

**TOWNSHIP OF UPPER  
CAPE MAY COUNTY  
ORDINANCE**

**ORDINANCE NO. 009-2018**

**RE: AN ORDINANCE TO AMEND CHAPTER XIII OF THE CODE OF UPPER  
TOWNSHIP TO PERMIT WIRELESS COMMUNICATIONS FACILITIES IN THE  
PUBLIC RIGHTS-OF-WAY**

**WHEREAS**, the Township Committee deems it necessary and appropriate to supplement and/or amend the Code of Upper Township to address issues associated with the deployment of wireless communications facilities in the public rights-of-way; and

**WHEREAS**, the Township acknowledges that wireless communications carriers may enter into written agreements with parties that have the lawful right to erect poles in the public rights-of-way pursuant to N.J.S.A. 48:3-18, and that the consent of the municipality is required pursuant to N.J.S.A. 48:3-19, if the party seeking to install such facilities does not have an independent lawful right to construct such facilities; and

**WHEREAS**, the consent by the Township for the facilities to be installed is limited to existing wood structure poles, commonly known as wooden utility poles, or replacement poles as regulated herein, no new poles of any material shall be erected within the Township by Wireless Company, the setting of poles is regulated by the New Jersey Board of Public Utilities (“BPU”) the Township authorizes only those that have an independent lawful right to construct utility poles to set poles in the Township’s public rights-of-way; and

**WHEREAS**, the Township acknowledges that in connection with the use of those public rights-of-way under the jurisdiction of the County of Cape May, municipal consent is required in addition to the consent of the County pursuant to N.J.S.A. 27:16-6; and

**WHEREAS**, the Township acknowledges that notwithstanding the proscriptions of 47 U.S.C. §253(a), it has the authority to manage the public rights-of-way as provided in 47 U.S.C. §253(c); and

**WHEREAS**, this Ordinance only effects the limited installation of facilities in the public rights-of-way on existing wooden poles and shall have no effect on site plan and zoning requirements for local communication towers or wireless telecommunication equipment and facilities elsewhere in the Township; and

**WHEREAS**, the purpose of this Ordinance is to allow the prompt deployment of wireless communications facilities in the public rights-of-way while also effectively managing the rights-of-way in the interests of the public health, safety and welfare; and

**NOW, THEREFORE, BE IT ORDAINED** by the Township Committee, in the Township of Upper, County of Cape May and State of New Jersey as follows:

**SECTION 1.** Chapter 13, Section 3, of the Revised General Ordinances of the Township of Upper, entitled “Wireless Communications Facilities in the Public Rights-of-Way” is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3 Wireless Communications Facilities in the Public Rights-of-Way.**

**SECTION 2.** Chapter 13, Section 3.1 of the Revised General Ordinances of the Township of Upper, entitled “Definitions” is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.1 Definitions.**

- a. For the purposes of this Ordinance, the following terms, phrases, words, and their

derivatives shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Any term not defined in this section shall have the meaning ascribed to it in the New Jersey Municipal Land Use Law, 40:55D-1, et seq., unless the context clearly requires otherwise. In the event that a term is not defined by this Ordinance, said term shall have its common and/ordinary meaning.

b. Definitions:

*Carrier* means any firm, partnership, association, corporation, limited liability company, or any other legally recognized organization, licensed by the Federal Communications Commission to provide Personal Wireless Services or authorized by the New Jersey Board of Public Utilities to provide telecommunications services in the State of New Jersey.

*Conduit* means a casing or encasement for wires or cables.

*County* means the County of Cape May, State of New Jersey.

*Facility or Facilities* means all structures, devices, and materials, including but not limited to: antennas, radios and radio cabinets, electrical wires and cables, fiber optic cables, communications and video cables and wires, poles, conduits, pads, backup power supply and other components of Personal Wireless Service Facilities, and appurtenances thereto, located in the public rights-of-way. Each pole mounting set up shall be a separate Facility for regulatory purposes, applications, and fees.

*Governing Body* means the Township Committee of the Township of Upper, County of Cape May, State of New Jersey.

*Municipality* means the Township of Upper, County of Cape May, State of New Jersey.

*Permittee* means the Carrier to which a permit has been issued pursuant to this Ordinance and Master License Agreement for Use of Public Rights-of-Way.

*Personal Wireless Services* means any technologies defined in 47 U.S.C. 332(c)(7) including commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, provided to personal mobile communication devices through wireless Facilities or any fixed mobile wireless services provided using personal wireless Facilities.

*Personal Wireless Service Facilities* means equipment at a fixed location that enables Personal Wireless Service between user equipment and a communications network, including but not limited to: (a) equipment associated with Personal Wireless Services such as private, broadcast and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul; and (b) Tower, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies and comparable equipment, regardless of technological configuration.

*Public Right-of-Way* means the surface, the air space above the surface, and the area below the surface of any Street, road, highway, lane, alley, boulevard, or drive, including the sidewalk, shoulder and area for utilities owned by the Township of Upper or within an easement to the public or other easement owned by the Township of Upper.

*Street* means any street, avenue, boulevard, road, parkway, viaduct, drive or other way as defined in the Municipal Land Use Law, 40: 55D-7.

*Stealth Structure* means a new structure for the mounting of Facilities, such as a light pole with integrated antenna, with aesthetics found to be reasonably acceptable to the Township Engineer.

*Utility pole* a tall wooden pole that is used to support telephone wires, electrical wires, etc.

*Township* means the Township of Upper, County of Cape May, State of New Jersey.

*Township Engineer* means, where applicable, the Administrative Officer as defined in N.J.S.A. 40:55D-3 and the duly appointed Township Engineer of the Township.

*Zoning Officer* means, where applicable, the Administrative Officer as defined in N.J.S.A. 40:55D-3 and the duly appointed Zoning Officer of the Township.

*Zoning Permit* means the document signed by the Zoning Officer pursuant to N.J.S.A. 40:55D-18 that is required as a condition precedent to the installation of an individual Facility and which acknowledges that the Facility complies with the provisions of this Ordinance, or approved deviation therefrom.

**SECTION 3.** Chapter 13 Section 3.2 of the Revised General Ordinances of the Township of Upper, entitled “Facilities in the Public Rights-of-Way” is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.2 Facilities in the Public Rights-of-Way.**

*a. Purpose.* The purpose and intent of this Ordinance is for the Township to exercise its lawful authority to grant consent to the limited use of the public rights-of-way and to allow the attachment of Facilities only to existing wooden utility poles located therein pursuant to N.J.S.A. 48-19, subject to certain conditions as stated herein, in order to allow the prompt deployment of Facilities while also effectively managing the public rights-of-way and protecting the aesthetic and safety interests of the public.

*b. Facilities subject to this Ordinance.* This Ordinance applies to all facilities, as herein defined, within the public rights-of-way, except as otherwise provided in any existing franchise, license or similar agreement. The deployment of facilities on private property and public property outside of the public rights-of-way shall not be controlled by this Ordinance or the Master License Agreement, but by the Township Zoning Ordinance, Site Plan Ordinance and the New Jersey Municipal Land Use Law. In no event shall this Ordinance apply to the Township or facilities owned or operated by the Township.

*c. Master License Agreement Required.* Every Carrier seeking to install facilities in the public rights-of-way, excluding those holding a franchise, license or similar agreement with the Township, shall first enter into the Master License Agreement substantially complying with the requirements of this Chapter and apply for and obtain a Zoning Permit as provided herein. The execution of the Master License Agreement by the Carrier and the Township shall grant the Township’s consent to the Carrier to utilize the public rights-of-way pursuant to N.J.S.A. 48-19 and N.J.S.A. 27:16-6 and shall control the installation, maintenance, and removal of the facilities.

*d. Duration of Consent and Removal.* The non-exclusive consent granted to the Carrier shall expire in twenty five (25) years unless earlier terminated. Carrier may cancel this Agreement upon sixty (60) days prior written notice to the Township. Upon expiration of such consent, or at such earlier date that the Carrier ceases to operate its facilities for a period of ninety (90) consecutive days, the Carrier shall remove its facilities and restore the right-of-way at its sole cost and expense.

**SECTION 4.** Chapter 13, Section 3.3 of the Revised General Ordinances of the Township of Upper, entitled “Permit Required; Application and Fees” is established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.3 Permit Required; Application and Fees.**

*a. Permit required.* No Carrier, without first filing an application and obtaining a Zoning Permit from the Township Zoning Officer pursuant to N.J.S.A. 40:55D-18, shall construct any Facility within any public right-of-way.

- b. Application requirements.* The application shall contain, at a minimum, the following:
1. The Carrier's name and address and telephone number of the contact person for such Carrier;
  2. The applicant's name and address, if different than the Carrier, and telephone number of the contact person for such applicant;
  3. The names, addresses, telephone number of the professional consultants, if any, advising the applicant with respect to the application;
  4. A brief description of the proposed work;
  5. A plan with specifications of the Facility showing the work proposed, including sufficient information regarding the components of the Facility, including their types and quantities;
  6. Any request for a deviation from one or more provisions of this Ordinance, and
  7. Such additional information as may be reasonably required by the Township Zoning Officer.
- c. Application fees.* All applications for Zoning Permits pursuant to this Ordinance shall be accompanied by a fee of Two Hundred Dollars (\$200.00) for each independent facility as compensation to the Township for expenses incurred in processing the application as permitted by N.J.S.A. 54:30A-124.

**SECTION 5.** Chapter 13, Section 3.4 of the Revised General Ordinances of the Township of Upper, entitled "Conditions and Requirements" is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.4 Conditions and Requirements.**

- a. Installation of Facilities.* It shall be lawful for wireless communication carriers to install facilities in the public rights-of-way on existing or replacement wooden poles only, shall comply with all requirements of this Ordinance and the terms and condition of the Master License Agreement. All applicants shall obtain any and all approvals necessary from the owner and/or operator of the wooden utility poles to be used;
- b. Other approvals.* All applicants shall obtain any and all approvals necessary from any other governmental agency in addition to the owner and/or operator of the wooden utility poles to be used;
- c. Height.* No antenna or attachment to an existing wooden utility pole shall exceed the height of that pole by more than six feet (6');
- d. New poles.* No new poles shall be erected for the purpose of placing Facilities regulated herein. The setting of utility poles is regulated by the New Jersey Board of Public Utilities ("BPU), the Township authorizes only the utility company to set utility poles in the public rights-of-way in their normal course as they deem appropriate and/or necessary subject to BPU regulation.
- e. Pole-Mounted equipment.* equipment shall be pole mounted at a minimum of eight feet (8') from the ground and/or shall conform to all Flood Prevention Ordinance requirements of the Township including but not limited to base flood plus elevations required, whichever is higher in height and shall be limited to one (1) antenna and one (1) cabinet or other mounted device at each site per carrier. A single antenna shall not exceed a height of four feet (4') and two feet (2') in width or two (2) antennas each of a maximum dimension of a height of two feet (2') and width of one foot (1'). The cabinet or other mounted device may project beyond the side of the pole no

more than thirty inches (30”).

*f. Ground-mounted equipment.* No ground-mounted equipment is permitted on or around any pole;

*g. Color & Conduit.* All antennas, conduit and equipment shall be a color that blends with the wooden utility pole on which it is mounted. Any cables or wiring attached to the utility pole shall be covered with an appropriate conduit;

*h. Construction Permits.* Subsequent to the issuance of the Zoning Permit, the Permittee shall obtain any necessary permits required pursuant to the current Uniform Construction Code adopted in New Jersey prior to installation;

*i. Underground work.* All underground work shall follow standard road opening permit requirements; and

*j. Co-locate.* All carriers shall co-locate and cooperate with each other to minimize the impact and number of facilities on and in the public rights-of-way.

*k. Nearby Facilities.* No Facility shall be installed within three hundred feet (300’) of an existing Facility.

*l. Aesthetics.* The Zoning Officer shall determine if the aesthetics of the proposed Facility are reasonably acceptable in accordance with the visual standards of the area. If the Zoning Officer and the Carrier cannot agree then the Carrier may appeal to the Township Committee to determine if the proposed facilities are reasonably acceptable in accordance with the visual standards in the area.

*m. Replacement Poles.* No existing pole shall be replaced with a new pole that is more than thirty-five feet (35’) above grade level unless the existing pole being replaced was taller than thirty-five feet (35’) in which case the replacement pole shall be no taller than the existing pole.

**SECTION 6.** Chapter 13, Section 3.5 of the Revised General Ordinances of the Township of Upper, entitled “Action on Zoning Permit Applications” is established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.5 Action on Zoning Permit Applications.**

The Zoning Officer shall approve or reject the permit application within thirty (30) days, unless the Zoning Officer determines that the permit application is incomplete and insufficient for him or her to either approve or reject, in which case the Zoning Officer shall inform the applicant in writing what information is missing. If the application does not conform to the requirements of this Ordinance and no request for a deviation is made with the application, the Zoning Officer shall reject such application in writing, stating the reasons therein. If the Zoning Officer is satisfied that the application conforms to the requirements of this Ordinance, the Zoning Officer shall issue a permit therefor within 60 days.

**SECTION 7.** Chapter 13, Section 3.6 of the Revised General Ordinances of the Township of Upper, entitled “Effect of Permit” is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.6 Effect of Permit.**

A Zoning Permit from the Zoning Officer shall confirm compliance with this Ordinance and shall authorize the Permittee to apply for construction permits to undertake the work set forth in the plans filed with the permit application. The permit shall not grant authority to the Permittee to impinge upon the rights of others who may also have an interest in the public rights-of-way.

**SECTION 8.** Chapter 13, Section 3.7 of the Revised General Ordinances of the Township of Upper, entitled “Deviations” is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.7 Deviations.**

- a. Request for deviations. A Carrier proposing to deviate from one or more of the provisions of this Ordinance shall do so in writing to the Township Engineer as part of the permit application. The request shall identify each provision of this Ordinance from which a deviation is requested and the reasons why a deviation should be granted.
- b. Authority to grant deviations. The Township Engineer shall have no authority to grant a deviation from any conditions of Section 13-3.4 “Conditions and Requirements”. The Township Engineer shall decide for all other requests whether a deviation is authorized by this Ordinance and the Carrier requesting the deviation has demonstrated that:
1. One or more conditions not under the control of the Carrier (such as terrain features or an irregular public rights-of-way line or condition) create a special hardship that would make enforcement of the provision unreasonable, given the public purposes to be achieved by the provision; and
  2. All other designs, methods, materials, locations or facilities that would conform to the provision from which a deviation is requested are impracticable in relation to the requested approach.
- c. *Additional conditions for granting of a deviation.* As a condition for authorizing a deviation, the Township Engineer may require the Carrier requesting the deviation to meet reasonable standards and conditions that may or may not be expressly contained within this Ordinance but which carry out its purposes.
- d. *Material deviations.* In the event the actual size, type, material, or location of any facilities installed in the public rights-of-way deviate in a materially significant way from that which was shown on the plans submitted with the Zoning Permit application, the Permittee shall file new plans with the Township Engineer within 30 days of request or be subject to a stop work order, an order of removal, or a requirement to apply to the Governing Body for relief.
- e. *Appeal to Township Committee.* If the Township Engineer determines that the deviation requested (or existing) is a major deviation and/or that practical hardship has not been properly demonstrated, or is a deviation from Chapter 13-3.4, the Carrier may appeal this decision to the Township Committee.
- f. *Review fees.* Any reasonable professional fees incurred by the Township in its review of a request for a deviation or as a result of the installation of a facility in violation of this Ordinance, and for which no approval is granted, shall be paid to the Township within thirty (30) and prior to the issuance of the Zoning Permit as permitted by N.J.S.A. 54:30A-124. An escrow of twenty-five hundred dollars (\$2,500.00) shall be submitted with the request for deviation to the construction office to cover such fees and be replenished as deemed appropriate by the Zoning Officer.

**SECTION 9.** Chapter 13, Section 3.8 of the Revised General Ordinances of the Township of Upper, entitled “Insurance” is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.8 Insurance.**

- a. *Required coverage and limits.* Each Carrier constructing a Facility in the public rights-of-way shall secure and maintain commercial general liability insurance with limits

\$6,000,000.00 per occurrence for bodily injury (including death) and for damage or destruction to property insuring the Carrier as named insured and including the Township as an additional insured as their interest may appear under this agreement on the policies. Required limits may be provided through a combination of primary and excess/umbrella liability insurance.

*b. Copies required.* The Carrier shall provide copy of certificates of insurance reflecting the requirements of this section to the Township within ten (10) days following zoning approval and prior to obtaining a construction permit pursuant to this Ordinance.

*c. Self-insurance.* A Carrier may self-insure all or a portion of the insurance coverage and limit requirements required by subsection (a) of this section. A Carrier that self-insures is not required, to the extent of such self-insurance, to comply with the requirement for the naming of additional insured under subsection (a) or the requirements of subsection (b) of this section. A Carrier that elects to self-insure shall provide to the Township evidence sufficient to demonstrate its financial ability to self-insure the insurance coverage and limit required under subsection (a) of this section. Proof of such financial ability to self-insure shall be provided to the Township within ten (10) days following the effective date of the Master License Agreement and prior to obtaining a permit pursuant to this Ordinance.

*d. Effect of insurance and self-insurance on Carrier's liability.* The legal liability of the Carrier to the Township and any person for any of the matters that are the subject of the insurance policies or self-insurance required by this section shall not be limited by such insurance policies or self-insurance or by the recovery of any amounts thereunder, however neither the Township nor the carrier shall be liable to the other for consequential, incidental, exemplary or punitive damages on account of any activity pursuant to this Ordinance.

**SECTION 10.** Chapter 13, Section 3.9 of the Revised General Ordinances of the Township of Upper, entitled "Indemnification" is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.9 Indemnification.**

Prior to constructing a Facility in the public rights-of-way, and as a precondition to the issuance of a permit pursuant to this Ordinance, the Carrier shall execute the Master License Agreement, agreeing, among other things, to indemnify and hold harmless the Township against any claim of liability or loss from personal injury or property damage resulting from or arising out of the negligence or willful misconduct of the Carrier, its employees, contractors or agents, except to the extent such claims or damage may be due to or caused by the negligence or willful misconduct of the Township, or its employees, contractors or agents. The Township will provide the Carrier with prompt, written notice of any claim covered by this indemnification; provided that any failure of the Township to provide any such notice, or to provide it promptly, shall not relieve the Carrier from its indemnification obligation in respect of such claim, except to the extent the Carrier can establish actual prejudice and direct damages as a result thereof. The Township shall cooperate with the Carrier in connection with the Carrier's defense of such claim. The Carrier shall defend the Township, at the Township's request, against any claim with counsel of the Township's choosing that is reasonably satisfactory to the Carrier.

**SECTION 11.** Chapter 13, Section 3.10 of the Revised General Ordinances of the Township of Upper, entitled "Permit Suspension and Revocation" is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.10 Permit Suspension and Revocation.**

*a. Right to revoke permit.* The Zoning Officer may revoke or suspend a permit issued pursuant to this Ordinance for one or more of the following reasons:

1. Materially false or incomplete statements in the permit application,
2. Non-compliance with one or more provisions this Ordinance for which a deviation

has not been allowed,

3. The Permittee's Facilities within the public rights-of-way presents a direct or imminent threat to the public health, safety, or welfare,
4. Permittee's failure to construct the Facilities substantially in accordance with the permit and approved plans, or
5. Violation of the terms and conditions of the Master License Agreement.

*b. Notice of revocation or suspension.* The Zoning Officer shall send written notice of its intent to revoke or suspend a permit issued pursuant to this Ordinance stating the reason or reasons for the revocation or suspension and the alternatives available to Permittee under this section.

*c. Permittee alternatives upon receipt of notice of revocation or suspension.* Upon receipt of a written notice of revocation or suspension from the Zoning Officer, the Permittee shall have the following options:

1. Immediately provide the Township with evidence that no cause exists for the revocation or suspension;
2. Immediately correct, to the satisfaction of the Zoning Officer, the deficiencies stated in the written notice, providing written proof of such correction to the Zoning Officer within ten (10) business days after the receipt of the written notice of revocation, or
3. Within ten (10) days remove the facilities located within the public rights-of-way and restore the public rights-of-way to the satisfaction of the Zoning Officer providing written proof of such removal to the Zoning Officer within ten (10) business days after receipt of the written notice of revocation. The Zoning Officer may, in his or her discretion, extend the time periods provided in this subsection. To be effective extensions must be in writing.

**SECTION 12.** Chapter 13, Section 3.11 of the Revised General Ordinances of the Township of Upper, entitled "Change of Ownership, Owner's Identity, or Legal Status" is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.11 Change of Ownership, Owner's Identity, or Legal Status.**

*Notification of change.* A Carrier shall notify the Township no less than thirty (30) days following the transfer of ownership of any facility in the public rights-of-way or change in identity of the Carrier. The rights and obligations given to the Carrier pursuant to the Master License and Zoning Permit shall be binding on and benefit the new owner of the Carrier or the facility, its successors and assigns, who shall have all the obligations and privileges enjoyed by the former owner under the Master License Agreement, Zoning Permit, and all applicable laws, ordinances, rules and regulations, including this Ordinance, with respect to the work and facilities in the public rights-of-way.

**SECTION 13.** Chapter 13, Section 3.12 of the Revised General Ordinances of the Township of Upper, entitled "Traffic Control" is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.12 Traffic Control.**

*a. Warning signs, protective devices, and flaggers.* The Carrier is responsible for providing and installing warning signs, protective devices and flaggers, when necessary for protection of the public and the Carrier's workers when performing work on the public rights-of-way.

*b. Interference with traffic.* All work shall be phased so that there is minimum interference with pedestrian and vehicular traffic.

c. *Compliance.* The Carrier shall take immediate action to correct any deficiencies in traffic protection requirements that are brought to the Carrier's attention by the Zoning Officer, Township Engineer, Local Fire District and the State Police.

**SECTION 14.** Chapter 13, Section 3.13 of the Revised General Ordinances of the Township of Upper, entitled "Removal, Relocation, or Modification of Facilities" is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.13 Removal, Relocation, or Modification of Facilities.**

a. *Notice.* Within 30 days following written notice from the Township, any Carrier with facilities in the public rights-of-way shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any facilities whenever the Township determines that (a) such removal, relocation, change or alteration, is reasonably necessary for the construction, repair, maintenance, or installation of any Township improvement in or upon the public rights-of-way; or (b) because the equipment is interfering with or adversely affecting proper operation of the light or other poles; or (c) the widening of the public rights-of-way. In such instance, the Township shall cooperate with Carrier to find a replacement location for the facility that will provide similar radio frequency coverage to the facility removed or relocated.

b. *Removal of unauthorized facilities.* Within thirty (30) days following written notice from the Zoning Officer to any Carrier that owns, controls, or maintains any unauthorized facility or related appurtenances within any public rights-of-way shall, at its own expense, remove all or any part of such facilities or appurtenances. A facility is unauthorized and subject to removal, but not limited to, in the following circumstances:

1. Upon expiration or termination of the Permittee's license, unless otherwise permitted by applicable law,
2. If the Facility was constructed without the prior grant of a Zoning Permit,
3. If the Facility was constructed without prior issuance of a required construction permit,
4. If the Facility was constructed at a location not permitted by the Permittee's permit, or
5. Upon abandonment of the Facility. Abandonment will be presumed where a Facility has not been used for the purpose for which it was installed for a period of ninety (90) consecutive days, or more, and where there have been no efforts to repair or renew the use during the ninety (90) day period. The Carrier owning, controlling or maintaining the facility shall have the burden of establishing to the Zoning Officer that the facility is still being used within thirty (30) days of the notice. All notices described herein shall be in writing and sent by recognized national overnight courier (e.g., U.S. Postal, Federal Express or UPS) for which proof of delivery is supplied. Failure to respond to the Zoning Officer's request for information regarding the abandonment of the facility shall constitute a presumption of abandonment. Upon the Zoning Officer's determination and final written notification to the Carrier of such abandonment the Carrier shall have sixty (60) days within which to:
  - (a) Reactivate the use of the facility or transfer the facility to another entity which makes actual use of the facility promptly, or
  - (b) Dismantle and remove the facility and notify the Zoning Officer in writing of the completion of such removal.

If the entity believes that the determination of abandonment by the Zoning Officer is incorrect it may file a written appeal with the Zoning Board of Adjustment pursuant to N.J.S.A. 40:55D-70a. If the entity fails to prevail on appeal, or fails to reactivate, or transfer to another active user or remove the service facility the Township shall have the right to have the facilities removed at the Carrier's sole expense. The Township shall be entitled to reimbursement for all costs and expenses associated with the removal of any facility thereafter.

**SECTION 15.** Chapter 13, Section 3.14 of the Revised General Ordinances of the Township of Upper, entitled “Cleanup and Restoration” is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.14 Cleanup and Restoration.**

Upon completion of all construction or maintenance of Facilities, the Carrier shall remove all debris and restore the right-of-way to a clean and safe condition in a timely manner and to the satisfaction of the Zoning Officer.

**SECTION 16.** Chapter 13, Section 3.15 of the Revised General Ordinances of the Township of Upper, entitled “Maintenance and Emergency Maintenance” is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.15 Maintenance and Emergency Maintenance.**

*a. General.* Facilities within public rights-of-way shall be maintained by or for the Carrier at the Carrier's sole expense. Carrier shall not damage the Public Right-of-Way and shall keep the Public Right-of-Way free of all debris. If any portion of the Public Right-of-Way suffers damage by reason of access by Carrier, then in that event, Carrier, at its sole cost and expense, shall immediately repair all such damage or replace the damaged portion of the Public Right-of-Way and restore the damaged portion of the property to its condition prior to the occurrence of such damage.

*b. Emergency maintenance procedures.* The noncompliance with normal procedures for securing a required permit shall be excused when a Carrier reasonably determines that an emergency exists.

1. If an emergency creates a hazard on the traveled portion of the public rights-of-way, the Carrier shall take immediate steps to provide all necessary protection for traffic on the roadway including the use of signs, lights, barricades or flaggers.

2. In an emergency, the Carrier shall, as soon as practical, notify the Zoning Officer or his or her duly authorized agent and the State Police of the emergency, informing him or her as to what steps have been taken for protection of the traveling public and what will be required to make the necessary repairs. On nights and weekends, the Carrier shall notify the State Police of an emergency if the Zoning Officer is unavailable. If the nature of the emergency is such as to interfere with the free movement of traffic, the State Police shall be notified immediately. To the extent that the Township has actual knowledge of the displacement or damage to any facility, it shall inform Carrier upon learning of the same.

**SECTION 17.** Chapter 13, Section 3.16 of the Revised General Ordinances of the Township of Upper, entitled “Enforcement” is hereby established to add the following Section in its entirety as follows:

**ADDED SECTION:**

**13-3.16 Enforcement.**

Nothing in this Ordinance shall be construed as limiting any additional or further remedies that the Township may have for enforcement of this Ordinance or the right of a Carrier to appeal any decision to the state courts of New Jersey or the United States District Court for the District of New Jersey.

**SECTION 18. SEVERABILITY.** If for any reason any section of this Ordinance shall be declared illegal by any Court of competent jurisdiction, the remaining section of the Ordinance shall remain in full force and effect, notwithstanding.

**SECTION 19. REPEALER.** Any Ordinance or provision thereof inconsistent with this Ordinance is hereby repealed to the extent of such inconsistency.

**SECTION 20. PUBLICATION.** This Ordinance shall take effect immediately upon the adoption and publication in accordance with the law.

ATTEST:

  
BARBARA L. YOUNG, Township Clerk

  
EDWARD BARR, Deputy Mayor

NOTICE IS HEREBY GIVEN THAT THE FOREGOING ORDINANCE WAS INTRODUCED FOR FIRST READING AT A MEETING OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF UPPER HELD ON THE 9<sup>th</sup> DAY OF JULY, 2018 AND WILL BE TAKEN UP FOR CONSIDERATION AS TO FINAL ADOPTION AT A PUBLIC HEARING OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF UPPER TO BE HELD ON THE 13<sup>th</sup> DAY OF AUGUST, 2018 AT 7:30 P.M. AT THE TOWNSHIP HALL, TUCKAHOE, NEW JERSEY.

BY ORDER OF THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF UPPER.

BARBARA L. YOUNG, TOWNSHIP CLERK  
TOWNSHIP OF UPPER

Legislative History:

Introduced: July 9, 2018

Publication: July 13, 2018

Newspaper(s): Press of Atlantic Township

Second Reading & Public Hearing: August 13, 2018

Final Adoption: August 13, 2018

Final Publication Date: August 17, 2018

I certify that the foregoing Ordinance was finally adopted by the Township Committee of the Township of Upper on August 13, 2018 and notice of adoption was thereafter published pursuant to law in The Press of Atlantic Township on August 17, 2018.

  
BARBARA L. YOUNG, Township Clerk