

ORDINANCE NO. []

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF BETHANY BEACH TO AMEND THE CHAPTER 493; STREETS AND SIDEWALKS, TO ADD ARTICLE VI, “WIRELESS FACILITIES IN PUBLIC RIGHTS-OF-WAY”.

WHEREAS, pursuant to the Delaware Code Title 22 Section 802, the Town of Bethany Beach (“Town”) has the authority to adopt such ordinances as it deems necessary and appropriate to assure good government in the Town, to protect and preserve the Town’s rights, property and privileges, and to preserve peace, safety and good order; and

WHEREAS, the Town’s Charter Section 4.2.23 allows the Town to regulate or prohibit the use of public streets, alleys, sidewalks, boardwalks, beaches, parks, right-of- ways, public places and Town-owned lands for commercial uses or activities not otherwise protected from such regulation or prohibition by the Constitutions of either the United States and the State of Delaware, or by any controlling federal statute; and

WHEREAS, the Town deems it to be necessary and appropriate to provide for certain standards and regulations relating to the location, placement, design, construction and maintenance of telecommunications towers, antennas and other structures within the Town’s public rights-of-way, and providing for the enforcement of said standards and regulations, consistent with federal and state law limitations on that authority.

NOW, THEREFORE, BE IT ENACTED AND ORDAINED by the Town Council:

SECTION 1: The foregoing Recitals are adopted as findings of the Town Council as though set forth in fully within the body of this ordinance.

SECTION 2: The Chapter 493; Streets and Sidewalks Code for the Town (“Code”) shall be amended to add a new Article VI, entitled “Wireless Facilities in Public Rights-Of-Way” as follows:

ARTICLE VI WIRELESS FACILITIES IN PUBLIC RIGHTS-OF-WAY

Section 493-28. Purpose.

- (a) The purpose of this Article is to establish a process for managing, and uniform standards for acting upon, requests for the placement of Wireless Facilities within the Public Right-of-Way of the Town consistent with the Town’s obligation to promote the public health, safety, and welfare, to manage the Public Right-of-Way, and to ensure that the public is not incommoded by the use of the Public Right-of-Way for the placement of Wireless Facilities . The Town recognizes the importance of Wireless Facilities to

provide high-quality communications service to the residents and businesses within the Town, and the Town also recognizes its obligation to comply with applicable Federal and State law regarding the placement of Personal Wireless Services Facilities in its Public Right-of-Way. This ordinance shall be interpreted consistent with those provisions.

Section 493-29. Definitions. The terms used in this Article shall have the following meanings:

Application: A formal request, including all required and requested documentation and information, submitted by an Applicant to the Town for a Wireless Encroachment Permit.

Applicant: A person filing an Application for placement or modification of a Wireless Facility in the Public Right-of-Way.

Base Station: shall have the meaning as set forth in 47 C.F.R. Section 1.6100(b)(1), or any successor provision.

Eligible Facilities Request: shall have the meaning as set forth in 47 C.F.R. Section 1.6100(b)(3), or any successor provision.

FCC: The Federal Communications Commission or its lawful successor.

Municipal Infrastructure: Town-owned or controlled property structures, objects, and equipment in the ROW, including, but not limited to, street lights, traffic control structures, banners, street furniture, bus stops, billboards, or other poles, lighting fixtures, or electroliers located within the ROW.

Permittee: any person or entity granted a Wireless Encroachment Permit pursuant to this Article.

Personal Wireless Services: shall have the same meaning as set forth in 47 U.S.C. Section 332(c)(7)(C)(i).

Personal Wireless Services Facility: means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.

Public Right-of-Way, or ROW: means the surface and space above, on, and below any public highway, avenue, street, lane, alley, boulevard, concourse, driveway, bridge, tunnel, park, parkway, waterway, dock, bulkhead, wharf, pier, public easement, right-of-way or any other public ground or water within or in which the Town now or hereafter holds any property interest.

Small Cell Facility: shall have the same meaning as “small wireless facility” in 47 C.F.R. 1.6002(1), or any successor provision (which is a Personal Wireless Services Facility that meets the following conditions that, solely for convenience, have been set forth below):

(1) The facility—

- (i) is mounted on a structure 50 feet or less in height, including antennas, as defined in 47 C.F.R. Section 1.1320(d), or
 - (ii) is mounted on a structure no more than 10 percent taller than other adjacent structures, or
 - (iii) does not extend an existing structure on which it are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
- (2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in 47 C.F.R. Section 1.1320(d)), is no more than three cubic feet in volume;
- (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;
- (4) The facility does not require antenna structure registration under 47 C.F.R. Part 17;
- (5) The facility is not located on Tribal lands, as defined under 36 C.F.R. Section 800.16(x); and
- (6) The facility does not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in 47 C.F.R. Section 1.1307(b).

Support Structure : Any structure capable of supporting a Base Station.

Tower: Any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities, including structures that are constructed for Personal Wireless Services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site. This definition does not include a Utility Pole.

Underground Areas: Those areas where there are no electrical facilities or facilities of the incumbent local exchange carrier in the right of way; or where the wires associated with the same are or are required to be located underground; or where the same are scheduled to be converted from overhead to underground. Electrical facilities are distribution facilities owned by an electric utility and do not include transmission facilities used or intended to be used to transmit electricity at nominal voltages in excess of 35,000 volts.

Utility Pole : A structure in the ROW designed to support electric, telephone and similar utility lines. A Tower is not a Utility Pole .

Wireless Encroachment Permit: A permit issued pursuant to this Article authorizing the placement or modification of a Wireless Facility of a design specified in the permit at a particular location within the ROW; and the modification of any existing Support Structure to which the Wireless Facility is proposed to be attached.

Wireless Facility, or Facility: The transmitters, antenna structures and other types of installations used for the provision of wireless services at a fixed location, including, without limitation, any associated Tower(s), Support Structure (s), and Base Station(s).

Wireless Infrastructure Provider: A person that owns, controls, operates or manages a Wireless Facility or portion thereof within the ROW.

Wireless Regulations: Those regulations that may be adopted pursuant to this Article and implementing the provisions of this Article.

Wireless Service Provider: An entity that provides Personal Wireless Services to end users.

Section 493-30. Scope.

- (a) **In general.** There shall be a type of encroachment permit entitled a “Wireless Encroachment Permit,” which shall be subject to all of the same requirements as a right of way permit would under Town Code, Article V, Section 493-17 in addition to all of the requirements of this Article. Unless exempted, every person who desires to place a Wireless Facility in the Public Right-of-Way or modify an existing Wireless Facility in the Public Right-of-Way must obtain a Wireless Encroachment Permit authorizing the placement or modification in accordance with this Article. Except for Small Cell Facilities, facilities qualifying as Eligible Facilities Requests, or any other type of facility expressly allowed in the public right-of-way by state or federal law, no other Wireless Facilities shall be permitted pursuant to this Article.
- (b) **Exemptions.** This Article does not apply to:
- (1) The placement or modification of facilities by the Town or by any other agency of the state solely for public safety purposes.
 - (2) Installation of a "cell on wheels," "cell on truck" or a similar structure for a temporary period in connection with an emergency or event, but no longer than required for the emergency or event, provided that installation does not involve excavation, movement, or removal of existing facilities.
 - (3) Installation of a Wireless Facility on the strand between two Utility Poles, provided that the cumulative volume of all Wireless Facilities on the strand shall not exceed 1 cubic foot and provided further that the installation does not require replacement of the strand, or excavation, modification or replacement of the Utility Poles.
- (c) **Other applicable requirements.** In addition to the Wireless Encroachment Permit required herein, the placement of a Wireless Facility in the ROW requires the persons who will own or control those facilities to obtain all permits required by applicable law, and to comply with applicable law, including, but not limited to, applicable law governing radio frequency (RF) emissions.
- (d) **Pre-existing Facilities in the ROW.** Any Wireless Facility already existing in the ROW as of the date of this Article’s adoption shall remain subject to the standards and conditions of the Town Code in effect prior to this Article, unless and until a renewal of such Facility’s then-existing permit is granted, at which time the provisions of this Article shall apply in full force going forward as to such Facility. The review of any request for a renewal of a permit for such pre-existing facilities shall be conducted pursuant to this Article, rather than the portion(s) of the Town Code that it was previously reviewed under.

- (e) **Public use.** Except as otherwise provided by Delaware law, any use of the public right-of-way authorized pursuant to this Chapter will be subordinate to the Town's use and use by the public.

Section 493-31. Administration.

- (a) **Town Manager.** The Town Manager or their designee is responsible for administering this Article. As part of the administration of this Article, the Town Manager may:
 - (1) Interpret the provisions of this Article;
 - (2) Develop and implement standards governing the placement and modification of Wireless Facilities consistent with the requirements of this Article, including regulations governing collocation and resolution of conflicting Applications for placement of Wireless Facilities ;
 - (3) Develop and implement acceptable designs and development standards for Wireless Facilities in the Public Right-of-Way, taking into account the zoning districts bounding the Public Right-of-Way;
 - (4) Develop forms and procedures for submission of Applications for placement or modification of Wireless Facilities , and proposed changes to any Support Structure consistent with this Article;
 - (5) Determine the amount of and collect, as a condition of the completeness of any Application, any fee established by this Article;
 - (6) Establish deadlines for submission of information related to an Application, and extend or shorten deadlines where appropriate and consistent with state and federal laws and regulations;
 - (7) Issue any notices of incompleteness, requests for information, or conduct or commission such studies as may be required to determine whether a permit should be issued;
 - (8) Require, as part of, and as a condition of completeness of any Application, notice to members of the public that may be affected by the placement or modification of the Wireless Facility and proposed changes to any Support Structure ;
 - (9) Subject to appeal as provided herein, determine whether to approve, approve subject to conditions, or deny an Application; and
 - (10) Take such other steps as may be required to timely act upon Applications for placement of Wireless Facilities , including issuing written decisions and entering into agreements to mutually extend the time for action on an Application.
- (b) **Appeal.**
 - (1) Any person adversely affected by the decision of the Town Manager may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal and specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the written decision of the Town Manager in the Town Office. An appeal by a wireless infrastructure provider must be taken jointly with the wireless service provider that intends to use the Personal Wireless Services Facility.

Section 493-32. General Standards for Wireless Facilities in the Public Rights-of-Way.

- (a) **Generally.** Wireless Facilities in the ROW shall meet the minimum requirements set forth in this ordinance and the Wireless Regulations , in addition to the requirements of any other applicable law.
- (b) **Regulations.** The Wireless Regulations and decisions on Applications for placement of Wireless Facilities in the ROW shall, at a minimum, ensure that the requirements of this section are satisfied, unless it is determined that Applicant has established that denial of an Application would, within the meaning of federal law, prohibit or effectively prohibit the provision of Personal Wireless Services , or otherwise violate applicable laws or regulations. If that determination is made, the requirements of this Article may be waived, but only to the minimum extent required to avoid the prohibition or violation.
- (c) **Minimum Standards.** Wireless Facilities shall be installed and modified in a manner that minimizes risks to public safety, avoids placement of aboveground facilities in Underground Areas, avoids installation of new Support Structures or equipment cabinets in the Public Right-of-Way, and otherwise maintains the integrity and character of the neighborhoods and corridors in which the facilities are located; ensures that installations are subject to periodic review to minimize the intrusion on the rights of way; and ensures that the Town bears no risk or liability as a result of the installations, and that such use does not inconvenience the public, interfere with the primary uses of the rights-of-way, or hinder the ability of the Town or other government agencies to improve, modify, relocate, abandon, or vacate the public rights of way or any portion thereof, or to cause the improvement, modification, relocation, vacation, or abandonment of facilities in the rights of way.
- (d) **Location Preferences.** All Applicants should, to the extent feasible, collocate new facilities and substantial changes to existing facilities with existing facilities. Collocations should, to the extent feasible, be proposed on structures in accordance with the following preferences.
 - (1) Applicants should avoid proposing new facilities and substantial changes to existing facilities in the following locations:
 - (i) East of Atlantic Avenue;
 - (ii) Municipal, Open Space, Recreation Facilities and Education District (MORE).
- (e) **Design Standards.** Permits for Personal Wireless Services Facilities shall incorporate specific concealment elements to minimize visual impacts and design requirements ensuring compliance with all standards for noise emissions. Unless it is determined that another design is less intrusive or placement is required under applicable law.
 - (1) The Town Council may develop and implement acceptable designs and development standards for Wireless Facilities in the Public Right-of-Way, taking into account the zoning districts bounding the Public Right-of-Way. Once codified, any updates to such standards shall be at the reasonable discretion of the Town Manager.

Section 493-33. Applications.

- (a) **Submission.** Unless the Wireless Regulations provide otherwise, Applicant shall submit a paper copy and an electronic copy of any Application, amendments, or supplements to an Application, or responses to requests for information regarding an Application to: Town Manager of the Town of Bethany Beach, at 214 Garfield Parkway, P.O. Box 109, Bethany Beach, DE 19930.
- (b) **Content.** An Applicant shall submit an Application on the form approved by the Town Manager, which may be updated from time-to-time, but in any event shall require the submission of all required fee(s), documents, information, and any other materials necessary to allow the Town Manager to make required findings and ensure that the proposed Facility will comply with applicable federal and state law, the Town Code, and will not endanger the public health, safety, or welfare. If no form has been approved, Applications must contain all information necessary to show that Applicant is entitled to the Wireless Encroachment Permit requested, and must specify whether the Applicant believes state or federal law requires action on the Application within a specified time period.
- (c) **Fees.** Application fee(s) shall be required to be submitted with any Application for a Wireless Encroachment Permit. The Town Council is hereby authorized to determine, or cause to be determined, the amount, type, and other terms of such fee(s) from time to time by means of resolution. Notwithstanding the foregoing, no Application fee shall be refundable, in whole or in part, to an Applicant for a Wireless Encroachment Permit unless paid as a refundable deposit.
- (d) **Waivers.** Requests for waivers from any requirement of this section shall be made in writing to the Town Manager or their designee. The Town Manager may grant or deny a request for a waiver pursuant to this subsection. The Town Manager may grant a request for waiver if it is demonstrated that, notwithstanding the issuance of a waiver, the Town Manager will be provided all information necessary to understand the nature of the construction or other activity to be conducted pursuant to the permit sought. All waivers approved pursuant to this subsection shall be (1) granted only on a case-by-case basis, and (2) narrowly-tailored to minimize deviation from the requirements of the Town Code.
- (e) **Incompleteness.** For Personal Wireless Facilities and Eligible Facilities Request, Applications will be processed, and notices of incompleteness provided, in conformity with state, local, and federal law. If such an Application is incomplete, the Town Manager may notify the Applicant in writing, and specifying the material omitted from the Application.

Section 493-34. Findings; Decisions; Consultants.

- (a) **Findings Required for Approval.**
 - (1) Except for Eligible Facilities Requests, the Town Manager or their designee, as the case may be, shall approve an Application if, on the basis of the Application and other materials or evidence provided in review thereof, it finds the following:
 - (i) The Facility is not detrimental to the public health, safety, and welfare;
 - (ii) The Facility complies with this Article and all applicable design and development standards;

- (ii) The Facility meets applicable requirements and standards of state and federal law; and
- (2) For Eligible Facilities Requests , the Town Manager or their designee, as the case may be, shall approve an Application if, on the basis of the Application and other materials or evidence provided in review thereof, it finds the following:
 - (i) That the Application qualifies as an eligible facilities request; and
 - (ii) That the proposed Facility will comply with all generally-applicable laws.
- (b) **Decisions.** Decisions on an Application by the Town Manager or their designee shall be in writing and include the reasons for the decision.
- (c) **Independent Consultants.** The Town Manager or their designee, as the case may be, is authorized, in its discretion, to select and retain independent consultant(s) with expertise in telecommunications in connection with the review of any Application under this Article. Such independent consultant review may be retained on any issue that involves specialized or expert knowledge in connection with an Application, including, but not limited to, Application completeness or accuracy, structural engineering analysis, or compliance with FCC radio frequency emissions standards.

Section 493-35. Conditions of Approval.

- (a) **Generally.** In addition to any supplemental conditions imposed by the Town Manager or their designee, as the case may be, all permits granted pursuant to this Article shall be subject to the following conditions, unless modified by the approving authority:
 - (1) *Code Compliance.* The Permittee shall at all times maintain compliance with all applicable federal, state and local laws, regulations and other rules, including, without limitation, those applying to use of Public Right-of-Way.
 - (2) *Permit Duration.* A Wireless Encroachment Permit shall be valid for a period of ten (10) years, unless pursuant to another provision of the Code or these conditions, it expires sooner or is terminated. At the end of ten (10) years from the date of issuance, such Permit shall automatically expire, unless an extension or renewal has been granted. A person holding a Wireless Encroachment Permit must either (1) remove the Facility within thirty (30) days following the permit's expiration (provided that removal of Support Structure owned by Town, a utility, or another entity authorized to maintain a Support Structure in the right of way need not be removed, but must be restored to its prior condition, except as specifically permitted by the Town); or (2) at least ninety (90) days prior to expiration, submit an Application to renew the permit, which Application must, among all other requirements, demonstrate that the impact of the Wireless Facility cannot be reduced. The Wireless Facility must remain in place until it is acted upon by the Town and all appeals from the Town's decision exhausted.
 - (3) *Timing of Installation.* The installation and construction authorized by a Wireless Encroachment Permit shall begin within one (1) year after its approval, or it will expire without further action by the Town. The installation and construction authorized by a Wireless Encroachment Permit shall conclude, including any necessary post-installation repairs and/or restoration to the ROW, within thirty (30) days following the day construction commenced.

- (4) *Commencement of Operations.* The operation of the approved Facility shall commence no later than one (1) month after the completion of installation, or the Wireless Encroachment Permit will expire without further action by the Town.
- (5) *As-Built Drawings.* The Permittee shall submit an as-built drawing within ninety (90) days after installation of the Facility . As-builts shall be in an electronic format acceptable to the Town.
- (6) *Inspections; Emergencies.* The Town or its designee may enter onto the Facility area to inspect the Facility upon 48 hours prior notice to the Permittee. The Permittee shall cooperate with all inspections and may be present for any inspection of its Facility by the Town. The Town reserves the right to enter or direct its designee to enter the Facility and support, repair, disable, or remove any elements of the Facility in emergencies or when the Facility threatens imminent harm to persons or property. The Town shall make an effort to contact the Permittee prior to disabling or removing any Facility elements, but in any case shall notify Permittee within 24 hours of doing so.
- (7) *Contact.* The Permittee shall at all times maintain accurate contact information for all parties responsible for the Facility , which shall include a phone number, street mailing address and email address for at least one natural person.
- (8) *Insurance.* Permittee shall obtain and maintain throughout the term of the permit commercial general liability insurance with a limit of \$1,000,000.00 per occurrence for bodily injury and property damage and \$2,000,000.00 general aggregate including premises operations, contractual liability, personal injury, and products completed operations. The relevant policy(ies) shall name the Town, its elected/appointed officials, commission members, officers, representatives, agents, and employees as additional insureds. Permittee shall use its best efforts to provide thirty (30) days prior notice to the Town of to the cancellation or material modification of any applicable insurance policy.
- (9) *Indemnities.* The Permittee and, if applicable, the owner of the property upon which the Wireless Facility is installed shall defend, indemnify and hold harmless the Town, its agents, officers, officials, and employees (i) from any and all damages, liabilities, injuries, losses, costs, and expenses, and from any and all claims, demands, law suits, writs of mandamus, and other actions or proceedings brought against the Town or its agents, officers, officials, or employees to challenge, attack, seek to modify, set aside, void or annul the Town's approval of the permit, and (ii) from any and all damages, liabilities, injuries, losses, costs, and expenses, and any and all claims, demands, law suits, or causes of action and other actions or proceedings of any kind or form, whether for personal injury, death or property damage, arising out of or in connection with the activities or performance of the Permittee or, if applicable, the property owner or any of each one's agents, employees, licensees, contractors, subcontractors, or independent contractors. In the event the Town becomes aware of any such actions or claims the Town shall promptly notify the Permittee and, if applicable, the property owner and shall reasonably cooperate in the defense. The Town shall have the right to approve, which approval shall not be unreasonably withheld, the legal counsel providing the Town's defense, and the property owner and/or Permittee (as applicable) shall reimburse Town for any costs and expenses directly and necessarily incurred by the Town in the course of the defense.

- (10) *Performance Bond.* Prior to issuance of a Wireless Encroachment Permit, the Permittee shall file with the Town, and shall maintain in good standing throughout the term of the approval, a performance bond or other surety or another form of security for the removal of the Facility in the event that the use is abandoned or the permit expires, or is revoked, or is otherwise terminated. The security shall be in the amount equal to 150% of the cost of physically removing the Facility and all related facilities and equipment on the site, based on the higher of two contractor's quotes for removal that are provided by the Permittee. The Permittee shall reimburse the Town for staff time associated with the processing and tracking of the bond, based on the hourly rate adopted by the Town Council. Reimbursement shall be paid when the security is posted and during each administrative review.
- (11) *Adverse Impacts on Adjacent Properties.* Permittee shall undertake all reasonable efforts to avoid undue adverse impacts to adjacent properties and/or uses that may arise from the construction, operation, maintenance, modification, and removal of the Facility .
- (12) *Noninterference.* Permittee shall not move, alter, temporarily relocate, change, or interfere with any existing structure, improvement, or property without the prior consent of the owner of that structure, improvement, or property. No structure, improvement, or property owned by the Town shall be moved to accommodate a permitted activity or encroachment, unless the Town determines that such movement will not adversely affect the Town or any surrounding businesses or residents, and the Permittee pays all costs and expenses related to the relocation of the Town's structure, improvement, or property. Prior to commencement of any work pursuant to a wireless encroachment permit, the Permittee shall provide the Town with documentation establishing to the Town's satisfaction that the Permittee has the legal right to use or interfere with any other structure, improvement, or property within the public right-of-way or Town utility easement to be affected by Permittee's facilities.
- (13) *No Right, Title, or Interest.* The permission granted by a Wireless Encroachment Permit shall not in any event constitute an easement on or an encumbrance against the public right-of-way. No right, title, or interest (including franchise interest) in the public right-of-way, or any part thereof, shall vest or accrue in Permittee by reason of a Wireless Encroachment Permit or the issuance of any other permit or exercise of any privilege given thereby.
- (14) *No Possessory Interest.* No possessory interest is created by a Wireless Encroachment Permit. However, to the extent that a possessory interest is deemed created by a governmental entity with taxation authority, Permittee acknowledges that Town has given to Permittee notice pursuant to **Delaware State Code Section 5402** that the use or occupancy of any public property pursuant to a Wireless Encroachment Permit may create a possessory interest which may be subject to the payment of property taxes levied upon such interest. Permittee shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interact taxes or other taxes, fees, and assessments levied against Permittee's right to possession, occupancy, or use of any public property pursuant to any right of possession, occupancy, or use created by this permit.

- (15) *General Maintenance.* The site and the Facility , including, but not limited to, all landscaping, fencing, and related transmission equipment, must be maintained in a neat and clean manner and in accordance with all approved plans. All graffiti on facilities must be removed at the sole expense of the Permittee within forty eight (48) hours after notification from the Town.
- (16) *RF Exposure Compliance.* All facilities must comply with all standards and regulations of the FCC and any other state or federal government agency with the authority to regulate RF exposure standards. After transmitter and antenna system optimization, but prior to unattended operations of the Facility , Permittee or its representative must conduct on-site post-installation RF emissions testing to demonstrate actual compliance with the FCC OET Bulletin 65 RF emissions safety rules for general population/uncontrolled RF exposure in all sectors. For this testing, the transmitter shall be operating at maximum operating power, and the testing shall occur outwards to a distance where the RF emissions no longer exceed the uncontrolled/general population limit.
- (17) *Testing.* Testing of any equipment shall take place on weekdays only, and only between the hours of 8:30 a.m. and 4:30 p.m., except that testing is prohibited on holidays that fall on a weekday. In addition, testing is prohibited on weekend days.
- (18) *Modifications.* No changes shall be made to the approved plans without review and approval in accordance with this Article.
- (19) *Agreement with Town.* If not already completed, Permittee shall enter into the appropriate agreement with the Town, as determined by the Town, prior to constructing, attaching, or operating a Facility on Municipal Infrastructure. This permit is not a substitute for such agreement.
- (20) *Conflicts with Improvements.* For all facilities located within the ROW, the Permittee shall remove or relocate, at its expense and without expense to the Town, any or all of its facilities when such removal or relocation is deemed necessary by the Town by reason of any change of grade, alignment, or width of any right-of-way, for installation of services, water pipes, drains, storm drains, power or signal lines, traffic control devices, right-of-way improvements, or for any other construction, repair, or improvement to the right-of-way.
- (21) *Abandonment.* If a Facility is not operated for a continuous period of 6 months, the Wireless Encroachment Permit and any other permit or approval therefor shall be deemed abandoned and terminated automatically, unless before the end of the 6 month period (i) the Town Manager has determined that the Facility has resumed operations, or (ii) the Town has received an Application to transfer the permit to another service provider. No later than forty-five (45) days from the date the Facility is determined to have ceased operation or the Permittee has notified the Town Council of its intent to vacate the site, the Permittee shall remove all equipment and improvements associated with the use and shall restore the site to its original condition to the satisfaction of the Town Manager. The Permittee shall provide written verification of the removal of the facilities within thirty (30) days of the date the removal is completed. If the Facility is not removed within thirty (30) days after the permit has been discontinued pursuant to this subsection, the site shall be deemed to be a nuisance, and the Town may cause the Facility to be removed at Permittee's expense or by calling any bond or other financial assurance to pay for

removal. If there are two (2) or more users of a single Facility or Support Structure, then this provision shall apply to the specific elements or parts thereof that were abandoned, but will not be effective for the entirety thereof until all users cease use thereof.

- (22) *Encourage Co-location.* Where the Facility site is capable of accommodating a co-located Facility upon the same site in a manner consistent with the permit conditions for the existing Facility, the owner and operator of the existing Facility shall allow co-location of third party facilities, provided the parties can mutually agree upon reasonable terms and conditions.
 - (23) *Records.* The Permittee must maintain complete and accurate copies of all permits and other regulatory approvals issued in connection with the Facility, which includes without limitation this approval, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval and any ministerial permits or approvals issued in connection with this approval. In the event that the Permittee does not maintain such records as required in this condition or fails to produce true and complete copies of such records within a reasonable time after a written request from the Town, any ambiguities or uncertainties that would be resolved through an inspection of the missing records will be construed against the Permittee.
 - (24) *Attorney's Fees.* In the event the Town determines that it is necessary to take legal action to enforce any of these conditions, or to revoke a permit, and such legal action is taken, the Permittee shall be required to pay any and all costs of such legal action, including reasonable attorney's fees, incurred by the Town, even if the matter is not prosecuted to a final judgment or is amicably resolved, unless the Town should otherwise agree with Permittee to waive said fees or any part thereof. The foregoing shall not apply if the Permittee prevails in the enforcement proceeding.
- (b) **Eligible Facilities Requests.** In addition to the conditions provided in Section 9(a) of this Article and any supplemental conditions imposed by the Town Manager or their designee, as the case may be, all permits for an Eligible Facility Request granted pursuant to this Article shall be subject to the following additional conditions, unless modified by the approving authority:
- (1) *Permit subject to conditions of underlying permit.* Any permit granted in response to an Application qualifying as an eligible facilities request shall be subject to the terms and conditions of the underlying permit.
 - (2) *No permit term extension.* The Town's grant or grant by operation of law of an eligible facilities request permit constitutes a federally-mandated modification to the underlying permit or approval for the subject Tower or Base Station. Notwithstanding any permit duration established in another permit condition, the Town's grant or grant by operation of law of a eligible facilities request permit will not extend the permit term for the underlying permit or any other underlying regulatory approval, and its term shall be coterminous with the underlying permit or other regulatory approval for the subject Tower or Base Station.
 - (3) *No waiver of standing.* The Town's grant or grant by operation of law of an eligible facilities request does not waive, and shall not be construed to waive, any standing by the Town to challenge Section 6409(a) of the Spectrum Act, any FCC rules that

interpret Section 6409(a) of the Spectrum Act, or any modification to Section 6409(a) of the Spectrum Act.

- (c) **Small Cell Facilities Requests.** In addition to the conditions provided in Section 9(a) of this Article and any supplemental conditions imposed by the Town Manager or their designee, as the case may be, all permits for a Small Cell Facility granted pursuant to this Article shall be subject to the following condition, unless modified by the approving authority:

(1) *No waiver of standing.* The Town's grant of a permit for a Small Cell Facility request does not waive, and shall not be construed to waive, any standing by the Town to challenge any FCC orders or rules related to Small Cell Facilities, or any modification to those FCC orders or rules.

Section 493-36. Breach; Termination of Permit.

- (a) **For breach.** A Wireless Encroachment Permit may be revoked for failure to comply with the conditions of the permit or applicable law. Upon revocation, the Wireless Facility must be removed; provided that removal of a Support Structure owned by Town, a utility, or another entity authorized to maintain a Support Structure in the right-of-way need not be removed, but must be restored to its prior condition, except as specifically permitted by the Town. All costs incurred by the Town in connection with the revocation and removal shall be paid by entities who own or control any part of the Wireless Facility .
- (b) **For installation without a permit.** An Wireless Facility installed without a Wireless Encroachment Permit (except for those exempted by this Article) must be removed; provided that removal of Support Structure owned by Town, a utility, or another entity authorized to maintain a Support Structure in the right of way need not be removed, but must be restored to its prior condition, except as specifically permitted by the Town. All costs incurred by the Town in connection with the revocation and removal shall be paid by entities who own or control any part of the Wireless Facility .
- (c) **Municipal Infraction.** Any violation of this Article will be subject to fines as set out in Chapter 1, General Provisions, Article 1, Penalties, upon conviction thereof.

Section 493-37. Infrastructure Controlled By Town. The Town, as a matter of policy, will negotiate agreements for use of Municipal Infrastructure. The placement of Wireless Facilities on those structures shall be subject to the agreement. The agreement shall specify the compensation to the Town for use of the structures. The person seeking the agreement shall additionally reimburse the Town for all costs the Town incurs in connection with its review, including vendor review, of, and action upon the person's request for, an agreement.

Section 493-38. Nondiscrimination. In establishing the rights, obligations and conditions set forth in this article, it is the intent of the Town to treat each Applicant or public right-of-way user in a competitively neutral and nondiscriminatory manner, to the extent required by law, and with considerations that may be unique to the technologies, situation and legal status of each particular Applicant or request for use of the Public Right-of-Way.

Section 493-39. The Town Manager, or their delegate, is directed to execute all documents and to perform all other necessary Town acts to implement effect this Ordinance.

Section 493-40. Severability. If any section, subsection, provision, sentence, clause, phrase or word of this Ordinance is for any reason held to be illegal or otherwise invalid by any court of competent jurisdiction, such invalidity shall be severable, and shall not affect or impair any remaining section, subsection, provision, sentence, clause, phrase or word included within this Ordinance, it being the intent of the Town that the remainder of the Ordinance shall be and shall remain in full force and effect, valid, and enforceable.

Section 493-41. In accordance with _____, this Ordinance shall become effective on the _____ day following its passage and adoption.

PASSED AND ADOPTED BY THE COUNCIL OF THE TOWN OF BETHANY BEACH
this _____ day of _____, _____, by the following vote:

AYES:

NOES:

ABSENT:

APPROVED:

[Name/Title]
Town of Bethany Beach, Delaware

ATTEST:

[Name/Title]
Town of Bethany Beach, Delaware

APPROVED AS TO FORM:

[Name/Title]
Town of Bethany Beach, Delaware