

**ORDINANCE NO. 06-22**

**AN ORDINANCE AMENDING AND SUPPLEMENTING THE CODE OF THE BOROUGH OF KINNELON BY THE ADDITION OF ARTICLE II, RIGHTS-OF-WAY PERMITS, OF CHAPTER 189, UTILITY POLES AND FACILITIES**

**WHEREAS**, the Borough of Kinnelon (“Borough”) 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 Borough 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 Borough 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 exist 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 Rights-of-Way; and

**WHEREAS**, New Jersey municipalities must grant 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 Rights-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>; and

**WHEREAS**, the Federal Communications Commission (the “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 approval for the placement of Small Cells on Existing Poles and the placement of new Poles and Cabinets in the Municipal Rights-of-Way; and

**WHEREAS**, the erection of new Poles and Ground Level Cabinets in the Municipal Rights-of-Way raise 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 Rights-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 triangles and other safety related issues related to the use of roadways by the public; and

**WHEREAS**, it is the Borough’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 Borough understands that technology is advancing in this area and that greater collocation may be required as same becomes more technologically possible; 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 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 Borough’s Municipal Rights-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 Rights-of-Way and not just to Small Cells; and

**WHEREAS**, the Borough has determined that the most efficient way to handle this process is to create a Rights-of-Way Permit system for all new Poles, Cabinets and Antennas in the Municipal Rights-of-Way; and

**WHEREAS**, the Borough 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 Governing Body of the Borough of Kinnelon, County of Morris, State of New Jersey, as follows:

**SECTION ONE.** Chapter 189, Utility Poles and Facilities, of the Code of the Borough of Kinnelon, Morris County, New Jersey is hereby amended and supplemented by the addition of Article I, Erection and Placement of Poles and Facilities, with the following existing Sections of Chapter 189 being designated and included as part of Article I, Erection and Placement of Poles and Facilities:

## **ARTICLE I ERECTION AND PLACEMENT OF POLES AND FACILITIES**

§189-1 **Plan required.**

§189-2 **Placement.**

§189-3 **Information to be included in plan.**

§189-4 **Additional information.**

§189-5 **Approval required.**

§189-6 **Time limit for approval or denial of new facilities.**

§189-7 **Replacement facilities.**

§189-8 **Written denial; reapplication.**

§189-9 **Rules and regulations provided.**

**SECTION TWO.** Chapter 189, Utility Poles and Facilities, of the Code of the Borough of Kinnelon, Morris County, New Jersey is hereby amended and supplemented by the addition of Article II, Rights-of-Way Permits, as follows:

## **ARTICLE II RIGHTS-OF-WAY PERMITS**

§189-10 **Definitions.**

- A. “Anticipated Municipal Expenses” means the cost of processing an application for a Rights-of-Way Permit including, but not limited to, all professional fees such as engineering and attorney costs incurred by the Borough.
- B. “Cabinet” shall mean a small box-like or rectangular structure used to facilitate utility or wireless service from within the Municipal Rights-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 Rights-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” or “Municipal Rights-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 held by the Borough as an easement or in fee simple ownership. This term also includes rights-of-way held by the County of Morris where the Borough’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, rounded piece of wood, 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 Rights-of-Way.
- K. "Rights-of-Way Agreement" shall mean an agreement that sets forth the terms and conditions for use of the Municipal Rights-of-Way and includes, but is not limited to, municipal franchise agreements.
- L. "Rights-of-Way Permit" shall mean an approval from the Borough setting forth applicant's compliance with the requirements of this Chapter.
- M. "Surrounding Streetscape" shall mean Existing Poles within the same rights-of-way which are located within five hundred linear (500) feet of the Proposed Pole.
- N. "Borough Council" shall mean the Borough Council of the Borough of Kinnelon.
- O. "Utilities Regulated by the Board of Public Utilities" shall mean companies subject to regulation by the New Jersey Board of Public Utilities under Title 48 of the Revised Statutes.
- P. "Utility Service" shall mean electric, telephone, or cable service.
- Q. "Zone, Non-Residential" shall mean the Commercial Zone, Restricted Commercial Zone, Limited Industrial Zone and Restricted Recreation Zone as designated in Chapter 207, Zoning, of the Code of the Borough of Kinnelon.
- R. "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.

**§189-11 Access to Rights-of-Way, Rights-of-Way Agreements.**

- A. No person shall operate or place any type of Pole Mounted Antenna, Cabinet or Pole within the Municipal Rights-of-Way without first entering into a Rights-of-Way Agreement pursuant to the provisions of this Section.

B. The terms of said Rights-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 this Chapter; and
- v. Any other items which may reasonably be required.

**§189-12 Application to utilities regulated by the Board of Public Utilities.**

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

**§189-13 Rights-of-Way Permits, Siting standards for poles, antennas and cabinets in the Rights-of-Way.**

A. No Pole, Antenna or Cabinet shall be installed within the Municipal Rights-of-Way without the issuance of a Rights-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 Rights-of-Way unless it:
  - 1. Is used to bring Utility Service across the Rights-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 Borough's Zoning Board of Adjustment or Planning Board pursuant a land use application; or
  - 4. Located on the opposite side of the street from the Electric Distribution System; and
  - 5. 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
  - 6. Is not located in an area with underground utilities; and
  - 7. Does not inhibit any existing sight triangles or sight distance; and
  - 8. Allows adequate room for the public to pass and re-pass across the Municipal Rights-of-Way; and

9. Is finished and/or painted, constructed 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 to permit the colocation of additional Pole Mounted Antennas thereon.

C. Ground Level Cabinet Site Standards

- i. Ground Level Cabinets are prohibited in Residential Zones.
- ii. Ground Level Cabinets are permitted in Non-Residential Zones provided that each Ground Level Cabinet:

- 1. Is less than twenty-eight cubic (28) feet in volume; and
- 2. Is finished and/or painted to blend in compatibly with its background to minimize its visual impact on surrounding properties; and
- 3. Does not inhibit any existing sight triangles or sight distance; and
- 4. Allows adequate room for the public to pass and repass across the Municipal Rights-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 and otherwise camouflaged, in conformance with best available stealth technology methods, to blend in compatibly with its background 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 Rights-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 and otherwise camouflaged, in conformance with best available stealth technology methods, to blend in compatibly with its background 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 Rights-of-Way.



iii. The Borough 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.

**§189-14 Application process.**

A. Pre-Application Meeting - While not required by the Borough, prior to making a formal application with the Borough for use of the Municipal Rights-of-Way, all applicants are advised to meet with the Borough Engineer to review the scope of applicant's proposal.

B. The Borough Council shall, by Resolution, approve or disapprove every Rights-of-Way Permit application based on the recommendations provided to it pursuant to subsection (e) below.

C. All applications made under this Chapter which trigger Federal Communications Commission shot clock rules pursuant to the Federal Communications Commission Order "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 stamped survey prepared by a New Jersey licensed surveyor demonstrating that any such Proposed Pole is located within the Municipal Rights-of-Way. An application which does not include such a survey shall immediately be deemed incomplete.

E. The Borough Engineer shall review applications made pursuant to this Chapter and advise the Borough Council 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 Borough Council in writing.

F. If the Borough Council denies any application made under this Chapter, it shall do so in writing and set forth the factual basis therefor.

**§189-15 Waiver.**

A. The Borough Council may, by Resolution, waive any siting standard set forth in Section 189-13 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 “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.

**§189-16 Rights-of-Way Permit Fees and deposit towards anticipated municipal expenses.**

A. Every Rights-of-Way Permit application must include a Rights-of-Way Permit Fee 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.

B. Deposit Towards Anticipated Municipal Expenses

- i. In addition to the Rights-of-Way Permit Fee, the Borough 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.
- ii. Applicant’s Deposit Towards Anticipated Municipal Expenses shall be placed in an escrow account. If said deposit contains insufficient funds to enable the Borough to perform its review, the Chief Financial Officer of the Borough or designee 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 or designee shall, upon request by the applicant, and after a final decision has been made by the Borough Council regarding his or her pending Rights-of-Way Permit application, and subject to review by the Borough Engineer, refund any unused balance from applicant’s Deposit Towards Anticipated Municipal Expenses.

**§189-17 Colocation requirement.**

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

**§189-18 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 Rights-of-Way Permit, also receive all necessary road opening permits, construction permits and any other requirement set forth in the Code of the Borough of Kinnelon or state statutes.

C. The Borough's consent for use of County Roads, as required pursuant to N.J.S.A. 27:16-6, shall take the form of a Rights-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 Rights-of-Way Agreement with the Borough.

D. Applicant must comply with all applicable state, local and federal regulations.

E. Any agreement or Rights-of-Way permit issued pursuant to this Chapter shall not supersede or in any way take the place of any local approvals or franchises which otherwise in the future may be required by applicant under the New Jersey Cable Television Act, N.J.S.A. 48:5A-1, et seq.

**SECTION THREE.** All Ordinances of the Borough of Kinnelon which are inconsistent with the provisions of this Ordinance are hereby repealed as to the extent of such inconsistency.

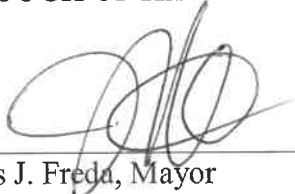
**SECTION FOUR.** If any section, subsection, clause, or phrase of this Ordinance is for any reason held to be unconstitutional or invalid by any Court of competent jurisdiction, such decision shall not affect the remaining portions of this Ordinance.

**SECTION FIVE.** This Ordinance shall take effect as provided by law.

ATTEST

BOROUGH OF KINNELON


  
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Karen M. Iuele, Borough Clerk

  
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James J. Freda, Mayor

### CERTIFICATION

I, Karen M. Iuele, Borough Clerk, Borough of Kinnelon, County of Morris, State of New Jersey, do hereby certify the foregoing to be a true copy of an Ordinance introduced, read by title,

and passed on first reading at a regular meeting of the Kinnelon Borough Council held on May 19, 2022 and adopted by the Governing Body at a regular meeting of the Borough held on June 16, 2022

  
Karen M. Iuele, Borough Clerk