

MODEL WIRELESS TELECOMMUNICATIONS ORDINANCE for Siting of "Small Cell" Telecommunication Infrastructure

*This document is intended for use by towns and villages that have existing code for wireless communications infrastructure developed and adopted **prior** to the introduction of "small cell" wireless equipment and its widespread deployment in public rights-of-way.*

We strongly advise against the placement of 4G/5G small cell antennas in any residential areas due to the lack of safety testing, and recommend that every effort be made by applicants to limit placement of antennas to the least populated areas, such as along highways or in large parking lots, and as far as possible from schools, daycare centers, playgrounds, parks and other area where children spend time. Locating antennas in or near residential areas increases issues regarding aesthetics and property values. These considerations are being used by some municipalities to challenge or deny permit applications.

Moreover, as public resistance to 4G/5G antennas grows and technology improves, the need for locating any antennas in residential areas may decline. We note that some wireless carriers are using existing towers and lower-band frequencies formerly used for analog television signals to carry so-called "5G" signals, eliminating the need for small cells.

Municipal officials and local attorneys should be cognizant that rulings and orders of the Federal Communications Commission (FCC) are not laws, and do not have the force of law. They are merely the agency's interpretation of the law and of its own powers and authority. Recently, decisions of the FCC regarding the National Environmental Policy Act (NEPA) were overturned by the District Court in Washington, DC. Congress is currently threatening bipartisan legislation to curb the over-reach of the FCC, and a number of cities are challenging the authority of the agency to preempt local control over the siting of small cell antennas.

The wireless industry often threatens legal action against any municipality considering health effects in its deliberations, based on Section 704 of the 1996 Telecommunications Act which prohibits consideration of "environmental effects" in making siting decisions. However, that prohibition is conditional on the antenna meeting all FCC emission standards at all times during its operation, which is why many local municipalities are requiring annual random, independent testing of all antennas.

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Section 1: FINDINGS

The Town of _____ hereby finds:

1.1 The wireless telecommunications industry has expressed interest in submitting applications to place antennas and associated equipment on new or existing structures in the Town's public rights-of-way for deployment of "small cell" wireless telecommunications facilities (hereinafter "small cell installations").

1.2 The deployment of small cell installations can have both positive and negative impacts on our community. Multiple small cell installations within the public right-of-way can impact property values; pose a threat to the public health, safety and welfare; create traffic and pedestrian safety hazards; impact trees where proximity conflicts may require trimming of branches or require removal of roots; create visual and aesthetic blights and potential safety risks from excessive size, height, weight, noise or lack of camouflaging which negatively impact the quality and character of the Town.

1.3 The Town currently regulates all wireless telecommunications facilities in the public right-of-way through a zoning and permit process. The Town's existing code has not been updated to reflect current telecommunications trends or necessary legal requirements. Further, the existing code provisions were not specifically designed to address the unique legal and practical issues that arise in connection with multiple small cell installations deployed in the public rights-of-way.

1.4 The Town recognizes its responsibilities under the federal Telecommunications Act of 1996 and state law, and believes that it is acting consistent with the current state of the law in ensuring that development activity does not endanger public health, safety, or welfare. The Town intends this Ordinance to ensure that the installation, augmentation and operation of small cell installations in the public rights-of-way are conducted in such a manner as to lawfully balance the legal rights of applicants under the federal Telecommunications Act and (*insert applicable State code*) with the rights, safety, privacy, property and security of residents of the Town.

1.5 This chapter is not intended to, nor shall it be interpreted or applied to: (1) prohibit or effectively prohibit any wireless telecommunications service provider's ability to provide reasonable and necessary wireless communications services; (2) prohibit or effectively prohibit any entity's ability to provide reasonable and necessary interstate or intrastate telecommunications service; (3) unreasonably discriminate among providers of functionally equivalent services; (4) deny any request for authorization to place, construct or modify wireless telecommunications service facilities solely on the basis of environmental effects of radio frequency emissions so long as such wireless facilities comply in every instance and regard with all FCC's regulations concerning such emissions; (5) prohibit any collocation or

modification that the Town may not deny under federal or state law; or (6) otherwise authorize the Town to preempt any applicable federal or state law.

1.6 Based on the foregoing, the Town (*Board, Selectmen or other governing body*) finds and determines that the preservation of public health, safety and welfare requires that this Ordinance be enacted and be effective immediately upon adoption.

NOW, THEREFORE, the Town of _____ does ordain as follows:

Section 2: DEFINITIONS

"Co-Located Small Cell Installation" means a single telecommunication tower, pole, mast, cable, wire or other structure supporting multiple antennas, dishes, transmitters, repeaters, or similar devices owned or used by more than one public or private entity.

"Exempted Telecommunications Facility" includes, but is not limited to, the following unless located within a recognized Historic District:

- a. A single ground or building mounted receive-only radio or television antenna including any mast, for the sole use of the tenant occupying the residential parcel on which the radio or television antenna is located; with an antenna height not exceeding twenty-five feet;
- b. A ground or building mounted citizens band radio antenna, including any mast, if the height (post and antenna) does not exceed thirty-five feet;
- c. A ground, building, or tower mounted antenna operated by a federally licensed amateur radio operator as part of the Amateur Radio Service, if the height (post and antenna) does not exceed thirty-five feet;
- d. A ground or building mounted receive-only radio or television satellite dish antenna, which does not exceed thirty-six inches in diameter, for the sole use of the resident occupying a residential parcel on which the satellite dish is located; provided the height of said dish does not exceed the height of the ridgeline of the primary structure on said parcel.
- e. Mobile services providing public information coverage of news events of a temporary nature.
- f. Hand-held devices such as cell phones, business-band mobile radios, walkie-talkies, cordless telephones, garage door openers and similar personal-use devices.
- g. Government-owned and operated receive and/or transmit telemetry station antennas for supervisory control and data acquisition (SCADA) systems for water, flood alert, traffic

control devices and signals, storm water, pump stations and/or irrigation systems, with heights not exceeding thirty-five feet.

h. Town-owned and operated antennae used for emergency response services, public utilities, operations and maintenance if the height does not exceed seventy feet.

i. Telecommunication facilities less than fifty feet in height, in compliance with the applicable sections of this chapter, located on a parcel owned by the Town and utilized for public and/or quasi-public uses where it is found by the Town Board to be compatible with the existing uses of the property and serving the public interest.

j. Telecommunication facilities, including multiple antennas, in compliance with the applicable sections of this chapter, located on an industrial parcel and utilized for the sole use and purpose of a research and development tenant of said parcel, where it is found by the planning director to be aesthetically compatible with the existing and surrounding structures.

"Major Telecommunications Facility" means telecommunication towers, poles or similar structures greater than 60 feet in height, including accessory equipment such as transmitters, repeaters, microwave dishes, horns, and other types of equipment for the transmission or receipt of such signals, as well as support structures, equipment buildings and parking areas.

"NEPA" is the National Environmental Policy Act.

"Public Right of Way" means the area on, below, or above property that has been designated for use as or is used for a public roadway, highway, street, sidewalk, alley or similar purpose, and for purposes of this Chapter shall include Public Utility Easements, but only to the extent the Town has the authority to permit use of the area for this purpose. The term does not include a federal interstate highway or other areas that are not within the legal jurisdiction, ownership or control of the Town.

"Related Third Parties" shall include any entity contracting with applicant for the design, construction, maintenance, use or operation of the proposed small cell installation, including such entity's officers, employees, contractors, subcontractors, volunteers and agents or any subsidiaries, affiliates, successors in interest or legal assigns.

"Small Cell Installation" means all equipment required for the operation and maintenance of so-called "small cell" wireless communications systems that transmit and/or receive signals but are not "Major Telecommunications Facilities," including antennas, microwave dishes, power supplies, transformers, electronics, and other types of equipment required for the transmission or receipt of such signals.

Section 3: PERMITTING PROCESS

3.1 Permit Required. No small cell installation shall be constructed, erected, modified, mounted, attached, operated or maintained within the Town on or within any public right-of-way without the issuance of a permit. No approval granted under this chapter shall confer any exclusive right, privilege, license or franchise to occupy or use the public right-of-way of the Town for delivery of telecommunications services or any other purpose.

3.2 Application Content. All permit applications must include:

- A. Detailed site and engineering plans for each proposed small cell installation, including full address, GIS coordinates, a list of all associated equipment necessary for its operation, as well as a proposed schedule for the completion of each small cell installation covered by the application;
- B. A master plan showing the geographic service area for the proposed small cell installation(s), and all of applicant's existing, proposed and anticipated installations in the Town;
- C. Certification that the proposed small cell installation(s) addresses an existing and significant gap in coverage in the service area, such certification to include a detailed map of the "gap areas" and documentation of such gaps causing an inability for a user to connect with the land-based national telephone network or maintain a connection capable of supporting a reasonably uninterrupted communication. (See Note 1)
- D. Photographs of proposed facility equipment;
- E. Visual impact analyses with photo simulations including both "before" and "after" appearances, including simulations of the appearance of the equipment from the perspective of any property owner and adjacent property owner within 100 feet of the proposed location.
- F. Certification by an independent certified radio-frequency (RF) engineer that the small cell installation will be in compliance with all FCC standards for RF emissions as they relate to the general public, including aggregate emissions for all co-located equipment;
- G. Certification that the applicant has a right under state law to install wireless telecommunications facilities in the public right-of-way;
- H. Documentation demonstrating significant effort to locate the small cell installation in non-residential areas, including an explanation of why non-residential locations are unsuitable;

- I. Documentation that owners of all properties within 500 feet of the proposed small cell installation have been notified in writing via certified mail of the proposed installation, including its exact location, and that a blaze orange sign measuring at least 9 inches by 12 inches has been conspicuously placed at the proposed location of each small cell installation
- J. A disclosure of all related third parties on whose behalf the applicant is acting, including contracting parties and co-locaters.
- K. An executed indemnification agreement as set forth in section 3.6 hereof, and documentation that applicant and any third party on whose behalf the small cell facility is being constructed and any co-locator is in possession of General Liability Insurance that does not exclude claims of harm related to exposure to radiofrequency microwave radiation;
- L. All required documentation to demonstrate full compliance with NEPA requirements as set forth by the FCC, unless exemption is claimed. If exempt, applicant must state the basis is for such exemption and provide proof, including all supporting documents, that each and every exempt installation meets prescribed requirements;
- M. If the small cell installation is proposed to be attached to an existing utility pole or wireless support structure owned by an entity other than the Town, sufficient evidence of the consent of the owner of such pole or wireless support structure to the proposed colocation;
- N. Performance specifications and data that identify the maximum and minimum amount or level of radio-frequency emissions that are produced by the equipment when it is in full operating mode, and a monitoring plan for the Applicant's equipment capable of tracking and recording the daily amounts or levels of radio-frequency emissions that are produced by the equipment in order to verify that the average and peak emissions do not exceed the applicable FCC regulations.

3.3 Application Fee. The Town shall assess a per-installation fee of _____ (See Note 2) to cover the Town's costs of processing, reviewing, evaluating, conducting a public hearing, and other activities involved in consideration of the application, and conducting oversight of the construction of the small cell installation to ensure compliance with zoning requirements.

3.4 Consultant Fee. The Town shall have the right to retain an independent technical consultant to assist the Town in its review of the application. The reasonable cost of the review shall be paid by the Applicant.

3.5 Compliance Bond. Upon approval of the application, the Permittee shall be required to post a bond in the amount of \$50,000 (fifty thousand dollars) for each small cell installation, such bond to be held and maintained during the entire period of Permittee's operation of each small

cell installation in the Town as a guarantee that no such installation, including any co-located equipment, exceeds or will exceed the allowable FCC limits for radio frequency radiation exposure to the general public as determined by a qualified independent radio frequency engineer under Section 3.7.2 hereof.

3.6 Indemnification. Permittee shall provide an executed agreement in the form provided by the Town, pursuant to which Permittee and any related third parties agree to defend, hold harmless and fully indemnify the Town, its officers, employees, agents, attorneys, and volunteers, from (i) any claim, action or proceeding brought against the Town or its officers, employees, agents, or attorneys to attack, set aside, void, or annul any such approval of the Town or (ii) a successful legal action brought against the Town for loss of property value or other harm caused by the placement or operation of a small cell installation. Such indemnification shall include damages, judgments, settlements, penalties, fines, defensive costs or expenses, including, but not limited to, interest, attorneys' fees and expert witness fees, or liability of any kind related to or arising from such claim, action, or proceeding whether incurred by the Permittee, the Town and/or the parties initiating or bringing such proceeding. The agreement shall also include a provision obligating the Permittee to indemnify the Town for all of the Town's costs, fees and damages which the Town incurs in enforcing the indemnification provisions of this Section.

3.7 Notice of Public Meeting. Within ten business days of receipt of a full and complete application for the installation of a small cell facility in the public Right of Way, the Town shall schedule a public meeting to be held within 60 days. Notice of such meeting shall be sent by the applicant to all property owners within 500 feet of each proposed installation, such notice to be sent by certified mail. At the public meeting, members of the public shall be given an opportunity to comment regarding the proposed installation

3.7 Annual Recertification.

3.7.1 Each year, commencing on the first anniversary of the issuance of the permit, the Permittee shall submit to the Town an affidavit which shall list all active small cell wireless installations it owns within the Town by location, certifying that (1) each active small cell installation is covered by liability insurance in the amount of \$2,000,000 per installation, naming the Town as additional insured; and (2) each active installation has been inspected for safety and found to be in sound working condition and in compliance with all federal regulations concerning radio frequency exposure limits.

3.7.2 The Town shall have the right to employ a qualified independent radio frequency engineer to conduct an annual random and unannounced test of the Permittee's small cell wireless installations located within the Town to certify their compliance with all FCC radio-frequency emission limits as they pertain to exposure to the general public. The reasonable cost of such tests shall be paid by the Permittee.

3.7.3 In the event that such independent tests reveal that any small cell installation or installations owned or operated by Permittee or its Lessees, singularly or in the aggregate, is emitting RF radiation in excess of FCC exposure guidelines as they pertain to the general public, the Town shall notify the Permittee and all residents living within 1500 feet of the small cell installation(s) of the violation, and the Permittee shall have forty-eight (48) hours to bring the small cell installation(s) into compliance. Failure to bring the small cell installation(s) into compliance and maintain them in compliance throughout the period of the lease shall result in the forfeiture of all or part of the Compliance Bond, and the Town shall have the right to require the removal of such installation(s), as the Town in its sole discretion may determine is in the public interest.

3.7.4 Any small cell wireless installation which is no longer in use shall be removed by the Permittee within 30 days of being taken out of use.

3.7.5 Any small cell wireless installation which is not removed within 30 days after being listed as no longer in use in the annual recertification affidavit shall be subject to a fine of \$100/day until such installation is removed.

3.7.6 Where such annual recertification has not been properly or timely submitted, or equipment no longer in use has not been removed within the required 30-day period, no further applications for small cell wireless installations will be accepted by the Town until such time as the annual re-certification has been submitted and all fees and fines paid.

3.8 Non-Permitted Installations. Any small cell installation constructed, erected, modified or enhanced prior to the issuance of a site-specific permit from the Town shall be removed prior to the submission of any other application. No application for a small cell installation shall be considered, and no so-called "shot clock" for approval shall commence, while such unauthorized installations remain.

3.9 Public Availability of Permit Applications. All permit applications submitted pursuant to this ordinance, including all related documents, shall be made available for viewing and/or copying by any member of the public during normal business hours at the relevant office of the Town. Any charge for copies shall be limited to the Town's actual cost. No additional charges may be assessed against any member of the public for access to the entire permit and all of its related documents.

Section 4: LOCATION AND CONFIGURATION PREFERENCES

4.1 Siting Guidelines. The purpose of this section is to provide guidelines to applicants and the reviewing authority regarding the preferred locations and configurations for small cell installations in the Town, provided that nothing in this section shall be construed to permit a small cell installation in any location that is otherwise prohibited by this ordinance or any other section of the Town code.

4.2 Order of preference - Location. The order of preference for the location of small cell installations in the Town, from most preferred to least preferred, is:

1. Industrial zone
2. Commercial zone
3. Mixed commercial and residential zone
4. Residential zone

(See Note 4)

Section 5: INSTALLATION SPECIFICATIONS

5.1 The Permittee must construct, install and operate the small cell installation in strict compliance with the plans and specifications included in the application.

5.2 Where feasible, as new technology becomes available, the Permittee shall replace larger, more visually intrusive facilities with smaller, less visually intrusive facilities, after receiving all necessary permits and approval required by the Town.

5.3 The Permittee shall submit and maintain current at all times basic contact and site information on a form to be supplied by the Town. The Permittee shall notify the Town of any changes to the information submitted within seven days of any change, including the name or legal status of the owner or operator.

5.4 At all times, all required notices and signs shall be posted on the site as required by the FCC and state law, and as approved by the Town. The location and dimensions of a sign bearing the emergency contact name and telephone numbers shall be posted pursuant to the approved plans.

5.5 The Permittee shall maintain current at all times liability and property insurance for each small cell installation in the Public Right of Way in the amount of \$2,000,000 (two million dollars) naming the Town as additional insureds.

5.6 The proposed small cell installation shall have an adequate fall zone to minimize the possibility of damage or injury resulting from pole collapse or failure, ice fall or debris fall, and to avoid or minimize all other impacts upon adjoining properties.

5.7 Every effort shall be made to locate small cell installations no less than 1500 feet away from the Permittee's or any Lessee's nearest other small cell installation, or within _____ feet of any permanent residential dwelling. (See Note 3)

5.8 Single or co-located small cell installations must be mounted on an existing structure such as a utility or lighting pole that can support its weight and the weight of any existing co-located

equipment. All new wires needed to service the small cell installation must be located within the width of the existing structure so as to not exceed the diameter and height of the existing utility pole.

5.9 All equipment not to be installed on or inside the pole must be located underground, flush to the ground, within three (3) feet of the utility pole. Each installation is to have its own dedicated power source to be installed and metered separately.

5.10 If a Permittee proposes to replace a pole in order to accommodate a small cell installation, the pole shall match the appearance of the original pole to the extent feasible, unless another design better accomplishes the objectives of this section. Such replacement pole shall not exceed the height of the pole it is replacing by more than seven feet.

5.11 Each small cell installation facility shall be designed to be resistant to, and minimize opportunities for, unauthorized access, climbing, vandalism, graffiti and other conditions that would result in hazardous situations, visual blight, or attractive nuisances. The Town may require the provision of warning signs, fencing, anti-climbing devices, or other techniques to prevent unauthorized access and vandalism when, because of their location or accessibility, a small cell installation has the potential to become an attractive nuisance.

5.12 The Permittee shall repair, at its sole cost and expense, any damage including, but not limited to, subsidence, cracking, erosion, collapse, weakening, or loss of lateral support to Town streets, sidewalks, walks, curbs, gutters, trees, parkways, street lights, traffic signals, improvements of any kind or nature, or utility lines and systems, underground utility line and systems, or sewer systems and sewer lines that result from any activities performed in connection with the installation or maintenance of a small cell installation in the public right-of-way. The Permittee shall restore such areas, structures and systems to the condition in which they existed prior to the installation or maintenance that necessitated the repairs. In the event the Permittee fails to complete such repair within the number of days stated on a written notice by the permitting authority, the permitting authority shall cause such repair to be completed at Permittee's sole cost and expense.

5.13 Prior to issuance of a building permit, the applicant shall obtain the permitting authority's approval of a tree protection plan prepared by a certified arborist if the small cell installation will be located within the canopy of a street tree, or a protected tree on private property, or within a 10-foot radius of the base of such a tree. Depending on site specific criteria (e.g., location of tree, size, and type of tree, etc.), a radius greater than 10 feet may be required by the permitting authority.

5.14 Applicant shall abide by all local, state and federal laws regarding design, construction and operation of the small cell installation, including all state and federal Occupational Safety and Health Administration (OSHA) requirements for worker safety in, around and above power lines.

Section 6: APPLICABILITY

This chapter shall apply to all small cell installations and co-located small cell installations in the Town, and shall not apply to any Exempted Telecommunications Facility or Major Telecommunications Facility.

* * *

Note 1: In its *Declaratory Ruling and Third Report and Order* issued in September, 2018, the FCC stated that “*applicants do not have to prove there is a significant gap in service nor do they have to prove that their installation is the least intrusive means of remedying that gap, rather, they may simply assert that they want the location to improve existing service or add new service.*” This assertion directly conflicts with federal case law establishing the “Significant Gap /Least Intrusive Means test.” See *Metro-PCS v. San Francisco* (2005) and other 9th and 7th Circuit related cases.

Note 2: In that same order, the FCC suggests that application fees be no more than \$500 per application, which can include up to five small cell installations, with an additional \$100 per installation after five. The FCC also suggests a fee limitation of \$270 per year for each small cell installation to cover any recurring fees, including rights-of-way. However, municipalities may charge their actual costs for processing such applications.

Note 3: The town may also wish to include preference for the *configuration* of small cell installations, from most-preferred to least-preferred. Configuration preferences might be:

- (1) Co-located with existing wireless facilities,
- (2) Mounted on existing utility poles,
- (3) Mounted on new poles or towers.

Considerations include the structural integrity of existing utility poles, the fact that mandating co-located equipment could result in an unfair esthetic burden on some residents or neighborhoods, and the possibility that new poles might be bigger, heavier and more obtrusive than existing poles.

Note 4: Every possible effort should be made to prevent the placement of small cell installations in close proximity to residences. Viable and legally defensible setbacks will vary based on zoning.

*This document was produced for American for Responsible Technology
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Version 11.0 December 2020*