

RESOLUTION NO. 139-2016

Date Adopted: September 28, 2016

Date Published:

Date Effective: October 1, 2016

**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, Sedgwick County Resolution No. 150-1996 has been the sole amendment to Resolution No. 2-1982, which granted the County Engineer the authority to approve such highway and utility permit agreements; and

WHEREAS, the Kansas legislature, within the Senate Substitute for House Bill No. 2131, codified as K.S.A. 66-2019, enacted legislation that significantly modifies wireless telecommunications and allows wireless telecommunications facilities to be located within the public rights-of-ways of municipalities; and

WHEREAS, within K.S.A. 66-2019, the Kansas legislature states that the rights of wireless telecommunications providers to locate within the public rights-of-way “shall always be subject and subordinate to the reasonable public health, safety and welfare requirements and regulations of the authority”; and

WHEREAS, due consideration must also be given to K.S.A. 68-545 and K.S.A.68-115, which respectively act to generally prohibit obstructions in the public rights-of-way and authorize the County Engineer to remove or cause to be removed such obstructions; and

WHEREAS, the provisions of the Wichita-Sedgwick County Unified Zoning Code do not apply to property included within the public rights-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. SEDGWICK COUNTY RESOLUTION NOS. 2-1982 AND 150-1996 REPEALED AND REPLACED IN THEIR ENTIRETY.

Sedgwick County Resolution Nos. 2-1982 and 150-1996, which include *Sedgwick County Code* Sections 22-21 through 22-26, are repealed and replaced in their entirety by the provisions included within Section 2 of this Resolution.

SECTION 2. NEW PROVISIONS FOR CHAPTER 22, ARTICLE II.

Sec. 22-21. – Title; purpose; jurisdiction; scope.

- (a) *Title.* The provisions of this Article shall be known as “Utility Permits Code,” and may be cited as such, and may also be referred to herein as “this Code” or “this Article”.
- (b) *Purpose.* This Code is intended to establish clear, safe, and appropriate guidelines for highway and utility permits that are granted by the County, such that citizens within the County may benefit from the services and access afforded by such highway and utility permits.
- (c) *Jurisdiction.* The provisions of this Code shall apply to the unincorporated area of Sedgwick County, Kansas.
- (d) *Limitation of Scope.* The scope of this Code does not include any permits or approvals that may be required within the Wichita-Sedgwick County Unified Building and Trade Code or within the Wichita-Sedgwick County Unified Zoning Code. Nothing in this Code shall be interpreted as expressly granting a public utility the authority to construct, maintain or operate any facility or related appurtenance on property owned by the County that might be outside of the public-right-of-way.

Sec. 22-22. – Definitions.

Above-ground Apparatus means any item associated with a public utility’s operations that is located above the existing ground level that is situated within the public right-of-way, with such term including but not limited to a pole, base station, tower, small-cell facility, transmission equipment, wireless facility, and wireless support structure.

Application means the utility permit agreement and any corresponding documentation submitted by public utilities for projects.

Base Station means a station that includes a structure that currently supports or houses an antenna, transceiver, coaxial cables, power cables or other associated equipment at a specific site that is authorized to communicate with mobile stations, generally consisting of radio transceivers, antennas, coaxial cables, power supplies and other associated electronics. “Base

station” does not mean a tower or equipment associated with a tower and does not include any structure that, at the time the relevant application is filed with the County, does not support or house equipment described in this paragraph.

Collocation means the mounting or installation of wireless facilities on a building, structure, wireless support structure, tower, utility pole, base station or existing structure for the purposes of transmitting or receiving radio frequency signals for communication purposes.

Contractor means every person or entity who contracts with any owner or lessee of real estate for the construction, maintenance or repair of a driveway entrance, curb, culvert, or ditch or work or any work that is performed on a public utility project which necessitates the performance of labor in or the use or storage of materials upon any road or public right-of-way in the unincorporated areas of the County. The term “contractor” also includes any person or company that builds or installs public utilities projects in the public right-of-way.

Eligible Facilities Request means the mounting or installation of wireless facilities on a building, structure, wireless support structure, tower, utility pole, base station or existing structure for the purposes of transmitting or receiving radio frequency signals for communication purposes.

Existing Structure means a structure that exists at the time an application to collocate wireless facilities on a structure is filed with an authority. The term includes any structure that is currently supporting or designed to support the attachment of wireless facilities, including, but not limited to, towers, buildings and water towers.

Project means either the furnishing of materials or the performance of labor in or upon a public right-of-way in the unincorporated area of the County, which furnishing or performing:

- (1) Occurs within a contiguous area of not to exceed one (1) square mile (with the exception of small cell facilities that may have up to twenty-five (25) small cell facilities within the same permitted project);
- (2) Is prosecuted according to plans on file with the Sedgwick County Public Works Department; and
- (3) Is completed no later than one (1) year after approval by the County Engineer or his/her designee and said construction shall be diligently pursued to completion.

Public Right-of-Way means only the area of real property in which the County has a dedicated or acquired right-of-way interest in the real property. It shall include the area on, below or above the present and future streets, alleys, avenues, roads, highways, parkways or boulevards dedicated or acquired as right-of-way. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications or other non-wire telecommunications or broadcast service easements obtained by utilities or private easements in platted subdivisions or tracts.

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.

Small Cell Facility means a wireless facility that meets both of the following qualifications: (A) Each antenna is located inside an enclosure of no more than six cubic feet in volume, or in the case of an antenna that has exposed elements, the antenna and all of the antenna's exposed elements could fit within an imaginary enclosure of no more than six cubic feet; and (B) primary equipment enclosures that are no larger than seventeen (17) cubic feet in volume, or facilities comprised of such higher limits as the federal communications commission has excluded from review pursuant to 54 U.S.C. § 306108. Associated equipment may be located outside the primary equipment, and if so located, is not to be included in the calculation of equipment volume. Associated equipment includes, but is not limited to, any electric meter, concealment, telecommunications demarcation box, ground-based enclosures, back-up power systems, grounding equipment, power transfer switch, cut-off switch and vertical cable runs for the connection of power and other services.

Small Cell Network means a collection of interrelated small cell facilities designed to deliver wireless service.

Substantial Modification means a proposed modification to an existing wireless support structure or base station that will substantially change the physical dimensions of the wireless support structure or base station under the objective standard for substantial change, established by the Federal Communications Commission pursuant to 47 C.F.R. 1.40001.

Transmission Equipment means equipment that facilitates transmission for a wireless service licensed or authorized by the Federal Communications Commission including, but not limited to, radio transceivers, antennas, coaxial or fiber optic cable and regular and backup power supply. "Transmission equipment" includes equipment associated with wireless services including, but not limited to, private, broadcast and public safety services such as wireless local area network services, and services utilizing a set of specifications developed by the institute of electrical and electronics engineers for interface between a wireless client and a base station or between two wireless clients, as well as unlicensed wireless services and fixed wireless services, such as microwave backhaul.

Wireless Facility means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including, but not limited to: (A) Equipment associated with 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) radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies and comparable equipment, regardless of technological configuration. “Wireless facility” does not mean any wired connections from a wireless support structure or base station to a hub or switching location.

Wireless Support Structure means a freestanding structure, such as a monopole, guyed or self-supporting tower or other suitable existing or alternative structure designed to support or capable of supporting wireless facilities. “Wireless support structure” shall not include any telephone or electrical utility pole or any tower used for the distribution or transmission of electrical service

Sec. 22-23. – Violations and penalty.

- (a) This Article is enforceable under Chapter 8 of the *Sedgwick County Code*. Except as otherwise stated, any violation of this Article shall be classified as a class H violation, as identified within Section 8-5.
- (b) Violations of this Article are punishable as provided in Section 1-8 of the *Sedgwick County Code*.

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 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 Section 22-24 (c) (1) – (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 Section 22-24 (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 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 Section 22-24 (c) (6), a party aggrieved by the final action of the Sedgwick County Public Works Department

within this Section 22-24 (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 Section 22-24 (c) (1) – (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 Section 22-24 (c) (5), which applies solely to incomplete applications.

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.*
- (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.

Sec. 22-26. – Highway permit agreement.

- (a) Prior to initiating any project for construction work within the public right-of-way in the unincorporated area of Sedgwick County not completed by Sedgwick County Public Works, its agents, or covered under a separate agreement or permit, a contractor authorized to complete such work shall execute and deliver to the Sedgwick County Public Works Department a highway permit agreement, which shall be substantially in the same form as Exhibit B included within this Code ("Exhibit B"), and the contractor must receive a counter-executed copy of said highway permit agreement. The terms and provisions of Exhibit B are incorporated into this Code by reference as if fully set forth in this Article, and such terms and provisions constitute requirements and conditions for each project undertaken by a contractor.
- (b) The Sedgwick County Engineer and his/her designee are authorized to accept and approve all highway permit agreements on behalf of Sedgwick County, Kansas, so long as they are in substantially the same form as Exhibit B.

Sec. 22-27. – Fees.

- (a) The following fees and charges shall be paid by the public utility or contractor, as the case may be, for each project, and the fees shall accompany the respective permit agreement:

- (1) Utility permit agreement: One hundred fifty dollars (\$150.00)
- (2) Highway permit agreement: One hundred fifty dollars (\$150.00)

*For small cell networks involving no greater than twenty-five (25) individual small cell facilities of substantially similar design, upon request of the public utility, Sedgwick County Public Works Department shall allow the public utility to file a consolidated application for such small cell facilities.

- (b) Such fees shall be paid only once for each project to be initiated under any respective highway permit agreement or utility permit agreement. The fees and charges established by this Section are for regulatory purposes only.
- (c) All fees provided in this Section shall be payable to Sedgwick County, and upon receipt the fees shall be deposited and credited to the County general fund.

Sec. 22-28. – Bond.

In order to guarantee satisfactory installation of a utility permit agreement or a highway permit agreement, each public utility or contractor, as the case may be, shall execute and deliver to the Sedgwick County Public Works Department a bond, payable to Sedgwick County, with good and sufficient sureties as indicated within Exhibit C to this Code (“Exhibit C”). The amount of the bond shall be according to the schedule attached to this Code within Exhibit C. A public utility or contractor may file and maintain with the Sedgwick County Public Works Department a bond continuous in nature that is in an amount that equals or exceeds what is required within Exhibit C.

Sec. 22-29. – Repair.

All public utilities that operate in the public right-of-way in the unincorporated area of Sedgwick County are required to repair all damage to a public right-of-way or any other property caused by the public utility, its agent, affiliate, employee or subcontractor while occupying, installing, repairing or maintaining facilities in a public right-of-way and to return the public right-of-way to its functional equivalence before the damage pursuant to the requirements and specifications of Sedgwick County Public Works. If the public utility fails to make the repairs required by Sedgwick County Public Works within sixty (60) days after Sedgwick County Public Works has provided written notice to the public utility, the County may make those repairs and charge the public utility the cost of those repairs. In this situation, the County would also be authorized to call and apply the bond provided by the public utility within Exhibit C.

Sec. 22-30. – Damaged, Abandoned, or Unused Above-ground Apparatus.

- (a) If an above-ground apparatus has sustained substantial structural damage such that said damage does not arise to the level of being an emergency as identified in Section 22-34, the public utility shall, upon discovery of such damage, promptly notify the Sedgwick County Public Works Department, commence any repairs to the above-ground apparatus within sixty (60) days of the notice provided to Sedgwick County Public Works, and diligently prosecute the repair of said above-ground apparatus. Upon receipt of such notice from the public utility, the Sedgwick County Public Works Department shall provide a written notice to inform the public utility of its duty to repair mentioned within this Subsection and the notice shall also mention the action that can be taken by the County pursuant to Section 22-30 (c) in the event of the public utility not completing the repairs within the indicated timeframe.
- (b) If an above-ground apparatus has sustained substantial structural damage such that said damage does not arise to the level of being an emergency as identified in Section 22-34 and the Sedgwick County Public Works Department becomes aware of such damage, the Sedgwick County Public Works Department shall provide a written notice to the public utility describing the above-ground apparatus by location and the damage that has been sustained.
- (c) If either the public utility or the Sedgwick County Public Works Department has notified the other party regarding substantial structural damage to an above-ground apparatus and sixty (60) days or more have passed and the public utility has failed to commence any repair or should otherwise fail to diligently prosecute such repair, the County may consider the above-ground apparatus to be an obstruction and take any action permitted by law to remove or modify the above-ground apparatus. Furthermore, if the County would be required to remove or modify the above-ground apparatus as noted in this subsection, the public utility would be required to reimburse the County for any costs incurred by the County.
- (d) If the Sedgwick County Public Works Department becomes aware that an above-ground apparatus appears to have been abandoned or unused for a period of six (6) months or longer, the Sedgwick County Public Works Department shall send a written notice to the public utility about the abandonment or non-use of the above-ground apparatus. The notice shall indicate the timeframe of such abandonment or non-use, the location of the above-ground apparatus, and any other details that the Sedgwick County Public Works Department may wish to provide. The notice shall indicate that if the public utility has not recommenced use of the above-ground apparatus, removed the above-ground apparatus, or taken other action to remedy the abandonment or non-use conditions within sixty (60) days after the date said notice is sent, the County may consider the above-ground apparatus to be an obstruction and take any action permitted by law to remove or modify the above-ground apparatus. Accordingly, should the abandonment or non-use conditions persist sixty (60) days or more after the notice has been sent, the County may consider the above-ground apparatus to be an obstruction and take any action permitted

by law to remove or modify the above-ground apparatus. Furthermore, if the County would be required to remove or modify the above-ground apparatus as noted in this subsection, the public utility would be required to reimburse the County for any costs incurred by the County.

Sec. 22-31. – Relocation.

Whenever requested by the County, in order to accomplish construction and maintenance activities directly related to improvements for the health, safety and welfare of the public, a public utility shall promptly remove its facilities (with this term including any above-ground apparatus and any other public utility property located within the public right-of-way) from the public right-of-way or shall relocate or adjust its facilities within the public right-of-way at no cost to the County. Such relocation or adjustment shall be completed as soon as reasonably possible within the time set forth in any request by the County for such relocation or adjustment. However, for wireless telecommunications projects that fit within the scope of K.S.A. 66-2019, and absent any circumstances beyond the County’s control that would require a shorter advance notice, the County would be required to provide the public utility written notice not less than one hundred eighty (180) days prior to any relocation. Any damages suffered by the County or its contractors as a result of the public utility’s failure to timely relocate or adjust its facilities shall be borne by the public utility.

Sec. 22-32. – Indemnification.

A public utility shall indemnify the County, and its elected and appointed officials, officers, managers, members, employees and agents, against any and all loss or damage to the extent such loss and/or damage arises out of the public utility’s or its agent’s or employee’s negligence and/or willful, wanton or reckless conduct undertaken with regard to this Code. This indemnification shall not be affected by any other provisions in agreements pertaining to insurance requirements or bond requirements.

Sec. 22-33. – Claim Notification.

A public utility shall promptly advise the County in writing of any known claim or demand against the public utility or the County related to, or arising out of the public utility’s activities in a public right-of-way.

Sec. 22-34. – Emergencies.

If there is an emergency necessitating response work or repair, any public utility, its agent, affiliate, employee or subcontractor may begin that repair or emergency response work or take any action required under the circumstances, provided that the public utility, its agent, affiliate, employee or subcontractor notifies Sedgwick County Public Works promptly after beginning the

work and timely thereafter meets any requirements established by permit, agreement, or federal, state or county law.

Sec. 22-35. – Applicability of Other Laws.

This Code shall be subject to all other applicable federal and state laws, including but not limited to federal statutes and Federal Aviation Administration regulations that may pertain to heights of wireless telecommunications facilities near airports, local building and electrical code resolutions, and K.S.A. 66-2019.

SECTION 3. 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 4. 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 take effect on the 1st day of October, 2016.

Commissioners present and voting were:

DAVID M. UNRUH	<u>AYE</u>
TIM R. NORTON	<u>AYE</u>
KARL PETERJOHN	<u>AYE</u>
RICHARD RANZAU	<u>AYE</u>
JAMES M. HOWELL	<u>AYE</u>

Dated this 28th day of September 2016.

BOARD OF COUNTY COMMISSIONERS
OF SEDGWICK COUNTY, KANSAS

ATTEST:

KELLY B. ARNOLD, County Clerk

JAMES M. HOWELL, Chairman
Commissioner, Fifth District

RICHARD RANZAU, Chair Pro Tem
Commissioner, Fourth District

APPROVED AS TO FORM:

JUSTIN M. WAGGONER
Assistant County Counselor

DAVID M. UNRUH
Commissioner, First District

TIM R. NORTON
Commissioner, Second District

KARL PETERJOHN
Commissioner, Third District