

ORDINANCE NO. 2023-3388

TOWNSHIP OF MIDDLETOWN'
COUNTY OF MONMOUTH

ORDINANCE AMENDING AND SUPPLEMENTING THE CODE OF THE
TOWNSHIP OF MIDDLETOWN ESTABLISHING PROCEDURES AND
STANDARDS REGARDING DEPLOYMENT OF SMALL WIRELESS
FACILITIES WITHIN PUBLIC RIGHTS-OF-WAY

WHEREAS, the wireless communications industry has expressed interest in submitting applications to utilize space in public rights-of-way within the Township of Middletown (the "Township") for the installation of small cell wireless telecommunications facilities ("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 nationwide 5G facilities network; and

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

WHEREAS, the Township recognizes that Small Wireless Facilities often are most effectively deployed in public rights-of-way and that the rules and regulations of the Federal Communications Commission ("FCC") require municipalities to make rights of way available subject to local police power regulations; and

WHEREAS, multiple installations of Small Wireless Facilities within the public rights-of-way can adversely 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 Township; and

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

WHEREAS, a September 2018 Ruling and Order of the FCC and subsequent federal court decisions impacting that ruling impose certain restrictions and preemptions on the exercise of local authority when dealing with small wireless facilities; and

WHEREAS, the Township needs to amend its code to address the legal and practical issues that arise in connection with multiple Small Wireless Facility installations deployed in public rights-of-way to protect the health, safety and welfare of its residents and visitors.

NOW, THEREFORE, BE IT ORDAINED by the Township Committee of the Township of Middletown in the County of Monmouth, State of New Jersey, as follows:

Section 1. 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 under 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:

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

Public Right-of-Way - 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 Township.

Small Wireless Facility - as defined by 47 C.F.R § 1.6002(1) as it may be amended. Small wireless facility means a wireless facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than 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 6 cubic feet; and (ii) all other wireless equipment attached directly to a utility pole associated with the facility is cumulatively no more than 25 cubic feet in volume. 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).

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 Township.

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

- A. No person shall place a Small Wireless Facility 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 Township Planning Director 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 in a public right-of-way shall not be issued by the Township Planning Director 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-19, et seq., and the administrative regulations adopted thereunder, Chapter 382, Article V, Street Openings, of the Code of the Township, 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 Township Planning Director 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. 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. The Township Planning Director 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 Township 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 in a public right-of-way shall be issued to any Applicant unless the Township, in the manner prescribed by applicable laws, has granted to the siting permit Applicant its consent to use public rights-of-way within the Township. No siting of a Small Wireless Facility shall be permitted within 500 feet of another Small Wireless Facility 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 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 municipality. Responsibility for judging proof of said claims lies solely with the municipality and/or its chosen representative(s).

Section 3. 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 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 municipality. Responsibility for judging proof of said claims lies solely with the municipality 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 as defined in this ordinance. A replacement pole is a new structure.

- C. No application for a Small Wireless Facility 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 Township's Wireless Siting Plan, which can be found on file with the Township Planning Director. All Small Wireless Facilities are prohibited in all Township Historic Districts as set forth on the Township's Wireless Siting Plan. All Small Wireless Facilities must be placed within a 25-foot radius of those specific locations set forth on the Township's Wireless Siting Plan. No more than one 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 feet of another. Any claims of carriers of technical incompatibility or inability to comply with this requirement need to be proven by the carrier, not disproven by the municipality. Responsibility for judging proof of said claims lies solely with the municipality and/or or its chosen representative(s).

Section 4. Siting Permit Application Process.

- A. **Application Filing.** An application for a siting permit to place one or more Small Wireless Facility within a right-of-way shall be made on forms which shall be available from the Township's Planning Director. The application, along with the required application fee and the required escrow fee, shall be filed with the Township's Planning Director. Immediately upon receipt of an application, the Township's Planning Director shall provide copies of the application and all supporting documents that were submitted by the Applicant with the application, to the Township Engineer, Zoning Officer, Construction Official and the Township Attorney.

- B. **Application Form.** The Small Wireless Facility 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 all of 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, existing structure and new structure work to be performed. 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, subservice 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 Township, or a designee of the Township, 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.
 6. 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.
 7. 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 in rights-of-way, may file a batched application for up to 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 5. Procedure on Permit Application; No Exclusive Rights.

- A. The Township shall review the application for a Small Wireless Facility siting permit considering its conformity with the provisions of this Ordinance.
- B. Within 10 days of receiving an application, the Township's Planning Director shall determine and notify the Applicant whether its application is complete, and if incomplete, what specific information is missing.
- C. The Township shall make its final decision to approve or deny a complete Application within the following timeframes:

- (1) Within 60 days from the submission of a complete application to install a Small Wireless Facility upon one or more existing structures.
- (2) Within 90 days from the submission of a complete application to install a Small Wireless Facility upon one or more new structures.
- (3) Within 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 the Township. Such consent shall be set forth on a form for such purposes which shall be available from the Township's Planning Director. Such consent on behalf of the Township shall be exercised by the Township Planning Director in their reasonable discretion.

- D. The Township's Planning Director 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 Township Attorney, from federal, state, or local laws, administrative regulations or codes as to why the Application was denied.
- E. Notwithstanding an initial denial, the Applicant may cure any deficiencies identified by the Township within 30 days of the denial without paying an additional application fee, provided the Township's Planning Director shall approve or deny the revised application within 30 days of receipt of the amended application which shall be limited to the deficiencies specified in the original notice of denial.
- F. A siting permit from the Township 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 Township for the delivery of telecommunications services or for any other purpose.
- G. 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 deployment.

Section 6. Duration.

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

Section 7. Routine Maintenance and Replacement.

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

- A. Routine maintenance of a Small Wireless Facility.
- B. The replacement of a Small Wireless Facility with another Small Wireless Facility 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 Township 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 Township and/or the other provider, as the case may be, to proceed is provided to the Township, which authorization to proceed shall not unreasonably be withheld by the Township and/or the other provider.
- D. Provided further that if the replacement of a Small Wireless Facility with another Small Wireless Facility includes replacement of the structure to which the Small Wireless Facility 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 8. Fees.

- A. **Application Fees.** All applications for approval and issuance of a Small Wireless Facility siting permit pursuant to this ordinance shall be accompanied by a fee as follows:
 - i. For applications that do not include the installation of any new structures within a right-of-way the application fee shall be \$500 for up to five Small Wireless Facilities with an additional \$100 for each Small Wireless Facility beyond five.
 - ii. For applications that include the installation of a new structure within a right-of-way the application fee shall be \$1000 for up to five Small Wireless Facilities with an additional \$100 for each Small Wireless Facility beyond five.
- A. **Other Fees.** No pole attachment fees will be assessed by the Township unless and until an applicant applies for pole attachment to a Township-owned pole.

Section 9. 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 siting permit shall be accompanied by an escrow fee as follows:
 - i. For applications whose proposed Small Wireless Facility deployment(s) will not require a street excavation permit pursuant to Chapter 428, Streets and Sidewalks, Article 1, Street Excavations, as amended and supplemented: \$5,000.
 - ii. For applications whose proposed Small Wireless

Facility deployment(s) will require a street opening permit pursuant to Chapter 428, Streets and Sidewalks, Article 1, Street Excavations, as amended and supplemented: \$7,500.

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 Township'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 Township for all fees, costs and expenses of third-party professionals and consultants incurred and paid by the Township for the review process of a Small Wireless Facility siting permit application, such as, but not limited to:

- i. Professional fees for reviews by third-party professionals or consultants of applications, plans and accompanying documents.
- ii. Issuance of reports or analyses by third-party professionals or consultants to the Township of Middletown setting forth recommendations resulting from the review of any documents submitted by the Applicant.
- iii. 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.
- iv. Review of additional documents submitted by the Applicant and issuance of reports or analyses relating thereto.
- v. Review or preparation of right-of-way use agreements, easements, deeds, right-of-way municipal consent ordinances or resolutions and any and all other like or similar documents.
- vi. Preparation for and attendance at all meetings by third-party professionals or consultants serving the Township, such as the Township Attorney, Township Engineer and Township Planner or other experts as required.

C. The escrow account deposits shall be placed in a separate account by the Township's Chief Financial Officer at the request of the Township's Planning Director and an accounting shall be kept of each Applicant's deposit.

- i. Upon either final denial of a Small Wireless Facility siting permit application or upon issuance of a Small Wireless Facility siting permit, any monies 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 Township.
- ii. If at any time during the application review process

75% of the escrow 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.

- iii. No Small Wireless Facility 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.
- iv. 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.

Section 10. Municipal Access to New Structures.

An Applicant whose siting permit includes the installation of any new Smart Pole structure of any of the types defined by this ordinance shall provide the Township with access to space within the Smart Pole structure for the purpose of deploying the Township's own equipment including but not limited to, public access Wi-Fi, 911 call service or security cameras. Notwithstanding the foregoing, the Township's use shall not interfere with Small Wireless Facilities of any other users of that Smart Pole. Any Township 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 Township with such access. Such costs shall be limited to the costs of providing electricity to the components used by the Township and the costs of any repairs required to be made to the components used by the Township, 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 11. Severability.

If any section, subsection or paragraph of this ordinance be declared unconstitutional, invalid or inoperative, in whole or in part, by a court of competent jurisdiction, such chapter, section subchapter or paragraph shall to the extent that is not held unconstitutional, invalid or inoperative remain in full force and effect and shall not affect the remainder of this ordinance.

SECTION 12. Repealer.

All ordinances and resolutions, and parts of ordinances and resolutions which are inconsistent with provisions of this ordinance shall be, and are hereby, repealed to the extent of any such inconsistency.

SECTION 13. Effective Date.

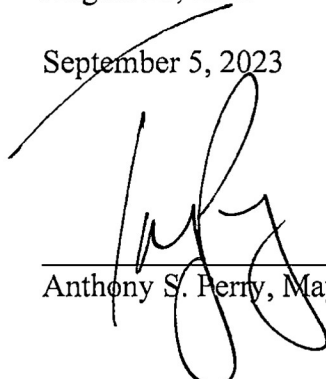
This ordinance shall take effect upon final adoption and publication in accordance with law.

PASSED ON FIRST READING:

August 21, 2023

PASSED AND APPROVED:

September 5, 2023



Anthony S. Perry, Mayor

ATTEST:



Heidi R. Pieluc, Township Clerk