

RESOLUTION NO. 062-2019

Published on: _____

Effective Upon Publication

A RESOLUTION MODIFYING CHAPTER 22, ARTICLE II OF THE SEDGWICK COUNTY CODE REGARDING UTILITY PERMITS.

WHEREAS, Sedgwick County Resolution No. 2-1982 established certain requirements for the use and administration of highway permit agreements and utility permit agreements by contractors and public utilities that use and occupy public rights-of-way in the County's unincorporated areas, which are included within the Sedgwick County Code as Chapter 22, Article II; and

WHEREAS, the Board of County Commissioners amended Chapter 22, Article II of the Sedgwick County Code with Resolution No. 139-2016; and

WHEREAS, Federal Communications Commission Declaratory Ruling FCC 18-133 provides that local governments that put aesthetic requirements in place for wireless facilities must publish such requirements prior to April 12, 2019; and

WHEREAS, within K.S.A. 66-2019, the County cannot impose any unreasonable requirements or obligations regarding the presentation, appearance or function of the wireless facilities and equipment; and

WHEREAS, Chapter 22, Article II does not presently contain any specific provisions regarding the presentation, appearance or function of public utilities that may locate within the public right-of-way; and

WHEREAS, K.S.A. 66-2019 also provides that if the County has provisions regarding the presentation, appearance or function for wireless facilities located within a public right-of-way, the County "shall consider input from property owners adjoining the affected public right-of-way"; and

WHEREAS, the Board of County Commissioners of Sedgwick County deems it appropriate to modify the Sedgwick County Code provisions governing utility permits.

NOW, THEREFORE, BE IT RESOLVED THAT THE BOARD OF COUNTY COMMISSIONERS OF SEDGWICK COUNTY, KANSAS, AMENDS THE SEDGWICK COUNTY CODE AS FOLLOWS:

Section 1. Amendment to the definition of "public utility" within Section 22-22 of the Sedgwick County Code.

The definition of "public utility" within Sec. 22-22 of the Sedgwick County Code is amended to state as follows:

Public utility means every person or entity, or their trustees, lessees, or receivers, that owns, controls, operates, or manages any poles, lines, anchors, conduit, pipe, transformers and any and all equipment or machinery incidental thereto for the transmission of telephone, telegraph, television, wireless data signal, or data messages or for the production, transmission or delivery or furnishing of heat, light, water or power within the public rights-of-way in the unincorporated areas of the county. The term applies to private utilities that are located within the public right-of-way. The term may also apply to any person or entity engaged in the business of providing wireless services or the wireless infrastructure required for wireless services, upon their submission of an application pertaining to a utility permit agreement. This definition is intended to encompass the types of items that may be allowed in the public right-of-way. However, this definition does not afford any additional rights, above and beyond what is required by law, for parties to locate in the public right-of-way.

Section 2. Amendment to Section 22-24 of the Sedgwick County Code.

Sec. 22-24 of the Sedgwick County Code is amended to state as follows:

Sec. 22-24. - Utility permit agreement.

- (a) The public utility shall complete all requirements of the utility permit agreement, enclose any required plans and documents, and deliver an executed utility permit agreement to the Sedgwick County Public Works Department. The form for the utility permit agreement can be obtained from the Sedgwick County Public Works Department and shall be substantially in the same form as Exhibit A included within this Code ("Exhibit A"). Prior to initiating any project, the public utility must receive a counter-executed copy of said utility permit agreement. The terms and provisions of Exhibit A are incorporated into this Code by reference as if fully set forth herein and such terms and provisions constitute requirements and conditions for each project undertaken by a public utility.
- (b) The Sedgwick County Engineer and his/her designee are authorized to accept and approve all utility permit agreements on behalf of Sedgwick County, Kansas, so long as they are in substantially the same form as Exhibit A.
- (c) The Sedgwick County Public Works Department will address each utility permit agreement that a public utility has submitted as an application for a wireless telecommunications project that may fall within the purview of K.S.A. 66-2019 as indicated below:
 - (1) For a new wireless support structure, within one hundred fifty (150) calendar days of receiving an application for a new wireless support structure, the Sedgwick County Public Works Department shall make a final decision to approve or disapprove the application and advise the public utility in writing of the final decision, including the reasons for such final decision.

- (2) For any substantial modification to an existing wireless support structure or base station, or any other application for placement, installation or construction of transmission equipment that does not constitute an eligible facilities request as defined by 47 U.S.C. § 1455(a), within ninety (90) calendar days of receiving an application, the Sedgwick County Public Works Department shall make a final decision to approve or disapprove the application and advise the public utility in writing of the final decision, including the reasons for such final decision.
 - (3) For small cell facilities or a small cell network, within sixty (60) days of receiving an application, Sedgwick County Public Works Department shall make a final decision to approve or disapprove the application and advise the public utility in writing of the final decision, including the reasons for such final decision.
 - (4) Sedgwick County Public Works Department shall review and issue any potential approvals of applications for eligible facilities requests, as defined by 47 U.S.C. § 1455(a) and this Code, within sixty (60) days according to the procedures established by federal regulations within 47 C.F.R. 1.40001.
 - (5) If, within the first thirty (30) days after the public utility has submitted its application, the Sedgwick County Public Works Department determines that the utility permit agreement or the required bond are incomplete, the aforementioned timeframe for approval may be tolled, provided that Sedgwick County Public Works Department notifies the public utility in writing that such utility permit agreement and/or bond is incomplete and includes, in writing, the reasons for that finding. The applicable timeframe within subsection (c)(1) through (4) shall recommence once the public utility resubmits its application. Alternatively, the applicable timeframe for approval of the utility permit agreement may be tolled by the express agreement in writing by both the Sedgwick County Public Works Department and the public utility.
 - (6) If the Sedgwick County Public Works Department fails to act on the application within the applicable timeframe included within subsection (c)(1) through (4), the application will be deemed approved once the public utility has provided notice to the Sedgwick County Public Works Department that the applicable time period has lapsed.
 - (7) Within thirty (30) days after: (a) approval of a utility permit agreement; (b) the affirmative denial of an application by the Sedgwick County Public Works Department; or (c) by the inaction of the Sedgwick County Public Works Department resulting in an approval pursuant to subsection (c)(6), a party aggrieved by the final action of the Sedgwick County Public Works Department within this subsection (c) may bring an action for review in any court of competent jurisdiction.
- (d) Nothing in this section shall prohibit a public utility whose application has been disapproved from resubmitting a modified version of its application.

- (e) Nothing contained within this section shall prevent the ability for Sedgwick County Public Works to communicate with a public utility to make any suggestions or comments for possible modifications or adjustments of the public utility's application after the public utility has submitted its application.
- (f) Should a public utility modify or adjust its application, any timeframe specified within subsection (c)(1) through (3) shall begin anew upon the public utility's modification or adjustment of the application. Any modification or adjustment of an application shall not incur a new utility permit agreement fee. If an application for a wireless telecommunications project has been denied by the Sedgwick County Public Works Department, it cannot later be considered eligible for a modification or adjustment under this section, but would instead be considered as a new application. The option for modifying or adjusting an application is to be viewed as distinct from subsection (c)(5), which applies solely to incomplete applications.
- (g) For any above-ground apparatus that is proposed to be located within the public right-of-way whose diameter at any point exceeds 23 inches, the following requirements shall apply:
 - (1) Any wiring specific to the operation of the above-ground apparatus shall be installed underground and within the support structure or within conduit immediately attached to the support structure. Any wiring specific to the operation of the above-ground apparatus shall not cross over, under, or through private property unless permitted by easement.
 - (2) Antennas and equipment on the above-ground apparatus shall be concealed by a cover or cabinet matching or coordinating with the color of the support structure or the color for existing equipment cabinets in the immediate vicinity.
 - (3) The above-ground apparatus shall not be placed in a location that obstructs pedestrian travel.
 - (4) The above-ground apparatus shall be placed in a location that does not hinder existing or planned uses of the public right-of-way, with such uses including but not being limited to utility usage, drainage, street lights, sidewalks, driveways, and turn lanes.
 - (5) The height of the above-ground apparatus shall not exceed ten percent (10%) above the height of existing structures in the public right-of-way that are located within 1,500 feet of the proposed above-ground apparatus unless a greater height is authorized in writing by the county engineer, or his/her designee.
- (h) For any above-ground apparatus that is proposed to be located within the public right-of-way whose diameter at any point exceeds 23 inches, the following recommendations shall apply:

- (1) To the extent practical, the design and location of the above-ground apparatus should be changed to mitigate an adjoining property owner's reasonable and objective concerns and to increase consistency with the guidelines of the Wichita-Sedgwick County Wireless Communication Master Plan.
 - (2) Equipment cabinets should be sized and placed in a manner that minimizes visual obtrusiveness, including screening by landscaping if appropriate for the location. The installation of equipment underground is encouraged.
 - (3) For any additional recommendations for any above-ground apparatus located within the public right-of-way, refer to the current version of the Wichita-Sedgwick County Wireless Communication Master Plan.
- (i) Upon receiving a permit application for any above-ground apparatus that is proposed to be located within the public right-of-way whose diameter at any point exceeds 23 inches, the county engineer shall mail notice of such application to the owners of record whose property adjoins the public right-of-way where the above-ground apparatus is proposed to be installed. The notice mailed by the county engineer shall request such owners' input in writing by a specific date. The county engineer will then consider such input and forward the input to the public utility and/or contractor who has submitted the permit application.

Section 3. Amendment to Section 22-25 of the Sedgwick County Code.

Sec. 22-25 of the Sedgwick County Code is amended to state as follows:

Sec. 22-25. - Public health, safety and welfare considerations.

- (a) The right of public utilities to use and occupy the public right-of-way shall always be subordinate to the reasonable public health, safety and welfare requirements and regulations of Sedgwick County, as determined by the Sedgwick County Engineer or his/her designee. To the extent that any such public health, safety and welfare requirements and regulations may cause the disapproval of a utility permit agreement, such items shall be detailed in writing, as stated within section 22-24(c), and shall be exercised in a competitively neutral manner that is not unreasonable or discriminatory.
- (b) At a minimum, any public utility operating within the public right-of-way will comply with the following requirements such that these requirements are not meant to operate to the exclusion of other public health, safety, and welfare concerns that might be present:
 - (1) No part of any above-ground apparatus shall be located within fifteen (15) feet of the edge of the driving surface of any road, street, highway or other similar public thoroughfare. However, with approval of the county engineer or his/her designee, a small cell facility may collocate with an existing above-ground apparatus that is already

located within fifteen (15) feet of the edge of the driving surface of any road, street, highway or other public thoroughfare.

- (2) No part of any above-ground apparatus, including improvements and grading, shall be located within the "clear zone", as identified within the most recent version of the Roadside Design Guide, as published by the American Association of State Highway and Transportation Officials (AASHTO).
 - (3) All public utilities shall comply with the provisions of the most recent version of the Manual Uniform Traffic Control Devices (MUTCD), published by the United States Department of Transportation, Federal Highway Administration, 2009 Edition, or any future equivalent portions of such publication.
 - (4) All public utilities shall comply with the most recent version of the Roadside Design Guide, as published by AASHTO.
 - (5) All public utilities shall comply with Sedgwick County's Utility Accommodation Policy, dated January 15, 1982, and any amendments or updates thereto.
 - (6) All public utilities shall comply with the Kansas Underground Utility Damage Prevention Act, as set forth in K.S.A. 66-1801 et seq.
 - (7) All public utilities shall be located in a manner that they do not obstruct pedestrian safety.
- (c) The county engineer and his/her designee may grant reasonable exceptions to the requirements included in subsection (b), so long as the work permitted through such exceptions continues to ensure public health, safety, and welfare.

Section 4. Severability Clause.

Should any section, clause or provision of this Resolution be declared by any court of competent jurisdiction to be invalid, the same shall not affect the validity of this Resolution as a whole, or any part thereof, other than the part so declared to be invalid.

Section 5. Publication and Effective Date.

Upon the adoption of this Resolution, the Clerk of Sedgwick County shall publish this Resolution once in the official County newspaper. This Resolution shall become effective upon its publication.

Commissioners present and voting were:

PETER F. MEITZNER
MICHAEL B. O'DONNELL, II
DAVID T. DENNIS
LACEY D. CRUSE
JAMES M. HOWELL

Aye
Aye
Aye
Aye
Aye

Dated this 20 day of March, 2019.

BOARD OF COUNTY COMMISSIONERS
OF SEDGWICK COUNTY, KANSAS

ATTEST:

for Kelly B. Arnold
KELLY B. ARNOLD, County Clerk



David T. Dennis
DAVID T. DENNIS, Chairman
Commissioner, Third District

Peter F. Meitzner
PETER F. MEITZNER, Chair Pro Tem
Commissioner, First District

APPROVED AS TO FORM:

Justin M. Waggoner
JUSTIN M. WAGGONER
Assistant County Counselor

Michael B. O'Donnell, II
MICHAEL B. O'DONNELL, II
Commissioner, Second District

Lacey D. Cruse
LACEY D. CRUSE
Commissioner, Fourth District

James M. Howell
JAMES M. HOWELL
Commissioner, Fifth District



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working for you

Sedgwick County

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Agenda Item Request Form (Text File)

File Number: 19-222

Agenda Date: 3/20/2019

Version: 1

Status: Consent Agenda

In Control: Board of Sedgwick County Commissioners

File Type: Consent

Agenda Number: 1

Title

A resolution to amend Chapter 22, Article II of the Sedgwick County Code Regarding Utility Permits. All districts.

Body

Recommended action: Approve and sign the resolution.

Background: Beginning in 2016, K.S.A 66-2019 allowed the placement of wireless telecommunications facilities in the public right of way. The Board of County Commissioners approved Resolution No. 139-2016 which implemented modifications to the existing county code to regulate this new usage of the right of way. The revised code did not include any aesthetic requirements for the placement of these facilities.

In 2018, the Federal Communications Commission issued Declaratory Ruling FCC 18-133 which would restrict local governments from imposing aesthetic requirements on wireless telecommunications facilities unless they are in place prior to April 12, 2019.

The County Counselor's Office, Public Works and Metropolitan Area Planning Department have prepared code modifications that provide for reasonable requirements on the presentation, appearance or function of wireless telecommunications facilities in the right of way. The code changes also provide a process for public input for certain facilities.

Alternatives: Take such action as the Board deems appropriate.

Financial Considerations: There are not additional costs to the County resulting from the adoption of this resolution.

Legal Considerations: Any changes to local codes that implement aesthetic requirements must be in place prior to April 12, 2019. The resolution will need to be approved prior to that date in order for the county to be able to enforce the new aesthetic requirements. The County has the authority to make changes pursuant to K.S.S. 19-101 et. seq. Approval requires a simple majority vote.

Policy Considerations: N/A

Outside Attendees: None