



Takoma Park City Council Meeting – November 14, 2018 Agenda Item 10

Reissued from the October 24, 2018 meeting

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
- [City Manager's Blog \(Why Now? Regulating Small Cell Antennas in Takoma Park\)](#)
- [Message from the Takoma Park City Attorney Regarding the Proposed City Code Amendments to Regulate the Installation of Cell Antennas and Support Structures in City Rights of Way](#)
- Link to [Video of October 24, 2018 Work Session Discussion](#)

1 **Proposed Amendments to the Takoma Park Code to Regulate the Installation of**
2 **Telecommunications Equipment in City Rights-of-Way**

3 **City Council Work Session**

4 **October 24, 2018**

5 **TAKOMA PARK CODE**

6 **Title 11**

7 **STREETS**

8 * * *

9 **Chapter 11.12**

10 **PERMITS AND IMPROVEMENTS**

11 **11.12.000 Definitions.**

12 As used in this Chapter:

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

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

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

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

23 **11.12.010 Permit required for grading ~~or~~ construction, and installation.**

EXPLANATORY NOTE

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

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

- 34 1. Comply with all structural and safety standards specified by the Director;
- 35 2. Not obstruct pedestrian or vehicular traffic flow or sight lines;
- 36 3. Comply with the Americans with Disabilities Act;
- 37 4. If a pole, not exceed 50 feet in height;
- 38 5. If an equipment box, not exceed 12 cubic feet if installed above ground, and not exceed
39 20 cubic feet if installed at ground level;
- 40 6. If metal, be treated or painted with nonreflective paint and in a way to conform to or
41 blend into the surroundings;
- 42 7. Not obstruct parking, including preventing persons from entering and exiting vehicles
43 parked in the right-of-way; and
- 44 8. Comply with such other requirements and conditions as the Director may determine are
45 appropriate.

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

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

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

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

62 **11.12.015 Attachments.**

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

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

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

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

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

72 **11.12.020 Permit application—Contents.**

73 A. All applications for grading ~~and~~, construction, and installation permits as described in
74 Section- 11.12.010- shall be filed in the ~~Clerk's~~Director's office on forms provided by that office
75 and shall be accompanied by 2 sets of detailed plans of the project, ~~indicating except that~~

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

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

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

91 **11.12.030 Application requirements.**

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

95 **11.12.040 Application revision and resubmission.**

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

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101 **11.12.050 Examination of application—Issuance of permit.**

102 The Director, upon receipt of an application for a ~~construction~~ permit, shall review the plans and
103 specifications of the proposed project, and if the Director is satisfied that the plans meet the
104 minimum construction standards as provided in Chapter ~~11.08~~ and ~~that~~ all other requirements of
105 this chapter have been complied with, the Director shall ~~so certify approval to the Clerk for issuance~~
106 ~~of~~issue a construction permit.

107 **11.12.060 Approval of plans required.**

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

114 **11.12.070 Permit ~~and inspection~~ fees.**

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

120 ~~1.—For disturbance activities within the roadbed: \$0.60 per linear foot.~~

121 ~~2.—For disturbance activities outside of the roadbed: \$0.30 per linear foot.~~

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

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

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129 escrow deposit or bond shall be determined by ~~the City Administrator or his or her designee~~Director
130 based on the project and shall be refunded after completion of the project with the approval of the
131 ~~City Administrator or his or her designee.~~Director

132 **11.12.080 Permit fees—Not to be credited or returned.**

133 Fees paid by any permittee whose ~~construction~~ permit has expired or become invalid shall not be
134 credited against the fees required for a new permit of the permittee. No fees shall be returnable.

135 **11.12.090 Expiration of permits—Renewal.**

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

139
140 * * *

141 **11.12.140 Permit required to excavate public street.**

142 A. No person without a permit shall make an excavation in any ~~public street, avenue~~right-of-way
143 or other public space or remove from or deposit in the area any earth or other material.

144 B. No person shall exceed the time period granted ~~on~~by such permit in performance of the project
145 for which the permit was issued.

146 C. A violation of this section is a Class B offense.

147 * * *

148 **11.12.170 Permit application--Communications facilities and communications support**
149 **structures.**

150 A. The installation of communications facilities and communications support structures in a City
151 right-of-way shall require a permit under this Chapter.

152 B. An applicant for such a permit shall complete an application form created by the Director and
153 submit the following information pertaining to particular sites or a proposed deployment of
154 communications facilities or communications support structures:

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- 155 1. A technical description of the proposed communication facilities or support structures,
156 including the purpose and intent of the proposed facilities or support structures, along with
157 detailed diagrams accurately depicting all proposed facilities and support structures;
- 158 2. A detailed deployment plan describing construction planned for the 12-month period
159 following the permit issuance, and a description of the completed deployment;
- 160 3. An engineering certification relating to the proposed installation;
- 161 4. A statement relating to intent to co-locate antennas on the proposed facility or support
162 structure;
- 163 5. A statement committing to comply with applicable safety standards for the proposed
164 activities in the City right-of-way;
- 165 6. In the case of a proposed attachment to a City-owned facility located in the City right-
166 of-way, an executed attachment agreement with the City;
- 167 7. In the case of a proposed attachment to an investor-owned utility pole in a City right-of-
168 way, proof of the existence of an executed attachment agreement with the utility pole owner,
169 setting forth, at a minimum, the title, date and term of the agreement; and
- 170 8. Such other information as the Director may require.

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

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

177 **11.12.180 Communications facilities and communications support structures requirements**
178 **and findings.**

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

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

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- 187 a. Additional communications facilities are necessary in the location of the
188 proposed pole or other communications support structure to provide adequate
189 telecommunications coverage; and
- 190 b. Existing utility poles do not exist in the area where the proposed
191 communications facilities are necessary or existing utility poles do not have the
192 capacity for the necessary communications facilities.
- 193 2. Any new communications support structure installed in a City right-of-way must:
- 194 a. Comply with all requirements of Section 11.12.010(B);
- 195 b. If in a Commercial/Residential, Industrial, or Employment zone, be at least 22
196 feet tall and be at least 10 feet from an existing building;
- 197 c. If in a Residential zone, be at least 22 feet tall and be at least 30 feet from a
198 dwelling;
- 199 d. If necessary because an existing utility pole does not have the capacity for the
200 necessary communications facilities, be no more than 10 feet taller than the existing
201 utility pole and be located within 2 feet of the base of an existing utility pole and at
202 the same distance from the edge of the travel lane;
- 203 e. Have only antennas that are concealed within an enclosure the same or similar
204 color as the pole, installed at a minimum height of 15 feet, and mounted parallel with
205 the pole;
- 206 f. Have no exterior wiring, except that exterior wiring is permissible on a wooden
207 pole when enclosed in a shielded conduit;
- 208 g. If it includes an equipment cabinet, the equipment cabinet must be installed at
209 the base at ground level or at least 12 feet above ground, not exceed 12 cubic feet if
210 installed above ground, not exceed 20 cubic feet if installed at ground level, and be
211 the same or similar color as the pole unless the cabinet is a stealth design approved
212 by the Director;
- 213 h. Be designed to accommodate the co-location of at least three different
214 communications providers' antennas and related equipment; and
- 215 i. Comply with such other requirements and conditions as the Director may
216 determine are necessary and appropriate.
- 217 3. Any communications facilities installed on an existing pole or other structure in the
218 right-of-way shall:

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- 219 a. Comply with Section 11.12.015;
- 220 b. Not have an antenna that is more than 3 cubic feet in volume;
- 221 c. If an antenna, be mounted parallel to the support structure;
- 222 d. Not result in more than three antennas per pole; and
- 223 e. Comply with such other requirements and conditions as the Director may
- 224 determine are appropriate.

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

- 227 1. The application complies with all standards and requirements set forth in Subsection A;
- 228 2. The location selected in the application is not in an area where there is an
229 overconcentration of poles or other facilities in, on or over the right-of-way;
- 230 3. All communications equipment associated with a communications support structure,
231 including communications equipment associated with a proposed new antenna and pre-
232 existing communications equipment, will be no more than 28 cubic feet in volume;
- 233 4. The structure does not require antenna structure registration under 47 C.F.R. Chapter 1,
234 Part 17, as amended; and
- 235 5. The applicant has entered into a master franchise agreement or a specific agreement
236 relating to the proposed communications facilities or communications support structures that
237 satisfies the requirements of Section 11.12.190.

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

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

242 **11.12.190 Required agreement.**

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

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

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- 248 B. The applicant shall indemnify and hold harmless the City from any claims arising from the
249 installation and presence of the communications facilities and communications support structures
250 and shall maintain liability insurance naming the City as additional insured in coverage amounts
251 determined by the Director;
- 252 C. The applicant shall provide the City with emergency contact information and promptly respond
253 to emergencies relating to its communications facilities and communications support structures;
- 254 D. The applicant promptly shall relocate or remove and replace, as appropriate, its
255 communications facilities and communications support structures upon written request by the City
256 when the City determines that the facility or structure materially interferes with the City’s use of the
257 right-of-way. The applicant authorizes the City to remove its communications facilities and
258 communications support structures and shall reimburse the City for the costs incurred if the
259 applicant fails promptly to respond to a request from the City;
- 260 E. The applicant shall repair, restore, or replace any portion of the right-of-way that is damaged
261 by its communications facilities and communications support structures or the installation or
262 maintenance thereof. The applicant authorizes the City to repair, restore, or replace the damaged
263 portion of the right of way and shall reimburse the City for the costs incurred if the applicant fails
264 promptly to perform the work;
- 265 F. The City retains the right to cut or remove any communications facilities and communications
266 support structures it deems necessary in response to a public emergency, and the applicant shall be
267 responsible for the cost of restoration;
- 268 G. If the applicant ceases to operate or abandons any of its communications facilities or
269 communications support structures, it shall remove them within 60 days. If the applicant fails to
270 remove the abandoned facilities or support structures, the City may perform the work and collect
271 the reasonable cost thereof from the applicant;
- 272 H. The applicant shall pay fair compensation to the City for the recurring costs it incurs for the
273 maintenance of the right-of-way and for the use of any City-owned poles or facilities, as determined
274 by the Director, and to the extent permitted by applicable federal and state law, recurring payments
275 for the use of any City-owned poles or facilities; and
- 276 I. The applicant shall deliver to the City a performance bond or cash escrow deposit in an amount
277 determined by the Director payable to the City to ensure the satisfactory work in the right-of-way
278 and compliance with the applicant’s obligations under this Chapter, which shall be maintained by
279 the City until all of the applicant’s obligations, including the obligation to remove and restore, are
280 satisfied.

281 **11.12.200 Exceptions.**

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

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