



Ordinance of the Township of Bernards

1 Collyer Lane, Basking Ridge, NJ 07920
908-766-2510; www.bernards.org

ORDINANCE #2432

An Ordinance Amending and Supplementing the Revised General Ordinances of the Township Of Bernards Chapter 18 “Streets, Sidewalks and Sanitation.” To Add New Section 18-9 “Siting of Poles, Cabinets and Antennas on the Municipal Right Of Way”

WHEREAS, the Township of Bernards (“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” Id.; 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, pursuant to N.J.S.A. 48:17-11, the use of all municipal streets are subject to such police and other regulations and restrictions as may be adopted by the governing body of the Township of Bernards; 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 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, it is the Township's goal to increase collocation of antennas, to the maximum amount possible, on existing poles thereby precluding the proliferation of new poles; and

WHEREAS, the Township understands that technology is advancing in this area and that greater collocation may be required as same becomes more technologically possible in the future; 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.

FOR THE FOREGOING REASONS, BE IT ORDAINED, by the Township Committee of the Township of Bernards, County of Somerset, State of New Jersey that Chapter 18 "Streets , Sidewalks and Sanitation," be amended to add Section 18-9 "Siting Of Poles, Cabinets and Antennas in the Municipal Right Of Way" of the Revised General Ordinances of the Township of Bernards as follows: (new Text is in double underline; deletions are ~~stricken~~):

Section 1

18-9.1 DEFINITIONS.

As used in this Chapter, the following terms have the following meanings:

- a. “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 in processing applications.
- b. “Cabinet” shall mean a small box-like or rectangular structure used to facilitate utility, telecommunications or wireless service from within the Municipal Right-of-Way.
- c. “Electric Distribution System” shall mean the part of the electric system, after the transmission system that is dedicated to delivering electric energy to an end user.
- d. “Existing Pole” shall mean a pole that is in lawful existence within the Municipal Right-of-Way.
- e. “Ground Level Cabinets” shall mean a Cabinet that is not attached to an existing pole and is touching or directly supported by the ground.
- f. “Municipal Right-of-Way” shall mean the surface of, and the space above or below, any public street, road, place, public way or place, sidewalk, alley, boulevard, parkway, drive, and the like, held by the Township as an easement or in fee simple ownership. This term also includes rights-of-way held by the County of Somerset 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.
- g. “Pole” shall mean a long, slender, piece of wood, fiberglass, concrete or metal.
- h. “Pole Mounted Antenna” shall mean a device that is attached to a Pole and used to transmit radio or microwave signals and shall include, but not be limited to, small cell equipment and transmission media such as femtocells, picocells, microcells, and outside distributed antenna systems.
- i. “Pole Mounted Cabinet” shall mean a Cabinet that is proposed to be placed on an Existing or Proposed Pole.
- j. “Proposed Pole” shall mean a Pole that is proposed to be placed in the Municipal Right-of-Way.
- k. “Right-of-Way Agreement” shall mean an agreement that sets forth the terms and conditions for use of the Municipal Right-of-Way and includes, but is not limited to, municipal franchise agreements.
- l. “Right-of-Way Permit” shall mean an approval from the Township setting forth applicant’s compliance with the requirements of this Section.
- m. “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.”
- n. “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.
- o. “Utility Service” shall mean electric, telephone, or cable service.
- p. “Zoning Group A” shall mean the E-1, E-2, E-3, E-4, and E-5 zones as designated in § 21-10.1 of the Revised General Ordinances of the Township of Bernards.
- q. “Zoning Group B” shall mean all other zones which are not zones within Zoning Group A, as defined above.

18-9.2 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 with the Township pursuant to the provisions of this subsection.
- b. The terms of said Right-of-Way agreement shall include:
 - i. A term not to exceed 15 (fifteen) years;
 - ii. Reasonable insurance requirements;
 - iii. Fine for unauthorized installations;
 - iv. A reference to the siting standards as set forth in Section 18-9.4; and
 - v. Any other items which may reasonably be required.

18-9.3 APPLICATION TO UTILITIES REGULATED BY THE BOARD OF PUBLIC UTILITIES.

- a. 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.

18-9.4 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
 - i. 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.
 - ii. Location, Safety and Aesthetics. No Pole shall be erected in the Right-of-Way unless it:
 1. Is used to bring Utility Service across the Right-of-Way to an existing or proposed development from an Existing Pole; or
 2. Is replacing an Existing Pole; or
 3. Approved pursuant to a land development application by either the Township's Zoning Board of Adjustment or Planning Board; or
 4. Located on the opposite side of the street from the Electric Distribution System; and
 5. For sites in Zoning Group B, is two hundred linear feet from any other Existing Pole or Proposed Pole along the same side of the street, or for sites in Zoning Group A is one hundred linear feet from any other Existing Pole or Proposed Pole along the same side of the street; and
 6. Is not located on a street with all underground utilities; and
 7. Does not inhibit any sight triangles or sight distance; and
 8. Allows adequate room for the public to pass and re-pass across the Municipal Right-of-Way; and

9. Is finished and/or painted, and constructed, 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 Site Standards
 - i. Ground Level Cabinets are prohibited at sites located in Zoning Group B.
 - ii. Ground Level Cabinets are permitted at sites in Zoning Group A provided that each Ground Level Cabinet:
 1. Does not exceed twenty-eight cubic feet in volume; and
 2. Is finished and/or painted so as to blend in compatibly with its background and so as to minimize its visual impact on surrounding properties; and
 3. Does not inhibit sight triangles or sight distance; and
 4. 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
 - i. Pole Mounted Antennas are permitted on Existing Poles in all zones, provided that each Pole Mounted Antenna:
 1. Does not exceed three (3) cubic feet in volume; and
 2. Is finished and/or painted, in conformance with best available stealth technology methods, so as to blend in compatibly with its background and so as to minimize its visual impact on surrounding properties; and
 3. Does not inhibit sight triangles or sight distance; and
 4. Allows adequate room for the public to pass and repass across the Municipal Right-of-Way.
 - ii. Pole Mounted Cabinets are permitted on Existing Poles in all zones, provided that each Pole Mounted Cabinet:
 1. Does not exceed sixteen (16) cubic feet; and
 2. Is finished and/or painted, in conformance with best available stealth technology methods, so as to blend in compatibly with its background and so as to minimize its visual impact on surrounding properties; and
 3. Does not inhibit sight triangles or sight distance; and
 4. Allows adequate room for the public to pass and repass across the Municipal Right-of-Way.
 - iii. The Township may also require that an applicant provide a certification from a licensed engineer attesting to the structural integrity of any Pole Mounted Antenna or Pole Mounted Cabinet and the structure on which it is proposed to be mounted.

18-9.5 APPLICATION PROCESS.

- a. Pre-Application Meeting- While not required by the Township, 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 Engineer shall approve or disapprove every Right-of-Way Permit application in writing.
- 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 must include a signed and sealed survey prepared by a New Jersey licensed surveyor demonstrating that any such Proposed Pole is located within the Municipal Right-of-Way. An application which does not include such a survey shall immediately be deemed incomplete.
- e. Every application for a Right-of-Way Permit shall include a fully executed Right-of-Way Agreement between the Township and applicant. An application which does not include such a Right-of-Way agreement shall immediately be deemed incomplete.
- f. If the Township Engineer denies any application made under this Section, he or she shall do so in writing and set forth the factual basis therefor.
- g. The Township Engineer shall create a checklist setting forth the requirements for an applicant’s submission under this Section. An application that does not meet all necessary checklist requirements shall be deemed incomplete.

18-9.6 WAIVER.

- a. The Township Engineer may waive any siting standard set forth in subsection 18-9.4 where the applicant demonstrates that strict enforcement of said standard:
 - i. Will prohibit or have the effect of prohibiting any interstate or intrastate telecommunications service pursuant to 47 U.S.C. 253(a); or
 - ii. Will prohibit or have the effect of prohibiting personal wireless service pursuant to 47 U.S.C. 332(c)(7)(B)(i)(II); or
 - iii. Will violate any requirement set forth by the Federal Communications Commission Order entitled “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment.” WT Docket No. 17-79; WC Docket 17-84.

18-9.7 RIGHT-OF-WAY PERMIT FEES AND DEPOSIT TOWARDS ANTICIPATED MUNICIPAL EXPENSES.

- a. Every Right-of-Way Permit application must include a non-refundable Deposit Towards Municipal Expenses in the following amounts:
 - i. One (1) to five (5) collocation sites on Existing Poles- \$500.00.
 - ii. Each additional collocation site on an Existing Pole- \$100.00.
 - iii. Each Proposed Pole- \$1,000.00
- b. Additional Deposits
 - i. If the deposits are not sufficient to cover the Township’s reasonable costs related to the review of an Applicant’s proposed facilities, an additional refundable Deposit Towards Municipal Expenses may be required by the Township Engineer when the initial deposit is exhausted.
 - ii. Applicant’s additional 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.

- iii. The Chief Financial Officer shall, upon request by the applicant, and after a final decision has been made by the Township Engineer 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 additional Deposit Towards Anticipated Municipal Expenses.

18-9.8 COLOCATION REQUIREMENT

Any applicant for a Right-of-Way permit shall, as a condition to the issuance of same, permit the colocation of Pole Mounted Antennas onto any new Pole to the maximum amount that colocation is technically feasible which, in any event, shall not be less than two Pole Mounted Antennas.

18-9.9 MISCELLANEOUS PROVISIONS.

- a. Any approval received pursuant to this Chapter does not relieve the applicant from receiving consent from the owner of the soil on 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 Bernards or state statutes or regulations.
- 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. This Article shall not permit the placement of Utility Service above ground in contravention to the requirements of Section 21-26 of the Township's land development code.
- e. Applicant must comply with all applicable state, local and federal regulations.

Section 2. All ordinances or parts of ordinances inconsistent with this Ordinance are hereby repealed to the extent of such inconsistency.

Section 3. If any section, paragraph, subdivision, clause or provision of this Ordinance shall be adjudged invalid, such adjudication shall apply only to the section, paragraph, subdivision, clause or provision so adjudged and the remainder of the Ordinance shall be deemed valid and effective.

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

TOWNSHIP OF BERNARDS
PUBLIC NOTICE

Ordinance #2432 was introduced and passed on first reading by the Township Committee of the Township of Bernards in the County of Somerset on 10/29/19 and then ordered to be published according to law. It will be further considered for final passage and adoption at a public hearing on 11/26/19 to be held at a meeting of the Township Committee at the Municipal Building, 1 Collyer Lane, Basking Ridge, NJ, at 8 P.M., when and where, or at such time and place to which said meeting may be adjourned, all persons interested will be given an opportunity to be heard concerning said ordinance. A complete text of this ordinance is available in the Office of the Municipal Clerk, 1 Collyer Lane, Basking Ridge, NJ, from 8:30 A.M. to 4:30 P.M., Monday through Friday. Copies are also available on the township website bulletin board www.bernards.org.

By Order of the Township Committee
Rhonda Pisano, Municipal Clerk

TOWNSHIP OF BERNARDS
PUBLIC NOTICE

Notice is hereby given that Bernards Township Ordinance #2432 was introduced and passed on first reading at a meeting of the Township Committee on 10/29/2019 and was passed on final reading and adopted following a public hearing thereon at a regular meeting of the Governing Body of the Township of Bernards on 11/26/2019.

By Order of the Township Committee
Rhonda Pisano, Municipal Clerk