

ORDINANCE NO. 2018-7

AMENDING AND ENACTING CERTAIN SECTIONS OF PART 9
STREETS AND PUBLIC SERVICES CODE OF THE CODIFIED
ORDINANCES; AND DECLARING AN EMERGENCY

WHEREAS, the General Assembly recently passed Sub.H.B. 478, effective August 1, 2018, amending state statutes regulating the placement and design of small cell and micro wireless facilities in municipal rights-of-way and permitting some local regulation of such facilities' placement and design; and

WHEREAS, the City desires to regulate the placement and design of such facilities to the fullest extent permitted by the recently passed Sub.H.B. 478; and

WHEREAS, the City of Blue Ash, Ohio, has determined a need to update certain portions of the Codified Ordinances for the City of Blue Ash to codify such regulations and to promulgate design guidelines for such facilities before the effective date of Sub.H.B. 478; and

WHEREAS, the proposed amendments affecting the Streets and Public Services Code (Part 9) were reviewed by representatives from the City Solicitor's office and the City Administration; and

WHEREAS, it is also necessary to amend Part 9 of the Code where noted so that the Codified Ordinances are consistent with the newly-enacted changes passed by the General Assembly in Sub.H.B. 478.

Be it ordained by the Council of the City of Blue Ash, Ohio,

SECTION I.

Certain sections of Part 9 Public Services Code are hereby amended (or enacted) as reflected in the attachment hereto. Additionally, the City Manager is also authorized to promulgate design, height, spacing, location, and co-location guidelines as permitted by newly-enacted R.C. 4939.0314.

SECTION II.

It is found and determined that all formal actions of this Council concerning and relating to the adoption of this ordinance were adopted in an open meeting of City Council, and that all deliberations of this Council and of any of its committees that resulted in such formal action were in meetings open to the public in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

SECTION III.

This ordinance is hereby declared to be an emergency measure for the immediate preservation of the public, peace, health, safety and welfare; the reason for the emergency being the immediate need to enact changes to the Codified Ordinances to permit the City to regulate the design and placement of small cell and micro wireless facilities in municipal rights-of-way to the fullest extent permitted by Sub.H.B. 478 before its effective date and to ensure that such Codified Ordinances are consistent with the recent changes enacted under Sub.H.B. 478. Therefore, this ordinance shall take effect and be in force from and after its passage.

PASSED this 12th day of July, 2018.

Thomas C. Adamec, Mayor

Jamie K. Eifert, Clerk of Council

APPROVED AS TO FORM:

Bryan E. Pacheco, Solicitor

CHAPTER 949
Right of Way

949.01	Purpose and scope of chapter.	949.10	Indemnification.
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949.07	Fees.	949.16	Foreclosure and receivership.
949.08	Notice of right of way work: joint planning.	949.17	Nonenforcement and waivers by City.
949.09	Use of permittee facilities.	949.18	Controlling law.
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		949.99	Penalties.

CROSS REFERENCES

Public right of way - see Ohio R.C. Title 49 Section 4939
 Streets and Public Services Code - see S. & P.S. Ch. 905
 Cable Television Regulations - see S. & P.S. Ch. 955
 Planning and Zoning Code - see Part Eleven Planning and Zoning
 Standards for Telecommunications Antennas and Towers - see
 P. & Z. Ch. 1149
 Eminent Domain and Blight Removal - see PROP. STAN. Ch. 1705
 Housing and Property Management Standards - see PROP.
 STAN. Ch. 1711
 Property Performance Standards - see PROP. STAN. Ch. 1717

949.01 PURPOSE AND SCOPE OF CHAPTER.

(a) The purpose of this Chapter is to provide requirements for the use or occupation of any and all Rights of Way and Public Property in the City, the issuance of Permits to Persons for such use or occupancy and to set forth the policies of the City related thereto.

(b) This Chapter does not take the place of any franchise, license, or permit which may be additionally required by law. Each Permittee shall obtain any and all such additional franchises, licenses, or permits necessary to the operations and conduct of its business.

(c) No Person shall use, occupy, own or operate facilities in, under, or over any Right of Way within the City unless such Person first obtains a Franchise and/or Permit conforming to the requirements set forth therein and in this Chapter.

- (d) The policy of the City with regard to Rights of Way is hereby declared to be:
- (1) To promote public safety and protect public property;
 - (2) To promote the efficient utilization of Rights of Way for the public health, safety, and welfare.
 - (3) To assure that rights of way are environmentally and aesthetically protected;
 - (4) To promote economic development in the City;
 - (5) To promote the availability of a wide range of utility, communication and other services, including the rapid deployment of new technologies and innovative services, to the City's citizens and taxpayers at reasonable rates;
 - (6) To promote cooperation among the City and Franchisees and Permittees in the occupation of Rights of Way, and work therein, in order to minimize public inconvenience during work in the Rights of Way and avoid uneconomic, unneeded, and unsightly duplication of facilities;
 - (7) To ensure adequate public compensation for the administration of the regulation of the private use of the Rights of Way; and
 - (8) To promote and require reasonable accommodation of all uses of Rights of Way and to establish the following priority of use of Rights of Way, when all requested usage of Rights of Way by Permittees cannot be accommodated:
 - A. The City;
 - B. Another governmental entity with City's concurrence or other uses required by law;
 - C. Utility Companies;
 - D. Telecommunications, General Permittees and Franchisees;
 - E. Special Permittees; and (Ord. 2001-23. Passed 2-8-01.)
 - F. Residential Permittees; provided, however, that the Public Works Director may reasonably require Right of Way Permittees and Franchisees to cooperate to accommodate use by other Permittees and Franchisees and provided further that the Public Works Director may alter this priority when the Public Works Director reasonably determines a deviation here from to be in the public interest.
(Ord. 2001-23. Passed 2-8-01; Ord. 2008-35. Passed 6-12-08.)

(e) Nothing in this Chapter should be construed to apply the provisions of this Chapter to facilities owned or operated by the City or any of its operations.

(f) Unless otherwise specifically stated in a Permit, all Permits or Franchises granted hereunder shall be nonexclusive.
(Ord. 2001-23. Passed 2-8-01.)

949.02 DEFINITIONS.

For purposes of this Chapter, the following terms, phrases, words, and their derivations shall have the meanings given herein. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. All capitalized terms used in the definition of any other term shall have their meaning as otherwise defined in this Section 949.02. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

- (a) "Applicant" means any Person applying for a permit hereunder.
- (b) "Approved" means approval by the City pursuant to this Chapter or any Regulations adopted hereunder.
- (c) "Best Efforts" means the best reasonable efforts under the circumstances, taking into consideration, among other appropriate matters, safety, expedition, available technology and human resources and cost.
- (d) "Cable Operator" has the same meaning as in section 2 of the "Cable Communications Policy Act of 1984," - 98 Stat. 2779, 47 U.S.C.A. 522, as amended.
- (e) "Cable Television Service" (as defined in Chapter 955 of the Codified Ordinances).
- (f) "Chapter" or "this Chapter" means this Chapter (949) of the Codified Ordinances of the City, as amended from time to time and any Regulations adopted hereunder.
- (g) "City" means the City of Blue Ash, Ohio, or as appropriate in the case of specific provisions of the Chapter, any board, bureau, authority, agency, commission, department of, or any other entity of or acting on behalf of, the City of Blue Ash, or any officer, official, employee, representative or agent thereof, the designee of any of the foregoing, or any successor thereto.
- (h) "Contractor" means any individual or company performing or subcontracting to perform the construction or installation of the facilities needed for the rendering of the services being provided by the permittee or franchisee.
- (i) "Council" means the Council of the City of Blue Ash, Ohio.
(Ord. 2001-23. Passed 2-8-01.)
- (j) "Director" means the Public Works Director or in his/her absence, the Assistant City Manager of the City of Blue Ash, Ohio.
(Ord. 2001-23. Passed 2-8-01; Ord. 2008-35. Passed 6-12-08.)
- (k) "Emergency" means any situation, occurrence, or happenstance that requires and demands immediate attention for the correction, maintenance, or reinstallation of the service provided by the permittee or franchisee to correct or prevent any imminent danger to the safety, health, and welfare of the public.
- (l) "Force Majeure" means a strike, acts of God, acts of public enemies, orders of any kind of a government of the United States of America or of the State of Ohio or any of their departments, agencies, or political subdivisions, riots, epidemics, landslides, lightning, earthquakes, fires, tornadoes, storms, floods, civil disturbances, explosions, partial or entire failure of utilities or any other cause or event not reasonably within the control of the disabled party, but only to the extent the disabled party notifies the other party as soon as practicable regarding such Force Majeure and then for only so long as and to the extent that, the Force Majeure prevents compliance or causes noncompliance with the provisions hereof.
- (m) "Franchise" means the nonexclusive right pursuant to the Constitution and laws of Ohio and/or the United States, granted by the City pursuant to this Chapter 955 to operate or provide cable television or services to consumers within the City.
- (n) "Micro wireless facility" means a small cell facility that is not more than twenty-four inches in length, fifteen inches in width, and twelve inches in height and that does not have an exterior antenna more than eleven inches in length suspended on cable strung between wireless support structures.
(Ord. 2018-7. Passed 7-12-18.)

- (~~no~~) "Permit" means the nonexclusive grant of authority to use or occupy all or a portion of City's Rights of Way granted pursuant to this Chapter.
- (~~op~~) "Permittee" means any person issued a Permit pursuant to this Chapter to use or occupy all or a portion of the Rights of Way in accordance with the provisions of this Chapter and said Permit.
- (~~pq~~) "Person" means any natural person or any association, firm, partnership, joint venture, corporation, or other legally recognized entity, whether for-profit or not-for-profit.
- (~~qr~~) "Public Property" means any real property, other than Right of Way, except for the last sentence of Section 949.02(~~uy~~) of this Chapter owned by the City.
- (~~rs~~) "Public Way" means any public street, road, highway, public easement, or public waterway, and includes the entire width of any right of way associated with any public way.
- (~~st~~) "Regulation" means any rule adopted by and pursuant to the authority of this Chapter.
- (~~tu~~) "Residential Related Purposes" shall mean residential use of Right of Way for mailboxes, decorative purposes, curb cuts, driveways, irrigation systems and other uses permitted in the Right of Way by ordinance.
- (~~uy~~) "Right of Way" means the surface of and the space above and below any public street, public road, public highway, public freeway, public lane, public path, public way, public alley, public court, public sidewalk, public boulevard, public parkway, public drive or any public easement or right of way now or hereafter held by the City which shall, within its proper use, entitle a Permittee or Franchisee, in accordance with the terms hereof and of any Permit, to the use thereof for the purpose of installing or operating any poles, wires, cables, transformers, conductors, ducts, lines, mains, conduits, vaults, manholes, amplifiers, appliances, attachments or other property or facilities as may be ordinarily necessary and pertinent to the provision of utility, cable television, communications, or other services as set forth in any Franchise or any Permit. Right of Way shall also include Public Property, but only to the extent the use or occupation thereof is specifically granted in a Permit or by Regulation.
- (w) "Small cell facility" means a wireless facility that meets both of the following requirements:
- (1) Each antenna is located inside an enclosure of not more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all of its exposed elements could fit within an enclosure of not more than six cubic feet in volume.
 - (2) All other wireless equipment associated with the facility is cumulatively not more than twenty-eight cubic feet in volume. The calculation of equipment volume shall not include electric meters, concealment elements, telecommunications demarcation boxes, grounding equipment, power transfer switches, cut-off switches, and vertical cable runs for the connection of power and other services.
- (Ord. 2018-7. Passed 7-12-18.)
- (~~vx~~) "Telecommunication" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.
- (~~wy~~) "Telecommunication Service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.
- (~~xz~~) "Utility" means water, electric, storm sewer, sanitary sewer services, and the companies or agencies providing said service.

(yaa) "Utility Service Provider" means a natural gas company, local exchange telephone company, interexchange telecommunications company, electric company, or any other person that occupies a public way to deliver natural gas, electric, or telecommunications services.
(Ord. 2001-23. Passed 2-8-01.)

(bb) "Wireless support structure" means a pole, such as a monopole, either guyed or self-supporting, street light pole, traffic signal pole, a fifteen-foot or taller sign pole, or utility pole capable of supporting small cell facilities. "Wireless support structure" excludes all of the following:

(1) A utility pole or other facility owned or operated by a municipal electric utility;

(2) A utility pole or other facility used to supply traction power to public transit systems, including railways, trams, streetcars, and trolleybuses.

(Ord. 2018-7. Passed 7-12-18.)

949.03 TYPES OF PERMITS OR FRANCHISES: GRANT OF AUTHORITY.

(a) The following type of Permits and Franchises are available:

- (1) Cable Television Franchise - granted to providers of Cable Television Service;
- (2) Telecommunication and Utility Permit - Permit granted to Persons who desire and are granted authority to utilize Rights of Way to provide a public utility and/or telecommunications service, other than Cable Television Service.
- (3) Special Permit - Permit granted to Persons for a specific, limited use of the Rights of Way or a specific portion thereof; and
- (4) Residential Permit - Permit granted to an adjacent or proximate residential landowner to occupy or use a portion of the Right of Way for Residential Related Purposes.
- (5) Micro Wireless Facility and Small Cell Facility Permit – granted to operators of Micro Wireless and Small Cell Facilities (Ord. 2018-7. Passed 7-12-18.)

(b) All Permits shall specify the use or uses for which such Permits or Franchises are granted and contain such other nondiscriminatory terms and conditions as are appropriate and as are set forth in this Chapter or conditions negotiated and agreed to by the City and the Permittee to provide for the public safety or welfare.

(c) Permits and the rights of Permittees thereunder are not transferable without the express written approval of the City.
(Ord. 2001-23. Passed 2-8-01.)

949.04 PROCEDURES FOR PERMITS: TERMS.

(a) Applicants for Cable Television Franchises shall be granted a Cable Television Franchise pursuant to Chapter 955 of the Codified Ordinances; provided, however, that a Cable Franchise shall only entitle the Franchisee to utilize the Rights of Way, in accordance with Chapter 955, for purposes directly related to the provision of the Cable Television Service. Any other Right of Way use by such Franchisee shall require a separate Permit.

(b) Applicants for Telecommunication and Utility Permits, or renewals thereof, shall file an application therefor, in such form as the Director may require, along with an application fee. The Director shall determine if the application is in order in accordance with the criteria set forth in Section 949.05 and shall make a final determination within thirty (30) days after the date the permit is applied for as to whether or not such Permit should be granted and, if so, upon what terms and conditions.

(c) Applicants for Special Permits, or renewals thereof, shall file an application therefor, in such form as the Director requires along with an application fee. The Director shall determine if the application is in order and if so, and if the Director also finds, in accordance with the criteria set forth in Section 949.05, that the application should be granted, the Director shall grant or renew such a Permit within thirty (30) days after the date the permit is applied for. The terms of such Permits shall be determined by the Director but shall in no event exceed ten years.

(d) Applicants for Residential Permits shall file an application therefore, in such form as the Regulations require, along with an application fee. The Director, or the Director's designate, shall determine if the application is in order and, if so, shall grant the application within thirty (30) days after the date the permit is applied for, so long as the Director also finds, in accordance with the criteria set forth in Section 949.05(c), that the application should be granted. Residential Permits shall be valid until canceled by the Director upon sixty (60) days written notice to the Permittee; provided, however, that upon a finding by the Director that an emergency exists the Director may cancel any such Permit upon such lesser notice as is necessary under the circumstances.

(e) Applicants for Micro Wireless Facility Permits or Small Cell Facility Permits, or renewals thereof, shall file an application therefor, in such form as the Director may require, along with an application fee. The Director shall determine if the application is in order in accordance with established administrative policy and shall make a final determination within ninety (90) days after the date the permit is applied for as to whether or not such Permit should be granted and, if so, upon what terms and conditions. The City Manager is authorized to promulgate regulations as allowed per Ohio Revised Code 4939.0314 including, but not limited to: design, height, spacing, location, and co-location.

(1) The City Manager shall promulgate detailed Design Guidelines with objective, technically feasible criteria applied in a non-discriminatory manner that reasonably match the aesthetics and character of the immediate area.

(2) The City Manager shall have authority to update or supplement the Design Guidelines to address relevant changes in law, technology, or administrative processes.

(Ord. 2018-7. Passed 7-12-18.)

(ef) Any Applicant may appeal the failure of the Director to grant a Permit or to recommend it to be granted upon terms and conditions acceptable to the Applicant. In order to perfect such an appeal, the Applicant shall file, within ten (10) days of the Director's determination or recommendation or ninety (90) days of the filing of the application if the Director has taken no action, an appeal to Council. Council shall then review the matter and render a final determination after affording the Applicant an opportunity to be heard either in person or writing. Except to the extent otherwise appealable by law, City Council's decision shall be final.

(Ord. 2001-23. Passed 2-8-01.)