



DEPARTMENT OF LAW

MUNICIPAL BUILDING • 255 MAIN STREET • WHITE PLAINS, NEW YORK 10601

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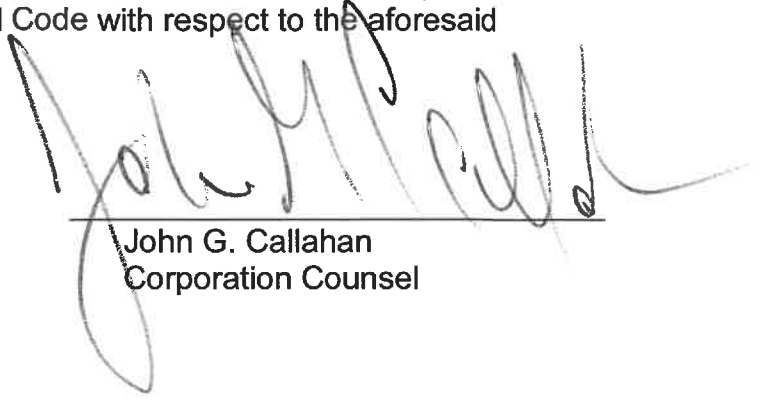
JOHN G. CALLAHAN

Corporation Counsel

To the Honorable Mayor and Members of the Common Council of The City of White Plains:

Although the Federal Communications Commission ("FCC") in a Declaratory Ruling and Third Report and Order adopted September 26, 2018 (No. 18-133) limited the ability of municipalities to regulate certain aspects of the installation and operation of small wireless facilities as defined in said Order, the City retains the ability to regulate those facilities in several areas. Attached is a proposed amendment which establishes certain setbacks from structures within the zoning districts of the City, (subject to the constraints of the aforementioned FCC Order), requires notices of applications for surrounding property owners be factual and contain no marketing promotion, provides for certain specific environmental liability insurance coverage, requires RF testing reports for new facilities to be provided within ten (10) days of activation, provides additional remedies to the City if random RF tests are failed and provides that applicants must show that their proposed sites are required to be approved under federal and state law.

Submitted for your consideration is an ordinance which amends Chapter 4-23-12 through 4-23-14 of the White Plains Municipal Code with respect to the aforesaid matters.



John G. Callahan
Corporation Counsel

Dated: March 30, 2023

AN ORDINANCE TO AMEND CHAPTER 4-23-12 THROUGH 4-23-14 OF THE WHITE PLAINS MUNICIPAL CODE WITH RESPECT TO SMALL WIRELESS FACILITIES.

Section 1. Chapter 4-23-12 of the White Plains Municipal Code is hereby amended by to read as follows:

4-23-12. Preferred locations for small wireless facilities and notice requirements.

(a) To the extent technically feasible, small wireless facilities should be located first in industrial districts, secondly in business districts and last in residential districts;

(b) No new small wireless facilities, as defined in 47 C.F.R. §1.6002(1), shall be approved unless the applicant can establish that failure to approve such an application would violate federal or state law.

[(b)c] To the extent technically feasible, no small wireless facilities as defined in 47 C.F.R. §1.6002(1) shall be located in the Front Facade Area of a residential structure, any public, private and/or state-chartered preschool, elementary school, or secondary school, daycare center or nursing home or use (“Front Facade Area” being the area of the public right-of-way directly in front of any of the aforementioned structures, identified by drawing a perpendicular line from each corner of the structure to the public right-of-way) but rather, if required, such facilities shall be located at the intersecting point of the front and side property lines due to the potential for fire or pole failure;

([c]d) In order to ensure and maintain the safety, property values and aesthetic qualities of White Plains streets and neighborhoods, the following setback provisions shall apply:

(i) industrial and business districts, a minimum of 25 feet from the nearest structure; and

(ii) residential districts, a minimum of 250 feet from the nearest structure;

([c]e) Notwithstanding the preferences in subsections a, [and] b, c and d hereof, the

Commissioner of Public Works may approve the location of a small cell wireless facility wherever necessary to meet the Applicant's network service needs, reduce the facilities aesthetic impact or prevent a violation of law.

([d]f) The Applicant shall provide notice of an application for a small wireless facility to the owners of property, if any, located within 500 feet of the proposed small wireless facility. Such notice, written in a factual manner, devoid of marketing promotion and approved by the Commissioner of Public Works, shall be sent by certified mail within five (5) days of filing for approval from the City which notice shall indicate (i)that the application is being considered by the Commissioner of Public Works and, if traffic poles are being utilized, by the Deputy Commissioner of Parking for Transportation, (ii) that the Commissioner(s) may consider whether a nearby location might have less of an aesthetic impact and be a safer location as well as the necessity of a general location to provide adequate service coverage for the Applicant's network and (iii) all comments should be promptly emailed to DPWadmin@whiteplainsny.gov within 15 days of the mailing of the notice. For informational purposes only, the Commissioner of Public Works shall post a list of the date filed and lproposed location of all pending applications

on the Department of Public Works page the the City of White Plains website
(<https://www.cityofwhiteplains.com>).

Section 2. Chapter 4-23-13 of the White Plains Municipal Code is hereby to read as follows:

4-23-13 Liability Insurance

All franchise agreements for small wireless facilities as defined in 47 C.F.R. §1.6002(1) shall provide general liability insurance in the amount specified in the franchise agreement without a pollution exclusion, or with a separate policy for pollution liability covering any solid, liquid, gaseous or thermal pollutant, irritant or contaminant including but not limited to artificially produced electric fields, magnetic fields, electromagnetic fields and all artificially produced ionizing and non-ionizing radiation in the required amount(s), or in the event that franchisee cannot obtain general liability insurance without a pollution exclusion or a pollution liability policy, the franchisee may supply self-insurance, so long as the net worth of the party electing to self-insure shall exceed Fifty Million Dollars (\$50,000,000.00) in Constant Dollars, upon the following terms:

a.. If the franchisee elects to self-insure for this risk, which would otherwise be covered by third party insurance required to be maintained hereby if such party had not elected to so self-insure, occurs:

(1) with respect to a commercial general liability insurance claim that would be covered except for the pollution exclusion clause of the commercial general

liability policy, the self-insuring party shall undertake the defense of any such claim, including a defense of the other party, at the sole cost and expense of the self-insuring party;

(2) the self-insuring party shall use its own funds to pay any claim or otherwise provide the funding which would have been available from insurance proceeds but for the election to self-insure (and this item (2) shall not be construed in any manner to prevent or restrict the self-insuring party from pursuing any claim against any party, except the other party and the other party's Indemnified Parties, with respect to such claim after the self-insuring party has paid the claim);

(3) since the franchise agreements require the City to be named as an additional insured, the self-insuring party shall have the same fiduciary duties to the other party that the self-insuring party's third party insurer would have had to the other party if

(i) such third party insurer was providing such insurance and

(ii) such third party insurer had named the other party as an additional insured with respect to such insurance;

(4) the claim shall be treated as an insured claim hereunder, and

(5) the expiration or termination of the franchise agreement or any default by the other party hereunder shall not terminate or otherwise affect the obligation of the self-insuring party to provide, through such self-insurance, the insurance coverage the self-insuring party would otherwise be required to obtain from a third party insurer hereunder.

Section 3. Chapter 4-23-14 of the White Plains Municipal Code is hereby amended to read as follows:

4-23-14 Testing of small wireless facilities

(a) All Small Wireless Facilities as defined in 47 C.F.R. §1.6002(1) operating in the City, whether pursuant to a franchise with the City or any other legal means shall at all times be operated in compliance with the RF standards established by the Federal Communications Commission. These RF safety standards shall apply to the aggregate emissions of co-located and nearby facilities not just the emissions of a single antenna.

(b) Any provider operating a Small Wireless Facility pursuant to a franchise (“Franchisee”) with the City shall document such RF compliance at times of installation by means of a report to the Commissioner of Public Works of such compliance.

(1) The report shall be in a format acceptable to the Commissioner of Public Works prepared by a RF engineer showing that all installations are in compliance with the applicable, mandatory guidelines of the Federal Communications Commission (“FCC”) including those related to radio frequency (“RF”) emissions and shall be submitted to the Commissioner within 10 days of activation of the facility If the provider fails to supply a satisfactory report within said time period to the Commissioner, the Commissioner may require the provider to deactivate the facility until a satisfactory report showing compliance is submitted..

(c) All Franchisees shall be also deposit funds, in an amount established by the Commissioner of Public Works into an escrow account These funds shall be used for the

exclusive purpose to allow the Commission of Public Works to retain a qualified independent testing firm to periodically verify that all Small Wireless Facilities are operating within the FCC's RF exposure levels. On no less than an annual basis, Franchisee shall replenish the escrow account to be at the required levels to ensure such testing capability.

(d) In the event that the independent testing firm finds any Small Wireless Facility of a Franchisee not to be in compliance with the FCC's standards then:

(1) Commissioner of Public Works will serve a notice of non-compliance upon Franchisee at the Emergency Contact found in the franchise agreement;

(2) Upon receipt of notice, Franchisee shall cease operation of that Small Wireless Facility (except for testing purposes) until it can document to the Commissioner of Public Work's satisfaction that the device is operating in compliance with the FCC's standards; and

(3) Franchisee, within thirty (30) days of the above notice of non-compliance shall provide a report signed by a RF engineer that all of the Franchisee's other small wireless facilities are operating within FCC guidelines.

(4) Failure to comply with Subsection (d) (2) & (3) above could result in the suspension or loss of Franchisee's permission to operate in the City or portions thereof.

Section 4. This ordinance shall take effect immediately.

Material to be added
[Material to be deleted]