

ORDINANCE NO. 535

**AN ORDINANCE OF NEW WILMINGTON BOROUGH, LAWRENCE COUNTY,
PENNSYLVANIA, ESTABLISHING PROCEDURES AND REQUIREMENTS
PERTAINING TO THE IMPLEMENTATION OF ACT 50 OF 2021 AND REGULATING
SMALL WIRELESS FACILITIES TO BE PLACED WITHIN THE
PUBLIC RIGHT-OF-WAY**

WHEREAS Act 50, 53 P.S. 11704, et seq., authorizes the Borough of New Wilmington (the “Borough”) to adopt ordinances that comply with Act 50 and requires that the Borough amend existing ordinances as necessary to comply with Act 50; and

NOW, THEREFORE, BE IT ORDAINED AND ENACTED, and it is hereby ordained and enacted by the Council of the Borough County, Pennsylvania as follows:

SECTION 1: REQUIREMENTS.

The Code of the Borough is hereby amended by adding a new Chapter 285, entitled “Regulation of Small Wireless Facilities” which shall read as follows:

§1-4: Application for Small Wireless Facilities

A. Application Process

(4) Applications are public records that may be subject to disclosure under the Pennsylvania Right-to-Know Law. The Applicant must designate any portions of the Application materials that it reasonably believes contain proprietary or confidential information by clearly and conspicuously marking each portion of such materials accordingly. If the Borough determines that the information is subject to disclosure, such determination shall be conclusive. If the Borough determines that a right-to-know request asks for proprietary or confidential information regarding a Small Wireless Facility, then the Borough shall notify the Applicant within five (5) days of receiving said request pursuant to the Right-to-Know Law. The Applicant and Borough shall use all reasonable efforts to coordinate a response pursuant to the Right-to-Know Law. If the Applicant determines that the requested information is confidential or proprietary information as defined by the Right-to-Know Law, or that any other exemption applies, then the Applicant shall notify the Borough within five (5) days of it receiving notification from the Borough. If the Applicant requests that the Borough deny a request pursuant to the Right-to-Know Law, then the Applicant shall be required to enter into an agreement with the Borough indemnifying the Borough for any and all legal expenses, including reasonably attorney’s fees, incurred by the Borough as a result of any challenge to the denial.

(7)(c) In the absence of an Application form, Applicant shall submit an Application packet consisting of a cover letter, all required supporting documentation, and full and complete payment of applicable permit Application fees. The Applicant shall detail the location of the proposed site(s)...

(7)(i) Proof that the Applicant has mailed to the owners of all property within 150 feet of the proposed Small Wireless Facility, not later than thirty (30) days prior to submission of the Application or the Application packet to the Borough a notice that the Applicant is submitting an Application to the Borough for placement or Modification of a Small Wireless Facility in the Right-of-Way, which notice must include:

(7)(k) ... An Application shall not be administratively complete unless all of the required elements set forth above are included in the Application, together with payment in full.

(8) Timing of Application Review.

(b) The Borough shall process Applications on a nondiscriminatory basis and Applications shall be deemed approved if the Borough fails to approve or deny the Application within 60 days of receipt of a complete Application to Collocate and within 90 days of receipt of a complete Application to replace an existing Utility Pole or install a new Utility Pole with Small Wireless facilities attached. A Permit associated with an Application deemed approved under this subsection shall be deemed approved if the Borough fails to approve or deny the Permit within seven business days after the date of filing the permit application with the Borough unless there is a public safety reason for the delay. An Applicant shall provide written notice to the Borough within 72 hours of when it discovers that a deemed approval has occurred. Written notice may be delivered by USPS, courier, or personal service.

§1-5: General Requirements

B. Attachment to Municipal Structures.

This Ordinance shall not be construed to require the Borough to construct, retain, extend, place, or maintain any Municipal Pole or other municipal facilities that in the Borough's discretion are not needed for the Borough's own utility service requirements.

An Applicant or Permittee has no right to object to the Borough granting permission to any party regarding use of a Municipal Pole.

Where applicable, an Appellant's Collocation of a Small Wireless Facility on a Municipal Pole shall be placed and maintained at all times in accordance with the requirements, specifications, rules and regulations of the latest edition of the National Electrical Safety Code and subsequent revisions thereof, any governing authority having jurisdiction, this Ordinance, and any reasonable design standards and rules governing pole attachments in the Borough as the Borough may adopt from time-to-time, and shall be otherwise consistent with generally accepted industry standards. If requested by the Borough, each Small Wireless Facility Collocated on a Municipal Pole shall be identified at all times by an identifying marker/band/tag stating the name of person holding the Permit. The marker/band/tag shall, at a minimum, (a) be reasonably durable under the typical weather conditions in the area and (b) have coloring unique to the Permittee, or such color as may be required by the Borough. If the Borough elects to require marking/banding/tagging by the Wireless Permittee, the borough shall provide the Permittee information concerning the type and color of marker/band/tag to

be used in satisfying the requirements of this section. Such markers/bands/tags shall also be capable of being read unaided from the ground by an adult of typical height and vision.

C. Insurance Each Permittee and any person who owns or operates a Small Wireless Facility shall annually provide the Borough with a certificate of insurance, in a form satisfactory to the Borough Solicitor, evidencing general liability coverage in the minimum amount of \$1,000,000 per occurrence and property damage coverage in the minimum amount of \$1,000,000 per occurrence covering the Small Wireless Facility and naming the Borough as an additional insured on each insurance policy. Each policy shall contain a provision requiring a written notice from the insurer to the Borough at least thirty (30) days prior to cancellation. All Permits issued for location of a Small Wireless Facility pursuant to this ordinance shall be deemed to be revoked in the event said insurance policy is cancelled, expires, or ceases to exist.

H. Historic Districts. No Small Wireless Facility may be located within seventy-five (75) feet of any property, or on a building or structure that is listed on either the National or Pennsylvania Registers of Historic Places, or eligible to be so listed under the Pennsylvania Historic District Act, located within a Historic District, or is included in the official historic structure list maintained by the Borough.

§1-6: Discontinuance.

A. Process

(3) The Borough reserves the right to pursue all available remedies under the law to ensure removal of the Small Wireless Facility and restoration of the site at the expense of the Permittee, and to recover the expenses and costs of any legal action incurred by the Borough plus costs, fees and expenses of expert witnesses and reasonable attorney's fees. Any delay by the Borough in taking action shall not invalidate the Borough's right to take action, nor shall any such action be barred by a statute of limitations.

With respect to a Small Wireless Facility Collocated on a Municipal Pole, the Borough may abandon a Municipal Pole upon thirty (30) days' notice to the Permittee. Permittee must remove or transfer all Facilities from abandoned Municipal Poles within the same thirty (30) days unless granted additional time by the Borough. The Borough will not unreasonably withhold consent of such request for additional time. The Permittee shall post a decommissioning bond in the amount of one hundred percent (100%) of the total cost of decommissioning with the Borough. If the Borough has no attachment(s) on said Municipal Poles and the Permittee has not removed or transferred its Facilities therefrom, the Borough may, in its sole discretion: (1) revoke the Permit for that Municipal Pole; or (2) remove the Small Wireless Facilities at the Permit holder's expense, with no liability falling on the Borough except in the case of gross negligence or willful misconduct and in such event of non-removal the Borough may pursue equitable and legal relief to compel removal and in all such events Borough shall be entitled to recover its expenses, damages, costs and reasonable attorneys' fees.

§1-7: Indemnification

Further, a Permittee shall repair all damage to the Right-of-Way or any other land so disturbed, directly caused by the activities of the Permittee or the Permittee's contractors and return the Right-of-Way in as good of condition as it existed prior to any work being done in the Right-of-Way by the Permittee. If the Permittee fails to make the repairs required by the Borough within 30 days after written notice, the Borough may perform those repairs and charge the Permittee the reasonable, documented cost of the repairs plus a penalty of \$500. In the event an Applicant or Permittee has failed to pay any costs invoiced by the Borough for repair work or penalties charged pursuant to this section, the Borough shall not process any further Applications unless or until the Applicant or Permittee has paid the amount assessed for the repair costs and the assessed penalty. Any unpaid invoice shall be subject to interest accruing on the unpaid amount at eighteen percent (18%) per annum beginning on the 31st day from the date of invoice until paid. In the event of legal actions taken under this paragraph, Borough shall be entitled to recover its expenses of litigation, together with reasonable attorney's fees and if successful as a defendant the Borough shall be entitled to the same right to recover its expenses of litigation and reasonable attorney's fees.

§1-8: Standard Permit Conditions

(6) The Permittee shall retain full and complete copies of all Permits, Applications, and other regulatory approvals issued in connection with the facility, which includes without limitations, all conditions of approval, approved plans, resolutions, and other documentation associated with the Permit or regulatory approval. In the event the borough cannot locate any such full and complete Permits, Applications, or other regulatory approvals in its own official records, and the Permittee fails to retain full and complete records in the Permittee's files, any ambiguities or uncertainties that would be resolved through an examination of the missing documents, will be resolved against the Permittee.

(8) Make-Ready Work. For any Municipal Pole Collocation Application, the borough shall provide a good faith estimate for any make-ready work.

(10)(f) Prior to the commencement of work, the contractor and/or subcontractor shall provide the Borough with a certificate of insurance, in a form satisfactory to the Borough Solicitor, evidencing general liability coverage in the minimum amount of \$1,000,000 per occurrence and property damage coverage in the minimum amount of \$1,000,000 per occurrence covering the Small Wireless Facility and naming the Borough as an additional insured on each insurance policy, which shall contain a provision requiring at least thirty (30) days notice from the insurer to the Borough prior to cancellation. All Permits issued for location of a Small Wireless Facility pursuant to this ordinance shall be deemed to be revoked in the event said insurance policy is cancelled, expires, or ceases to exist.

§1-9: Revocation of Permit

The Borough may revoke a Wireless Permit for failure to comply with the conditions of the Permit of Applicable Codes after providing adequate notice to the Permittee and allowing the Permittee an opportunity to cure any noncompliance. Within 60 days of suspension or revocation of a Permit due to noncompliance with Act 50 or other Applicable Codes, the Applicant shall remove

the Small Wireless Facility and any Accessory Equipment, including the Utility Pole and any Wireless Support Structures if the Applicant's Small Wireless Facilities and Accessory Equipment are the only Wireless Facilities on the Utility Pole. Within 90 days of the end of a Permit term or an extension of the Permit term, the Applicant shall remove the Small Wireless Facility and any Accessory Equipment, including the Utility Pole and any Wireless Support Structures.

§1-11: Violations and Penalties

A. This Ordinance shall be enforced by the appointed agent of the Borough. If he determines that any Permittee has violated this ordinance, then a notice of violation shall be issued by the agent describing the violation and a time period for compliance. If the person to whom the notice of violation is issued fails to comply as directed, the agent shall order the discontinuance of noncompliance and may pursue any other enforcement remedies available at law or equity. In such event the Borough shall be entitled to recover its costs and expenses of litigation, together with fees and expenses of experts and reasonable attorney's fees.

B. Any person who has violated the provisions of this chapter, upon being found liable therefor in a civil enforcement proceeding commenced by the borough, shall pay a judgment of more than \$600 plus all court costs, including reasonable attorney fees incurred by the Borough as a result thereof. No judgment shall commence, or be imposed, levied or payable until the date of the determination of a violation of the Magisterial District Judge. If the defendant neither pays nor timely appeals the judgment, the Borough may enforce the judgment pursuant to the applicable rules of civil procedure and the Borough shall be entitled to recover the judgment debt plus interest at the statutory rate and costs and expenses of litigation, including reasonable attorney's fees and fees and expenses of expert witnesses.

C. Nothing herein shall prevent the Borough from taking such other lawful action as is necessary to prevent or remedy any violation and in any such action the Borough shall be entitled to recover the costs and expenses of litigation, fees of experts, together with reasonable attorney's fees.

SECTION 3. VENUE. Lawrence County, Pennsylvania shall be the sole and exclusive venue in which disputes and issues arising from or related to this Ordinance shall be resolved.

SECTION 4. EFFECTIVE DATE.
This Ordinance shall be effective immediately.

REPEALER. **Subparagraph 13(c) of Paragraph D of Section 275-25 is repealed.**

ORDAINED AND ENACTED this 7th day of March, 2022.

Natalie Stull
Council Administrator

Jon Welker
Council President