

**TOWNSHIP OF MILLBURN  
ORDINANCE NO. 2522-18  
AN ORDINANCE TO PROVIDE FOR THE PARTIAL AMENDMENT, SUPPLEMENTATION AND  
REVISION OF CHAPTER IV, OF THE “REVISED GENERAL ORDINANCES OF THE TOWNSHIP OF  
MILLBURN” WITH THE ADDITION OF A NEW SECTION 4-2 ENTITLED “RIGHT-OF-WAY PERMITS”**

**STATEMENT OF PURPOSE:**

*The purpose of this Ordinance is to provide for reasonable regulations concerning the placement of small cell wireless facilities within the Township, consistent with state and federal law through the implementation of a Right-of-Way Permit procedure.*

**WHEREAS**, the Township Committee is aware that certain technological developments have made access to its municipal rights-of-way desirable by various 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., (3<sup>rd</sup> Ed.), Section 30.73; and

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

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

**WHEREAS**, the Federal Telecommunications Act (“FTA”) 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 FTA 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 FTA 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 FTA 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 technology, involve the placement of Small Cells and Cabinets in Municipal Rights-of-Way; and

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

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

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

**WHEREAS**, the FCC in its recent Order provides that municipalities can impose aesthetic requirements on Small Cells where said requirements are: (1) reasonable; (2) no more burdensome than those applied to other types of infrastructure deployment; 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**, in addition, Ground Level Wireless Cabinets 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 Township’s rights-of-way when it comes to aesthetics and the ability of the public to pass and repass over same and for the safety of pedestrians and drivers through the blocking of sight triangles; and

**WHEREAS**, New Poles and Ground Level Wireless Cabinets erected in the Municipal Rights-of-Way also raise concerns related to sight triangles and other safety related issues and aesthetic concerns associated with the use of roadways by the public, including but not limited to the public’s ability to pass

and repass over same and the impact on the streetscape and character of residential neighborhoods;  
and

**WHEREAS**, the Federal Highway Administration has acknowledged this problem by stating, “[as] demand for the finite space in existing ROW increases, the difficulty and cost of adding new utility facilities and relocating existing utility facilities also increases. Just as significant is how utility service interruptions may add to public discontent with overall highway construction. It is therefore essential for planners, designers, and builders of street and highway projects to avoid unnecessary utility relocations...” Federal Highway Administration, Avoiding Utility Relocations, <https://www.fhwa.dot.gov/utilities/utilityrelo/2.cfm> (updated through April 19, 2018 and accessed August 22, 2018); 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.

**NOW, THEREFORE, BE IT ORDAINED** by the Township Committee of the Township of Millburn in the County of Essex and State of New Jersey, as follows:

**Section 1:**

Chapter IV, “General Licensing” in the “Revised General Ordinances of the Township of Millburn is hereby amended, supplemented and revised with the addition of a new Article 4-2 entitled “Right-of-Way Permits” which shall read, in its entirety, as follows:

**ARTICLE 6.**  
**RIGHT-OF-WAY PERMITS**

**4-2.1. Definitions.**

The following terms when used in this Article shall have the meaning indicated:

**“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 engineer and attorney costs to the Township.

**“Township Committee”** means the Governing Body of the Township of Millburn.

**“Township Non-Residential Zones”** means the B-1, B-2, B-3, B-4, OR-1, OR-2, OR-3, CMO, CD and CE, zones as designated in Article 6 of the Township of Millburn Development Regulations.

**“Township Residential Zones”** means the R-O, R-3, R-4, R-5, R-6, R-7, and R-8, of the Township of Millburn Development Regulations.

**“Cabinet”** means a small box-like or rectangular structure used to facilitate utility or wireless service from within the Municipal Right-of-Way.

**“Electric Distribution System”** means the part of the electric system, after the transmission system, that is dedicated to delivering electric energy to an end user.

**“Existing Pole”** means a pole that is in lawful existence within the Municipal Right-of-Way.

**“Ground Level Cabinet”** means a Cabinet that is not attached to an Existing Pole and is touching the ground.

**“Municipal Right-of-Way”** means the surface of, and the space above or below, any public street, road, lane, path, 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 any other area that is determined by the Township to be a right-of-way in which the Township may allow the installation of Poles, Cabinets and Antennas, as well as rights-of-way held by the County of Essex where the Township’s approval is required for the use of same pursuant to N.J.S.A. 27:16-6.

**“Pole”** means a long, slender, rounded support structure constructed of wood or metal located in the municipal right-of-way.

**“Pole Mounted Antenna”** means 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”** means a Cabinet that is proposed to be placed on an Existing Pole or Proposed Pole.

**“Proposed Pole”** means 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”** means an approval from the Township Committee setting forth applicant’s compliance with the requirements of this Article.

**“Surrounding Streetscape”** means Existing Poles within the same right-of-way which are located within five hundred (500) feet of the Proposed Pole.

**“Utilities regulated by the Board of Public Utilities”** means companies subject to regulation by the New Jersey Board of Public Utilities under Chapter 48 of the Revised Statutes.

**“Utility Service”** means electric, telephone or cable service.

**4-2.2. Pole Mounted Antennas, Access to Right-of-Way, Right-of-Way Agreements.**

- a. No person shall operate or place any type of Pole Mounted Antenna within the Municipal Right-of-Way without first entering into a Right-of-Way Agreement with the Township pursuant to the provisions of this Article.
- b. The terms of said Right-of-Way Agreement shall include:
  - (1) A term not to exceed fifteen (15) years;
  - (2) Reasonable insurance requirements;
  - (3) A fine for unauthorized installations;
  - (4) A reference to the siting standards set forth in this Article; and
  - (5) Any other items which may be reasonably required.

**4-2.3. Application to Utilities Regulated by the Board of Public Utilities, Other Entities.**

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

**4.2.4. 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 Proposed Pole shall be taller than thirty-five (35) feet or 110% of the height of Poles in the Surrounding Streetscape, whichever is higher.
  - (2) Distance from curb line. No Proposed Pole shall be farther than eighteen (18) inches from the curb line.
  - (3) Location, Safety and Aesthetics. No Proposed Pole shall be erected in the Right-of-Way unless it:
    - (a) Is replacing an Existing Pole; or
    - (b) Approved pursuant to a land development application by either the Zoning Board of Adjustment or Planning Board pursuant to a land use application; or
    - (c) Located on the opposite side of the street from the Electric Distribution System; and
    - (d) For sites in the Residential Zones is a minimum of two hundred (200) linear feet from any other Existing Pole or Proposed Pole along the same side of the street, or for sites in the Non-Residential Zones is a minimum of one hundred (100) 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 distances; and
    - (g) Allows adequate room for the public to pass and re-pass across, along and through the Right-of-Way; and
    - (h) Is finished and/or painted and/or 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.
- c. Ground Level Cabinet Siting Standards.
  - (1) Ground Level Cabinets are prohibited in the Municipal Right-of-Way in the Residential Zones and any future residential zones.
  - (2) Ground Level Cabinets are permitted in the Non-Residential Zones provided that such Ground Level Cabinet:
    - (a) Is less than twenty-eight (28) 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, along and through the Municipal Right-of-Way.
- d. Pole Mounted Antenna and Pole Mounted Cabinet Siting Standards.
- (1) Pole Mounted Antennas are permitted on Existing Poles, provided that each Pole Mounted Antenna:
    - (a) Does not exceed three (3) cubic feet in volume; and
    - (b) Is finished and/or painted and/or 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 any sight triangles or sight distance; and
    - (d) Allows adequate room for the public to pass and repass across, along and through the Municipal Right-of-Way.
  - (2) Pole Mounted Cabinets are permitted on Existing Poles in all Residential Zones and Non-Residential Zones provided that each Pole Mounted Cabinet:
    - (a) Does not exceed sixteen (16) cubic feet; and
    - (b) Is finished and/or painted and/or 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 any 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 an applicant provide a certification from a Licensed Professional Engineer attesting to the structural integrity of any Pole Mounted Antenna or Pole Mounted Cabinet.

#### **4-2.5. 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 schedule a meeting with the Township Engineer to review the scope of the 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) of this Section 4-2.
- c. All applications made under this Article shall be expedited so as to comply with the shot clocks set forth in the FCC Order entitled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment," WT Docket No. 17-79; "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment," WC Docket No. 17-84.

Every application made pursuant to this Article must include a signed and sealed survey prepared by a New Jersey Licensed Professional Land Surveyor demonstrating that any Proposed Pole and/or Proposed Ground Level Cabinet is located within the Municipal Right-of-Way. Any such application which does not include such a survey shall immediately be deemed incomplete.

d. New Poles and Ground Level Cabinets.

(1) The Planning Board shall, pursuant to N.J.S.A. 40:55D-25(B)(3), review applications for the placement of New Poles and Ground Level Cabinets within the Municipal Right-of-Way and advise the Township Committee of its recommendation to approve or disapprove same.

(i) If the Planning Board recommends the disapproval of a Right-of-Way Permit, it shall set forth the factual basis for such a disapproval in writing.

e. Pole Mounted Antenna and Pole Mounted Cabinets.

(1) The Township Engineer shall review applications to place Pole Mounted Antenna and Pole Mounted Cabinets within the Municipal Right-of-Way and advise the Township Committee of his or her recommendation to approve or disapprove same.

(i) If the Township Engineer recommends the disapproval of a Right-of-Way Permit, he or she shall set forth the factual basis for such a disapproval in writing.

f. If the Township Committee denies any application for a Right-of-Way Permit under this Article, it shall do so in writing and set forth the factual basis for the denial.

g. Waiver. The Township Committee may waive any siting standard set forth in Section 4-2.5 where the applicant demonstrates that the 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 in the FCC Order entitled “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,” WT Docket No. 17-79; “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,” WC Docket No. 17-84; or
- (4) Will prohibit, or have the effect of prohibiting, the ability of an entity to provide Utility Service to any prospective customer within the Township .

**4-2.6. Right-of-Way Permit Fees and Deposits Towards Anticipated Municipal Expenses.**

- a. Every Right-of-Way Permit application shall include a Right-of-Way Permit Fee in the following amounts:

- (1) One (1) to five (5) sites - \$500.00
- (2) Each additional site - \$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 sole 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 Article.
- (2) Any 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 Township’s Chief Financial Officer of the Township shall provide applicant with a notice of insufficient balance. In order for review to continue, the applicant shall, within ten (10) days of said notice, post a deposit to the account in an amount to be mutually agreed upon.
- (3) The Township’s Chief Financial Officer shall, upon request by the applicant, after a final decision has been made by the Township Committee regarding the pending Right-of-Way Permit application, refund any unused balance from the applicant’s Deposit Towards Anticipated Municipal Expenses.

**4-2.7. Miscellaneous Provisions.**

- a. Any Right-of-Way Permit approved pursuant to this Article 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 by New Jersey law.

- b. In addition to receiving a Right-of-Way Permit, an applicant must also receive all necessary road opening permits, construction permits and any other requirement set forth in the “Revised General Ordinances of the Township of Millburn”, or New Jersey statute.
- 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 Article. No such applicant shall be required to enter into a Right-of-Way Agreement with the Township.

**Section 2:**

All other provisions in the Revised General Ordinances shall be unaffected and are hereby continued.

**Section 3:**

All Ordinances and parts of Ordinances or other local requirements inconsistent or in conflict with this ordinance are hereby repealed and superseded to the extent of any such inconsistency or conflict, and the provisions of this Ordinance shall apply.

**Section 4:**

This Ordinance shall be construed so as not to conflict with any provision of New Jersey or Federal law. Notwithstanding that any provision of this Ordinance is, for any reason, held to be invalid or unconstitutional by a Court of competent jurisdiction, such a decision shall not affect the validity of the remaining portions of this Ordinance, which shall continue to be of full force and effect. The provisions of this Ordinance shall be cumulative with, and not in substitution for, all other applicable zoning, planning and land use regulations.

**Section 5:**

This Ordinance shall take effect immediately after final passage and publication thereof as provided by law.

Introduced: 12/4/2018

Published: 12/6/2018