be required.
- 330-71 APPLICATION TO UTILITIES REGULATED BY THE BOARD OF PUBLIC UTILITIES, OTHER ENTITIES
- a. Notwithstanding any franchise or Right-of-Way Agreement to the contrary, all facilities proposed to be placed within the Municipal Right-of-Way by a Utility Regulated by the Board of Public Utilities and all other entities lawfully within the Municipal Right-of-Way shall be subject to the standards and procedures set forth in this Chapter and shall require Right-of-Way Permits for the siting of Poles, Antennas and Cabinets in the Municipal Right-of-Way.
- 330-72 RIGHT-OF-WAY PERMITS, SITING STANDARDS FOR POLES, ANTENNAS AND CABINETS IN THE RIGHT-OF-WAY
- a. No Pole, Antenna or Cabinet shall be installed within the Municipal Right-of-Way without the issuance of a Right-of-Way Permit.
 - b. Pole Siting Standards
 - i. Height. No Pole shall be taller than thirty-five (35) feet or 110% of the height of Poles in the Surrounding Streetscape, whichever is higher.
 - ii. Distance from the curb line. No pole shall be farther than eighteen (18) inches from the curb line.
 - iii. Location, Safety and Aesthetics. No Pole shall be erected in the Right-of-Way unless it:
 - 1. Is replacing an Existing Pole; or
 - 2. Approved pursuant to a land development application by the Borough's Planning Board pursuant a land use application; or

3. Located on the opposite side of the street from the Electric Distribution System; and
 4. Is two hundred (200) linear feet from any other Existing Pole or Proposed Pole along the same side of the street; and
 5. Is not located in an area with Underground Utilities; and
 6. Does not inhibit any existing sight triangles; and
 7. Allows adequate room for the public to pass and re-pass across the Right-of-Way; and
 8. Is finished and/or painted so as to blend in compatibly with its background and so as to minimize its visual impact on surrounding properties.
- iv. Any necessary equipment is permitted within a Pole where said Pole otherwise conforms with the standards set forth in Section 330-70(b).
- c. Ground Level Cabinet Site Standards
 - i. Ground Level Cabinets are prohibited in the Municipal Right-of-Way located in the R-1, R-2 and R-3 zones.
 - ii. Ground Level Cabinets are permitted in the RC and GC zones provided that such Ground Level Cabinet:
 1. Is less than twenty-eight (28) cubic feet in volume; and
 2. Is finished and/or painted so as to blend in compatibly with its background and so as to minimize its visual impact on surrounding properties; and
 3. Does not inhibit any existing sight triangles or sight distance; and
 4. Allows adequate room for the public to pass and repass across, along and through the Municipal Right-of-Way.
 - d. Pole Mounted Antenna and Pole Mounted Cabinet Siting Standards
 - i. Pole Mounted Antennas are permitted on Existing Poles, provided that each Pole Mounted Antenna:
 1. Does not exceed three (3) cubic feet in volume; and
 2. Is finished and/or painted and otherwise camouflaged, in conformance with best available stealth technology methods, so as to blend in compatibly with its background and so as to minimize its visual impact on surrounding properties; and
 3. Does not inhibit sight triangles; and
 4. Allows adequate room for the public to pass and repass across the municipal right-of-way.
 - ii. Pole Mounted Cabinets are permitted on Existing Poles, provided that each Pole Mounted Cabinet:
 1. Does not exceed sixteen (16) cubic feet; and
 2. Is finished and/or painted and otherwise camouflaged, in conformance with best available stealth technology methods, so as to blend in compatibly with its background and so as to minimize its visual impact on surrounding properties; and
 3. Does not inhibit sight triangles; and
 4. Allows adequate room for the public to pass and repass across the municipal right-of-way.
 - iii. The Borough may also require that an applicant provide a certification from a licensed engineer attesting to the structural integrity of any Pole Mounted Antenna or Pole Mounted Cabinet.

330-73 APPLICATION PROCESS

- a. Pre-Application Meeting- Prior to making a formal application with the Borough for use of the Municipal Right-of-Way, all applicants are advised to meet with the Zoning Officer to review the scope of applicant's proposal.

- b. The Borough Council shall, by resolution, approve or disapprove every Right-of-Way Permit application based on the recommendations provided to it pursuant to subsections (e) and (f) below.
- c. All applications made under this section shall be expedited so as to comply with the shot clocks set forth in the Federal Communications Commission Order titled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by the Removal of Barriers to Infrastructure Investment." WT Docket No. 17-79; WC Docket No. 17-84.
- d. Every application for a Proposed Pole made pursuant to this Chapter must include a stamped survey prepared by a New Jersey licensed surveyor demonstrating that any such Proposed Pole is located within the Municipal Right-of-Way. Any such application which does not include such a survey shall immediately be deemed incomplete.
- e. Proposed Poles and Ground Level Cabinets
 - i. The Zoning Officer shall review applications for the placement of Proposed Poles and Ground Level Cabinets within the Municipal Right-of-Way and advise the Borough Council of its recommendation to approve or disapprove same.
 - 1. If the Zoning Officer recommends a denial of an application, it shall set forth the factual basis for such a denial in writing.
- f. Pole Mounted Antenna and Pole Mounted Cabinets
 - i. The Zoning Officer shall review applications to place Pole Mounted Antenna and Pole Mounted Cabinets within the Municipal Right-of-Way and advise the Borough Council of his or her recommendation to approve or disapprove same.
 - 1. If the Zoning Officer recommends a denial of an application, he or she shall set forth the factual basis for such a denial in writing.
- g. If the Borough Council denies any application made under this Section, it shall do so in writing and set forth the factual basis therefor.
- e. Waiver. The Borough Council may waive any siting standard set forth in Section 330-72 where the applicant demonstrates that strict enforcement of said standard:
 - i. Will prohibit or have the effect of prohibiting any interstate or intrastate telecommunications service pursuant to 47 U.S.C. 253(a); or
 - ii. Will prohibit or have the effect of prohibiting personal wireless service pursuant to 47 U.S.C. 332(c)(7)(B)(i)(II); or
 - iii. Will violate any requirement set forth by the Federal Communications Commission Order entitled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment." WT Docket No. 17-79; WC Docket 17-84; or

330-74 RIGHT-OF-WAY PERMIT FEES AND DEPOSIT TOWARDS ANTICIPATED MUNICIPAL EXPENSES

- a. Every Right-of-Way Permit application must include a Right-of-Way Permit Fee in the following amounts:
 - i. One (1) to five (5) sites - \$500.00
 - ii. Each additional site - \$100.00
- b. Deposit Towards Anticipated Municipal Expenses
 - i. In addition to the Right-of-Way Permit Fee, the Zoning Officer may, in his or her own discretion, require the posting of a two thousand-dollar (\$2,000.00) Deposit Towards Anticipated Municipal Expenses related to an application made pursuant to this Chapter.
 - ii. Applicant's Deposit Towards Anticipated Municipal Expenses shall be placed in an escrow account. If said deposit contains insufficient funds to enable the Borough to perform its review, the Chief Financial Officer of the Borough shall provide applicant a notice of insufficient balance. In order for review to continue, the

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Applicant shall, within ten (10) days post a deposit to the account in an amount to be mutually agreed upon.

- iii. The Chief Financial Officer shall, upon request by the Applicant after a final decision has been made by the Borough Commission regarding his or her pending Right-of-Way Permit application, refund any unused balance from applicant's Deposit Towards Anticipated Municipal Expenses.

330-75 MISCELLANEOUS PROVISIONS

- a. Any approval received pursuant to this Chapter does not relieve the applicant from receiving consent from the owner of the land above which an applicant's facility may be located as may be required under New Jersey law.
- b. Applicant must, in addition to receiving a Right-of-Way Permit, also receive all necessary road opening permits, construction permits and any other requirement set forth in the Code of the Borough of Spring Lake or state statutes.
- c. The Borough's consent for use of County Roads, as required pursuant to N.J.S.A. 27:16-6, shall take the form of a Right-of-Way Permit subject to the standards and application process set forth in this chapter. No such applicant shall be required to enter into a Right-of-Way Agreement with the Borough.

Section 2. If any section or provision of this Ordinance shall be held invalid in any court of competent jurisdiction, the same shall not affect the other sections or provisions of this Ordinance, except so far as the section or provision so declared invalid shall be inseparable from the remainder or any portion thereof.

Section 3. All ordinances or parts of ordinances inconsistent with this Ordinance are hereby repealed to the extent of such inconsistency.

Section 4. This Ordinance shall take effect upon final adoption and publication in accordance with law.

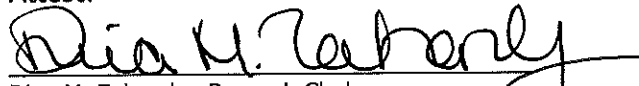
INTRODUCED: September 10, 2019

ADOPTED: September 24, 2019

APPROVED: _____


JENNIFER NAUGHTON, Mayor

Attest:


Dina M. Zahorsky, Borough Clerk