

ORDINANCE

O-14-2023

BOROUGH OF NORTH CALDWELL, ESSEX COUNTY

AN ORDINANCE SUPPLEMENTING THE CODE OF THE BOROUGH OF NORTH CALDWELL TO ADD CHAPTER 108 "SMALL WIRELESS FACILITIES IN THE RIGHT-OF-WAY" TO REGULATE SMALL CELL WIRELESS FACILITIES WITHIN THE BOROUGH RIGHTS-OF-WAY

WHEREAS, the Borough of North Caldwell is aware that certain technological developments have made access to its public rights-of-way desirable by certain telecommunications companies for the placement of small cell wireless facilities, including but not limited to, the installation of antennas, small cells and other communication devices and associated equipment (collectively the "Small Cells"); and

WHEREAS, the Borough 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 which therefore must be managed carefully; and

WHEREAS, the Federal Telecommunications Act preserves local governments' ability to manage the public rights-of-way on a competitively neutral and non-discriminatory basis pursuant to 47 U.S.C. 332 (c)(7)(A); 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 public rights-of-way pursuant to N.J.S.A. 48:17-10; and

WHEREAS, the Federal Communications Commission ("FCC") has recently adopted an order entitled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment," WT Docket No. 17-79; WC Docket 17-84, which places a "shot clock" on municipal approval for the placement of Small Cells on existing poles and the placement of new poles in the public right-of-way; and

WHEREAS, the erection of new poles and ground level cabinets in the Public 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 requirement are: 1) reasonable; 2) no more burdensome than those applied to other types of infrastructure deployment; and 3) published in advance; 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 public rights-of-way.

NOW THEREFORE, BE IT ORDAINED as follows:

Section 1. The Code of the Borough of North Caldwell is hereby supplemented by the addition of the following:

Chapter 108 Small Wireless Facilities in the Right-of-Way

§108-1 Definitions.

Unless indicated otherwise in this article, the meanings of terms used herein shall be as follows:

ADMINISTRATIVE REVIEW

Ministerial review of an application by the Designee and Borough Engineer, as preferred by the Borough, to determine whether the issuance of a permit is in conformity with the applicable provisions of this chapter.

ANTENNA

Communications equipment that transmits and/or receives electromagnetic radio frequency signals used in the provision of wireless services. This definition does not apply to broadcast antennas, antennas designed for amateur radio use, or satellite dishes for residential or household purposes.

APPLICABLE CODES

Uniform building, fire, safety, electrical, plumbing, or mechanical codes adopted by a recognized national code organization to the extent such codes have been adopted by the Borough, including any amendments adopted by the Borough, or otherwise are applicable in the jurisdiction.

APPLICANT

Any person or entity who submits an application under this chapter.

APPLICATION

A written request on a form provided by the Borough.

COLLOCATE or COLLOCATION

To install or mount a small wireless facility in the public right-of-way on an existing support structure, an existing tower, or on an existing pole to which a small wireless facility is attached at the time of the application.

COMMUNICATIONS FACILITY

Collectively, the equipment at a fixed location or locations within the public right-of-way that enables communications services, including; (i) radio transceivers, antennas, coaxial, fiber-optic or other cabling, power supply (including backup battery), and comparable equipment, regardless of technological configuration; and (ii) all other equipment associated with any of the foregoing. A communications facility does not include the pole, communication wiring (in the case of Strand Mounted Antennas, as the term is defined herein), tower or support structure to which the equipment is attached.

COMMUNICATIONS SERVICE

Cable service, as defined in 47 U.S.C. §522(6); information service, as defined in 47 U.S.C. §153(24); or telecommunications service, as defined in 47 U.S.C. §153(53).

COMMUNICATIONS SERVICE PROVIDER

A provider of communications services and includes a cable operator as defined in 47 U.S.C. §522(5).

DECORATIVE POLE

A pole that is specially designed and placed for aesthetic purposes, and which may allow for collocation of multiple carriers, and additional municipal services including, but not limited to, public Wi-Fi and surveillance cameras. Decorative Pole design(s) are subject to Borough review and approval by the Mayor and Borough Council.

DESIGNEE

The person appointed by the Borough to serve as the initial point-of-contact and consultant for the Borough for all matters pertaining to this chapter, and who may be contracted for professional services.

ELIGIBLE FACILITIES REQUEST

An eligible facilities request as set forth in 47 C.F.R. §1.6100, as that section may be amended from time to time.

FCC

The Federal Communications Commission of the United States.

LAWS

Collectively, any and all federal, state or local law, statute, common law, code, rule, regulation, order, or ordinance.

ORDINARY MAINTENANCE AND REPAIR

Inspections, testing and/or repair that maintain functional capacity, aesthetic and structural integrity of a communications facility and/or the associated support structure, pole or tower, that does not require blocking, damaging or disturbing any portion of the public right-of-way.

PERMIT or R.O.W. PERMIT

A written authorization to install, at a specified location(s) in the public right-of-way, a communications facility, tower or a pole to support a communications facility.

PERMITTEE

An applicant that has received a permit under this chapter.

PERSON

An individual, corporation, limited liability company, partnership, association, trust or other entity or organization, including a governmental entity.

POLE

A legally constructed pole, such as a utility, lighting or similar pole made of wood, concrete, metal or other material, located or to be located within the public right-of-way. A pole does not include a tower or support structure and does not include a pole or structure that supports electric transmission lines.

PROVIDER

A communications service provider or a wireless services provider, and includes any person that owns and/or operates within the public right-of-way any communications facilities, wireless facilities, poles built for the sole or primary purpose of supporting communications facilities or towers.

PUBLIC RIGHT-OF-WAY

The area on, below, or above property that has been designated for use as or is used for a public roadway, highway, street, sidewalk, or similar purpose. The term does not include a federal interstate highway, state highway, county right of way or other areas that are not within the legal jurisdiction, ownership or control of the Borough.

REPLACE or REPLACEMENT

In connection with an existing pole, support structure or tower, to replace (or the replacement of) same with a new structure, substantially similar in design, size and scale to the existing structure and in conformance with this chapter and any other applicable regulations in order to address limitations of the existing structure to structurally support collocation of a communications facility.

SMALL WIRELESS FACILITY

A wireless facility that meets the following qualifications: (i) each antenna could fit within an enclosure of not more than three cubic feet in volume; and (ii) all other wireless equipment associated with the antenna, including the preexisting equipment, is cumulatively no more than 28 cubic feet in volume, (iii) the maximum height of the Small Wireless Facility is 50 feet.

STATE

The State of New Jersey.

STRAND MOUNTED ANTENNA

An Antenna with a maximum volume of 1.5 cubic feet, including any ancillary components of said Antenna, which is attached to communication wiring that is mounted to and which runs between utility Poles or similar structures in the right-of-way and which are intended to support such communications wiring..

SUPPORT STRUCTURE

A structure in the public right-of-way other than a pole or a tower to which a wireless facility is attached at the time of the application.

SURROUNDING STREETSCAPE

The visual elements of a street, including the road, adjoining buildings, street furniture, trees and open spaces, etc., that combine to form the street's character.

TOWER

Any structure in the public right-of-way built for the sole or primary purpose of supporting a wireless facility. A tower does not include a pole or a support structure.

WIRELESS FACILITY

The equipment at a fixed location or locations in the public right-of-way that enables wireless services. The term does not include: (i) the support structure, tower or pole on, under, or within which the equipment is located or collocated; or (ii) coaxial, fiber-optic or other

cabling that is between communications facilities or poles or that is otherwise not immediately adjacent to or directly associated with a particular antenna. A small wireless facility is one type of a wireless facility. A wireless facility is one type of communications facility.

WIRELESS SERVICES

Any wireless services using licensed or unlicensed spectrum, whether at a fixed location or mobile, provided to the public.

§108-2 Access to public right-of-way.

Prior to installing in the public right-of-way any Communications Facility or any Pole built for the sole or primary purpose of supporting a Communications Facility, or any tower, a person shall enter into a Right-of-Way Use Agreement with the Borough of North Caldwell expressly authorizing use of the public right-of-way for the communications facility, pole or tower proposed to be installed.

- A. The term of the Right-of-Way Use Agreement shall not exceed 30 years.
- B. The Right-of-Way Use Agreement authorizes the provider's non-exclusive use of the public right-of-way for the sole purpose of installing, maintaining and operating communications facilities, including any pole built for the sole or primary purpose of supporting the communications facilities and to provide the services expressly authorized in the agreement subject to applicable codes and applicable laws, this chapter and the terms and conditions of the agreement. The agreement authorizes use only of the public right-of-way in which the Borough has an actual interest. It is not a warranty of title or interest in any public right-of-way and it does not confer on the provider any interest in any particular location within the public right-of-way. No other right or authority is granted except as expressly set forth in the agreement. Nothing herein shall authorize the use of the Borough's poles, towers, support structures, or other structures in the public right-of-way. All use of the Borough's poles, towers, support structures and other structures in the public right-of-way shall require a separate agreement and the payment of separate fees for such use.
- C. The provider shall, at its sole cost and expense, keep and maintain its communications facilities, poles, support structures and towers in the public right-of-way in a safe condition, and in good order and repair.
- D. Right-of-Way Use Agreement Exhibit. The Borough may make available and utilize a template Right-of-Way Use Agreement to incorporate the provisions of this subsection, as well as the additional applicable provisions of this Chapter.
- E. The provider shall provide insurance and indemnification of the Borough as described in the Right-of-Way Use Agreement. The provider shall provide proof of the following coverages:
 - (1) Worker's Compensation and Employer's Liability insurance in compliance with the State's Worker's Compensation Law, with minimum limit of liability of \$500,000.
 - (2) Comprehensive General Liability insurance with minimum limit of liability of \$2,000,000 per occurrence.
 - (3) Automobile Liability insurance covering claims for bodily injury and property damage arising from all owned, hired and non-owned vehicles with minimum limit of liability of \$1,000,000 combined single limit.
- E. The following applies to any Right-of-Way Use Agreement entered into pursuant to this section:
 - (1) The terms and conditions of a Right-of-Way Use Agreement between the Borough and a cable television service provider for the installation of Cabinets and Antennas in the Public Right-of-Way may be modified from the above conditions if any of the following apply:
 - a. Such modification is required by the New Jersey Board of Public Utilities
 - b. Such modification is required by any other local, state or federal agency having jurisdiction over the provision of cable services and laws and regulations pertaining to the installation of cable television infrastructure pursuant to same.
 - (2) In such instances, at minimum, a right-of-way agreement shall include:
 - a. An exhibit listing all installed facilities, located by nearest address and coordinates
 - b. A basic description of the equipment installed.

- (3) It is the intention of this chapter that any right-of-way agreement between the Borough and a cable television service provider shall not regulate the installation of cabling and communication wiring. Communications cabling and wiring shall be regulated by the applicable franchise issued to the cable television service provider pursuant to the New Jersey Cable Television Act.

§108-3 Right-of-way permit.

- A. No person may construct, maintain or perform any other work in the Public right-of-way related to Communications Facilities, Wireless Facilities, Poles built for the sole or primary purpose of supporting Communications Facilities, or Towers without first receiving a permit to the extent required under this chapter, and any subsequent permits or authorizations required by applicable laws or the Borough.
- B. The Borough shall not issue a permit unless the applicant, or a provider on whose behalf the applicant is constructing communications facilities, poles or towers, has applied for and received the Right-of-Way Use Agreement required by Section 108-2 of this chapter, or otherwise has a current and valid franchise with the Borough expressly authorizing use of the public right-of-way for the communications facilities, poles or towers proposed in the application, and all applicable fees have been paid.
- C. The provider shall not locate or maintain its communications facilities, wireless facilities, support structure, poles and towers so as to unreasonably interfere with the use of the public right-of-way by the Borough, by the general public or by other persons authorized to use or be present in or upon the public right-of-way.

§108-4 Location and siting.

A. General Siting Standards.

- (1) Applicant shall restrict its Communications Facility and Pole placement subject to Borough review and approval by the Mayor and Borough Council and consistent with all locations in the Borough where Communications Facilities and Poles in the Public Right-of-Way are pre-approved as to location, with other terms and conditions subject to this Chapter.
- (2) If locations approved by the Mayor and Borough Council are deemed to be unacceptable or insufficient for Applicant's network requirements, Applicant shall reasonably demonstrate why this is the case to the satisfaction of the Borough.
- (3) If Applicant can sufficiently demonstrate the conditions of subsection (2) above, then Borough may approve additional locations for the placement of its Communications Facilities, with the fewest number of additional locations being approved as are necessary to meet the coverage requirements of Applicant.

B. Location, Safety and Aesthetics. No Pole shall be erected in the public right-of-way unless it:

- (1) Complies with the above General Siting Standards; and
- (2) Is replacing an existing Pole; or
- (3) Is approved by the Borough; or
- (4) Is located within the Public Right-of-Way; and
- (5) Is at least 150 linear feet from any other existing pole or proposed pole, which is used to support a small wireless facility; and
- (6) Is not located in an area with underground utilities except as specified in paragraph I below; and
- (7) Does not inhibit any existing sight triangles; and
- (8) Does not interfere with Public Right-of-Way usage by first responders and other emergency services vehicles and personnel; and
- (9) Does not interfere with ingress and egress on to and off of private property; and
- (10) Does not pose a traffic hazard or other hazardous condition; and
- (11) Allows adequate room for the public to pass and re-pass across the public right-of-way; and
- (12) Subject to subsection (D) below and subject to Borough review and approval by the Mayor and Borough Council, Applicant will heed reasonable requests by the Borough to utilize stealth technology and decorative poles when requested to preserve the existing character and streetscape and minimize impact on surrounding properties by causing the proposed pole and small cell to blend in compatibly with their background.

- C. Height. No pole shall be taller than 50 feet in height including the antennas or 110% of the height of poles in the surrounding streetscape, whichever is higher.
- D. Distance from curb line. No pole shall be farther than five feet from the curb line.
- E. Decorative Poles. At its sole discretion, the Borough may require adherence to the following design standards, which will be enforced in a non-discriminatory manner:
- (1) The Borough may require some or all new poles in the Applicant's build plan to be Decorative Poles.
 - (2) Borough may reasonably require Applicant to utilize the Decorative Pole designs subject to Borough review and approval by the Mayor and Borough Council.
 - (3) Applicant retains responsibility for acquiring and configuring, at Applicant's own expense, said Decorative Poles for use for provision of its telecommunications services.
 - (4) The burden of proof is on the Applicant, on a case by case basis, to demonstrate why a concealed design site requested by the municipality is not possible or feasible for the Applicant.
- F. General Antenna Design Requirements. Pole mounted antennas are permitted on new and existing Poles, provided that each pole mounted antenna:
- (1) Does not exceed three cubic feet in volume; and
 - (2) Is finished and/or painted and otherwise camouflaged, in conformance with best available stealth technology methods, so as to blend in compatibly with its background and so as to minimize its visual impact on surrounding properties; and
 - (3) Does not inhibit sight triangles; and
 - (4) Allows adequate room for the public to pass and repass across the public right-of-way.
- G. Cabinet Design Requirements. Pole mounted cabinets are permitted on new and existing poles, provided that each pole mounted cabinet:
- (1) Does not exceed 16 cubic feet; and
 - (2) Is finished and/or painted and otherwise camouflaged in conformance with best available stealth technology methods so as to blend in compatibly with its background and so as to minimize its visual impact on surrounding properties; and
 - (3) Does not inhibit sight triangles; and
 - (4) Allows adequate room for the public to pass and repass across the public right-of-way.
- H. Strand Mounted Antenna Siting and Design Standards. All Strand Mounted Antennas shall comply with the following standards:
- (1) Located between two utility Poles on communication wiring that is parallel to the ground and the edge of the right-of-way.
 - (2) Not located on communication wiring that crosses the right-of-way.
 - (3) Located entirely within the limits of the Public Right-of-Way.
 - (4) Placed as close as possible to the nearest utility Pole, and in no event more than five feet from the Pole unless a greater distance is technically necessary or is required by the utility Pole owner for safety clearance.
 - (5) Not exceed a maximum volume of 1.5 cubic feet, including Antenna and supplementary equipment
 - (6) No Strand-Mounted Antenna or component shall exceed 18 inches in diameter
 - (7) No portion of a Strand Mounted Antenna shall extend greater than a distance of 12 inches measured from the wiring on which it is mounted.
 - (8) Consolidated to the greatest extent technically feasible.
- I. Structural Certification. 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.
- J. Ground Mounted Equipment. Ground mounted equipment may be used only to house equipment and other supplies in support of the small wireless facility.
- K. Underground Utilities. Unless otherwise agreed to in writing by the Borough or otherwise required by applicable laws, whenever any existing electric utilities or communications facilities are located underground within a public right-of-way, the provider with permission to occupy the same portion of the public right-of-way shall locate its communications facilities underground at its own expense. The Borough may, in its sole discretion, approve

above-ground placement of equipment cabinets, pedestals and similar equipment. For facilities or equipment such as wireless facilities that cannot, by their nature, operate unless located above ground, the provider and Borough shall work to find a suitable location for such facilities or equipment, and which may be outside the public right-of-way, only if the Borough owns or otherwise manages said locations and has the authority to make them available to applicant for its communications facilities under similar terms and conditions as locations are made available in the public right-of-way. The applicant shall not be compelled to locate its above ground wireless facilities on private property that is not owned, controlled or otherwise managed by the Borough.

- L. Total Volume. All wireless equipment associated with the pole or tower, including the wireless equipment associated with the antenna and any preexisting associated equipment shall not be more than 28 cubic feet in volume.
- M. As-Built Plans. The provider shall, upon completion of construction, provide the Borough with as-built drawings and a map showing the location of the facility and equipment.
- N. Fewest Possible New Poles. Applicant shall use existing Poles when possible for the placement of its Small Wireless Facilities and shall minimize the number of new proposed Poles in the public right-of-way to the fewest possible to meet the coverage and capacity requirements.
- O. Fewest Possible Small Wireless Facilities. Applicant shall minimize the number of new proposed Communications Facilities in the Public Right-of-Way to the fewest possible to meet its coverage and capacity requirements.
- P. Collocation. To the maximum extent practical, Applicant shall make its poles available to subsequent and additional applicants who desire to utilize the Right-of-Way to provide Wireless Services. Applicants shall collocate on existing Poles when possible.
- Q. Advertising and Signage. Unless otherwise permitted by the Borough, all Communications Facilities and supporting Poles and other support structures shall not contain any advertising or signage, other than that which is required by the FCC and New Jersey Board of Public Utilities, as well as other applicable state, local and federal laws and regulations.
- R. Noise. Small Wireless Facilities shall not cause noise that will result in a disturbance to nearby properties or interfere with the right of quiet enjoyment to same, and shall not violate the provisions of any applicable noise ordinance, including local state and federal standards. Small Wireless Facilities shall adhere to noise standards for stationary commercial and industrial sources promulgated by the New Jersey Department of Environmental Protection (NJDEP) via its statutory authority under the 1971 Noise Control Act and specified in detail in the Model Local Noise Control Ordinance. This includes the standard that sound levels emitted from Small Wireless Facilities may not exceed 65 decibels between 7:00am and 10:00pm and may not exceed 50 decibels between 10:00pm and 7:00am, as well as any such and related standards which are revised by the NJDEP from time to time.

§108-5 Restoration requirements.

- A. The provider, or its agent or contractor, shall restore, repair and/or replace any portion of the public right-of-way that is damaged or disturbed by the provider's communications facilities, poles, towers or work in or adjacent to the public right-of-way. Said restoration, repair and replacement shall be done to the satisfaction of the Borough engineer who will determine good workmanship as well as compliance with applicable standards and ordinances regarding road openings and pavement and sidewalk repair.
- B. If the provider fails to timely restore, repair or replace the public right-of-way as required in this section, the Borough or its contractor may do so and the provider shall pay the Borough's costs and expenses in completing the restoration, repair or replacement.

§108-6 Removal, relocation and abandonment.

- A. Within 30 days following written notice from the Borough, the provider shall, at its own expense, protect, support, temporarily or permanently disconnect, remove, relocate, change or alter the position of any of its communications facilities, poles, support structures or towers within the public right-of-way, including relocation of above-ground communications facilities underground (consistent with the provisions of this chapter), whenever the Borough has determined, in its sole discretion, that such removal, relocation, change or alteration is

necessary for the construction, repair, maintenance or installation of any Borough improvement, the operations of the Borough in, under or upon the public right-of-way, or otherwise is in the public interest. The provider shall be responsible to the Borough for any damages or penalties it may incur as a result of the provider's failure to remove or relocate communications facilities, poles, support structures or towers as required in this section.

- B. The Borough retains the right and privilege to cut or move any communications facility, pole, support structure or tower located within the public right-of-way of the Borough, as the Borough may determine, in its sole discretion, to be necessary, appropriate or useful in response to any public emergency. If circumstances permit, the Borough shall notify the provider and give the provider an opportunity to move its own facilities prior to cutting or removing the communications facility, pole, support structure or tower. In all cases, the Borough shall notify the provider after cutting or removing the communications facility, pole, support structure or tower as promptly as reasonably possible.
- C. A provider shall notify the Borough of abandonment of any communications facility, pole, support structure or tower at the time the decision to abandon is made, however, in no case shall such notification be made later than 30 days prior to abandonment. Following receipt of such notice, the provider shall remove its communications facility, pole, support structure or tower at the provider's own expense, unless the Borough determines, in its sole discretion, that the communications facility, pole, support structure or tower may be abandoned in place. The provider shall remain solely responsible and liable for all of its communications facilities, poles, support structures and towers until they are removed from the public right-of-way unless the Borough agrees in writing to take ownership of the abandoned communications facilities, poles, support structures or towers.
- D. If the provider fails to timely protect, support, temporarily or permanently disconnect, remove, relocate, change or alter any of its communications facilities, poles, support structures or towers or remove any of its abandoned communications facilities, poles, support structures or towers as required in this section, the Borough or its contractor may do so and the provider shall pay all costs and expenses related to such work, including any delay damages or other damages the Borough incurs arising from the delay.

§108-7 Fees and charges.

- A. One-time fees and recurring rates. As consideration to the Borough for entering into the Right-of-Way Use Agreement and also as a condition precedent for the issuance of any required permit pursuant to this chapter, the applicant shall pay the required one-time fees and recurring rates as set forth in this section, and which may be amended or modified from time to time per revision and modification to local, state and federal laws and regulations. Said fees shall include application or one-time fees and recurring right-of-way occupancy rates.
- B. Permit application escrow. A permit application escrow of \$1,000 per new small wireless facility, including any new pole or support structure, as applicable, and \$500 per alteration, expansion, modification to an existing small wireless facility or pole or support structure, shall be submitted along with each application for a permit and held in escrow to be billed against actual incurred costs. Any expenses above the escrow shall be invoiced to applicant directly and shall be paid by applicant prior to the issuance of any permit.
- C. Reasonable approximation. All one-time fees will be a reasonable approximation of objectively reasonable costs.
- D. One-time fees apply to all work. One-time fees and event fees apply to the initial installation of facilities as well as to any subsequent upgrade, replacement, expansion, modification or alteration of same, with each instance of an upgrade, expansion, alteration, modification or repair being a separate project subject to a permit application and one-time fees. Ordinary maintenance and repair does not trigger any one-time fees.
- E. Designee consulting fee. Applicant shall be responsible for Designee consulting fees which will be a reasonable reflection of objectively reasonable costs, and which shall be first paid to Designee via the permit application escrow. Said fee shall be at the rate of \$350 per hour and shall not exceed three hours per installation, modification, alteration, upgrade or expansion of a small wireless facility or pole or support structure. Said consultation shall supplement Borough personnel with expertise and knowledge not otherwise possessed by Borough agents and officials.

- F. Annual right-of-way occupancy rate shall be \$270 per annum, and shall be paid within 30 days of the issuance of the applicable permit and annually thereafter, with payment being due on the anniversary of the first payment date for the balance of the term. However, under no circumstances shall the rate be remitted later than 90 days after the full execution of the applicable Right-of-Way Use Agreement between Borough and applicant.
- G. Annual attachment rate shall be equal to an amount that represents a reasonable approximation of the objectively reasonable costs incurred by the Borough for the attachment of each small wireless facility to Borough-owned structures in the public right-of-way. This amount shall be paid within 30 days of issuance of the applicable permit(s) and annually thereafter. The annual rates in this subsection and the annual right-of-way occupancy rate subsection combined shall not exceed \$270 annually per small wireless facility location.
- H. All fees and rates will be applied in a non-discriminatory manner to all communications service providers.
- I. Other fees. The applicant or provider shall be subject to any other generally applicable fees of the Borough or other government body, such as those required for electrical permits, building permits, or street opening permits, which the applicant or provider shall pay as required in the applicable laws, as well as attachment fees for the use of the Borough owned poles, towers, support structures, ducts, conduits or other structures in the public right-of-way, as set forth in attachment agreements authorizing such use.
- J. No refund. Except as otherwise provided in the Right-of-Way Use Agreement, Franchise Agreement or License, the provider may remove its communications facilities, poles or towers from the public right-of-way at any time, upon not less than 30 days prior written notice to the Borough, and may cease paying the Borough any applicable recurring fees for such use, as of the date of actual removal of the facilities and complete restoration of the public right-of-way. In no event shall a provider be entitled to a refund of any fees paid prior to removal of its communications facilities, poles or towers.

§108-8 Permit applications.

- A. Permit required. Unless expressly authorized in this chapter or in writing by the Borough, no person may construct, install, modify, expand, alter or maintain in the public right-of-way any Small Wireless Facilities, communications facilities, poles built for the sole or primary purpose of supporting communications facilities or towers, including the installation or collocation of communications facilities on existing poles, towers, support structures or other structures within the public right-of-way without first receiving a permit. Notwithstanding the foregoing, in the event of an emergency, a provider or its duly authorized representative may work in the public right-of-way prior to obtaining a permit, provided that the provider shall attempt to contact the Borough prior to commencing the work and shall apply for a permit as soon as reasonably possible, but not later than 24 hours after commencing the emergency work. For purposes of this subsection, an “emergency” means a circumstance in which immediate repair to damaged or malfunctioning facilities is necessary to restore lost service or prevent immediate harm to persons or property.
- B. Permit application requirements. The application shall be made by the provider or its duly authorized representative. It shall be submitted to the Borough engineer and shall contain the following:
 - (1) The applicant’s name, address, telephone number, and email address, including emergency contact information for the applicant.
 - (2) The names, addresses, telephone numbers and email addresses of all consultants, if any, acting on behalf of the applicant with respect to the filing of the application.
 - (3) A description of the proposed work and the purposes and intent of the proposed communications facility, pole, tower, support structure or wireless facility (as applicable) sufficient to demonstrate compliance with the provisions of this chapter.
 - (4) If applicable, a copy of the authorization for use of the property from the pole, tower or support structure owner on or in which the communications facility will be placed or attached.
 - (5) Detailed construction drawings regarding the proposed communications facility, pole, tower, support structure or wireless facility (as applicable). Construction drawings shall include, at minimum, a clear delineation of the right-of-way, distance of the proposed communications facility, pole or support structure from certain existing public right-of-way features such as curb ramps for handicap accessibility pursuant to the

Americans With Disabilities Act, sidewalk width and other details standard for these types of telecommunications installations in the public right-of-way.

- (6) To the extent the proposed facility involves collocation on a pole, tower or support structure, a structural report performed by a duly licensed engineer evidencing that the pole, tower or support structure will structurally support the collocation (or that the pole, tower or support structure will be modified to meet structural requirements) in accordance with applicable codes.
 - (7) For any new aboveground facilities, accurate visual depictions or representations. If not included in the construction drawings.
 - (8) The following additional permits, approvals and authorization, as each is reasonably applicable to the proposed application:
 - a) Street opening permit in accordance with Borough ordinances.
 - b) Construction permit in accordance with Borough ordinances or State codes, as applicable.
 - c) County approval, for sites located in the County right-of-way.
- C. Proprietary or confidential information in application. Applications are public records that may be made publicly available pursuant to the New Jersey Open Public Records Act. Notwithstanding the foregoing, Applicant may designate portions of its application materials that it reasonably believes contain proprietary or confidential information as “proprietary” or “confidential” by clearly marking each portion of such materials accordingly, and the Borough shall treat the information as proprietary and confidential, subject to the New Jersey Open Public Records Act and the Borough’s determination that the applicant’s request for confidential or proprietary treatment of application materials is reasonable. The Borough shall not be required to incur any costs to protect the application materials from disclosure, other than the Borough’s routine procedures for complying with the New Jersey Open Public Records Act.
- D. Ordinary maintenance and repair. A permit shall not be required for ordinary maintenance and repair. The provider or other person performing the ordinary maintenance and repair shall obtain any other permits required by applicable laws and shall notify the Borough in writing at least 48 hours before performing the ordinary maintenance and repair. Notwithstanding the foregoing, the Borough reserves the right to inspect applicant’s small wireless facilities at any time in order to determine if the existing configuration matches the configuration contained in the most recently issued permit, and the applicable Right-of-Way Use Agreement. Applicant shall bear no costs for said inspections. However, if it is determined that an existing small wireless facility is found to be larger than the dimensions specified in the most recently issued applicable permit, then applicant shall be in violation of this chapter. Applicant shall receive notice from the Borough and, upon receipt of such notice, be required to restore the site within ten days to the configuration of the most recently approved permit or retroactively apply for administrative approval for the unapproved modifications. In such instances, Applicant will be responsible for costs and fees incurred by the Borough to perform inspections and review.
- E. Material changes. Unless otherwise agreed to in writing by the Borough, any material changes to an application, as determined by the Borough in its sole discretion, shall be considered a new application for purposes of the time limits set forth in chapter, unless otherwise provided by applicable laws.
- F. Application fees. Unless otherwise provided by applicable laws, all applications pursuant to this chapter shall be accompanied by the required fees.
- G. Effect of permit. A permit from the Borough authorizes an applicant to undertake only the activities in the public right-of-way specified in the application and permit, and in accordance with this chapter and any general conditions included in the permit. A permit does not authorize attachment to or use of existing poles, towers, support structures or other structures in the public right-of-way; a permittee or provider must obtain all necessary approvals from the owner of any pole, tower, support structure or other structure prior to any attachment or use. A permit does not create a property right or grant authority to the applicant to interfere with other existing uses of the public right-of-way.
- H. Duration. Any permit for construction issued under this chapter shall be valid for a period of 365 days after issuance, provided that the period may be extended for up to an additional 180 days upon written request by the applicant (made prior to the end of the initial 365 day period) if the failure to complete construction is as a result of circumstances beyond the reasonable control of the applicant.

- I. Batch permit. An applicant may simultaneously submit not more than 25 applications for communications facilities, or may file a single, consolidated application covering such communications facilities, provided that the proposed communications facilities are to be deployed on the same type of structure using similar equipment and within an adjacent, related geographic area of the Borough. If the applicant files a consolidated application, the applicant shall pay the application fee calculated as though each communications facility were a separate application.

§108-9 Application review.

- A. Pre-application Meeting. Prior to making a formal application with the Borough for use of the public right-of-way, all applicants are advised to meet voluntarily with the Borough Engineer and Designee to review the scope of the applicant's proposal. This meeting may include discussion of Small Wireless Facility proposed locations and design.
- B. All applications made under this chapter 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; Accelerating Wireline Broadband Deployment by the Removal of Barrier to Infrastructure Investment." WT Docket No. 17-79; WC Docket No. 170-84.
- C. The Designee and Borough Engineer shall review all applications for the placement of new poles and new Small Wireless Facilities, including ground level cabinets within the public right-of-way and the placement of pole mounted antennas and pole mounted cabinets within the public right-of-way, and advise the Borough whether the application is complete and whether it meets the requirements of this chapter.
- D. Except as otherwise provided by applicable laws, the Borough shall, within 30 days of receiving an application, notify the applicant if the application is incomplete and identify the missing information. The applicant may resubmit the completed application within ten days without additional charge, in which case the Borough shall have 30 days from receipt of the resubmitted application to verify the application is complete, notify the applicant that the application remains incomplete or, in the Borough's sole discretion, deny the application.
- E. The Borough shall review the application and, if the application conforms with applicable provisions of this chapter, the Borough shall issue the permit, subject to the standard permit requirements published by the Borough.
- F. The Borough shall make its final decision to approve or deny the Application within 60 days for a collocation of a small wireless facility to an existing structure, and 90 days to deploy a small wireless facility on a new structure, after the Application is complete (or deemed complete in the event the Borough does not notify the applicant that the application or resubmitted application is incomplete). Review of an application to deploy a facility other than a small wireless facility using an existing structure or new structure shall be decided within 150 days.
- G. Waiver. The Borough, via its council, administrator or any person designated as having the right to do so, may waive any siting standard set forth in this chapter where the applicant demonstrates that strict enforcement of said Standard:
- a) Will prohibit or have the effect of prohibiting any interstate or intrastate telecommunications service pursuant to 47 U.S.C. 253(a); or
 - b) Will prohibit or have the effect of prohibiting personal wireless service pursuant to 47 U.S.C. 332(c)(7)(B)(i)(11); or
 - c) Will violate any requirement set forth by the FCC Order entitled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by the Removal of Barrier to Infrastructure Investment." WT Docket No. 17-79; WC Docket No. 170-84.
 - d) Will violate or conflict with any applicable provision of P.L. 1972 c. 186 the "Cable Television Act", as codified in N.J.S.A. 48:5A-1 et seq.
 - e) Will violate or conflict with the applicable terms and provisions of any duly effective local system wide franchise for the provision of cable television service, as the term is defined in N.J.S.A. 48:5A-3 Definitions.
 - f) Will violate or conflict with any applicable provision section 14:18 of the New Jersey Administrative Code which pertains to the provision of cable television service.
 - g) Will violate or conflict with any other applicable state or federal law or regulation which pertains to the installation and operation of communications facilities in the public rights-

of-way, regardless of whether such facilities are part of a wireless communications, cable television or landline telephonic system.

H. The Borough shall advise the applicant in writing of its final decision.

§108-10 Permitted use.

Notwithstanding anything else in the codes and ordinances of the Borough of North Caldwell, the installation of antennas, small cells and other communication devices and associated equipment in the public right-of-way either on existing or new poles are permitted and considered a permitted use if a Right-of-Way Use Agreement and right-of-way permits are obtained pursuant to this chapter.

§108-11 Governance of deployments outside of the public right-of-way.

This chapter is intended to govern the installation, placement, maintenance, modification, upgrade and repair of communications facilities, including small wireless facilities, in the public right-of-way. The placement of telecommunications equipment outside of the public right-of-way shall be governed by the applicable codes and ordinances of the Borough.

§108-12 Preexisting sites and municipal agreements.

- A. Any communications facilities in the public right-of-way existing at the time of the adoption of the provisions of this chapter, whether or not a Right-of-Way Use Agreement exists or is in force and effect with regard to same, shall be required to comply with the provisions of this chapter.
- B. Any Right-of-Way Use Agreements entered into between the Borough and any provider regarding communications facilities in the public right-of-way shall be required to conform to the provisions and standards of this chapter. To the extent the provisions of any existing such agreement conflict with this chapter, said provisions, at the discretion of the Borough, shall be replaced and superseded by the applicable terms of this chapter.

§108-13 New Jersey One Call.

In addition to compliance with the applicable provisions of this chapter, prior to the start of any installation of poles, support structures, small wireless facilities or other communications facilities that requires excavation, Applicant shall contact New Jersey One Call at 811 at least three full business days prior to the commencement of work.

§108-14 Violations.

Violation of any of the provisions of this chapter shall be punishable with a civil penalty of \$500 for each violation which continues more than ten days after written notice of such violation is provided to the person or applicant. Each day, after such notice, that a violation occurs or is permitted to exist by the person or applicant, constitutes a separate offense.

Section 2. Repealer.

All ordinances or parts of ordinances inconsistent or in conflict with this Ordinance are hereby repealed as to said inconsistencies and conflicts.

Section 3. Severability.

If any section, part of any section, or clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the remaining provisions of this ordinance. The governing body of the Borough of North Caldwell declares that it would have passed the ordinance and each section and subsection thereof, irrespective of the fact that any one or more of the subsections, sentences, clauses or phrases may be declared unconstitutional or invalid.

Section 4. Effective Date.

This ordinance shall take effect immediately upon passage and publication according to law.

INTRODUCED: August 15, 2023
PUBLIC HEARING: September 27, 2023
ADOPTED: September 27, 2023

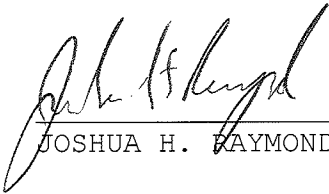
Moved By: Councilman Weinstein

Seconded By: Councilman Atlas

COUNCIL MEMBER	YES	NO	ABSTAIN	ABSENT	COUNCIL MEMBER	YES	NO	ABSTAIN	ABSENT
ATLAS	X				REES	X			
FLORIA-CALLORI	X				TILTON	X			
KESSLER	X				WEINSTEIN	X			



TAMI MICHELOTTI, BOROUGH CLERK



JOSHUA H. RAYMOND, MAYOR