

PROPOSED ORDINANCE NO. 35-2017

AN ORDINANCE TO REGULATE COUNTY RIGHTS-OF-WAY IN RELATION TO UTILITIES

WHEREAS, public rights-of-way subject to the jurisdiction and control of the County of Nassau: (1) are critical to the travel of Permittees and the transport of goods and other tangibles in the business and social life of the community and all citizens; (2) are a unique and physically limited resource and proper management by the County of Nassau is necessary to maximize efficiency, minimize the cost to the taxpayers of the foregoing uses, and to minimize the inconvenience to and negative effects upon the public from the installation, maintenance and removal of facilities and equipment in the public rights-of-way; and (3) are intended for public uses and must be managed and controlled consistently with that intent; and

WHEREAS, it is the intent of this Legislature to exercise its authority to adopt rules and regulations with respect to the management of the public rights-of-way to the fullest extent allowed by Federal and State law; now, therefore

BE IT ORDAINED by the County Legislature of the County of Nassau, as follows:

Section 1. Definitions

For the purposes of this Ordinance, the following terms shall have the following meanings:

- a. "Abandonment" shall mean the permanent cessation of all uses of plant and equipment located in a County Right-of-Way.
- b. "Commissioner" shall mean the Commissioner of the Department of Public Works.
- c. "County" shall mean County of Nassau.

- d. "County Rights-of-Way" shall mean a public right-of-way, public utility easement, highway, street, bridge, tunnel, alley or sidewalk for which the County of Nassau is the authority that has jurisdiction and control and may lawfully grant access pursuant to applicable law, and includes the surface, the air space over the surface and the area below the surface. "County Rights-of Way" shall not include private property.
- e. "Damaged Pole" shall mean any utility pole that may be structurally compromised and poses a potential threat to public safety.
- f. "Department of Public Works" shall mean the Nassau County Department of Public Works.
- g. "Double Pole" shall mean any utility pole that is located directly next to or in close proximity to another utility pole.
- h. "Emergency" shall mean a condition that affects the public's health, safety or welfare, and includes an unplanned out-of-service condition of pre-existing plant or equipment. Permittee shall, within seventy-two (72) hours of the identification of an emergency, provide written notice to the Department of Public Works of the emergency response and the placement or maintenance of plant or equipment in a County Right-of-Way as a result of the emergency.
- i. "Place or maintain" or "placement or maintenance" or "placing or maintaining" shall mean to exercise physical control over, erect, construct, install, maintain, place, repair, extend, expand, remove, occupy, locate or relocate.
- j. "Plant" or "Equipment" shall mean any permanent or temporary plant, equipment, utility pole or other property placed or maintained or to be placed or maintained in the

County Rights-of-Way and used for the transmission or to facilitate the transmission of electricity, or voice, data, audio, video or any other information.

- k. "Permittee" or "Entity" shall mean any person, association of persons, corporations, municipal corporations, or other legal entity that has placed plant or equipment in any County Right-of Way.
- l. "Utility Pole" shall mean a column or post used to support service lines for a Permittee.

§2. Placement or Maintenance of Plant or Equipment in County Rights-of-Way

- a. A Permittee shall not commence to place plant or equipment in a County Right-of-Way until all applicable permits have been issued by the Nassau County Department of Public Works or other appropriate authority, except in the case of an Emergency.
- b. No permit shall be required to remedy Emergency conditions; however, Permittees shall be responsible for the restoration of County Rights-of-Way to the extent required by this Ordinance.
- c. With respect to permit applications to place new or replace existing plant or equipment in County Rights-of-Way, the Permittee shall provide the following:
 - 1. The location and specifications of the proposed plant or equipment, including a description of the work to be performed;
 - 2. A description of the manner in which the plant or equipment will be installed detailing anticipated construction methods and techniques;
 - 3. A maintenance of traffic plan for any disruption of the County Rights-of-Way;
 - 4. A description of the plan to restore the County Right-of-Way including construction details in conformance to Nassau County standards and specifications;

5. The timetable for construction of the project or each phase thereof, including restoration of the County Right-of-Way;
 6. Information as to anticipated disruptions in services provided by the Permittee as a result of the proposed work;
 7. Such additional information as the Department of Public Works finds reasonably necessary with respect to the placement and maintenance of the plant or equipment that is the subject of the permit application to review such permit application.
- d. To the extent not otherwise prohibited by State or Federal Law, the Department of Public Works shall have the power to impose terms and conditions with respect to the issuance of any permit issued pursuant to this Ordinance.
 - e. To the extent not otherwise prohibited by State or Federal law, the Department of Public Works shall have the power to prohibit or limit the placement of new or additional plant or equipment within a particular area of County Rights-of-Way.
 - f. All plant and equipment shall be placed or maintained so as not to unreasonably interfere with County and other municipal public safety systems, the use of the County Rights-of-Way by the public and with the rights and convenience of property owners who adjoin any of the County Rights-of-Way.
 - g. After completion of any placement or maintenance of plant or equipment in County Rights-of-Way, a Permittee shall, at its own expense, restore the County Right-of-Way to its original condition before such work, in conformance to Nassau County standards and specifications. If the Permittee fails to make such restoration within thirty (30) days, or such longer period as may be agreed to by the Commissioner, following the

completion of such placement or maintenance, the Department of Public Works may perform the restoration, and Permittee shall be liable for all costs and expenses, including administrative expenses incurred by Nassau County, in connection with such restoration. Such costs and expenses may be recovered by the County from any Construction Bond or Security Fund required by the Department of Public Works. For twelve (12) months following the original completion of the work, the Permittee shall guarantee its restoration work and shall correct any restoration work that does not satisfy the requirements of the Ordinance at its own expense. Failure to make such restoration within thirty (30) days, or such longer period as may be granted by the Commissioner shall subject the Permittee to the penalties described herein.

- h. The Department of Public Works may promulgate reasonable rules and regulations concerning the placement or maintenance of plant and equipment in County Rights-of-Way consistent with this Ordinance and other applicable law.
- i. A permit from the Department of Public Works constitutes authorization to undertake only certain activities in County Rights-of-Way in accordance with this Ordinance, and does not create a property right or grant authority to impinge upon the rights of others who may have an interest in the County Right-of-Way, nor does it relieve the Permittee of its duty to obtain all other necessary permits, licenses and authority and to comply with all other applicable laws, rules and regulations.

§3. Suspension of Permits

- a. The Department of Public Works may suspend a permit without a fee refund for work in the County Rights-of-Way for one or more of the following reasons:

1. Violation of permit conditions, this Ordinance, the rules and regulations promulgated by the Commissioner pursuant to this Ordinance, or any other applicable Nassau County ordinances, laws, rules or regulations governing the placement or maintenance of Plant or Equipment in the County Rights-of-Way;
2. Misrepresentation or fraud by Permittee in a permit application to Nassau County;
or
3. Failure to properly register with the Nassau County Department of Public Works.

§4. Indemnification

- a. A Permittee shall, at its sole cost and expense, indemnify, hold harmless, and defend the County, its officials, boards, members, agents, and employees, against any and all claims, suits, causes of action, proceedings, judgments for damages or equitable relief, and costs and expenses incurred by the County arising out of the placement or maintenance of plant or equipment in County Rights-of-Way, regardless of whether the act or omission complained of is authorized, allowed or prohibited by this Ordinance, provided, however, that a Permittee's obligation hereunder shall not extend to any claims caused by the negligence, gross negligence or willful acts of the County. This provision includes, but is not limited to, the County's reasonable attorneys' fees incurred in defending against any such claim, suit or proceeding. The County shall notify the Permittee, in writing, within a reasonable time of the County receiving notice, of any issue it determines may require indemnification. Nothing in this Section shall prohibit the County from participating in the defense of any litigation by its own counsel and at its own cost if in the County's reasonable belief there exists or may exist a conflict, potential conflict or appearance of conflict.

- b. The indemnification provisions of this Ordinance shall survive and be in effect after the termination or cancellation of a Registration or permit.

§5. Construction Bond

- a. Prior to issuing a permit where the work under the permit will require restoration of County Right-of-Way, the Department of Public Works may, at its sole discretion, require a construction bond, other surety and/or cash escrow, as a condition to granting such permit, to secure the restoration of the County Right-of-Way.
- b. The rights reserved by the County with respect to any construction bond or cash escrow established pursuant to this Ordinance are in addition to all other rights and remedies the County may have under this Ordinance, or at law or equity.
- c. The rights reserved to the County under this Ordinance are in addition to all other rights of the County, whether reserved in this Ordinance, or authorized by other law, and no action, proceeding or exercise of a right with respect to the construction bond will affect any other right the County may have.

§6. Security Fund

- a. As a condition to the granting of any Permit, Permittees may be required to file with the County an annual bond, cash deposit or irrevocable letter of credit in a sum to be determined by the Department of Public Works having as surety a company qualified to do business in the State of New York, and acceptable to the Commissioner of the Department of Public Works, which shall be referred to as the “Security Fund”. The Security Fund shall be maintained until the transfer, sale, assignment, or removal of all plant or equipment located in County Rights-of-Way.

- b. The Security Fund shall be furnished annually or as frequently as necessary to provide a continuing guarantee of the Permittee's full and faithful performance at all times. In the event a Permittee fails to perform its duties and obligations imposed upon the Permittee by the provisions of this Ordinance, there shall be recoverable, jointly and severally from the principal and surety of the Security Fund, any damage or loss suffered by the County as a result, including the full amount of any compensation, indemnification or cost of removal, relocation or abandonment of the plant or equipment in County Rights-of-Way, plus a reasonable allowance for attorneys' fees and administrative expenses. Notwithstanding the foregoing, the Department of Public Works may, in its discretion, not require a Security Fund or may accept a corporate guarantee of the Permittee or its parent company.

§7. Removal of Plant or Equipment from a County Right of Way

To the extent not otherwise prohibited by State or Federal law, the Department of Public Works shall have the power to require the removal of plant or equipment from a County Right-of-Way. Failure to remove any plant and equipment if required by the Department of Public Works within a time period specified by the Department of Public Works may result in penalties provided for in §14 of this Ordinance.

§8. Double Poles and Damaged Poles

- a. Double Poles

1. When the Department of Public Works issues a permit for the installation of a utility pole that is directly next to or in close proximity to another utility pole in

a County Right-of-Way, the Permittee shall within five days of the issuance of the permit notify any other entity that has plant or equipment on that utility pole that such entity has thirty (30) days to remove such plant or equipment from the pole that is to be replaced. Such notification shall be provided to the Department of Public Works. Any entity receiving such notification shall provide written notice to the Department of Public Works upon the removal of its plant and equipment. The last entity to remove such plant or equipment shall remove the utility pole that is to be replaced within thirty (30) days of the expiration of the period to remove plant or equipment.

2. The Permittee shall notify the Department of Public Works of any entity that has failed to remove such plant and equipment within the required thirty (30) days of notification. Failure to remove any plant and equipment from the pole that is to be replaced pursuant to this section may result in penalties provided for in §14 of this Ordinance.
3. Any Permittee that submits proof to the Department of Public Works that its failure to remove its plant and equipment from the utility pole that is to be replaced was due to the failure of another entity to remove its plant and equipment from that pole shall not be liable for any penalty and such Permittee's thirty (30) day deadline to remove plant or equipment shall be tolled until the interfering plant and equipment is removed by such other entity. However, any entity that due to its placement of plant or equipment on the utility pole that is to be replaced prohibits or interferes with any other entity

from the removal of its plant and equipment or from the removal of the pole shall be liable for double the penalty provided for in §14 of this Ordinance.

4. Failure to remove the utility pole that is to be replaced and any plant and equipment that is located on such pole may result in penalties provided for in §14 of this Ordinance.

b. Damaged Poles

1. When the Department of Public Works determines that a utility pole in a County Right-of-Way may be damaged and pose a potential threat to public safety, the Department of Public Works shall notify the Permittee, in writing, that it must be removed and replaced within seventy-two hours, or such longer period as may be agreed to by the Commissioner.
2. Failure to remove the pole that is to be replaced and any plant and equipment that is located on such pole may result in penalties provided for in §14 of this Ordinance.

§9. Abandonment of Plant or Equipment

- a. Upon Abandonment of plant or equipment owned by a Permittee in County Rights-of-Way, the Permittee shall notify the County within seventy-two (72) hours.
- b. Upon Abandonment of plant or equipment owned by a Permittee in County Rights-of-Way, the Permittee shall remove such plant and equipment within thirty (30) days.
- c. The County may direct the Permittee, by written notice, to remove all or a portion of such abandoned plant or equipment at the Permittee's sole expense.

- d. If the Permittee fails to remove all or any portion of abandoned plant or equipment as directed by the County within a reasonable time period as may be required by the County under the circumstances, the County may perform such removal and charge double the cost of the removal against the Permittee.
- e. Failure to notify the County of abandoned plant and equipment shall constitute a violation of this Ordinance and subject the Permittee to penalties as set forth in §14 of this Ordinance.
- f. Failure to remove plant or equipment owned by a Permittee in County Rights-of-Way within thirty (30) days of abandonment shall constitute a violation of this Ordinance and subject the Permittee to penalties as set forth in §14 of this Ordinance.

§10. Miscellaneous

- a. A Permittee shall not place or maintain its plant or equipment so as to interfere with, displace, damage or destroy any facilities or underground utilities, including but not limited to, sewers, gas or water mains, storm drains, pipes, cables or conduits of the County of Nassau or any other Permittee's facilities lawfully occupying the County Rights-of-Way.
- b. The Department of Public Works shall have the right to make such inspections of Plant or Equipment placed or maintained in County Rights-of-Way as it finds necessary to ensure compliance with this Ordinance.

§11. Enforcement

- a. A Permittee's failure to comply with the provisions of this Ordinance shall constitute a violation of this Ordinance and subject the Permittee to penalties defined herein.
- b. Before assessing any fine or penalty pursuant to this Ordinance, the Department of Public Works shall give written notice of the violation and its intention to assess such fines or penalties, which notice shall contain a description of the alleged violation. Following the receipt of such notice, the Permittee shall have thirty (30) days to either: (a) cure the violation to the County's satisfaction and the County shall make good faith reasonable efforts to assist in resolving the violation; or (b) file an appeal, as described herein, with the County to contest the alleged violation or to request additional time to cure the violation. If no appeal is filed and if the violation is not cured within the thirty (30) day period, the County may assess all fines and penalties owed, beginning on the first day of the violation.
- c. Appeals to challenge a notice of violation issued by the Department of Public Works shall be made in writing and be directed to the Commissioner, who shall, after due deliberation, accept, reject or modify the notice of violation.
- d. If the Permittee fails to remedy an alleged violation within a reasonable time period as may be required by the Department of Public Works, the County may perform such remedial actions and charge the cost of the removal, including the cost of any administrative expenses incurred by the County, against the Permittee.
- e. Failure of the County to enforce any requirements of this Ordinance shall not constitute a waiver of the County's right to enforce that violation or subsequent violations of the same type or to seek appropriate enforcement remedies.

§12. Force Majeure

- a. In the event a Permittee's performance of or compliance with any of the provisions of this Ordinance is prevented by a cause or event not within the Permittee's control, such inability to perform or comply shall be deemed excused and no penalties or sanctions shall be imposed as a result, provided, however, that such Permittee uses all practicable means to expeditiously cure or correct any such inability to perform or comply. For purposes of this Ordinance, causes or events not within a Permittee's control shall include, without limitation, acts of God, floods, earthquakes, landslides, hurricanes, fires and other natural disasters, acts of public enemies, riots or civil disturbances, sabotage, strikes and restraints imposed by order of a governmental agency or court.

§13. Reservation of Rights

- a. Any person, association of persons, corporation, municipal corporation, or any other legal entity who uses the plant or equipment of a Permittee, other than the Permittee that owns the plant or equipment, shall not be entitled to any rights to place or maintain such plant or equipment in excess of the rights of the Permittee that places or maintains the plant or equipment.

§14. Penalties

- a. Any violation of this Ordinance shall be punishable by a fine of five hundred dollars (\$500). Each day or part of a day in which a violation continues shall constitute a separate violation.
- b. Failure to perform restoration activities as required by this Ordinance shall be punishable by a fine not to exceed five hundred dollars (\$500) in addition to the

repayment of any costs incurred by the County. Each day or part of a day in which a violation continues shall constitute a separate violation.

- c. In addition to any charges imposed pursuant to this Ordinance, there shall be a penalty of three times the amount of the applicable permit fee for any violation of the terms and conditions or requirements of a permit issued by the Department of Public Works pursuant to this Ordinance or for any actions improperly undertaken without obtaining such a permit from the Department of Public Works in violation of this Ordinance.

§15. Severability

If any clause, sentence, paragraph, subdivision, section or part of this ordinance or the application thereof to any Permittee, individual, corporation, firm, partnership, entity or circumstance shall be adjudged by any court of competent jurisdiction to be invalid or unconstitutional, such order or judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part of this law or in its application to the Permittee, individual, corporation, firm, partnership entity or circumstance directly involved in the controversy in which order or judgment shall be rendered.

§16. State Environmental Quality Review Act Determination

It is hereby determined by the Nassau County Legislature, the lead agency, and pursuant to the provisions of the State Environmental Quality Review Act (“SEQRA”), 8 NYECL section 0101 et seq. and its implementing regulations, Part 617 of 6 NYCRR, and Section 1611 of the County Government Law of Nassau County, that this Ordinance will not have a significant impact on the environment and that no further environmental review or action is required.

§17. Effective Date:

This Ordinance shall take effect immediately.