THE MAYOR AND COUNCIL OF BOONSBORO

ORDINANCE NO. 2019-__02__

SMALL WIRELESS COMMUNICATIONS FACILITIES ORDINANCE

WHEREAS, in the Declaratory Ruling and Third Party Report and Order of the Commission, WC Docket No. 17-79/WC Docket No. 17-84, effective January 14, 2019 (Order), the Federal Communications Commission established certain parameters to be applied by local government in considering requests by wireless communications providers to locate small wireless communications facilities and appurtenances in the municipal rights-of-way owned or controlled by the Town; and

WHEREAS, in the exercise of its general police powers, in furtherance of the health, safety and general welfare of the inhabitants of the Town and the general public, the Town has determined to regulate the location, appearance and other characteristics of small wireless communications facilities and appurtenances located in the Town rights-of-way; in accordance with the parameters and subject to the limitations established and promulgated by the Federal Communications Commission;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF BOONSBORO AS FOLLOWS:

Section 1. Application Required. An applicant desiring to place, establish, locate, construct or install a small wireless communications facility or appurtenance in a right-of-way owned or controlled by the Town shall apply to the Mayor and Council for authorization prior to commencing such activity. Applicants are encouraged to request a conference with the Mayor and Council or its designee prior to submitting an application. The Mayor and Council may adopt procedural rules to be applied in its administrative review of applications. The application

shall be submitted in accordance with the procedural rules adopted by the Mayor and Council, and shall include or be accompanied by an accurate scale drawing of the proposed facility and appurtenances, its location and manner of attachment, including an accurate survey of the proposed location, and such other documents, information and materials as may be required in the procedural rules. If the pole, structure or location of a proposed small wireless communications facility or appurtenance is not owned by the Town, contemporaneously with the application, the applicant shall obtain and provide to the Mayor and Council with the written consent of the owner of the pole, structure or location where the applicant proposes to place or attach the small wireless communications facility or appurtenances. The application shall be accompanied by a bond satisfactory to the Mayor and Council conforming to the Order and any applicable Maryland statute. The application shall not require the Mayor and Council to perform any work for the purpose of making any pole or structure ready for the installation or attachment of the proposed small wireless communications facility or appurtenances. The application shall include a description of any such work required, the manner of performance of such work, and by whom the proposed work is to be performed.

Section 2. Application and other Fees. The minimum application and recurring fees shall be as established in the presumptively reasonable fee limits set forth in paragraph 79 of the Order. The Mayor and Council may require additional application or recurring fees in accordance with the criteria specified in the Order. The application fee shall be submitted in full, together with the initial annual recurring fee, at the time of filing an application. In the event the application is disapproved, the initial recurring fee shall be refunded to the applicant without interest.

Section 3. Burden of Proof. The burden of proof is on the applicant in submitting an application to establish by satisfactory evidence that the site proposed is owned or controlled by the Town. In the event the evidence establishes that the proposed site is not owned by the Town in fee simple, but is within a public easement, the burden of proof shall be on the applicant to establish by satisfactory evidence the owner of the servient tenancy, and that the proposed use of land is permitted by and within the scope of the public easement. As used in this section, satisfactory evidence shall mean such evidence as would be admissible in the circuit courts of this State sufficient to establish the findings required in this section, as determined by the Mayor and Council. In determining the sufficiency of the evidence submitted by the applicant, the Mayor and Council may take into consideration the opinion of the Town Attorney or other legal counsel selected by the Mayor and Council for that purpose.

Section 4. Criteria. Small wireless communications facilities or appurtenances shall not be located where visibility may be impaired resulting in a traffic safety hazard, or where the small wireless communications facility or appurtenance creates an unsafe or unreasonable obstruction to use of sidewalks or rights-of-way by pedestrians, as determined by the Mayor and Council. Except as otherwise permitted by Maryland statute, small wireless communications facilities or appurtenances may not be located on poles exceeding the prevailing height of existing poles in the vicinity of the location proposed, nor may existing poles or support structures be replaced by poles or structures of greater height, except as permitted by Maryland statute. Facilities on existing poles shall not be moved or otherwise disturbed except with the consent of the owner of the facilities. New poles or supporting structures shall not be installed where the proposed small wireless communications facility or appurtenance may be reasonably established on an existing pole or supporting structure. The burden of proof is on the applicant

to establish the need for a new pole or supporting structure in the application. The burden of proof is also on the applicant to establish by satisfactory evidence that the attachment proposed will not render the pole structurally unsound. The Mayor and Council may refer an application to the Planning Commission for review and comment in accordance with the Town's adopted comprehensive plan. The analysis and recommendation of the Planning Commission may be considered by the Mayor and Council in approving, denying or conditioning approval of the application. New poles or other support structures shall not be permitted if the Mayor and Council determine that the proposed small wireless communications facility or appurtenance may be effectively located on an existing pole or structure. The burden is on the applicant to establish by satisfactory evidence that the proposed small wireless communications facility or appurtenance may not be effectively located on an existing pole or support structure. Small wireless communications facilities or appurtenances mounted at ground level shall not impede or obstruct pedestrian or vehicular passage, shall not block any entrance to any building, shall not adversely impact any adjacent business or commercial use, and, except as otherwise provided by the Order or Maryland statutory law, shall not materially and adversely diminish the value, use or enjoyment of property. The burden is on the applicant to establish by satisfactory evidence that the proposed small wireless communications facility or appurtenance is compatible with the neighborhood and vicinity in which the installation is proposed. The Mayor and Council may by resolution establish additional aesthetic and other criteria consistent with the Order and Maryland statutory law to be applied in its consideration of applications. The criteria may be amended from time to time by resolution of the Mayor and Council. As used in this section, the burden of proof includes the burdens of production and persuasion.

Section 5. Consideration of Application. The Mayor and Council shall consider and approve or deny the application, including a batch application, in accordance with the times for considering applications established by the FCC in the Order.[1] The Mayor and Council may impose conditions in approving an application which are not inconsistent with the Order or Maryland statutory law. The Mayor and Council may elect to conduct an administrative hearing or informal conference with the applicant on the application. The applicant's failure to participate in such administrative hearing or informal conference after reasonable notice shall be sufficient grounds for denial of the application. If the Mayor and Council determines to deny an application, it shall provide the reasons for its denial. An application may be denied if the application is determined by the Mayor and Council to be incomplete in any material respect. Approval of an application does not constitute a determination by the Mayor and Council that the proposed use or facility will not adversely affect the health, safety or public welfare, nor shall such approval constitute a defense to any claim against the applicant by an injured or aggrieved party.

Section 6. Judicial Review. The decision of the Mayor and Council approving or denying an application shall be subject to review in the Circuit Court for Washington County, as provided in the Order, to the extent the Circuit Court has subject matter jurisdiction with respect to such decisions. A petition for judicial review or other civil action, as determined by the Circuit Court, challenging a decision of the Mayor and Council shall be commenced within thirty (30) days of the date of approval or denial by the Mayor and Council. The Town shall be a party in any such proceeding in the Circuit Court.

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[1] A copy of the Order is included as an appendix to this Ordinance.

Section 7. Indemnification and Hold Harmless. Except to the extent prohibited under Maryland law, the applicant shall hold harmless and indemnify the Town from and against any damages awarded against the Town in any action or proceeding sounding in trespass or interference with an easement, including actions for injunctive or declaratory relief, or for tortious damage to property, or for tortious personal injury or death, in which the Town is named as a party, and from and against all costs and expenses of defense, including reasonable expert witness and attorneys fees incurred by the Town in any such action or proceeding.

Section 8. Zoning. The Land Development Ordinance shall not apply to applications under this Ordinance for locations within a right-of-way owned or controlled by the Town.

Section 9. Streets and Sidewalks. The applicant shall not commence any work in, above or below any street, sidewalk or other public right-of-way prior to obtaining approval of the Mayor and Council. The work shall be in accordance with the application and any conditions imposed in approving the application. Not less than thirty (30) days before commencing activity on, above or below a public street, sidewalk or other public right-of-way, the applicant shall inform the Mayor and Council of how and when construction is proposed to be conducted on streets, sidewalks and other public right-of-way, and shall take appropriate precautions to prevent injury to persons or damage to property, as determined by the Mayor and Council, which may include the use of signs, barricades or flagmen. Any such work shall be planned in a manner which will avoid interference with peak hour traffic, town events or other conflicting uses of the public right-of-way, as determined by the Mayor and Council.

Section 10. Compliance with Applicable Codes. All work performed by or on behalf of the applicant pursuant to an approved application shall conform to all applicable building,

electrical and other codes relating to the work, except as otherwise provided by the Order or by Maryland statute.

Section 11. Municipal Infraction. A violation of this Ordinance shall be deemed a municipal infraction. Each day a violation continues shall be deemed a separate offense.

Section 12. Use of Poles and other Structures. Approval of an application by the Mayor and Council under this Ordinance conclusively establishes the granting of irrevocable consent by the applicant, for itself, its successors and assigns, permitting the Town and its assignees to use any pole or structure installed or extended by or for the applicant for any municipal or other public purpose, and that the applicant shall promptly execute and deliver to the Town such other and further assurances of its consent as may be requested from time to time.

Section 13. Severability. If any part of this Ordinance is declared invalid by the final, unappealable judgment of a court having jurisdiction, the remaining provisions of this Ordinance are intended to be severable and shall remain valid and enforceable.

Section 14. Prevailing Law. In the event any provision of this Ordinance is judicially determined to be in conflict with applicable Federal or Maryland law, the Federal or Maryland law shall prevail.

ATTEST:

Kimberly A. Keller

~~Sarah Campbell, Town Clerk~~
Kimberly A. Keller
Office Manager

THE MAYOR AND COUNCIL OF BOONSBORO

By: Howard W. Long

Howard W. Long, Mayor

Rickard Byrd

Rickard Byrd, Council Member

(SEAL)

Marilee Kerns, Council Member

Terri Hollingshead, Council Member

Anthony Nally, Council Member

Rick Weaver, Council Member

Ray Hanson, Council Member

INTRODUCED: March 18th, 2019

ENACTED: April 8th, 2019

EFFECTIVE: April 8th, 2019