

Ordinance No. 18 of 2022 was tabled at the April 20, 2022 Public Hearing for further consideration at a Public Hearing to be held on May 4, 2022

Egg Harbor Township

Ordinance No. 18

2022

An ordinance to amend the Code of the Township of Egg Harbor, specifically Chapter 195 entitled “Streets and Sidewalks” by adding a new Article VII entitled “Siting of Poles, Cabinets and Antennas”

WHEREAS, the Township of Egg Harbor (“Township”) 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 Township 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”; and

WHEREAS, the Township has determined that its Municipal 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 municipal Rights-of-Way pursuant to N.J.S.A. 48:17-10; and

WHEREAS, the Federal Highway Administration has acknowledged the problem of overburdening the Municipal Right-of-Way 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 7, 2018); 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 review and approval for the placement of Small Cells on Existing Poles and the placement of New Poles and Cabinets in the Municipal Right-of-Way; and

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

WHEREAS, 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 Municipal Right-of-Way when it comes to aesthetics and the ability of the public to pass and repass over same; and

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

WHEREAS, the FCC in its recent order provides that municipalities can impose aesthetic and location 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 Township'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 Township 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 Township 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.

BE IT ORDAINED, by the Township Committee of the Township of Egg Harbor, in the County of Atlantic, New Jersey as follows:

SECTION 1. Chapter 195 "Streets & Sidewalks" of Code of the Township of Egg Harbor is hereby amended through the addition of new **Article VII** entitled "**Siting of Poles, Cabinets and Antennas in the Municipal Right-of-Way**" as follows:

Article VII

Siting of Poles, Cabinets and Antennas in the Municipal Right-of-Way

§195-36 Definitions.

"Anticipated Municipal Expenses" means the cost of processing an application for a Right-of-Way Permit including, but not limited to, all professional fees such as engineering and attorney costs incurred by the Township.

"Cabinet" shall mean a small box-like or rectangular structure used to facilitate utility or wireless service from within the Municipal Right-of-Way.

"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.

"Existing Pole" shall mean a pole that is in lawful existence within the Municipal Right-of-Way.

"Ground Level Cabinets" shall mean a Cabinet that is not attached to an existing pole and is touching or directly supported by the ground.

"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 Township as an easement or in fee simple ownership. This term also includes rights-of-way held by the County of Ocean where the Township's approval is required for the use of same pursuant to N.J.S.A. 27:16-6. This term shall not include private roadways.

“Pole” shall mean a long, slender, rounded piece of wood, concrete or metal.

“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.

“Pole Mounted Cabinet” shall mean a Cabinet that is proposed to be placed on an Existing or Proposed Pole.

“Proposed Pole” shall mean a Pole that is proposed to be placed in the Municipal Right-of-Way.

“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.

“Right-of-Way Permit” shall mean an approval from the Township setting forth applicant’s compliance with the requirements of this Article.

“Surrounding Streetscape” shall mean Existing Poles within the same right-of-way which are located within five hundred linear (500) feet of the Proposed Pole. Poles carrying electric transmission lines shall not be considered part of the “Surrounding Streetscape.”

“Township Committee” shall mean the Township Committee of the Township of Egg Harbor.

“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.

“Utility Service” shall mean electric, telephone, or cable service.

“Zone, Non-Residential” shall mean the PB-1, POR-LI, WTHD, WTB-1, WTOP, OR-LI, HD-10, HD-3/3A, O-P, B-1, TC, MP, and L1 zones as designated in Article IV of Chapter 245 of the Revised General Ordinances of the Township of Egg Harbor.

“Zone, Residential” shall mean any zones permitting single family, two family, or multifamily residences, assisted-living residences, nursing homes, and/or residential health care facilities.

§195-37 Access To Right-of-Way, Right-of-Way Agreements.

- A. No person shall operate or place any type of Pole Mounted Antenna, Cabinet or Pole 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:

- 1) A term not to exceed 15 (fifteen) years;
- 2) Reasonable insurance requirements;
- 3) Fine for unauthorized installations;
- 4) A reference to the siting standards as set forth in this Article; and
- 5) Any other items which may reasonably be required.

§195-38 Application to Utilities Regulated by the Board of Public Utilities.

Notwithstanding any franchise or Right-of-Way Agreement to the contrary, all Antennas, Poles and Cabinets proposed to be placed within the Municipal Right-of-Way by a Utility Regulated by the Board of Public Utilities, or any other entity with legal access to the Municipal Right-of-Way, shall be subject to the standards and procedures set forth in this Article and shall require Right-of-Way Permits for the siting of Poles, Antennas and Cabinets in the Municipal Right-of-Way.

§195-39 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
 - 1) Height. No Pole shall be taller than thirty five (35) feet or 110% of the average height of Poles in the Surrounding Streetscape, whichever is higher.
 - 2) Location, Safety and Aesthetics. No Pole shall be erected in the Right-of-Way unless it:
 - a) Is used to bring Utility Service across the Right-of-Way to an existing or proposed development from an Existing Pole; or
 - b) Is replacing an Existing Pole; or
 - c) Located on the opposite side of the street from the Electric Distribution System; and
 - d) For sites in Residential Zones, is two hundred linear feet from any other Existing Pole or Proposed Pole along the same side of the street, or for sites in Non-Residential Zones is one hundred linear feet from any other Existing Pole or Proposed Pole along the same side of the street; and
 - e) Is not located in an area with underground utilities; and
 - f) Does not inhibit any existing sight triangles or sight distance; and
 - g) Allows adequate room for the public to pass and re-pass across the Municipal Right-of-Way; and
 - h) 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.

- 3) Application of Pinelands Regulations to Proposed Poles. Notwithstanding the standards set forth in subsection (ii) of Section 372-38(b), no Pole shall be sited in a manner inconsistent with Subchapter 5 and 6 of the Pinelands Comprehensive Manage Plan (N.J.A.C. 7:50-5 and 6 *et seq.*)

C. Ground Level Cabinet Site Standards

- 1) Ground Level Cabinets are prohibited in Residential Zones.
- 2) Ground Level Cabinets are permitted in Non-Residential Zones provided that each Ground Level Cabinet:
 - a) Is less than twenty-eight cubic feet in volume; and
 - b) 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
 - c) Does not inhibit any existing sight triangles or sight distance; and
 - d) Allows adequate room for the public to pass and repass across the Municipal Right-of-Way.

D. Pole Mounted Antenna and Pole Mounted Cabinet Siting Standards

- 1) Pole Mounted Antennas are permitted on Existing Poles in all zones, provided that each Pole Mounted Antenna:
 - a) Does not exceed three (3) cubic feet in volume; and
 - b) 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
 - c) Does not inhibit sight triangles or sight distance; and
 - d) Allows adequate room for the public to pass and repass across the Municipal Right-of-Way.
- 2) Pole Mounted Cabinets are permitted on Existing Poles in all zones, provided that each Pole Mounted Cabinet:
 - a) Does not exceed sixteen (16) cubic feet; and
 - b) 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
 - c) Does not inhibit sight triangles or sight distance; and
 - d) Allows adequate room for the public to pass and repass across the Municipal Right-of-Way.
- 3) The Township may also require that a Permittee provide a certification from a licensed engineer attesting to the structural integrity of any Pole Mounted

Antenna or Pole Mounted Cabinet and the structure on which it is proposed to be mounted.

§195-40 Application Process.

- A. Pre-Application Meeting- Prior to making a formal application with the Township for use of the Municipal Right-of-Way, all applicants are advised to meet with the Township Engineer to review the scope of applicant's proposal.
- B. The Township Committee 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 which trigger Federal Communications Commission shot clock rules pursuant to 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 shall be processed on an expedited basis.
- D. Every application for a Proposed Pole shall be deemed incomplete upon filing unless same includes:
 - 1) A stamped survey prepared by a New Jersey licensed surveyor demonstrating that any such Proposed Pole is located within the Municipal Right-of-Way.
 - 2) For sites within the Pinelands Area, a certificate of filing from the New Jersey Pinelands Commission.
- E. The Township Engineer shall review applications made pursuant to this Article and advise the Township Committee of his or her recommendation to approve or disapprove same. If he or she recommends that an application be disapproved, the factual basis for that recommendation must be transmitted to the Township Committee in writing.
- F. If the Township Committee denies any application made under this Section, it shall do so in writing and set forth the factual basis therefor.

§195-41 Waiver.

- A. Except for standard set forth in Subchapter 5 and 6 of the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50-5 and 6 et seq.), the Township Committee may waive any siting standard set forth in Section 195-39 where the applicant demonstrates that strict enforcement of said standard:
 - 1) Will prohibit or have the effect of prohibiting any interstate or intrastate telecommunications service pursuant to 47 U.S.C. 253(a); or

- 2) Will prohibit or have the effect of prohibiting personal wireless service pursuant to 47 U.S.C. 332(c)(7)(B)(i)(II); or
- 3) 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.

§195-42 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:
 - 1) One (1) to five (5) collocation sites on Existing Poles- \$500.00.
 - 2) Each additional collocation site on an Existing Pole- \$100.00.
- B. Deposit Towards Anticipated Municipal Expenses
 - 1) In addition to the Right-of-Way Permit Fee, the Township Engineer 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.
 - 2) Applicant's Deposit Towards Anticipated Municipal Expenses shall be placed in an escrow account. If said deposit contains insufficient funds to enable the Township to perform its review, the Chief Financial Officer of the Township shall provide applicant a notice of insufficient balance. In order for review to continue, the applicant shall, within ten (10) days post a deposit to the account in an amount to be mutually agreed upon.
 - 3) The Chief Financial Officer shall, upon request by the applicant, and after a final decision has been made by the Township Committee regarding his or her pending Right-of-Way Permit application, and subject to review by the Township Engineer, refund any unused balance from applicant's Deposit Towards Anticipated Municipal Expenses.

§195-43 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, or the owner of any existing pole on which the facility may be mounted.

- 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 revised ordinances of the Township of Egg Harbor or state statutes.
- C. The Township'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 Township.
- D. Applicant must comply with all applicable state, local and federal regulations including, but not limited to, the New Jersey Pinelands Preservation Act (N.J.S.A. 13:18A-1).

§194-44 Proposed Poles- Pinelands Commission Process.

- A. Application submission and modification. Where a Proposed Pole is located within a Pinelands Area, written notification shall be given by the Township, by email or regular mail, to the Pinelands Commission within seven days after a determination is made by the Township that an application for a Right-of-Way Permit for the siting of a Proposed Pole is complete or if a determination is made by the Township Engineer that the application has been modified. Said notice shall contain:
 - 1) The name and address of the applicant;
 - 2) The legal description and street address, if any, of the parcel that the applicant proposes to development;
 - 3) A brief description of the proposed development, including uses and intensity of uses proposed;
 - 4) The application number of the Certificate of Filing issued by the Pinelands Commission and the date on which it was issued;
 - 5) The date on which the application, or any change thereto, was filed, and any application number or other identifying number assigned to the application by the approval agency;
 - 6) The approval agency with which the application or change thereto was filed;
 - 7) The content of any change made to the application since it was filed with the Commission, including a copy of any revised plan or reports; and
 - 8) The nature of the municipal approvals being sought.
- B. Meetings and hearings. Where a meeting, hearing or other formal proceeding on an application for a Right-of-Way Permit in the Pinelands Area is required, the applicant shall provide notice to the Pinelands Commission by email, regular mail or delivery of the same to the principal office of the Commission at least five days prior to such

meeting, hearing or other formal proceeding. Such notice shall contain at least the following information:

- 1) The name and address of the applicant;
- 2) The application number of the Certificate of Filing issued by the Pinelands Commission and the date on which it was issued;
- 3) The date, time and location of the meeting, hearing or other formal proceeding;
- 4) The name of the approval agency, or representative thereof, that will be conducting the meeting, hearing or other formal proceeding;
- 5) Any written reports or comments received by the approval agency on the application for development that have not been previously submitted to the Commission; and
- 6) The purpose for which the meeting, hearing or other formal proceeding is to be held.

C. Notice of approvals and denials. The Pinelands Commission shall be notified of all approvals and denials of the Township Committee's determination related to an application for a Right-of-Way Permit in the Pinelands Area. The applicant shall, within five days of the approval or denial, give notice by email or regular mail to the Pinelands Commission. Such notice shall contain the following information:

- 1) The name and address of the applicant;
- 2) The legal description and street address, if any, of the parcel that the applicant proposes to develop;
- 3) The application number of the Certificate of Filing issued by the Pinelands Commission and the date on which it was issued;
- 4) The date on which the Township Committee's approval or denial was issued;
- 5) Any written reports or comments received by the approval agency on the application for development that have not been previously submitted to the Commission;
- 6) Any revisions to the application not previously submitted to the Commission; and
- 7) A copy of the resolution, Right-of-Way Permit, or other documentation of the approval or denial. If the application was approved, a copy of any preliminary or final plan, plot or similar document that was approved shall also be submitted.

D. Review by the Pinelands Commission.

- 1) Upon receipt by the Pinelands Commission of the notice of approval, the Applicant's application for a Right-of-Way permit shall be reviewed in accordance with the provisions of N.J.A.C. 7:50-4.36 through 7:50-4.42. The approval or denial of the Township shall not be effective, and no development shall be carried out prior to a determination of whether the development approval will be reviewed by the Commission. If the applicant is notified that the Commission will review the application, no development shall be carried out until such review has been completed.
- 2) Pursuant to N.J.A.C. 7:50-4.1(b) and until January 4, 1991, approvals issued by the Pinelands Development Review Board or the Pinelands Commission under the Interim Rules and Regulations shall serve as the basis for Pinelands Commission review of local approvals under this section.
- 3) Although the Pinelands Commission shall be notified of all denials, no such denial actions are subject to further review and action by the Pinelands Commission.
- 4) Effect of Pinelands Commission's decision on Township's approval of Right-of-Way Permit. If the Pinelands Commission disapproves an application for development which was previously approved by the Township by way of Right-of-Way Permit, such approval shall be automatically revoked. If the Pinelands Commission approves the decision of the Township Committee related to an application for a Right-of-Way Permit, subject to conditions, the Township Committee, shall, within 30 days, modify its approval to include all conditions imposed by the Pinelands Commission; and if final approval of the application is required, shall grant final approval only if the application for approval demonstrates that the conditions specified by the Pinelands Commission have been met by the applicant.

- E. Participation of Pinelands Commission in Township Committee meetings. The Pinelands Commission may participate in a hearing held in Egg Harbor Township involving the issuance of a Right-of-Way Permit pursuant to N.J.A.C. 7:50-4.26.

SECTION 2. All ordinances and parts of Ordinances inconsistent herewith are hereby repealed.

SECTION 3. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by a Court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

SECTION 4. This Ordinance shall take effect upon final passage, adoption and publication in the manner prescribed by law.

NOTICE IS HEREBY GIVEN THAT THE FOREGOING ORDINANCE WAS INTRODUCED AT A MEETING OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EGG HARBOR, IN THE COUNTY OF ATLANTIC AND STATE OF NEW JERSEY, HELD MARCH 16, 2022, AND WILL BE FURTHER CONSIDERED FOR FINAL PASSAGE AFTER A PUBLIC HEARING THEREON AT A REGULAR MEETING OF SAID TOWNSHIP COMMITTEE IN THE TOWNSHIP HALL, IN SAID TOWNSHIP ON APRIL 20, 2022 AT 5:30 P.M.

Dated: March 16, 2022

Eileen M. Tedesco, RMC
Township Clerk