Work Session
Amendments to Title 11, Streets, Chapter 11.12, Permits and Improvements, of the Takoma Park Code regulating the installation of telecommunications equipment in City rights-of-way.

Recommended Council Action
Consider the proposed code amendments.

Context with Key Issues
As a result of increased demand for wireless broadband service and developments in wireless communications technology, cellular service providers have begun installing small short-range antennas as part of their network. While the Montgomery County Zoning Ordinance regulates the installation of antennas on private property in the City, City legislation is necessary to regulate installations in our rights-of-way.

Federal law requires that local governments allow the installation of small antennas and related equipment in their rights-of-way and limits their authority to regulate the installations and the fees they may charge for installation permit applications, for use of the right of way, and for attachment to government-owned poles.

Under the Telecommunications Act of 1996, Congress prohibits state or local regulations that “prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service.” On September 26, 2018, the Federal Communications Commission (“FCC”) issued an order providing an expansive interpretation of the preemptive scope of the 1996 Act.

First, the FCC ruled that delays in approving antenna installation applications constitute a prohibition on the provision of service and imposed “shot clocks” of sixty days for the issuance of permits to attach antennas to existing structures and ninety days for the issuance of permits to install new antenna support structures.

Second, the FCC ruled that fees charged by local governments for permit application review and recurring fees for use of the right-of-way and use of government-owned structures in the right-of-way are limited to the cost the local government incurs to review the permit and to maintain its rights-of-way and support structures. It deemed the following fees to be presumptively permissible: $500 for an application to attach one to five antennas to an existing pole; $1,000 for an application to install a new pole; and $270 per year for use of the right-of-way and attachment to a government-owned pole. (As a result, higher fees may be subject to legal challenge.)

Third, the FCC ruled that aesthetic requirements imposed by local governments for the installation of antennas and support structures must be “(1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.” The vagueness of these limitations, and the requirement that aesthetic standards, an inherently subjective issue, be “objective,” makes it difficult to anticipate permissible aesthetic requirements.
Montgomery County recently enacted a Zoning Text Amendment ("ZTA"), ZTA 18-02, expanding the permissibility of antennas and support structures in commercial and industrial zones and is in the process of enacting a ZTA expanding their permissibility in residential zones. The ZTAs address installations in county rights-of-way (of which there are none in the City) and on private property, including private property in the City. The pending ZTA, ZTA 18-11, distinguishes between installations upon and replacement of poles less than and greater than 22 feet tall because the shorter poles (typically street light poles) are located up-county, where there are neighborhoods built after 1967 that have underground utilities. ZTA 18-02 requires that cell antennas be located at least 10 feet from a building in commercial, commercial/residential, or industrial zones. ZTA 18-11 would require that cell antennas be located at least 30 feet from a dwelling in residential zones. The ZTAs also limit the size, location on the pole, and appearance of antennas and related equipment (antennas often require an equipment box).

The proposed amendments to the Takoma Park Code are intended to comply with the limitations of federal law while maximizing the City’s control over its rights-of-way. Because Takoma Park was developed before 1968 and has above-ground utilities, the amendments favor the installation of antennas on existing Pepco-owned utility poles, which are prevalent throughout the City. (The only potential support structures the City owns are decorative light poles.) New poles are permitted only when there is no existing pole in a location necessary to provide wireless coverage (which is unlikely) or, when an existing pole is inadequate to support necessary wireless equipment, as a replacement for the existing pole. The proposed amendments mimic the setback requirements of the ZTAs because the setback requirements were developed based on an understanding of need for adequate coverage and with the intent of avoiding preemption. In addition, using the same standards should make it more likely that permit applicants seek appropriate locations in the City.

Regarding aesthetics, the proposed amendments limit the size and mounting locations of antennas and related equipment in accordance with the ZTAs. Like the ZTAs, the proposed amendments require that the appearance of new installations conform to or blend into the surrounding area. Though this seems to be a subjective standard, research indicates that the standard is sufficiently objective when a permit denial based on the standard is provided in writing and cites specific evidence that the proposed installation is inconsistent with the surrounding area.

In an effort to comply with the federal requirement that local regulations not discriminate against wireless communications facilities, the proposed amendments incorporate the aesthetic requirements into the requirements for other installations in the right of way.

Direct legal challenges to the recent FCC Order and litigation over the interpretation the Order are very likely. Therefore, the proposed amendments are intended to leave some flexibility to modify fees and aesthetic requirements via regulation.

The proposed amendments also include changes to the Code not specifically related to the installation of wireless facilities. The current fee for a right of way work permit, $40.00, which was established many years ago, has been removed from the Code and is to be established by regulation, which will facilitate a change to reflect the current cost of application review now and in the future. The amendments also eliminate the charge per linear foot for right-of-way disturbances, as the current practice of the City is to charge only the permit application fee and require that the permittee restore the right-of-way.
Council Priorities
• A livable community for all.
• Fiscally sustainable government.

Environmental Considerations
N/A

Fiscal Considerations
The proposed amendments will allow the City to recover the cost of right-of-way permit application review and recurring right-of-way maintenance costs associated with installations in the right-of-way to the extent permitted by federal law.

Racial Equity Considerations
The proposed amendments will apply throughout the City. The City should monitor the availability of wireless broadband service throughout the City and encourage deployment in underserved areas if disparities are discovered.

Attachments and Links
• Text of proposed amendments.
Proposed Amendments to the Takoma Park Code to Regulate the Installation of Telecommunications Equipment in City Rights-of-Way

City Council Work Session

October 24, 2018

TAKOMA PARK CODE

Title 11

STREETS

* * *

Chapter 11.12

PERMITS AND IMPROVEMENTS

11.12.000 Definitions.

As used in this Chapter:

“Communications facility” means, collectively, the equipment at a fixed location or locations within a City right-of-way that enables communications services, including: (i) radio transceivers, antennas, coaxial, fiber-optic or other cabling, power supply (including backup battery), and comparable equipment, regardless of technological configuration; and (ii) all other equipment associated with any of the foregoing. A communications facility does not include the pole, tower or support structure to which the equipment is attached.

“Communications support structure” means a utility pole or other structure located in the City right-of-way to which communications facilities are attached or proposed or intended to be attached.

“Director” means the Director of Public Works or his or her designee.

“Investor-owned utility pole” means a utility pole that is not owned by the City.

11.12.010 Permit required for grading or, construction, and installation.

EXPLANATORY NOTE
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A. No person shall grade, construct, cut or excavate any City street, road, highway, alley, driveway apron, sidewalk, right-of-way, curb or gutter, or begin any of the work of such grading or construction, without first obtaining a permit from the City.

B. No person, including any utility company, shall cut any road or public right-of-way without first obtaining a permit from the City. A permit shall not be issued for a proposed structure when the location selected in the application is in an area where there is an overconcentration of structures or facilities in, on or over the right-of-way, as determined by the Director in the Director’s reasonable discretion and judgment. Any pole, equipment box, or other structure installed in a City right-of-way must:

1. Comply with all structural and safety standards specified by the Director;
2. Not obstruct pedestrian or vehicular traffic flow or sight lines;
3. Comply with the Americans with Disabilities Act;
4. If a pole, not exceed 50 feet in height;
5. If an equipment box, not exceed 12 cubic feet if installed above ground, and not exceed 20 cubic feet if installed at ground level;
6. If metal, be treated or painted with nonreflective paint and in a way to conform to or blend into the surroundings;
7. Not obstruct parking, including preventing persons from entering and exiting vehicles parked in the right-of-way; and
8. Comply with such other requirements and conditions as the Director may determine are appropriate.

C. No person, including any utility company, shall cut any road or City right-of-way for the purpose of installing or connecting underground power, communication lines, water or sewer lines, or cable television wires or for any other purpose without first obtaining a permit from the City.

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CD. In the event of an unexpected repair or emergency, a utility company may commence such repair and emergency response work as required under the circumstances, provided that the utility company shall notify the City as promptly as possible of such repair or emergency work and shall obtain a permit from the City for such work as soon as possible.

DE. A violation of this chapter and any regulations adopted to implement or enforce this chapter is a Class B offense.

EF. In addition to all other means of enforcement provided for by law and in this chapter, the City Administrator, City Manager, Director, Code Enforcement Officers or police officers may issue a stop-work order to any utility company or person who violates any provision of this chapter or any regulations adopted to implement or enforce this chapter. Any utility company or person who receives such a stop-work order shall immediately cease the work which constitutes the violation of the work. The utility company or person shall comply with all terms and conditions imposed by the stop-work order before the work may resume.

11.12.015 Attachments.

All attachments to poles or other structures in the City right-of-way must:

A. For each pole or structure, have an equipment box or boxes no greater in collective size than 28 cubic feet in volume, provided that neither the width nor the depth of any box may exceed 2 linear feet;

B. If metal, be treated or painted with nonreflective paint that is similar to the color of the structure upon which it is mounted;

C. For attachments located in a historic district, be shrouded to minimize visibility; and

D. Comply with such other requirements and conditions as the Director may determine are necessary and appropriate.

11.12.020 Permit application—Contents.

A. All applications for grading and construction and installation permits as described in Section 11.12.010 shall be filed in the Clerk’s office on forms provided by that office and shall be accompanied by 2 sets of detailed plans of the project, indicating the work which constitutes the violation of the work. The utility company or person shall comply with all terms and conditions imposed by the stop-work order before the work may resume.

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applications for communications facilities and communications support structures shall be governed by Section 11.12.170. The plans for the project shall include, wherever applicable, the following:

1. Right-of-way, name of street (if any) and width of right-of-way, abutting lots, North point and scale;
2. Pavement plan, curb and gutter, sidewalks, curb cuts and driveways, and dimensions;
3. Catch basins, inlets, culverts and other drainage structures, and dimensions;
4. Construction details, including cross section pavement, curb and gutter, details of drainage structures, culverts, headwalls, etc.;
5. Grading plan and profile, showing existing grades and finishing grades;
6. Any additional data required by the Director of Public Works or the Director’s representative.

B. Driveway apron applicants shall provide the address and lot and block number where construction is to be done and a drawing showing measurement for the property, all buildings, all porches, all permanent walks, all other permanently installed improvements and the size and location of the driveway to be installed.

11.12.030 Application requirements.
An application for a permit under Sections 11.12.010 or 11.12.015 shall not be accepted by the Director unless and until the required information is furnished, together with the necessary plans and specifications, and the required fee is paid as required under Section 11.12.070.

11.12.040 Application revision and resubmission.
In cases where the plans and specifications submitted to the Director do not meet the minimum construction standards as provided in this chapter, or if unusual conditions require a special determination by the Director as to type of construction, the plans and specifications, with necessary revisions noted appropriately thereon, shall be returned to the applicant for revision and resubmission.

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11.12.050 Examination of application—Issuance of permit.
The Director, upon receipt of an application for a construction permit, shall review the plans and specifications of the proposed project, and if the Director is satisfied that the plans meet the minimum construction standards as provided in Chapter 11.08, and that all other requirements of this chapter have been complied with, the Director shall certify approval to the Clerk for issuance of a construction permit.

11.12.060 Approval of plans required.
No new subdivision or resubdivision is required, then no construction permit shall be issued by the Clerk unless and until the Clerk has evidence in writing from the Maryland-National Capital Park and Planning Commission that a preliminary plan and profiles and grades for the subdivision in which the proposed highway, road, street or alley construction is located has been approved by the Park and Planning Commission and by the Washington Suburban Sanitary Commission, as applicable.

11.12.070 Permit and inspection fees.
A. Before any street, sidewalk, gutter, curb or drainage project may be begun on a road or street or within the boundaries of a dedication to public use, the applicant for a permit to undertake the project shall pay a fee established by the Director for road construction, right-of-way openings, pavement cuts, excavations and other disturbance work within a public right-of-way of the greater of $40.00 or the following:

1. For disturbance activities within the roadbed: $0.60 per linear foot.

2. For disturbance activities outside of the roadbed: $0.30 per linear foot.

B. In addition to the permit fee, a permittee shall reimburse the City, on an hourly basis, for reasonable engineering and staff expenses related to the review and inspection of construction within a public right-of-way. The hourly rates for such engineering and staff time shall be established by regulations promulgated in accordance with the provisions of Chapter 2.12.

C. In all cases in this chapter, the City Administrator or his or her designee may require that an escrow deposit or a bond to cover costs of possible damage or other related problems to public property be paid to the Treasurer. The amount of the

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escrow deposit or bond shall be determined by the City Administrator or his or her designee. Based on the project and shall be refunded after completion of the project with the approval of the City Administrator or his or her designee.

11.12.080 Permit fees—Not to be credited or returned.
Fees paid by any permittee whose construction permit has expired or become invalid shall not be credited against the fees required for a new permit of the permittee. No fees shall be returnable.

Construction permits when issued by the Clerk shall be valid for a period of 6 months from the date of issuance. If any work under a permit has not been commenced within this period, the permit shall be invalid, and a new permit required before the project may be commenced.

** * * *

11.12.140 Permit required to excavate public street.
A. No person without a permit shall make an excavation in any public street, avenue, right-of-way or other public space or remove from or deposit in the area any earth or other material.
B. No person shall exceed the time period granted only such permit in performance of the project for which the permit was issued.
C. A violation of this section is a Class B offense.

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11.12.170 Permit application--Communications facilities and communications support structures.
A. The installation of communications facilities and communications support structures in a City right-of-way shall require a permit under this Chapter.
B. An applicant for such a permit shall complete an application form created by the Director and submit the following information pertaining to particular sites or a proposed deployment of communications facilities or communications support structures:

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1. A technical description of the proposed communication facilities or support structures, including the purpose and intent of the proposed facilities or support structures, along with detailed diagrams accurately depicting all proposed facilities and support structures;

2. A detailed deployment plan describing construction planned for the 12-month period following the permit issuance, and a description of the completed deployment;

3. An engineering certification relating to the proposed installation;

4. A statement relating to intent to co-locate antennas on the proposed facility or support structure;

5. A statement committing to comply with applicable safety standards for the proposed activities in the City right-of-way;

6. In the case of a proposed attachment to a City-owned facility located in the City right-of-way, an executed attachment agreement with the City;

7. In the case of a proposed attachment to an investor-owned utility pole in a City right-of-way, proof of the existence of an executed attachment agreement with the utility pole owner, setting forth, at a minimum, the title, date and term of the agreement; and

8. Such other information as the Director may require.

C. Every applicant shall pay a permit application fee established by the Director upon submission of the application. Such fees shall not be refundable.

D. The Director may require payment of an additional application fee if the Director determines that material changes to an application after submission will materially increase the time or costs of the permit review and treat the changed application as a new application for purposes of any time limits for permit decisions under applicable law.

11.12.180 Communications facilities and communications support structures requirements and findings.

A. Communications facilities and communications support structures proposed to be located in the City right-of-way shall meet the following requirements:

1. Absent a special finding by the Director, communications facilities may only be installed on existing utility poles, and only entities certificated by the Maryland Public Service Commission pursuant to the Annotated Code of Maryland, Public Services and Utilities, Division I, Title 7 or Title 8, as amended, may erect new poles in the City's right-of-way. To allow the installation of a new pole or other communications support structure, the Director must find that

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a. Additional communications facilities are necessary in the location of the proposed pole or other communications support structure to provide adequate telecommunications coverage; and

b. Existing utility poles do not exist in the area where the proposed communications facilities are necessary or existing utility poles do not have the capacity for the necessary communications facilities.

2. Any new communications support structure installed in a City right-of-way must:

   a. Comply with all requirements of Section 11.12.010(B);

   b. If in a Commercial/Residential, Industrial, or Employment zone, be at least 22 feet tall and be at least 10 feet from an existing building;

   c. If in a Residential zone, be at least 22 feet tall and be at least 30 feet from a dwelling;

   d. If necessary because an existing utility pole does not have the capacity for the necessary communications facilities, be no more than 10 feet taller than the existing utility pole and be located within 2 feet of the base of an existing utility pole and at the same distance from the edge of the travel lane;

   e. Have only antennas that are concealed within an enclosure the same or similar color as the pole, installed at a minimum height of 15 feet, and mounted parallel with the pole;

   f. Have no exterior wiring, except that exterior wiring is permissible on a wooden pole when enclosed in a shielded conduit;

   g. If it includes an equipment cabinet, the equipment cabinet must be installed at the base at ground level or at least 12 feet above ground, not exceed 12 cubic feet if installed above ground, not exceed 20 cubic feet if installed at ground level, and be the same or similar color as the pole unless the cabinet is a stealth design approved by the Director;

   h. Be designed to accommodate the co-location of at least three different communications providers' antennas and related equipment; and

   i. Comply with such other requirements and conditions as the Director may determine are necessary and appropriate.

3. Any communications facilities installed on an existing pole or other structure in the right-of-way shall:

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a. Comply with Section 11.12.015;

b. Not have an antenna that is more than 3 cubic feet in volume;

c. If an antenna, be mounted parallel to the support structure;

d. Not result in more than three antennas per pole; and

e. Comply with such other requirements and conditions as the Director may determine are appropriate.

B. Communications facilities and communications support structures proposed to be located on City rights-of-way may be permitted upon a finding by the Director that:

1. The application complies with all standards and requirements set forth in Subsection A;

2. The location selected in the application is not in an area where there is an overconcentration of poles or other facilities in, on or over the right-of-way;

3. All communications equipment associated with a communications support structure, including communications equipment associated with a proposed new antenna and pre-existing communications equipment, will be no more than 28 cubic feet in volume;

4. The structure does not require antenna structure registration under 47 C.F.R. Chapter 1, Part 17, as amended; and

5. The applicant has entered into a master franchise agreement or a specific agreement relating to the proposed communications facilities or communications support structures that satisfies the requirements of Section 11.12.190.

C. The Director may waive minor variances from the requirements of this chapter if the variance does not jeopardize the public health, safety, or welfare.

D. The Director shall condition the issuance of a permit to install a replacement pole on the applicant’s agreement to remove the original pole within 60 days.

11.12.190 Required agreement.

An applicant for a permit to install communications facilities and communications support structures in the City right-of-way must agree to the following before the Director may issue a permit:

A. The applicant shall, at its sole expense, keep its communications facilities and communications support structures in a safe condition and in good and neat order and repair;

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B. The applicant shall indemnify and hold harmless the City from any claims arising from the installation and presence of the communications facilities and communications support structures and shall maintain liability insurance naming the City as additional insured in coverage amounts determined by the Director;

C. The applicant shall provide the City with emergency contact information and promptly respond to emergencies relating to its communications facilities and communications support structures;

D. The applicant promptly shall relocate or remove and replace, as appropriate, its communications facilities and communications support structures upon written request by the City when the City determines that the facility or structure materially interferes with the City’s use of the right-of-way. The applicant authorizes the City to remove its communications facilities and communications support structures and shall reimburse the City for the costs incurred if the applicant fails promptly to respond to a request from the City;

E. The applicant shall repair, restore, or replace any portion of the right-of-way that is damaged by its communications facilities and communications support structures or the installation or maintenance thereof. The applicant authorizes the City to repair, restore, or replace the damaged portion of the right of way and shall reimburse the City for the costs incurred if the applicant fails promptly to perform the work;

F. The City retains the right to cut or remove any communications facilities and communications support structures it deems necessary in response to a public emergency, and the applicant shall be responsible for the cost of restoration;

G. If the applicant ceases to operate or abandons any of its communications facilities or communications support structures, it shall remove them within 60 days. If the applicant fails to remove the abandoned facilities or support structures, the City may perform the work and collect the reasonable cost thereof from the applicant;

H. The applicant shall pay fair compensation to the City for the recurring costs it incurs for the maintenance of the right-of-way and for the use of any City-owned poles or facilities, as determined by the Director, and to the extent permitted by applicable federal and state law, recurring payments for the use of any City-owned poles or facilities; and

I. The applicant shall deliver to the City a performance bond or cash escrow deposit in an amount determined by the Director payable to the City to ensure the satisfactory work in the right-of-way and compliance with the applicant’s obligations under this Chapter, which shall be maintained by the City until all of the applicant’s obligations, including the obligation to remove and restore, are satisfied.

11.12.200 Exceptions.

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No City permit shall be required under this Chapter to excavate any portion of a street that is a part of the state highway system and for which a state permit is required under the provisions of the Annotated Code of Maryland, Transportation, § 8-646 as amended.