

MEMORANDUM

TO: Ohio Municipal Corporations

FROM: Lindsay Miller

DATE: January 17, 2018

RE: Authority and Restrictions under Proposed O.R.C. § 4939 regarding Small Cell Facilities and Wireless Support Structures in the Public Way

This memo outlines the authority and restrictions assigned to municipal corporations in Ohio under the newly proposed language to Ohio Revised Code chapter 4939 (“O.R.C. § 4939” or “chapter 4939”), “Use of Municipal Public Way”. In addition, this memorandum includes the new O.R.C. § 4939 provisions related to the adoption and implementation of design guidelines.

I. Authority Granted to Municipal Corporations under the Proposed O.R.C. § 4939 regarding Small Cell Facilities and Wireless Support Structures in the Public Way

Under the newly proposed language to O.R.C. § 4939, municipal corporations maintain certain existing authority and are granted additional authority regarding small cell facilities and wireless support structures in the public way. The full scope of this authority is summarized below:

- A municipal corporation can adopt written design guidelines with objective, technologically feasible criteria that reasonably match the aesthetics and character of the area regarding:
 - the location of any ground-mounted small cell facilities;
 - the location of a small cell facility on a wireless support structure;
 - the appearance and concealment of small cell facilities, including criteria relating to materials used for arranging, screening, or landscaping; and
 - the design and appearance of a wireless support structure including any height requirements adopted by the municipal corporation in accordance with chapter 4939.

The design guidelines must be applied in a nondiscriminatory manner, but a municipal corporation can deny collocation of a small cell facility to a wireless support structure that is owned or operated by the municipal corporation and located in the public way if the operator does not comply with the design guidelines and reasonable terms and conditions for collocations adopted by the municipal corporation that are consistent with the design guidelines and Ohio Revised Code chapter 4939.¹

- In addition to requiring that a collocation align with a municipal corporation’s design guidelines, a municipal corporation can condition approval of collocation on the replacement or modification of the wireless support structure at the operator’s cost if the municipal

¹ O.R.C. § 4939.0314(C) (Proposed Draft I_132_2153, 2018).

corporation determines that replacement or modification is necessary for compliance with its written construction or safety standards.

The replacement or modification of the wireless support structure must conform to the applicable design guidelines and the municipal corporation's applicable specifications for the type of structure being replaced. Municipal corporations can retain ownership of a replacement wireless support structure.²

- A municipal corporation can reserve space in the public way or on a wireless support structure or pole that is owned or operated by the municipal corporation if:
 - the reservation of space is for future public safety or transportation uses;
 - there is a documented and approved plan in place regarding the future public safety or transportation uses at the time that the application for a small cell facility or wireless support structure is filed with the municipal corporation; and
 - the reservation of space does not wholly preclude placement of a pole or collocation of a small cell facility.

If a municipal corporation's pole or wireless support structure will need to be replaced in order to accommodate collocation of a small cell facility and the future public safety or transportation use, the operator must pay for the replacement of the pole or wireless support structure and the replaced pole or wireless support structure must accommodate the future public safety or transportation use.³

- A municipal corporation can require reasonable and nondiscriminatory spacing regarding the location of new wireless support structures if:
 - spacing requirements are set forth in ordinance, local rule, or design guidelines, and
 - spacing requirements do not prohibit or have the effect of prohibiting the provision of wireless service to any location.⁴
- In response to an application for a new wireless support structure, a municipal corporation can propose:
 - an alternate location within 100 feet of the location requested by the applicant, or
 - an alternate location within a distance equal to the width of the public way in or on which the new wireless support structure is being proposed.

The applicant must use the alternate location proposed by the municipal corporation as long as the applicant has the right to use the alternate location on reasonable terms and conditions and the alternate location does not impose technical limits or additional costs.⁵

² O.R.C. § 4939.0322 (Proposed Draft I_132_2153, 2018).

³ O.R.C. § 4939.0314(A) (Proposed Draft I_132_2153, 2018).

⁴ O.R.C. § 4939.0314(B) (Proposed Draft I_132_2153, 2018).

- A municipal corporation can require that any collocation or new wireless support structure that is granted by the municipal corporation be completed within 180 days after issuance of the permit to the applicant.
 - The municipal corporation and the applicant can extend this time period:
 - upon mutual agreement,
 - if a delay is caused by make-ready work for a municipal-owned wireless support structure or decorative pole, or
 - if a delay is caused by the lack of commercial power or backhaul availability.
 - In the instance of a delay, the municipal corporation can
 - grant an extension, or
 - declare the permit void if:
 - the applicant did not make a request within 60 days after the issuance of the permit for commercial power or backhaul services, or
 - the additional time to complete installation will exceed 360 days after issuance of the permit.⁶
- A municipal corporation can restrict the height of a wireless support structure and the placement of a wireless facility so that:
 - The overall height of a new wireless support structure and any collocated antennas is not more than 40 feet above ground level;
 - The municipal corporation's design guidelines cap the permissible height of small cell facilities at 35 feet in height or higher above ground level in areas meeting the following criteria:
 - the area is within 300 feet of the proposed site for a new wireless support structure in the same public way or a connecting public way;
 - there are no wireless support structures or utility poles taller than 30 feet in height above ground level in the area; and
 - the maximum allowable height for building construction in the underlying zoning district is thirty-five (35) feet in height above ground level or less.
 - For an existing wireless support structure, the antenna and any associated shroud or concealment material can be collocated at the top of the existing wireless support

⁵ O.R.C. § 4939.0324(D) (Proposed Draft I_132_2153, 2018).

⁶ O.R.C. § 4939.0314(E) (Proposed Draft I_132_2153, 2018).

- structure, but cannot increase the height of the existing wireless support structure by more than 5 feet.⁷
- The municipal corporation, by regulation, can permit a person to construct, modify, or maintain a utility pole or wireless support structure along, across, and under a public way that is in excess of the above size limits.⁸
 - A municipal corporation can require compliance with reasonable and nondiscriminatory requirements that prohibit public utilities or cable operators from installing structures and facilities in the public way because an area is either designated solely for undergrounding or structures and facilities are required to be placed elsewhere in the public way, if:
 - The municipal corporation has required all structures and facilities, including structures and facilities owned by a municipal electric company, but not including structures and facilities owned by a municipal corporation or a transit authority, to be placed underground or elsewhere in the public way or a utility easement by a date certain that is three months prior to the submission of the application;
 - The municipal corporation does not prohibit the replacement of wireless support structures or the collocation of small cell facilities on wireless support structures in the designated area; and
 - The municipal corporation permits operators to seek a waiver of the undergrounding or alternative location requirements for the placement of a new wireless support structure to support small cell facilities if the operator is unable to achieve its service objective using a small cell facility:
 - from a location in the public way where the prohibition does not apply,
 - in a utility easement the operator has the right to access, or
 - in or on other suitable locations or structures made available by municipal corporations at reasonable rates, fees and terms.
- Municipal corporations shall process waivers in a reasonable and nondiscriminatory manner that does not have the effect of prohibiting the provision of wireless service.⁹
- Municipal corporations may require reasonable, technically feasible, and non-discriminatory design or concealment measures in a historic district so long as:
 - the measures do not run afoul of the restrictions on municipal authority (below);
 - the facilities are not otherwise excluded from evaluation for effects on historic properties under 47 C.F.R. § 1.1307(a)(4) of the FCC's rules;

⁷ O.R.C. § 4939.0314(F) (Proposed Draft I_132_2153, 2018).

⁸ O.R.C. § 4939.033 (Proposed Draft I_132_2153, 2018).

⁹ O.R.C. § 4939.0314(G) (Proposed Draft I_132_2153, 2018).

- the design or concealment measures do not have the effect of prohibiting any operator's technology; and
- the design or concealment measures are not considered a part of the small cell facility for purposes of the size restrictions in the definition of small cell facility.¹⁰
- If multiple requests are received by a municipal corporation to install 2/+ poles that would violate applicable spacing requirements, or to collocate two or more small cell facilities on the same wireless support structure, the municipal corporation can resolve conflicting requests through whatever reasonable and nondiscriminatory manner it deems appropriate.¹¹
- A municipal corporation can impose reasonable requirements for bonds, escrow deposits, letters of credit, or any other type of financial surety to ensure removal of abandoned or unused wireless facilities or damage to municipal property caused by an operator or agent.¹²
- A municipal corporation can require a work permit for:
 - routine maintenance of wireless facilities in the public way;
 - replacement of wireless facilities with other wireless facilities that are consistent with the municipal corporation's design guidelines and are either substantially similar to the existing wireless facilities or the same size or smaller than the existing facilities;
 - the collocation of a small cell facility; and
 - the construction, maintenance, modification, operation, or replacement of wireless support structures in, along, across, upon, and under the public way.¹³
- A municipal corporation can request that, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety and welfare of the public, an operator relocate or adjust its facilities within the public way in accordance with local law and at no cost to the municipal corporation, as long as such request similarly binds all users in or on such public way.¹⁴
- A municipal corporation can apply its generally applicable health, safety, and welfare regulations when granting consent for a small cell facility or wireless support structure in the public way.¹⁵ A municipal corporation, for good cause shown, can withhold, deny, or delay

¹⁰ O.R.C. § 4939.0314(H) (Proposed Draft I_132_2153, 2018).

¹¹ O.R.C. § 4939.0314(I) (Proposed Draft I_132_2153, 2018).

¹² O.R.C. § 4939.0314(J) (Proposed Draft I_132_2153, 2018).

¹³ O.R.C. § 4939.0311 (Proposed Draft I_132_2153, 2018).

¹⁴ O.R.C. § 4939.09 (Proposed Draft I_132_2153, 2018).

¹⁵ O.R.C. § 4939.037 (2017).

its consent to any person based upon the person's failure to possess the financial, technical, and managerial resources necessary to protect the public health, safety, and welfare.¹⁶

- A municipal corporation can continue to establish priorities for access to or occupancy or use of a public way by a public utility or cable operator when the public way cannot accommodate all public way occupants or users, so long as the municipal corporation's priorities are not unduly discriminatory and are competitively neutral in their application to public utilities or cable operators.¹⁷

II. Restrictions on Municipal Corporations under the Newly Proposed O.R.C. § 4939 regarding Small Cell Facilities and Wireless Support Structures in the Public Way

The majority of the restrictions on municipal corporations regarding small cell facilities and wireless support structures in the public way are outlined in section 4939.0313 ("Restrictions on municipal authority"). In summary, under chapter 4939, municipal corporations cannot:

- Require a person to submit information about, or evaluate a person's business decisions with respect to the person's service, customer demand, or quality of service to or from a particular area or site as a condition for approval of the request;
- Require a person to submit information about the need for the small cell facility or the associated wireless support structure, including additional wireless coverage, capacity, or increased speeds, as a condition for approval of the request;
- Require a person to justify the need for the new small cell facility or associated wireless support structure, or to submit business information, including strategy documents, propagation maps, or telecommunications traffic studies as a condition for approval of the request;
- Require the removal of existing wireless support structures or small cell facilities, wherever located, as a condition for approval of the request, unless the existing wireless support structures or small cell facilities have been unused or abandoned, but *this does not preclude a municipal corporation from adopting reasonable rules intended to ensure the public health, safety, and welfare with respect to the removal of an abandoned wireless support structure or abandoned wireless facility*;
- Impose restrictions with respect to objects in navigable airspace that are stricter than or in conflict with any restrictions imposed by the Federal Aviation Administration;
- Unreasonably discriminate among providers of functionally equivalent services;
- Condition the grant of consent on the requirement that a person purchase or lease facilities, networks, or services owned or operated by municipal corporations, in whole or in part, or owned or operated, in whole or in part, by any entity in which municipal corporations has an economic governance interest;

¹⁶ O.R.C. § 4939.03(5) (2017).

¹⁷ O.R.C. § 4939.04(A)(2) (2002).

- Condition the grant of consent on the requestor's agreement to permit other wireless facilities to be placed at, attached to, or located on the associated wireless support structure;
- Impose setback or fall-zone requirements for wireless support structures that are different from requirements imposed on other similar types of structures in the public way;
- Impose environmental testing, sampling, or monitoring requirements that exceed rules and regulations established under state or federal law or that are not imposed on other types of construction or elements of the construction;
- Impose any regulations pertaining to radio frequency emissions or exposure to such emissions that are contrary to or exceed rules of the Federal Communications Commission;
- Require consent for:
 - routine maintenance of wireless facilities in the public way, or
 - replacement of wireless facilities with other wireless facilities that are consistent with the municipal corporation's design guidelines and are either:
 - substantially similar to the existing wireless facilities, or
 - the same size or smaller than the existing wireless facilities.¹⁸
- Enter into an exclusive arrangement with any entity for the right to attach to the municipal corporation's wireless support structures.
- Institute a moratorium on the filing, acceptance of filings, consideration, or approval of requests for consent.¹⁹

¹⁸ "Substantially similar" is not otherwise defined in the language.

¹⁹ O.R.C. § 4939.0315 (2017).