

BOROUGH OF TOPTON
BERKS COUNTY, PENNSYLVANIA

ORDINANCE NO. 03-2022

AN ORDINANCE OF THE BOROUGH OF TOPTON, BERKS COUNTY, PENNSYLVANIA, AMENDING THE BOROUGH OF TOPTON CODE OF ORDINANCES, CHAPTER 154 TITLED "ZONING", TO CREATE A NEW §154.101 TITLED "SMALL WIRELESS FACILITIES" UNDER GENERAL REGULATIONS TO ALLOW FOR AND TO REGULATE SMALL WIRELESS FACILITIES WITHIN THE PUBLIC RIGHTS-OF-WAY IN THE BOROUGH OF TOPTON, INCLUDING PURPOSE AND INTENT, APPLICABILITY, DEFINITIONS, RIGHT-OF-WAY RATES AND FEES, RIGHT OF ACCESS, PERMITTED USE; APPLICATION AND FEES, ACTION ON PERMIT APPLICATIONS, DESIGN CRITERIA AND PERMIT REVIEW, REMOVAL OF EQUIPMENT, RESTORATION OF RIGHT-OF-WAY, SEVERABILITY, ADOPTION AND REPEALING ANY ORDINANCE INCONSISTENT WITH THE PROVISIONS OF THIS ORDINANCE.

WHEREAS, the Borough of Tipton, Berks County, Pennsylvania, is a municipal corporation organized and existing under the laws of the Commonwealth of Pennsylvania; and

WHEREAS, Act 50 of 2021 provides for deployment of Small Wireless Facilities in the Commonwealth of Pennsylvania in accordance with applicable federal laws and regulations, and allows for local regulation of certain design and district placement, and fees for the use of the public right-of-way; and

WHEREAS, the Borough Council has determined that it is in the public interest to provide for design standards and fees for use of the public right-of-way in accordance with the Act.

NOW THEREFORE, BE IT ENACTED AND ORDAINED by the Borough Council of the Borough of Tipton, Berks County, Pennsylvania, as follows:

SECTION 1. PURPOSE AND INTENT.

A) The purpose of this Ordinance is to establish procedures and standards, consistent with all applicable federal and state laws, for the consideration, permitting, siting, construction, installation, collocation, modification, operation, regulation and removal of small wireless facilities (as defined in Section 3 below) in the public right-of-way of streets and roads.

B) The intent of this Ordinance is to:

1) Establish basic criteria for applications to install and / or collocate small wireless facilities in the public right-of-way;

2) Ensure that small wireless facilities are appropriately designed, constructed, modified, maintained, and removed when no longer in use in conformance with all applicable health and safety regulations;

3) Preserve the character of the Borough by minimizing the potentially adverse visual impact of small wireless facilities through careful design, siting, landscaping and camouflaging techniques to blend these facilities into their environment to the maximum extent practicable;

4) Establish an application process and structure for payment of fees and charges to be uniformly applied to all applicants, operators and owners of small wireless facilities for such facilities;

5) Comply with, and not conflict with or preempt, all applicable state and federal laws, as may be amended or superseded, and all FCC rules and regulations to interpret and implement applicable federal statutes; and

6) Limit interference with the use of streets, sidewalks, alleys, parkways, public utilities, public views, certain city corridors, and other public ways and places.

C) Zoning. Applications to collocate a small wireless facility or install or modify an associated utility pole in the rights-of-way shall be treated as a permitted use pursuant to Act 50 of 2021, the Small Wireless Facilities Deployment Act, and exempt from local zoning where required by the Act. Any other wireless facilities not meeting the definition of a small wireless facility shall remain subject to applicable zoning requirements.

D) This Chapter is intended to implement the requirements of the Small Wireless Facilities Deployment Act. Failure of the Borough to include all language set forth in that Act in this Ordinance does not constitute a waiver of any rights under the Act.

SECTION 2. APPLICABILITY. The provisions of this Chapter shall only apply to activities of a wireless provider within the right-of-way to deploy small wireless facilities and associated new utility poles with small wireless facilities attached.

SECTION 3. DEFINITIONS. The following words and phrases when used in this Chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Antenna." Telecommunications equipment that transmits and receives electromagnetic radio signals used in the provision of all types of wireless telecommunications services.

"Applicable codes." Any of the following: 1) Uniform building, fire, electrical, plumbing or mechanical codes adopted by a recognized national code organization or local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons; 2) Borough zoning, land use, streets and sidewalks, rights-of-way and permitting ordinances.

"Applicant." A communications service provider that submits an application.

"Application." A request submitted by an applicant to the Borough: 1) for a permit to collocate small wireless facilities; or 2) to approve the installation, modification or replacement of a utility pole with small wireless facilities attached.

"Borough." Borough of Tipton, Berks County, Pennsylvania.

"Cable facility." Buildings, other structures and equipment used by the owner or operator of a cable television system to provide service. As used in this definition, the term "cable system" shall have the meaning given to it in section 602(6) of the Cable Communications Policy Act of 1984 (Public Law 98- 549, 47 U.S. C. § 522(7)).

"Collocation" or "collocate." To install, mount, maintain, modify or replace small wireless facilities on an existing utility pole or other wireless support structure.

"Communications facility." A set of equipment and network components, including wires and cables and associated facilities, used by a communications service provider to provide a communications service.

"Communications service provider." Any of the following: 1) A cable operator as defined in section 602(4) of the Cable Communications Policy Act of 1984 (Public Law 98-549, 47 U.S.C. §522(5)); 2) A provider of information service as defined in section 3(20) of the Communications Act of 1934 (48 Stat. 1064, 47 U.S. C.§ 153(24)); 3) A telecommunications carrier as defined in section 3(44) of the Communications Act of 1934 (47 U.S. C. § 153(51)); 4) A wireless provider.

"Decorative pole." A municipal pole that is specially designed and placed for aesthetic purposes.

"FCC." The Federal Communications Commission.

"Historic district or building." A building that is or a group of buildings, properties or sites that are: 1) Listed in the National Register of Historic Places or formally determined eligible for listing by the Keeper of the National Register; 2) Determined to be eligible for listing by the Keeper of the National Register of Historic Places, who has been delegated the authority by a Federal agency to list properties and determine their eligibility for the National Register of Historic Places in accordance with section VI.D. 1. a.i-v of the Nationwide Programmatic Agreement for Review Regarding the Section 106 National Historic Preservation Act Review Process as specified under 47 CFR Part 1, App. C (relating to Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process); 3) Marked as a historical site by the Pennsylvania Historical and Museum Commission pursuant to 37 Pa.C.S. (relating to historical and museums); 4) Within a historic district created pursuant to the Act of June 13, 1961 P.L. 282, No. 167), an act authorizing counties, cities, boroughs, incorporated towns and boroughs to create historic districts within their geographic boundaries; providing for the appointment of Boards of Historical Architectural Review; empowering governing bodies of political subdivisions to protect the distinctive historical character of these districts and to regulate the erection, reconstruction, alteration, restoration, demolition or razing of buildings within the historic districts.

"Micro wireless facility." A small wireless facility that: 1) does not exceed two (2) cubic feet in volume; and 2) has an exterior antenna no longer than 11 inches.

"Modification" or "modify." The improvement, upgrade or replacement of a small wireless facility or an existing utility pole that does not substantially change, as defined in 47 CFR.

§1.6100(b)(7) (relating to wireless facility modifications), the physical dimension of the small wireless facility or utility pole.

"Municipal pole." A utility pole owned, managed or operated by or on behalf of the Borough.

"Right-of-way." The area on, below or above a public roadway, highway, street, sidewalk, alley, utility easement or similar property. The term does not include a Federal interstate highway.

"Small wireless facility or small wireless facilities." The equipment and network components, including antennas, transmitters and receivers, used by a wireless provider that meet the following qualifications: 1) Each antenna associated with the deployment is no more than three (3) cubic feet in volume; 2) The volume of all other equipment associated with the wireless facility, whether ground-mounted or pole-mounted, is cumulatively no more than 28 cubic feet. Any equipment used solely for the concealment of the small wireless facility shall not be included in the calculation of equipment volume under this paragraph.

"Technically feasible." By virtue of engineering or spectrum usage, the proposed placement for a small wireless facility or its design or site location can be implemented without a material reduction in the functionality of the small wireless facility.

"Utility facility." Buildings, other structures and equipment owned or operated by a public utility, as defined in 66 Pa.C.S. § 102 (relating to definitions), to provide service.

"Utility pole." A pole or similar structure that is or may be used, in whole or in part, by or for telecommunications, electric distribution, lighting, traffic control, signage or a similar function or for collocation. The term includes the vertical support structure for traffic lights but does not include wireless support structures or horizontal structures to which signal lights or other traffic control devices are attached.

"Wireless facility." As follows: 1) Equipment at a fixed location that enables wireless service between user equipment and a communications network, including any of the following: i) Equipment associated with wireless services; ii) Radio transceivers, antennas, coaxial or fiber optic cables, regular and backup power supplies or comparable equipment, regardless of technological configuration; 2) The term includes a small wireless facility; 3) The term does not include any of the following: i) The structure or improvements on, under or within which the equipment is collocated; ii) The coaxial or fiber optic cables that are not immediately adjacent to or directly associated with a particular antenna.

"Wireless infrastructure provider." A person or entity authorized by the Pennsylvania Public Utility Commission to provide telecommunications service in the Commonwealth of Pennsylvania that builds or installs wireless communication transmission equipment, wireless facilities, or wireless support infrastructure. This term does not include a wireless services provider.

"Wireless provider." A wireless infrastructure provider or a wireless services provider.

"Wireless services." Services, whether at a fixed location or mobile, using a licensed or unlicensed spectrum, provided to the public using wireless facilities.

"Wireless services provider." A person or entity that provides wireless services. This term does not include a wireless infrastructure provider.

"Wireless support structure." The term shall have the same meaning given to it in the Act of October 24, 2012 (P.L. 1501, No. 191), known as the Wireless Broadband Collocation Act.

SECTION 4. RIGHT-OF-WAY RATES AND FEES. Wireless providers shall be required to pay an annual fee for the use of the right-of-way. The annual right-of-way fee shall initially be Two Hundred Seventy Dollars (\$270) per small wireless facility or Two Hundred Seventy Dollars (\$270) per new utility pole with a small wireless facility. The Borough may amend the fee from time to time by resolution of Borough Council to a rate not to exceed the maximum rate which is found to be permitted by the Federal Communications Commission and / or Small Wireless Facilities Deployment Act.

SECTION 5. RIGHT OF ACCESS. 1) In accordance with the Small Wireless Facilities Deployment Act, and with the permission of the owner of the structure, a wireless provider shall have the right to perform the following within the public right-of-way: i) Collocate a small wireless facility; ii) Replace an existing utility pole or install a new utility pole with attached small wireless facilities; 2) Collocation. In accordance with the Small Wireless Facilities Deployment Act, collocation on Borough-owned poles may be permitted unless the small wireless facility would cause structural or safety deficiencies to the municipal pole, in which case the Borough and applicant shall work together for any make-ready work or modifications or replacements that are needed to accommodate the small wireless facility; 3) All structures and facilities shall be installed and maintained so as not to obstruct nor hinder travel or public safety within the right-of-way or obstruct the legal use of the right-of-way by the Borough and utilities.

SECTION 6. PERMITTED USE; APPLICATION AND FEES.

A) Permit Required. No person shall place a small wireless facility or associated utility pole in the right-of-way, without first filing an application and obtaining a permit therefore, except as otherwise provided in this Ordinance.

B) Application. All applications for permits filed pursuant to this Chapter shall be on a form, paper or electronic, provided by the Manager of the Borough.

C) Application Requirements. An application shall be made by the wireless provider or its duly authorized representative, and shall contain the following:

1) The wireless provider's name, address, telephone number, and email address;

2) The applicant's name, address, telephone number, and e-mail address, if different than the wireless provider, and its interest in the work;

3) 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.

4) A general description of the proposed work and the purposes and intent of the small wireless facility. The scope and detail of such description shall be appropriate to the nature and character of the work to be performed, with special emphasis on those matters likely to be affected or impacted by the work proposed.

5) A site plan, with sufficient detail to show the proposed location of items the applicant seeks to install in the right-of-way, including any manholes or poles, the size, type, and depth of any conduit or enclosure.

6) An attestation that the small wireless facility will be operational for use by a wireless services provider within one (1) year after the permit issuance date, unless the Borough and the applicant agree to extend this period.

7) An attestation that, to the best of the applicant's knowledge, the information contained in the application is true.

8) Whether each small wireless facility is proposed to be installed on an existing pole or structure or a new pole or structure.

9) The name of the owner of the pole or structure on which the small wireless facility is proposed to be installed and the address, phone number, email address of the owner's contact person.

10) If a small wireless facility is proposed to be installed on a pole or structure owned by a party other than the applicant, the application shall be accompanied by a written confirmation of the owner's agreement to allow the applicant to locate each small wireless facility on such owner's pole or structure.

11) Documentation in the form of both narrative and drawings indicating the size of each proposed small wireless facility, the height of the pole or structure on which each is proposed to be installed, and the cubic volume of each small wireless facility.

D) When Application Not Required. An application shall not be required for: (i) routine maintenance; (ii) the replacement of a small wireless facility with another small wireless facility that is substantially similar or smaller in size, weight, and height; or (iii) for the installation, placement, maintenance, operation, or replacement of micro wireless facilities that are strung on cables between existing utility poles, in compliance with the National Electrical Safety Code. A permit may be required to perform work within the right-of-way for the activities under paragraph (D), for work that involves excavation, closure of a sidewalk or closure of a vehicular lane.

E) Application Fees. All applications for permits shall be accompanied by a fee of Five Hundred Dollars (\$500) for a single up-front application that includes up to five (5) small wireless facilities, with an additional One Hundred Dollars (\$100) for each small wireless facility beyond five (5); and One Thousand Dollars (\$1,000) in non-recurring fees for each new associated utility pole.

F) Consolidated Applications. An applicant may submit a consolidated Application for up to 20 small wireless facilities.

1) A single Applicant shall not exceed application for 20 small wireless facilities in a 30-day period.

2) The denial of one (1) or more small wireless facilities in a consolidated application shall not delay processing of any other small wireless facilities in the same consolidated application,

3) A single permit may be issued for siting and collocating multiple small wireless facilities spaced to provide wireless coverage in a contiguous area.

4) If multiple applicants submit applications cumulatively exceeding 20 applications within in a 30-day period, the extensions to deadlines provided for in the Small Wireless Facilities Deployment Act shall apply.

SECTION 7. ACTION ON PERMIT APPLICATIONS.

A) Review of Small Wireless Facility and Utility Pole Applications.

1) Within ten (10) days of receiving an initial application, the Borough will determine and notify the applicant whether the application is materially complete. If an application is materially incomplete, the Borough will specifically identify the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information. The shot clock set forth in subsection (2) shall restart at zero on the date which the applicant submits all the documents and information identified by the Borough to make the application complete. If the applicant's supplemental submission fails to make the application complete, and the Borough notifies the applicant within ten (10) days of the supplemental submission and clearly and specifically identifies the missing documents or information, the applicable shot clock set forth in subsection (2) shall be tolled until the applicant provides the missing documents and information. The shot clock resumes (the date calculation does not restart) to run on the date when the applicant submits all the documents and information identified by the Borough to render the application complete.

2) All applications shall be processed on a nondiscriminatory basis, and the Borough shall approve or deny an application for: (i) collocation of Small Wireless Facility on an existing structure within 60 days of receipt of the application; or (ii) within 90 days for applications to deploy a Small Wireless Facility using a new structure.

3) An applicant and the Borough may enter into a written agreement to toll the time periods set forth in Subsection (2).

4) If the Borough fails to issue a decision on an application for a Small Wireless Facility within the required time periods set forth in Section 4(A)(2), it shall constitute a deemed approved.

5) The Borough may deny a proposed collocation of a small wireless facility or installation or modification of a utility pole only if the proposed application does at least one (1) of the following: i) The small wireless facility materially interferes with the safe operation of traffic control equipment, sight lines or clear zones for transportation or pedestrians or compliance with the Americans with Disabilities Act of 1990 Public Law 101-336, 104 Stat. 327 or similar Federal or State standards regarding pedestrian access or movement; ii) The small wireless facility fails to comply with applicable codes; iii) The small wireless facility fails to comply with the requirements specified under the Small Wireless Facilities Deployment Act; iv) The applicant fails to submit a report by a qualified engineering expert which shows that the small wireless facility will comply with applicable FCC regulations.

6) The Borough must document the basis for a denial, including the specific code provisions on which the denial was based, and send the documentation to the applicant on or before the day the Borough denies an application. The applicant may cure the deficiencies identified by the Borough and resubmit the application within 30 days of the denial without paying an additional application fee. The Borough shall approve or deny the revised application within 30 days. Any subsequent review shall be limited to the deficiencies cited in the denial.

7) The applicant may cure the deficiencies identified by the Borough and resubmit the application within 30 days of receiving the written basis for the denial without being required to pay an additional application fee. The Borough shall approve or deny the revised application within 30 days of the application being resubmitted for review or the resubmitted application shall be deemed approved 30 days after resubmission. Any subsequent review shall be limited to the deficiencies cited in the denial. If the resubmitted application addresses or changes other sections of the application that were not previously denied, the Borough shall be given an additional 15 days to review the resubmitted application and may charge an additional fee for the review.

B) Permit Scope and Effect. Installation, modification, or collocation, for which a permit is granted pursuant to this section, shall be completed within one (1) year after the permit issuance date unless the Borough and the applicant agree to extend this period. Approval of an application authorizes the applicant to:

1) Collocate on an existing utility pole, modify or replace a utility pole or install a new utility pole with small wireless facilities attached as identified in the initial application.

2) Subject to the permit requirements and the applicant's right to terminate at any time, operate and maintain small wireless facilities and any associated equipment on a utility pole covered by the permit for a period five (5) years, which shall be renewed for two additional five (5) year periods if the applicant is in compliance with the criteria set forth in the Small Wireless Facilities Deployment Act and applicable codes, and the applicant has obtained all necessary consent from the utility pole owner.

C) Authority Granted; No Property Right or Other Interest Created. A permit from the Borough authorizes an applicant to undertake only certain activities in accordance with this Chapter and does not create a property right or grant authority to the applicant to impinge upon the rights of others who may already have an interest in the right-of-way.

SECTION 8. DESIGN CRITERIA AND PERMIT REVIEW.

A. Upon receipt of a completed application for a small wireless facility permit and all required fees, the Borough Manager and/or the Borough's Engineer or his or her respective designee shall review the application to determine whether the proposed small wireless facilities and support structure or pole comply with the following design criteria:

1) The structure on which antenna facilities are mounted:

(a) an existing utility pole, provided the installation does not extend more than five (5) feet above the pole; or

(b) a new or replacement pole are not taller than 50 feet. Any height in excess of these limits shall require application to the Zoning Hearing Board for a variance.

2) Each antenna associated with the deployment (excluding the associated equipment) may be no more than three (3) cubic feet in volume; and iii) All other equipment associated with the facility (excluding antennas) are cumulatively no more than 28 cubic feet in volume.

B. The Borough may adopt by resolution Small Wireless Facility Design Guidelines with objective, technically feasible criteria applied in a nondiscriminatory manner that reasonably match the aesthetics and character of the immediate area.

1) The Small Wireless Facility Design Guidelines may include examples of small wireless facilities preferences including visual depictions (if readily available and identified by the Borough).

2) The provisions in this Chapter shall not limit or prohibit the Borough's discretion to promulgate and make publicly available other information, materials or requirements in addition to, and separate from, Small Wireless Facility Design Guidelines so long as the information, materials, or requirements do not conflict with state or federal law.

C. All small wireless facilities and associated equipment within the public right-of-way shall be located such that it meets ADA requirements and does not hinder, obstruct or impede usual pedestrian and vehicular travel.

D. The Borough shall have authority to update or supplement the Small Wireless Facility Design Guidelines to address relevant changes in law, technology, or administrative processes.

E) Wireless Support Structure Design Standards - General Guidance:

1) small wireless facilities equipment must be indistinguishable from the support pole or structure to the greatest degree possible using matching colors, textures, and materials. The antennas and related equipment shall be in a color that will provide the most camouflage.

2) All wires, antennas, and other small wireless facility equipment shall be enclosed and not visible.

3) Screening and equipment enclosures shall blend with or enhance the surrounding context in terms of scale, form, texture, materials, and color. Equipment shall be concealed as much as possible by blending into the natural and / or physical environment.

4) Casing to enclose all wires, antennas, and other small wireless facility equipment may be mounted on top of existing and new poles in a cylindrical shape to look like an extension of the pole.

5) Brand logos and other signage are prohibited on all small wireless facilities except contact information to be used by workers on or near the small wireless facilities and as otherwise required by federal or state law. Signage will be no larger than required to be legible from street level.

6) As a condition for approval of new small wireless facilities or new wireless support structure in a historic district, the applicant shall comply, to the greatest extent possible, with the design and aesthetic standards of the historic district, or historic preservation standards in place, to minimize the negative impact to the aesthetics in these districts or areas.

SECTION 9. REMOVAL OF EQUIPMENT.

A) Within 60 days of suspension or revocation of a permit due to noncompliance with applicable codes, the applicant shall remove the small wireless facility and any associated equipment, including the utility pole and any support structures if the applicant's wireless facilities and associated equipment are the only facilities on the utility pole, after receiving adequate notice and an opportunity to cure any noncompliance.

B) Within 90 days of the end of a permit term or an extension of the permit term, the applicant shall remove the small wireless facility and any associated equipment, including the utility pole and any support structures if the applicant's small wireless facilities and associated equipment are the only facilities on the utility pole.

SECTION 10. RESTORATION OF RIGHT-OF-WAY. Applicants are required to repair all damage directly caused by the activities of the applicant and return the right-of-way in as good of condition as it existed prior to any work being done. If the applicant fails to make the repairs required by the Borough within 30 days after written notice, the Borough may perform those repairs and charge the provider the reasonable, documented cost of the repairs plus a penalty not

to exceed Five Hundred Dollars (\$500). The Borough may suspend the ability of an applicant to receive a new permit from the Borough until the applicant has paid the amount assessed for the repair costs and the assessed penalty.

SECTION 11: REPEALER. All ordinances, resolutions and parts of ordinances and resolutions inconsistent herewith, are hereby repealed.

SECTION 12: SEVERABILITY. The provisions of this ordinance are severable, and if any section, sentence, clause, part, or provision hereof shall be held illegal, invalid or unconstitutional by any court of competent jurisdiction, such decision of the court shall not affect or impair the remaining sections, sentences, clauses, or parts of this Ordinance. It is hereby declared to be the intent of the Borough Council that this Ordinance would have been adopted if such illegal, invalid, or unconstitutional sections, sentence, clause, part, or provision had not been included therein.

SECTION 13: ADOPTION. This ordinance shall become effective on the earliest date allowed by applicable law.

ENACTED AND ORDAINED this 11th day of APRIL, 2022.

BOROUGH OF TOPTON
BERKS COUNTY, PENNSYLVANIA

By: Michelle L. Lovak
(Vice) President of Council

Attest: Stacy C. Dileo
Secretary

Approved as an Ordinance this _____ day of _____, 20__.

By: Thomas A. Biltcliff 74
Thomas A. Biltcliff, Mayor