

**ORDINANCE #2018-28C**

**AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER 212 “ZONING”  
OF THE CODE OF THE BOROUGH OF BEACH HAVEN, COUNTY OF OCEAN,  
STATE OF NEW JERSEY ADDING NEW SUBSECTION 212-28A “PLACEMENT OF  
SMALL CELL EQUIPMENT AND TELECOMMUNICATION FACILITIES”**

**WHEREAS**, the Borough of Beach Haven (the “Borough”) is aware that telecommunications technology is evolving at a rapid pace, and that certain technological developments have made access to, among other things, Public Rights-of-Way desirable by certain telecommunications companies; and

**WHEREAS**, Borough property, including public rights-of-way, such as they are or may be, constitutes a valuable resource, finite in nature, and which exist as a common right of the public to pass and repass freely over and across said lands without unreasonable obstruction or interference, and which therefore must be managed carefully; and

**WHEREAS**, the Federal Telecommunications Act preserves local government’s ability to “manage the public rights-of-way” on a competitively neutral and non-discriminatory basis. 47 U.S.C. § 253(c); and

**WHEREAS**, the Federal Telecommunications Act preserves local government’s authority over the, “placement, construction and modification of personal wireless service facilities.” 47 U.S.C. § 332(c)(7)(A); and

**WHEREAS**, the Federal Telecommunications Act makes it unlawful for local government to prohibit or have the effect of prohibiting the provision of personal wireless service. 47 U.S.C. §332(c)(7)(B)(i)(H); and

**WHEREAS**, the Borough has determined that it is necessary to implement clear and uniform procedures in relation to the siting of Telecommunications Facilities on Borough and County of Ocean (the “County”) owned property, including Public Rights-of-Way, for the benefit of its citizens and any utilities which use or will seek to use Borough or County owned property;

**WHEREAS**, New Jersey municipalities may give consent for the placement of Small Cell Equipment and Wireless Cabinets in the public rights-of-way pursuant to N.J.S.A. § 48:3-19 and for the erection of Wireless Poles within the Public Rights-of-Way pursuant to N.J.S.A. § 48:17-10; and

**WHEREAS**, the Borough has further determined that it is necessary to set forth clear standards in relation to the siting of Small Cell Equipment and Wireless Poles within the Public Rights-of-Way 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**, it is hereby ordained by the Governing Body of the Borough of Beach Haven as follows:

**PART I**

Chapter 212, “Zoning,” of the Code of the Borough of Beach Haven is hereby supplemented with the addition of Section 212-28A, entitled “Placement of Small Cell Equipment and Telecommunication Facilities,” which shall read as follows:

**Section 212-28A**

- (1) **Purpose.** The purpose and intent of this Section is to:
- a. Establish a local policy concerning Telecommunications Facilities, including Small Cell Equipment and Wireless Poles.
  - b. Conserve the limited physical capacity of the Public Rights-of-Way held in public trust by the Borough and the County.

- c. Assure that any and all Telecommunications Carriers providing Telecommunications Services in the Borough through Telecommunications Facilities, including but not limited to Small Cell Equipment and Wireless Poles, comply with the laws, rules and regulations of the Borough.
- d. Assure that the Borough can continue to fairly and responsibly protect the public health, safety and welfare.
- e. Enable the Borough to discharge its public trust consistent with rapidly evolving federal and state regulatory policies, industry competition, and technological development.

(2) **Definitions.** The following words and phrases shall, for the purpose of this Chapter, have the meaning herein indicated:

- a. Colocation means the use of a common wireless telecommunications tower or a common structure, by two or more wireless license holders or unlicensed holders nevertheless regulated by the Federal Communications Commission or by one wireless license holder for more than one type of communications technology and/or the placement of a wireless telecommunication tower on a structure owned or operated by a utility or other public entity.
- b. “Public Right-of-Way” means the surface of, and the space above, any public street, road, lane, path, public way or place, sidewalk, alley, boulevard, parkway, drive, and the like, held by the Borough or County as an easement or in fee simple ownership, or any other area that is determined by the Borough or County to be a right-of-way in which the Borough may allow the installation of telecommunications facilities.
- c. “Small Cell Equipment” and “Small Cell Facility” means:
  - 1. Wireless facilities and transmission media, including femtocells, picocells and microcells;
  - 2. Outside Distributed Antenna Systems (“ODAS”);
  - 3. A personal wireless service facility as defined by the Federal Telecommunications Act of 1996, as amended, that is attached, mounted or installed on an existing pole or wireless pole in the public rights-of-way and used to provide Telecommunications (defined herein) services.
  - 4. A wireless service facility that meets both of the following qualifications:
    - i. Each antenna is located inside an enclosure of no more than three (3) cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an imaginary enclosure of no more than three (3) cubic feet; and
    - ii. Primary equipment enclosures are not larger than seventeen (17) cubic feet in volume. The following associated equipment may be located outside of the primary equipment enclosure and, if so located, is not included in the calculation of equipment volume: electric meter, concealment, telecommunications demarcation box, ground-based enclosures, backup-up power systems, grounding equipment, power transfer switch, and cut-off switch.
- d. “Telecommunications” means the transmission by wire, radio, optical, or any electromagnetic system, between or among points specified by the user, of information

of the user's choosing, without change in the form or content of the information as sent and received.

- e. "Telecommunications Carrier" means any provider of Telecommunications Services.
- f. "Telecommunications Facility" means any structure or device used for the purpose of providing, supporting, enabling, or otherwise facilitating telecommunications, including, but not limited to Small Cell Equipment, Wireless Poles, as defined herein.
- g. "Telecommunications Service(s)" means the offering of Telecommunications to the public, regardless of the Telecommunications Facilities used.
- h. "Wireless Pole" means a column or post lawfully located in the Borough or County right-of-way used solely to support small cell equipment and/or provide personal wireless services as defined by federal law.

(3) **Permitted Zones and Use for Telecommunications Facilities**

- a. Placement of Telecommunications Facilities, except for Wireless Poles, Small Cell Equipment and Small Cell Facilities existing or to exist in the Borough or County Right-of-Ways, shall be limited to placement within the boundaries of Zoning District BD as shown on the Official Zoning Map of the Borough of Beach Haven.
- b. Telecommunications Facilities, except for Wireless Poles, Small Cell Equipment and Small Cell Facilities existing or to exist in the Borough or County Right-of-Ways, shall be a Conditional Use within Zoning District BD, and subject to all applicable local and state requirements for conditional use approval, and the required notice as specified in Section 212-28A(11), below.
- c. Telecommunications Facilities and/or new wireless poles shall not be permitted in the following zones: RA, RNA, RSA, RB, RC, HP, MC, and RCB.

(4) **Small Cell Facility License.** The following shall apply to applications for all Small Cell Facilities and Wireless Poles:

- a. Any Telecommunications Carrier who desires to construct, install, operate, maintain, or otherwise locate Small Cell Facilities within the Borough, including on any Public Right-of-Way, for the purpose of providing Telecommunications Services to persons and areas inside or outside the Borough shall first obtain Land Use Board approval and a license from the Borough in accordance with this Section.
- b. For purposes of this Section, the construction, installation, operation, maintenance or location of Telecommunications Facilities includes the Colocation with any Telecommunications Facility.
- c. A Telecommunications Carrier who is issued a license pursuant to this Section who, during the License Term (as defined in subsection (e) below), wishes to add, supplement, or modify the Telecommunications Facility for which the license was granted shall be required to obtain a new license in accordance with the procedures established by this Section, except that no new license shall be required during the License Term if the addition, supplement or modification does not materially change the overall size, dimensions, technical aspects, or appearance of the Telecommunications Facility, as reasonably determined by the Borough Manager in consultation with the Borough Engineer. Nothing in this Section shall be construed as eliminating or otherwise altering duration of the License Term.
- d. No application to construct a new wireless Telecommunication Service Facility shall be approved unless the applicant demonstrates to the reasonable satisfaction of the Borough that no existing personal wireless Telecommunication Service Facility within a reasonable distance, regardless of municipal boundaries, can accommodate the applicant's needs. Evidence submitted to demonstrate that no existing personal

wireless Telecommunication Service Facility can accommodate the applicant's proposed facility shall consist of one or more of the following:

- i. No existing Telecommunications Facilities are located within the geographic area required to meet the applicant's coverage demands.
  - ii. Existing Telecommunications Facilities are not of sufficient height to meet the applicant's coverage demands and cannot be extended to such height.
  - iii. Existing Telecommunications Facilities do not have sufficient structural strength to support applicant's proposed antenna and related equipment.
  - iv. Existing Telecommunications Facilities do not have adequate space on which proposed equipment can be placed so it can function effectively and reasonably.
  - v. The applicant's proposed antenna would cause electromagnetic interference with the antennas on the existing s facility, or the antennas on the existing facility would cause interference with the applicant's proposed antenna.
  - vi. The applicant demonstrates that there are other compelling limiting factors, including but not limited to economic factors, that render existing facilities or structures unsuitable.
- e. License Term: The term of a license issued pursuant to this Section shall be no less than five (5) years, and shall not exceed seven (7) years.

(5) **Small Cell Facility License Application Process.** Any person who desires a license pursuant to this Section shall file an application with the Borough Administrator. The application shall include the following information:

- a. The identity of the license applicant, including all affiliates of the applicant.
- b. A description of the Telecommunications Services that are or will be offered or provided.
- c. A description of the Telecommunications Facility(ies).
- d. A description of the transmission medium that will be used by the licensee to offer or provide Telecommunications Services.
- e. Preliminary engineering plans, a survey, specifications, and a network map of the Telecommunications Facility to be located within the Borough, all in sufficient detail to identify:
  1. The location and route requested for applicant's proposed Telecommunications Facility.
  2. The location of all antennae, cells and nodes for applicant's proposed Telecommunications Facility.
  3. The location of all overhead and underground public utility, telecommunications, cable, water, sewer drainage and other facilities in the public way along the proposed route.
  4. The specific trees, structures, improvements, facilities and obstructions, if any, that applicant proposes to temporarily or permanently remove, relocate or alter.
  5. Telecommunications Facilities Providers use various methodologies and analysis tools, including geographically based computer software, to determine the specific technical Parameters of facilities,

such as expected coverage area, antenna configuration and topographic constraints that affect signal paths. In certain instances there may be a need for expert review by a third party of the technical data submitted by the provider. The Borough may require such a technical review to be paid for by the applicant for a Telecommunications Service Facility. The selection of the third party expert may be by mutual agreement between the applicant and the Borough or at the discretion of the Borough, with a provision for the applicant and interested parties to comment on the proposed expert and review its qualifications. The expert review is intended to be a site-specific review of technical aspects of the Telecommunications Facilities and not a subjective review of the site selection. The expert review of the technical submission shall address the following:

- a. The accuracy and completeness of the submission;
  - b. The applicability of analysis techniques and methodologies;
  - c. The validity of conclusions reached; and
  - d. Any specific technical issues designated by the Borough.
6. A preliminary construction schedule and completion date.
  7. Financial statements prepared in accordance with generally accepted accounting principles demonstrating the applicant's financial ability to construct, operate, maintain, relocate and remove the telecommunications facilities.
  8. Information to establish the applicant's technical qualifications, experience and expertise regarding the Telecommunications Facilities and Telecommunications Services described in the application.
  9. Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the Telecommunications Facilities and to offer or provide the Telecommunications Services.
  10. Information to establish that the Telecommunications Facility meets the current standards and regulations of any agency of the federal government with the authority to regulate telecommunications facilities.
  11. Information to establish that the proposed telecommunications facility conforms to the requirements of the international building code and national electrical code, as applicable.
  12. Proof of notice pursuant to the requirements set forth below in subsection (11) below, "Notification for Telecommunication Facilities."
  13. A copy of Land Use Board approval.

**(6) Determination by the Borough Manager for Small Cell Facility Licenses**

- a. Upon the Borough Manager's determination that an application for a license is complete, including obtaining Land Use Board approval, the Borough Manager, after consultation with the Borough Solicitor and Borough Engineer, shall issue the determination.
- b. A determination shall be issued within ninety (90) days of applicant's submission of a complete application.

- c. If the application is denied, the written determination shall include the reasons for denial and supported by facts upon which the denial is based.

**(7) Fees and Escrows for Small Cell Facility Licenses**

- a. An application for a license under this Section shall be accompanied by a payment of a One Thousand (\$1,000.00) dollar fee.
- b. Pursuant to N.J.S.A. § 54:30A-124, the Borough shall recover reasonable professional fees for actual services incurred in the review of applications under this Section. Applicant shall make a deposit in an escrow for professional fees in the amount of Two Thousand five hundred (\$2,500.00) dollars. If said escrow account contains insufficient funds to enable the Borough to perform its review, the chief financial officer shall provide the applicant a notice of insufficient balance. In order for review to continue, the applicant shall, within fifteen (15) days, post a deposit to the account in an amount to be mutually agreed upon.

**(8) Assignment or Transfers of Small Cell Facility Licenses.** Ownership or control of a license issued pursuant to this Section may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the grantee, by operation of law or otherwise, without the prior consent of the Borough as expressed by resolution.

**(9) General Indemnification of Borough in Connection with Small Cell Facility Licenses.** Each license grantee shall indemnify and hold the Borough and its officers, employees, agents and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorney's fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its Telecommunications Facilities, and in providing or offering Telecommunications Services over the facilities, whether such acts or omissions are authorized, allowed or prohibited by this Chapter or by a grant agreement made or entered into pursuant to this Chapter.

**(10) Revocation or Termination of Small Cell Facility Licenses**

a. The Borough may revoke a license granted under this Chapter for the following reasons:

1. Construction or operation without a license.
2. Construction or operation at an unauthorized location.
3. Unauthorized substantial transfer of control of the grantee.
4. Unauthorized assignment of a license.
5. Unauthorized sale, assignment or transfer of grantee's assets, or a substantial interest therein.
6. Misrepresentation or lack of candor by or on behalf of a grantee in any application to the Borough.
7. Abandonment of the Telecommunications Facility. A Telecommunications Facility shall be deemed "abandoned" if it is either disconnected from power service or unused for greater than six (6) months. Abandoned Telecommunications Facilities shall be removed by the owner. Should the owner fail to remove the Telecommunications Facility, the Borough may do so at its option, and the costs thereof shall be a charge against the owner.
8. Insolvency or bankruptcy of the grantee.

9. Material violation of the Borough's Revised General Ordinances.

b. In the event that the Borough believes that grounds exist for revocation of a license, it shall give the grantee written notice of the apparent violation or noncompliance, providing a statement of the nature and general facts of the violation or noncompliance, and providing the grantee a reasonable period of time not exceeding 30 days to furnish evidence:

1. That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance; and
2. That rebuts the alleged violation or noncompliance; and
3. That it would be in the public interest to impose some penalty or sanction less than revocation.

c. The Borough shall consider the apparent violation or noncompliance in a public meeting, with respect to which the grantee shall be given notice and a reasonable opportunity to be heard concerning the matter.

**(11) Notification Required by Telecommunications Facility Providers**

a. Any Telecommunications Carrier who desires to change existing use, construct, install, operate, maintain, or otherwise locate a Telecommunications Facility in the Borough shall provide notice to property owners certified by the Borough Administrator to be within five hundred (500') feet of the proposed Telecommunications Facility.

b. Notice shall be given to a property owner by:

i) serving a copy thereof on the property owner as shown on the current certified tax list, or his or her agent in charge of the property; or

ii) mailing a copy thereof by certified mail and regular mail to the property owner at the address as shown on the said current certified tax list, and service by mailing shall be deemed complete upon deposit with the U.S. Postal Service; and

iii) Notice pursuant to this Section shall state the identity of the Telecommunications Carrier; a description of the Telecommunications Services that are or will be offered or provided; a description of the location(s) of any Telecommunications Facilities; and a description of the Telecommunications Facilities to be installed and the location of the Telecommunications Facilities. The notice shall also advise that a copy of the applicant's application is on file with the Borough Administrator and may be reviewed by the public.

c. Such other and further information as may be required by the Borough Manager.

d. In the case of an application that seeks to construct, install, operate, maintain, or otherwise locate a Telecommunications Facility or equipment on any property owned or controlled by the County – including, but not limited to, a County right-of-way – the applicant shall also provide notice to and obtain a permit from the County authorizing the placement of such Telecommunications Facility on any such property or right-of-way.

**(12) Land Use Ordinance Not Superseded.** The requirements of this Chapter shall be in addition to, and shall not be in lieu of, any requirements imposed by the Borough's Zoning Code. No license for a Telecommunication Facility shall be issued under this Chapter until an applicant obtains site plan approval, and the approval of any variances from the Land Use Board.

(13) **Severability.** If any section or provision of this Ordinance shall be held invalid in any court of competent jurisdiction, the same shall not affect the other sections or provisions of this Ordinance, except so far as the section or provision so declared invalid shall be inseparable from the remainder or any portion thereof.

## **PART II**

**Repealer.** All Ordinances or parts of Ordinances inconsistent herewith are repealed to the extent of such inconsistency. The Clerk of the Borough is authorized to renumber and/or re-codify any sections affected by such repeal to the extent consistent with this Ordinance.

## **PART III**

**Severability.** If any word, phrase, clause, section or provision of this Ordinance shall be found by any Court of competent jurisdiction to be unenforceable, illegal or unconstitutional, such word, phrase, clause, section or provision shall be severable from the balance of the Ordinance and the remainder of the Ordinance shall remain in full force and effect.

## **PART IV**

**Effective Date.** This Ordinance shall take effect upon publication thereof after final passage according to law.

## **NOTICE**

Public Notice is hereby given that the foregoing Ordinance was introduced and passed on the first reading at a public meeting of the Borough Council of the Borough of Beach Haven, County of Ocean, State of New Jersey, held on August 13, 2018 at 7:00 p.m. A copy of the ordinance can be obtained, without cost, by any member of the general public at the Office of the Municipal Clerk, 300 Engleside Ave., Beach Haven, NJ 08008 Monday through Friday, 9:00 a.m. to 4:00 p.m.

Further public notice is hereby given that said ordinance shall be considered for final passage and adoption at a public meeting of the Borough Council to be held on September 10, 2018 at 7:00 p.m. at the Beach Haven Municipal Building, 300 Engleside Ave., Beach Haven, New Jersey 08008.

## **CERTIFICATION**

I, Sherry Mason, RMC, Municipal Clerk of the Borough of Beach Haven, do hereby certify that the foregoing Ordinance was duly adopted on first reading by the Municipal Council of the Borough of Beach Haven at a regular meeting held on the 13<sup>th</sup> day of August, 2018, a quorum being present and voting in the majority.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 13<sup>th</sup> day of August, 2018.

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Sherry Mason, RMC, Municipal Clerk

*First Reading:*            *August 13, 2018*  
*Publication:*            *August 23, 2018*  
*Adoption:*                *September 10, 2018*  
*Final Publication:*      *September 20, 2018*  
*Effective:*                *October 10, 2018*