

ORDINANCE #30-23

**AN ORDINANCE ESTABLISHING PROCEDURES AND STANDARDS REGARDING
DEPLOYMENT OF SMALL WIRELESS FACILITIES IN PUBLIC
RIGHTS-OF-WAY IN THE BOROUGH OF SAYREVILLE**

WHEREAS, the wireless communications industry has expressed interest in submitting applications to utilize space in public rights-of-way within the Borough of Sayreville ("**Borough**") for the installation of small cell wireless telecommunications facilities (hereinafter "Small Wireless Facilities") in connection with the industry's efforts to expand and/or upgrade existing 4G Facilities and as part of the construction of a nation-wide 5G Facilities network; and

WHEREAS, the Borough supports these investments and deployment of wireless networks in a way that balances our community character, needs, and interests while preserving the Borough's ability to manage public rights-of-way in the overall interests of the public health, safety and welfare; and

WHEREAS, the Borough recognizes that Small Wireless Facilities and/or Smart Poles often are most effectively deployed in public rights-of-way and that the rules and regulations of the Federal Communications Commission require municipalities to make rights of way available subject to local police power regulations; and

WHEREAS, multiple installations of Small Wireless Facilities and/or Smart Poles within the public right-of-way can impact property values, create traffic and pedestrian safety hazards, impact shade trees where proximity conflicts may require trimming of branches or require removal of roots and create visual and aesthetic blights all of which can negatively impact the quality and character of life within the Borough; and

WHEREAS, the Borough wishes to preserve the aesthetics of the community by encouraging the location of Small Wireless Facility equipment on existing or previously approved concealment infrastructure; and

WHEREAS, A September 2018 Ruling and Order of the Federal Communications Commission ("FCC") and subsequent federal court decision impacting that ruling imposes certain restrictions and preemptions on the exercise of local authority when dealing with small wireless facilities and/or Smart Poles.

WHEREAS, the Borough needs to amend its municipal code to address the legal and practical issues that arise in connection with multiple Small Wireless Facility and/or Smart Pole installations deployed in the public rights-of-way; and

WHEREAS, in light of the foregoing, this governing body is of the opinion that the adoption of this Ordinance is in the best interest of the Borough and the health, safety and welfare of its residents and visitors.

NOW, THEREFORE, BE IT ORDAINED by the Mayor and Borough Council of the Borough of Sayreville, in the County of Middlesex, State of New Jersey, as follows:

Section One. Definitions.

- A. All definitions of words, terms and phrases that are set forth in the Communications Act of 1934, P.L. 73-416, as amended by various statutory enactments including, but not limited to, the Telecommunications Act of 1996 P.L. 104-104, are incorporated herein and are made apart hereof.
- B. All definitions of words, terms and phrases that are set forth in the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-1, *et. seq.*, are incorporated herein and are made apart hereof.
- C. All of the definitions of words, terms and phrases that are set forth in the Code of Federal Regulations at 47 C.F.R. §1.6002, as amended, are incorporated herein and are made a part hereof.
- D. In addition to the foregoing, the following words, terms and phrases shall have the meanings indicated unless an alternate meaning clearly is discernable from the context in which the word, term or phrase is used:

Administrative Review means ministerial review of an Application by the Borough to determine whether the issuance of a Permit is in conformity with the applicable provisions of this Chapter.

Antenna means communications equipment that transmits and/or receives electromagnetic radio frequency signals used in the provision of Wireless Services. This definition does not apply to broadcast antennas, antennas designed for amateur radio use, or satellite dishes for residential or household purposes.

Applicable Codes means uniform building, fire, safety, electrical, plumbing, or mechanical codes adopted by a recognized national code organization to the extent such codes have been adopted by the Authority, including any amendments adopted by the Authority, or otherwise are applicable in the jurisdiction.

Applicant means any Person or Entity who submits an Application under this Chapter, such as a Provider described herein.

Application means a written request, on a form provided by the Borough of Sayreville.

Authority means the Borough Council of the Borough of Sayreville. The term

“Authority” and “Borough” are interchangeable.

Collocate means to install or mount a Small Wireless Facility in the Public Right-Of-Way on an existing Support Structure, on an existing Pole, on a new pole, or smart pole.

"Collocation" has a corresponding meaning.

Communications Facility means, collectively, the equipment at a fixed location or locations within the Public ROW that enables Communications Services, including; (i) radio transceivers, Antennas, coaxial, fiber-optic or other cabling, power supply (including backup battery), and comparable equipment, regardless of technological configuration; and (ii) all other equipment associated with any of the foregoing. A Communications Facility does not include the Pole or Support Structure to which the equipment is attached.

Communications Service means cable service, as defined in 47 U.S.C. § 522(6); information service, as defined in 47 U.S.C. § 153(24); or telecommunications service, as defined in 47 U.S.C. § 153(53).

Communications Service Provider means a provider of Communications Services and includes a cable operator as defined in 47 U.S.C. § 522(5).3

Consultant means any Person appointed by the Borough to serve as a consultant for the Borough for all matters concerning this Chapter, and who may be contracted for professional services.

FCC means the Federal Communications Commission of the United States.

Laws means, collectively, any and all Federal, State or Local law, statute, common law, code, rule, regulation, order, or ordinance.

Ordinary Maintenance and Repair means inspections, testing and/or repair that maintain functional capacity, aesthetic and structural integrity of a communications Facility and/or the associated Support Structure or Pole, that does not require blocking, damaging or disturbing any portion of the Public ROW.

Permit, "R.O.W. Permit" or "Small Cell Permit" means a written authorization to install, at a specified location(s) in the Public ROW, a Communications Facility, Smart Pole or a Pole to support a Communications Facility.

Permittee means an Applicant that has received a Permit under this Chapter.

Person means an individual, corporation, limited liability company, partnership, association, trust or other entity or organization, including a governmental entity.

Personal Wireless Services

"Personal Wireless Services," as defined in 47 U.S.C. §332(c)(7)(C), as supplemented and/or as amended.

Public Right-of-Way

The surface, the airspace above the surface and the area below or along the surface of any street, road, highway, lane, alley, boulevard or drive, including the sidewalk, shoulder and area for utilities owned by the Borough of Sayreville.

Small Wireless Facility

"Small Wireless Facility," as defined in the Code of Federal Regulations at 47 C.F.R. §1.6002(1), as supplemented and/or as amended. **Small wireless facility** means a wireless facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure not to exceed forty-five (45) feet in height and be no more than six (6) cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than six (6) cubic feet; and (ii) all other wireless equipment attached directly to a utility pole associated with the facility is cumulatively no more than twenty-five (25) cubic feet in volume and not exceed forty-five (45) feet in height. The following types of associated ancillary equipment are not included in the calculation of equipment volume: electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and other services.

Smart Pole

A decorative utility pole that conceals three or more Small Wireless Facility installation(s) and may include other features such as street lighting, 911 call service access, public access Wi-Fi and surveillance cameras. A Smart Pole must allow for multiple occupants and allow space for municipal use for other services and/or equipment. Smart Poles shall neither have external latches, external hinges, external cabling, or other attachments. The pole should be made of an inherently rust-resistant material (i.e. aluminum alloys or stainless steel) and not exceed forty-five (45) feet in height.

Utility Pole

A wooden or metal pole that is used by public utilities to support electrical wires, telephone wires, coaxial cables, fiber optic cables and like and similar appurtenances.

Wireless Communications Infrastructure

Infrastructure designed specifically for the purpose of supporting wireless facility equipment deployments, including large-scale (macro) collocatable infrastructure as well as Small Wireless Facilities Infrastructure

Small Wireless Facilities Infrastructure

A Smart Pole meeting the above definition or other collocatable infrastructure designed or deployed for the purpose of supporting small wireless facility, the types of which may be approved by geographical zones as defined by the Borough.

- E. In the event that a term, word or phrase is not defined in any of the aforementioned statutes and is not otherwise defined herein then that term, word or phrase shall have its common, ordinary meaning.

Section Two. Small Wireless Facility Siting Permit Required; Consent to Use Rights-of-Way Required.

- A. No person shall place a Small Wireless Facility and/or Smart Pole in any right-of-way without first filing a Small Wireless Facility siting permit application, in the form specified herein and in accordance with the procedures specified herein, with the Borough Clerk and obtaining a siting permit therefore, except as otherwise may be provided in this ordinance. Upon approval of a siting permit application, the siting permit authorizing placement of a Small Wireless Facility and/or Smart Pole in a public right-of-way shall not be issued by the Borough Clerk to any Applicant unless:
 - 1. All siting permit application fees and escrow fees, as established herein, have been paid; and
 - 2. All other governmental permits or other governmental approvals that are required for the deployment(s) proposed by the Applicant's siting permit application under the New Jersey Uniform Construction Code Act, N.J.S.A. 52:27D-1 l 9, et. seq., and the administrative regulations adopted thereunder, the Ordinances of Borough, and by any other applicable federal, state or municipal law have been issued by the appropriate issuing authority therefore to the Applicant and the Applicant has supplied copies of such other permits or approvals to the Borough Clerk for inclusion with the Applicant's application documents; and
 - 3. The Applicant has entered into a "Right-of-Way Use Agreement," the approved form of which is set forth in Appendix "A" to this ordinance, with the Borough. The approved form of "Right-of-Way Use Agreement" may from time-to-time be revised, supplemented or otherwise amended or replaced. All such revisions, supplements,

amendments or replacements shall be approved by Resolution of the Borough Council. The Borough Clerk shall maintain on file the currently approved Right-of-Way Use Agreement version and shall provide a copy to all siting permit applicants. Minor deviations to the terms and conditions that are set forth in the approved form of Right-of-Way Use Agreement may be approved by the Borough Council at the time that it grants consent to use a right-of-way to a siting permit Applicant.

- B. No siting permit authorizing placement of a Small Wireless Facility and/or Smart Pole in a public right- of-way shall be issued to any Applicant unless the Borough Council, in the manner prescribed by applicable laws of the State of New Jersey, has granted to the siting permit Applicant its consent to use public rights-of-way within the Borough. No siting of a Small Wireless Facility and/or Smart Pole shall be permitted within five-hundred (500) feet of another Small Wireless Facility and/or Smart pole unless it can be established by clear and convincing evidence that compliance with these regulations would effectively prohibit the applicant from providing service and that co-location on an existing or previously approved Small Wireless Facility and/or Smart Pole is not feasible. Any claims of applicants of technical incompatibility or inability to collocate need to be demonstrated scientifically by the applicant how technical incompatibility exists, not disproven by the Borough. Responsibility for judging proof of said claims lies solely with the Borough and/or or its chosen representative(s).

Section Three. Installation of New Structures; Installation on Existing Structures.

- A. No application for a Small Wireless Facility siting permit shall be approved if the application proposes the deployment of a Small Wireless Facility upon an existing structure in a right-of-way unless the structure is one of the types of Smart Poles that are set forth in Section One: Definitions to this ordinance and such Smart Pole specifically is designed to accommodate the reasonable and customary equipment necessary for a Small Wireless Facility installation which will accommodate at least three carriers per Small Wireless Facility deployment. Any exception to this requirement must be accompanied by clear and convincing evidence that co-location on an existing or previously approved Small Wireless Facility is not feasible. Any claims of applicants of technical incompatibility or inability to comply with this requirement need to be demonstrated scientifically by the applicant, not disproven by the Borough. Responsibility for judging proof of said claims lies solely with the Borough and/or or its chosen representative(s).
- B. No Small Wireless Facility shall be installed upon any new structure within any right- of-way unless the new structure is one of the types of

Smart Poles that are identified in Section One: Definitions to this ordinance. A replacement pole is a new structure.

- C. No application for a Small Wireless Facility and/or Smart Pole siting permit shall be approved if the application proposes the deployment of a Small Wireless Facility in an area other than those specific locations set forth within the City's Wireless Siting Plan, which can be found on file with the Office of the City Clerk. All Small Wireless Facilities must be placed within a 25 ft. radius of those specific locations set forth on the City's Wireless Siting Plan. No more than one (1) Smart Pole shall be permitted per intersection or block if the Siting Plan calls for the deployment of a Small Wireless Facility at any location other than an intersection, unless otherwise specified within the Wireless Siting Plan. No Smart Poles shall be located within 500 ft. of another. Any claims of carriers of technical incompatibility or inability to comply with this requirement need to be scientifically demonstrated by the applicant, not disproven by the Borough. Responsibility for judging proof of said claims lies solely with the Borough and/or its chosen representative(s).

Section Four. Siting Permit Application Process.

- A. Application Filing. An application for a siting permit to place one or more Small Wireless Facility and/or Smart Pole within a right-of-way shall be made on forms which shall be available from the Office of the Borough Clerk. The application, along with the required application fee and the required escrow fee, shall be filed with the Borough Clerk. Immediately upon receipt of an application, the Borough Clerk shall provide copies of the application and all supporting documents that were submitted by the Applicant with the application, to the Borough Engineer, Zoning Official, Construction Official and the Borough Solicitor.
- B. Application Form. The Small Wireless Facility and/or Smart Pole siting permit application shall be made by a provider of personal wireless services, its duly authorized representative, as noted in a notarized statement from the provider of personal wireless services, on whose behalf the representative is acting, or an entity in the business of deploying wireless communications facilities or infrastructure, and shall contain the following:
 - 1. The Applicant's name, address, telephone number and e-mail address;
 - 2. The names, addresses, telephone numbers, and e-mail addresses of all consultants, if any, acting on behalf of the Applicant with respect to the filing of the Application;

3. A general description of the proposed Small Wireless Facility, structure type, and new structure work to be performed. Color photographs shall be provided depicting the current state of the location where the installation is proposed. Additionally, a rendering of the proposed installation shall be provided for each location the Small Wireless Facility is proposed. The scope and detail of such description shall be appropriate to the nature and character of the work to be performed, with particular emphasis on those matters, including, but not limited to, subsurface utilities likely to be affected or impacted by the work proposed along with a description of such other governmental permits or approvals as may be required by applicable law with respect to the proposed installation(s) and a description of such other permits or approvals for which the Applicant has applied;

4. Authorization for any consultant acting on behalf of the Applicant to speak with the Borough, or a designee of the Borough, on the area of consultation for the Applicant even if the Applicant cannot be available;

5. Verification via sworn statement from an appropriate professional that the Small Wireless Facility shall comply with all applicable federal, state and local laws, administrative regulations and codes;

1. With respect to radio frequency emissions, Applicant must provide a sworn statement from a qualified radio frequency engineer that the Application will comply with all applicable Federal, State, and Local laws regarding radio frequency emissions

6. The Applicant shall certify that they shall make available approved facilities to all major wireless carriers in the marketplace. The Applicant shall further certify that they will encourage, manage and coordinate the location and placement of any interested carrier's equipment on their structure.

C. An Applicant seeking to deploy a network of Small Wireless Facilities, all of which are to be located in rights-of-way, may file a batched application for up to twenty-five (25) Small Wireless Facilities and receive a single siting permit for multiple Small Wireless Facilities. Any denial of any individual Small Wireless Facilities within a batched application, will not impact the consideration of other sites within the same application.

Section Five. Procedure on Permit Application; No Exclusive Rights.

A. The Borough shall review the application for a Small Wireless Facility and/or Smart Pole siting permit in light of its conformity with the provisions of this Ordinance, and shall approve or deny a siting

permit on nondiscriminatory terms and conditions subject to the following requirements:

1. Within ten (10) days of receiving an Application, the Borough Clerk shall determine and notify the Applicant:

(a) Whether the Application is complete;

(b) If the Application is incomplete, what specific information is missing; and

B. The Borough shall make its final decision to approve or deny the Application within the following timeframes:

(1) Sixty (60) days from the submission of a complete application to install a Small Wireless Facility upon one or more existing structures.

(2) Ninety (90) days from the submission of a complete application to install a Small Wireless Facility upon one or more new structures.

(3) Ninety (90) days from the submission of a complete batched application to install Small Wireless Facilities upon both existing and new structures.

The timeframes described above by which an application shall be either approved or denied may be extended by mutual consent of the Applicant and Borough. Such consent shall be set forth on a form for such purposes which shall be available from the Office of the Borough Clerk. Such consent on behalf of the Borough shall be exercised by the Zoning Officer which shall not be unreasonably withheld.

C. The Borough Clerk shall notify the Applicant in writing of the final decision, and if the Application is denied Specify the basis for denial; and cite such specific provisions, as may be recommended by the Borough Solicitor, from federal, state, or local laws, administrative regulations or codes as to why the Application was denied.

D. Notwithstanding an initial denial, the Applicant may cure any deficiencies identified by the Borough within thirty (30) days of the denial without paying an additional application fee, provided the Borough Clerk shall approve or deny the revised application within thirty (30) days of receipt of the amended application which shall be limited to the deficiencies specified in the original notice of denial.

E. A siting permit from the Borough authorizes an Applicant to undertake

only certain activities in accordance with this ordinance. No approval or consent granted, or siting permit issued, pursuant to this ordinance shall confer any exclusive right, privilege, license or franchise to occupy or use any public right-of-way within the Borough of Sayreville for the delivery of telecommunications services or for any other purpose.

- F. Nothing in this section affects an applicant's obligation to apply for other permits that may be required under this code, such as street opening permits or construction permits, for which the Applicant has not yet applied. No Small Wireless Facility siting permit shall be approved until the Applicant has applied for all other permits and approvals required by all other laws and regulations that are applicable to the Applicant's proposed Small Wireless Facility and/or Smart Pole deployment.

Section Six. Duration.

No siting permit issued under this ordinance shall be valid for a period longer than twelve (12) months unless construction has actually begun and continuously and diligently is pursued to completion. Upon written request from the Applicant, the Mayor, upon consultation with the Construction Official, may extend the siting permit for a period of up to twelve (12) months so long as construction has begun at the time that the Applicant's request for an extension is made.

Section Seven. Routine Maintenance and Replacement.

A Small Wireless Facility siting permit shall not be required for:

- A. Routine maintenance of a Small Wireless Facility and/or Smart Pole.
- B. The replacement of a Small Wireless Facility and/or Smart Pole with another Small Wireless Facility and/or Smart Pole that is the same or smaller in size, weight and height to the Small Wireless Facility that is being replaced.
- C. Provided, however, that on a location where the Borough and/or another provider has placed equipment or facilities, any routine maintenance or replacement that is done shall not occur until written authorization from the Borough and/or the other provider, as the case may be, to proceed is provided to the Borough, which authorization to proceed shall not unreasonably be withheld by the Borough and/or the other provider.
- D. Provided further that if the replacement of a Small Wireless Facility and/or Smart Pole with another Small Wireless Facility includes replacement of the structure to which the Small Wireless Facility

and/or Smart Pole is attached then an application for a siting permit shall be required.

- E. Notwithstanding anything to the contrary in this section 7, permits are required for any activity that involves any road closure or other activity that will impact vehicle or pedestrian traffic.

Section Eight. Fees.

- A. Application Fees. All applications for approval and issuance of a Small Wireless Facility and/or Smart Pole siting permit pursuant to this ordinance shall be accompanied by a fee as follows:
 - 1. For applications that do not include the installation of any new structures within a right-of-way the application fee shall be \$500.00 for up to five (5) Small Wireless Facilities and/or Smart Pole with an additional \$100.00 for each Small Wireless Facility and/or Smart Pole beyond five (5).
 - 2. For applications that include the installation of a new structure within a right-of-way the application fee shall be \$1000.00 for up to five (5) Small Wireless Facilities with an additional \$100.00 for each Small Wireless Facility beyond five (5).
- B. Other Fees: No pole attachment fees will be assessed by the City unless and until an applicant applies for pole attachment to a City-owned pole
- C. Annual Rate: Applicant/permit holder shall pay a \$270 Annual ROW Maintenance Rate per Small Wireless Facility, starting on the anniversary of the permit issuance.

Section Nine. Escrow Fee for Third-Party Professionals and Consultants.

- A. In addition to the application fee, all applications for approval and issuance of a Small Wireless Facility and/or Smart Pole siting permit shall be accompanied by an escrow fee as follows:
 - 1. For applications whose proposed Small Wireless Facility and/or Smart Pole deployment(s) will not require a street opening permit, an escrow fee in the amount of \$5,000.00 shall be required.
 - 2. For applications whose proposed Small Wireless Facility and/or Smart Pole deployment(s) will require a street opening permit, an escrow fee of \$7,500.00 shall be required.
- B. The escrow account deposits are required to pay for the costs of

professional services, including engineering, planning, legal and other third-party professional consulting expenses connected with the review of submitted materials, including any traffic engineering review or other special analyses related to the Borough's review of the materials submitted by the Applicant and the preparation of any reports or any necessary legal agreement regarding rights-of-way use. An Applicant is required to reimburse the Borough for all fees, costs and expenses of third-party professionals and consultants incurred and paid by the Borough for the review process of a Small Wireless Facility and/or Smart Pole siting permit application, such as, but not limited to:

1. Professional fees for reviews by third-party professionals or consultants of applications, plans and accompanying documents;
 2. Issuance of reports or analyses by third-party professionals or consultants to the Borough setting forth recommendations resulting from the review of any documents submitted by the Applicant;
 3. Charges for any telephone conference(s) or meeting(s), including travel expenses, requested or initiated by the Applicant, the Applicant's attorney or any of the Applicant's experts or representatives;
 4. Review of additional documents submitted by the Applicant and issuance of reports or analyses relating thereto;
 5. Review or preparation of easements, deeds, right-of-way municipal consent ordinances or resolutions and any and all other like or similar documents; and
 6. Preparation for and attendance at all meetings by third-party professionals or consultants serving the Borough, such as the Borough Attorney, Borough Engineer and Borough Planner or other experts as required.
- C. The escrow account deposits shall be placed in a separate account by the Borough's Chief Financial Officer at the request of the Borough Clerk and an accounting shall be kept of each Applicant's deposit. Thereafter:
1. All third-party professional or consultant fees, costs, expenses and charges shall be paid from the escrow account and charged to the applicant;
 - a. Third-party professional or consultant fees shall not be disbursed from escrow if they are for a service performed in the context of an identical paid service

between applicant and same third-party who may otherwise be entitled to said fees.

2. Upon either final denial of a Small Wireless Facility and/or Smart Pole siting permit application or upon issuance of a Small Wireless Facility and/or Smart Pole siting permit, any moneys not expended for third-party professional or consulting services shall be returned to the Applicant within 90 days upon written request by the Applicant and as authorized by the Borough Council;

3. If at any time during the application review process 75% of the money originally posted shall have been expended, the Applicant shall be required to replenish the escrow deposit to 100% of the amount originally deposited by the Applicant;

4. No Small Wireless Facility and/or Smart Pole siting permit application shall be considered complete until such time as the required escrow fee has been posted to guarantee payment of third-party professional or consultant fees, costs, expenses and charges;

5. All payments charged to the escrow deposit shall be pursuant to vouchers from the third-party professionals or consultants stating the hours spent, the hourly rate and the fees, costs, expenses and charges incurred;

6. Third-party professionals and consultants submitting charges pursuant to this section shall be permitted to charge for such services at the same rates as they would charge their private clients for like or similar work provided that:

(a) Professional fees are billed at rates that do not exceed such professional fees as are customarily charged by other like professionals and consultants performing similar work within Middlesex County; and

(b) Out-of-pocket costs, expenses and charges are billed on a dollar-for-dollar basis with no mark-up being permitted;

7. The Borough shall render a written final accounting to the Applicant on the uses to which the escrow deposit was put. The written final accounting shall include copies of all vouchers that were submitted by third-party professionals and consultants and paid by the Borough.

Section Ten. Municipal Access to New Structures.

An Applicant whose siting permit includes the installation of any new Smart Pole structure of any of the types that are defined in in Section One: Definitions to this ordinance shall provide the Borough with access to space within the Smart Pole structure for the purpose of deploying Borough's own equipment including but not limited to, public access Wi-Fi, 911 call service or security cameras. Notwithstanding the foregoing, the Municipal use shall not interfere with Small Wireless Facilities of any other users of that Smart Pole. Any Municipal use pursuant to this section shall include a reimbursement to the applicant, on an annual basis, of the costs, on a dollar-for-dollar basis, of providing the Borough with such access. Such costs shall be limited to the costs of providing electricity to the components used by the Borough and the costs of any repairs required to be made to the components used by the Borough, unless the repair costs are necessitated by the acts of the Applicant or subsequent owner of the structure, without regard to whether such acts are negligent or intentional.

Section Eleven.

All Ordinances or parts of Ordinances inconsistent with this Ordinance, to the extent of such inconsistencies only, be and the same hereby are repealed.

Section Twelve.

Notwithstanding any provision to the contrary, nothing in this code should be interpreted to have the effect of prohibiting or effectively prohibiting the deployment of broadband or other communications services

Section Thirteen.

This Ordinance shall take effective immediately upon final passage and publication as provided by law.

INTRODUCED/APPROVED ON FIRST READING

DATED: August 21, 2023

Jessica Morelos, R.M.C.
Clerk of the Borough of Sayreville

Daniel Balka, Councilman
(Admin. & Finance Committee)
Borough of Sayreville

ADOPTED ON SECOND READING

DATED: September 11, 2023

Jessica Morelos, R.M.C.
Clerk of the Borough of Sayreville

Daniel Balka, Councilman
(Admin. & Finance Committee)
Borough of Sayreville

APPROVAL BY THE MAYOR ON THIS _____ DAY OF _____, 2023.

Victoria Kilpatrick, Mayor
Borough of Sayreville

APPROVED AS TO FORM:

SEAN KEAN, ESQ., Borough Attorney

APPENDIX A

(Form of Approved Small Wireless Facility Right-of-Way Agreement)

**SMALL WIRELESS FACILITY AND/OR SMART POLE RIGHT-OF-WAY USE
AGREEMENT**

This Right-Of-Way Use Agreement ("Agreement") is made and entered into on _____, 20__ by and between the Borough of Sayreville ("Borough"), a body corporate and politic of the State of New Jersey, having its municipal offices at 167 Main Street, Sayreville, NJ 08872 and APPLICANT ("Licensee"), having a mailing address at APPLICANT ADDRESS.

Throughout this Agreement the Borough and Licensee each may be referred to as a "Party" and collectively may be referred to as the "Parties."

WITNESSETH

WHEREAS, the Borough is a municipality duly formed, organized and existing in accordance with the laws of the State of New Jersey; and

WHEREAS, the Borough possesses and exercises control over various permanent rights-of-way that are, or are planned to be, utilized for streets, roads and highways and those rights-of-way are depicted on the current Borough Tax Map and/or other maps and documents of public record; and

WHEREAS, various public utilities that are subject to the jurisdiction of the New Jersey Board of Public Utilities such as, by way of example and not by way of limitation, ELECTRIC COMPANY, have erected and maintain utility poles within the public rights-of-way in the Borough for use in connection with supplying and distributing electricity, telephone services, cable television, telecommunication services and/or other utilities pursuant to consent previously granted by the Borough; and

WHEREAS, Licensee does not presently have the right to maintain utility poles in any municipal right-of-way within the Borough or to otherwise use or occupy any municipal right-of-way within the Borough for any of its Small Wireless Facilities and/or Smart Poles, as hereinafter defined; and

WHEREAS, Licensee has petitioned the Borough for its consent to locate, place, attach, install, operate, control, maintain, upgrade and enhance its Small Wireless Facilities and/or Smart Poles in municipal rights-of-way as well as on utility poles and/or other facilities that are owned by third parties which already are located in municipal rights-of-way pursuant to municipally granted franchises or otherwise; and

WHEREAS, N.J.S.A. 48:3-18 provides that any person may enter into a written agreement with any other person owning utility poles erected under municipal consent in or along any street, highway or other public place for use by the former person and N.J.S.A. 48:3-19 requires that the former person obtain the consent of the municipality for use by the former person of the poles of another if the former person does not have the lawful right to maintain poles in such street, highway or public place; and

WHEREAS, as to those utility poles or structures that are owned by third parties and which are located in municipal rights-of-way pursuant to municipally granted franchises or otherwise, Licensee has provided the Borough with evidence, consisting of written agreements, that it has obtained consent from those third parties to use the utility poles or structures that are owned by those third parties; and

WHEREAS, consent for use of any street, avenue, park, parkway, highway or other public place may be granted by ordinance and not otherwise; and

WHEREAS, Borough Council adopted Ordinance #30-23 which authorizes the making and execution of this Agreement.

WHEREAS, the Borough established the order of preference for Small Wireless Facility attachments as 1. Existing or approved concealment or Smart Pole, 2. Wood Pole Attachment where option 1. is shown not to be viable, 3. new standalone, single-occupant pole where options 1. and 2. are shown not to be viable.

NOW, THEREFORE, for and in consideration of the covenants and obligations contained herein and for other good and valuable consideration, the receipt and sufficiency of which hereby is acknowledged, the Parties hereby agree as follows:

1. **Incorporation of Preamble.** All of the statements of the Preamble are repeated and are incorporated herein and are made apart hereof by this

reference thereto as if set forth at length.

2. **Definitions.** All definitions of words, terms and phrases that are set forth in the Communications Act of 1934, P.L. 73-416, as amended by various statutory enactments including, but not limited to, the Telecommunications Act of 1996 P.L. 104-104, are incorporated herein and are made apart hereof.

All definitions of words, terms and phrases that are set forth in the New Jersey Municipal Land Use Law, N.J.S.A. 40:550-1, et. seq., are incorporated herein and are made apart hereof.

In the event that a term, word or phrase is not defined in any of the aforementioned statutes and is not otherwise defined by this Agreement then that term, word or phrase shall have its common, ordinary meaning.

"County" means the County of Middlesex in the State of New Jersey.

"Borough" means the Borough of Sayreville in the County of Middlesex.

"Licensee" means NAME OF LICENSEE.

"Public Right-Of-Way" means the surface, the airspace above the surface and the area below the surface of any street, road, highway, lane, alley, boulevard or drive, including the sidewalk, shoulder and area for utilities owned by the Borough of Sayreville within an easement to the public or other easement owned by the Borough.

"Pole" means a wooden or metal pole that is used to support electrical wires, telephone wires, coaxial cables, fiber optic cables and the like.

3. **Grant of Consent.** In accordance with the provisions of N.J.S.A. 48:3-19, et. seq., and Borough Ordinance #30-23, and subject to obtaining the permission of the owner(s) of the affected Utility Poles, the Borough hereby grants approval and consent

to Licensee, its consultants, agents and contractors, to enter upon Public Rights-of-Way within the confines of the Municipality for the purpose of owning, constructing, attaching, operating, maintaining, removing, reattaching, reinstalling, relocating and replacing its Small Wireless Facilities that more particularly are depicted and are described in Section One: Definitions, made a part hereof, upon the Poles that are particularly identified in Section One: Definitions all of which Poles are located in Public Rights-Of-Ways and all of which Poles are owned by third parties. Licensee represents that it has obtained consent from the owners of the Utility Poles to utilize those Poles for the aforementioned purposes. Licensee shall furnish as Exhibit B the Borough with evidence of its Pole attachment agreement(s) made pursuant to N.J.S.A. 48:3-18 and/or N.J.S.A. 14:18-2.9, et. seq. Further, the Borough hereby grants approval and consent to Licensee, its consultants, agents and contractors, to enter upon Public Rights-of-Way within the confines of the Municipality for the purpose of constructing and owning, such new utility poles or new structures for the purposes attaching, operating, maintaining, removing, reattaching, reinstalling, relocating and replacing its Small Wireless Facilities that more particularly are depicted and are described in Section One: Definitions, made a part hereof. Nothing in this Agreement shall be construed as authorizing Licensee to own, construct, attach, operate, maintain, remove, reattach, reinstall, relocate and/or replace any Small Wireless Facility, Utility Pole or any other structure unless the Licensee first has obtained all permits and other approvals therefore, as required by all applicable laws and regulations. Nothing in this Agreement shall be construed as granting Licensee consent to utilize any rights-of-way over which the Borough lacks authority to grant consent such as any right-of-way over which the County or the State of New Jersey have exclusive authority. This Grant of Consent is a grant of consent generally to use the right of way but is not a grant of consent to place any specific facilities at any specific site. Exhibit A will contain the list of approved locations and installation details.

4. **Term.** The term of this Agreement shall be fifteen (15) years, commencing on _____, 202_, unless sooner terminated by either Party in accordance with the provisions of this Agreement. The term of this Agreement may be extended by mutual written agreement for up to four (4) successive terms of five (5) years each on the same terms and conditions as are set forth herein.

5. **Non-Exclusive License.** This Agreement is a non-exclusive license. It shall not be recorded. Any and all rights granted to Licensee under this Agreement shall be exercised at Licensee's sole cost and expense, shall be subject to the prior and continuing right of the Borough to use any and all parts of its Public Rights-of-Way exclusively or concurrently with any other person or entity and further shall be subject to all deeds, easements, dedications,

conditions, covenants, restrictions, encumbrances and claims of title of record which may affect the Public Rights-of-Way. Nothing in this Agreement shall be deemed to grant, convey, create or vest in Licensee a real property interest in any land, including any fee, leasehold interest or easement.

6. **Compliance with Laws; Required Permits; Utilities; Maintenance.**

(a) **Compliance with Laws.** Licensee shall comply with all applicable federal, state and Borough laws, administrative regulations, codes, zoning ordinances, ordinances, standards, specifications and requirements relating to the construction, installation, operation, maintenance and control of Licensee's Small Wireless Facilities, appurtenant equipment, structures and utility poles defined in Section One: Definitions, in the designated locations within the Public Rights-of-Way. Licensee shall not attach, install, maintain or operate any Small Wireless Facility and/or Smart Pole within any Public Right-of-Way without a permit therefore first having been issued by the Borough. Therefore, in the event that Licensee desires to construct, attach, install, maintain or operate any additional Small Wireless Facilities, Utility Poles, Smart Poles and/or structures within a Public Right-of-Way that is not defined in Section One: Definitions then such construction, attachment, installation, maintenance or operation first shall be approved by a majority vote of the governing body and permit therefore issued by the Borough prior to the commencement of such construction, attachment, installation, maintenance or operation of the Small Wireless Facilities, Utility Poles, Smart Poles and/or structures.

(b) **Required Permits.** If the attachment, installation, operation, maintenance or location of any Small Wireless facility by Licensee in any Public Right-of-Way requires any permit, including any Borough street opening permit, then Licensee, if required under applicable Borough ordinances, shall apply for the appropriate permit with the appropriate municipal official and shall pay the required fee therefore.

(c) **Utilities.** Licensee shall pay for all utilities used (and connections to said utilities) in connection with the installation, operation and maintenance of its Small Wireless Facilities and/or Smart Poles. Licensee agrees to take utility access from the nearest possible connection in order to minimize utilization of the Public Rights-of-Way.

(d) **Maintenance.** In the performance and exercise of its rights and obligations under this Agreement, Licensee, at its sole cost and expense, shall maintain its Small Wireless Facilities, its Utility Poles, Smart Poles, its structures and any real property utilized to access any of the foregoing in a safe and satisfactory condition as directed by, and to the satisfaction of, the Borough, including, but not limited to, removal of any debris generated by Licensee and replacement of any plants, trees or vegetation damaged or destroyed by Licensee. In the event that any of Licensee's Small Wireless Facilities, Smart Poles and/or appurtenances thereto, its Utility Poles or its structures causes damage to any Public Right-of-Way or interferes with the performance of any of the Borough's public duties or other uses of the Public Rights-of-Way, Licensee agrees, upon notice from the Borough, to promptly commence and complete all necessary repairs to cure any such damage at Licensee's sole cost and expense. If Licensee fails to repair the damage within 45 days after receiving notice from the Borough or if an emergency necessitates immediate repair of the damage then the Borough, in its sole discretion, may perform the repair work itself in which case Licensee shall reimburse the Borough for the cost of the repair work within thirty (30) days after receiving a statement detailing such costs.

7. **Removal and Relocation.** Within 30 days following written notice from the Borough, Licensee, at its own expense, shall temporarily or permanently remove, relocate, change or alter the position of any of its Small Wireless Facilities, Utility Poles, Smart Poles and/or structures if the Borough determines that (a) such removal, relocation, change or alteration, is reasonably necessary for the construction, repair, maintenance, or installation of any Borough improvement in or upon, the Public Right-of-Way; or (b) because the Small

Wireless Facilities, Utility Poles, Smart Poles and/or structures are interfering with or adversely affecting proper operation of street lighting, traffic signaling or other poles; or (c) the widening of the Public Right-of-Way necessitates such removal, relocation, change or alteration. In such instance, the Borough shall cooperate with Licensee to find a replacement location for its Small Wireless Facilities and/or Smart Poles that will provide similar radio frequency coverage as is provided by the Small Wireless facilities and/or Smart Poles to be removed or relocated. Once the emergency condition no longer exists Licensee shall apply for any permit for the work that was performed during the emergency that it would have had to secure for said work prior to performing said work in the absence of the emergency.

8. **Emergent Conditions.** Licensee shall maintain all of its Small Wireless facilities, Utility Poles, Smart Poles and structures at Licensee's sole cost and expense. The noncompliance with normally required procedures for securing a required permit shall be excused when Licensee reasonably determines that an emergency exists. If an emergency creates a hazard on the traveled portion of the Public Right-of-Way, then Licensee shall take immediate steps to provide all necessary protection for traffic on the roadway including the use of signs, lights, barricades or flaggers. Licensee shall, as soon as practical, notify the Borough's Engineer, Construction Official, or their designees, and the Borough Police Department of the emergency, informing them as to what steps have been taken for protection of the traveling public and what will be required to make the necessary repairs. On nights and weekends the Licensee shall notify the Borough Police Department of an emergency if the Borough Engineer and Construction Official are unavailable. If the nature of the emergency is such as to interfere with the free movement of traffic, the Borough Police Department shall be notified immediately, prior to any other action being taken. To the extent that the Borough has actual knowledge of the displacement or damage to any of Licensee's Small Wireless Facilities, Utility Poles, Smart Poles or structures, it shall inform Licensee upon learning of the same.

9. **Personal Property Owned by Licensee.** All Small Wireless Facilities, Utility Poles, Smart Poles and structures covered under this Agreement shall be considered personal property and shall remain the property of and shall be under the dominion and control of the Licensee. Such personal property may not be utilized by any third party without the express prior written consent of Licensee, but Licensee, upon the request of the Borough and at no cost to Licensee, shall cooperate with any third party in collocating the third party's equipment upon any Utility Pole or structure upon which Licensee has installed any Small Wireless facility and/or Smart Pole.

10. **Insurance and Indemnity.**

(a) Licensee shall secure and maintain commercial general liability insurance or self-insurance with limits of \$2,000,000 for injury or death on one or more persons in any one occurrence and in the aggregate and \$2,000,000 for damage or destruction in any one occurrence and in the aggregate insuring Licensee as named insured and listing the Borough as an included insured on the policies. The Borough's included insured status shall (i) be limited to bodily injury, property damage or personal and advertising injury caused, in whole or in part, by Licensee, its employees, agents or independent contractors; (ii) not extend to claims for punitive or exemplary damages arising out of the acts or omissions of the Borough, its employees, agents or independent contractors or where such coverage is prohibited by law or to claims arising out of the gross negligence of the Borough, its employees, agents or independent contractors; and, (iii) not exceed Licensee's indemnification obligation under this Agreement, if any. Notwithstanding the forgoing, Licensee may, in its sole discretion, self-insure any of the required insurance under the same terms as required by this Agreement. In the event Licensee elects to self-insure its obligation under this Agreement to include the Borough as an additional insured, the following conditions apply: (i) the Borough shall promptly and no later than thirty (30) days

after notice thereof provide Licensee with written notice of any claim, demand, lawsuit, or the like for which it seeks coverage pursuant to this Section and provide Licensee with copies of any demands, notices, summonses, or legal papers received in connection with such claim, demand, lawsuit, or the like; (ii) the Borough shall not settle any such claim, demand, lawsuit, or the like without the prior written consent of Licensee; and (iii) the Borough shall fully cooperate with Licensee in the defense of the claim, demand, lawsuit, or the like.

(b) Certificates of the insurance required by this paragraph 10, along with the evidence of financial ability to self-insure as described in paragraph (a) above, if applicable, shall be provided to the Borough within ten (10) days following the effective date of this Agreement and prior to obtaining any permits required under paragraph 6(b).

Thereafter, and so long as this Agreement remains executory, Licensee shall provide certificates of insurance or of self-insurance reflecting the requirements of this paragraph to the Borough within ten (10) days following receipt of a written request from the Borough. Production of a certificate of self-insurance always shall be accompanied by the evidence of ability to self-insure that is described in paragraph 10(a) above. Should any policy of insurance on which the Borough is an included insured be cancelled before the expiration date thereof then Notice of the cancellation shall be provided to the Borough in accordance with the policy provisions by Licensee or by its affiliated parent or by the insurer.

(c) Licensee agrees to indemnify and hold harmless the Borough against any claim of liability or loss from personal injury or property damage to the extent directly resulting from or arising out of the negligence or willful misconduct of the Licensee, its employees, contractors or agents, except to the extent such claims or damage may be due to or caused by the negligence or willful misconduct of the Borough, or its employees, contractors or agents. The Borough will provide the Licensee with prompt, written notice of any claim covered by this indemnification and

hold harmless provision; provided that any failure of the Borough to provide any such notice, or to provide it promptly, shall not relieve the Licensee from its indemnification and hold harmless obligation in respect of such claim, except to the extent the Licensee can establish actual prejudice and direct damages as a result thereof. The Borough shall cooperate with the Licensee in connection with the Licensee's defense of such claim. The Licensee shall defend the Borough, at the Borough 's request, against any claim with counsel of the Borough 's choosing that is reasonably satisfactory to the Licensee.

(d) The legal liability of the Licensee to the Borough and any person for any of the matters that are the subject of the insurance policies required by this paragraph shall not be limited by such insurance policies or by the recovery of any amounts thereunder, however neither the Borough nor the Licensee shall be liable to the other for consequential, incidental, exemplary or punitive damages on account of any activity pursuant to this Agreement.

11. **No Waiver of Breach of Remedies.** No waiver by a Party of any breach of this Agreement or of any representation hereunder by the other Party shall be deemed to be a waiver of any other breach by the other Party (whether preceding or succeeding and whether or not of the same or similar nature), and no acceptance of performance by a Party after any breach by the other Party shall be deemed to be a waiver of any breach of this Agreement or of any representation hereunder by the other Party whether or not the first Party knows of such breach at the time it accepts such performance. No failure or delay by a Party to exercise any right it may have by reason of the default of the other Party shall operate as a waiver of default or modification of this Agreement or shall prevent the exercise of any right by the first Party while the other Party continues to be so in default. Any remedy that either Party may have by reason of a breach of any provision of this Agreement by the other Party at all times shall be preserved and may not be waived.

12. **Mediation of Disputes.** In the event of any dispute concerning the

interpretation of the terms of this Agreement or of the obligations of either Party under this Agreement, the Parties shall attempt in good faith to resolve such dispute via consultation between their designated representatives. If such consultation fails to resolve the dispute, then the Parties agree to submit the dispute to mediation. The mediation shall be initiated by one Party serving the other Party with a written demand to mediate. The mediation demand shall include the initiating Party's designation of a mediator. Within fourteen (14) days of receipt of the mediation demand the Party receiving the mediation demand shall either agree to the mediator designated by the other Party or shall provide the other Party with its written designation of a mediator. Thereafter, the designated mediators immediately shall jointly designate a third mediator who shall be either a New Jersey licensed attorney-at-law or a retired judge of the Superior Court of New Jersey. Payment of mediation fees, costs and expenses shall be split evenly amongst the Parties. The mediated resolution of the dispute may include a provision that provides for something other than an even split of the mediation fees, costs and expenses.

13. **Severability.** If any provision of this Agreement or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Agreement nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law.

14. **Governing Law.** This Agreement shall be governed, construed and interpreted by, through and under the laws of the State of New Jersey without reference to conflict of law principles, except in such instances when the laws of the United States preempt the laws of the State of New Jersey and all actions, suits and litigation arising under the terms of this Agreement shall be litigated in the Superior Court of New Jersey, Middlesex County, or in the United States District Court for the District of New Jersey (Camden), but no such litigation shall be initiated by a Party until there has been compliance with the mediation provisions of this Agreement that are set forth above. In the event of litigation

arising out of this Agreement, the prevailing party shall not be entitled to recover its costs of suit and attorney's fees from the non-prevailing party unless such recovery is specifically and expressly provided for by a statute of the United States or a statute of the State of New Jersey.

15. **Entire Agreement.** This Agreement contains the entire understanding between the parties, and such understanding may not be modified or terminated except in writing and signed by all parties to this Agreement.

16. **Notice.** Any notice required or permitted under this Agreement or under state or federal law shall be deemed sufficiently given or served if sent by United States certified mail, return receipt requested or by a nationally-recognized overnight delivery service. The Borough and Licensee may change the address required for service of any notice by providing the other party to this Agreement with a new address for sending and receiving of required notices under this Agreement. No notice required under this Agreement may be served validly by email. All notices to the Borough or Licensee shall be delivered to the following addresses:

Borough of Sayreville: Jessica Morelos, R.M.C.
 167 Main Street
 Sayreville, New Jersey 08872

Licensee: INSERT NAME AND ADDRESS

With a copy to: INSERT NAME AND ADDRESS

17. **Emergency Contact Information for Licensee.** The emergency telephone contact number to reach Licensee 24 hours per day, seven days per week, is: **INSERT PHONE NUMBER**. Should that number be disabled or revised for any reason, Licensee shall give the Borough immediate notice of an alternate emergency contact telephone number. Additionally, Licensee may be reached during business hours as follows:

INSERT ADDITIONAL CONTACT INFORMATION

18. **Assignment.** Licensee may sell, assign or transfer this Agreement without the need for any approval or consent of the Borough to Licensee's principal, affiliates, subsidiaries of its principal or to any entity which acquires all or substantially all of Licensee's assets in the market defined by the Federal Communications Commission in which the Borough is located by reason of a merger, acquisition or other business reorganization. Except as provided in the previous sentence, Licensee may not assign this Agreement without the prior express written consent of the Borough, which consent shall not be unreasonably withheld, conditioned, or delayed after written notice to the Borough of the request. The terms and conditions herein contained shall be binding upon and inure to the benefit of the permitted successors and assigns of the Parties hereto.

19. **Miscellaneous.**

a. This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and all those who succeed to their rights and responsibilities, including their respective successors in interest.

b. The headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement and shall not be deemed to explain, modify, amplify or otherwise alter the substance of this Agreement.

c. Borough and Licensee each acknowledge that they have had adequate opportunity to review the contents of this Agreement with legal counsel and have executed this Agreement with full and complete understanding of its terms.

d. This Agreement (and all exhibits thereto) is deemed to have been jointly prepared by the Parties hereto, and any uncertainty or ambiguity existing herein, if any, shall not be interpreted against any Party, but shall be interpreted according to the application of the rules of interpretation

for arm's-length agreements.

20. **Execution.** Each Party represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform its respective obligations under this Agreement. This Agreement may be executed in one or more counterparts, each of which should be deemed an original, but which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, and in order to bind themselves to the terms and conditions of this Agreement, the Parties have caused this Agreement to be executed by their proper corporate officers and their corporate seals have been affixed hereto on the date first set forth above.

ATTEST:

Borough of Sayreville

Jessica Morelos, RMC
Municipal Clerk

ATTEST:

INSERT LICENSEE NAME

, Witness