NOTICE OF MEETING
REGULAR MEETING
PLANNING AND ZONING COMMISSION

Chairperson Dan Kovacevic	
Vice Chairperson Clayton Corey	**Commissioner Nick Porter**
Commissioner Mathew Corrigan	**Commissioner Scott Schlossberg**
Commissioner Peter Gray	**Commissioner Phil Sveum**

TIME: **6:00 PM - REGULAR MEETING**
DOORS OPEN 15 MINUTES PRIOR TO THE START OF THE MEETING.
WHEN: **MONDAY, NOVEMBER 10, 2025**
WHERE: **FOUNTAIN HILLS COUNCIL CHAMBERS**
16705 E. AVENUE OF THE FOUNTAINS, FOUNTAIN HILLS, ARIZONA

REQUEST TO COMMENT

The public is welcome to participate in Commission meetings.

TO SPEAK TO A CONSENT OR REGULAR AGENDA ITEM, complete a Request to Comment card and hand it to the Clerk prior to discussion of that item. Include the agenda item NUMBER on which you wish to comment. A separate submission is required for each agenda item. Request to Comment cards will not be accepted once the Comission deliberations begin. Submit a Request to Comment card prior to a public hearing agenda item.

TO COMMENT ON A CONSENT OR REGULAR AGENDA ITEM IN WRITING ONLY, complete a Request to Comment card, indicating that it is a written comment, check the box on whether you are FOR or AGAINST a consent or regular agenda item, and hand it to the Clerk prior to discussion on that item. A separate submission is required for each agenda item.

TO SPEAK TO CALL TO THE PUBLIC, complete a Request to Comment card and hand it to the Clerk. Speakers will be allowed three contiguous minutes to address the Commission. Verbal comments should be directed through the Presiding Officer and not to individual Commissionmembers.

TO COMMENT IN WRITING ONLINE, Visit https://www.fountainhillsaz.gov/publiccomment and submit a Request to Comment card by 3:00 PM on the day of the meeting. These comments are shared with the Commission.

This Request to Comment card, and any information you write on it, is a public record subject to public disclosure.

1. **CALL TO ORDER AND PLEDGE OF ALLEGIANCE**

2. **ROLL CALL**

3. **STATEMENT OF PARTICIPATION**

Anyone wishing to address the Commission regarding items listed on the agenda or under "Call to the Public" should fill out a Request to Comment card located in the back of the Council Chambers and hand it to the clerk prior to consideration of that agenda item. Once the agenda item has started, late requests to speak cannot be accepted. When your name is called, please approach the podium, speak into the microphone, and state your name and if you are a resident for the public record. Please limit your comments to three minutes. It is the policy of the Commission to not comment on items brought forth under "Call to the Public." However, staff can be directed to report back to the Commission at a future date or to schedule items raised for a future Commission agenda. It is also requested that applause be kept to a minimum to avoid disruption of the meeting, to maintain decorum, and provide for an equal and uninterrupted presentation.

4. **CALL TO THE PUBLIC**

5. **CONSENT AGENDA**

   a. **CONSIDERATION AND POSSIBLE ACTION:** Approving the regular meeting minutes of the Planning and Zoning Commission October 13, 2025.

6. **REGULAR AGENDA**

   a. **PUBLIC HEARING, with CONSIDERATION AND POSSIBLE ACTION:** Relating to a request for approval of a Special Use Permit for property at 13212 N. Saguaro Blvd. (southwest corner of Saguaro and Palisades Blvds.) to reduce the required number of parking spaces by up to nine spaces.

   b. **PUBLIC HEARING, with CONSIDERATION AND POSSIBLE ACTION:** Relating to Ordinance 25-12 rezoning the area bounded by La Montana Dr., Saguaro Boulevard, and Avenue of the Fountains to adopt the Downtown Overly District and to remove the existing Entertainment and Planned Shopping Plaza Overlay Districts to the area bounded by La Montana Drive, Palisades Boulevard, Saguaro Boulevard, and Avenue of the Fountains.

   c. **PUBLIC HEARING, CONSIDERATION AND POSSIBLE ACTION:** Special Use Permit to allow 11 residential units on 11 non-contiguous parcels in a commercial subdivision (Plat 106) generally located north of El Pueblo Blvd. between Fountain Hills Blvd. and Ivory Dr. in the C-C (Community Commercial) zoning district.

   d. **DISCUSSION:** Review and discussion of regulations and court decisions regarding small cell wireless facilities in the Town's rights-of-way.

7. **COMMISSION DISCUSSION/REQUEST FOR RESEARCH TO STAFF**

8. **SUMMARY OF COMMISSION REQUESTS FROM DEVELOPMENT SERVICES DIRECTOR**

9. **REPORT FROM DEVELOPMENT SERVICES DIRECTOR**

10. **ADJOURNMENT**

Dated this 6 day of November, 2025.

Paula Woodward

Paula Woodward, Executive Assistant

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TOWN OF FOUNTAIN HILLS

STAFF REPORT

Meeting Date: 11/10/2025
Meeting Type: Planning and Zoning Commission Regular Meeting
Submitting Department: Development Services / Planning
Prepared by:
Staff Contact Information: Phone:
Email:

Request to Town Council Regular Meeting (Agenda Language)

CONSIDERATION AND POSSIBLE ACTION: Approving the regular meeting minutes of the Planning and Zoning Commission October 13, 2025.

Staff Summary (background)

The intent of approving meeting minutes is to ensure an accurate account of the discussion and action that took place at the meeting for archival purposes. Approved minutes are placed on the
Town's website and maintained as permanent records in compliance with state law.

Related Ordinance, Policy or Guiding Principle

Risk Analysis

Recommendation(s) by Board(s) or Commission(s)

Staff Recommendation(s)

Staff recommends approving the meeting minutes of the regular meeting minutes of the Planning and Zoning Commission October 13, 2025.

Suggested Motion

MOVE to approve the regular meeting minutes of the Planning and Zoning Commission October 13, 2025.

FISCAL IMPACT

Fiscal Impact:
Budget Reference:
Funding Source:

ATTACHMENTS

1. 251030 PZC Minute Summary & Verbatim

TOWN OF FOUNTAIN HILLS
MINUTES OF THE REGULAR MEETING
OF THE FOUNTAIN HILLS PLANNNING & ZONING COMMISSION
OCTOBER 13, 2025

A Regular Meeting of the Fountain Hills Planning & Zoning Commission was convened at 16705 E. Avenue of the Fountains in open and public session at 6:00 p.m.

Members Present: Chairperson Dan Kovacevic (telephonically); Vice Chairperson Clayton Corey (telephonically);Commissioner Mathew Corrigan; Commissioner Nick Proctor; Commissioner Scott Schlossberg (telephonically) and Commissioner Phil Sveum

Members Absent: Commissioner Peter Gray

Staff Present: Development Services Director John Wesley, Senior Planner Farhad Tavassoli, and Executive Assistant Paula Woodward.

TOWN OF FOUNTAIN HILLS
SUMMARY MINUTES OF THE REGULAR MEETING OF THE
PLANNING AND ZONING COMMISSION
OCTOBER 13, 2025

1. CALL TO ORDER, PLEDGE OF ALLEGIANCE AND MOMENT OF SILENCE

Commissioner Sveum called the Regular Meeting of the Fountain Hills Planning and Zoning Commission held on October 13, 2025, to order at 6:00 p.m. and led the Commission and audience in the Pledge of Allegiance.

2. ROLL CALL

Commissioners Present: Chairperson Dan Kovacevic (telephonically); Vice Chairperson Clayton Corey(telephonically); Commissioner Mathew Corrigan; Commission Nick Proctor; Commissioner Scott Schlossberg (telephonically);and Commissioner Phil Sveum

Commissioners Absent: Commissioner Peter Gray

Staff Present: Development Services Director John Wesley, Senior Planner Farhad Tavassoli, and Executive Assistant Paula Woodward

3. STATEMENT OF PARTICIPATION

4. CALL TO THE PUBLIC

None

5. CONSENT AGENDA

a. CONSIDERATION AND POSSIBLE ACTION: Approving the regular meeting minutes of the Planning and Zoning Commission August 11, 2025.

MOVED BY Commissioner Proctor to approve the regular meeting minutes of the Planning and Zoning Commission August 11, 2025. **SECONDED BY** Commissioner Corrigan. 6/0 Unanimously

6. REGULAR AGENDA

a. PUBLIC HEARING, WITH CONSIDERATION AND POSSIBLE ACTION: Ordinance 25-09, amending Zoning Ordinance Chapter 1 (Introduction), and Chapter 19 (Architectural Design Guidelines), authorizing administrative personnel to review and approve design review plans based on objective standards.

MOVED BY Commissioner Proctor to recommend the Town Council approve Ordinance 25-09, amending Zoning Ordinance Chapter 1 (Introduction), and Chapter 19 (Architectural Design Guidelines), authorizing administrative personnel to review and approve design review plans based on objective standards. **SECONDED BY** Commissioner Corrigan. 6/0 Unanimously

b. PUBLIC HEARING, WITH CONSIDERATION AND POSSIBLE ACTION: Request for a Special Use Permit to allow up to six (6) residential units on a 12,000 square-foot property generally located 200 feet west of the of the northwest corner of Avenue of the Fountains and Verde River Drive (16740 E. Avenue of the Fountains; APN#176-27-008) in the C-2 (Intermediate Commercial) zoning district.

MOVED BY Commissioner Proctor to recommend the Town Council approve (with stipulations) a Special Use Permit to allow up to six (6) residential units on a 12,000 square-foot property generally located 200 feet west of the of the northwest corner of Avenue of the Fountains and Verde River Drive (16740 E. Avenue of the Fountains; APN#176-27-008) in the C-2 (Intermediate Commercial) zoning district. **SECONDED BY** Vice Chair Corey. 6/0 Unanimously

c. PUBLIC HEARING, CONSIDERATION AND POSSIBLE ACTION: Special Use Permit to allow 11 residential units on 11 non-contiguous parcels in a commercial subdivision (Plat 106) generally located north of El Pueblo Blvd. between Fountain Hills Blvd. and Ivory Dr. in the C-C (Community Commercial) zoning district.

MOVED BY Chair Kovacevic to continue the PUBLIC HEARING, CONSIDERATION AND POSSIBLE ACTION: Special Use Permit to allow 11 residential units on 11 non-contiguous parcels in a commercial subdivision (Plat 106) generally located north of El Pueblo Blvd. between Fountain Hills Blvd. and Ivory Dr. in the C-C (Community Commercial) zoning district, to the November 10, 2025, Planning and Zoning Commission meeting. **SECONDED BY** Commissioner Corrigan. 6/0 Unanimously

7. COMMISSION DISCUSSION/REQUEST FOR RESEARCH to staff.

Chair Kovacevic inquired about the wireless text amendment status.

8. SUMMARY OF COMMISSION REQUESTS from Development Services Director.

Mr. Wesley said that the plan is to pick up the wireless discussion at the November Planning and Zoning Commission meeting. He said he has met with the new town attorney regarding the wireless text amendment.

9. REPORT from Development Services Director.

10. ADJOURNMENT

Commissioner Sveum adjourned the Regular meeting of the Fountain Hills Planning and Zoning Commission held on October 13,2025 at 7:07 p.m.

Post-Production File

Town of Fountain Hills

Planning and Zoning Commission Meeting Minutes

October 13, 2025

Transcription Provided By:

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Transcription is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings.

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SVEUM: Well, let's do the pledge.

ALL: I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

SVEUM: All right. Thank you.

Paula, roll call please.

WOODWARD: Chairman Kovacevic.

KOVACEVIC: Present.

WOODWARD: Vice Chair Corey.

VICE CHAIR COREY: Here.

WOODWARD: Commissioner Sveum.

SVEUM: Here.

WOODWARD: Commissioner Schlossberg.

SCHLOSSBERG: Here.

WOODWARD: Commissioner Gray.

Commissioner Corrigan.

CORRIGAN: Here.

WOODWARD: Commissioner Proctor.

PROCTOR: Here.

WOODWARD: Okay.

SVEUM: Thank you. Call to the public should fill out a request and hand it over to Paula. Thank you.

Do we have any cards?

WOODWARD: No, Chair.

SVEUM: All right. Nothing on the consent agenda.

WOODWARD: Our meeting minutes.

SVEUM: Oh, yes.

WOODWARD: Item number A.

SVEUM: Okay. Is there a motion to approve the regular meeting minutes of the Planning and Zoning Committee of August 11th, 2025?

PROCTOR: I'll make that motion.

CORRIGAN: Second.

SVEUM: Moved and seconded.

All those in favor?

ALL: Aye.

SVEUM: Opposed? Motion carried.

WOODWARD: 6-0.

SVEUM: All right. Next on the agenda, public hearing with consideration and possible action, ordinance of 2509, amending Zoning Ordinance Chapter 1 and Chapter 19, architectural design guidelines authorizing administrative personnel to review and approve design review plans based on objective standards.

TAVASSOLI: Thank you, Mr. Chairman, members of the commission both up here at the dais and joining us remotely. So as you mentioned, this is a zoning ordinance text amendment to Chapter 19 particularly with a few additions to the definition section of section 1 of Chapter 1. So what is the purpose of this amendment that we're bringing before you? This is staff initiated. However, it is in response to some recent legislation that was approved earlier this year.

Actually, I believe it was codified earlier in the summer, that being HB 2447. Like I said, it's codified in the statutes, and this is to replace -- the purpose of this amendment is in response to that legislation. And particularly here, the purpose is to replace subjective design guidelines that are spelled out in Chapter 19 of the Zoning Ordinance. Those guidelines address particularly architecture, architectural enhancements, features, embellishments, color palettes, things like that. So the purpose is to replace those subjective design guidelines. And I'll explain a little bit more later what we mean by subjective versus objective.

To replace them with objective, measurable standards. It is to enable administrative approval of those objective standards. We already approved site plans administratively, with a few exceptions, but I just wanted to reinforce that point. And also maintain high quality context sensitive development outcomes ultimately. Again, as I mentioned, HB

2447 was approved earlier this year. So this is somewhat going over some of the same stuff I went earlier. But it takes effect at the end of the year. And you might be thinking, well, why are we coming to you at this point here in the last quarter of the year presenting this to you. Well, given the lead time and given the fact that we didn't have a commission meeting, I'm not sure if it was July or August, but it didn't quite work out to bring it before you any earlier. So we staff kind of try to put this together and bring something before you, so we can meet that deadline.

So what are our objective standards. Well, they're not based on personal interpretation or taste. I'll give you some examples of that here in a few seconds. They're verifiable by reference to adopted benchmarks or criteria in the zoning ordinance. And it uses measurable terms such as shall, must. It lists numeric values, for example, when it talks about light reflectivity, sidewalk width. So an example would be a facade. This is particularly in the architecture section. Facade must be -- must include three materials rather than just simply saying facade should include three materials, or it would be great if it would include three materials.

And also, for example, walkways must be 5 feet wide. So we'll start with amending the title. We're going to change it, Chapter 19, the title currently being Architectural Design Guidelines to Architectural Design Standards to reflect a shift from discretionary guidance to enforceable standards. Now, this here is a summary of the amendments that are being proposed in the ordinance, or I should say Chapter 19, in particular. You may have gone through the legislative edits that are attached to the staff report, and you've probably noticed a lot of strikeouts and a lot of additions. Much of that was kind of restructuring so that the language is a little bit more clear.

There were a few additions with regards to applying or implementing some measurable standards, as I mentioned earlier, but largely the outcome that we expect to see in our architectural reviews would closely align with the -- what are now the guidelines and soon to be, hopefully, standards.

What I will do at this point, since there are a lot of edits that you've noticed already, I will -- if you would allow me to slowly, not too slowly, scroll down some of these edits

and starting with Sections 1901 and 1902, which clarifies the purpose and applicability. And at this point, for those two sections, I'll open it up to any questions or comments you might have. Sorry. I'm too fast there, but as you can see -- yes.

KOVACEVIC: I have a question. I think part of 1901, is that with the stacking of the -- is that the section that mentions the stacking of the cars?

TAVASSOLI: 1901. The reference to stacking. That would be -- I'm hearing from John. That would be for the drive throughs --

KOVACEVIC: Yeah.

TAVASSOLI: -- in 1903. Yeah, that would be in the next section.

KOVACEVIC: All right.

TAVASSOLI: Well, 1903 specifically.

KOVACEVIC: Well, when we -- I'll ask my question when we get there.

TAVASSOLI: Okay. Okay. So okay. Well, hearing no comments, I will move on to Section 1903, which addresses site planning. And here, we've added measurable standards with regards to site planning and walkway width. And as Chairman Kovacevic mentioned, stacking particularly -- a stacking capacity of 11 vehicles per lane from a pickup window at a drive through establishment.

Commissioner or Chairman Kovacevic.

KOVACEVIC: Yeah. I guess and I see number 11 came from. That's what's already in our code, but I did -- that just seems like an awful lot of cars to require. And so when I looked at what our neighbors to the south require, and they're in the neighborhood of four, I think maybe three from a pickup window from the order speaker 6. But 11 just seems like an awful lot. Now, I would guess that this isn't maybe the place that we would want to change that; we don't have the time. But between that and the LRV, which we haven't gotten to yet I think some of these standards, we want to -- well, that's my comments.

TAVASSOLI: Okay.

SVEUM: I have a question regarding that as well. Is this -- if it was a pharmacy or a bank, it might have two lanes. Does that include both lanes or just one lane or how

that's --

TAVASSOLI: That's a good question. Well, in this case it says per lane. So we could consider splitting that between two lanes if -- or switch two lanes.

SVEUM: That's -- yeah. I think it is a good point there. That's an awful lot of cars. Probably four or five per lane would be sufficient. But are there other situations where you've come up with -- when you're working with drive throughs that -- if they wanted more or less, or you've had to kind of cut them back, or has it been a problem? Not with 11 probably.

TAVASSOLI: Dutch Bros has a particularly long two lanes.

SVEUM: Yeah. Yeah. That's true.

TAVASSOLI: But other than that, I -- we've actually John and I have dealt with few drive through establishments featuring drive through establishment or drive through lanes. But as you can see, there are many throughout town that have been around for a while.

SVEUM: I was also in that same section looking at avoiding pedestrian. I think the minimizing is a good way to put it because there might be parking. Well, for instance, even at one of the other coffee establishments off of Fountain Hills Boulevard, the line combined way back, but there's parking on the other side of that of that drive through lane. So I mean, you really can't avoid being there. I'm just -- I think minimizing is a good maybe a good term.

Are there other commentary?

CORRIGAN: My thought was the same about the Dutch Bros at any given time on from, let's say, 6 a.m. to 9 even. You might see more than 11 cars, but there are two lanes. So to -- yeah, valid point.

SVEUM: Okay. If I can, what was the rationale for 11 per lane?

TAVASSOLI: That's a good question. As you can see, because it's not -- hasn't been struck out or edited. That's been there for -- that was there previously. I'm not sure if it was from the original ordinance or if it was evolved over time, but.

SVEUM: Perhaps prevailing practice, I mean, I --

TAVASSOLI: Probably. It might have been based on previous models. Now you got

phone orders and pick up windows and things like that.

SVEUM: I concur with what the sentiment that 11 may be a bit much and maybe split them up per lane.

TAVASSOLI: Okay. All right. So anything further on -- for Section 1903, parking and vehicular circulation, site design variety. I'll just go over to 1904, which addresses requirements for facade articulation, color limits, and energy efficient features. And by that, we mean particularly shaded areas and patios and things like that.

So Section 1904(a) addresses facade articulation. And yeah, really much of it is in the same spirit as what is currently in effect, only as you can see here, we've kind of broken it down, so folks can read each of the criteria kind of in a line-item format, one, two, three, four.

SVEUM: Commissioner Corrigan.

CORRIGAN: Farhad, I might be showing my ignorance here, but what is visual interest?

TAVASSOLI: Visual interest. Well, I guess you could say it is -- it has to do with how attractive a building is, or does it -- does the architecture, I guess, kind of attract the attention in any special way of a pedestrian or passerby.

CORRIGAN: And the reason I asked that question is, you know, I guess we're trying to stay away from the subjective and more the definitive is that in the area of maybe subjective versus factual.

TAVASSOLI: Yeah. Something that's kind of hard to measure.

CORRIGAN: I don't know.

TAVASSOLI: It all depends on taste. Yeah. Yeah. Yeah. I understand what you're saying. The hope is with these objective standards such as the ones here one through four, the goal would be to attract some visual interest. Now, whether or not these requirements will actually do that, yeah, that would be subjective. I would agree.

CORRIGAN: Would -- just consistency to the prevailing architectural design of the town, or I don't know quite how to phrase that, but rather than a subjective term as I see it, a visual interest.

TAVASSOLI: Yeah. That's a good point. There's somewhere in here in the zoning

ordinance that or in Chapter 19 where it talks about earth tones or neutral colors, but. Maybe we'll come across it here shortly, but yeah, I understand specificity matters. Moving on here, color and material variation might be in here. So I think Chairman Kovacevic made mention of this, that there is a mention in here of the light reflectivity values as a measurable standard in reviewing architectural features.

KOVACEVIC: I think that's 1906, we'll get -- so we can -- we'll get there.

TAVASSOLI: Okay. Okay. Energy efficiency and shading. Got some measurable standards here. As I said, energy efficiency here. We mean things such as building orientation, shading devices, reflectivity of roofing materials. There's already mention of a misting systems and canopies being permitted. This is not required. Transparency and security. This is to avoid dark things such as dark corridors, hiding spots. There's a section in the general plan that discusses encouraging a safe -- what's called safe by design. I'm not sure if that's a trademarked phrase, but as it is right now, the current -- currently the chapter is the same in the same spirit. Although, again, we're using objective standards here.

Accessibility, screening, utilities and equipment, corporate buildings, infill, and contextual compatibility. So that concludes Section 1904.

Moving on to Section 1905. As you can see here, landscaping and signage. We've defined landscaping quantities, signage integration, and lighting limits as objective standards.

I wish there was a smoother way to scroll down this page.

Water conservation, parking lot, landscaping. And again, I want to reemphasize the fact that currently everything is in paragraph form, and so we've broken it down here to make it easier to navigate and to find the requirements by using the numbers.

Okay. I'm not hearing much, so I'll move on to materials and colors.

So here, we've mentioned permitted and prohibited materials. And there are already some -- I think there were already some prohibited materials mentioned in here in the current version. I want to change the format here to be consistent with the other instead of using bullets, use numbers. Okay. Reflectivity -- yes, Chairman Kovacevic.

KOVACEVIC: Any comments on this yet?

TAVASSOLI: No. Not yet.

KOVACEVIC: Okay. Sorry.

TAVASSOLI: I'm sorry, Chairman. Were you asking if I'm taking comments or have there been any comments?

KOVACEVIC: Are you taking comments?

TAVASSOLI: Oh, yes. Absolutely. Sorry. I misunderstood you.

KOVACEVIC: Okay. Sorry. So with the colors and the LRVs, we have a minimum, but we don't have a maximum. And our neighbors have a maximum, and it's generally 40 or less. And they allow 60 or less on commercial, but 40 or less is residential. And so, you know, again, I don't know if we're addressing the actual standards or just trying to fix them or set them to or document what they already are, I guess is what I'm trying to say. But as we revisit these chapters of the ordinance, we should look at a maximum LRV as well, because it's not comfortable driving down the street and having a sun reflecting off of a bright white house into your eyes. That's all.

TAVASSOLI: Point well taken. There is a -- let's see here. Well, going back to one of the previous sections, 1904, there is a LRV is addressed under the -- let's see. That would be section B, color and materials variation, where for facades, we would be requiring an LRV between 20 and 60. So I'm not sure if that addresses your concern, but not beyond that. Not beyond 60.

SVEUM: The changes that you're -- you put in in the red line, everything, are they compared to surrounding community? Is it any more strict than Scottsdale or Mesa?

TAVASSOLI: Having looked at -- Commissioner Sveum, members of the commission, having looked at some of the other ones, there were a handful of jurisdictions where their design -- well, they would be design standards were measurable, and they've actually provided a rubric. And I don't -- I can't say for sure which one it was that I came across, but I think, it might have been Scottsdale. Yeah. And there were quite a few jurisdictions that already had Queen Creek. I clearly remember speaking with the development services director there, and yeah, they had to make very few changes in

response to this, HB 2447.

SVEUM: It's nice to have kind of a measuring stick with all this and make it your comments easier to -- or your review easier to make and have the applicant understand what the requirements are. Architecture is in the eye of the beholder. So again, putting some meat to it or some teeth to it, it makes a lot of difference. I think it's a good idea. It's hard to follow all of this, I will say, because of all the changes. We spent a lot of time on 5G that goes underground, and we're not spending a lot of time on what's above ground, but I mean it. So that's -- I think it's -- I don't know if this has to be all decided tonight without having a final copy or. I know your -- we have to have it done by the end of the year, correct?

TAVASSOLI: Right. Yeah. I believe the way the statute is codified, it would need to take effect December 30th, which means we would need to have it approved in November.

SVEUM: Yeah. So any comments from those that are out of town?

Commissioner Corrigan.

CORRIGAN: Farhad, I just wondered with Scottsdale, how did they designate all this? Is it by palette or reflectivity, or how do they measure when it's reference to color? I'm just curious. How do they do that? How do they determine what's an acceptable palette or reflectivity or whatever? Are there restrictions?

TAVASSOLI: I mean, we don't --

CORRIGAN: Let's say, for example, just being outrageous here. Pumpkin orange or parrot blue or you know I mean? Do they define a palette, a color, a scheme?

TAVASSOLI: Mr. Chairman, Commissioner Corrigan, I don't think they -- like, you know, whatever you want to paint your house, you get this fan deck, you know. You wouldn't find a palette an acceptable, I guess, palette of colors. Typically, they're generalized as you know, earth tones or -- yeah. But yeah, that's one objective standard that we don't find, at least from what I've seen.

CORRIGAN: Okay. Thank you.

TAVASSOLI: Yeah. And then, Section 1907 just found this as an opportunity to just clarify the administrative role in appeals procedures. So not much change there. Now,

if there's no more comments about these proposed changes in Chapter 19, we did have to add a definition to the definition section of the zoning ordinance, that being design review plan. The legislation uses that term, but it's really synonymous with site plan. Now, there's no the ordinance uses site plan a lot throughout the ordinance, never design review plan. But we included now both definitions to make the definitions clear and also clarify that they are synonymous with one another. And they do align with the current legislation. And also, to ensure consistency and legal clarity as I just mentioned, with these two -- addition of these two new terms.

So the intended outcome is to ensure compliance with state law and -- to the end of my presentation here, provide predictable, consistent review for applicants and staff, reduced delays by allowing administrative approvals. Like I said, we already do that. But we will be doing the same once these standards become objective and to preserve the town's design, quality and character. So our recommendation is to approve the proposed amendments to Chapter 19 as presented, as well as to add the two definitions to Chapter 1 or specifically Section 1.12.

Got it? Thank you.

SVEUM: Questions? Well, ask for a motion.

CORRIGAN: Before a motion --

SVEUM: I guess I have -- I'm sorry.

CORRIGAN: Oh. I'm sorry.

SVEUM: I should ask if there's any other public --

WOODWARD: No Chair.

SVEUM: All right. I'll close the public hearing and ask further questions.

PROCTOR: I don't think from hearing from other Commissioners, we're ready to approve as written. There were some questions on the stacking. Others on some other areas but not a ton. I'm all for, you know, narrowing the subjective bandwidth. I think this does a good job on that. But I'll just throw a suggestion, perhaps we can buck this back to staff to make those changes and bring it back to us next month for approval or for consideration for approval. Or alternatively, we could make a motion stipulating

what changes we want made and go that way. But I think from listening to other Commissioners, there are a few tweaking areas that we'd like to do.

TAVASSOLI: Chairman, Commissioners, that's what I would recommend. I got a pen handy here. So if -- aside from recording the meeting, but if any specific changes that you'd like to see, now's a good time, and we'll make sure that they're reflected on the version that town council will be receiving next month.

SVEUM: Are we having a meeting next month, John?

WESLEY: Yes, Chair. We will be having a meeting next month. We've got several items that will be on that agenda. We'll point out, as Farhad pointed out earlier, in order to make sure we're compliant with state statute, we need town council to act on this November because it takes 30 days for it to go into effect. So if we're to be done by the end of the year, council needs to act in November. So if you want to continue, it would need to schedule a special meeting within the next week or so for you to come back together to consider those amendments.

SVEUM: Well, does the calendar not work if we meet at our regular -- or it doesn't work for November? Oh.

WOODWARD: The meeting date in November is scheduled November 10th.

KOVACEVIC: Commissioner, can I make a comment here? Like, for instance, the stacking -- the stack, that's already in the Code. That's what our existing code says. That's not something staff came up with to put in a new amendment. It's what it already says. I'd like to suggest that we approve it and ask John and Farhad to revisit the specific numbers that go -- that are in this section of the Code. And that we review them and have the chance to modify them and that they use Mesa, Chandler, Scottsdale, Cave Creek, carefree as -- and compare the numbers to what those municipalities have in their code. Because the -- like the stacking is -- it is way out of line with what everybody else requires, but I don't think this is the night to change that. That's my two cents as far as that goes.

CORRIGAN: So Dan, you are -- you are suggesting to pass it as it's been presented and then address it -- have staff addressed the stacking and bring it back?

KOVACEVIC: Yes, that's what I'm suggesting. Stacking, I think we -- I don't have a complaint with the numbers. I think they need to be restated in that other section of the Code. In 1906 -- I mean, we mentioned it earlier on the facades, but in 1906(e), we should have a statement there that we have a maximum LRV of 60 or whatever it is. But that -- yeah, but that's where I'm at. I would pass it so that so that we can remain compliant with state law and then come back and revisit the actual numbers.

TAVASSOLI: Are you okay with that?

CORRIGAN: Sounds good to me.

TAVASSOLI: Okay.

PROCTOR: Well, with that Mr. Chair, I'll make the motion to move to adopt ordinance 2509 as written.

KOVACEVIC: It's been moved. Is there a second?

SVEUM: Second?

CHAIR KOVACEVIC: All in favor, signify by saying aye.

ALL: Aye.

KOVACEVIC: Opposed? Motion carries.

WOODWARD: 6-0.

KOVACEVIC: Thank you. All right. Next on our agenda is public hearing with consideration and possible action request for a special use permit to allow up to six residential units on a 12,000 square foot property located 200 feet west of the northwest corner of the Avenue of the Fountains and Verde River Drive, which is 16740 East Avenue of the Fountains in the C-2 Intermediate Commercial Zoning district.

TAVASSOLI: Thanks again. Commissioners Sveum, members of the Commission. So some of you might be familiar with this property as it was presented before you as a different special use permit request about a year ago, I think it was about 11 months ago. So this is a 12,000-square-foot vacant lot located just down the street here by the Chase Bank. In between the Chase Bank and a vacant lot immediately to the west of that is a series of commercial buildings, which include establishments like the Thai restaurant and a new martial arts studio. It is zoned C-2 currently with the planned

shopping center overlay, as well as another overlay, that being the entertainment district. The general plan designates it as the Town Center.

Directly to the north is the common parking area that's intended to provide all the parking for Plat 208. And to the south, as I mentioned, is the Avenue and Park Place, one of the phases of Park Place, just beyond that to the south. So this is coming to you as a special-use permit request, because the applicant is proposing more than one residential unit on one of the upper floors. That being a total of six for-sale residential units. Each of those residential units being 31 -- little over 3,100 square feet. Those residential units will be multi-level, but they'll be occupying the second and third floors, and there will be a deck on top of that where the elevators will lead up to, and each individual unit will have its own elevator, I should note.

The commercial suites, of course, would be on the lower level. Each of those suites -- each of those three suites will be approximately 950-square feet. Parking. There will be six private garages for each of those units accommodating a total of two cars. They're pretty -- if you look at the site plan, they're pretty deep. I think it's about 37 or 38 feet in depth. So it may accommodate a tandem arrangement but, certainly, wide enough for cars to park side by side. There is access to the parking in Plat 208 in addition to the shared and on street parking for commercial.

The architecture, as you can see on the lower right, features a desert modern design. The height to the, I believe, to the parapet is just under 40 feet. And as I mentioned, the elevator overrun goes to the 44-foot level.

I should mention for the record, there was some confusion by particularly one of the Commissioners about the previous special-use permit case that came before. I don't quite remember the number of units. I think it's -- 12. Thank you. 12 units. That came in November of 2024. That passed overwhelmingly, however, it did not proceed to the town council meeting as there were some changes in the plans, so to speak.

So the zoning ordinance requirements -- yes.

CHAIR KOVACEVIC: This is Dan.

TAVASSOLI: Yeah.

KOVACEVIC: You're saying that planning and zoning voted unanimously to approve the prior on this lot?

TAVASSOLI: Correct, Chairman Kovacevic. And I believe it was a 7-0 vote. I think everyone was present at that meeting.

SCHLOSSBERG: Hey, Chair. I think I was a nay.

TAVASSOLI: Okay.

KOVACEVIC: What's that?

SCHLOSSBERG: Schlossberg was a nay on that vote.

KOVACEVIC: Okay. So it's 6-1.

TAVASSOLI: 6-1.

KOVACEVIC: Okay.

TAVASSOLI: My apologies. Yeah. But yeah, it did not proceed to the town council. So I was going over the parking requirements here for -- so typically for commercial uses, there's one space required for 275 square feet. Residential requires two and a quarter for each unit in a multifamily arrangement. And so a total of 48 would be required, but the parking requirements are met through the tract 208 common area, plus the private garages I mentioned earlier.

Solid waste is required within 250 feet of walking distance of each of these units. There is currently a trash enclosure within -- well within that distance. It would require approval from Plat 208, the Property Owners Association, prior to any of the residents using that trash enclosure. So there's ongoing discussion between the applicant in the Plat 208 association about perhaps adding an additional enclosure. So public -- the applicant, as required, did arrange a public outreach effort.

I actually had a meeting last month, I believe September 25th with the neighboring landowners and stakeholders to state it more generally. I believe I have this slide titled incorrectly. I think this should be about, basically, consistency with the general plan and the zoning ordinance. But the general plan supports mixed use, walkable development for this area in particular, and encourages compatibility with surrounding uses. In our estimation staff, it meets -- the proposal would meet the zoning ordinance and overlay

district intent with the minor height exception subject to site plan review. This is the -- this is correctly titled.

We believe it's consistent with the general plan and downtown vision, what the applicant is proposing. It supports mixed use, walkable development, and is compatible with surrounding land uses, meets zoning and overlay district intent with the mixed-use nature of what's being proposed with the residential in the second floor, and minor height exemptions are subject to site plan review as well.

I think before I go, I really don't have much more here. But before going ahead in these slides, I thought I'd pull up the site plan. And by the way, the applicant is here as well, has also prepared a presentation. But if I can navigate here and just share a few details real quick.

And again, you've seen this rendering. As I mentioned, the residential units, all six of them here, they will be multi-level on the -- starting on the second floor. First floor, commercial. There will be three -- well, at least three -- actually, more, walkways leading into the commercial level of the building. And then, garages would be, as I mentioned, at the rear. These are actually side view -- this is a side view here. I believe this -- yeah. The side elevation and the front as well. You saw the rendering earlier. And then, the back would feature the garages. And there will be some modifications that will need to be made to the driveways accessing the back of this building. As I mentioned, each of the units will feature an elevator. And I think that's about the extent I wanted to share with regards to the building's design and architectural features.

And I will conclude here shortly if I pull up the right presentation. So our recommendation is to recommend approval of the special-use permit request as presented. There are two stipulations that you see in the staff report but you see a total of five bullets here. Much of this -- three of these are actually taken straight out of the zoning ordinance, such as site plan approval being required and substantial conformance with submitted plans.

And with that, I'll conclude my presentation and open it up to questions. As I mentioned, the applicant is here as well and has prepared a presentation. Thanks.

SVEUM: Questions so far?

Commissioner Corrigan.

CORRIGAN: Farhad, in the -- I know in the analysis staff analysis, one of the comments was it notes here that the applicant is proposing a tandem garage for each unit, but staff is concerned that the length of the tandem garages might be too short. And considering that the request required dimensions for parking stall are 9 by 19 and the garages appear to be shorter than that. Is this part of the modification that you were talking about? Is that what you're referring to?

TAVASSOLI: Now Mr. Chairman, Commissioner Corrigan as was mentioned earlier in my presentation, or perhaps I didn't address this in the staff report, the garage is wide enough for two cars to park side by side. That garage door that you saw earlier in that elevation, 16-feet wide, so certainly, two cars can park in there. Now, the depth is about 38 feet. And so perhaps a two -- perhaps economy sized car and a smaller car could fit right behind it. But certainly, a lot of square footage within that garage. Yeah.

CORRIGAN: Okay. Thank you. I think that's it.

TAVASSOLI: Yeah.

SVEUM: I'll pull up your presentation here. There you go.

DEMOSS: Okay. All right. Okay. Thank you. Hi. My name is Samantha DeMoss. I'm with Rose Law Group, 7144 East Stetson. And I am here tonight for the East Avenue of the Fountain's mixed-use development on behalf of Bondy Construction and Design. So Farhad gave a great presentation, so I won't try to be, too -- I'll try not to be too repetitive, but this is the general conceptual. It's mixed-use right on the avenue of the Fountain's next to the bank.

All right. And so the purpose of our request, it's zoned C-2. We're going to have C-2 uses on the ground floor. The purpose of the SUP is to allow the addition of the residential units. It's going to be six residential units, totaling about a little over 3,100-square feet per unit. And then three small commercial suites on the bottom at about 1,000-square feet. It is vacant, and it's generally located on the corner of East Avenue Fountains and Verde Drive. The lot is a little over a quarter acre. It was originally

platted in the original Plat 208 in 1971, and was replatted in 2001, and has been vacant since then.

And as Farhad mentioned, there was a prior concept before that was withdrawn that had 12 townhomes. And we now have six with the mixed-use concept. Okay. And that's just kind of a street view of where we're at. Okay. And then this is the zoning in the overlays. As I said, it's intermediate commercial. It's also located within the entertainment overlay and the planned overlay district and the general plans and area plans that apply are -- it's in the Avenue District of the Downtown Vision Plan. It is in a mixed-use growth area, and it has a mixed-use designation in the future land use plan.

So this is the preliminary site plan. As you can see, it'll be pedestrian oriented commercial at the ground level, accessible to pedestrians attending the commercial suites on East Avenue of the Fountains. And then, the residents will access it through the back with their private garages. We're set back 5 feet on the front. The sides have a 3-foot setback to allow pedestrian walkway along the sides and no setback on the rear. And the density is about eight-dwelling units per acre and the lot coverage, the ordinance standard is 100 percent, and we are at 79 percent for our lot coverage.

All right. And those are our preliminary architectural elevations. You can see like he was talking about the private two-car garages in the back and they are intended for non-tandem parking. But the garages have elevator access through them to get straight up to your unit if you're a resident. And then there's just the other side elevation.

All right. And then site access and circulation. Just to kind of help you visualize, the residents will enter on North Verde Drive and enter through the back. And we've been in contact with Plat 208 consistently, and we'll have meetings coming up. But they wanted us to meet with them to finalize the site access and shared improvements during the site planning phase.

Okay. And then there's just the back view. Okay. And this is just kind of a general idea of the design concept. Very appropriate in a downtown pedestrian-oriented vertical separation of uses with commercial at the street level. And then it'll be transparent glazing and wide sidewalks to be attractive to the pedestrian and promote safety.

All right. And community outreach. We had five people attend our neighborhood meeting, and most of them were just curious, and we had nothing but positive feedback. We've also been doing outreach with the local owners on the Avenue of the Fountains, and we also presented to the Fountain Hills Chamber of Commerce. And we have their support. And that is our support letter from the Fountain Hills Chamber of Commerce.

All right. And so a little bit about the developer. He's actually local. He's going -- he lives here, and he's going to own and operate it. Him and his family live in Fountain Hills, and they're excited to become further involved with Fountain Hills through this project. And then, that's just kind of some concepts of -- they're very experienced company, and these are concepts they've done in the past kind of proving their track record, especially with infill and mixed-use oriented sites.

Okay. And this just kind of goes over the vision for the downtown and the overlays, entertainment, live, work, play, heavily interactive. And this encourages coordinated multi-tenant development with the pedestrian focus as those overlays intend.

Thank you and I'm happy to take any questions.

SVEUM: Perhaps I missed it. The residential units are rental, or are they for purchase?

DEMOSS: For purchase, yes. So they'll be for sale.

SVEUM: They're for purchase.

DEMOSS: Yeah. The idea is have long-term residents that can live and walk around, and there will also be an association for the condos separately.

SVEUM: Separately.

DEMOSS: Yeah. Uh-huh.

SVEUM: Thank you.

Mr. Corrigan.

CORRIGAN: I understood they were for sale, is that not correct, the six units?

DEMOSS: Uh-huh.

CORRIGAN: Oh, okay.

DEMOSS: Oh, yeah. Sorry. I meant there will be an association for the general property

management, but they're for sale. Uh-huh.

CORRIGAN: What are your thoughts about the commercial users? Any thought put into that or what you're trying to attract as far as retail or service or?

DEMOSS: Yeah. The applicant's currently actively targeting retail lessees. The goal is kind of an anchor tenant is a coffee shop or something along those lines and then just appropriate uses that would complement that.

CORRIGAN: So they'll all be tenants that would pay a sales tax?

DEMOSS: Yes.

CORRIGAN: (Indiscernible) requiring that now. All right. And they're all about 950 square feet, you said?

DEMOSS: Yes. So if there were food related users, they'll be smaller users, like a coffee shop, but yeah, about 950-square feet per. Uh-huh.

CORRIGAN: Okay.

SVEUM: Anyone? Anyone have any other comments of our -- other commissioners? Questions?

Go ahead, Clayton.

SCHLOSSBERG: It's Scott here.

SVEUM: Oh.

SCHLOSSBERG: I just wanted to comment. I mean, I've been doing this a long time with P&Z, and that was I -- in my opinion, arguably the best packet I've ever seen. I mean, I really don't have any questions because it was so well done. So kudos to the Rose Group.

DEMOSS: Thank you. I'm very lucky I have a project manager who's beyond detailed, so I'm sure all your questions were answered, and staff was very helpful as well.

VICE CHAIR COREY: This is Clayton. I agree and great PowerPoint presentation.

DEMOSS: Thank you.

KOVACEVIC: This is Dan. One question for you. The parking is behind the -- where the garages are and behind the building. There's not really a place provided that somebody parking in the Plat 208 parking lot can walk to the front to get into the retail. Has any

thought been given to that?

DEMOSS: Yeah. So there will be setbacks on the sides of the building. Three foot, and there'll be walkways so that they can walk straight through. The reason the setbacks are on the side is so that the residents didn't have to do tandem parking so that they could have that full space. But the full access details will cover in the site planning as we work with the association as well. Thank you.

SVEUM: Any other questions? Comments?

CORRIGAN: I guess I was just curious. This project is in the shopping and entertainment overlay, and that's the request for the special-use permit for that. And I know we've had -- I'll call it a trend of commercial properties turning into other than designated and usually residential. And this, by the way, it's a very attractive project. There's nothing aesthetically or physically wrong with it. It's a beautiful project, but I continue to question the special-use permit process for this. And I recognize that right across the street, Park Plaza, one, retail on the bottom, you know, residential on top. That's the plan that that is consistent. And Park Plaza, two, and three, will probably happen. I understand that, but I am concerned about the special use permit process that we use to continually seemingly turn commercial property into residential. So that's my concern. It's not necessarily something that you would answer, but maybe more for the commission to consider.

And the other thing, do you happen to know the De Ja View condo, which is fairly close to your development project. Do you know if that happens to be a rental or an ownership project? It's maybe two units away. I saw it on the plot.

DEMOSS: I'm not familiar with that project. I'm sorry. I just know ours will be for sale, but I'm not familiar with that one. My apologies.

CORRIGAN: Okay. Thank you.

DEMOSS: Of course.

SVEUM: All right. I guess I will also mention the Fountain Hills Chamber of Commerce letter that you had referenced. We all did get a copy of that. So want to put that into the record.

Any other questions? I'll close the public hearing. Any further discussion?

Is there a motion? Oh, sorry. Go ahead, Dan.

KOVACEVIC: I just wanted to mention to Matt. Matt, the underlying zoning here is C-2. So in order to do residential in a C-2 zoning district, we have to do a special -- but we got a zoning overlay that encourages residential, but we still need to do the special ordered palette. They still have to go through that process.

CORRIGAN: Thank you for the clarification, Chairman Kovacevic. Appreciate that. Thank you.

SVEUM: All right. Is there a motion?

PROCTOR: I'll go ahead and make the motion that we approve the special use permit for up to six dwelling units. All residential units to be on the second and third floors with the two stipulations listed in the staff recommendations.

SVEUM: Second. Is there a second?

COREY: Second.

WOODWARD: Who was that that just second?

CHAIR KOVACEVIC: Oh, that's Clayton.

SVEUM: Clayton. Okay.

All right. Any further discussion?

All in favor, say aye.

ALL: Aye.

SVEUM: Opposed. Motion carried.

DEMOSS: Thank you, Commissioners.

SVEUM: Thank you.

Next, public hearing in consideration of possible action, special-use permit to allow 11 residential units on 11 noncontiguous parcels in a commercial subdivision Plat 106. Generally located at the north of El Pueblo Boulevard, between Fountain Hills Boulevard and Ivory Drive in the city or the community commercial zoning district.

TAVASSOLI: Thank you, again, Chairman, Commissioners. Commissioners, I'm sure you recall this special use permit request for the residential units of Plat 106 came before

you in August, in which the applicant presented a new plan differing from the initial plan about several months before that. The applicant, or rather the Commission, upon conclusion of the presentation and the as proposed voted to post- or rather continue the case to today's meeting to in which the Commission might have expected to see a revised plan.

I'm here to tell you that the applicant is still in ongoing discussions with the owners of Plat 106. Some progress has been made with regard to some proposed -- even more proposed changes in which the hope is that there would be a more organic, more cohesive design. Like I said, it's still ongoing. The applicant is requesting that it be further continued to the November 10th commission meeting. Otherwise, I don't have a presentation before you, but the applicant is here. In case you have any questions for him. Thank you.

SVEUM: Any questions?

CORRIGAN: Yes. Dan, I have one question for John. How many continuances can we give before we can't continue anymore?

WESLEY: So Chair Kovacevic, if the Commission has a limited number that they can do and has to take action, I believe it's within 90 days, but if it's the applicant requesting the continuance, they can basically ask for as many as they want.

KOVACEVIC: Okay. So they can ask for continuances until they get their plan --

WESLEY: Yes. The Commission doesn't necessarily have to agree with the continuance, but you're not under the same obligation to act within a certain number of days when it's the applicant that's requesting the continuance.

KOVACEVIC: Okay. Thank you.

SVEUM: Thank you, John.

All right. Next commission discussion. Request for research to staff. Oh. Oh. I'm sorry.

UNIDENTIFIED SPEAKER: I actually make a motion to vote on this --

SVEUM: Okay.

CHAIR KOVACEVIC: I'll move that we continue to November 10th meeting.

SVEUM: Is there a second?

CORRIGAN: I'll second that.

SVEUM: All in favor?

ALL: Aye.

WOODWARD: 6-0.

SVEUM: Okay. Now, we'll go to Commission discussion/request for research to staff. We're looking for any -- for anything from the staff.

KOVACEVIC: Yeah. Well, I'm wondering, John, when are we going to get back? When can we wrap up wireless broadband?

WESLEY: Chair, yes, I was going to give an update on that here in just a moment. I guess I can't -- and I'll go ahead and do that now if you would like, and kind of move on maybe to our combination of items 8 and 9 here on the agenda as far as my report. I can't say when you're going to wrap it up, but I can say that the plan is to have -- pick up the discussion at your November meeting. As you know, the last time we met, which was June or July on, I can't remember which it was, we started talking about the small cell portion of the requirements, and we went through a presentation of the different pieces of that.

The main controlling document in that is the Terms and Conditions document. And we've been needing our attorney to get up to speed on a number of things. She came on board with the town, and so we had a meeting, again, with her last week to review the progress on her review of that document.

And she felt that she could complete that review and have me some information, so we can be prepared to start talking about it again at the November meeting. That's the goal that we set. And so again, we do plan to pick that particular item up for your November meeting.

At your November meeting, now, my mind just went blank on a couple other things. I know that are on that agenda for how do you remember. I know one is another text amendment, but I can't remember what it's for at the moment, but I guess you'll have the actual rezoning of the downtown to apply the new overlay is one item that I know you'll have on there. So I know there's two or three items for that November meeting.

SVEUM: Any summary of commission requests from development services director?

And you've already given your report. I'll entertain a motion to adjourn.

CORRIGAN: So moved.

COREY: Second.

SVEUM: All those in favor signify by saying "aye."

ALL: Aye.

SVEUM: Opposed. Unanimous. Thank you everybody.

KOVACEVIC: Thanks, Phil.

SCHLOSSBERG: Thank you.

Having no further business, Commissioner Sveum adjourned the Regular Meeting of the Planning and Zoning Commission held on October 13, 2025, at 7:07 p.m.

TOWN OF FOUNTAIN HILLS

_____
Dan Kovacevic, Chairperson

ATTEST AND PREPARED BY:

_____
Paula Woodward, Executive Assistant

CERTIFICATION

I hereby certify that the foregoing minutes are a true and correct copy of the minutes of the Regular Meeting held by the Planning & Zoning Commission of Fountain Hills in the Town Hall Council Chambers on the 13 of October 2025. I further certify that the meeting was duly called and that a quorum was present.

DATED this 10 Day of November 2025.

_____
Paula Woodward, Executive Assistant

TOWN OF FOUNTAIN HILLS

STAFF REPORT

Meeting Date:	11/10/2025
Meeting Type:	Planning and Zoning Commission Regular Meeting
Submitting Department:	Development Services
Prepared by:	John Wesley, Development Services Director
Staff Contact Information:	Phone: 480-816-5138 Email: jwesley@fountainhillsaz.gov

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Request to Town Council Regular Meeting (Agenda Language)

PUBLIC HEARING, with CONSIDERATION AND POSSIBLE ACTION: Relating to a request for approval of a Special Use Permit for property at 13212 N. Saguaro Blvd. (southwest corner of Saguaro and Palisades Blvds.) to reduce the required number of parking spaces by up to nine spaces.

Staff Summary (background)

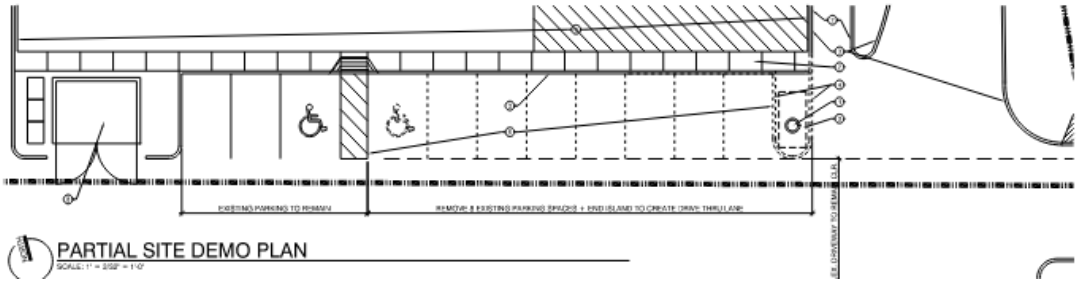
The Request

The property owner at 13212 N. Saguaro Blvd (southwest corner of Saguaro and Palisades Blvds.) is requesting approval of a Special Use Permit (SUP) to allow a reduction in the total number of parking spaces required for the existing building. This SUP request is allowed by Zoning Ordinance Section 26.06 A, which allows up to a 50% reduction of required parking for properties within the Planned Shopping Plaza Overlay District.

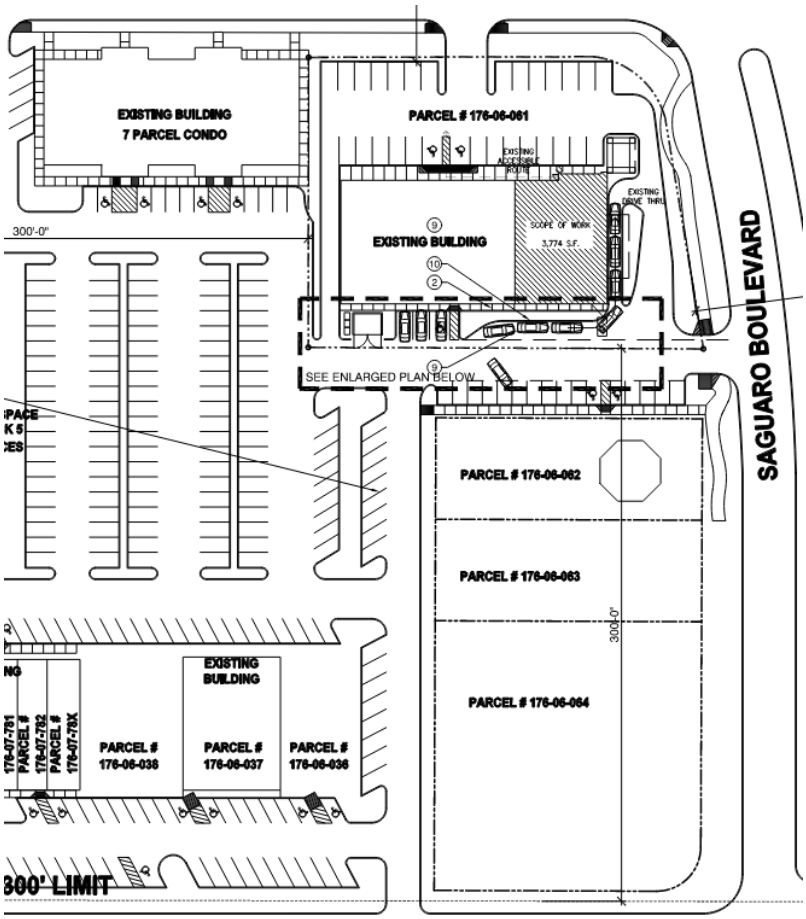
Section 7.06 of the Zoning Ordinance establishes the minimum parking requirements for developments. For lots such as this with a group commercial building that can have a variety of uses in it over time, the parking requirement is one space for each 275 gross square feet of floor area. This building requires 41 parking spaces. There are 41 spaces currently provided on the lot.

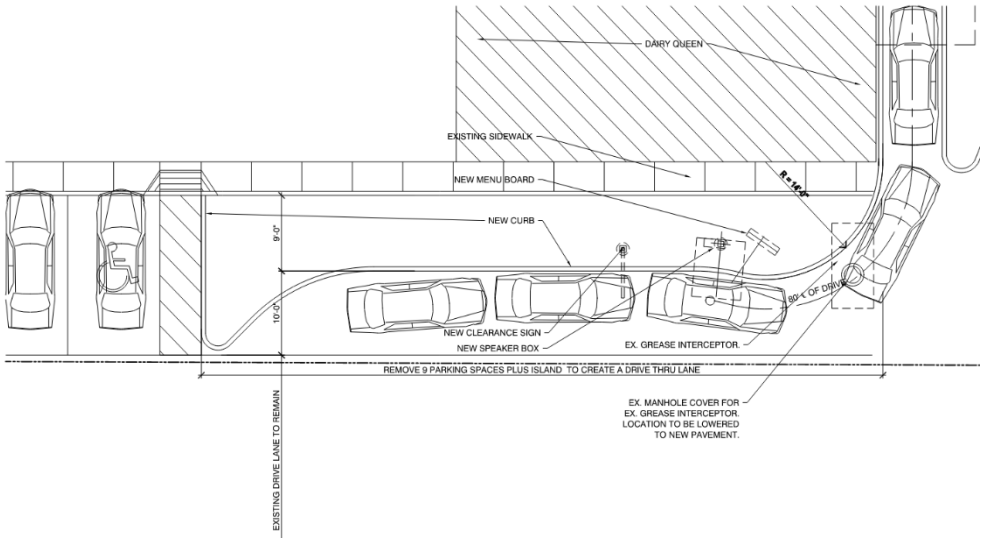
A suite in the building is being remodeled to a quick-serve restaurant (Dairy Queen). The standard for Dairy Queen is to have room for a minimum of five vehicles between the pick-up window and the order board. There is also a need for vehicles to stack behind the order board in a way that does not block traffic. To provide the needed drive-up lane, parking spaces and a landscape island need to be removed from the south side of the building.

Existing parking spaces and landscape island to be removed:



Site plan for the proposed drive-up lane:





General and Area Plans

Fountain Hills General Plan 2020

Character Areas

GOAL 1: Encourage future development, redevelopment and infill in a manner that will

maintain and protect existing neighborhoods, the Town's economic health, community well-being, and natural environment.
GOAL 2: Development, redevelopment and infill support Fountain Hill's small-town identity and the distinct character of each area while fostering long-term viability.
GOAL 4: Allow the Town Center to achieve its full potential.

2. Attract and retain small and medium-sized businesses to mixed-use projects in the Town Center to promote day and evening activities.

Zoning Ordinance

This lot and the surrounding area is zoned C-2 and developed with a variety of commercial uses. The Zoning Ordinance, Chapter 12, defines the intention of the C-2 zoning district as follows:

"C-2. Intermediate Commercial Zoning District: The principal purpose of this Zoning District is to provide for the sale of commodities and the performance of services and other activities in locations for which the market area extends beyond the immediate residential neighborhoods. Principal uses permitted in this Zoning District include furniture stores, hotels and motels, restaurants, and some commercial recreation and cultural facilities such as movies and instruction in art and music. This Zoning District is designed for application at major street intersections"

Section 26.06 A of the Zoning Ordinance allows for consideration of reducing the required parking in the Planning Shopping Plaza Overlay zoning district through a Special Use Permit. This section of the ordinance allows for a reduction of up to 50% of the required parking.

Section 2.02 of the zoning ordinance establishes the process and criteria for consideration of a SUP. Section 2.02 F. 1. d. of the zoning ordinance states:

d. In order to recommend approval of any use permit, the findings of the Commission must be that the establishment, maintenance, or operation of the use or building applied for will not be detrimental to the public health, safety, peace, comfort, and general welfare of persons residing or working in the neighborhood of such proposed use, nor shall it be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the Town.

Analysis

This area has been zoned, platted and developed for a variety of commercial and business uses. Plat 208 was developed with a large common parking field to serve the needs of most of the lots within the Plat. The exception was five larger corner lots that are to provide all of their own parking. This lot is one of the lots required to provide its own parking. The use being proposed for the site will require elimination of up to nine existing parking spaces.

Based on the requirements stated above, the consideration for approval of this SUP is based on the Commission determining the following conditions have been met.

- Will approval of the SUP to reduce the on-site required parking be detrimental to the public health, safety, peace, or comfort of the neighborhood?

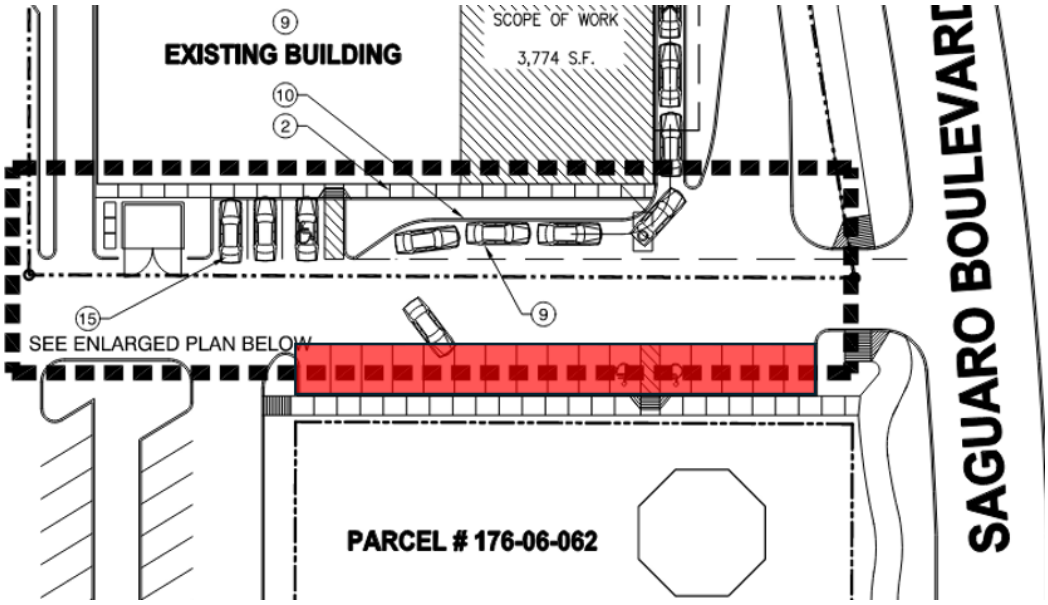
In practice today, the other uses of this building do not generate much parking demand. The parking lot typically has ample spaces available to serve the new restaurant use. The applicant has provided information stating they calculated a parking demand for the

restaurant at 16 spaces.

The eastern end of the block (area bounded by Verde River, Palisades, Saguaro, and Parkview) contains 216 common-use parking spaces. The calculated parking requirement for this area at build out will need is 142 parking spaces. Based on this calculation, there is an excess of 74 spaces. If there is a high concentration of restaurants or medical offices in this area, the number of excess spaces would be reduced.

- Will approval of the SUP be detrimental or injurious to the current commercial improvements within this Plat?

Staff has been in discussions with owners of the two lots along Saguaro south of this property. They are considering restaurant uses of these properties. The owner of the lot immediately south of the access drive has concerns that reduced parking on this lot will impact the parking available for her lot (the area in red below). Given access challenges from this area to the businesses, customers are unlikely to park here, but employees might.



A related concern comes from the proposed re-use of the parking area as a drive-thru lane. The site plan provided shows a maximum of 7 cars stacked from the pick-up window to the end of the drive-up lane. There are only two spaces behind the vehicle stopped at the menu board. Under the ordinances today, there is no specific requirement for the number of stacking spaces required. Chapter 19 of the zoning ordinance recommends 11 spaces. Staff has researched the stacking requirement in other jurisdictions and find that most require six or seven spaces behind the pick up window.

Staff has some concern the stacking behind the menu board will impede circulation in the driveway from Saguaro leading into the parking lot. The owner of the lot to the south has also expressed some concerns that stacking in this drive-thru lane could impact costumers coming and going from her business. The applicant has supplied

information from their corporate perspective that states they are comfortable this amount of stacking will work for this building and will not cause a conflict. There is also a commitment from the applicant that if a problem arises they will put out cones to direct the traffic.

- Will the approval of this SUP be detrimental or injurious to the general welfare of the Town?

Staff has not identified any impacts of approval of this SUP on the general welfare of the Town.

ADDITIONAL ITEMS
The documents submitted with the application show a menu board 40 square feet in size. The maximum allowed by code is 20 square feet. Further, there is an approved comprehensive sign plan for this property that also limits the size of a menu board to 20 square feet. The size of the menu board is not part of this request. However, because this information was included in the packet of materials for this SUP, staff does not want the applicant to believe approval of the SUP also approves the menu board.

There is an existing grease interceptor for the sanitary sewer in the landscape island at the corner of the building. In order to construct the new drive-thru lane, they will remove the landscape island and lower the manhole for the grease interceptor. Fountain Hills Sanitary District has expressed concerns with this solution and wants to see the grease interceptor moved. Again, this is not directly an issue at this point but will be if the SUP is approved, and they move forward with the drive-thru lane.

Citizen Participation
Copies of the applicant's citizen participation plan and report are attached. Two virtual meetings were held, one on October 15 and one on October 22. Two neighbors attended the meeting on the 15th; no one attended the meeting on the 22nd.

Concerns raised at the meeting on the 15th included:

- Concern about stacking traffic from the drive-thru blocking the main drive to the south of the property.
- Common parking parcel, the POA concerned about dedicating parking to this tenant.

Applicant responses to these concerns included:

- The applicant noted that they would address any parking that blocked the main drive immediately. The applicant said they would use cones or other necessary measures to immediately address traffic. The neighbor was comfortable with this proposal.
- The applicant had several calls with HOA and Town staff to address parking. The HOA submitted a letter to staff on October 22, 2025, supporting our proposal and use of parking.

Related Ordinance, Policy or Guiding Principle

Zoning Ordinance Section 2.02, Special Use Permits
Zoning Ordinance Section 7.06, Schedule of Off-street Parking Spaces
Zoning Ordinance Chapter 26, Planned Shopping Plaza Overlay

Risk Analysis

N/A

Recommendation(s) by Board(s) or Commission(s)

N/A

Staff Recommendation(s)

There is clearly excess parking in the area today. The property owner projects there are plenty of spaces on the lot to contain all the parking necessary for the proposed use. Staff has some concern that the stacking of vehicles for the order board will interfere with or block traffic using the adjacent driveway and seeks comments from the Commissioners regarding these possible impacts on the area.

If the Planning and Zoning Commission is satisfied the issue with the stacking of vehicles for the future drive-thru lane can be handled, Staff recommends approval of the SUP to allow a reduction of up to nine parking spaces on this lot, leaving a requirement for a minimum of 32 spaces on this lot.

Conditions that could be placed on the approval to address concerns include:

- Resolving the issue of the location of the grease interceptor with the Fountain Hills Sanitary District prior to submission of a building permit application.
- Requiring all employees of businesses in this building to park either on site or in the parking area to the southwest, not in the parking spaces directly to the south.

Suggested Motion

MOVE TO recommend approval of SUP25-000002 to allow a reduction of up to 9 parking spaces subject to the conditions listed in the staff recommendation.

FISCAL IMPACT

Fiscal Impact:
Budget Reference:
Funding Source:

ATTACHMENTS

1. Case Details Map
2. 009-narrative-9-3-2025
3. site plans (1)
4. Dairy Queen ENLARGED SITE PLAN w 14' Turning Rad (10-29-25)
5. Citizen Participation Plan Response Report-10-23-25
6. 011-GOOD NEIGHBOR STATEMENT
7. letter regarding grease interceptor-10-23-25
8. SUP-PROPOSED SITE PLAN WITH SEWERLINE (10-23-25)

Special Use Permit Vicinity Map

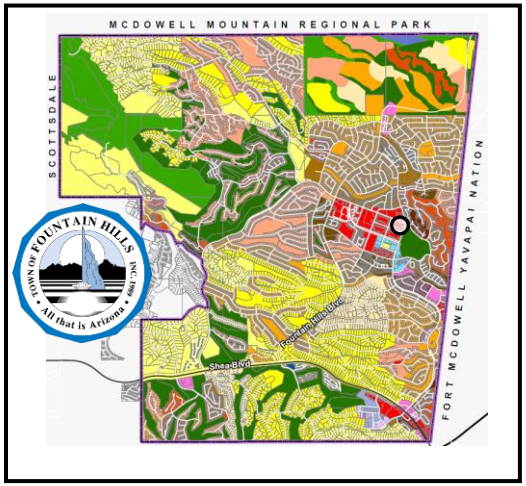
Case Details

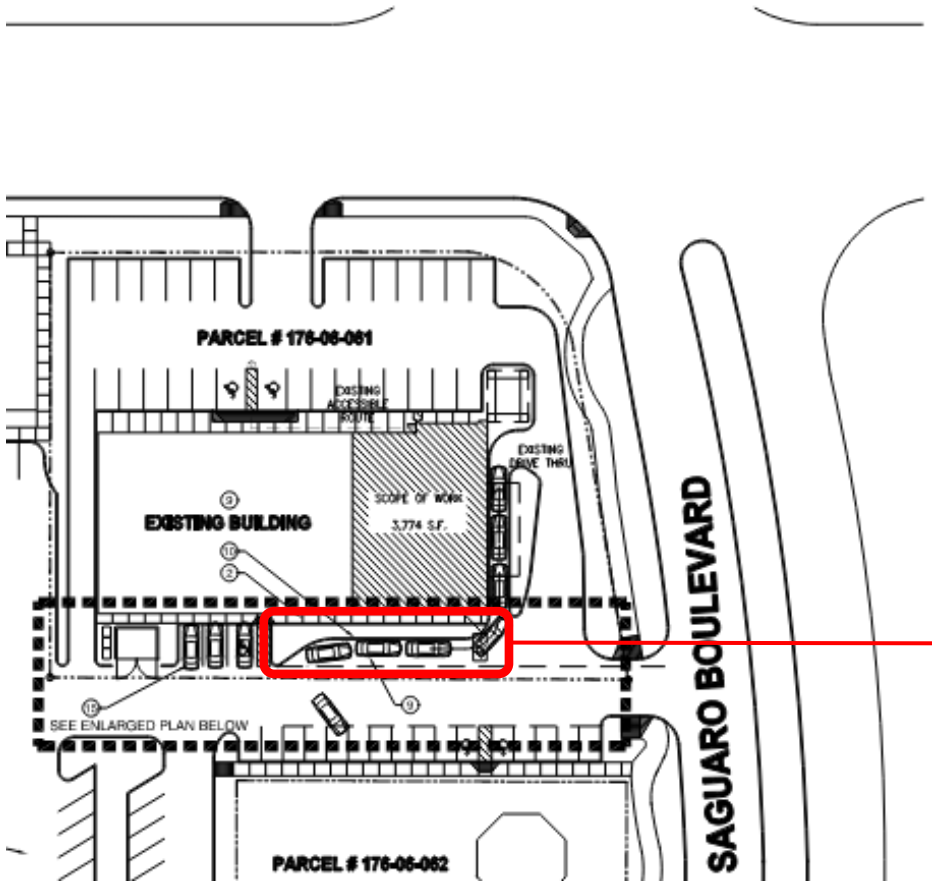
CASE:
SUP25-000002

SITE / ADDRESS:
13212 N. Saguaro

REQUEST:
Reduce the required parking on the lot by up to nine (9) parking spaces

Site Location





PLAN NOTES

1. EXISTING BURIED GREASE INTERCEPTOR TO REMAIN IN PLACE. MANHOLE LID TO BE LOWERED AS REQUIRED TO BE FLUSH WITH NEW DRIVE LANE.
2. EXISTING SIDEWALK TO REMAIN IN PLACE.
3. EXISTING CURB TO REMAIN IN PLACE.
4. REMOVE EXISTING CURB AT ISLAND.
5. REMOVE 8 PARKING SPACES TO CREATE DRIVE THRU LANE.
6. EXISTING BUILDING.
7. EXISTING DRIVE THRU LANE.
8. EXISTING TRASH ENCLOSURE TO REMAIN.
9. PROPOSED NEW DRIVE THRU LANE. SEE ENLARGED PLAN ON SHEET A-2. SEE DEMO PLAN BELOW ON THIS SHEET.
10. PROPOSED NEW CONCRETE CURB TO DEFINE NEW DRIVE THRU LANE.
11. EXISTING COMMON PARKING AREA TO TO USED FOR THE 8 SPACES WE ARE DELETING TO CREATE THE DRIVE THRU LANE.
12. NEW DAIRY QUEEN HEIGHT CLEARANCE BAR. SEE CUT SHEET.
13. NEW DAIRY QUEEN SPEAKER PYLON AND CANOPY. SEE CUT SHEET.
14. NEW DAIRY QUEEN MENU BOARD. SEE CUT SHEET.
15. EXISTING PARKING TO REMAIN.

Location where parking spaces will be removed

September 3, 2025

Town of Fountain Hills
Development Services
16705 East Avenue of the Fountains
Fountain Hills, Az. 85268

RE: Special Use Permit
Dairy Queen
13212 North Saguaro Blvd.
Fountain Hills, Arizona

NARRATIVE

Location

The property address is 13212 North Saguaro Blvd. and the site area is approximately 41,004 SF (0.9413 acres). This property is Parcel # 176-06-061and it is located on southwest corner of North Saguaro Blvd. & East Palisades Blvd.

This property is zoned C-2 and is currently occupied by a single, one-story retail building with three (3) tenants. Our client is Dairy Queen and they will be occupying approximately 3,774 SF at the east end of the building. The total area of the building is approximately 11,260 SF. Parking Required for this building is 11,260 SF / 275 = 41 Spaces.

Parking Provided on-site for this building is 41 Spaces.

This parcel is located on the northeast corner of a development of parcels that surround a large lot used for common parking. This common parking lot has 287 shared parking spaces.

Proposal Development

Back in the early 2000's there was a Dairy Queen in this building at this location. There is an existing drive-through lane at the east end of this building. Over the past 18-20 years this space has been used as a fitness center, a bank and an office space. Our client is looking to put a new Dairy Queen Restaurant in this location. They plan to use the existing drive thru window on the east side of the building. Due to current Dairy queen corporate requirements, they need to provide a 5-car stacking Distance (approximately 80') from the order speaker to the pick-up window. They also need to provide a 2-car stack behind the order speaker.

We are proposing to eliminate 8 parking spaces along the south side of our building to create a drive thru lane that provides the drive-thru lane for required stacking, that is clear of the required 2-way drive lane. We will provide a new concrete curb to create and define this drive-thru lane. We will also add a clear height monument to call out drive thru clearance, a speaker monument with a canopy and a menu board. See attached plans and cut sheets of Dairy Queen standard elements.

leonardARCHITECTS
2716 north 16th street phoenix arizona 85006 602.571.5711 jack@leonardarchitects.com

We are proposing to replace these 8 spaces we are losing with 8 spaces from the Common Parking Area. The property owner has agreed to this new drive thru lane and the use of the common parking.

We are not aware of any conditions or restrictions that would prevent this proposed development.

Existing Property Access

- There is existing road access to the property from the north off of East Palisades Blvd. This road does not have a median and there is access from both directions.
- There is a drive along the west end of the property that connects the front parking with the parking in the rear.
- Along the east side of the property there is an existing drive-thru lane with a canopy and a by-pass lane.
- To the south of the property, there is a driveway that provides access to the parking on the south side of the building as well as access to the large common parking lot. Saguaro Boulevard at this point has a median, so you only have access to enter the property when traveling south on Saguaro Blvd. When leaving the property, you may only exit to the south as well.
- Access to the large common parking lot has access off on N. Verde River Drive to the west, East Palisades Blvd. to the north, and East Parkview Ave. to the south.

SUMMARY

We believe our proposal to relocate 8 parking spaces and create a drive thru lane will not have a negative impact on the property and it will allow a restaurant with a drive thru to be located on this site. The town and the property owner both agree that a restaurant will be a good addition to this area and serve a need. The property owner is in support of this proposal. The size of the standard Dairy Queen Menu Board will be sized to comply with the Town of Fountain Hills Sign Plan.

leonardARCHITECTS
2716 north 16th street phoenix arizona 85006 602.571.5711 jack@leonardarchitects.com

PHOTOS

Photo of rear of building looking west.

Photo of rear of building looking east. This is the island that will be removed for the drive thru lane.

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2716 north 16th street phoenix arizona 85006 602.571.5711 jack@leonardarchitects.com

Rear of building looking to the north and the existing drive thru on the east side of the building.

Sincerely,

Jack Leonard AIA, NCARB, LEED AP

Exhibits: Sheet A1 Context Plan and Demo

Sheet A2 Proposed site plan and Enlarged Plan of Proposed Drive Thru Lane

Dairy Queen Clearance Bar

Dairy Queen Speaker Plyon & Canopy

Dairy Queen Menu Board.

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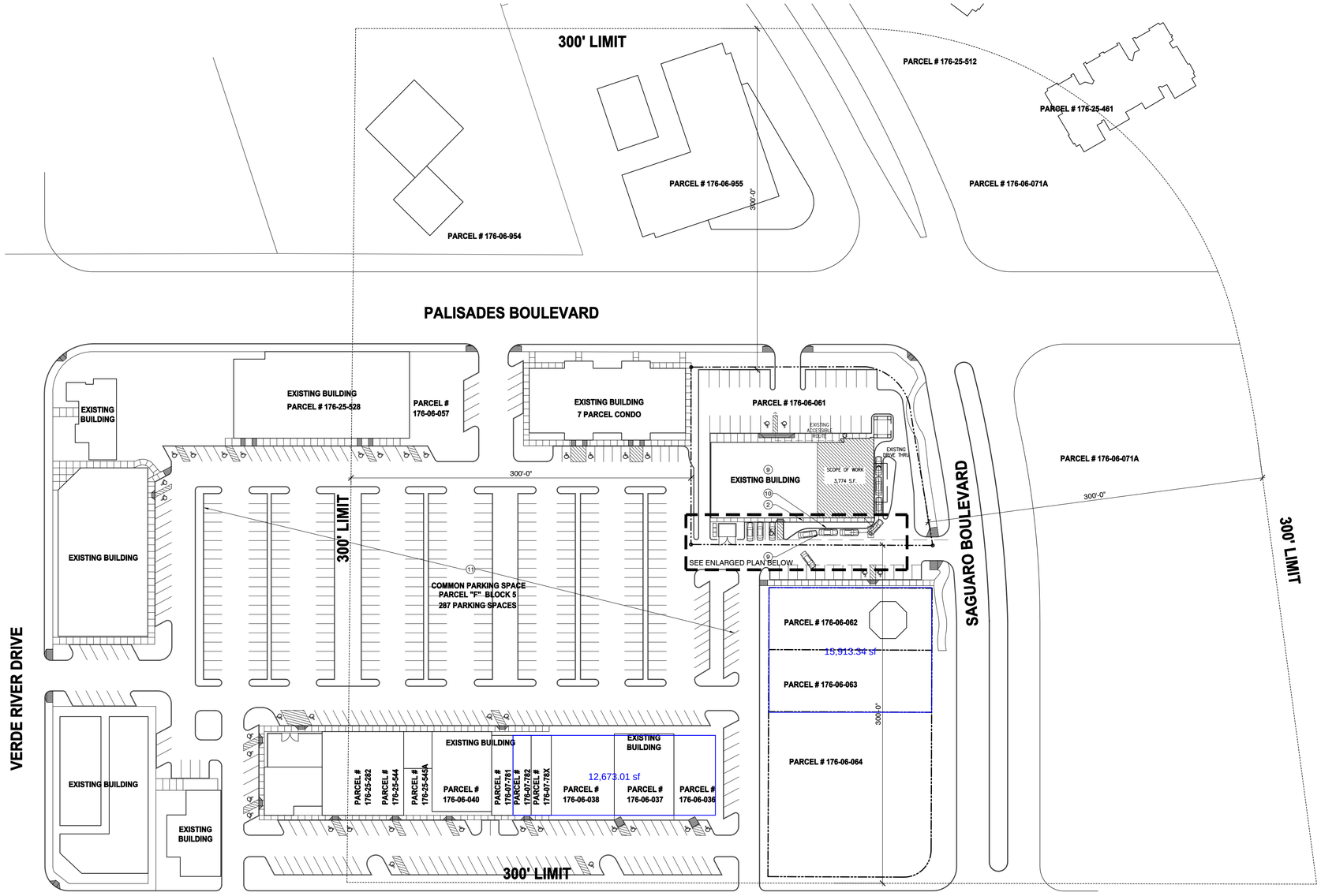
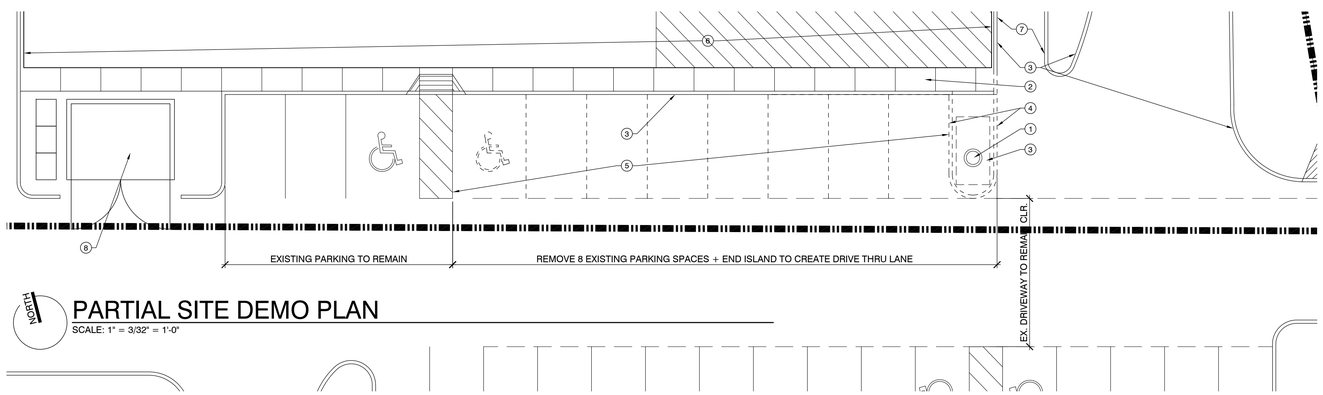
2716 north 16th street phoenix arizona 85006 602.571.5711 jack@leonardarchitects.com



NORTH

SITE CONTEXT PLAN

SCALE: 1" = 50'-0"



NORTH

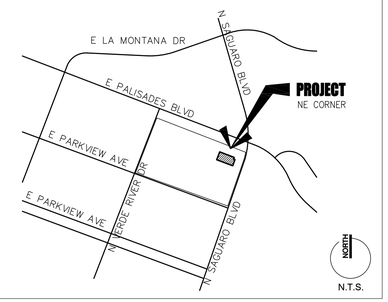
PARTIAL SITE DEMO PLAN

SCALE: 1" = 3/32" = 1'-0"

PROJECT DATA

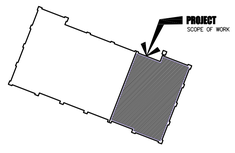
PROJECT ADDRESS:	13212 N. SAGUARO BLVD. FOUNTAIN HILLS, ARIZONA 85284
A.P.N.:	176-06-061
TENANT NAME:	DAIRY QUEEN ADDRESS CITY, STATE ZIP CODE
CONTACT:	NAME (XXX) XXX-XXXX
PROJECT AREA:	3,774 S.F.
BUILDING AREA:	11,260 S.F.
OCCUPANCY:	A-2 / B (GENERAL OFFICE) NO OCCUPANCY SEPARATION REQUIRED
OCCUPANT LOAD:	3,774 S.F. / [100] [150] = XX (XX EXITS REQUIRED)
CONSTRUCTION TYPE:	5B WITH AUTOMATIC SPRINKLERS
PROPERTY ZONING:	C-2
FIRE SPRINKLERS:	YES (SEPARATE PERMIT)
FIRE ALARMS:	YES (SEPARATE PERMIT)
BUILDING CODES:	ALL CONSTRUCTION SHALL COMPLY WITH THE FOLLOWING CODES AND AMENDMENTS PER THEIR ADOPTING ORDINANCES: XXXXXX
BLDG. PARKING REQUIRED:	11,260 S.F. / 275 = 41 SPACES
PARKING PROVIDED:	41 EXISTING. WE ARE PROPOSING TO ELIMINATE 8 SPACES ON THIS PARCEL AND USE 8 SPACES FROM THE COMMON PARKING AREA THAT IS SHARED PARKING.
DESCRIPTION OF WORK:	COMMERCIAL TENANT IMPROVEMENT INTERIOR REMODEL PROJECT. WORK INCLUDES: MINOR DEMOLITION, NEW INTERIOR PARTITIONS, MECHANICAL, PLUMBING AND ELECTRICAL AND FIRE PROTECTION. NO STRUCTURAL OR EXTERIOR MODIFICATIONS. NO MEDICAL GAS IN SCOPE OF WORK. FIRE PROTECTION UNDER SEPARATE PERMIT.

PROJECT LOCATION



[KEY / SITE] PLAN

THIS SUITE IS ON THE FIRST FLOOR OF A ONE-STORY BUILDING. THIS SUITE IS A GROUP "B" & "A-2" OCCUPANCY AND [ALL ADJACENT SUITES ARE GROUP "M" & "B" OCCUPANCY.



KEYNOTES

1. EXISTING BURIED GREASE INTERCEPTOR TO REMAIN IN PLACE. MANHOLE LID TO BE LOWERED AS REQUIRED TO BE FLUSH WITH NEW DRIVE LANE.
2. EXISTING SIDEWALK TO REMAIN IN PLACE.
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9. PROPOSED NEW DRIVE THRU LANE. SEE ENLARGED PLAN ON SHEET A-2. SEE DEMO PLAN BELOW ON THIS SHEET.
10. PROPOSED NEW CONCRETE CURB TO DEFINE NEW DRIVE THRU LANE.
11. EXISTING COMMON PARKING AREA TO TO USED FOR THE 8 SPACES WE ARE DELETING TO CREATE THE DRIVE THRU LANE.

APPROVALS

leonardarchitects
2716 North 16th Street
Phoenix, Arizona 85006
phone 602.571.5711
jack@leonardarchitects.com

REGISTERED ARCHITECT
CERTIFICATE NO.
21361
JOHN G.
LEONARD JR.
ARIZONA U.S.A.
EXPIRES 06 30 27

SPECIAL USE PERMIT APPLICATION

DAIRY QUEEN

13212 N. SAGUARO BLVD., SUITE XXX
FOUNTAIN HILLS, ARIZONA 85284

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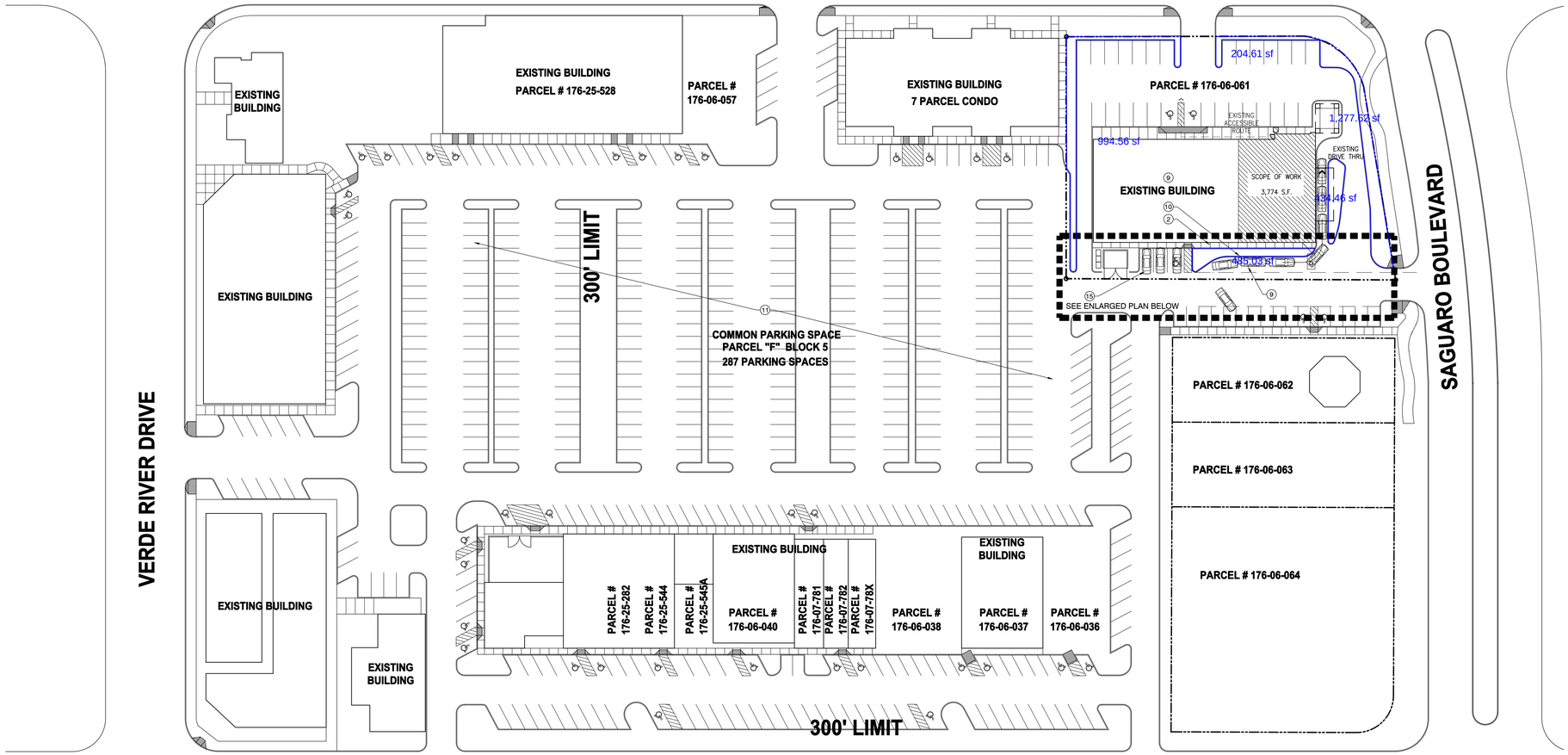
Dates
09 03 2025

Drawn By
JGL

Project Number
2025032

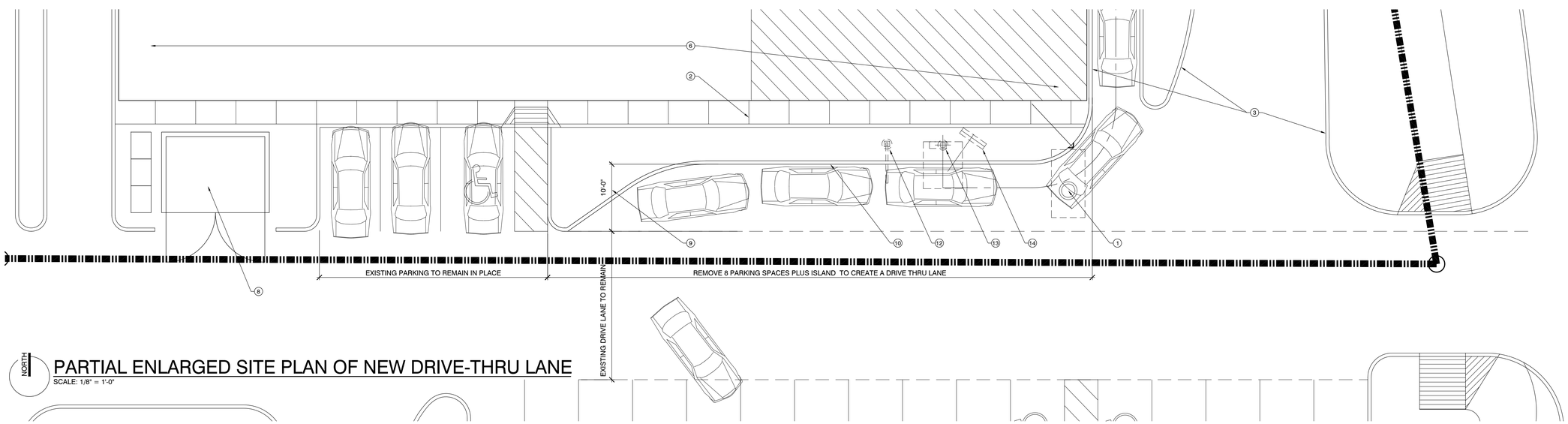
Drawing Number
A1



NORTH

OVERALL SITE PLAN OF NEW DRIVE-THRU LANE

SCALE: 1" = 40'-0"



NORTH

PARTIAL ENLARGED SITE PLAN OF NEW DRIVE-THRU LANE

SCALE: 1/8" = 1'-0"

PLAN NOTES

1. EXISTING BURIED GREASE INTERCEPTOR TO REMAIN IN PLACE. MANHOLE LID TO BE LOWERED AS REQUIRED TO BE FLUSH WITH NEW DRIVE LANE.
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13. NEW DAIRY QUEEN SPEAKER PYLON AND CANOPY. SEE CUT SHEET.
14. NEW DAIRY QUEEN MENU BOARD. SEE CUT SHEET.
15. EXISTING PARKING TO REMAIN.

leonardarchitects
2716 North 16th Street
Phoenix, Arizona 85006
phone 602.571.5711
jack@leonardarchitects.com

REGISTERED ARCHITECT
CERTIFICATE NO.
21361
JOHN G. LEONARD JR.
Date Signed 09-03-25
ARIZONA U.S.A.

EXPIRES 06 30 27

SPECIAL USE PERMIT APPLICATION

DAIRY QUEEN

13212 N. SAGUARO BLVD., SUITE XXX
FOUNTAIN HILLS, ARIZONA 85284

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Dates
09 03 2025

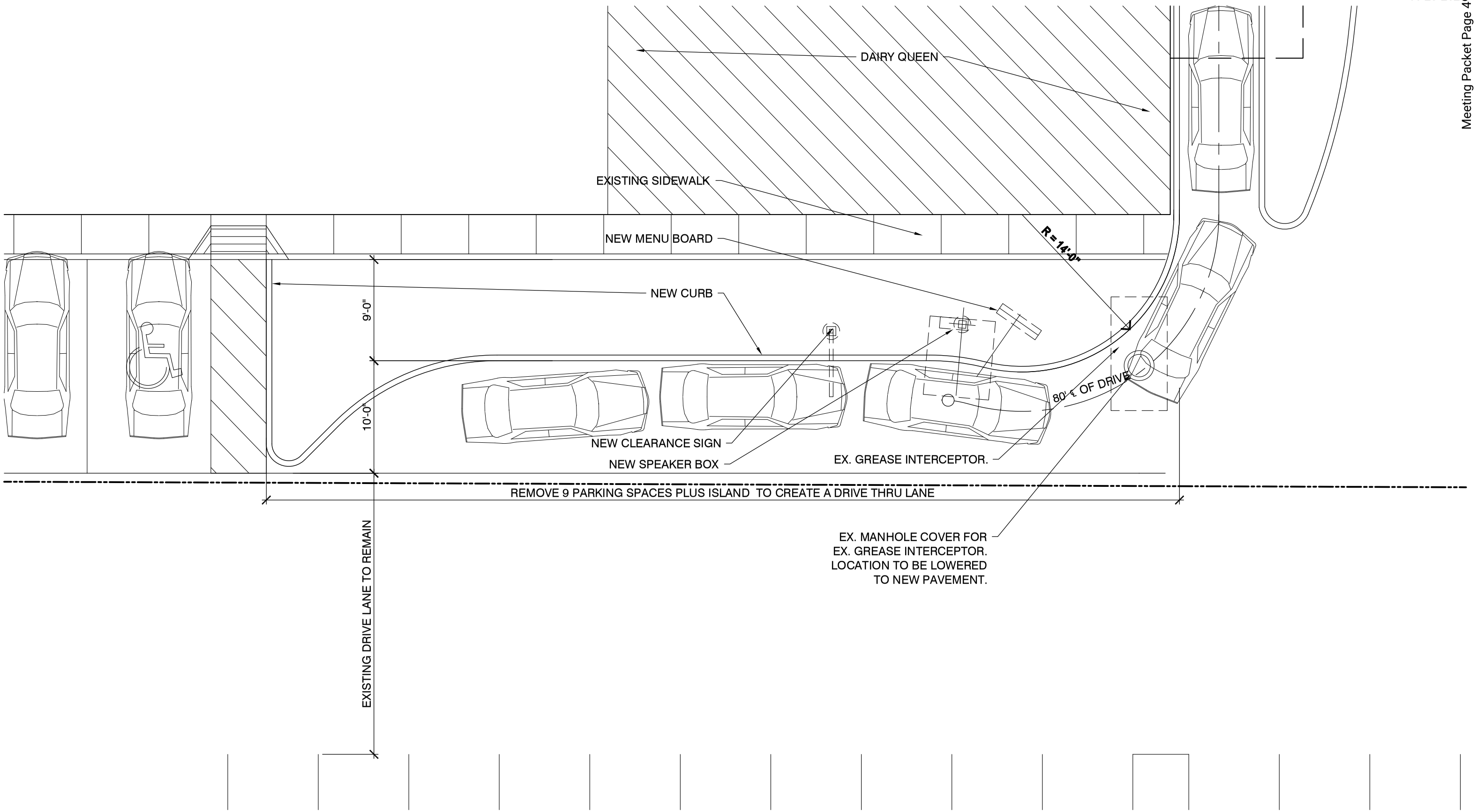
Drawn By
JGL

Project Number
2025032

Drawing Number

A2

Meeting Packet Page 49 of 398



ENLARGED SITE PLAN

SCALE: 1/8" = 1'-0"

NOT FOR CONSTRUCTION

DAIRY QUEEN

13212 N SAGUARO BLVD
FOUNTAIN HILLS, ARIZONA 85284

Citizen Participation Plan for Dairy Queen Drive-thru Special Use Permit

Date: September 19, 2025

Purpose: The purpose of this Citizen Participation Plan is to inform citizens, property owners, and nearby neighborhood associations of the special use permit application for a new restaurant with a drive-thru. This plan will ensure that those affected by this application will have an adequate opportunity to learn about and comment on the proposal.

Applicant:
Amit Verma, Dairy Queen
(480) 277-2358
email: dqds16@yahoo.com

Architect:
Jack Leonard; Leonard Architects
(602) 571-5711
Email: jack@leonardarchitects.com

Location: The property being considered for this SUP is located at the southwest corner of North Saguaro Blvd. & East Palisades Blvd. (see attached location map.) The property address is 13212 North Saguaro Blvd.

Action Plan: In order to provide effective citizen participation in conjunction with this application, the following actions will be taken to provide opportunities to understand and address any real or perceived impacts of the development that members of the community may have.

1. A contact list has been developed for citizens and HOA's within 300' of the project location.
2. All persons listed on the contact list will receive a letter describing the project, project schedule, site plan and invitation to a series of two neighborhood meetings to be held virtually. The letter will also include access information for anyone wanting to attend the meetings virtually. We mailed out letters to all neighbors and HOA's within the 300' limit. These were mailed out on September 28, 2025 and October 9, 2025.
   - The first meeting will be an introduction to the project, and opportunity to ask questions and state concerns. A sign-in list will be used and comment forms provided. Copies of the sign-in list and any comments will be submitted with the Citizen Participation Report.
   - The second meeting will be held one week later, if necessary, and will include responses to questions and concerns of the first meeting. A sign-in list and comment cards will be provided to the Town with the Citizen Participation Report.
3. Presentations will be made to groups of citizens or neighborhood associations upon request. Copies of the sign-in list and any comments will be submitted with the Citizen Participation Report.
4. An email will be sent to the case planner following each of the scheduled meetings, and at any other time there is significant input, to inform the staff of the progress of implementing the Plan.

Schedule:

Submit Application:	September 19, 2025
Mail letters to neighbors, etc.:	October 1, 2025

First neighborhood virtual meeting:	October 15, 2025, 5-6 P.M.
Second neighborhood meeting (if necessary):	October 22, 2025, 4-5 P.M.
Provide Report of meetings to Town:	October 31, 2025
Planning & Zoning Commission:	November 10, 2025
Town Council Meeting:	December 16, 2025

Join Zoom Meeting on October 15, 2025, 5-6 P.M.

https://us02web.zoom.us/j/85246664255?pwd=8X3acR0aXt0rmPAzrqxTD6yedHsdXM.1

Meeting ID: 852 4666 4255

Passcode: 485446

One tap mobile

+16699006833,,85246664255# US (San Jose)

+16694449171,,85246664255# US

Join Zoom Meeting on October 22, 2025, 4-5 P.M.

Topic: DQ Fountain Hill Touch base

Time: Oct 22, 2025 04:00 PM Pacific Time (US and Canada)

Join Zoom Meeting

https://us02web.zoom.us/j/81450494734?pwd=oV489CxdauytG2S30YII9bzVCyBLKI.1

Meeting ID: 814 5049 4734

Passcode: 830315

One tap mobile

+16694449171,,81450494734# US

+16699006833,,81450494734# US (San Jose)

Citizen Participation Report for Dairy Queen's Drive-thru Special Use Permit

Case #: **XXXX**

Date of Report: 10 23 2025

Overview:

Purpose: This Special Use Permit is to install a new drive thru lane on the south side of the building at 13212 North Saguaro Road for Dairy Queen. There is an existing drive thru window on the east side of the building. This proposal is extending the drive thru lane along the south face of the building and will require re-location of **9** parking spaces. See attached plans.

This plan will ensure that those affected by this application will have an adequate opportunity to learn about and comment on the proposal.

Applicant:
Amit Verma, Dairy Queen
(480) 277-2358
email: dqds16@yahoo.com

Neighborhood Meetings: The following are dates and locations of all meetings where citizens were invited to discuss the applicant's proposal [comments, sign in lists and other feedback are attached];

1. October 15, 2025} – Virtual, 5 P.M. to 6 P.M. – 2 neighbors in attendance virtually plus applicant and architect.
2. October 22, 2025 – Virtual, 4 P.M. to 4:15 P.M. – 0 neighbors in attendance virtually plus applicant and architect.

Correspondence and Telephone Calls: We had multiple phone calls and emails with Zack Brooks (Plat 208) to discuss shared parking. On October 22, 2025 he provided an email to John Wesley (Town of Fountain Hills) supporting our project.

1. All persons listed on the contact list & 2 HOA's received a letter describing the project, project schedule, site plan and invitation to a series of two neighborhood meetings to be held virtually. The letter will also include access information for anyone wanting to attend the meetings virtually. We mailed out letters to all neighbors and HOA's within the 300' limit. These were mailed out on September 28, 2025 and October 9, 2025.

Results:

There are 2 persons on the contact list that attended our first meeting on October 15. These neighbors attended virtually as well as the applicant and the architect. We held a second virtual meeting on October 22, 2025 and there were no neighbor attendees.

October 15, 2025 Attendees were:

- Zack Brooks – Plat 208 HOA; zack@zbrooks.com
- Lori Shaffer - Owner of Octogen Property; shafferlori1967@gmail.com
- Amit Verma - Applicant: dkds16@yahoo.com
- Jack Leonard – Architect; jack@leonardarchitects.com

1. Summary of concerns, issues and problems:
- Concern about stacking traffic from the drive thru blocking the main drive to the south of the property.
- Common parking parcel HOA concerned about dedicating parking to this tenant.

2. How concerns issues and problems were addressed:
- The Applicant noted that they would address any parking that blocked the main drive immediately. The applicant said they would use cones or other necessary measures to immediately address traffic. Neighbor was comfortable with this proposal.
- Applicant had several calls with HOA and Town staff to address parking. The HOA submitted a letter to staff on October 22, 2025 supporting our proposal and use of parking.

3. Concerns, issues and problems not addressed and why:
- All concerns were addressed to the satisfaction of the neighbors.

October 22, 2025 Attendees were:

- Amit Verma - Applicant: dkds16@yahoo.com
- Jack Leonard – Architect; jack@leonardarchitects.com
- No neighbors in attendance.

4. Summary of concerns, issues and problems:
- No comments

5. How concerns issues and problems were addressed:
- No comments

6. Concerns, issues and problems not addressed and why:
- No comments.

GOOD NEIGHBOR STATEMENT

CITY OF FOUNTAIN HILLS SPECIAL USE PERMIT

PROPERTY OWNER:	Jason Kalich 13439 N. Stone View Trail Fountain Hills, Az. 85268
TENANT:	Dairy Queen Amit Verma, Dairy Queen (480) 277-2358 email: dqds16@yahoo.com
	The Tenant commits to place emergency contact information on the property in a location that is visible to the public.

October 23, 2025

John Wesley
Development Services Director
Town of Fountain Hills
16705 East Avenue of the fountains
Fountain Hills, Arizona 85268

RE: Sanitation request regarding: Grease Interceptor location
Special Use Permit
Dairy Queen
13212 North Saguaro Blvd.
Fountain Hills, Arizona

Dear John,

Your email of October 22, 2023 stated that the Sanitary District requires that the grease interceptor be moved out of the drive aisle. They require that this be resolved prior to Council approval of the SUP.

There is no place to move the grease interceptor that is on our property and is not in a drive aisle. Please see attached site plan. The sewer line exits the building on the south side, goes through the grease interceptor and ties into the sewer line in the main drive parallel to our south property line. The Applicant has verified with the grease interceptor company that the equipment is designed to be buried under traffic and can withstand the loads of vehicles. It is also very common for these grease interceptors to be located under paving in traffic areas. The applicant is the one that will maintain the grease interceptor and typically they are cleaned and maintained outside of business hours. We will lower the manhole cover to be flush with paving and the applicant has verified it is designed to bear traffic loads.

At this point we do not see any location for this piece of equipment other than under the drive through lane. Please review and let us know how we may proceed.

leonardARCHITECTS
2716 north 16th street phoenix arizona 85006 602.571.5711 jack@leonardarchitects.com

PHOTOS

Photo of rear of building looking west.

Photo of rear of building looking east. This is the island that will be removed for the drive thru lane.

leonardARCHITECTS
2716 north 16th street phoenix arizona 85006 602.571.5711 jack@leonardarchitects.com

Rear of building looking to the north and the existing drive thru on the east side of the building.

Sincerely,

Jack Leonard AIA, NCARB, LEED AP

Exhibits: Proposed site plan and Enlarged Plan of Proposed Drive Thru Lane

leonardARCHITECTS
2716 north 16th street phoenix arizona 85006 602.571.5711 jack@leonardarchitects.com

CEL #
06-057

EXISTING BUILDING
7 PARCEL CONDO

PARCEL # 176-06-061

EXISTING ACCESSIBLE ROUTE

EXISTING DRIVE THRU WINDOW

EXISTING DRIVE THRU

SCOPE OF WORK
3,913 S.F.

EXISTING BUILDING

DAIRY QUEEN T.I.

NEW MENU BOARD

NEW SPEAKER AND CANOPY

12'-0"

EX. GREASE INTERCEPTOR

NEW CLEAR HT. BAR

EX. DRIVE 100'-0"

PROP. LINE

EX. SEWER LINE

REMOVE 9 SPACES TO CREATE NEW DRIVE THRU LANE, SPEAKER AND MENU BOARD

SAGUARO BOULEVARD

COMMON PARKING SPACE
PARCEL "F" BLOCK 5
287 PARKING SPACES

PARCEL # 176-06-062

PROPOSED SITE REFERENCE PLAN

SCALE: 11" = 30'-0"

NOT FOR CONSTRUCTION

DAIRY QUEEN
13212 N SAGUARO BLVD
FOUNTAIN HILLS, ARIZONA 85284

TOWN OF FOUNTAIN HILLS

STAFF REPORT

Meeting Date:	11/10/2025
Meeting Type:	Planning and Zoning Commission Regular Meeting
Submitting Department:	Development Services
Prepared by:	John Wesley, Development Services Director
Staff Contact Information:	Phone: 480-816-5138 Email: jwesley@fountainhillsaz.gov

Request to Town Council Regular Meeting (Agenda Language)

PUBLIC HEARING, with CONSIDERATION AND POSSIBLE ACTION: Relating to Ordinance 25-12 rezoning the area bounded by La Montana Dr., Saguaro Boulevard, and Avenue of the Fountains to adopt the Downtown Overly District and to remove the existing Entertainment and Planned Shopping Plaza Overlay Districts to the area bounded by La Montana Drive, Palisades Boulevard, Saguaro Boulevard, and Avenue of the Fountains.

Staff Summary (background)

On September 2, 2025, the Town Council approved the new Downtown Overlay District. Following the approval of this new zoning overlay, staff began the process of rezoning the area to apply the new zoning district to the designated area. This proposed rezoning will remove the two existing overlays in the area bounded by La Montana, Palisades, Saguaro, and Avenue of the Fountains and apply the new Downtown Overlay as approved by Council to the area bounded by La Montana, Saguaro, and Avenue of the Fountains.

Staff have processed this rezoning in the same manner as any other rezoning application. The steps have included:

- Creating a Citizen Participation Plan. The Plan involved sending a letter to all property owners within the overlay area them of the rezoning process. Information was also posted on the Town's website, including a link to the new ordinance.

As a result of the Citizen Participation notice sent to all property owners, staff received an email asking questions about some specifics of the new ordinance and restricting residential use of the ground floor in the Avenue District. There were no comments or questions about the actual rezoning, removing the existing overlays and replacing them with the new overlay.

- Providing notice of the public hearing. Notices were mailed to all property owners in the area and within 300' of the area and signs were posted throughout the area on October 21, 2025. A notice has also been published in the newspaper on October 22 and 29, 2025. Each of these notices describe the action being proposed and provides the dates and times for the rezoning hearings that will be held by the Planning and

Zoning Commission and the Town Council.

As a result of the public notice which was sent, staff have received several emails and phone calls requesting additional information. These came primarily from residents north of La Montana. Staff have responded to the calls and emails and explained the change. Most of the residents' concerns have been satisfied. Some are concerned the increased employment use opportunity might spur new buildings in the area south of La Montana and those new buildings would be built at the maximum allowed height of 40 feet and block their views. It should be understood, the 40' building height is in the base C-2 zoning district which applies today and is not changed with the overlay. One property owner within the area raised a concern about the new overlay establishing a built-to line.

The new overlay district was drafted and approved based on the goals of the new Downtown Strategic Plan to bring increased residential density, additional employment opportunities, and entertainment activities to the downtown area. The issue before the Commission at this time is not about any of the provisions contained within the new overlay district. The issue is whether or not to remove the existing overlays and replace them with the newly adopted overlay district. The new district implements the goals for the area by increasing the allowed residential density by right from 8 units per acre, adds employment options for the area north of Palisades, and facilitating active uses along the Avenue over time.

Related Ordinance, Policy or Guiding Principle

General Plan, Downtown Character Area
General Plan, Economic Development Element, Goal 1, Policies 1 and 2
Community Economic Development Strategy
Resolution 2024-28, Downtown Strategy

Risk Analysis

N/A

Recommendation(s) by Board(s) or Commission(s)

N/A

Staff Recommendation(s)

Staff recomends adoption of Ordinance 25-12.

Suggested Motion

MOVE TO recommend adoption of Ordinance 25-12.

FISCAL IMPACT

Fiscal Impact:
Budget Reference:
Funding Source:

ATTACHMENTS

1. Ord 25-12 Rezoning
2. Citizen Participation Plan
3. Citizen Participation Report

ORDINANCE NO. 25-12

AN ORDINANCE OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, AMENDING THE OFFICIAL ZONING DISTRICT MAPS OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, BY CHANGING THE ZONING DESIGNATION FOR 50.7 ACRES OF A 72.3-ACRE PROPERTY SOUTH OF PALISADES TO REMOVE THE ENTERTAINMENT AND PLANNED SHOPPING PLAZA OVERLAY DISTRICTS AND REZONING THE ENTIRE AREA BOUNDED BY LA MONTANA DRIVE, SAGUARO BOULEVARD, AND AVENUE OF THE FOUNTAINS TO ADOPT THE DOWNTOWN OVERLAY DISTRICT, KEEPING THE UNDERLYING BASE ZONES AS THEY EXIST

ENACTMENTS

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS as follows:

SECTION 1. The approximately 50.7 acres depicted on Exhibit A, attached hereto and incorporated herein by reference, is rezoned to remove the Entertainment and Planned Shopping Plaza Overlay Districts.

SECTION 2. The approximately 72.3 acres depicted on Exhibit B, attached hereto and incorporated herein by reference, is rezoned to add the Downtown Overlay District to the existing base zoning districts.

SECTION 3. If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance.

SECTION 4. The Mayor, the Town Manager, the Town Clerk and the Town Attorney are hereby authorized and directed to execute all documents and take all steps necessary to carry out the purpose and intent of this Ordinance.

PASSED AND ADOPTED by the Mayor and Council of the Town of Fountain Hills, Arizona, this 16th day of December, 2025.

FOR THE TOWN OF FOUNTAIN HILLS: ATTESTED TO:

Gerry Friedel, Mayor

Bevelyn Bender, Town Clerk

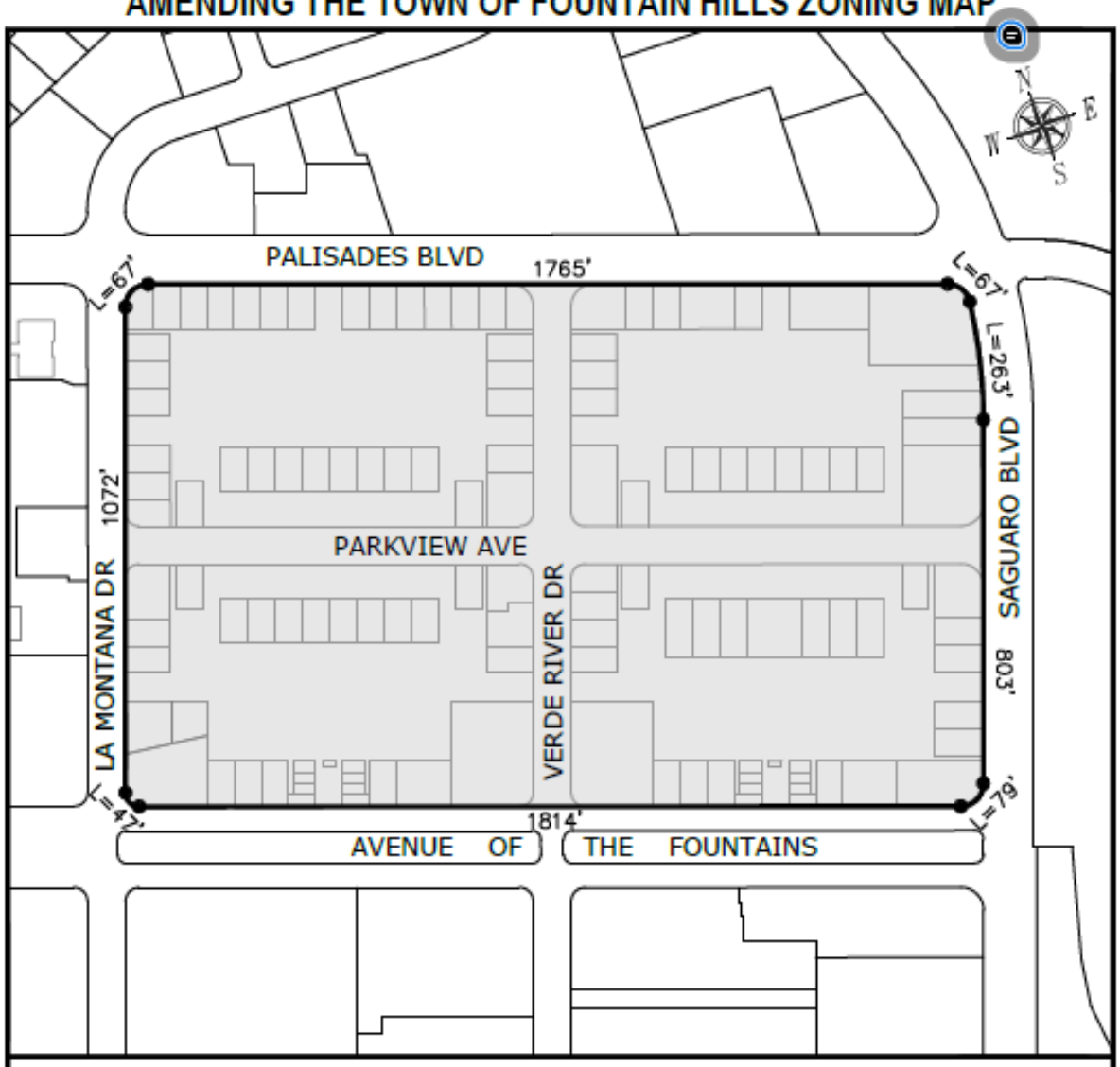
REVIEWED BY:

Rachael Goodwin, Town Manager

APPROVED AS TO FORM:

Jennifer J. Wright, Town Attorney

EXHIBIT A
OFFICIAL SUPPLEMENTARY ZONING MAP
AMENDING THE TOWN OF FOUNTAIN HILLS ZONING MAP



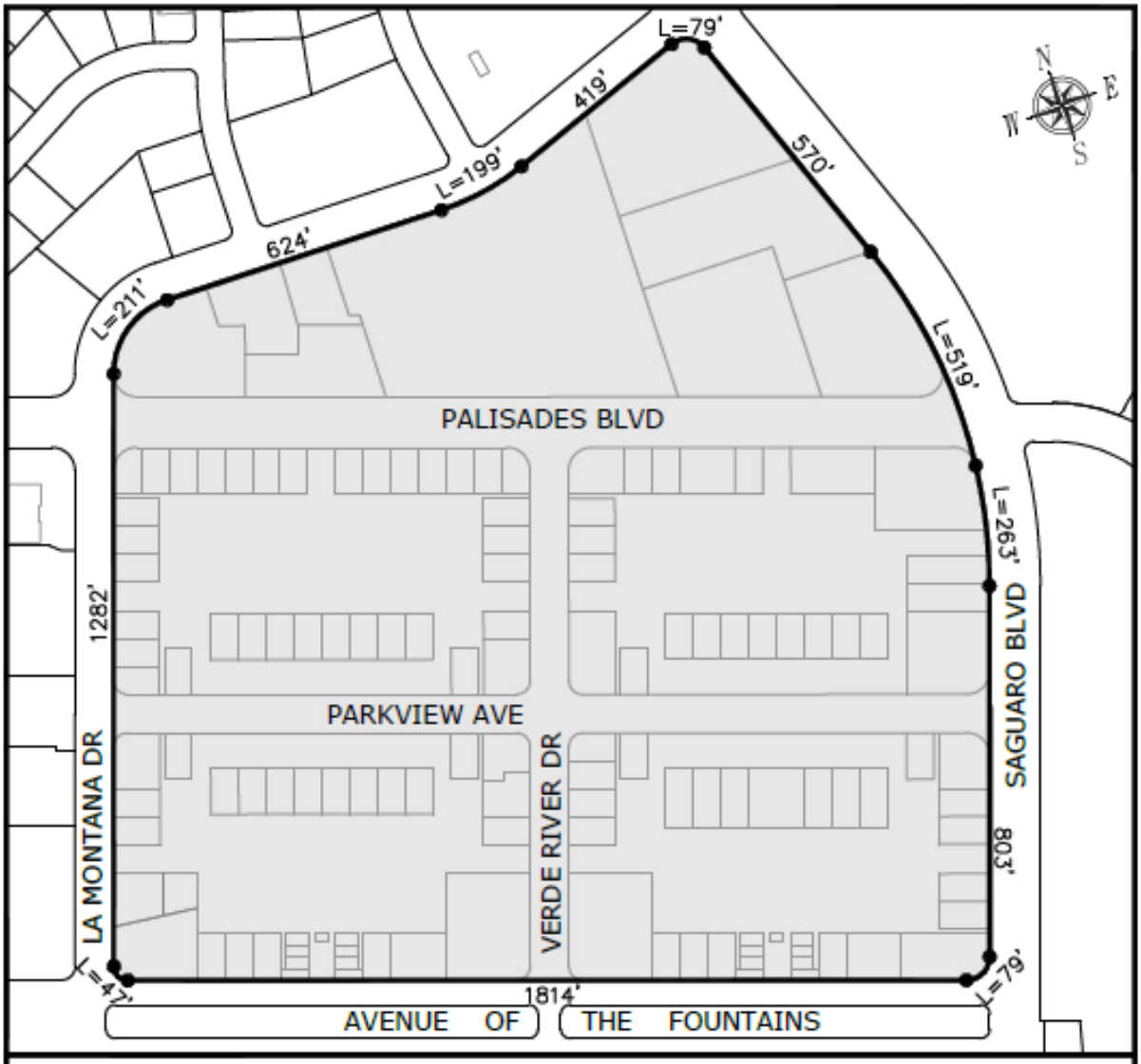
CASE: RZ25-000001
ACREAGE: 50.7
REQUEST: THE APPROXIMATELY 50.7 ACRES DEPICTED HEREON, EXHIBIT A, IS REZONED TO REMOVE THE ENTERTAINMENT AND PLANNED SHOPPING PLAZA OVERLAY DISTRICTS.

ORDINANCE: ORD 25-12

Please be advised that the attached zoning changes were approved by the Fountain Hills Town Council on December 16th, 2025 by Ordinance # 25-12. If you have any questions concerning these changes, contact the Town of Fountain Hills Development Services Department at 480-816-5122.

_____ ATTEST: _____ DATE: _____
MAYOR TOWN CLERK

EXHIBIT B
OFFICIAL SUPPLEMENTARY ZONING MAP
AMENDING THE TOWN OF FOUNTAIN HILLS ZONING MAP



CASE: RZ25-000001
ACREAGE: 72.3
REQUEST: THE APPROXIMATELY 72.3 ACRES DEPICTED HEREON, EXHIBIT B, IS REZONED TO ADD THE DOWNTOWN OVERLAY DISTRICT TO THE EXISTING BASE ZONING DISTRICTS.

ORDINANCE: ORD 25-12

Please be advised that the attached zoning changes were approved by the Fountain Hills Town Council on December 16th, 2025 by Ordinance # 25-12. If you have any questions concerning these changes, contact the Town of Fountain Hills Development Services Department at 480-816-5122.

_____ ATTEST: _____ DATE: _____

MAYOR TOWN CLERK

Citizen Participation Plan
Rezoning downtown to apply the Downtown Overlay Ordinance

Purpose: The purpose of this Citizen Participation Plan is to inform citizens, property owners, business owners, and property owner associations of the rezoning application to apply the newly created Downtown Overlay to the defined downtown area. The rezoning will remove the existing two overlay districts from the Plat 208 area. This plan has been prepared to define the process which will be used to inform the impacted property owners and businesses of the intended rezoning and provide them with a means to provide input to the proposed zoning change.

Applicant:
Town of Fountain Hills

Location:
The area bounded by Avenue of the Fountains, La Montana, and Saguaro.

Action Plan: In order to provide effective citizen participation in conjunction with this rezoning process, the following actions will be taken:

1. A contact list of property owners, business owners, and property owner associations within the area and property owners within 300' of the boundary of the rezoning area will be created.
2. All persons on the contact list will be sent a letter describing the proposed rezoning and provided a link to the new Downtown Overlay District. The letter will describe the process for Planning and Zoning Commission and Town Council consideration and adoption of the new overlay district. The letter will also inform the recipients of the options to provide feedback on the proposed rezoning.
3. The Town's website will be updated with a page describing the rezoning and the new overlay and provide interested individuals with information on how to provide feedback on the proposal.

Schedule:
Letters mailed: NLT 9/18
Public hearings: Planning and Zoning Commission November 10; Town Council December 16

Citizen Participation Report

Notification

As required by the Plan, the letters were mailed to the property owners on September 19. The letter provided property owners with information about the rezoning request and the staff email address and phone number to ask questions or provide comments.

Results

One property owner emailed with a comment about the zoning. The comments were about a couple of the details of the ordinance, the restriction on services uses along the Avenue the on ground floor residential uses. There was no comment specifically on the removal of the existing overlay to be replaced with the new overlay.

No other comments were received.

TOWN OF FOUNTAIN HILLS

STAFF REPORT

Meeting Date:	11/10/2025
Meeting Type:	Planning and Zoning Commission Regular Meeting
Submitting Department:	Development Services / Planning
Prepared by:	Farhad Tavassoli, Senior Planner
Staff Contact Information:	Phone: 480-816-5139 Email: ftavassoli@fountainhillsaz.gov

Request to Town Council Regular Meeting (Agenda Language)

PUBLIC HEARING, CONSIDERATION AND POSSIBLE ACTION: Special Use Permit to allow 11 residential units on 11 non-contiguous parcels in a commercial subdivision (Plat 106) generally located north of El Pueblo Blvd. between Fountain Hills Blvd. and Ivory Dr. in the C-C (Community Commercial) zoning district.

Staff Summary (background)

The applicant's most recently revised plan was presented to the Commission on August 10, 2025. Due to ongoing concerns regarding several aspects of the proposal, the Commission voted to continue the case to the October 13, 2025, meeting. This extension was intended to provide the applicant additional time to engage with neighboring landowners and work toward a more broadly supported vision for Plat 106.

While full consensus has not yet been reached, the applicant remains in active discussions with surrounding property owners. In the meantime, the applicant has requested to move forward with a revised plan that reflects a more widely shared vision for the area.

The current proposal is for a mixed-use residential development within the Community Commercial (C-C) zoning district known as Plat 106—a commercial subdivision located north of El Pueblo Boulevard, between Fountain Hills Boulevard (F.H.B.) and Ivory Road. The plan includes 11 residential units, seven of which will be single-family "cottages" constructed across four rows of adjoining parcels on both sides of the north-south alley that bisects the subdivision.

Each cottage will be a two-story home featuring four bedrooms, 2.5 bathrooms, a living room, kitchen, dining area, and a rear patio. The units will be approximately 1,325 square feet in size and include a 407-square-foot tandem two-car garage. The buildings will not exceed a height of 25 feet. To accommodate three of the units and a shared open space, the 5,558-square-foot lot to the north will need to be re-platted into four lots, each with a minimum area of 1,125 square feet.

The mixed-use component of the development will consist of a two-story building. The ground floor will feature four commercial spaces, each approximately 1,250 square feet, suitable for uses permitted under the C-C zoning designation—such as offices, retail shops, or dining establishments. The second floor will contain four attached residential units, also

approximately 1,250 square feet each. The building's primary entrance will face Fountain Hills Boulevard and the adjacent parking lot, with a secondary entrance oriented north toward a commonly owned property envisioned as an open corridor.

The applicant intends to continue negotiations with the owners of properties north of the corridor to incorporate them into a broader plan featuring additional mixed-use buildings that would mirror those proposed. Additionally, the applicant has expressed interest in entering negotiations with the adjacent church property, seeking a first right of refusal to purchase and potentially include it in the overall development vision.

General Plan

The General Plan includes the following Goals and Policies:
Neighborhoods Element
GOAL 2: Support a housing strategy that encourages a broad range of quality housing types to address current and future housing needs and to support long-term economic vitality.
POLICIES
1. Encourage a broad range of housing types affordable to all income ranges and age groups in a manner compatible with adjacent development.
2. Encourage a range of housing types and residential densities and maintain consistency with the existing character of infill areas in conformance with criteria provided in Table 1: Character Areas Plan.
5. Direct higher-density residential and mixed-used development to the Town Center and redevelopment areas such as Shea Corridor as opportunities arise.

Character Areas Element
GOAL 1: Encourage future development, redevelopment and infill in a manner that will maintain and protect existing neighborhoods, the Town's economic health, community well-being, and natural environment.
POLICIES
1. Achieve and maintain a diverse and sustainable land use mix consistent with our small-town character that supports thriving neighborhoods, environment and economy by attracting and retaining revenue-generating uses that:
a. Enhance the Town's economic vitality; and
b. Increase the Town's revenue base to maintain quality infrastructure, services and amenities.

GOAL: 2: Development, redevelopment and infill support Fountain Hills' small-town identity and the distinct character of each area while fostering long-term viability.
POLICIES
3. Support a mix of residential, employment, and commercial uses at densities and intensities and in the development form that reflect the small-Town character of Fountain Hills.
5. Strongly encourage a wide range of housing types, densities and prices to support the current and projected populations (particularly families and working professionals) and to ensure the future stock of affordable housing for all income ranges.
6. Require that development, redevelopment, and infill conform with Exhibit 2, Character Areas Plan map, and Table 1.

Section III of the General Plan includes information on the Character Areas in the Town. This small commercial area at El Pueblo and Fountain Hills Boulevards was included as part of the surrounding Neighborhood character type. More specifically, this area is considered a Mixed Neighborhood with smaller lots and a mix of non-residential uses. This existing commercial area is intended to remain a low intensity area with any further development or redevelopment consistent with the surrounding neighborhood. Allowing the proposed residential use within this commercial area would be consistent with the intent of the Plan for this area.

Analysis

Staff believes the applicant's recent modifications represent a significant improvement over the previous submittals. The revised plan includes added features such as usable open space, trash enclosures, and additional parking. Plat 106 presents notable challenges for both residential and commercial development, which likely contributes to the site's limited development to date. While issues remain—particularly regarding tight circulation and design constraints caused by the configuration of private parcels and shared spaces like alleys and parking areas—the applicant has made a constructive effort to work within these limitations and maximize the site's potential.

The common parking area was included in the final plat and fulfills the required parking for fully built-out conditions in Plat 106. Although this site is zoned C-C, covered parking for two cars would have been required if the site were zoned for the single-family residential. The applicant is proposing a tandem garage for each unit, but staff is concerned that the length of the tandem garages might be too short, considering that the required dimensions for a parking stall are 9' x 19', and the garages appear to be shorter than 38 feet. It should be noted that the applicant's initial proposal included only one carport for each unit, and responded to staff's comment to include covered parking for at least two vehicles. Upon finding that this might present some physical design constraints, especially after factoring in adequate clearance requirements between the garage door and the adjacent alleys, staff offers Commission an option to waive the requirement for two-car parking along with any recommendation for approval.

Good Neighbor Statement

Given the nature of the use, the applicant has provided a good neighbor statement.

Citizen Participation

The applicant submitted a Citizen Participation Plan as part of the original 2024 application. The plan included mailing notification letters to all property owners within a 300-foot radius and hosting two community meetings on October 11 and October 15, 2024. The letter outlined the proposed project, provided contact information for questions, and offered to meet with residents individually if desired.

A Citizen Participation Report was submitted on October 17, 2024. Three property owners from Plat 106 attended the meetings. They asked clarifying questions, and the applicant provided additional information. Some concerns were raised about potential impacts on accessibility to Plat 106 and the possibility of residents using adjacent property for parking. However, the report notes that after the discussion, all attendees expressed support for the project.

Although no opposition was recorded during the initial outreach, at least three residents voiced concerns about the original proposal during the Planning & Zoning Commission meeting on January 13, 2025. Following the Commission's recommendation for denial, the applicant revised the proposal and presented the updated version at a subsequent meeting with the Plat 106 board. The outcomes of that meeting are included in this report.

Following the Commission's decision to continue the case to a future date, Town Hall hosted a Citizen Review meeting on September 9, 2025, with the applicant and property owners within Plat 106. During the meeting, the applicant introduced a new concept and initiated a dialogue with the group. That dialogue remains ongoing, with details still being refined.

Site Plan Review

If the Special Use Permit is approved by the Town Council, the applicant's next step will be to submit a final site plan for staff review and approval. This must be completed within six months to meet the requirement for submittal of the building permit plans within six months of approval of the SUP. Through the detailed site plan review staff will continue to review and resolve technical issues with the site plan and ensure the site plan complies with any conditions of approval.

Related Ordinance, Policy or Guiding Principle

Fountain Hills General Plan 2020
Zoning Ordinance Section 2.02 - Special Use Permits
Zoning Ordinance Section 12.03 - Uses Subject to Special Use Permits in Commercial Zoning Districts

Risk Analysis

N/A

Recommendation(s) by Board(s) or Commission(s)

As mentioned earlier in the report, the Planning and Zoning Commission reviewed the applicant's original proposal on January 13, 2025, which included two special use permit (SUP) requests for residential development within the commercial subdivision known as Plat 106. The first request sought approval for four multifamily buildings, each containing three units, across four contiguous parcels. The second request proposed the construction of ten single-family homes within the same subdivision. Because the two projects were separated by an alley within the subdivision, they were treated as distinct proposals and assigned separate case numbers.

Following the public hearing, the Commission unanimously recommended denial of both requests, citing insufficient consideration of the design's overall impact. Rather than advancing the proposals to the Town Council, the applicant requested that the Council return the cases to the Planning and Zoning Commission for review of a substantially revised plan. Town Council approved that request, and the applicant presented a new plan to the Commission on August 11, 2025. The Commission acknowledged improvements made to the original plan, but still cited significant concerns regarding the inorganic nature of the new plan and urged the applicant to work with other landowners within Plat 106 to develop a more cohesive plan.

Staff Recommendation(s)

Staff supports the proposed use as a valuable infill opportunity within Plat 106, which

remains significantly underutilized. While challenges persist for residential development in this area—particularly related to accessibility and constrained development envelopes—staff finds that the applicant's revised proposal represents a substantial improvement over the versions presented to the Commission in January and August 2025. Despite these efforts, several key issues remain unresolved, and there is currently no clear indication of full consensus among the property owners whose parcels are included in the applicant's broader vision for Plat 106. As such, staff is not prepared to recommend approval of the Special Use Permit at this time.

Given the applicant's request for the case to be heard today without further delay, staff recommends either denial of the request or, alternatively—despite the applicant's preference—continuing the case to a future date to allow additional time for the Plat 106 community to develop a plan with broader and more clearly demonstrated support. Note, based on the requirements of Section 2.02 F. 1. c., a continuance will be possible only with the agreement of the applicant because it has been 90 days since the original hearing.

Suggested Motion

MOVE to deny Special Use Permit to allow 11 residential units on 11 non-contiguous parcels in a commercial subdivision (Plat 106) generally located north of El Pueblo Blvd. between Fountain Hills Blvd. and Ivory Dr. in the C-C (Community Commercial) zoning district.

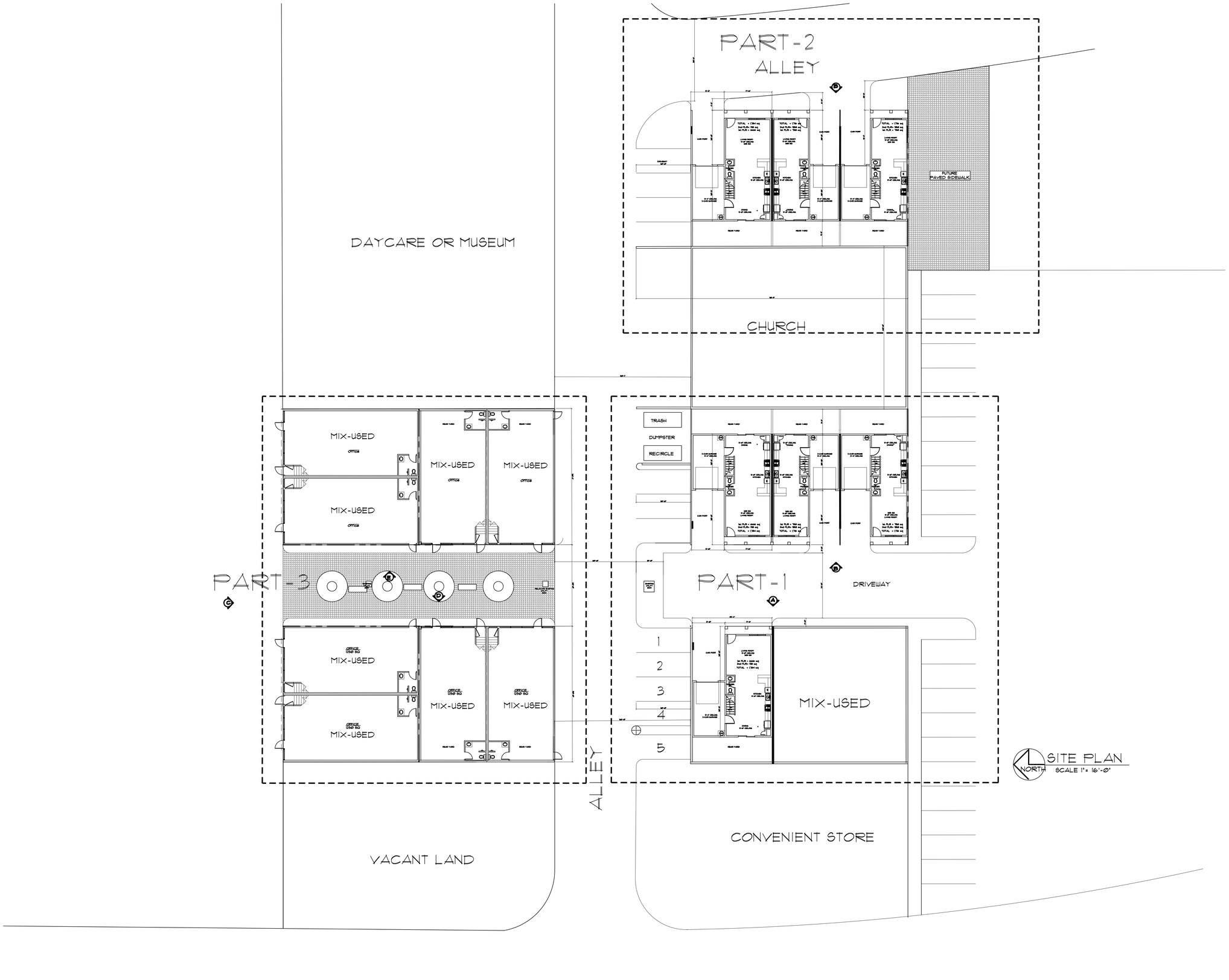
Alternatively, the Commission may recommend a continuance to a later date in order to allow the applicant to continue negotiations with the Plat 106 stakeholders. Staff is available to provide suggestions for language to include in the motion.

FISCAL IMPACT

Fiscal Impact:
Budget Reference:
Funding Source:

ATTACHMENTS

1. Revised Plan for 11-10-25
2. Revised Narrative for 11-10-25
3. Staff Report and Attachments from 08-10-2025



DESIGN ejm GROUP

REGISTRANT SEAL:
-

PROJECT:

PUEBLO'S COTTAGES

15014 N. IVORY DR

FOUNTAIN HILLS AZ 85268

PROJECT TYPE:
=

CONTRACTOR:

REVISION

NO.	DESCRIPTION	DATE
1		

DATE ISSUED:	5-9-2025
REVIEWED BY:	=
DRAWN BY:	WILSON
DESIGNED BY:	=
SCALE:	1/16"=1'-0"
DG PROJECT NO.:	2404

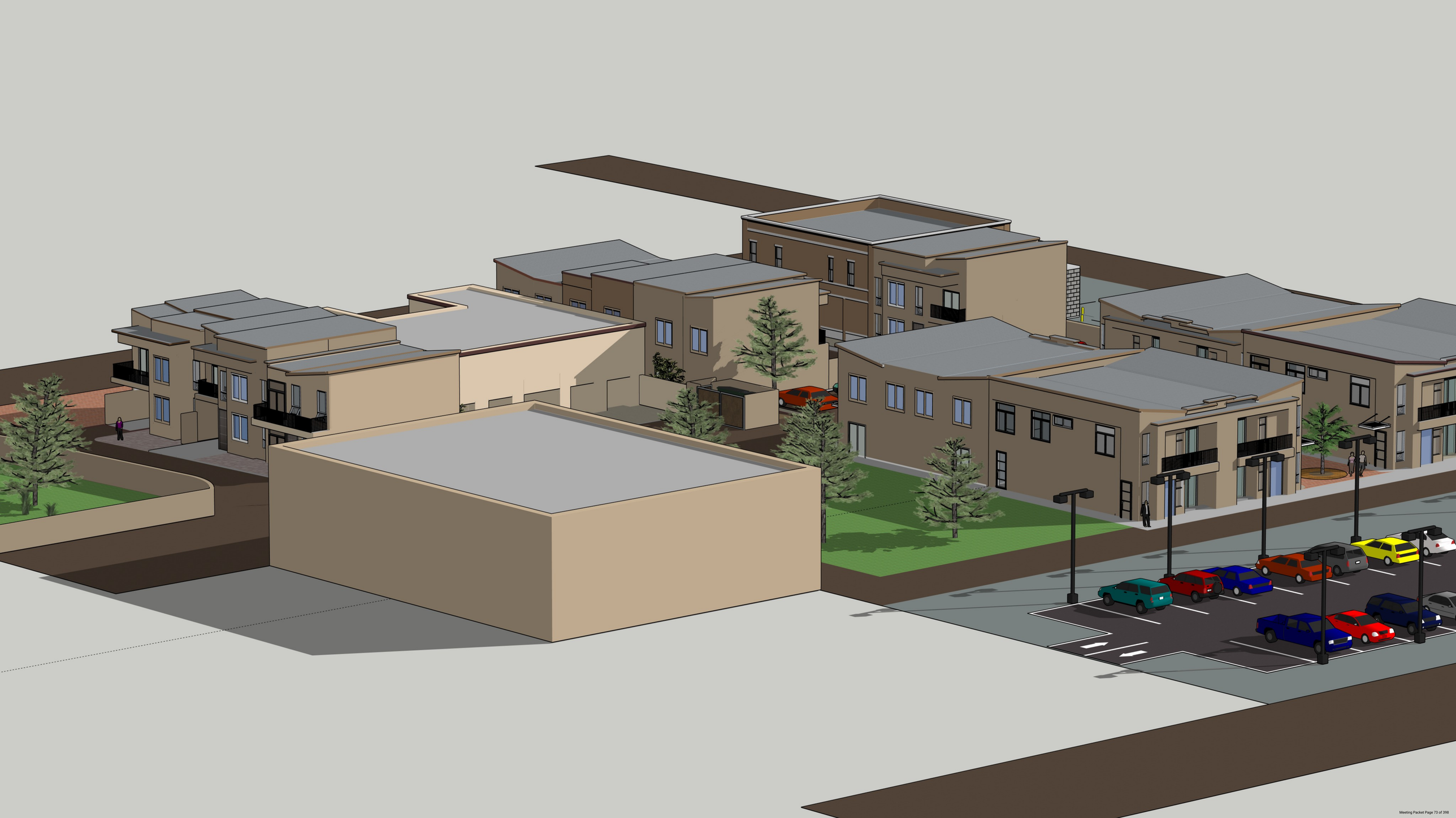
DESIGN GROUP & PROJECT MANAGEMENT

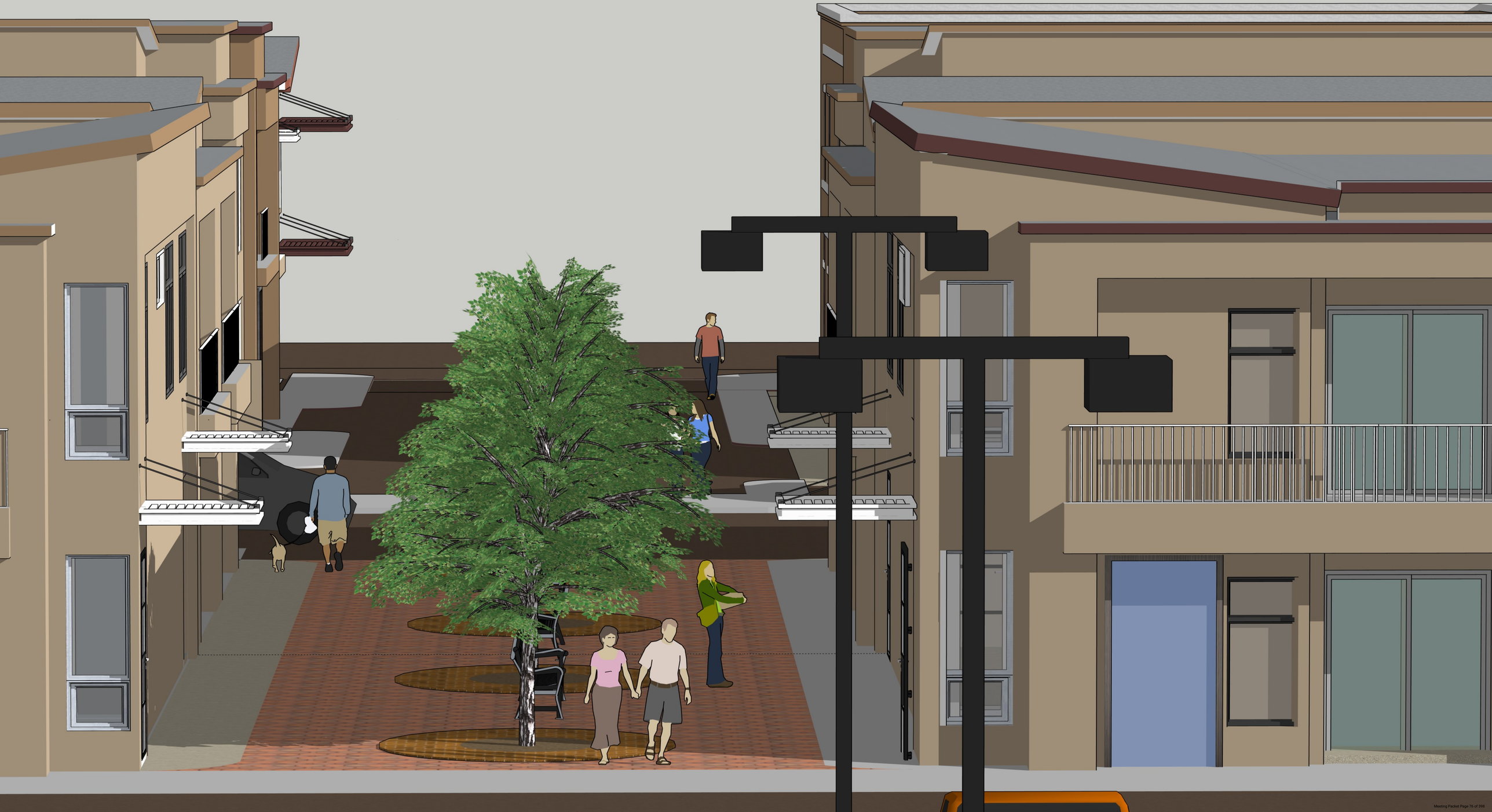
14561 W. PORT AU PRINCE LANE,
SURPRISE, AZ. 85379
TEL: (623) 742-8704
wilson@designgrouparch.com
www.designgrouparch.com

SHEET TITLE:
MASTER PLAN

SHEET NO.
A1.0

© DESIGN GROUP & PM





UPDATED PROJECT NARRATIVE

El Pueblo @ Foutain Hills
15043 N. Fountain Hill Blvd

Project Overview:
El Pueblo - Fountain Hills is an envisioned opportunity to provide a mixed-used building that will house both commercial retail development and affordable multifamily Town Homes in an area where it is certainly needed. The proposed project is an imaginative use of infill space that would benefit the community by delivering a two-story mixed-used building with 4 retail spaces and (4) 2- bedrooms residential condo identified on the site plan as part 3. Part 1 and part-2 are multifamily 4-plex 2-story Town Homes building and a 3-plex Town Homes building respectively. The retail spaces are about 1200 sqft, the condos are approximately 1200 sqft, and the Town homes between 1700 sqft – 2000 sqft. The project is situated in an underutilized and undeveloped vacant lot that sits between actively used properties. The development of this space could serve the community in many ways including live/workspace for young and active adults, such as teachers, artists, small business owners, and healthcare professionals because of its proximity to Mayo Clinic.

Site Context:
The property is about 1,250 sqft, in C-C zoning district designated for neighborhood commercial with 25 feet maximum building height and 100% lot coverage. The entire project will be on 9 lots combined into 3 separate lots. Lots 10, 11, 12, & 13 will be a mixed-used building with 4 condos with 1.5 parking spaces provided for each condo unit with a total of 6 parking spaces for the condo. The parking for the commercial is provided by the community parking spaces of Tract 106 development. Lots 19, 23, & 25 will be multifamily 4 plex Town Homes with 2 parking spaces each that include 1-car garage and a tandem car port. Lot 18, 22, and portion of lot 25 provide 12 additional parking spaces for guests and commercial spaces. We are requesting a special use permit based on the zoning for these properties to house the proposed uses.

Imagery & Design:
Similar projects were approved for a mixed-used building with ground floor commercial, residential condos on the 2nd level, and a set of multifamily Town Homes in this community. This project is like what has been approved by the board and is designed to blend in with the surrounding community, with combinations of flat roofs, tiled roofs, earth tone color choices, stucco, and design features that are aesthetically pleasing.

2601 E. Thomas Road
Suite 135
Phoenix, AZ 85016
623 742 8704
designgrouparch.com

TOWN OF FOUNTAIN HILLS

STAFF REPORT

Meeting Date:	8/11/2025
Meeting Type:	Planning and Zoning Commission Regular Meeting
Submitting Department:	Development Services / Planning
Prepared by:	Farhad Tavassoli, Senior Planner
Staff Contact Information:	Phone: 480-816-5139 Email: ftavassoli@fountainhillsaz.gov

Request to Town Council Regular Meeting (Agenda Language)

PUBLIC HEARING, CONSIDERATION AND POSSIBLE ACTION: Special Use Permit to allow 11 residential units on 11 non-contiguous parcels in a commercial subdivision (Plat 106) generally located north of El Pueblo Blvd. between Fountain Hills Blvd. and Ivory Dr. in the C-C (Community Commercial) zoning district.

Staff Summary (background)

On January 13, 2025, the Planning and Zoning Commission reviewed the applicant's original proposal, which included two special use permit (SUP) requests for residential development within the commercial subdivision known as Plat 106. The first request sought approval for four multi-family buildings, each containing three units, across four contiguous parcels. The second request proposed the construction of ten single-family homes within the same subdivision. Because the two projects were separated by an alley within the subdivision, they were treated as distinct proposals and assigned separate case numbers.

Following the public hearing, the Commission unanimously recommended denial of both requests, citing insufficient consideration of the design's overall impact. Rather than advancing the proposals to the Town Council, the applicant requested that the Council return the cases to the Planning and Zoning Commission for review of a substantially revised plan. At their meeting on June 17, he Council approved the request to allow the Planning and Zoning Commission to consider a modified proposal.

The applicant is now proposing a mixed-use residential development within the Community Commercial (C-C) district known as Plat 106—a commercial subdivision located north of El Pueblo Boulevard, between Fountain Hills Boulevard (F.H.B.) and Ivory Road. Of the 11 proposed residential units, nine will be single-family "cottages" constructed across four rows of adjoining parcels on both sides of the north-south alley that bisects the subdivision.

Each cottage is designed as a two-story home featuring four bedrooms, 2.5 bathrooms, a living room, kitchen, dining area, and a rear patio. The units will be approximately 1,325 square feet in size and include a 407-square-foot tandem two-car garage. The buildings will have a maximum height of 25 feet. To accommodate three of the units and a shared open space, the 5,558-square-foot lot to the north will need to be re-platted into four lots, each with a minimum area of 1,125 square feet.

The mixed-use component of the development will consist of a two-story building. The ground floor will include two commercial spaces, each approximately 1,250 square feet, suitable for uses permitted under the C-C zoning—such as offices, retail shops, or dining establishments. The second floor will house two attached residential units, also around 1,250 square feet each. The building's main entrance will face Fountain Hills Boulevard and the adjacent parking lot.

General Plan

The General Plan includes the following Goals and Policies:
Neighborhoods Element
GOAL 2: Support a housing strategy that encourages a broad range of quality housing types to address current and future housing needs and to support long-term economic vitality.
POLICIES
1. Encourage a broad range of housing types affordable to all income ranges and age groups in a manner compatible with adjacent development.
2. Encourage a range of housing types and residential densities and maintain consistency with the existing character of infill areas in conformance with criteria provided in Table 1: Character Areas Plan.
5. Direct higher-density residential and mixed-used development to the Town Center and redevelopment areas such as Shea Corridor as opportunities arise.

Character Areas Element
GOAL 1: Encourage future development, redevelopment and infill in a manner that will maintain and protect existing neighborhoods, the Town's economic health, community well-being, and natural environment.
POLICIES
1. Achieve and maintain a diverse and sustainable land use mix consistent with our small-town character that supports thriving neighborhoods, environment and economy by attracting and retaining revenue-generating uses that:
a. Enhance the Town's economic vitality; and
b. Increase the Town's revenue base to maintain quality infrastructure, services and amenities.

GOAL: 2: Development, redevelopment and infill support Fountain Hills' small-town identity and the distinct character of each area while fostering long-term viability.
POLICIES
3. Support a mix of residential, employment, and commercial uses at densities and intensities and in the development form that reflect the small-Town character of Fountain Hills.
5. Strongly encourage a wide range of housing types, densities and prices to support the current and projected populations (particularly families and working professionals) and to ensure the future stock of affordable housing for all income ranges.
6. Require that development, redevelopment, and infill conform with Exhibit 2, Character Areas Plan map, and Table 1.

Section III of the General Plan includes information on the Character Areas in the Town. This small commercial area at El Pueblo and Fountain Hills Boulevards was included as part of the surrounding Neighborhood character type. More specifically, this area is considered a

Mixed Neighborhood with smaller lots and a mix of non-residential uses. This existing commercial area is intended to remain a low intensity area with any further development or redevelopment consistent with the surrounding neighborhood. Allowing the proposed residential use within this commercial area would be consistent with the intent of the Plan for this area.

Analysis

Staff believes the applicant's modified proposal represents a significant improvement over the previous submittals. The revised plan includes added features such as usable open space, trash enclosures, and additional parking. Plat 106 presents notable challenges for both residential and commercial development, which likely contributes to the site's limited development to date. While issues remain—particularly regarding tight circulation and design constraints caused by the configuration of private parcels and shared spaces like alleys and parking areas—the applicant has made a constructive effort to work within these limitations and maximize the site's potential.

The common parking area was included in the final plat and fulfills the required parking for fully built-out conditions in Plat 106. Although this site is zoned C-C, covered parking for two cars would have been required if the site were zoned for the single-family residential. The applicant is proposing a tandem garage for each unit, but staff is concerned that the length of the tandem garages might be too short, considering that the required dimensions for a parking stall are 9' x 19', and the garages appear to be shorter than 38 feet. It should be noted that the applicant's initial proposal included only one carport for each unit, and responded to staff's comment to include covered parking for at least two vehicles. Upon finding that this might present some physical design constraints, especially after factoring in adequate clearance requirements between the garage door and the adjacent alleys, staff offers Commission an option to waive the requirement for two-car parking along with any recommendation for approval.

Good Neighbor Statement

Given the nature of the use, the applicant has provided a good neighbor statement.

Citizen Participation

The applicant submitted a Citizen Participation Plan as part of the original 2024 application. The plan included mailing notification letters to all property owners within a 300-foot radius and hosting two community meetings on October 11 and October 15, 2024. The letter outlined the proposed project, provided contact information for questions, and offered to meet with residents individually if desired.

A Citizen Participation Report was submitted on October 17, 2024. Three property owners from Plat 106 attended the meetings. They asked clarifying questions, and the applicant provided additional information. Some concerns were raised about potential impacts on accessibility to Plat 106 and the possibility of residents using adjacent property for parking. However, the report notes that after the discussion, all attendees expressed support for the project.

Although no opposition was recorded during the initial outreach, at least three residents voiced concerns about the original proposal during the Planning & Zoning Commission

meeting on January 13, 2025. Following the Commission's recommendation for denial, the applicant revised the proposal and presented the updated version at a subsequent meeting with the Plat 106 board. The outcomes of that meeting are included in this report.

On June 17, 2025, staff received a letter of opposition from John Gurczak, a property owner within Plat 106 who is currently developing two projects in the subdivision. In his letter, Mr. Gurczak raised concerns regarding the proposal's impact on accessibility and its compatibility with the surrounding area. His letter is provided as an attachment.

Site Plan Review

If the Special Use Permit is approved by the Town Council, the applicant's next step will be to submit a final site plan for staff review and approval. This must be completed within six months to meet the requirement for submittal of the building permit plans within six months of approval of the SUP. Through the detailed site plan review staff will continue to review and resolve technical issues with the site plan and ensure the site plan complies with any conditions of approval.

Related Ordinance, Policy or Guiding Principle

Fountain Hills General Plan 2020
Zoning Ordinance Section 2.02 - Special Use Permits
Zoning Ordinance Section 12.03 - Uses Subject to Special Use Permits in Commercial Zoning Districts

Risk Analysis

N/A

Recommendation(s) by Board(s) or Commission(s)

As mentioned earlier in the report, the Planning and Zoning Commission reviewed the applicant's original proposal on January 13, 2025, which included two special use permit (SUP) requests for residential development within the commercial subdivision known as Plat 106. The first request sought approval for four multifamily buildings, each containing three units, across four contiguous parcels. The second request proposed the construction of ten single-family homes within the same subdivision. Because the two projects were separated by an alley within the subdivision, they were treated as distinct proposals and assigned separate case numbers.

Following the public hearing, the Commission unanimously recommended denial of both requests, citing insufficient consideration of the design's overall impact. Rather than advancing the proposals to the Town Council, the applicant requested that the Council return the cases to the Planning and Zoning Commission for review of a substantially revised plan.

Staff Recommendation(s)

Staff supports the proposed use as a valuable infill opportunity within Plat 106, which remains significantly underutilized. While challenges persist for residential development in this area—particularly related to accessibility and constrained development envelopes—staff finds that the applicant's revised proposal represents a substantial improvement over the version presented to the Commission in January 2025. As such, staff recommends approval of the special use permit request.

Suggested Motion

MOVE to approve Special Use Permit to allow 11 residential units on 11 non-contiguous

parcels in a commercial subdivision (Plat 106) generally located north of El Pueblo Blvd. between Fountain Hills Blvd. and Ivory Dr. in the C-C (Community Commercial) zoning district.

Staff is available to provide suggestions for language to include in the motion.

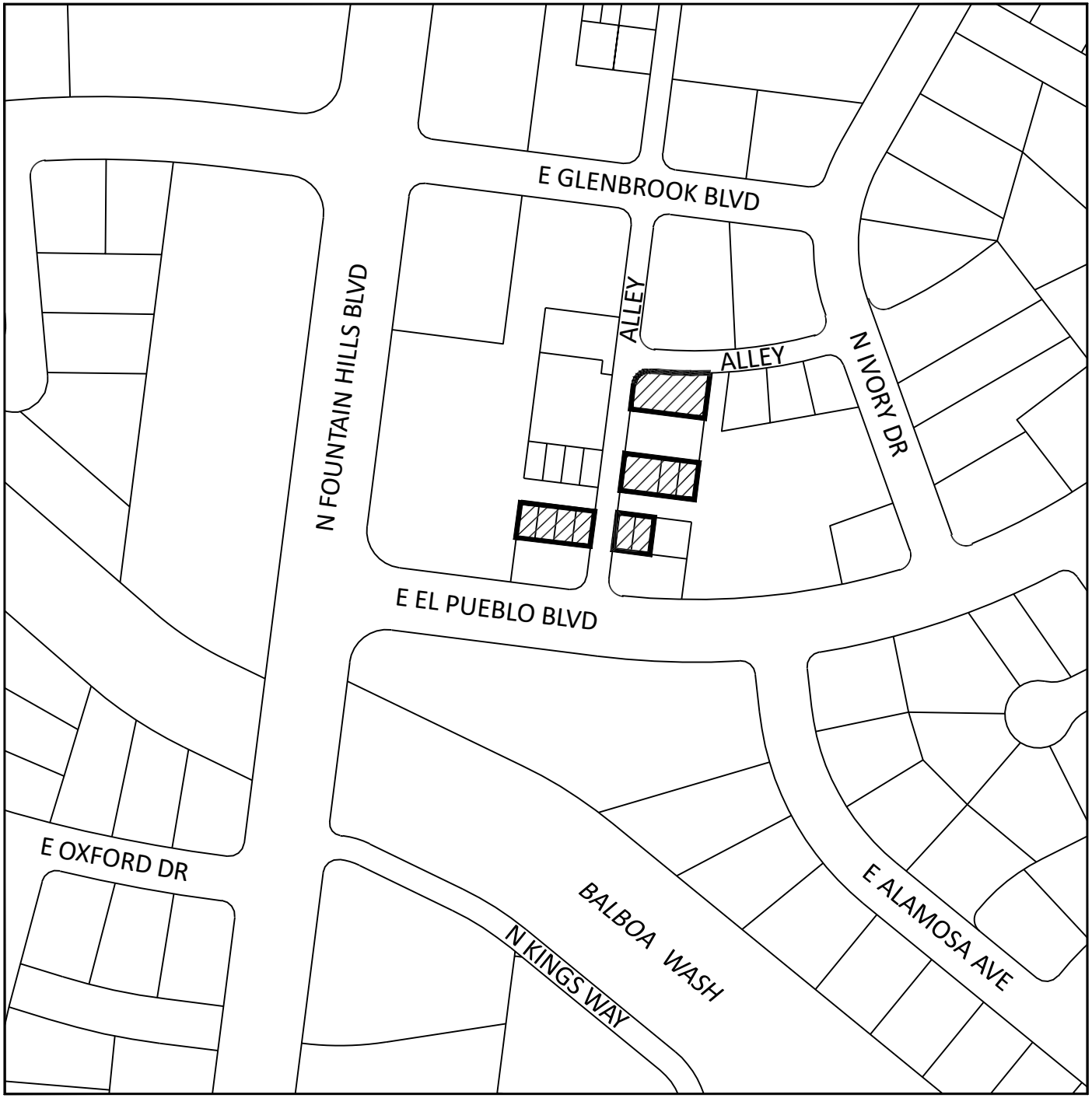
FISCAL IMPACT

Fiscal Impact:
Budget Reference:
Funding Source:

ATTACHMENTS

1. Case Maps 24-003-004 Combined
2. Revised Narrative, Citizen Participation Plan, and Final Report
3. Good_Neighbor_statement
4. Master plan (rev)
5. Plan Details Part-1
6. Plan Details Part -2
7. Plan Details Part -3
8. Letter of Opposition

Vicinity Map: SUP25-000003; 000004



Case Details

CASE: SUP24-000003; SUP24-000004

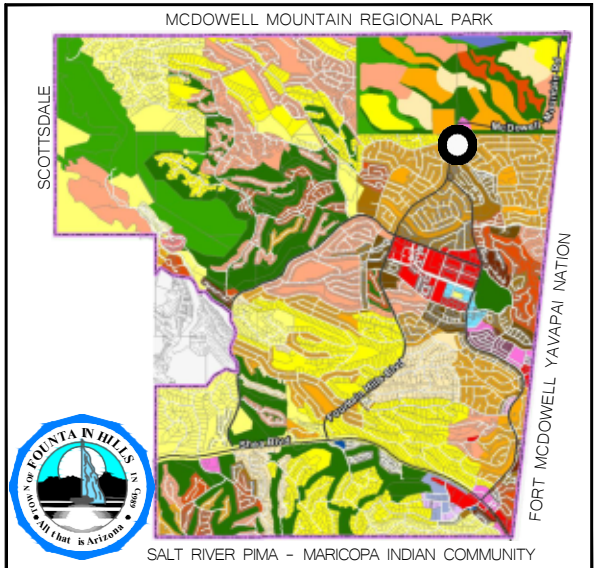
SITE / ADDRESS:
15012-15014-15016-15020-15022 &
15026 N. IVORY DR; 15037-15039-15041-15043
N FOUNTAIN HILLS BLVD

APNs: 176-04-704A, 176-04-705A, 176-04-806, 176-04-708A, 176-04-709A, 176-04-711A, 176-04-699A, 176-04-698A, 176-04-697A, 176-04-696A

REQUEST:

SPECIAL USE PERMIT to allow 11 residential units on 11 non-contiguous parcels in a commercial subdivision (Plat 106) generally located north of El Pueblo Blvd. between Fountain Hills Blvd. and Ivory Dr. in the C-C (Community Commercial) zoning district.

Site Location



Citizen Participation Plan and Final Report

El Pueblo @ Foutain Hills
15043 N. Fountain Hill Blvd

May 09, 2025,

Overview: This report is a revision to the former El Pueblo @ Fountain Hills project based on the comments raised by the P/Z board on the January board meeting. After the meeting, many considerations have been given to the issues raised. I have met with community members who attended the P/Z meeting and listened to their concerns as well as discussing potential solutions. I also had phone and in person meetings with the Tract106 POA board members. The revised plan is based on the findings, ideas, and solutions discussed at these meetings to address the challenges of the project. The proposed project envisions an opportunity to provide accessible, affordable housing, and live/workspace for young and active adults, such as healthcare workers, teachers, artists, and small business owners. The project includes 8 two-story single-family dwellings with a mixed used building. The homes are 4 bedrooms each with 2.5 bathrooms, living room, kitchen and dining space with a back patio; approximately 1325 sqft to 1525 sqft with 220 sqft garage and a tandem – covered parking. The offices are about 1150 sqft spaces.

Site Context: The project is situated in underutilized and undeveloped vacant plots that sit between actively used properties. The individual property is about 1,125 sqft in C-C zoning district designated for neighborhood commercial with 25 feet maximum building height, allowing for 100% lot coverage. The entire project will be in separate lots: 10, 11, 12, 13, 18, 19, 22, 23, 20a, & 25. We are requesting a special use permit based on the zoning district to house the proposed uses.

Imagery & Design: The project is carefully designed to blend in with the surrounding community with a combination of flat roofs and tiled roofs that match the surrounding structures, earth tone color choices, and a combination of stucco, metal and smart siding exteriors, and design features that are aesthetically pleasing. Most of the design features are borrowed from neighboring buildings.

Resolutions:

1. Five additional parking spaces were provided along the existing Alley to mitigate parking constraints
2. A solid waste collection area was provided close to the residence and existing business.
3. A dog park was provided and an open area for potential outdoor activities.
4. The existing Alley will have 50 feet unobstructed view to avoid potential accidents.
5. The Mixed-Used building will face the Fountain Hill blvd for better business exposure

Besides the in-person meeting with residents, several zoom meetings were held with the City Staffs: John Wesley and Farhad Tavassoli to discuss the findings, examine the citizens' concerns, and solutions before recommendations to the P/Z board for further review.

2601 E. Thomas Road
Suite 135
Phoenix, AZ 85016
623 742 8704
designgrouparch.com

Good Neighbor Statement

The proposed project will seek to maintain good relationships with neighbors by encouraging residents to avoid any gathering or partying after 10 pm at night. Moreover, littering around the property, leaving trash, or hanging clothing on the balconies will be prohibited. Residents will be required to maintain some level of decorum, abiding by the CC&R of plat 106 development. These conditions and restrictions will be included as part of an agreement to purchase or reside in the property.

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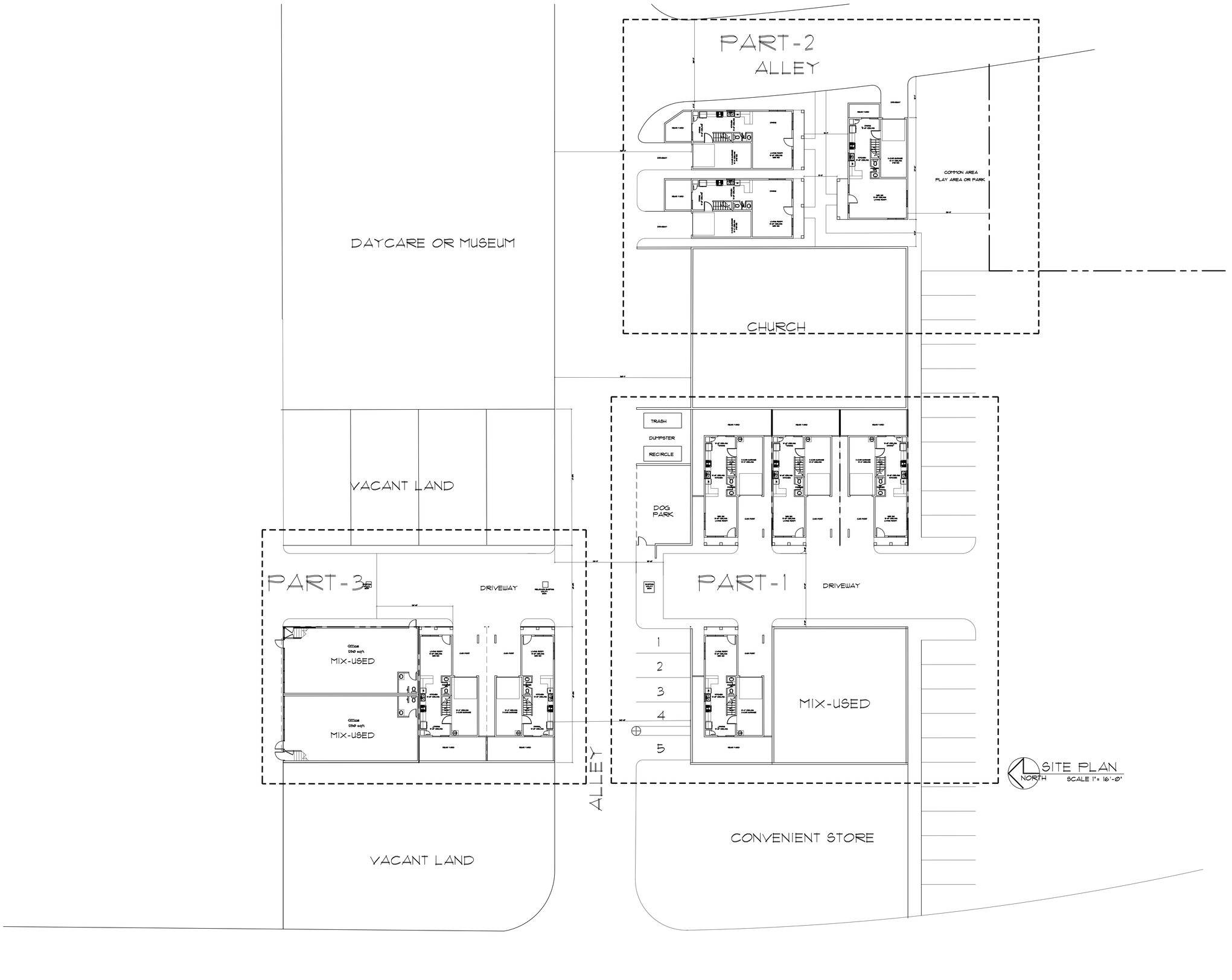

DESIGN GROUP

REGISTRANT SEAL:
-

PROJECT:

PUEBLO'S COTTAGES

15014 N. IVORY DR

FOUNTAIN HILLS AZ 85268

PROJECT TYPE:

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CONTRACTOR:

REVISION

NO.	DESCRIPTION	DATE
1		

DATE ISSUED:	5-9-2025
REVIEWED BY:	=
DRAWN BY:	WILSON
DESIGNED BY:	=
SCALE:	1/16"=1'-0"
DG PROJECT NO.:	2404

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MASTER PLAN

SHEET NO.

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WEST ELEV - Part 1

SOUTH ELEV - Part 2

NORTH ELEV - Part 3

EAST ELEV-PART-3

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15014 N. IVORY DR

FOUNTAIN HILLS AZ 85268

PROJECT TYPE:

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DATE ISSUED: 4-21-2025
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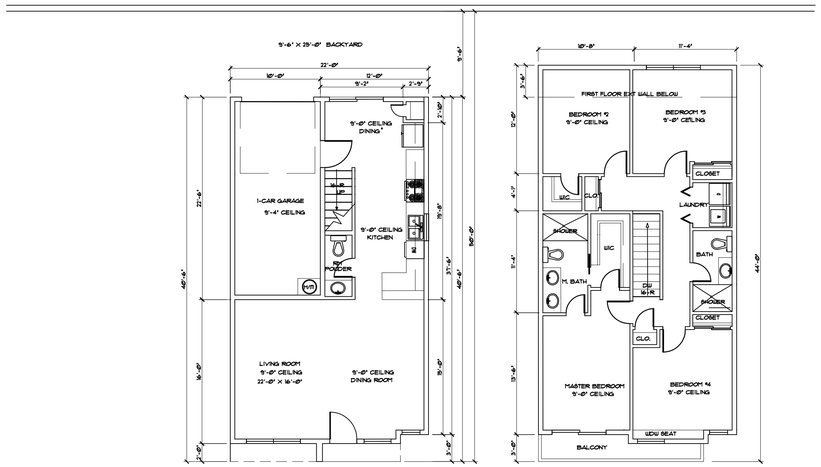
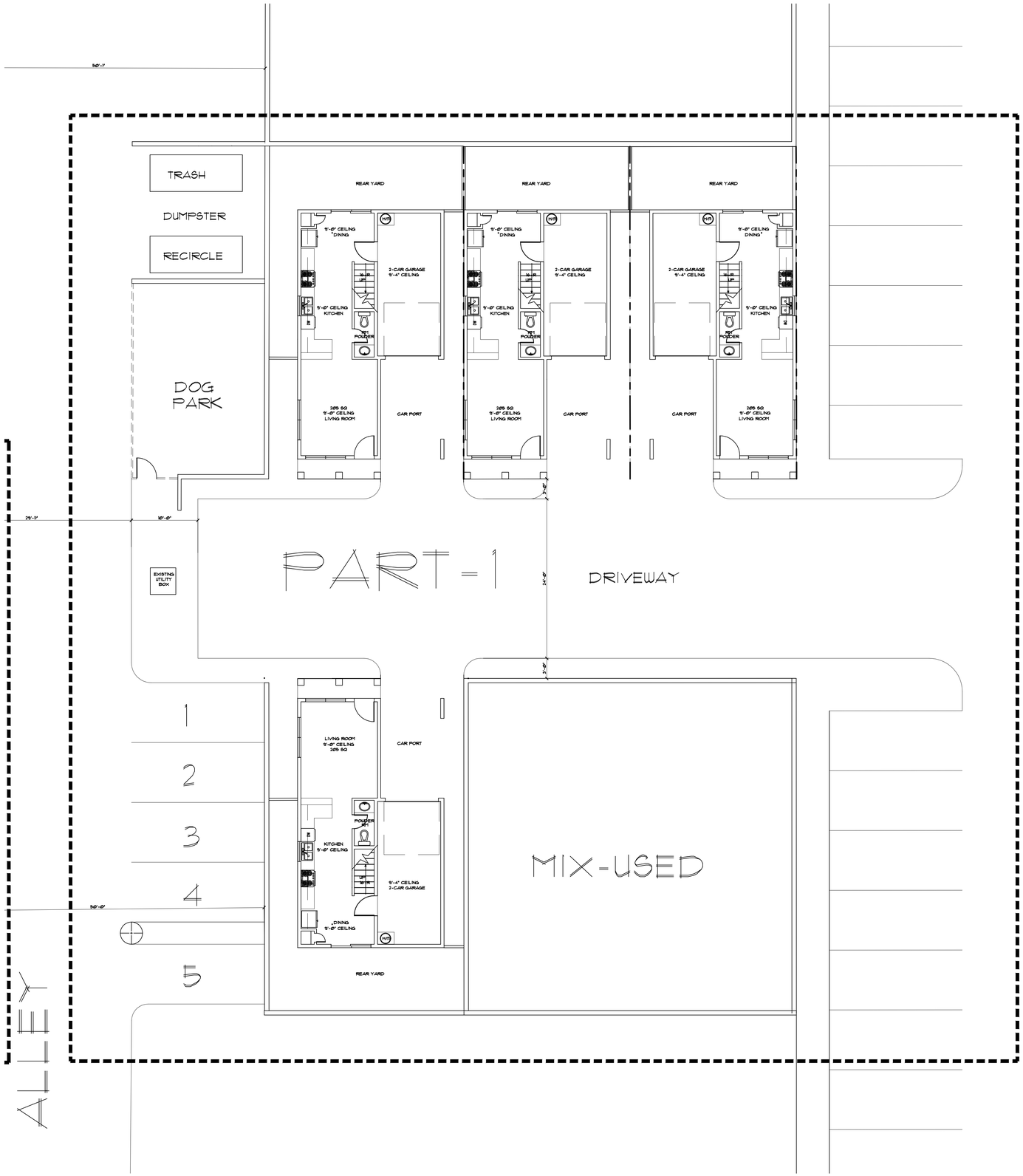

15'-6" X 25'-0" BACKYARD
22'-0"
10'-0"
12'-0"
9'-3"
2'-9"
5'-6"
2'-0"
22'-6"
40'-6"
16'-0"
5'-0"
5'-0" CEILING DINING
1-CAR GARAGE 9'-4" CEILING
W.H.
LIN.
5'-0" CEILING KITCHEN
REF.
DW
R
MICRO
R
R
R



NORTH

SITE PLAN

SCALE 1" = 16'-0"

DESIGN GROUP

REGISTRANT SEAL:

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DATE ISSUED:	5-9-2025
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DESIGNED BY:	=
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DG PROJECT NO.:	2404

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SITE PLAN pt -1

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WEST ELEV PART-1

EAST ELEV-PART-1

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WEST ELEV PART-1

SCALE 1/4"= 1'-0"

EAST ELEV-PART-1

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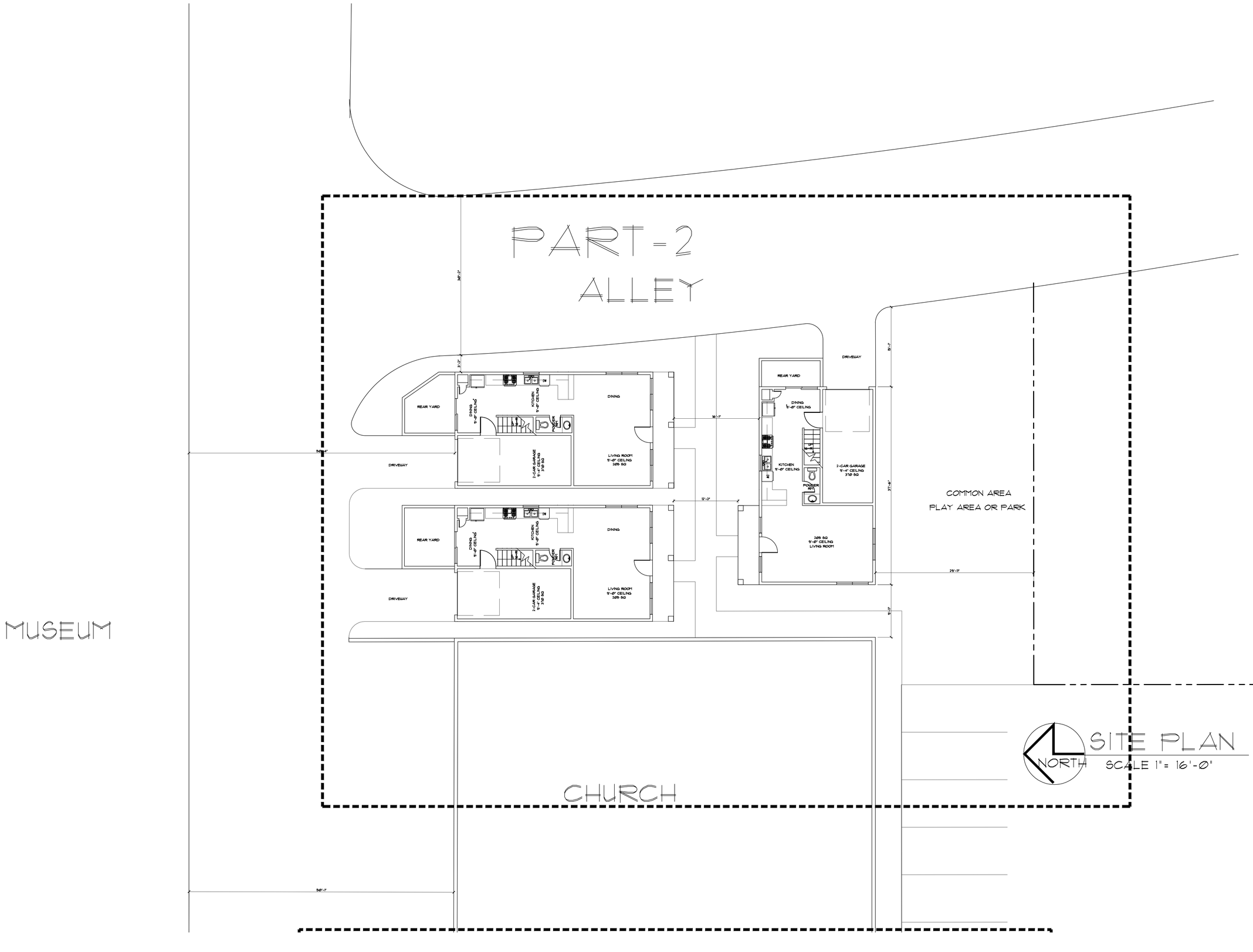

NORTH

SITE PLAN

SCALE 1" = 16'-0"

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REGISTRANT SEAL:
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PROJECT:

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15014 N. IVORY DR

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pt -2

SHEET NO.
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FOUNTAIN HILLS AZ 85268

PROJECT TYPE:

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DESIGNED BY:	=
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SOUTH ELEV-PART-2

SCALE 1/4"= 1'-0"

DESIGN GROUP

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DATE ISSUED:	5-9-2025
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VACANT LAND

SITE PLAN

NORTH

SCALE 1" = 16'-0"

PART - 3

EXISTING UTILITY BOX

DRIVEWAY

RELOCATE EXISTING UTILITY BOX

28'-0"

50'-2"

50'-0"

29'-11"

10'-0"

DOG PARK

EXISTING UTILITY BOX

50'-0"

Office

MIX-USED

Office

MIX-USED

LIVING ROOM
9'-0" CEILING
205 SQ

CAR PORT

CAR PORT

LIVING ROOM
9'-0" CEILING
205 SQ

POWDER RM

KITCHEN
9'-0" CEILING

UP
16'-R

9'-4" CEILING
2-CAR GARAGE

9'-4" CEILING
2-CAR GARAGE

POWDER RM

KITCHEN
9'-0" CEILING

UP
16'-R

DINING
9'-0" CEILING

H/TI

H/TI

DINING
9'-0" CEILING

REAR YARD

REAR YARD

1

2

3

4

5

DESIGN GROUP

REGISTRANT SEAL:

PROJECT:

PUEBLO'S COTTAGES

15014 N. IVORY DR

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PROJECT TYPE:

CONTRACTOR:

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NO.	DESCRIPTION	DATE
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DATE ISSUED: 5-9-2025
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DRAWN BY: WILSON
DESIGNED BY: =
SCALE: 3/16"=1'-0"
DG PROJECT NO.: 2404

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NORTH ELEV-PART-3

EAST ELEV-PART-3

DESIGN GROUP

REGISTRANT SEAL:
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PROJECT:

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15014 N. IVORY DR

FOUNTAIN HILLS AZ 85268

PROJECT TYPE:

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NORTH ELEV-PART-3

SCALE 1/4"= 1'-0"

EAST ELEV-PART-3

SCALE 1/4"= 1'-0"

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GURCZAK LUXURY DEVELOPMENT

Gurczak Luxury Development LLC
P.O. Box 20256
Fountain Hills, AZ 85268

June 17th, 2025

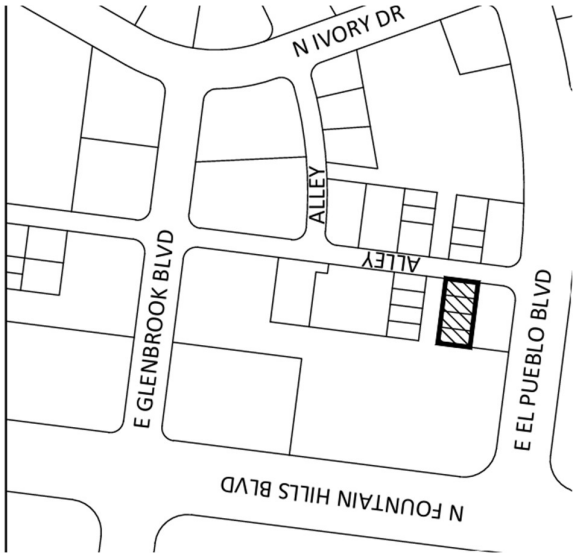
Fountain Hills Town Councilmembers

RE: Special Use Permit for 15037, 15039, 15041 & 15043 E. Fountain Hills Blvd., 15012, 15014, 15016, 15020, 15022 & 15026 E. Ivory Dr.

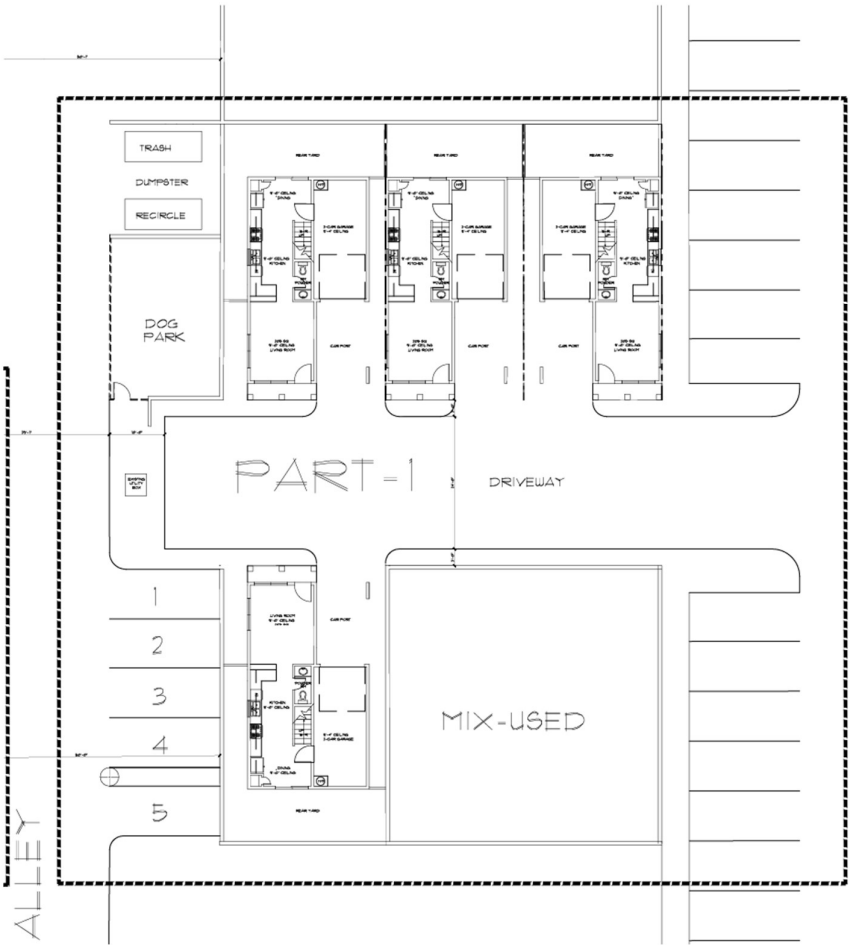
Town Councilmembers & P & Z Commissioners,

I am writing to voice my opposition to the above listed SUP request in Tract 106. I have two previously approved SUP requests in this plaza, one on the corner of El Pueblo/Ivory for a mixed-use building that is currently under construction & another for 7 townhouses, which will be breaking ground shortly, just north of that corner.

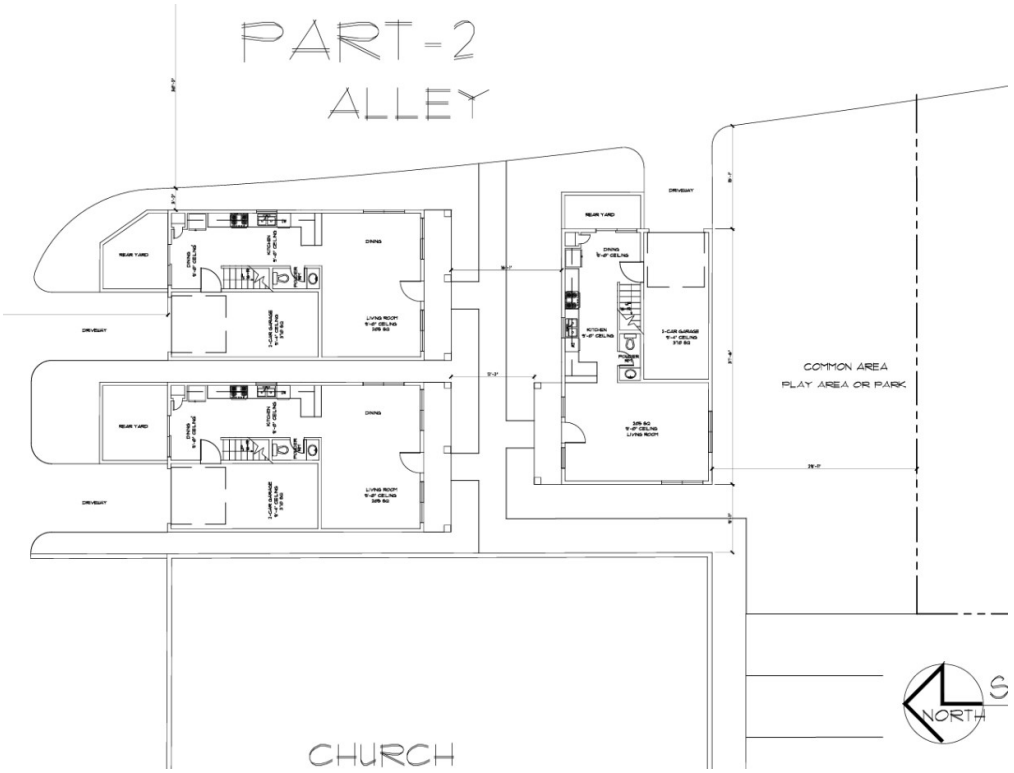
The project presented by the applicant is completely inconsistent with how the rest of this plaza should be developed/redeveloped. The applicant is essentially proposing small "cottages" in between existing commercial buildings & the project as whole does not blend in or work well with the existing surrounding buildings. While the applicant may try to compare the "cottages" to the 7 townhouses we have approved near there, the projects are not comparable & the lots in which he is proposing to do the "cottages" on are not lots that should have that type of housing whether it be townhouses or "cottages." My townhouse rental project has access through an outside alley & serves as a good buffer between the existing duplex neighborhood & the rest of this commercial plaza. The proposed "cottages" are simply scattered across multiple random lots & the applicant intends to sell them individually, which I don't see how that would work in this plaza.



The 4 consecutive 1,250 sq. ft. lots in the diagram above should be combined with the larger parcel next to it & be developed as one building, not as some spaced apart “cottages” with a neighboring office space. The proposed “driveway” was not & is not intended to be used as a driveway but a walking path & there are utility boxes/transformers located there. The residential units also show a small rear yard but if something is built in the neighboring parcel off El Pueblo these yards would only be 5 – 10 ft at most & could look at a 25’ high wall.



The 4 proposed “cottages” in the above section of the plaza also are inconsistent with how they those parcels should be developed & the location of “cottages” on these lots does not make sense. Once again, the small rear yards would directly face existing commercial buildings which the church & liquor store building have walls of about 12’ high already & the existing mixed use building wall height is about 25’. Also, the proposed driveway was never intended to be used as a driveway for vehicles.



The 3 proposed “cottages” on the above parcel is also inconsistent with surrounding buildings. This parcel should also be developed as one consistent building, not as these separate “cottages.” The “play area/park” is also not intended for that use & is in a utility easement. There will be a new transformer in the “play area” to supply power for my townhouse project next door.

The overall project does not make sense for this area & there are so many issues like driveway access & rear yards directly facing large block walls that simply cannot be resolved. As Commissioner Phil Sevum stated in his criticism of the plan & with which I completely agree, “With all due respect, this is so disjointed and not well thought out,” he said. “It is very poorly planned and designed. It should never have been brought forward.”

Upon the completion of just the mixed-use building on the corner of Ivory/El Pueblo, I will have invested more into this plaza than all other existing owners combined & do not want to see this inconsistent scattered project be built when there are several better ways to develop these parcels in a consistent manner that would blend in with the existing buildings. The updated plan is not much different than the original plan & all the same issues persist. This project should be denied & not even sent back to P & Z.

Sincerely,

John A. Gurczak

John A. Gurczak – President – Gurczak Luxury Development LLC

TOWN OF FOUNTAIN HILLS

STAFF REPORT

Meeting Date:	11/10/2025
Meeting Type:	Planning and Zoning Commission Regular Meeting
Submitting Department:	Development Services
Prepared by:	John Wesley, Development Services Director
Staff Contact Information:	Phone: 480-816-5138 Email: jwesley@fountainhillsaz.gov

Request to Town Council Regular Meeting (Agenda Language)

DISCUSSION: Review and discussion of regulations and court decisions regarding small cell wireless facilities in the Town's rights-of-way.

Staff Summary (background)

As directed by the Town Council, staff and the Planning and Zoning Commission have been reviewing all the regulations and requirements associated with wireless telecommunications in the Town. The Commission began with a thorough review of Chapter 17 of the Zoning Ordinance. This chapter provides all the requirements for every type of wireless telecommunication antennas and towers, except small wireless facilities (SWF) located within the public right of way. The Commission has prepared a preliminary draft of possible changes to Chapter 17. Continued review and finalization of recommendations for updates to this chapter have been put on hold while the Commission considers any possible changes related to SWF.

The Commission began review of SWF at their June 9, 2025, meeting. A copy of the report provided for that meeting is attached. After reviewing the documents provided, the Commission recognized the bulk of the regulations and requirements are in the Terms and Conditions document. The Commission requested the Town Attorney review this document in light of the discussion and goals of the Commission and provide comments and suggestions on what amendments can be made. That review is still in process.

At several meetings, comments have been made that there have been rulings by the 9th Circuit Court of Appeals regarding wireless communication towers and antennas that would impact our ability to regulate small cell wireless facilities in the Town's rights-of-way. The Town Attorney has reviewed the relevant decision by the 9th Circuit. Attached to this report is a memorandum from the Town Attorney reviewing the 9th Circuit decisions as well as background information regarding related federal and state law. There is a lot to digest from this memorandum, but as an overview, the rulings from the 9th Circuit have not significantly impacted Arizona statutes.

On a related note, there has been a Federal Communication Commission (FCC) Notice of Rulemaking filed which seeks to modify the ability of local jurisdictions to regulate wireless communication facilities. The primary objective is "to expedite, eliminate, and simplify permitting burdens that inhibit economic development, job creation, and energy

production." A provision of the Fountain Hills Zoning Ordinance that requires testing of antennas to ensure they are compliant with FCC guidelines on radiofrequency emissions was cited as an example of possible local government overreach. On Tuesday, November 18, the Town Council will be considering directing staff to prepare a letter providing comments on the possible rule changes. If changes are ultimately approved by the FCC they could impact our ordinance.

Related Ordinance, Policy or Guiding Principle

N/A

Risk Analysis

N/A

Recommendation(s) by Board(s) or Commission(s)

N/A

Staff Recommendation(s)

This is a discussion item, staff is not making any recommendations at this time.

Suggested Motion

This is a discussion item, no motions will be made.

FISCAL IMPACT

Fiscal Impact:

Budget Reference:

Funding Source:

ATTACHMENTS

1. 251104 Municipal Small Cell Regulation Memo
2. PZC 6_9_25 Agenda Item

Timothy A. La Sota PLC

Timothy A. La Sota, Principal
tim@timlasota.com

Jennifer J. Wright, Of Counsel
jen@timlasota.com

MEMORANDUM

To: Planning & Zoning Commission

From: Jennifer Wright, Town Attorney

Cc: Rachael Goodwin, Town Manager
John Wesley, Development Services Director

Re: Municipal Small Cell Regulation

Date: November 4, 2025

This memo provides legal analysis of Ninth Circuit decisions regarding municipal small cell regulations as well as a general background regarding related federal regulations and state law.

City of Portland v. United States **Case Summary**

City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020)

The case involves multiple petitions for review of orders issued by the Federal Communications Commission (FCC) in 2018, which relate to the installation and management of small cell wireless facilities necessary for the deployment of 5G technology. The petitioners include local governments, public and private utilities, and wireless service providers, with the City of Portland, Oregon, as the lead petitioner. The FCC orders in question are the Small Cell Order, the Moratoria Order, and the One-Touch Make-Ready Order. These orders were issued under the authority of the Telecommunications Act of 1996, which aims to encourage the expansion of wireless communications.

The Small Cell Order and the Moratoria Order address the limits on local governments' authority to regulate telecommunications providers, particularly concerning fees, aesthetic requirements, and time limits for processing applications. The FCC concluded that excessive fees and aesthetic requirements imposed by local governments were materially

inhibiting the deployment of 5G technology. The orders set limits on fees, requiring them to be a reasonable approximation of the government's costs, and established criteria for aesthetic requirements, which must be reasonable, objective, and published in advance. The orders also introduced shot clocks, setting time limits for local governments to act on applications for wireless facility deployment.

The One-Touch Make-Ready Order aims to facilitate the attachment of new cellular facilities to existing utility poles by allowing new attachers to perform all necessary preparatory work, rather than relying solely on the pole owners. This order was issued under the authority of the Pole Attachment Act, which was expanded by the Telecommunications Act of 1996.

In this case, the court upheld most of the FCC's orders, finding them consistent with the Telecommunications Act and not arbitrary or capricious. However, the court vacated the provisions of the Small Cell Order that required aesthetic regulations to be "no more burdensome" than those applied to other technologies and that required all aesthetic regulations to be "objective," as these provisions were found to be contrary to the statutory directive and inadequately explained.

The court also addressed constitutional challenges to the orders, including claims that they violated the Fifth and Tenth Amendments. The court rejected these challenges, finding that the orders did not constitute a physical or regulatory taking and did not violate the Tenth Amendment.

Intersection of Arizona Law, FCC Small Cell Order, and *City of Portland*

Arizona Revised Statute 9-591 et seq. generally aligns with the 2018 FCC Small Cell Order's framework for regulating small wireless facilities, but contains some provisions that may conflict with federal preemption standards established in *City of Portland v. United States*. While both regulatory schemes aim to streamline small wireless facility deployment, Arizona's statute permits higher municipal fees than the FCC's safe harbor provisions and provides more detailed state-level regulatory authority. The *City of Portland* decision significantly constrains Arizona municipalities' regulatory power by upholding federal fee limitations and shot clock requirements while limiting their ability to impose restrictive aesthetic regulations. Arizona municipalities must now navigate between state statutory authority and federal preemption, with federal standards generally taking precedence where conflicts arise.

Arizona Revised Statute 9-591 et seq. Framework

Arizona's comprehensive small wireless facility regulatory framework, enacted in 2017 and amended in 2019, establishes detailed definitions and procedural requirements for

municipal regulation. The statute defines small wireless facilities as those with antennas located within an enclosure of not more than six cubic feet in volume and all other wireless equipment cumulatively not more than twenty-eight cubic feet in volume. A.R.S. § 9-591. This definition closely mirrors federal standards but provides Arizona-specific dimensional requirements.

The Arizona framework significantly limits municipal authority through several key provisions. Section 9-592 prohibits exclusive arrangements between authorities and wireless providers for utility pole construction or small wireless facility collocation. A.R.S. § 9-592. More importantly, the statute establishes strict fee limitations, restricting charges to no more than the direct and actual cost of managing the right-of-way, with fees that are competitively neutral and non-discriminatory. *Id*. Arizona permits application fees up to $750 and annual recurring fees of $50 per small wireless facility. *Id*.

Section 9-593 further constrains municipal permitting authority by generally prohibiting regulation or charges for small wireless facility collocation, except under specific circumstances. A.R.S. § 9-593. The statute requires municipalities to accept and process applications within established timeframes and includes a deemed approval provision if authorities fail to act within specified periods. *Id*.

Additionally, Arizona law exempts certain small wireless facility installations from zoning review if they meet height and size requirements. A.R.S. § 9-592.

2018 FCC Small Cell Order Provisions

The FCC's 2018 Declaratory Ruling and Third Report and Order (FCC 18-133) established comprehensive federal standards for small wireless facility regulation aimed at accelerating 5G deployment. *See City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). The Small Cell Order created presumptively reasonable fee safe harbors of $500 for application fees and $270 annually for recurring fees per wireless facility. *Id*. These federal standards represent maximum fees that localities can charge without triggering preemption scrutiny under the Telecommunications Act.

The FCC Order also implemented modified shot clock requirements, mandating that state and local governments decide applications within 60 days for installations on existing infrastructure and 90 days for other applications. *Id*. These timeframes apply to all telecommunications permits, not just zoning permits, expanding federal oversight beyond traditional land use decisions. The Order further established standards for aesthetic regulations, requiring that they be reasonable and published in advance while prohibiting requirements that are not technically feasible. *Id*.

Critically, the FCC determined that municipalities act in a regulatory rather than proprietary capacity when controlling access to public rights-of-way, subjecting their fee structures and permitting processes to federal preemption under Sections 253 and 332 of the Telecommunications Act. *Id*. This determination significantly expanded federal preemption authority over traditional municipal functions.

***City of Portland v. United States* Holdings**

The Ninth Circuit's decision in *City of Portland v. United States* largely upheld the FCC's Small Cell Order while striking down specific provisions that exceeded the agency's statutory authority. *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). The court applied the effective prohibition standard from *Sprint Telephony PCS v. County of San Diego*, which requires actual or effective prohibition rather than the mere possibility of prohibition to trigger federal preemption. *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008). Under this standard, the FCC must demonstrate that local regulations actually prohibit or effectively prohibit telecommunications service deployment.

The court upheld the FCC's fee limitations, finding that the agency reasonably concluded that above-cost fees, when considered in aggregate, materially inhibit small wireless facility deployment nationwide. *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). The decision noted that "even fees that might seem small in isolation have material and prohibitive effects on deployment, particularly when considered in the aggregate given the nature and volume of anticipated Small Wireless Facility deployment". *Id*. This holding validates federal authority to override local fee structures that exceed cost-based calculations.

However, the court struck down two key aesthetic regulation requirements. The FCC's mandate that aesthetic requirements be "no more burdensome" than those imposed on functionally equivalent services was found to exceed statutory authority because it prohibited even reasonable regulatory distinctions among physically different but functionally equivalent services. *Id*. The court also vacated the requirement that aesthetic regulations be "objective," finding this standard arbitrary and capricious because the FCC failed to explain why all subjective aesthetic requirements lack public benefit. *Id*.

The court upheld the FCC's shot clock requirements, finding that Section 332(c)(7)(B)(ii)'s mandate for decisions within a "reasonable period of time" reasonably extends to all permitting decisions, not just zoning permits. *Id*. The decision also rejected constitutional challenges under the Fifth and Tenth Amendments, holding that the federal requirements do not constitute a regulatory taking or impermissible commandeering of state officials. *Id*.

Areas of Conflict and Alignment

Several significant discrepancies exist between Arizona's statutory framework and federal standards as validated by *City of Portland*. Most notably, Arizona permits application fees up to $750 while the FCC establishes a $500 safe harbor. *Compare* A.R.S. § 9-592 with FCC 18-133. Similarly, Arizona's $50 annual per-facility fee cap falls well below the FCC's $270 safe harbor, suggesting Arizona's fee structure may be more restrictive than federal minimums require. *Id*.

The temporal frameworks also present potential conflicts. While Arizona requires municipalities to establish rates and terms within six months of August 9, 2017, or three months after receiving the first request, the federal shot clocks impose more stringent 60- and 90-day decision deadlines that may supersede Arizona's timelines. *Id*.

However, substantial alignment exists in definitional frameworks and procedural requirements. Both regulatory schemes emphasize streamlined permitting and prohibit discriminatory treatment. *Id*. Arizona's prohibition on exclusive arrangements and emphasis on competitive neutrality aligns with federal goals of promoting deployment and competition. A.R.S. § 9-592.

The aesthetic regulation framework presents a complex intersection. Arizona law permits municipalities to impose "objective design standards and reasonable stealth and concealment requirements," which appears consistent with the *City of Portland* court's validation of "reasonable" aesthetic standards while rejecting overly restrictive "objective" requirements. A.R.S. § 9-592; *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). Arizona municipalities retain authority to impose reasonable aesthetic requirements under both state and federal frameworks, provided such requirements are technically feasible and published in advance.

Practical Implications

Arizona municipalities must carefully restructure their small wireless facility regulations to comply with federal preemption standards while maintaining legitimate local authority. Fee structures require immediate attention, as Arizona's $750 application fee authorization exceeds the FCC's $500 safe harbor and may trigger preemption challenges. Municipalities should consider adopting the federal safe harbor amounts or developing detailed cost justifications for higher fees based on actual administrative expenses.

Permitting processes need revision to meet federal shot clock requirements of 60 days for existing infrastructure installations and 90 days for new construction applications. Municipal staff training and workflow adjustments are essential to avoid deemed approval scenarios where applications are automatically granted due to processing delays.

Comprehensive application tracking systems and clear approval criteria help ensure compliance with federal timing requirements.

Aesthetic regulation frameworks require careful balancing between local design standards and federal reasonableness requirements. Following the *City of Portland* decision, municipalities can impose reasonable aesthetic requirements that are published in advance and technically feasible, but cannot apply overly restrictive objective standards or impose more burdensome requirements than those applied to comparable infrastructure. Design guidelines should focus on legitimate safety and visual impact concerns rather than creating deployment barriers.

Municipal attorneys should review existing ordinances for compliance with both Arizona statutory requirements and federal preemption standards, recognizing that federal law generally governs where conflicts arise.

Recent Developments

The 2020 *City of Portland v. United States* decision marked a significant shift in federal-local regulatory balance by upholding most FCC Small Cell Order provisions while rejecting overly broad aesthetic regulation requirements. *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). This decision established important precedent for other circuits addressing similar challenges to federal small wireless facility regulations. The Ninth Circuit's partial validation of FCC authority provides greater certainty for both municipalities and wireless providers regarding the scope of federal preemption.

The 2024 *League of California Cities v. Federal Communications Commission* decision addressed ongoing disputes over wireless facility modification standards under Section 6409 of the Spectrum Act. *League of California Cities v. Federal Communications Commission*, 118 F.4th 995 (9th Cir. 2024). This decision clarified when equipment additions constitute substantial changes to existing facilities, affecting both federal preemption analysis and state regulatory authority over facility modifications. The continuing evolution of modification standards impacts Arizona municipalities' ability to review and condition wireless facility upgrades.

Ongoing circuit court decisions continue to interpret the effective prohibition standard established in *Sprint v. County of San Diego*, with courts applying varying levels of scrutiny to local regulations that may burden small wireless facility deployment. *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008). Recent decisions in the Fifth Circuit and other jurisdictions demonstrate increasing federal court willingness to find local regulations preempted where they create substantial deployment barriers, even absent complete prohibition of service.

Administrative Decisions and Guidance

Arizona Revised Statute (A.R.S.) § 9-591 et seq. establishes state-level regulations governing small wireless facilities, including provisions on siting fees, permits, and deployment timelines, designed to expedite 5G infrastructure while balancing municipal authority. The 2018 FCC Small Cell Declaratory Ruling and Third Report and Order, issued in WT Docket No. 17-79, seeks to remove barriers to wireless infrastructure investment by setting federal "shot clocks" for local approvals (60 days for collocations, 90 days for new construction), capping fees to amounts that reasonably approximate local costs, and clarifying that small cells generally do not constitute major federal actions requiring environmental or historic reviews. The FCC recognized the need for a uniform regulatory framework to expedite deployment nationwide, limiting local authority where excessive fees or delays impede service expansion. IN THE MATTER OF ACCELERATING WIRELESS BROADBAND DEPLOYMENT BY REMOVING BARRIERS TO INFRASTRUCTURE INVESTMENT, 33 FCC Rcd. 9088 (2018); REMARKS OF FCC CHIEF OF STAFF MATTHEW BERRY AT THE 7TH ANNUAL AMERICAS SPECTRUM MANAGEMENT CONFERENCE NATIONAL PRESS CLUB WASHINGTON, DC, 2018 WL 4851379 (2018).

In *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), the Ninth Circuit affirmed key aspects of the FCC's 2018 Declaratory Ruling, upholding limits on local fees and shot clocks, reinforcing FCC preemption over state and local regulations that effectively prohibit wireless infrastructure deployment, including small cells in public rights-of-way. This decision notably constrains Arizona municipalities' regulatory discretion under A.R.S. § 9-591 et seq., by limiting their ability to impose fees or process times exceeding FCC-established thresholds, promoting faster 5G deployment consistent with federal law. IN THE MATTER OF PETITION FOR DECLARATORY RULING THAT CLARK COUNTY, NEVADA ORDINANCE NO.4659 IS UNLAWFUL UNDER SECTION 253 OF THE COMMUNICATIONS ACT AS INTERPRETED BY THE FEDERAL COMMUNICATIONS COMMISSION AND IS PREEMPTED, 36 FCC Rcd. 278 (2021).

Commentary

The FCC's 2018 Small Cell Order was designed to accelerate 5G deployment by imposing expedited shot clock deadlines (60 days for collocations on existing structures and 90 days for new construction) on state and local governments' processing of small cell wireless facility applications. It also capped the fees municipalities could charge, requiring them to be reasonable approximations of local costs to avoid effectively prohibiting wireless service. The Ninth Circuit in *City of Portland v. United States* upheld most of these provisions, affirming that the Telecommunications Act's pro-competitive goals supported

expansion of shot clocks to all necessary permits beyond zoning, thereby preventing local delays via alternative permit denials. The court also upheld the FCC's fee limitations as neither arbitrary nor capricious, recognizing that excessive fees in one jurisdiction could obstruct nationwide 5G rollouts. However, the court vacated provisions that broadly preempted local aesthetic regulations beyond color, size, shape, and placement, emphasizing local governments' retained authority to regulate aesthetics without unreasonable discrimination. *See* 4 American Land Planning Law § 86:40 (Rev. Ed.); *see also* Federal Land Use Law & Litigation § 10:13 (2025 ed.).

Arizona Revised Statutes § 9-591 et seq. governs local use of public rights-of-way but must be interpreted in harmony with the federal limitations under the Telecommunications Act and the FCC's rulings. Federal law, as clarified in 47 U.S.C. § 332(c)(7), preserves local zoning authority while restricting unreasonable discrimination, denials unsupported by substantial evidence, and regulatory actions effectively prohibiting wireless service. Following Portland, Arizona municipalities must comply with FCC shot clocks and fee limits but retain some aesthetic regulatory powers, provided these do not unreasonably discriminate among providers or prohibit service. Municipalities are thus constrained in regulatory delays or fee practices that exceed FCC guidelines and must carefully justify aesthetic restrictions under the narrowed scope approved by federal courts. *See* 2 Handling the Land Use Case § 41:2 (3d ed.); *see also* 4 American Land Planning Law § 86:40 (Rev. Ed.); *see also* 3 Am. Law. Zoning § 25:10 (5th ed.).

What kinds of regulations can be implemented by Arizona municipalities?

Arizona municipalities can implement zoning regulations and administrative restrictions to regulate small cell construction within the constraints of A.R.S. § 9-591 *et seq*., the Telecommunications Act of 1996 (TCA), and the 2018 FCC Small Cell Order, as clarified by the Ninth Circuit in *City of Portland v. United States*. Municipalities may regulate small wireless facilities through zoning ordinances, public right-of-way (ROW) management provisions, building or structural safety codes, historic preservation regulations, and design standards specific to certain districts or planned developments. *See Small Wireless Facilities in Public Rights-of-Way*, Practical Law Practice Note W-014-4949 (attached as Exhibit A).

Under A.R.S. § 9-591 *et seq*., municipalities retain authority to regulate small wireless facilities in public ROWs, provided that their regulations do not effectively prohibit telecommunications services or conflict with the TCA. *See* Ex. A; *see also Local Government Regulation of Telecommunications Facilities*, Practical Law Practice Note (attached as Exhibit B). The TCA preserves local zoning authority but prohibits unreasonable discrimination among providers of functionally equivalent services and regulations that effectively ban the provision of telecommunications services. *See* Ex. B.

Additionally, municipalities must comply with FCC requirements, such as ensuring that aesthetic standards are reasonable, published in advance, and avoid unreasonable discrimination among providers. *See* Ex. A.

The Ninth Circuit's decision in *City of Portland* upheld FCC requirements that aesthetic regulations be reasonable and published in advance but struck down the FCC's criteria requiring aesthetic standards to be objective and no more burdensome than those applied to other infrastructure deployments. *See* Ex. A; *see also* Ex. B.

Municipalities can address aesthetic concerns by adopting regulations that ensure compatibility in size, mass, and color with other facilities, establish maximum heights and diameters, encourage camouflaging techniques, and regulate facilities in historic districts and areas emphasizing architectural consistency. *See* Ex. A.

Arizona municipalities may also impose fees for the use of public ROWs, provided the fees are a reasonable approximation of costs incurred, based on objectively reasonable costs, and nondiscriminatory. The FCC has established presumptively reasonable fee amounts, such as $500 for an application covering up to five small wireless facilities, $100 for each additional facility, and an annual charge of $270 per facility for ROW access or attachment to municipally owned structures. *See* Ex. A.; *see also Regulations for Wireless Facilities in Public Rights-of-Way*, Practical Law Standard Document (attached as Exhibit C). Municipalities must ensure their fees comply with these standards unless state law imposes stricter limits. *See* Ex. A; *see also* Ex. C.

Finally, municipalities must adhere to the FCC's "shot clock" timelines for reviewing applications for small wireless facilities. Failure to process applications within these timelines may constitute a violation of the TCA. *See* Ex. A; *see also* Ex. B.; *see also* Ex. C. Municipalities may also establish procedures for granting waivers or variances to zoning and land use standards if compliance would materially inhibit a provider's ability to offer competitive service. *See* Ex. A; *see also* Ex. B.

In summary, Arizona municipalities can regulate small cell construction through zoning, ROW management, aesthetic standards, and fee structures, provided their regulations comply with A.R.S. § 9-591*et seq*., the TCA, and the FCC's Small Cell Order, as interpreted by the Ninth Circuit. *See* Ex. A; *see also* Ex. B; *see also* Ex. C.

Timothy A. La Sota PLC

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EXHIBIT A

Small Wireless Facilities in Public Rights-of-Way

by Practical Law Government Practice

Maintained • USA (National/Federal)

A Practice Note discussing local regulation of small wireless facilities, including small cell systems and distributed antenna systems (DAS), in the public rights-of-way. This Note addresses right-of-way management and zoning issues associated with these wireless telecommunications systems, which are integral to the deployment of 5G service. It describes the effects of the Telecommunications Act of 1996 (TCA), actions taken by the Federal Communications Commission (FCC), and other state and federal constraints on local authority.

Wireless Communications, AI, and the Internet of Things

Small Wireless Facility Technology

Advantages of Small Wireless Facilities

Challenges of Small Wireless Facilities

Regulating Small Wireless Facilities

Legal Constraints on Local Regulation

Special Considerations in Drafting Small Wireless Facility Regulations

Review of Small Wireless Facility Applications

Regulatory Versus Proprietary Capacity

Batched Applications

Timelines for Review

Application Denials

Fee Payments

FCC Restrictions on Fees

Application Fees

Fees for Use of the Rights-of-Way

Pole Attachment Fees

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Local governments have traditionally regulated telecommunications facilities such as towers and large antennas, but now they must extend their focus to newer technologies. In many areas, telecommunications providers want to use alternatives such as small cell systems and distributed antenna systems (DAS), frequently in public rights-of-way (ROW). Legal constraints at the federal and state level govern the way local governments can regulate these systems. Local government attorneys and decision makers must develop an understanding of small wireless facilities and the unique issues associated with regulating them.

This Note discusses both the benefits and the challenges local governments encounter in accommodating and regulating small wireless facilities. It addresses opportunities for compensation to the government and includes tips for drafting small wireless facility regulations. For sample local government ordinance provisions dealing with wireless facilities in the ROW, see Standard Document, Regulations for Wireless Facilities in Public Rights-Of-Way.

Wireless Communications, AI, and the Internet of Things

The development of new wireless technologies and the expanding role of the internet have led to the phenomenon known as the **Internet of Things (IoT)**. A "thing" may be something like an automobile, a camera streaming live video feed, a smart thermostat, a person's medical monitor, or a tracking device attached to an animal. The continuing demand for more data, along with the development of autonomous vehicles and other new "things," has led to the rollout of 5G technology. The standards for 5G aim for higher capacity and reliability than 4G technology. Coupled with this is the rapid evolution of AI uses that perform tasks that simulate human intelligence.

All of this relies on infrastructure, including small cell systems and DAS facilities, with multiple components placed on both public and private property. Small wireless facilities, play a key role in the IoT, the progress toward making 5G universal, and advancing toward 6G.

Small Wireless Facility Technology

Local governments may receive applications for approval of small wireless facilities, including proposals for small cell or DAS facilities, before they are familiar with the technology. Before reviewing these proposals, they should have a basic understanding of how the technology differs from older communications systems. Regulators should know that:

- **Small cell systems** can be a complement or alternative to towers, adding coverage and capacity where usage demand is high. These systems typically use small antennas and cabinets mounted to utility poles, streetlight poles, traffic signal poles, or stand-alone poles, connected by fiber that carries data. They are often (but not always) installed in the public right-of-way. While small cells can be more aesthetically pleasing than large antennas and towers, equipment in the ROW can be noticeable and obtrusive. Local governments generally want to maintain control over the size, location, and appearance of facilities on public property.

- **Distributed antenna systems** bear some similarities to small cell systems. However, rather than relying on a network of individual cells, a DAS uses a single headend that shares and receives signals with all remote nodes simultaneously within a sector. Additionally, multiple communications providers can share a DAS, unlike small cell systems. When a DAS is in the public right-of-way, local governments generally have the same concerns that arise with small cell systems.

Small cell and DAS components in the ROW can include:

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- Poles.
- Antennas.
- Base stations or equipment cabinets.
- Power sources or meters.
- Canisters or boxes attached to a pole for housing antennas or equipment.
- Fiber lines.

Advantages of Small Wireless Facilities

Most communities want to embrace advances in technology and encourage connectivity. On the other hand, they want to avoid new installations of large wireless telecommunications towers, sometimes referred to as macro towers. Small wireless facilities offer advantages over macro towers because they:

- Rely on components that are shorter, more compact, and generally less prominent than macro towers.
- Offer cost advantages that make it more economically feasible to provide coverage in some communities.
- Add capacity to networks, supporting more consistent coverage and fewer blocked calls in areas with heavy usage.
- Help improve performance of individual mobile devices, with the added benefit of extending battery life.

Challenges of Small Wireless Facilities

Despite their benefits, small wireless facilities are not always an ideal solution. When a government receives a proposal for a small wireless facility within a public right-of-way, the concerns that may arise include:

- Whether control of the right-of-way falls under state or local government responsibility (see Ownership and Control of the Right-of-Way).
- Whether the components of the system are in keeping with the character of the surrounding area and the community's aesthetic goals (see Aesthetics).
- Whether installing the system will result in an overcrowded right-of-way (see Preventing Clutter).

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- The potential for conflict with other right-of-way uses (see Competing Uses of the Rights-of-Way).
- Threats to public safety (see Public Safety).
- Obstructions to right-of-way use by pedestrians (see Accessibility Issues).
- Interference with mowing, tree trimming, and other maintenance activities in the ROW (see Right-of-Way Maintenance).

To the extent legal authority allows (see Legal Constraints on Local Regulation), local government regulators should adopt regulations that address the concerns and opportunities small wireless facilities present (see Special Considerations in Drafting Small Wireless Facility Regulations).

Regulating Small Wireless Facilities

Local government may regulate small wireless facilities in the ROW through various approaches, such as:

- Zoning regulations.
- Public right-of-way management provisions.
- Building or structural safety codes.
- Historic preservation regulations.
- Design standards specific to certain districts or planned developments.

These approaches are not mutually exclusive and local governments may use them in combination with each other. Because of the complexities associated with telecommunications facilities, some cities adopt separate regulations dealing exclusively with telecommunications facilities in the ROW.

Local governments typically regulate telecommunications facilities both within and outside the public rights-of-way by passing an ordinance. Before drafting any ordinance, the drafter must develop a general understanding of the local government's authority (see Practice Note, Considerations Before Drafting an Ordinance). Broad authority to impose regulations may be found in the government's charter or in statutes of general application. For sample ordinance provisions local governments can draw from to develop their own regulations for wireless facilities in the ROW, see Standard Document, Regulations for Wireless Facilities in Public Rights-Of-Way.

Legal Constraints on Local Regulation

Local government counsel should become familiar with federal and state legislation and regulations that affect local authority over small wireless facilities in the ROW, including:

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- The Telecommunications Act of 1996 (see Telecommunications Act of 1996).
- The Americans with Disabilities Act (see Other Federal Statutes).
- The Spectrum Act (see Other Federal Statutes).
- Actions taken by the Federal Communications Commission (FCC) (see FCC Rulings and Orders).
- State laws that limit or preempt local regulation (see State Laws).

Telecommunications Act of 1996

The enactment and enforcement of small wireless facility regulations must comply with the Telecommunications Act of 1996 (TCA). The TCA includes:

- Barriers to entry provisions that make it unlawful for state or local governments to prohibit or effectively prohibit the ability of any entity to provide telecommunications service (47 U.S.C. § 253). Safe harbor language in this section allows state or local governments to manage public ROW.
- Language at 47 U.S.C. § 332(c)(7) that preserves local zoning authority over personal wireless service facilities, but with certain limitations (see Practice Note, Local Government Regulation of Telecommunications Facilities: Zoning Authority Preserved, Subject to Limitations).

Some courts have held the TCA does not preempt nonregulatory decisions of a local governmental entity acting in its proprietary capacity (see *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002)). More recently, however, the FCC has ruled that the TCA's restrictions on regulation of communications facilities in the ROW apply even when the local government owns the property within the ROW (see Regulatory Versus Proprietary Capacity).

Other Federal Statutes

Local government regulators should also be aware of:

- Provisions from Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, also known as the Spectrum Act. These provisions require local governments to allow certain modifications to existing wireless towers or base stations if the modifications do not substantially change a facility's physical dimensions (47 U.S.C. § 1455) (see Practice Note, Section 6409 and Modifications to Wireless Facilities).
- The Americans with Disabilities Act (ADA) of 1990, which protects the rights of persons with disabilities (42 U.S.C. § 12101). The ADA includes provisions that prohibit discrimination by local governments based on disability. Under the ADA, the federal government imposes regulations that cover access to programs and services provided by local governments. These regulations require sidewalks and other pedestrian facilities to accommodate persons

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with disabilities. Local standards for small wireless facilities in public ROW should ensure that the facilities leave an ADA-compliant path of travel for disabled persons (see Accessibility Issues).

FCC Rulings and Orders

The FCC has proactively sought to accelerate deployment of small wireless facilities. FCC actions affecting wireless facilities on both public and private property include rulings and orders dealing with:

- Non-substantial modifications to wireless facilities.
- New facilities and collocations that constitute a substantial change.
- Moratoria.

(See Practice Note, Local Government Regulation of Telecommunications Facilities: FCC Actions.)

Most significantly, the FCC's Declaratory Ruling and Third Report and Order (FCC 18-133 (2018 WL 4678555)), issued in September 2018, addresses a number of specific issues involving small wireless facilities. A large group of local governments and other parties challenged this action. The US Court of Appeals for the Ninth Circuit vacated part of the FCC Ruling but left most of it intact (*City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020)). The FCC's action, which took effect in January 2019, included:

- New criteria to determine whether state or local regulations affecting small wireless facilities violate the TCA's effective prohibition standards. Under these criteria, an effective prohibition occurs where a requirement “materially limits or inhibits the ability of any competitor or potential competitor to compete”. For more information on determining whether an action constitutes an effective prohibition, see Practice Notes, Local Government Regulation of Telecommunications Facilities: Effective Prohibition of Service and FCC Restrictions on Regulation of Small Wireless Facilities: Effective Prohibition Standard.
- Limits on the fees that state and local governments can charge to wireless providers to install small wireless facilities (see FCC Restrictions on Fees).
- Specific fee levels (safe harbors) that presumptively comply with the new standard.
- Criteria to determine when the TCA preempts state and local aesthetic requirements. In *City of Portland*, the Ninth Circuit overturned portions of these criteria but upheld other portions (*City of Portland*, 969 F.3d at 1041). For more on the options communities have to regulate the appearance of small wireless facilities, see Aesthetics.
- A finding that state and local governments act in their regulatory capacities, rather than in a proprietary role, when authorizing and setting terms for wireless infrastructure in the public ROW (see Regulatory Versus Proprietary Capacity).
- New timelines, commonly known as "shot clocks," for reviewing the attachment of small wireless facilities to existing structures and the construction of new small wireless facilities (see Timelines for Review).

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- Broadening the applicability of the shots clocks to cover a wider variety of authorizations necessary for deployment, including building permits, agreements to access ROW, and pre-application procedures.

- Concluding that a state or local government's failure to process small wireless facility applications before the shot clocks expire would constitute a violation of the TCA.

- New remedies for applicants when state and local governments fail to process small wireless facility applications before the shot clocks expire.

- Implementation of a modified system for tolling shot clock periods to encourage providers to submit complete applications.

For a thorough discussion of the significance of this FCC action, see Practice Note, FCC Restrictions on Regulation of Small Wireless Facilities.

Small wireless facilities are also subject to FCC regulations that implement federal law on modifications to existing facilities. In 2020, the FCC issued a Declaratory Ruling (FCC 20-75) and a Report and Order (FCC 20-153 (2020 WL 6501650)) that further address these modifications by clarifying:

- The triggers that set its 60-day shot clock into motion for state or local government review of non-substantial modification proposals.

- What constitutes a substantial change in the physical dimensions and placement of wireless infrastructure.

For more on the FCC's actions regarding modifications to existing facilities, see Practice Note, Section 6409 and Modifications to Wireless Facilities.

State Laws

Local government counsel should understand the extent to which state law allows regulation of small wireless facilities in the ROW (see Practice Note, Local Government Regulation of Telecommunications Facilities: State Laws). An increasing trend has resulted in laws in some states that specifically limit or preempt local regulation of wireless communications facilities in the ROW (see Small Cells State Laws Chart and Quick Compare: Small Cell State Laws). To the extent these laws adopt statewide standards for wireless facilities, local governments may still have authority to enforce the state's standards, even if they cannot impose their own.

In some cases, state laws address issues that overlap with FCC rulings and orders. The strictest limitations on local authority apply whenever there is an overlap or conflict. Local regulators should determine which standards apply when they are processing applications for wireless facilities.

Special Considerations in Drafting Small Wireless Facility Regulations

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Defining "Small Wireless Facility"

Regulators must first be able to determine whether a proposed wireless facility meets the definition of "small" when applying small wireless facility regulations. Under the FCC's definition, "small wireless facilities" must meet each of the following conditions:

- Each antenna is no more than three cubic feet.
- All other equipment associated with the structure totals no more than 28 cubic feet.
- The facilities:
    - are mounted on structures 50 feet or less in height, including antennas;
    - are mounted on structures no more than ten percent taller than other adjacent structures; or
    - do not extend existing structures on which they are located to a height of more than 50 feet or by more than ten percent, whichever is greater.

The FCC's small wireless facilities classification excludes facilities that:

- Require notice of proposed construction to the Federal Aviation Administration.
- Are located on Tribal lands, as defined by the federal government.
- Exceed FCC safety standards on human exposure to radiofrequency radiation.

(47 C.F.R. § 1.6002.)

Some local governments established criteria to define small wireless facilities before the FCC adopted its definition. Local governments should revise regulations that use criteria conflicting with those used by the FCC.

Ownership and Control of the Right-of-Way

The transportation network in many cities and counties includes roads that are under local control and others that are part of a state highway system. Even when the state owns and maintains a road, the local government may have some degree of control over adjacent sidewalks and unpaved areas. Before imposing requirements for facilities to be located on right-of-way owned by the state, the local government should understand the extent of its authority.

Right-of-Way Management Versus Zoning

The TCA preserves local authority to:

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- Manage public ROW.
- Exercise zoning powers over placing, constructing, and modifying personal wireless service facilities (see Telecommunications Act of 1996).

Local governments have approached regulation of small wireless facilities from both directions. While zoning may be the more logical method for some aspects of communications facility regulation, right-of-way management carries some advantages. For example, right-of-way management regulations:

- Generally require less time for adoption than zoning regulations, which may require additional levels of review and public hearings.
- May be easier to amend than zoning regulations.
- Fall under the safe harbor language of the TCA's barrier to entry provisions.

Aesthetics

Local government authorities tasked with reviewing a small wireless facility proposal want to know that the facilities' appearance will fit in with the surrounding area. Ugly equipment boxes or antennas that rise far above other structures in the right-of-way can tarnish the streetscape. There are a variety of tools that can address concerns about appearance. Before incorporating these tools into proposed regulations, counsel should develop an understanding of:

- The local government's authority to address aesthetic concerns under applicable state law (see Practice Note, Local Government Regulation of Telecommunications Facilities: State Laws).
- The FCC's criteria for assessing whether aesthetic regulations are allowable (at FCC 18-133, ¶ 86), keeping in mind that the *City of Portland* decision struck down two of these criteria. The Ninth Circuit's ruling:
    - upheld the FCC's requirements that aesthetic regulations be reasonable and published in advance; and
    - struck down requirements that aesthetic standards be objective and no more burdensome than those applied to other types of infrastructure deployments.

    (969 F.3d at 1041-1042; for more on the FCC requirements and the Ninth Circuit's decision, see Practice Note, FCC Restrictions on Regulation of Small Wireless Facilities: Aesthetic Requirements).

Under the TCA, aesthetic requirements must still avoid unreasonable discrimination among providers of functionally equivalent services (47 U.S.C. § 332(c)(7)(B)(i)(I)).

Subject to the TCA, the FCC's restrictions, and applicable state law, communities can address aesthetic concerns by adopting regulations that:

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- Require compatibility in size, mass, and color with other facilities in the area.
- Establish maximum heights, such as prohibiting poles and antennas that extend beyond the lesser of:
  - the tallest existing facility within a certain distance; or
  - an overall height limit.
- Set a maximum diameter for poles and a maximum overall diameter, sometimes accomplished by maximum distances equipment may extend past the edge of the pole.
- Limit aboveground communications facilities in areas where utilities are underground. However, the FCC has held that undergrounding requirements constitute an effective prohibition of service in violation of the TCA if they:
  - require underground deployment of all wireless facilities; or
  - otherwise materially inhibit wireless service.
- Encourage disguise or camouflaging techniques that make structures unobtrusive.
- Strictly regulate the appearance of aboveground facilities in historic districts and other areas where architectural consistency is stressed.
- Dictate specific colors for uniformity.
- Require metal poles, rather than wood, with powder coating or other standard finishes.
- Limit canisters and equipment cabinets to specific designs.
- Prescribe screening standards for base stations and ground equipment.
- Avoid damage to root systems and interference with canopies of trees in or near the ROW.
- Impose other requirements to achieve the goal of minimizing physical and visual impact.

Preventing Clutter

The need to accommodate communications technology can be at odds with the need to avoid overcrowding in the ROW. Preventing clutter in the ROW is closely related to aesthetic concerns but goes beyond the mere physical appearance of individual system components. Like sign regulations aimed at preventing sign clutter, good ROW management precludes an overabundance of poles, antennas, and other equipment.

Regulations of small wireless installations in the ROW sometimes include:

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- Minimum separations between individual components of the proposed system.
- Minimum separations between components of the proposed system and poles or antennas used for other purposes.
- Requirements for sharing poles or other support structures with other uses (see Collocation Requirements).

The FCC holds that minimum spacing requirements should be evaluated under the same standards it has adopted for aesthetic requirements (see Aesthetics). It acknowledges that some spacing requirements may be reasonable, while others may be an effective prohibition of service in violation of the TCA.

Competing Uses of the Rights-of-Way

Public rights-of-way are multi-functional. Effective ROW management can require coordination of a variety of uses, such as:

- Cable and telecommunications facilities.
- Utilities such as gas, sewer, water, and electric lines.
- Signs.
- Traffic control devices.
- Streetlights.
- Sidewalks and bike paths.
- Bus benches and shelters.
- Fire hydrants.

Small wireless facilities, including both aboveground and underground components, should fit within the right-of-way as seamlessly as possible. Regulations should not only ensure that installations will avoid interference on the front end but will also accommodate future uses. Some regulations require providers to agree to relocate or modify their facilities when necessary for public improvement projects or responses to emergencies that affect the right-of-way (see Relocations and Alterations).

Collocation Requirements

Drafters of small wireless regulations should consider including provisions that encourage telecommunications providers to mount components onto existing support structures. Collocation of facilities can be a useful tool for preventing clutter.

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While collocation most typically involves poles, communications equipment can also be located on other structures, such as billboards. Collocation requirements should include exceptions that may apply when:

- A provider submits evidence supporting the unsuitability of collocation.
- The owner of an otherwise suitable support structure is unwilling to accommodate the provider's equipment and cannot be required to cooperate.
- The official or board considering the proposal determines that installing new support structures is the better option.

While collocation is often the preferred approach over installing new poles, some poles may not be desirable candidates for collocation. For example, communities might disfavor collocation on a decorative streetlamp pole unless the collocated equipment's design blends in with the aesthetics of the pole. Furthermore, communities sometimes reject collocations that would result in an overly bulky appearance.

Public Safety

Safety of motorists, pedestrians, bicyclists, and the general public is foremost among the concerns associated with managing the public ROW. Small wireless components in the ROW should not:

- Obstruct sight lines to drivers, pedestrians, and bicyclists.
- Interfere with public safety communications.
- Pose a risk of falling during heavy winds.

Some communities mandate fall zones for telecommunications facilities that exceed a certain height. However, overall height limitations for structures in the ROW may eliminate the need for fall zones for small wireless facilities.

Generally, the potential health impact of radio frequency emissions is not within the purview of local government regulation. Under the TCA, emissions cannot be the basis for rejecting a telecommunications facility proposal if the facility complies with FCC standards (see Practice Note, Local Government Regulation of Telecommunications Facilities: Health, Safety, and Environmental Concerns).

Local regulations sometimes provide that:

- Government personnel may inspect any communications facility in a public ROW to ensure compliance with health and safety standards.
- Owners of the facilities must cooperate with the inspections and provide any information needed for completing the inspections.

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Accessibility Issues

Telecommunications facilities in a public ROW must leave room for:

- Pedestrians on foot.
- Disabled persons using wheelchairs or motorized scooters.
- Bicyclists, if the right-of-way includes bike paths or is intended for bicycle use.

In addition to leaving enough width for passage, equipment mounted on poles should be at an adequate height above ground level for clearance by pedestrians and bicyclists. Facilities in the ROW should not violate the accessibility standards mandated by the ADA (see Other Federal Statutes). State statutes or regulations may also prescribe accessibility standards.

Accommodation of Cameras and Other Equipment

New poles for small wireless facilities can present an opportunity for placing new streetlights, cameras, or other equipment to serve the public. Regulations can require telecommunications providers to allow government equipment on their support structures, assuming placement of the equipment will not:

- Pose any safety problems.
- Interfere with the provider's system.

When a provider accommodates government equipment, reductions in fees otherwise imposed for use of the ROW may be appropriate.

Maintenance of Shared Facilities

When a telecommunications provider shares poles or other support structures with another user, there should be a clear up-front understanding regarding maintenance of the shared facilities. For example, regulations or user agreements should set out:

- The division of responsibilities and costs for maintenance, repairs, and replacements of shared facilities.
- A schedule for painting shared poles and other structures, or a method for determining when the structures should be painted.
- The party responsible for replacing streetlights that operate from a provider-owned pole.
- The allocation of electrical costs.

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- Notification procedures to the other party when a party plans to undertake maintenance, repairs, or replacements.
- Protections against accelerated deterioration, including restrictions on drilling holes in metal poles and limits on the amount of weight added.

Right-of-Way Maintenance

Local governments frequently assume many responsibilities that involve maintaining or working in the public ROW, including:

- Mowing grass.
- Trimming trees and maintaining landscaping.
- Washing sidewalks and other hard surfaces.
- Collecting trash.
- Maintaining pavement surfaces and markings.
- Cleaning, maintaining, and repairing facilities owned by the government or its agencies (see Competing Uses of the Rights-of-Way).

Small wireless facilities should not interfere with the government's ability to carry out its responsibilities. In addition, regulations or agreements should assign maintenance responsibilities up-front when:

- A telecommunications provider must plant landscaping to screen equipment.
- A provider shares poles or other facilities with other users (see Maintenance of Shared Facilities).

Insurance and Indemnity

As a condition of installing and maintaining its facilities in the public ROW, a provider should indemnify the local government. To back up its indemnity obligations, the provider should maintain adequate insurance coverage.

Indemnification and insurance requirements should be similar to the requirements imposed on other parties who construct and operate facilities on government property. Indemnification should cover any claims alleging that the acts or omissions of the provider or those working for the provider resulted in personal injury, death, or property damage. The provider should submit proof of required insurance coverages, along with verification that the policy names the government as an additional insured.

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Requirements for Related Permits

Regulations should make it clear that approval of a proposal for a small wireless facility does not free the facility owner from obligations to obtain other permits. For example, approval for placement of facilities in a public right-of-way may be contingent on issuance of:

- An excavation permit, authorizing digging within the right-of-way to place fiber or other system components.
- An obstruction permit, if construction or installation of the facilities will temporarily hinder passage over a portion of the right-of-way.

These permits typically require the applicant to:

- Meet insurance and indemnification requirements.
- Post a bond to guarantee restoration of the right-of-way.
- Provide safety measures to protect the public, including signage and a rerouting plan for vehicular and pedestrian traffic.
- Limit lane closures to non-peak traffic hours.

The FCC has held that all authorizations necessary for the deployment of small wireless facilities are subject to its shot clocks, starting on the date the application for a facility is submitted (see Practice Note, FCC Restrictions on Regulation of Small Wireless Facilities: Authorizations Subject to the Shot Clocks). The review process for each application should provide for coordination of responsibilities to ensure the approval process addresses all required authorizations within the applicable timeframe.

Relocations and Alterations

Occasionally, the government may need a provider to relocate its support structures or other small wireless components. Regulations should address what happens if this occurs. Relocation may be necessary to facilitate:

- Construction, installation, or repair of streets or other improvements within the ROW.
- Painting, reconditioning, or replacement of government-owned poles that include collocated provider equipment.
- Installation or modification of traffic control devices.
- Responses to public health or safety emergencies.

In some cases, a temporary alteration may be enough, while a permanent relocation may be necessary under other circumstances. In either event, provisions should:

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- Establish how the government notifies the provider of the need to relocate.
- Impose a deadline for the relocation or describe how a deadline will be determined.
- Describe the government's right to relocate the facilities by other means if the provider fails to do so within the deadline.
- Clarify the responsibility for the costs of relocation.

Annual Reporting Requirements

Once a small wireless facility is in the ROW, the government should have a mechanism in place to maintain contact with the system's owner. One way to accomplish this is through annual reporting requirements. Annual reports can be useful for gathering updated information such as:

- Contact information for persons primarily responsible for operating and maintaining the system.
- The status of all pending projects involving the ROW, including estimated timetables and completion dates.
- As-built maps showing the location of all components, including fiber.
- Ongoing proof of compliance with insurance and bond requirements.
- Any other information necessary to assess the status of the system and verify that the ROW is not occupied by equipment that is no longer needed (see Abandonment of Facilities).

The government can also set the annual reporting dates to coincide with the due date for the payment of fees from the system owner (see Fees for Use of the Rights-of-Way and Pole Attachment Fees).

Abandonment of Facilities

Measures should be in place to deal with small wireless facilities that are no longer in use. Right-of-way use regulations can provide for:

- Required removal of structures, equipment, fiber, and other components that are no longer in use (unless the government wishes to repurpose the components for its own use).
- The government's right to remove components that are no longer in use and have not been removed within the required timeframe.

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- Reimbursement of any costs incurred by the government for removal, storage, and disposal associated with abandoned components.

Penalties for Noncompliance

Regulation of small wireless facilities in the ROW should include provisions that impose penalties for failure to:

- Obtain a required permit.
- Comply with the terms and conditions of a permit that has been issued.
- Maintain system components as required by regulations.
- Submit required reports (see Annual Reporting Requirements).
- Pay fees by the due date.

Applicable penalties for violations vary according to the authority granted to local government under state laws, but potentially include:

- Increased permitting costs, such as doubling the permit fee if the facility owner commenced work before obtaining a permit.
- Revoking a permit.
- Defined monetary penalties for noncompliance with regulations, set within the regulations themselves.
- Fines imposed by a municipal court or other court empowered to hear ordinance violations. Ordinances sometimes specify that each daily occurrence of a violation is considered a separate offense, for which the court may impose a separate fine.
- Late payment penalties or interest when fees are unpaid by the due date.
- Removal of system components within the ROW, along with assessment of costs for any expense the government incurs in conjunction with the removal.

Waivers

A small wireless proposal may be the most practical way to provide effective coverage even though it deviates from regulations for facilities in the ROW. Zoning and land use standards should not be so restrictive that they effectively prohibit the provision of telecommunications service (see Practice Note, Local Government Regulation of Telecommunications Facilities: Zoning Authority Preserved, Subject to Limitations and fecitve). Regulation drafters should consider including

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procedures that allow flexibility when there is no other way for the provider to offer competitive service. These procedures can require an applicant to show that:

- The otherwise applicable standards would materially inhibit the applicant's ability to:
    - fill a coverage gap;
    - densify a network;
    - introduce new services; or
    - improve service capabilities.
- The requested waiver minimizes any potentially negative physical or visual impact on the area.

Addressing the Digital Divide

In both urban and rural areas, many Americans with lower incomes do not have reliable broadband access. This happens because:

- Existing infrastructure often brings high speed internet primarily to areas where providers can earn higher profits from users.
- Low-income households frequently do not have computers and cannot afford the latest technology.

The COVID-19 pandemic highlighted the divide in digital equity, as the internet became the only option for education, healthcare, and employment in many cases. Although some homes without computers rely on cellphones to access the internet, cellphones may not provide the same level of access to websites or online meetings or classes. Even when lower income neighborhoods have internet access, the internet speeds may be frustratingly slow.

Local governments and technology providers can cooperate to address the digital divide. Expanding small wireless infrastructure into underserved areas may be part of the solution in some areas. Local governments can incentivize rollouts into these areas with measures such as:

- Reducing or waiving application fees and ongoing right-of-way use fees for small wireless facilities that improve internet access in previously neglected areas.
- Allowing installation of small wireless facilities in these areas on government property such as utility poles or building rooftops at no charge.

Some state laws allow local governments to build out their own wireless infrastructure to ensure internet availability throughout their communities. Grant funding for these initiatives may be available in some cases.

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Review of Small Wireless Facility Applications

Procedures must be in place to assure that small wireless proposals are adequately and timely reviewed (see Practice Note, Local Government Regulation of Telecommunications Facilities: Process for Reviewing Telecommunications Facility Applications). The initial step in gathering the information needed for the review is a completed application form. Ideally, forms should be developed specifically for placement of facilities in the ROW (see Processing Applications for Wireless Communications Facilities Checklist).

The final step in the review process may involve issuing a permit, executing a right-of-way use agreement with the applicant, or both. Alternatively, if the application fails to win approval, the government must issue a written denial meeting TCA requirements (see Application Denials).

Regulatory Versus Proprietary Capacity

Rights-of-way are often the property of the local government. Some local regulators have assumed they act as proprietors rather than regulators when acting on proposals for communications facilities in public ROW. However, processing an application for a wireless facility in a public ROW is subject to the same federal restrictions that apply to a facility on private property. The FCC holds that governments act in their regulatory capacities when authorizing and setting terms for wireless infrastructure in the public ROW (FCC 18-133, ¶¶ 92-97).

Batched Applications

The FCC prohibits local governments from refusing to accept batches of applications for small wireless facilities. As a result, applicants may submit:

- Multiple separate applications at the same time, each for one or more sites.
- A single application covering multiple sites.

The review timeline that applies to a batch of applications is the same that would apply if an applicant seeks approval for a standalone facility. If a single application for small wireless facilities includes only collocated facilities, the same 60-day shot clock applicable to individual collocations applies. If a single application includes both collocated facilities and new structures, the longer 90-day shot clock applicable to new structures applies (see Timelines for Review). Where a batched application causes legitimate overload on local government resources, the government can rebut the presumption of reasonableness of the shot clock period. (FCC 18-133, ¶¶ 113-115.)

Timelines for Review

The FCC has adopted shot clocks that establish timelines for governmental review of new wireless facilities, as well as collocations and modifications of existing facilities (see Practice Notes, Local Government Regulation of Telecommunications Facilities: Timelines for Review and Section 6409 and Modifications to Wireless Facilities: Time Limits for Reviewing

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Modification Requests). Under FCC 18-133, these shot clocks apply to the review of small wireless facility proposals whether on private property or in the public ROW.

From the day an application for a small wireless facility is submitted, a state or local government must act on the application within:

- **60 days** if the applicant seeks to:
  - collocate a small wireless facility on an existing structure (the existing structure does not have to be a telecommunications structure) (47 C.F.R. § 1.6003(c)(1)(i)); or
  - make any other type of non-substantial modification to an existing facility. (47 C.F.R. § 1.6100(c)(2)). For guidance on when this shot clock begins to run, see Practice Note, Section 6409 and Modifications to Wireless Facilities: When the Time Begins to Run and When it Stops.
- **90 days** for a small wireless facility using a new structure (47 C.F.R. § 1.6003(c)(1)(iii)).

Additionally, the FCC has established these time limits that apply to the initial review of small wireless facility applications:

- **10 days** to review a small wireless facility application for completeness and notify the applicant of missing documents or information (47 C.F.R. § 1.6003(d)(1)). When the applicant resubmits the application, the shot clock restarts at zero.
- **30 days** to review any wireless facility application for completeness and toll the shot clock if the regulator notifies the applicant in writing the application is not acceptable (47 C.F.R. §1.6003(d)(2)). A regulator who misses the initial ten-day deadline to identify deficiencies in a small wireless facility application can still ask for corrections within this 30-day review period. However, regulators should understand the difference between restarting the shot clock after an initial ten-day review and tolling the shot clock without resetting it after a 30-day review.
- **10 days** to review a resubmission and notify the applicant of any missing documents or information (47 C.F.R. § 1.6003(d)(3)). This notification tolls the shot clock again until the applicant submits all missing documents and information.

To stop the applicable shot clock, the notification of incompleteness the regulator provides to the applicant must clearly and specifically identify:

- The missing documents or information the applicant must submit to render the application complete.
- The specific rule or regulation that requires the missing documents or information.

Beyond the federal shot clocks, some states have also adopted legislation that imposes review timelines for small wireless facility proposals in the public ROW (see Small Cells State Laws Chart and Quick Compare, Small Cell State Laws). Local governments in these states are subject to the shot clocks set by state law if they are shorter than those set by the FCC. Counsel for agencies reviewing small wireless facility proposals should stay aware of new developments and make sure the agency applies the correct shot clocks.

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Application Denials

When a local government decides to deny a request for a small wireless facility, the TCA requires the denial to be:

- In writing.
- Supported by substantial evidence in a written record (see Practice Note, Local Government Regulation of Telecommunications Facilities: Denial of Applications for New Facilities).

The government must provide written reasons for the denial at essentially the same time it issues the denial notification, whether they are within the same document or in a separate record (*T-Mobile South, LLC v. City of Roswell, Ga.*, 135 S. Ct. 808 (2015)).

The FCC has eliminated any distinction between proprietary and regulatory capacities for wireless infrastructure in public ROW (see Regulatory Versus Proprietary Capacity). As a result, the TCA's requirements for application denials apply whether a facility is proposed for private property or within a public right-of-way.

Fee Payments

Some local governments have adopted schedules of fees for:

- Processing applications for small wireless facilities in the ROW (see Application Fees).
- The ongoing occupancy of the ROW by small wireless facility components (see Fees for Use of the Rights-of-Way).
- Attaching small wireless facility components to support structures owned by the government (see Pole Attachment Fees).

Counsel should make sure that fees charged by a local government client comply with applicable state and federal restrictions. In addition to fee restrictions established by the FCC, statutes in some states have capped these fees or set a statewide rate. In some cases, state law has even preempted fees for ongoing right-of-way use altogether (see Small Cells State Laws Chart). Periodic reviews and updates should occur to ensure that fee schedules comply with applicable law and reflect current costs to the extent permitted.

FCC Restrictions on Fees

The FCC has determined that:

- Fees charged for the deployment of small wireless facilities both inside and outside the ROW must be:

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    - a reasonable approximation of the state or local government's costs;
    - based on costs that are objectively reasonable; and
    - no higher than fees charged to similarly situated competitors in similar situations (FCC 18-133, ¶ 50).

- The following non-recurring fee amounts are presumptively reasonable:
    - $500 for a single up-front application that includes up to five small wireless facilities;
    - $100 for each additional small wireless facility beyond five; and
    - $1,000 for a new pole intended to support one or more small wireless facilities.

- An annual charge of $270 per facility is a presumptively reasonable fee for recurring charges, including right-of-way access or attachment to municipally owned structures in a ROW (FCC 18-133, ¶ 79).

The FCC's presumptively reasonable fee amounts are known as "safe harbors" because a local government may charge these amounts without having to independently justify them. A local government that wants to charge fees higher than the safe harbors must be confident that it can defend the fees if there is a challenge. However, local governments in states with statutes that preempt certain fees or set mandatory limits must follow state law.

Application Fees

Government agencies typically charge a fee when an applicant requests a permit or other form of approval. These fees are intended to offset the costs incurred in processing the application. An application fee for a small wireless facility should be reasonable in relation to the efforts of those involved in reviewing the proposal and the costs incurred. A local government that imposes application fees based on the FCC's presumptively reasonable fees will not have to prove the reasonableness of the fees (see FCC Restrictions on Fees).

The government's costs sometimes include not only those associated with staff time, but external costs such as outside consultant fees. However, a city should not pass these costs through to an applicant unless the total fees, including external costs, would either:

- Be within the amounts found to be presumptively reasonable by the FCC.
- Meet the FCC criteria for establishing higher fees.

Fees for Use of the Rights-of-Way

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The TCA allows local governments to require compensation for the use of the public ROW by telecommunications providers if the compensation is:

- Fair and reasonable.
- Competitively neutral and nondiscriminatory.
- Publicly disclosed.

(47 U.S.C. § 253(c).)

ROW use fees for small wireless facilities may be assessed at:

- The presumptively reasonable annual ROW access fee of $270 per facility, as established by the FCC.
- The maximum amount allowed under state law if a state statute mandates a lower fee than the FCC's presumptively reasonable ROW access fee.
- A higher amount than the FCC's presumptively reasonable fee only if:
    - state law does not prescribe a lower fee; and
    - the local government is prepared to show that its fees otherwise comply with the TCA and meet FCC criteria.

The FCC specifically holds that ROW fees based on a provider's gross revenues generally bear no relation to the government's actual costs and, if so, would be preempted.

Some local governments set fees by ordinance or resolution as part of the government's right-of-way management scheme. In the event changing conditions warrant changing the fees, a city can revise its fees more easily if they are set by resolution. An individual franchise or right-of-way use agreement can also set fees.

Pole Attachment Fees

Government-owned utility poles, streetlight poles, or traffic signal poles can be useful for attaching small wireless facility components. Using existing poles saves providers the cost of installing new poles. Government entities generally expect compensation for allowing telecommunications providers to attach equipment to government-owned poles.

Some state laws require local governments to allow pole attachments and limit the fees governments can charge. Otherwise, local governments are:

- Subject to the FCC's criteria for fees for deployment of small wireless facilities (see FCC Restrictions on Fees).

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- Limited to the presumptively reasonable annual fee of $270 per facility unless they can show that a higher fee is reasonable.

Government entities can set these pole attachment rates by ordinance or resolution or through negotiated agreements. As with right-of-way use fees, a local government can revise its fees more easily if they are not part of a codified ordinance. Local government counsel should stay aware of developments at both the state and federal levels that could affect charges for use of government-owned poles.

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EXHIBIT
B

Local Government Regulation of Telecommunications Facilities

by Practical Law Government Practice

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A Practice Note discussing local government authority to regulate the location, placement, and design of telecommunications facilities, such as antennas, poles, and towers. This Practice Note examines the significant constraints placed on local governments by federal law, including the Telecommunications Act of 1996 (TCA) and the Spectrum Act. It explores the TCA's prohibition of barriers to entry, its preservation of local zoning authority, and the areas where that authority is preempted. This Note also details the impact of numerous actions by the Federal Communications Commission (FCC), including its "shot clock" timelines, the "Small Cell Order," and other legislative mandates that affect local regulation. It provides guidance on the process for reviewing and denying applications, the requirement for a written denial to be supported by substantial evidence, and the potential grounds for denial and ensuing litigation, referencing key court decisions like *City of Portland v. United States*.

Scope of Local Authority to Regulate Telecommunications Facilities

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Written Record

Litigation of Challenges Under the TCA

Challenges Under Barrier to Entry Provisions

Challenges Under the TCA's Zoning Provisions

Consequences of a Successful Challenge

Local governments often consider requests for new telecommunications facilities, including:

- Towers on public or private property.
- Poles and wires in the public rights-of-way.
- Antennas attached to buildings, poles, towers, water tanks, or other structures.
- Equipment enclosures such as boxes, sheds, cabinets.

The Telecommunications Act of 1996, along with other federal legislation, FCC rulings, and state laws, limits local governments' ability to deny or impose conditions on new telecommunications facility applications.

This Note addresses the scope of authority and the applicable constraints when local governments consider telecommunications facility applications. For a thorough discussion of modifications to existing facilities, see Practice Note, Section 6409 and Modifications to Wireless Facilities. For more on the use of the public rights-of-way for telecommunications facilities, see Practice Note, Small Wireless Facilities in Public Rights-Of-Way. This Note does not cover direct-to-home satellite services, cable programming, or television broadcast signals.

Scope of Local Authority to Regulate Telecommunications Facilities

Local governments often have an interest in regulating the location, placement, dimensions, and design of telecommunications facilities. Local regulations should include clear procedures for determining whether to approve a facility as proposed, approve it with conditions, or deny it (see Process for Reviewing Telecommunications Facility Applications). Counsel drafting or reviewing regulations should understand the scope of local authority. Local regulatory authority and the limitations on that authority are found in federal statutes (see Telecommunications Act of 1996 and Spectrum Act), FCC rulings and orders (see FCC Actions), and state law (see State Laws).

Telecommunications Act of 1996

Congress passed the Telecommunications Act of 1996 (TCA) to increase competition among telecommunications providers. The TCA:

- Preempts local regulations that act as barriers to entry (see Prohibition of Barriers to Entry).

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- Preserves local zoning authority over wireless communications facilities, unless local procedures are unreasonable or effectively prohibit wireless service (see Zoning Authority Preserved, Subject to Limitations).

Prohibition of Barriers to Entry

The TCA preempts any local statute, regulation, or other legal requirement that prohibits or has the effect of prohibiting the provision of telecommunications service (47 U.S.C. § 253). The FCC has the authority to block any statute, regulation, or requirement that violates the prohibition (see Challenges Under Barrier to Entry Provisions).

Zoning Authority Preserved, Subject to Limitations

While the TCA prohibits barriers to entry, it preserves local zoning authority over the placement, construction, and modification of personal wireless service facilities (47 U.S.C. § 332(c)(7)(A)). This authority is not unlimited. In regulating these facilities, government officials must remember that the TCA:

- Prohibits unreasonable discrimination among providers of functionally equivalent services. For example, a city should not deny an antenna request if it has previously approved visually similar antennas from a competitor at a comparable location (see *MetroPCS New York, LLC v. Village of East Hills*, 764 F. Supp. 2d 441 (E.D. N.Y. 2011)).

- Makes it unlawful to effectively ban the provision of personal wireless services. Even if a regulation does not expressly prohibit personal wireless service facilities, it still violates the TCA if it is drawn or applied so strictly that it has the effect of doing so. A denial may be unlawful if:

  - no alternative sites exist and denial would result in coverage deficits (see *Sprint Spectrum L.P. v. Town of N. Stonington*, 12 F. Supp. 2d 247 (D. Conn. 1998));

  - a significant coverage gap exists and the proposed facility is the least intrusive means to close it (*Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630 (2nd Cir. 1999)); or

  - the local government has imposed an open-ended moratorium on new facilities and refuses to process applications (*Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309 (N.D.N.Y. 2017)).

  (See Effective Prohibition of Service for information on actions the FCC finds to be prohibitive.)

- Directs the government to act within a reasonable time on any request for placement, construction, or modification of personal wireless service facilities (see Timelines for Review).

- Requires the denial of a request to be in writing, supported by substantial evidence in a written record (see Substantial Evidence Requirement and Written Record).

- Prohibits decisions based on the environmental effects of radio frequency emissions, provided the facilities comply with FCC regulations (see Health, Safety, and Environmental Concerns).

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Note that the TCA does not address zoning for telecommunications facilities other than personal wireless service facilities. When considering applications for non-wireless telecommunications facilities, local government decision makers should:

- Look to state law to determine what zoning powers are available.
- Avoid imposing a barrier to entry (see Prohibition of Barriers to Entry).

Spectrum Act

In addition to the TCA, the Middle Class Tax Relief and Job Creation Act of 2012—specifically Title VI, known as the Spectrum Act— imposes obligations on local governments reviewing telecommunications facilities proposals. Section 6409 of the Spectrum Act requires approval of modification requests to existing wireless towers or base stations that do not substantially change their physical dimensions. (47 U.S.C. § 1455.)

FCC Actions

Non-Substantial Modifications to Wireless Facilities

In 2014, the FCC issued a Report and Order implementing Section 6409 of the Spectrum Act and detailing the types of modifications that constitute a substantial change (FCC 14-153). This Report and Order also adopted shorter review timelines for non-substantial modifications (see Timelines for Review). In 2020, the FCC addressed non-substantial modifications again in a Declaratory Ruling (FCC 20-75) and a Report and Order (FCC 20-153 (2020 WL 6501650)) that further clarify:

- The triggers that set its 60-day shot clock into motion for reviewing non-substantial modification proposals.
- What constitutes a substantial change in physical dimensions, including guidance on:
  - the number of equipment cabinets allowed at a site and what the term "equipment cabinet" includes;
  - measuring increases in height; and
  - changes that result in a loss of concealment elements.
- Circumstances under which changes are substantial, such as excavation or deployment:
  - outside the current site, for towers that are in the public right-of-way; or
  - more than 30 feet from the site, for towers that are not in the right-of-way.

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FCC 20-75 distinguished between concealment elements (such as a tower designed to look like a tree) and other siting conditions when determining whether a modification is substantial. The FCC considered changes to concealment elements as substantial modifications that would not fall within the shot clock requirement. However, changes like making a tower visible above a tree line, even if it was to remain hidden as originally approved, were not deemed substantial. The US Court of Appeals for the Ninth Circuit invalidated this distinction, finding that it was a legislative rule that the FCC improperly adopted without proper notice-and-comment procedures (*League of Cal. Cities v. FCC*, 118 F.4th 995 (9th Cir. 2024)).

For more on the FCC's actions regarding modifications to existing facilities, see Practice Note, Section 6409 and Modifications to Wireless Facilities.

New Facilities and Substantial Collocations

For new wireless facilities and collocations that constitute a substantial change, a 2009 FCC Declaratory Ruling (FCC 09-99) established longer review timelines (see Timelines for Review). The FCC also held that denying an application because service is available from another provider violates the TCA.

Moratoria

A Declaratory Ruling issued in August 2018 (FCC 18-111 (2018 WL 3738326)) held that both express moratoria and de facto moratoria on communications facilities violate the TCA. De facto moratoria are actions that "effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium".

Small Wireless Facilities

In September 2018, the FCC placed new limits on state and local government regulation of "small wireless facilities". These facilities are often, but not always, placed in public rights-of-way. The FCC's Declaratory Ruling and Third Report and Order (FCC 18-133 (2018 WL 4678555)), known as the "Small Cell Order," took effect in January 2019 and included:

- New shot clocks for reviewing small wireless facility proposals.
- Restrictions on fees that local governments can charge providers for small wireless facility installations.
- Criteria for when the TCA preempts aesthetic standards.

The impact of this action forced many local regulators to overhaul the way they handle proposals for small wireless facilities. For a discussion of the specifics of the Small Cell Order, see Practice Note, FCC Restrictions on Regulation of Small Wireless Facilities.

A large group of local governments and other parties challenged the measures the FCC adopted under the Small Cell Order. The Ninth Circuit dismissed most of the challenges but partially overturned the FCC's limitations on aesthetic regulations. The decision:

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- Upheld the FCC's requirements that aesthetic regulations be reasonable and published in advance.
- Struck down requirements that aesthetic standards be objective and no more burdensome than those for other infrastructure.

(*City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).)

Effective Prohibition of Service

While the 2018 Small Cell Order primarily addressed small wireless facilities, it also established new standards to determine the types of regulatory actions that constitute effective prohibition of service. Presumably, these standards apply to actions affecting any type of telecommunications facilities.

A denial violates the TCA if it effectively prohibits service. Many communities previously interpreted this to mean only that regulations and decisions must not prevent coverage gap remediation. However, the FCC ruled that a regulation effectively prohibits service if it:

- Materially limits or inhibits a competitor's ability to compete, even if not insurmountable.
- Hinders a provider's ability to:
  - fill a coverage gap;
  - densify a network;
  - introduce new services; or
  - improve service capabilities.

(FCC 18-133 (2018 WL 4678555), ¶¶ 34-42.)

Counsel should be aware that courts are not bound by FCC interpretations and may apply their own legal analysis when evaluating whether a regulation effectively prohibits service. For example, in *Vogue Tower Partners VII, LLC v. City of Elizabethton, Tenn.*, the court followed Sixth Circuit precedent rather than adopting the FCC's standard for assessing effective prohibition under the TCA (752 F. Supp. 3d 912, 918–19 (E.D. Tenn. 2024)). Local governments should comply with FCC standards unless a controlling court decision in their jurisdiction requires otherwise.

State Laws

State laws authorize local governments to enact zoning ordinances governing property use (see Practice Note, Local Government Zoning and Land Use Regulation: Overview). These ordinances often address:

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- Whether telecommunications facilities are allowable uses in specific zoning districts.
- Dimensional standards for lots with telecommunications facilities, such as lot size and street frontage.
- Facility-specific standards, including height and area limits.
- Placement of facilities on the lot, through setback and buffer requirements.

In some states, local governments may have clear authority to enforce zoning regulations that are based purely on aesthetics. Courts in other states have found that local governments lack authority or have limited authority to dictate aesthetic design. When drafting or reviewing aesthetic standards for telecommunications facilities, counsel should be comfortable with the level of authority the local government possesses.

Increasingly, state laws have resulted in limitation or outright preemption of local regulation of some types of telecommunications facilities. Local government counsel should keep abreast of statutory changes that affect local regulatory authority. These laws may set standards for local governments that go beyond those established in the TCA (see Small Cells State Laws Chart).

Process for Reviewing Telecommunications Facility Applications

Procedures must be in place to ensure adequate review of telecommunications facility proposals. These procedures should:

- Distinguish between applications eligible for administrative approval and those requiring review by a governing body, planning commission, or other board.
- Route applications to all necessary reviewers (see Stakeholders in the Review).
- Gather sufficient information to support a defensible decision to:
    - approve the application as proposed;
    - approve with conditions; or
    - deny.
- Provide a schedule for completing review within required timelines (see Timelines for Review).
- Specify how the applicant will be notified of the outcome.

The initial step in gathering the information needed for the review is a completed application form (see Standard Document, Wireless Facility Application and Processing Applications for Wireless Communications Facilities Checklist). The final step in the review process may be the issuance of a permit or other form of approval. Alternatively, if the application fails to

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win approval, the government must issue a written denial meeting TCA requirements (see Denial of Applications for New Facilities).

Special considerations apply to towers proposed on lands belonging to federally recognized tribes or native Hawaiian organizations. Counsel representing these parties should be familiar with the review process established under the National Historic Preservation Act, as well as the tower construction notification requirements that apply (see FCC: National Historic Preservation Act Review Process and FCC: Tower Construction Notifications).

Object of the Review

The object of the review of a telecommunications facility application is to make sure that:

- The application is complete and provides all information needed to complete the review.
- The proposal complies with all applicable requirements.
- The facility, when completed, will not interfere with public safety needs (or with other uses of the public right-of-way, for facilities located in a right-of-way).
- If a public body will vote on the matter, all relevant information the body needs is provided in an understandable format. Typically, it is also standard practice to provide a professional recommendation to assist in the decision.
- All steps of the review are coordinated so that the review is completed within required timeframes (see Timelines for Review).

Stakeholders in the Review

A thorough review of a proposal for a telecommunications facility may require input from several sources. Depending on the circumstances, stakeholders involved in reviewing the proposal may include:

- Planning and land development staff.
- Engineers.
- Building codes officers.
- Public works and utilities staff.
- Public safety personnel.
- Information technology department.

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- Design review boards.
- Historic zoning boards or staff.
- Outside consultants with expertise in telecommunications.

Application Fees

Government agencies typically charge a fee when an applicant requests a permit or other form of approval. These fees can recoup the costs incurred in processing the application.

For all telecommunications facilities, application fees should be reasonable in relation to the effort required by those involved in reviewing the proposal and the costs incurred. Local regulators should also be aware of specific limitations that the FCC has applied to application fees for small wireless facilities (see FCC Actions and Practice Note, FCC Restrictions on Regulation of Small Wireless Facilities).

For facilities other than small wireless facilities, an application fee may be a flat amount or it may be based on the complexity of the proposal. Costs recovered through application fees sometimes include not only those associated with staff time, but external costs such as outside consultant fees and public notice advertisements. In some locations, the applicant must pay external costs separately in addition to the application fee.

Counsel should make sure that application fees comply with any limitations set by state law, in addition to those set by the FCC for small wireless facilities. Periodic reviews and updates should occur to ensure that fee schedules reflect current costs to the extent permitted.

Timelines for Review

Review procedures for telecommunications facility applications should include deadlines for approval or denial that comply with the FCC's "shot clocks". In some states, statutes may establish shorter timelines.

The FCC has adopted a variety of shot clocks, based on the type of application submitted, including:

- **10 days** to review a small wireless facility application for completeness and notify the applicant of missing information in order to reset the shot clock to zero (47 C.F.R. § 1.6003(d)(1)).
- **30 days** to review any wireless facility application for completeness and toll the shot clock if the applicant is notified in writing the application is not acceptable (47 C.F.R. §1.6003(d)(2)(iii)).
- **10 days** to review a resubmission and notify the applicant of any missing information (47 C.F.R. § 1.6003(d)(3)(iii)). (The shot clock stops again until the applicant submits all missing information.)

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- **60 days** to act on an application to collocate a small wireless facility on an existing structure (does not have to be a telecommunications structure) (47 C.F.R. § 1.6003(c)(1)(i)).

- **60 days** to act on a request for a non-substantial modification, including modifications to macro towers. (47 C.F.R. § 1.6100(c)(2)). (For guidance on when this shot clock begins to run, see Practice Note, Section 6409 and Modifications to Wireless Facilities: When the Time Begins to Run and When it Stops.)

- **90 days** to act on an application to collocate a facility other than a small wireless facility using an existing structure (47 C.F.R. § 1.6003(c)(1)(ii)). (Under the 2018 Small Cell Order, this shot clock applies to a collocation on any existing structure, including structures that were not previously used to support communications facilities.)

- **90 days** to act on an application for a small wireless facility using a new structure (47 C.F.R. § 1.6003(c)(1)(iii)).

- **150 days** to act on an application for a facility other than a small wireless facility using a new structure (47 C.F.R. § 1.6003(c)(1)(iv)).

These shot clocks apply to reviewing applications for wireless facilities. The FCC describes the 60-day, 90-day, and 150-day shot clocks as "presumptively reasonable periods of time". If an applicant seeks an injunction to force a decision within the shot clock time, a local government may show it needs more time under the circumstances (*City of Portland*, 969 F.3d at 1043-1044).

Coordinating the Review to Comply with Time Limits

Agencies considering telecommunications facility applications should schedule adequate time within the applicable timeframe for:

- Review by all departments and agencies that play a role in process.

- Outside consultant review, if applicable.

- Public notice and public hearing requirements.

- Board action.

- Official notification of approval or denial (see Denial of Applications for New Facilities).

The FCC shot clocks apply to all authorizations necessary for the deployment of personal wireless services infrastructure (FCC 18-133 (2018 WL 4678555), ¶¶ 132-137). Regulators should coordinate reviews for these facilities to include handling all necessary permits, agreements, approvals, meetings, and procedures within the applicable shot clock period. For non-substantial modifications, even an applicant's written request for a pre-application meeting with government staff can start the shot clock. (See Practice Notes, FCC Restrictions on Regulation of Small Wireless Facilities: New Time Limits for Processing Small Wireless Facility Applications and Section 6409 and Modifications to Wireless Facilities: When the Time Begins to Run and When it Stops).

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Remedies for Shot Clock Violations

A state or local government that fails to approve or deny an application within the applicable FCC shot clock period may be subject to one of the following consequences:

- Failure to act within the 60-day shot clock for a request for a non-substantial modification will result in the request being deemed granted. However, the approval takes effect only if the applicant notifies the reviewing authority in writing that the application is deemed granted.
- An applicant may sue a state or local government that fails to act within the other 60-day, 90-day, or 150-day shot clocks (see Litigation of Shot Clock Violations).

Denial of Applications for New Facilities

Under the TCA, a denial of an application for placement, construction, or modification of a personal wireless service facility must be:

- In writing (see Issuance of Denial).
- Supported by substantial evidence in a written record (see Substantial Evidence Requirement and Written Record).

Merely referring to zoning provisions that the applicant has allegedly failed to meet may not be sufficient (see *T-Mobile Cent., LLC v. Charter Tp. of West Bloomfield*, 691 F.3d 794 (6th Cir. 2012)). Instead, the denial should specify how the proposal fails to conform to applicable standards and why that failure warrants denial.

Potential Grounds for Denial

In considering applications for wireless telecommunications facilities, local governments have had varying degrees of success with denials based on:

- Whether the proposed facility is necessary to the provider's ability to provide services (see Need for Facility).
- The impact of concerns expressed by the public (see Public Opposition).
- Noncompliance with applicable design standards (see Failure to Meet Design Standards).
- Preference for a different location (see Availability of Preferable Sites and Collocation).
- Noncompliance with specific local zoning standards (see Specific Land Use and Zoning Restrictions).

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- Objections to the overall appearance of the proposed facility (see Visibility and Aesthetic Concerns).
- Obtrusiveness of the facility in relation to its location (see Character of the Surrounding Area).
- Adverse effects on health, safety, and the environment (see Health, Safety, and Environmental Concerns).

Need for Facility

If substantial evidence shows that service will not be materially inhibited, a local government may deny a proposal for a new wireless telecommunications facility. However, courts dislike denials that are based on unsubstantiated assertions that a proposed facility will not fully address a coverage gap or that existing coverage is sufficient (see *West Bloomfield*, 691 F.3d at 807; *Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64 (3rd Cir. 1999)). Availability of good service through other providers, even if shown by substantial evidence, should not form the basis of a denial.

Public Opposition

When public opposition contributes to the denial of a telecommunications proposal, decision makers should be sure that the concerns expressed by the public serve as substantial evidence to support the denial. Local government boards often feel pressure to vote against proposals based on public opposition. Residents and property owners may object to a telecommunications facility due to its height, design, or perceived health and safety risks (see Visibility and Aesthetic Concerns and Health, Safety, and Environmental Concerns).

Court decisions have provided guidance about the weight decision makers should give public opposition (or lack of it). For example:

- The US Court of Appeals for the Fourth Circuit has held that reasonably founded concerns of the community can serve as substantial evidence to support a denial decision (*New Cingular Wireless PCS, LLC v. Fairfax Cnty. Bd. of Supervisors*, 674 F.3d 270 (4th Cir. 2012)).
- The Eleventh Circuit has indicated that a lack of evidence showing public opposition can be construed as evidence in support of the application (*Preferred Sites, LLC v. Troup County*, 296 F.3d 1210 (11th Cir. 2002)).
- The Sixth Circuit has held that opposition effectively amounting to "NIMBY" (not in my backyard) complaints are not sufficient evidence for denial (*West Bloomfield*, 691 F.3d at 800). Similarly, the Second and Third Circuits held that generalized concerns over aesthetics or potential decreases in property values did not support denial (*Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490 (2nd Cir. 1999); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Tp.*, 181 F.3d 403 (3rd Cir. 1999)).

Failure to Meet Design Standards

Local governments often adopt design standards for telecommunications facilities, including:

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- Maximum allowable height and width, which may vary by location or proximity to other property uses.
- Color.
- Disguise techniques.
- Avoidance of lattice or guyed towers.

Even when the government has not adopted explicit standards, decision makers have sometimes successfully denied objectionable proposals by concluding that a different facility design will provide adequate coverage (see *Nextel Commc'ns of the Mid-Atlantic, Inc. v. Town of Brookline, Mass.*, 520 F. Supp. 2d 238 (D. Mass. 2007); *USCOC of Virginia RSA #3 v. Montgomery County Bd. of Sup'rs*, 343 F.3d 262 (4th Cir. 2003)). To withstand a challenge, the conclusion must be supported by evidence in the record (see *West Bloomfield*, 691 F.3d at 801).

Availability of Preferable Sites and Collocation

Decision makers may find that a proposed telecommunications facility would be more palatable in a different location. If substantial evidence supports the government's position that a site with fewer adverse impacts can meet the applicant's needs, denial may be an option. However, if the evidence is insufficient to show the adequacy of the preferred site, the denial is likely to be overturned (see *New Cingular Wireless PCS, LLC v. Town of Fenton*, 843 F. Supp. 2d 236 (N.D.N.Y. 2012)).

The provider's failure to show that it has adequately explored alternative sites can also form the basis for a denial (see *Green Mountain Realty Corp. v. Leonard*, 688 F.3d 40 (1st Cir. 2012); *Helcher v. Dearborn Cnty.*, 595 F.3d 710 (7th Cir. 2010)). As part of the application process for telecommunications facilities in certain areas, some local governments require providers to submit studies showing that other sites have been considered and ruled out.

Similarly, regulations often require providers to show why collocating on an existing facility is a less desirable alternative to installing a new facility. This requirement explicitly places the burden on the provider to prove that a new facility is the most viable alternative (see *U.S. Cellular Tel. of Greater Tulsa L.L.C. v. City of Broken Arrow, Okla.*, 340 F.3d 1122 (10th Cir. 2003)).

In addition to collocations on other communication facilities, providers sometimes place antennas on or alongside electrical towers or water tanks. Many communities find these alternatives to be preferable to a standalone facility. Locating a telecommunications facility on government-owned property also creates a revenue opportunity for the government through long-term leasing.

The fact that an alternative is available may be grounds for denial even though it is not the most optimal option for the provider, either from the standpoint of coverage or cost. Local government counsel should seek assurance that the alternatives allow the provider a reasonable opportunity to compete with other providers.

Specific Land Use and Zoning Restrictions

Local governments have successfully denied proposals for telecommunications facilities due to noncompliance with specific local zoning standards or the comprehensive land use plan. For example, these situations can justify denial:

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- The proposal is at odds with provisions that establish preferences for placement of facilities in certain areas, such as industrial or other nonresidential zones. Zoning regulations sometimes prohibit or severely restrict communications towers in some areas, such as historic districts and some planned developments. Ideally, denial of a facility because of its proposed location should reference specific language in the zoning ordinance.

- The proposed facility fails to comply with setback or lot size restrictions. Some ordinances also mandate "fall zones" for communications towers. These provisions establish minimum distances from property lines that exceed normal setback requirements.

- The zoning ordinance limits the number of uses allowed on a lot and the proposed facility would result in too many uses.

- The facility as proposed fails to meet the government's standards for:
    - buffers and screening;
    - lighting requirements and restrictions;
    - security barriers;
    - erosion control and stormwater management; or
    - interference with public safety communications.

Zoning and land use standards should not be so restrictive that they effectively prohibit the provision of telecommunications service (see Zoning Authority Preserved, Subject to Limitations and Effective Prohibition of Service). It may be useful to establish a procedure for granting variances when providers can establish that the zoning standards leave no reasonable alternatives for providing adequate service. (For sample language, see Standard Document, Wireless Facilities Regulations (Non-Right-of-Way): Section 1.19 Waivers.)

Visibility and Aesthetic Concerns

Decision makers often simply conclude that a facility would be an eyesore. The TCA leaves room for decision makers to reject proposals based on visibility or aesthetic concerns. However, generalized hostility toward communication towers does not justify a denial. Instead, the written record must include substantial evidence showing why the proposal is untenable. Evidence of adverse economic impact on nearby properties can bolster aesthetic concerns, especially in states where land use decisions based purely on aesthetics are not permitted.

Testimony and exhibits can show that a facility would be of a different magnitude than anything else in the vicinity or out of keeping with nearby uses. Simulated pictures showing how the facility would look in its setting can be useful in supporting a finding that the proposal deviates from aesthetic standards. Tests involving cranes or balloons can show the height of a proposed facility. If allowable under state and local law, decision makers should consider requiring the applicant to cover the costs of these tests. For small wireless facilities, however, regulators should not pass these costs along to the applicant unless the total application costs are within FCC restrictions. Aesthetic standards for small wireless facilities also fall under restrictions the FCC adopted under the 2018 Small Cell Order, as modified by the Ninth Circuit under *City of Portland* (969

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F.3d at 1042-1043) (see Small Wireless Facilities and Practice Note, FCC Restrictions on Regulation of Small Wireless Facilities).

Providers sometimes attempt to overcome visibility issues with camouflage and concealment techniques. For example, some towers look like trees or flagpoles. These efforts sometimes address visibility or aesthetic concerns that would otherwise pose a problem. On the other hand, denial may still be warranted for a tower disguised as a tree if the tower would noticeably rise far above the real trees in the area (*New Cingular Wireless PCS, LLC v. Fairfax Cnty. Bd. of Supervisors*, 674 F.3d 270 (4th Cir. 2012)). Similarly, an antenna concealed within a flagpole may be objectionable if the flagpole looms significantly above the other structures in the area (*USCOC of Greater Missouri v. City of Ferguson, Mo.*, 583 F.3d 1035 (8th Cir. 2009)).

Character of the Surrounding Area

When there are no specific aesthetic standards for communications facilities or adopted standards do not apply, local government sometimes still deny proposals that would be out of character with the surrounding area. For example, an antenna or tower might be objectionable if it would be:

- Within or close to a historically significant property or district.
- In a planned development or district where architectural compatibility is stressed.
- Near a scenic waterway, the top of a prominent slope, or an otherwise scenic viewshed.
- At the gateway to a community.

Similarly, a local government may find grounds for denial even when the proposal meets applicable aesthetic regulations. The Eleventh Circuit held that an applicant had to show compliance with specific zoning regulations before the government would even consider its proposal. However, compliance with the regulations did not automatically entitle the applicant to approval. (*American Tower LP v. City of Huntsville*, 295 F.3d 1203 (11th Cir. 2002).)

As with other visibility and aesthetic concerns, decision makers should clearly articulate reasons for a denial that are based on the character of the area. The record can be enhanced with:

- Photographic evidence.
- Testimony from:
  - architects;
  - city planners; and
  - environmental experts.

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Health, Safety, and Environmental Concerns

Generally, if a wireless communications facility proposal complies with FCC standards, the TCA prohibits using the health impact of radio frequency emissions as grounds for denial (see Zoning Authority Preserved, Subject to Limitations). Even so, some courts have allowed evidence showing a demonstrable negative impact of emissions on property values, based on a public perception of adverse health effects. Still, counsel should be wary of overreliance on evidence based on emissions.

Beyond emissions produced by communications facilities, local governments sometimes consider other safety factors, such as:

- Obstruction of sight lines to vehicle drivers.
- Proximity to airports or aircraft flight patterns.
- Sight distance related to the facility's access drive.
- Risk of collapse due to wind or ice.
- Ice falling from towers or antenna arrays onto vehicles or persons.
- Likelihood that the facility will become an attractive nuisance, tempting children to climb on it.

These hazards are often more speculative than likely. If a denial or a condition of approval is based on any of these grounds, counsel must be able to show that the concerns are real and substantiated in the record. The record should show a significant risk of an adverse impact that would pose a substantial threat to the health and safety of the community (see *Ogden Fire Co. No. 1 v. Upper Chichester TP.*, 504 F.3d 370 (3rd Cir. 2007)).

Issuance of Denial

The TCA requires the denial of a request for a personal wireless service facility to be in writing but does not prescribe a specific form for notifying an applicant that its proposal has been denied. When a proposal is denied, counsel should be sure:

- Someone with authority to represent the decision maker notifies the applicant of the denial in writing (see Party Responsible for Issuance). Local governments have taken a variety of approaches to meeting this requirement, including:
  - simply writing or stamping "denied" on the face of the application for a permit and sending a copy to the applicant;
  - issuing a brief letter describing an application as denied;
  - providing a copy of the minutes from the meeting in which the application was denied; and

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    - sending a detailed letter spelling out the reasons for the denial, with links to specific evidence in the record.

- The reasons for the denial are provided to the applicant. However, the US Supreme Court has held that the reasons do not have to be included in the same document that conveys the denial (*T-Mobile South, LLC v. City of Roswell*, 135 S.Ct. 808 (2015)).

- The written denial together with the written record would allow a court to determine if the denial is supported by substantial evidence (see Substantial Evidence Requirement).

- The denial and the reasons for the denial address each proposal, if the provider offered alternative proposals.

A local government's decision to approve or deny any type of telecommunications facility must also comply with state laws and local protocol. State laws often provide guidance for all zoning decisions but may also dictate specific requirements for decisions related to telecommunications proposals.

Timing of Denial

The TCA provides that an aggrieved party must seek judicial review of an adverse zoning decision within 30 days of the decision. Because the denial starts the clock for the provider to mount a challenge, the government's record must be complete when the denial is issued (see Written Record).

In *City of Roswell*, the Supreme Court stressed that the government must provide written reasons for denying a wireless facility at essentially the same time it issues the written denial notification (*City of Roswell*, 135 S.Ct. at 816). If the government cannot promptly provide its reasons for denial, it can delay issuance of the written denial if it still meets required timelines (see Timelines for Review). Therefore, if the government relies on meeting minutes to serve as the written reasons for denial, the written denial should not be issued until the minutes have been adopted (see *City of Roswell*, 135 S.Ct. at 817).

Party Responsible for Issuance

The TCA does not specify who should issue the denial of an application. Denial letters issued by staff members or attorneys representing a local government board have withstood challenges by telecommunications providers whose proposals have been denied. However, the person issuing the denial must have actual authority to speak for the government board, either by its specific instruction or by established rule or protocol.

Substantial Evidence Requirement

The TCA requires a denial of an application for a wireless communications facility to be supported by substantial evidence in a written record (see Issuance of Denial and Written Record). Courts look for a record that establishes "less than a preponderance, but more than a scintilla of evidence" (*Town of Oyster Bay*, 166 F.3d at 494).

A denial decision will stand a better chance in the face of a challenge if:

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- The decision makers cite actual written standards for telecommunications facilities, as opposed to making up new standards during deliberations.
- The record shows how the application violates applicable standards, rather than merely citing or quoting those standards.
- Various grounds support the decision, rather than one (although substantial evidence for denial on one ground can suffice even if evidence on another ground is lacking).
- Facts, figures, and illustrations support the denial, as opposed to unsubstantiated assertions.
- The decision makers have considered all of the evidence, including evidence supporting approval of the application.

In some cases, the telecommunications provider acknowledges that its proposal does not comply with local requirements but asks for relief from those requirements. Procedures should be in place to allow flexibility when there is no other way for the provider to improve a coverage gap. If the request for relief is denied, decision makers should be sure that strict adherence to the applicable requirements is reasonable under the circumstances. The record should examine the specifics of the proposal and support a conclusion that relief is not warranted.

It is often useful to include testimony and exhibits of expert witnesses in the record. For example, statements made by residents generally carry less weight than an expert opinion on the effect a view of a communications tower will have on the potential buyer pool. On the other hand, courts sometimes recognize that the detrimental effect of a proposal on neighboring properties is so obvious that statements by neighbors will suffice. When a government entity retains outside experts to assist in consideration of an application, the entity should consider requiring the applicant to cover the costs, subject to legal limitations (see Application Fees).

Burden of Proof When Denial Is Challenged

The TCA does not assign the burden of proof to either the government or the provider when a provider challenges denial of an application for a telecommunications facility. Although there is not complete consensus, most court opinions indicate the burden should be on the provider. If the issue has not been settled in the federal courts for the circuit in which the local government entity is located, counsel will be better off if prepared to shoulder the burden of proof. In any event, counsel should remember that courts generally only review the written record for substantive evidence. The burden will always be on the government to make sure the record is complete and correct on the law (see *USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of the City of Des Moines*, 465 F.3d 817 (8th Cir. 2006)).

Written Record

The TCA's mandate that a denial be supported by substantial evidence contained in a written record should be considered as separate from the requirement that the denial be in writing. The written record should be issued contemporaneously with the written notification of denial and should explain the reasons for denial (see Issuance of Denial and Timing of Denial).

The written record should not contain evidence that was not considered when the decision was made but should sufficiently describe the actual grounds on which the denial was based. The Supreme Court, in *City of Roswell*, held that the reasons

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included in the record need not be elaborate or even sophisticated, but rather, simply clear enough to enable judicial review (*City of Roswell*, 135 S.Ct. at 815).

Litigation of Challenges Under the TCA

Challenges Under Barrier to Entry Provisions

The FCC has authority to preempt local requirements that violate 47 U.S.C. Section 253 (see Prohibition of Barriers to Entry). Even so, telecommunications providers have also turned to the courts to seek remedies to alleged barriers to entry.

Some disagreement exists about whether the TCA's barrier-to-entry prohibition authorizes a private right of action in federal court for telecommunications providers. For example:

- The US Courts of Appeals for the Sixth and Eleventh Circuits held that a private cause of action exists in federal court, but only for challenges brought under Section 253(c). These challenges deal with management of the public rights-of-way and related compensation. The courts ruled that all other barrier-to-entry challenges under Section 253 must be addressed to the FCC (*Superior Commc'ns v. City of Riverview,* 881 F.3d 432 (6th Cir. 2018); *BellSouth Telecommc'ns, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001)).

- The US Courts of Appeals for the Second, Fifth, Eighth, Ninth, and Tenth Circuits have all indicated that there is no private right of action at all under Section 253 (*NextG Networks of NY, Inc. v. City of New York*, 513 F.3d 49, 53 (2nd Cir. 2008); *Sw. Bell Tel., LP v. City of Houston*, 529 F.3d 257, 261 (5th Cir. 2008); *Spectra Commc'ns Group, LLC v. City of Cameron*, 806 F.3d 1113 (8th Cir. 2015); *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 580-81 (9th Cir. 2008); *Qwest Corp. v. City of Santa Fe* 380 F.3d 1258 (10th Cir. 2004)). However, the Fifth Circuit subsequently held that even though Section 253 does not confer a private right, it does not prevent a plaintiff from seeking equitable relief of preemption grounds (*Crown Castle Fiber, L.L.C. v. City of Pasadena*, 76 F.4th 425, 433-35 (5th Cir. 2023)).

As a result, local government counsel in some jurisdictions may be able to argue that a party has no standing to allege violation of the TCA's barrier to entry provisions in federal court. Counsel should also consider whether the matter is ripe for adjudication (see *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1170-73 (9th Cir. 2001)).

Challenges Under the TCA's Zoning Provisions

The federal courts have jurisdiction to hear any challenge alleging that a local government has violated the TCA's zoning provisions in denying a telecommunications facility application (see Zoning Authority Preserved, Subject to Limitations). An adversely affected party must file suit within 30 days of the effective date of the denial. The TCA requires courts to decide these cases on an expedited basis. Additionally, when a denial of a telecommunications facility proposal is based on the health impact of radio frequency emissions, the applicant may petition the FCC for relief.

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Litigation of Shot Clock Violations

The FCC considers a state or local government's failure to act within its shot clock violations to be a violation of the TCA (see Timelines for Review). Failure to act within the 60-day shot clock for a request for a non-substantial modification will result in the request being deemed granted. If a state or local government fails to act within one of the other shot clock timeframes, the applicant may sue the government. The FCC has held that its shot clocks apply not only to zoning permits, but all authorizations to place, construct, or modify personal wireless service facilities (see Practice Note, FCC Restrictions on Regulation of Small Wireless Facilities: Authorizations Subject to the Shot Clocks.)

Except for the shot clock applicable to non-substantial modifications, the FCC designates its shot clocks as presumptively reasonable periods. A state or local government can rebut the presumption by demonstrating that its failure to act was reasonable under the circumstances.

Consequences of a Successful Challenge

The TCA provides no specific remedies when a government entity improperly denies a proposal for a telecommunications facility. Instead, the law leaves it to the courts to determine the type of relief that should be granted under the TCA.

Injunctive and Equitable Relief

In some cases, courts have determined that immediate injunctive relief is the appropriate remedy for a violation of the TCA. When this happens, a court may require the local government to issue a permit and allow construction or installation of a telecommunications facility to commence immediately. This is especially likely if the court determines that further review by the defendant would serve no useful purpose and would unnecessarily create additional cost and delay to the provider. In the context of shot clock violations involving small wireless facilities, the FCC has encouraged the courts to award injunctive relief (FCC 18-133 (2018 WL 4678555), ¶ 123).

Remand for New Proceedings

If it appears a board had valid concerns that could justify denying a facility proposal but failed to include an adequate description of those concerns in the record, a court may find it appropriate to remand the matter. Arguably, an injunction requiring the board to allow installation of the facility would unfairly penalize the public for a technical error by the board. Remand may also be appropriate where a board fails to weigh positive factors with the negative factors that led to denial. The board would then need to balance the pros and cons in its reconsideration of the matter.

Damages Not Available Under TCA

Compensatory damages and attorneys' fees are not available to parties who succeed in challenging a local government's denial of an application for a personal wireless service facility under the TCA (see *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005)). However, counsel should be aware of any state laws that provide for damages.

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EXHIBIT C

Regulations for Wireless Facilities in Public Rights-of-Way

by Practical Law Government Practice

Maintained • USA (National/Federal)

Sample local government ordinance provisions for regulating wireless communications facilities in public rights-of-way. These regulations apply to small cell systems, distributed antenna systems, and other types of wireless facilities. This Standard Document has integrated notes with important explanations and drafting tips.

Drafting Note: Read This Before Using Document

Wireless communications systems offer many benefits to the public, but also present challenges to local governments. The development of technologies such as small cell systems and distributed antenna systems has resulted in increasing demands on public rights-of-way. Local governments want to enable connectivity while effectively managing the rights-of-way under their control. Good right-of-way management addresses concerns such as:

- Community aesthetics and avoidance of clutter.
- Prevention of conflicts between competing right-of-way uses.
- Public safety.
- Accessibility to pedestrians and bicyclists.
- Right-of-way maintenance issues.

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This Standard Document provides sample clauses for incorporation into a local government ordinance regulating wireless communications facilities in rights-of-way. (For ordinance clauses dealing with facilities on property other than public rights-of-way, see Standard Document, Wireless Facilities Regulations (Non-Right-Of-Way).) The ordinance drafter may:

- Incorporate all of the clauses to:
    - completely replace an existing ordinance; or
    - create a new ordinance where the local government has few if any regulations in place governing communications facilities.
- Use the clauses that work well for the local government entity to supplement or amend an existing ordinance. Entities that use this approach may need to adjust or remove some internal links to other sections.

The drafter should tailor the clauses to the community's needs, and supplement them with additional language where appropriate.

In dealing with communications facilities, some local governments distinguish between actions taken in a purely regulatory role and actions taken in a proprietary capacity. Historically, this distinction potentially affected the way the government processed and decided on proposals for right-of-way uses. However, in 2018 the Federal Communications Commission (FCC) held that governments act in their regulatory capacities when authorizing and setting terms for wireless infrastructure in public rights-of-way ((FCC 18-133, ¶¶ 92-97 (2018 WL 4678555)). For more on this issue, see Drafting Note, Regulatory Versus Proprietary Capacity.

The clauses in this document are intended to comply with federal law, including FCC regulations. Counsel should be aware of the extent of the local government's authority under applicable state law, as well as the constraints on the government's ability to regulate communications facilities (see Practice Notes, Local Government Regulation of Telecommunications Facilities: Scope of Local Authority to Regulate Telecommunications Facilities and FCC Restrictions on Regulation of Small Wireless Facilities; Small Cells State Laws Chart and Quick Compare: Small Cell State Laws).

With any proposal for a wireless communications facility, the local government should determine at the outset whether the applicant wants to:

- Collocate a small wireless facility using an existing structure.
- Collocate a facility other than a small wireless facility using an existing structure.
- Deploy a small wireless facility using a new structure.
- Deploy a facility other than a small wireless facility using a new structure.
- Substantially modify an existing facility (not including a collocation).

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- Modify an existing facility under the "eligible facilities request" provisions of Section 6409 of the Middle Class Tax Relief and Jobs Creation Act (47 U.S.C. § 1455).
- Activate a network or group of facilities involving:
  - multiple new structures; or
  - some combination of new structures, collocations, and modifications.

This determination will affect the way the local government handles the proposal and the timetable that applies to its consideration. For more information on the timetables set by the FCC, see Practice Note, Local Government Regulation of Telecommunications Facilities: Timelines for Review. For more information on modifications to existing wireless facilities, see Practice Note, Section 6409 and Modifications to Wireless Facilities.

Benefits of Adopting These Regulations

Many communities already have some form of regulations in place to govern wireless facilities. However, changes in both technology and the law may have rendered those regulations obsolete to some extent. The regulations in this Standard Document may be a departure from the way many local governments regulate wireless facilities, but the benefits include:

- Objective standards that make the decision-making process more straightforward and consistent. If decisions are to be made in public meetings, clearly defined standards will keep the deliberations more focused (see Drafting Note, Board Action).
- Applicability of the standards to numerous types of wireless facilities, rather than only large towers.
- Locational standards that encourage the applicant, the government, and potentially the public to cooperate toward finding optimal solutions.
- Acknowledgment of limitations on local authority that the FCC has established or may establish in the future.

Assumptions

This Standard Document assumes that the entity adopting these regulations:

- Is incorporated as a city in the US. The drafter should reword the clauses as needed if the entity is a county, town, village, or other form of government.
- Intends to adopt the regulations in the form of an ordinance that adds new provisions to a municipal code. However, local government procedures and terminologies vary in the US. If the local government is adopting these regulations by some other means, the drafter should adjust the terminology as

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needed. The drafter should add the entity's own ordinance boilerplate language, including a title and a signature block. (For more information on drafting a local government ordinance, see Practice Note, Drafting a Local Government Ordinance and Standard Document, Model Ordinance Template.)

- Has authority to adopt them under applicable state law or the entity's charter. The drafter should alter the regulations as needed to comply with any preemptions of authority or any alternative procedures imposed under state law (see Small Cells State Laws Chart and Quick Compare: Small Cells State Laws).
- Intends to follow all requirements for adoption of the regulations (such as notice, publication, and public hearing if applicable).
- Either owns the rights-of-way where the regulations will be enforced or possesses a sufficient degree of control over the rights-of-way to support enforcement of the regulations.
- Does not have existing right-of-way management regulations that fully address the issues that arise with wireless communications facilities (see Drafting Note, Existing Right-of-Way Management Regulations).

Structure and Formatting

When incorporating provisions from this Standard Document into local ordinances, drafters should revise the layout and formatting to be consistent with their cities' other ordinances, including:

- Changing references to articles, sections, or other divisions in this Standard Document as necessary to match the organization of individual municipal codes.
- Adjusting numbering for consistency with the existing numbering scheme.

If the clauses in this Standard Document are used to amend existing code provisions, the drafter may want to use some combination of strikethroughs, underlining, highlighting, and bold print to delineate amendments and deletions of existing provisions.

Bracketed Items

The drafter should replace bracketed text in ALL CAPS with information specific to the local government and its practices and policies. Bracketed items in sentence case are either optional provisions or include alternative language choices to be selected, edited, or deleted at the drafter's discretion.

END DRAFTING NOTE

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PREAMBLE

WHEREAS, the City of [CITY NAME] finds that the public rights-of-way, including but not limited to all streets, sidewalks, bicycle paths, greenways, and utilities therein, are vital to the welfare of the City and the citizens, workers, visitors, and businesses who use them; and

WHEREAS, competing demands for uses of the public rights-of-way require local governments to establish regulations that will preserve the integrity, safe usage, and aesthetics of the rights-of-way; and

WHEREAS, various types of communications facilities are among the uses seeking space in the public rights-of-way; and

WHEREAS, the City seeks to balance the need to accommodate advanced technologies in communications with regulations that provide for proper management of the rights-of-way; and

WHEREAS, the regulations adopted herein are necessary to assist in the management of facilities placed in or over the public rights-of-way; to minimize congestion, inconvenience, visual impact, and other adverse effects associated with installation and maintenance of such facilities; to manage costs to the public resulting from the placement of such facilities; and to govern the use and occupancy of the public rights-of-way; and

WHEREAS, [SOURCE OF AUTHORITY] authorizes the [GOVERNING BODY] to adopt such regulations; and

WHEREAS, the regulations adopted herein are intended to comply with applicable state and federal laws and regulations, including rulings and orders issued by the Federal Communications Commission; and

[WHEREAS, the City has met all requirements for publication of notice prior to passage of the regulations contained herein; and**]**

[WHEREAS, a public hearing on these regulations was held on [DATE] to solicit public input prior to adoption; and]

WHEREAS, the City further finds that such regulations are needed to adequately protect the public health, safety, and welfare.

NOW THEREFORE, BE IT ORDAINED BY THE CITY OF [CITY NAME], [STATE] AS FOLLOWS:

Drafting Note: Preamble

Typically, a preamble immediately follows the ordinance number and title (see Standard Document, Model Ordinance Template: Drafting Note: Ordinance Title). The style and formatting of the ordinance's preamble should be consistent with the city's other ordinances. The "whereas" clauses should describe what the city seeks to accomplish by enacting the ordinance. The preamble provides important context and legislative history that can be useful in later years, especially if a legal challenge occurs. The drafter may adjust or add to the wording of these clauses to tailor them to individual circumstances. (See Standard Document, Model Ordinance Template: Drafting Note: Preamble.)

This preamble includes optional language that refers to:

- Publication of a notice informing the public that the regulations are under consideration.

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- A public hearing held during the adoption process.

Some cities must publish a public notice and hold a public hearing whenever certain types of regulations are under consideration. Even if there is no requirement, a governing body may want to provide an opportunity for public input before adopting provisions for wireless facilities.
END DRAFTING NOTE

ARTICLE I

WIRELESS COMMUNICATIONS FACILITIES IN THE PUBLIC RIGHT-OF-WAY

Drafting Note: Article Header

This Standard Document assumes that a city is adding new provisions to its municipal code to regulate wireless communications facilities in the public right-of-way. The layout of the code and the placement of these provisions in the code dictate whether they take the form of a new article, chapter, division, or other designation. A codification clause that is consistent with the local government's other ordinances should precede the new code provisions. (see Standard Clauses, Ordinance Clauses: Code Amendment and Codification).
END DRAFTING NOTE

Section 1.01 **Purpose and intent.**

(a) *Purpose*. The purpose of this article is to establish uniform, nondiscriminatory standards for the placement, construction, and modification of wireless communications facilities in rights-of-way within the City's jurisdiction in a manner that will provide public benefit and will preserve the integrity, safe usage, and aesthetics of the right-of-way.

(b) *Intent*. The City recognizes that wireless communications facilities are essential to the community. The intent of the standards established herein is to facilitate deployment of facilities that provide for the public benefits of advanced communications services, while providing for proper management of the right-of-way in a

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manner that complies with all applicable state and federal laws and regulations. In fulfilling this intent, this article is designed to prevent:

(i) Interference with the use of streets, sidewalks, alleys, bikeways, and other public ways and places;

(ii) Creation of visual and physical obstructions and other conditions that are hazardous to vehicular and pedestrian traffic;

(iii) Interference with facilities and operations of facilities lawfully located in or near rights-of-way;

(iv) Environmental damage, including damage to trees; and

(v) Degradation to the character of the areas in which facilities are installed.

(c) *Conflicts*. To the extent any previously adopted provisions of this Code conflict with this article, this article supersedes all such provisions.

Section 1.02 **Definitions.**

The following words, terms, and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Applicant means a person or entity who submits an application to the City for a permit for a wireless communications facility pursuant to the requirements of this article. "Applicant" also includes the agents, employees, and contractors of such person or entity.

Camouflaging means covering, painting, or disguising a wireless facility or support structure or otherwise blending it with its environment, hiding it, or keeping it from sight so that the wireless facility or support structure is visually unobtrusive. Camouflaging techniques may include hiding a wireless facility or support structure beneath a façade, blending it with surrounding area design, painting it to match the surrounding area, or disguising it with artificial tree branches that are similar in appearance to branches on real trees in the area.

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Co-applicant means any person or entity joining with an applicant in an application for a permit. A co-applicant may be an owner of a wireless communications facility; owner of the subject property; or any proposed tenant or user of the wireless communications facility.

Collocate means to install or mount equipment or facilities on, under, or within a pre-existing communications facility, utility pole, or other support structure.

Communications facility means equipment at a fixed location that enables communications between user equipment, or between user equipment and a communications network, including but not limited to radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, equipment cabinets and shelters, support structures, and any other equipment or structures associated with communications, regardless of technological configuration. "Communications facility" does not include a utility pole erected for purposes other than communications, but on, under, or within which communications equipment is collocated.

[DEPARTMENT NAME] department means the City's [DEPARTMENT NAME] department or such other department, division, or functional unit of the City that assumes the functions assigned in this ordinance to the [DEPARTMENT NAME] department.

Design means the appearance of a communications facility, including the structures, materials, colors, and shape.

Director means the head of the [DEPARTMENT NAME] department.

Eligible facilities request means any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, as further defined in 47 C.F.R. § 1.6100.

Equipment cabinet or *equipment shelter* means an enclosed structure, either above or below ground, housing essential equipment for the operation of a communications facility, such as batteries and electrical equipment.

FCC means the Federal Communications Commission, the federal agency charged with licensing and regulating wireless communications at the national level.

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Height means the distance measured from existing grade to the highest point of a wireless facility, including any antenna.

Modification means the changing of any portion of a communications facility, including any addition, collocation, or replacement of any component equipment, excluding like-for-like substitutions.

Network means an interconnected group of communications facilities that relies on multiple support structures.

Permittee or *permit holder* means an applicant who has been granted a permit to place a wireless communications facility or network in the public right-of-way, or a subsequent owner of a wireless communications facility or network for which a permit has been granted.

Right-of-way means the area on, below, or above a street, along with all adjacent land designated as right-of-way or public easement by law or on plats, deeds, or other instruments of record. In addition to the street, a right-of-way may include sidewalks, bicycle paths, greenways, buffers, utilities, and other public facilities that are incorporated into or adjacent to the street.

Site means that portion of a specific property or right-of-way where a communications facility is to be placed.

Small wireless facility means a wireless facility meeting the definition established by the FCC for "small wireless facilities" in 47 C.F.R. § 1.6002.

Support structure means a freestanding structure, including a pole, tower, sign, or other structure, designed to support or capable of supporting communications facilities.

Utility pole means a pole or similar structure that is used in whole or in part for carrying electric distribution lines or cables or wires for telecommunications, cable, or electric service, or for lighting, traffic control, signage, or a similar function, regardless of ownership, including City-owned poles.

Wireless communications facility or *wireless facility* means a communications facility associated with wireless communications, regardless of technological configuration.

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Drafting Note: Definitions

Definitions can avoid ambiguity by providing clear meanings for certain words used in the regulations. Uses of defined terms should be consistent throughout the document. When the draft is complete, the drafter should return to the definitions section to verify that:

- The definitions agree with uses of the terms in the regulations.
- The definitions section does not include terms that are not used in the document.

Some municipal codes include provisions of general applicability with a definitions section for terms that are used throughout the code. There is no need to repeat these definitions elsewhere in the code when the terms are used in a manner that is consistent with their definitions. For example, "right-of-way" may be included elsewhere in definitions that apply throughout the entire code. If so, there is no need to define the term again here.
END DRAFTING NOTE

Section 1.03 **Right-of-way use permits.**

Drafting Note: Right-of-Way Use Permits

This Standard Document assumes the local government intends to require an entity to obtain a permit before being allowed to put a wireless communications facility in the public right-of-way. Some local governments require execution of a right-of-way use agreement in lieu of a permit or along with a permit. Nomenclatures associated with permits and agreements also vary. However, the information sought by the government, the review process, and the requirements imposed are often similar, regardless of method or terminology.

Additional requirements may obligate right-of-way users to obtain other types of permits, such as building or excavation permits, before work may begin. Local governments should coordinate these permitting processes, since timelines for review established by the FCC apply to all approvals necessary for deployment of a wireless facility (see Drafting Note, Timeline for Review).

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Some cities want potential right-of-way users to pre-register and provide general information about their business before applying for specific permits (see Standard Clause, Right-Of-Way Management Ordinance Clauses: Registration). However, the local government cannot use mandatory pre-application procedures and requirements to toll the FCC's shot clocks.

Existing Right-of-Way Management Regulations

Local governments may already have existing right-of-way management regulations in place. Counsel should review those regulations and determine how adequately they cover the issues addressed in this Standard Document. Following this review, counsel might conclude that:

- Existing regulations make it unnecessary to adopt some of the clauses in this Standard Document.
- Clauses in this Standard Document should be integrated into existing regulations.
- Clauses in this Standard Document should be adopted as standalone provisions.

END DRAFTING NOTE

(a) *Permit required.*No person may construct, place, replace, or modify a wireless communications facility in a public right-of-way without first filing a wireless facility application and obtaining a right-of-way use permit. A separate right-of-way use permit is required for each location at which a wireless facility is to be installed, except for proposals that qualify for network permits as provided in this section. Each wireless facility for which a permit is issued must comply fully with:

(i) All applicable provisions of this article;

(ii) All conditions imposed upon the issuance of the permit; and

(iii) All other applicable codes, laws, and regulations pertaining to the installation, operation, and maintenance of the wireless facility.

(b) *Issuance of permit.* A permit will be issued by the [DEPARTMENT NAME] department upon:

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(i) Approval of an application submitted by a prospective permittee pursuant to Section 1.05;

(ii) The applicant's submission of proof of insurance as required by Section 1.18 and acceptance of such proof of insurance by the [finance/[DEPARTMENT NAME]] department;

(iii) Posting of financial security as required by Section 1.16 and acceptance of such security by the [finance/[DEPARTMENT NAME]] department; and

(iv) Fulfillment of all other conditions established by the City as a pre-requisite to issuance of the permit.

(c) *Network permits.* An application for a network of facilities may be processed as follows:

(i) An applicant may file a consolidated application and request a single permit for a network of connected wireless facilities.

(ii) The denial of any site or sites proposed within a single application will not necessarily affect other sites proposed in the same application. When one or more sites proposed in a consolidated application have been denied, the City may grant a permit for any other sites proposed in the application.

Drafting Note: Network Permits

Small Wireless Facilities

While telecommunications providers may still seek approval for standalone facilities, local governments increasingly see applications for networked facilities. Frequently, these facilities are part of small cell systems or distributed antenna systems (DAS) that are proposed for public rights-of-way. The FCC refers to all wireless facilities that fall below certain size limits as "small wireless facilities" and sets limitations on local authority to regulate them (FCC 18-133 (2018 WL 4678555)). These facilities can be a complement or alternative to large towers. They rely on small antennas and

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related equipment that are mounted to utility poles, streetlight poles, traffic signal poles, standalone poles, or other support structures.

Small cell and DAS components in the rights-of-way can include:

- Poles.
- Antennas.
- Base stations, cabinets, or shelters to house equipment.
- Power sources or meters.
- Canisters or boxes attached to a pole for housing antennas or equipment.
- Fiber lines.

Local governments may prefer small wireless facilities to new installations of large towers, but small wireless facilities come with their own challenges. Regulators should attempt to balance the desire to encourage connectivity with the need to apply good right-of-way management practices. These practices include handling competing demands for space and preserving the aesthetic character of the community.

Regulating small wireless facilities can be tricky due to legal constraints imposed by federal law, FCC regulations, and, in some cases, state law. Counsel should be familiar with these constraints and tailor local regulations to comply with applicable law.

At the federal level, multiple local governments and other parties challenged the action the FCC took under FCC 18-133. The US Court of Appeals for the Ninth Circuit vacated part of the FCC's action limiting aesthetic regulations, but left the rest intact (*City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020)). (See Practice Note, FCC Restrictions on Regulation of Small Wireless Facilities.)

Batched Applications

The FCC prohibits local governments from refusing to accept batches of applications for small wireless facilities. As a result, applicants may submit:

- Multiple separate applications at the same time, each for one or more sites.
- A single application covering multiple sites.

The shot clock that applies to a batch of applications is the same that would apply if an applicant applies for a standalone facility. If a single application for small wireless facilities includes only collocated facilities, the same 60-day shot clock

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applicable to individual collocations applies. If a single application includes both collocated facilities and new structures, the longer 90-day shot clock applicable to new structures applies. Where a batch application causes legitimate overload on local government resources, the government can rebut the presumption of reasonableness of the shot clock period. (FCC 18-133, ¶¶ 113-115 (2018 WL 4678555).)

END DRAFTING NOTE

(d) *Applicability to cable and telecommunications franchise holders.* A holder of an active cable or telecommunications franchise may continue to exercise all rights granted under the franchise; provided, however, that any wireless facilities placed in a public right-of-way by the franchise holder will be subject to the provisions of this article.

Drafting Note: Applicability to Cable and Telecommunications Franchises

Separate providers generally offered cable and telecommunications services in the past, but the services providers now offer frequently overlap each other. Historically, local governments had authority to require cable and telecommunications providers to obtain franchises before using public rights-of-way to install or extend cable or phone lines.

In more recent years, some states have adopted statewide franchising schemes, under which cable or telecommunications providers can use public rights-of-way under one state franchise. Some of the services offered by these providers may now rely on small wireless facilities. Local regulators will need to determine which facilities fall under existing franchises or other statutory schemes and which facilities are subject to regulations like these.

END DRAFTING NOTE

(e) *Other permits.* Prior to commencing any work authorized under a right-of-way use permit, the applicant or the applicant's contractor must obtain all other permits and licenses that are required for carrying out the work[, including but not limited to:

(i) [Excavation permits required under [APPLICABLE CODE SECTION];]

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(ii) [Obstruction permits required under [APPLICABLE CODE SECTION]; and]

(iii) [OTHER PERMITS]].

Drafting Note: Other Permits

The FCC has held that all authorizations necessary for the deployment of small wireless facilities are subject to its shot clocks, starting on the date the application for a facility is submitted (see Practice Notes, FCC Restrictions on Regulation of Small Wireless Facilities: Authorizations Subject to the Shot Clocks and Small Wireless Facilities in Public Rights-Of-Way: Requirements for Related Permits).
END DRAFTING NOTE

(f) *Federal and state requirements*. As a condition of approval for a right-of-way use permit, a proposed wireless facility must comply with all applicable federal and state requirements, including but not limited to regulations pertaining to:

(i) Environmental matters;

(ii) Historic preservation;

(iii) Radio frequency emissions; and

(iv) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101).

(g) *Traffic control.* A permit for work that involves traffic lane or sidewalk closures is subject to approval of a traffic control plan by the [city manager/[ADMINISTRATOR]].

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(h) *Current violations as grounds for denial.* The City may deny a permit sought by an applicant who is currently in violation of any of the provisions of this article regarding other communications facilities owned, placed, or maintained by the applicant.

(i) *Permits to be displayed.* A copy of all permits and licenses required by the City must be displayed at the work site at all times during the construction, replacement, or installation of a wireless facility.

(j) *Duration of permit.* A permit issued under this article will expire [180/[NUMBER]] calendar days after the date of issuance unless construction, placement, replacement, or modification of the wireless facility has commenced. If substantial work ceases at any point for more than [180/[NUMBER]] calendar days, the permit will be deemed expired[; provided, however, that the director of the [DEPARTMENT NAME] department may extend a permit if the director determines that the delay was caused by circumstances beyond the permittee's control].

Drafting Note: Duration of Permit

Once a permit is issued, the government should allow the permit holder a reasonable time to follow through with its plans. However, without an expiration date, a permit holder may claim it maintains a right to build a facility that was approved many years ago. With the passage of time, standards change and a facility approved in the past may vary dramatically from new standards. In establishing expiration dates for permits, the local government should acknowledge any vested rights the permit holder has under state or local law.
END DRAFTING NOTE

(k) *Limits on authority.* A permit issued under this article:

(i) Authorizes non-exclusive use of a public right-of-way as designated in the permit;

(ii) Does not create a property right or grant authority to the permittee to impinge upon the rights of others who may already have an interest in the rights-of-way, nor does it extend to the use of any property or facilities outside the right-of-way; and

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(iii) Does not authorize the use of support structures owned by the City unless an agreement for the use of such support structures has been authorized by the [city manager/[ADMINISTRATOR]/[GOVERNING BODY]] as required by Section 1.15.

(l) *Failure to obtain permit.* It is a violation of this article to construct, place, replace, or modify a wireless communications facility in a public right-of-way without obtaining a permit as required herein. Each day any such communications facility or any components of any such facility remain in the right-of-way will be considered a separate violation, subject to the penalties provided in Section [SECTION NUMBER] of this Code, until a permit application meeting the requirements of this section is submitted. In addition to any penalties that may be imposed for violation of this article, the violator will be subject to the following provisions:

(i) Where construction, placement, replacement, or modification of a wireless facility has been commenced without a permit, the work will be subject to issuance of a stop work order and the permit application fee for such facility will be doubled. Additionally, the City may hold the violator liable for any additional costs it incurs for inspection of the work and enforcement of this section.

(ii) If a complete application is not submitted for the facility within [90/[NUMBER]] days after issuance of a stop work order, or if an application for the facility is denied, then the City may take such legal actions as may be appropriate, including action to ensure removal of the facility from the right-of-way and restoration of the right-of-way.

(m) *Exceptions.* Notwithstanding the foregoing, no new right-of-way use permit is required for:

(i) Relocations and modifications performed at the City's direction pursuant to Section 1.27; or

(ii) Responses to outages, malfunctions, and other emergencies involving existing facilities, provided that:

(A) The facility owner must provide a description of the work to be performed to the director of the [DEPARTMENT NAME] department prior to commencement of the work if possible, but no later than [two/[NUMBER]] hours after commencement of the work;

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(B) Any response involving excavations, construction work, or redirection of vehicular or pedestrian traffic must be coordinated with the City; and

(C) Any increases to the physical dimensions or other permanent changes to the appearance of the facility will require a new permit.

Section 1.04 **Preexisting and previously authorized facilities.**

(a) *Permitted use.* A wireless facility lawfully constructed or placed in a public right-of-way prior to the adoption of this article or any amendments to this article will be deemed a permitted use, subject to the conditions and requirements applicable at the time of its construction or placement, unless the facility is a threat to public health, safety, or welfare. A wireless facility lawfully approved for a location in a public right-of-way prior to the adoption of this article or any amendments to this article may be located as approved, provided that substantial efforts have begun for its construction or placement within [180/[NUMBER]] calendar days of its approval.

(b) *Relocation or expansion.* An owner of a wireless facility in a public right-of-way may not relocate, expand, or otherwise modify the facility without first obtaining all permits and approvals required under this article.

(c) [*Restoration of existing facilities.* If a lawfully authorized wireless facility in a public right-of-way is destroyed or damaged to the extent that it must be rebuilt or replaced, it may be rebuilt or replaced without a new right-of-way use permit, provided that its location, physical dimensions, and appearance are substantially unchanged and all other required permits are obtained.

OR

Restoration of existing facilities. If a lawfully authorized wireless facility in a public right-of-way is destroyed or damaged to the extent that it must be rebuilt or replaced:

(i) The owner of the facility must apply for a new right-of-way use permit prior to rebuilding or replacing the facility; and

(ii) The rebuilt or replacement facility must comply with the standards of this article in effect at the time of rebuilding or replacement.]

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(d) *Collocation of wireless facility on nonconforming structure.* A provider may collocate a new wireless facility on a legal nonconforming structure if the provider obtains a permit for the new wireless facility pursuant to the provisions set forth in this article.

Drafting Note: Preexisting and Previously Authorized Facilities

Development of new communications technologies sometimes occurs more rapidly than local governments' ability to respond. Additionally, increasing competition for right-of-way space results in evolving standards that address aesthetic and safety issues. As a result, some structures and equipment in public rights-of-way may have been lawful when they were installed but would not meet current standards. Local governments must decide how to deal with these nonconforming uses of the right-of-way if they are destroyed or significantly damaged. Damage and destruction can occur due to vehicle accidents, weather, or exposure to the elements over time.

When facilities must be rebuilt or replaced, local regulators may be able to require the facility owner to upgrade the facilities to new standards. However, local government counsel should advise regulators about any state laws on nonconforming uses and vested rights that apply to these situations. In some cases, these laws may allow facility owners to rebuild or replace the facilities in their previous form. Vested rights laws may also allow permit holders a lengthier time to commence work on a wireless facility than a city would otherwise allow.
END DRAFTING NOTE

Section 1.05 **Application requirements.**

Any person wishing to obtain a permit to construct, place, replace, or modify a wireless communications facility or wireless network in a public right-of-way must submit an application to the [DEPARTMENT NAME] department on forms provided by the department. At a minimum, the application must contain the following information:

(a) The applicant's name and mailing address, along with the name and mailing address of the co-applicant, if applicable.

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(b) Identification of the proposal as:

(i) A new facility or network;

(ii) An eligible facilities request for a nonsubstantial modification to an existing facility; or

(iii) A substantial modification to an existing facility.

(c) The name, title, mailing address, telephone number, and email address of the person primarily responsible for submitting the application.

(d) The name, title, mailing address, telephone number, and email address of any contractor to be employed in the installation or modification of the facility or network.

(e) The name, title, mailing address, telephone number, and email address of the primary and secondary contact persons during the installation or modification of the facility or network.

(f) The name, title, mailing address, telephone number, and email address of the primary and secondary contact persons in matters related to the operation and maintenance of the facility or network.

(g) A general description of the proposed work and the size and location of the proposed facility or network. The scope and detail of such description should be appropriate to the nature and character of the work to be performed, with special emphasis on the effect and impact of the proposed work on the public right-of-way, other facilities in or near the right-of-way, and the surrounding area.

(h) If the proposed wireless facility is to be collocated:

(i) A description of the facility, utility pole, or other support structure on which the proposed wireless facility is to be installed or mounted;

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(ii) Identification of the owner of said facility, utility pole, or other support structure; and

(iii) Photographs that depict the scale and location of said facility, utility pole, or other support structure.

(i) If the proposed wireless facility is not to be collocated, a list of all support structures within [1,000/[NUMBER]] feet that could potentially accommodate collocation, along with an explanation justifying why the applicant is not seeking collocation, pursuant to Section 1.15.

(j) Locations and extent of any proposed:

(i) Excavation work;

(ii) Temporary closure of any portion of a public thoroughfare, including any street, sidewalk, trail, or bicycle path; and

(iii) Traffic redirection plans.

(k) A map depicting the location of all equipment and appurtenances associated with the proposed wireless facility or network, including identification of any existing poles or other support structures to be used or replaced. The map must also include locations of all of the following within the area where the proposed facility or network will be located:

(i) Aboveground and underground utilities, including poles that are not proposed to be used for the wireless facility or network;

(ii) Traffic signals and other public improvements; and

(iii) Other support structures that are not proposed to be used for the wireless facility or network.

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(l) Any proposed modifications to sidewalks or other public improvements or facilities.

(m) The manner in which each of the placement and design standards established in Section 1.13 herein will be addressed.

(n) A description of any waivers the applicant is seeking from the otherwise applicable standards of this article, pursuant to Section 1.14.

(o) Images of existing street views and the street views showing placement of proposed support structures, attachments, and all other associated equipment.

(p) Verification by a qualified engineer licensed by the State of [STATE] that:

(i) The proposed facility or network is designed to meet all applicable building and electrical code standards; and

(ii) Each support structure that is to be a part of the facility or network will safely support the load of all equipment to be attached to the structure.

(q) Verification that the proposed facility will comply with all applicable federal and state requirements, including but not limited to regulations pertaining to:

(i) Environmental matters;

(ii) Historic preservation;

(iii) Radio frequency emissions; and

(iv) The Americans with Disabilities Act.

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(r) For a wireless facility placed on a new support structure, verification as to whether the facility will be available for collocations.

(s) Identification of any radio frequencies proposed to be used on the wireless facility.

(t) Such additional information as may be required by the [DEPARTMENT NAME] department to assist in determining the effect and impact of the proposed facility or network and its compliance with the provisions of this Code and other applicable laws and regulations.

(u) An agreement, signed by a duly authorized employee or official of the applicant, to:

(i) Indemnify and hold harmless the City and its elected and appointed officials, employees, and agents from any and all claims arising from the construction, installation, operation, removal, or maintenance of the facility or network, or failure to properly maintain the facility or network, as provided in Section 1.17; and

(ii) Provide and maintain the insurance coverage required under Section 1.18.

Drafting Note: Application Requirements

The first step in gathering information needed to sufficiently review a request to use a public right-of-way is a good application form. Ideally, forms should be developed specifically for placement of facilities in the rights-of-way. Counsel should work with the department that will be receiving the applications to design an application form that will allow adequate review (see Processing Applications for Wireless Communications Facilities Checklist: Design the Application Forms). Other stakeholders within the government who have an interest in wireless facility proposals should also provide input into developing the application form (see Practice Note, Local Government Regulation of Telecommunications Facilities: Stakeholders in the Review).

The ordinance does not necessarily need to identify every detail that should be included in the application. Instead, the ordinance should authorize staff to require

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applicants to include supplemental information that will be valuable in assessing the potential impact of the proposal.

For a sample application form, see Standard Document, Wireless Facility Application.
END DRAFTING NOTE

Section 1.06 **Application fees.**

(a) *Fee to be paid with application submittal.* Each application for a permit to construct, place, replace, or modify a wireless communications facility or wireless network in a public right-of-way must be accompanied by payment of an application fee. The [GOVERNING BODY] shall establish the amount of the application fees by resolution and may adjust such fees periodically by resolution.

(b) [*Reduced fee for eligible facilities requests.* A reduced application fee may be charged for an eligible facilities request, as defined in this article. If the City subsequently determines that the proposal does not qualify as an eligible facilities request and the applicant wishes to move forward with the application, the applicant must pay the full amount of the application fee.]

Drafting Note: Application Fees

Ideally, regulators should charge application fees that are reasonable but cover the cost of processing and reviewing applications. The FCC has determined the following non-recurring fee amounts to be presumptively reasonable:

- $500 for a single up-front application that includes up to five small wireless facilities.
- $100 for each additional small wireless facility beyond five.
- $1,000 for a new pole intended to support one or more small wireless facilities.

(FCC 18-133, ¶ 79 (2018 WL 4678555).)

To avoid litigation risks, a city may adopt higher fees only if the fees meet these FCC criteria:

- The higher fees are a reasonable approximation of costs incurred by the city.

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- Those costs themselves are reasonable.
- The fees are non-discriminatory.

(FCC 18-133, ¶ 80 (2018 WL 4678555).)

Cities may incur external costs in reviewing wireless facility applications, such as fees from outside consultants. However, a city should not pass these costs through to an applicant unless the total fees, including external costs would either:

- Be within the amounts found to be presumptively reasonable by the FCC.
- Meet the FCC criteria for establishing higher fees.

Rather than adopting application fees in the ordinance establishing regulations for wireless facilities, local governments should consider setting fees by separate action such as a resolution. If there is a need to change the fees in the future, a city can revise them more easily if they are not part of a codified ordinance.

Counsel should also be aware of any state law limitations that apply to application fees (see Small Cells State Laws Chart and Quick Compare: Small Cell State Laws). In some states, these limitations may require fees to be less than those allowed by the FCC.

For more on fees local governments impose on wireless providers, see Practice Note, Small Wireless Facilities in Public Rights-Of-Way: Fee Payments.

END DRAFTING NOTE

Section 1.07 **Review procedure.**

(a) *Pre-application meeting.* Applicants are not required to meet with the [DEPARTMENT NAME] department prior to submitting applications. However, at an applicant's request, the [DEPARTMENT NAME] department will schedule a voluntary pre-application meeting with the applicant before submittal of an application.

(b) *Staff review.* The [DEPARTMENT NAME] department will review each application for a right-of-way use permit to assess the impact of a proposed wireless facility and its compliance with the purpose and intent of this article as set forth in Section 1.01 and the applicable standards established in this article. The [DEPARTMENT NAME] department will forward the application to other departments and parties from whom input is needed in the review process. The [DEPARTMENT NAME] department will notify the applicant of:

(i) Any documents or information missing in the application;

(ii) The specific rule or regulation creating the obligation to submit such documents or information; and

(iii) The deadline for submitting revisions.

(c) *Deadline for submitting revisions.* If the application is missing any documents or information, the applicant must submit the missing items within [180/(NUMBER)] days from the date the [DEPARTMENT NAME] department notifies the applicant of the deficiencies. If the applicant fails to submit the missing items by the required time:

(i) The application will be void; and

(ii) A new application must be submitted and new fees paid if the applicant wishes to proceed with the proposal.

(d) *Recommended revisions.* In addition to identifying any omissions or deficiencies in the application, the [DEPARTMENT NAME] department may recommend revisions to the applicant's proposal aimed at carrying out the purpose and intent of this article.

(e) [*Referral to [BOARD NAME].* If the application requires [BOARD NAME] approval:

(i) The [DEPARTMENT NAME] department will coordinate its review to assure compliance with any timeframe applicable to final action by the [BOARD NAME] under Section 1.08;

(ii) The [DEPARTMENT NAME] department will provide a recommendation to the [BOARD NAME] for approval or denial of the application, based on its assessment; provided, however, that the [BOARD NAME] will not consider the application until all deficiencies in the application as identified by the [DEPARTMENT NAME] department have been corrected; and

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(iii) The applicant's failure to respond to any recommendations for revisions provided by the [DEPARTMENT NAME] department may result in denial of the application by the [BOARD NAME].]

(f) *Eligible facilities requests.* Notwithstanding any other provision of this article, the [DEPARTMENT NAME] department shall approve any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of such structure, according to the procedures established by the FCC under 47 C.F.R. § 1.6100.

(g) *Material changes.* If an applicant makes any material changes to an application, other than a revision specifically requested by the City, the application will be treated as a new application, for which a new application fee must be paid and the review period will begin again. For purposes of this section, the [DEPARTMENT NAME] department will have discretion to determine whether a change to an application will be considered material.

Drafting Note: Review Procedure

Once an application is filed, the government should have clearly defined procedures in place to aid in deciding what should be done with it. Staff members should be assigned with the responsibility to:

- Make an initial determination about what is being proposed and whether it can be approved administratively or requires board action. Note that the section above includes two options, so the regulations may provide that either:
  - some applications require approval by a board, following staff review and recommendations, but others require only administrative approval; or
  - all applications are subject only to administrative review; no applications require board approval.
- Coordinate review by all stakeholders within the organization and by outside consultants if needed.
- Establish a schedule that will ensure compliance with applicable timeline requirements.

It is not essential to include all details of the review procedure within an ordinance. The ordinance can establish basic parameters, while leaving room for staff members to develop internal policies and procedures that provide more detailed guidance for conducting the review.

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For further discussion of the review procedure for communications facility applications, see:

- Practice Notes, Local Government Regulation of Telecommunications Facilities: Process for Reviewing Telecommunications Facility Applications and Small Wireless Facilities in Public Rights-Of-Way: Review of Small Wireless Facility Applications.
- Processing Applications for Wireless Communications Facilities Checklist.

Pre-Application Meetings

A pre-application meeting between the applicant and the government can be useful for:

- Educating the applicant about the government's regulations.
- Providing the government an opportunity to preview the applicant's plans and save time once the actual review process begins.
- Identifying any potential problems with the applicant's proposal, along with possible solutions.

However, the FCC holds that time spent on mandatory pre-application procedures and requirements counts toward its shot clocks for acting on applications. Rather than requiring a pre-application meeting, the government can encourage applicants to voluntarily request a meeting. (FCC 18-133, ¶¶ 145-146 (2018 WL 4678555).) For an eligible facilities request for modifications to an existing facility (see Drafting Note, Eligible Facilities Requests), even the applicant's request for a required meeting can begin the shot clock (FCC 20-75, ¶ 18).

Language in this section makes it clear that a pre-application meeting is not a requirement, but that an applicant may request a voluntary pre-application meeting. Once an applicant has submitted an application, however, a request for a meeting does not stop the shot clock from running.

Avoiding Effective Prohibition

Under the Telecommunications Act of 1996 (TCA), local regulations must not prohibit or have the effect of prohibiting telecommunications service. FCC standards hold that a requirement is an effective prohibition if it materially inhibits the ability of a provider to:

- Provide service to a new area.
- Address coverage gaps or densify wireless networks.
- Introduce new services.

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- Improve existing services.

(FCC 18-133, ¶ 37 (2018 WL 4678555).)

Special Considerations for Facilities in Public Rights-of-Way

Regulatory Versus Proprietary Capacity

A local government may view itself as the proprietor of the rights-of-way it maintains. Some cities have used the distinction between proprietary and regulatory roles to treat wireless facilities in public rights-of-way differently from facilities on private property. For example, cities may have assumed that FCC timelines for review of applications did not apply when they were acting in their proprietary roles. In 2018, however, the FCC held that cities act in their regulatory capacity when authorizing and setting terms for wireless deployments in public rights-of-way (see FCC 18-133, ¶¶ 92-97 (2018 WL 4678555)). As a result, local regulation of wireless facilities in rights-of-way is subject to the FCC's shot clocks and other federal restrictions on local authority.

Laws enacted or under consideration by some state legislatures also diminish the distinction between proprietary and regulatory (see Small Cells State Laws Chart). The best approach is to follow similar procedures for wireless facility applications involving either private property or the public right-of-way, without considering the distinction between the two possible roles. This approach reduces the threat of a challenge by an applicant based on how the government handled an application.

Eligible Facilities Requests

Section 6409 of the Middle Class Tax Relief and Jobs Creation Act requires approval of modifications to an existing wireless facility that do not substantially change its physical dimensions (47 U.S.C. § 1455). The FCC has established the criteria for eligible facilities requests under Section 6409, as well as shot clocks for review of these requests (47 C.F.R. § 1.6100). A local government must approve an eligible facilities request in the public right-of-way within 60 days from the time the applicant has both:

- Taken the first required procedural step that is part of the review process.

- Submitted written documentation showing that a proposed modification is an eligible facilities request, if the documentation was not provided as part of the first step.

(FCC 20-75, ¶ 16.)

For more on eligible facilities requests and the shot clocks that apply to them, see Practice Note, Section 6409 and Modifications to Wireless Facilities.

END DRAFTING NOTE

Section 1.08 **[BOARD NAME] action.**

(a) [[*BOARD NAME*] *approval required*. No right-of-way use permit under this article may be issued without the approval of the [BOARD NAME], except as otherwise provided in this section.]

OR

[[*BOARD NAME*] *approval required.* No right-of-way use permit under this article may be issued for a wireless facility other than a small wireless facility without the approval of the [BOARD NAME], except as otherwise provided in this section. Approval of the [BOARD NAME] is not required for a small wireless facility.]

(b) *Exceptions to* [*BOARD NAME*] *approval requirement*. Where a wireless facility has been legally placed in a public right-of-way, the [BOARD NAME]'s approval is not required for:

(i) Routine maintenance and repairs, provided that the facility is not expanded and the location and appearance are substantially unchanged;

(ii) An eligible facilities request involving a modification to an existing facility that is not considered a substantial change, as defined by the FCC at 47 C.F.R. § 1.6100, provided that sufficient documentation has been provided to allow City staff to verify that the modification qualifies as an eligible facilities request; [or]

(iii) [The replacement of the facility with another facility that is substantially similar in appearance and substantially similar or smaller in its dimensions; or]

(iv) [OTHER BOARD APPROVAL EXCEPTIONS].

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Drafting Note: Board Action

The delegation of authority to approve or deny proposals for wireless facilities in public rights-of-way varies among the states and within cities in each state. Frequently, proposals for some facilities are approved administratively, while larger facilities or networks with numerous components may require a board's approval.

Governing bodies, planning commissions, and zoning appeals boards are among the boards that approve or deny wireless facilities. In some cases, a board such as a historic board may also have jurisdiction to approve or at least review and comment on the proposal. This may differ from other right-of-way management matters, such as driveway connections or temporary lane closures, that are more likely to be approved administratively. There should be a clear assignment of authority, so staff members receiving applications will know how to direct them. Both staff and board members who consider wireless facility proposals should learn about the local, state, and federal regulations that affect their consideration.

Administrative Approval

Unless dictated by city charter or state law, it is up to each local government to determine how to divide approval authority for wireless facilities between staff and public bodies. Wireless facility regulations sometimes allocate too much authority to boards made up of lay members who do not understand the complex issues involved or the limits of their authority. To avoid this situation, a city that wants to delegate more authority to staff can expand the list of exceptions in this section. A city that handles all proposals for wireless facilities in rights-of-way through an administrative process will not need to include this section's provisions in its regulations. A hybrid option would delegate approval authority to staff, except in limited circumstances where requests for exceptions or variances are sent to a board.

The FCC defines facilities under certain size limits as "small wireless facilities" (47 C.F.R. § 1.6002.) For these facilities, administrative review may be the best option, as it will:

- Make it easier to meet tighter timeframes under the FCC's shot clocks.
- Avoid the possibility of a board's rejection of a proposal for reasons that are unlikely to withstand a challenge.

END DRAFTING NOTE

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Section 1.09 **Additional conditions.**

In addition to the specific standards established in this article, approval of an applicant's proposal may be made subject to additional conditions when it is deemed necessary to protect and preserve existing land uses in the area, address safety issues, or to otherwise fulfill the intent of this article.

Drafting Note: Additional Conditions

It is difficult to draft wireless facility regulations that address every possible contingency. In some cases, it is useful to establish additional conditions that must be met as a part of the approval of a right-of-way use permit. These conditions may address matters unique to the area where the facility will be placed or safety issues associated with the proposed facility. However, regulators must use caution in setting additional requirements that are purely aesthetic. For facilities classified as small wireless facilities, the FCC requires aesthetic standards to be reasonable and published in advance, and warns against "secret" rules that result in uncertainty (see FCC 18-133, ¶ 88 (2018 WL 4678555) and Drafting Note, Placement and Design Standards).
END DRAFTING NOTE

Section 1.10 **Denial.**

If a permit is denied, the [director of the [DEPARTMENT NAME] department/[OTHER OFFICIAL]] will notify the applicant in writing. Permit denials must be supported by findings based on the provisions of this article and meet applicable requirements of federal and state law.

Drafting Note: Denial

The TCA imposes specific requirements when a local government denies a wireless facility request. To meet TCA standards, a denial must be:

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- In writing.
- Supported by substantial evidence in a written record.

For a thorough discussion of these requirements, along with potential grounds for denial, see Practice Note, Local Government Regulation of Telecommunications Facilities: Denial of Applications for New Facilities.
END DRAFTING NOTE

Section 1.11 **Timeline for review.**

Action to approve or deny an applicant's proposal will be completed within any applicable timeframe established by the FCC or otherwise established by state or federal law, subject to any deferral of consideration requested by or agreed to by the applicant. Notwithstanding the foregoing, where the applicable timeframe has been designated as presumptively reasonable, the amount of time to approve or deny a proposal may be extended if necessary under the circumstances. [Where no such timeframe applies under state or federal law, action will be completed in accordance with the City's standard procedures.]

Drafting Note: Timeline for Review

"Shot clocks" apply to review of new wireless facilities, collocations, and modifications of existing facilities (see Practice Note, Local Government Regulation of Telecommunications Facilities: Timelines for Review). In various actions since 2009, the FCC has established shot clocks that apply to different types of applications for wireless facilities. In some cases, the FCC has designated its timelines as presumptively reasonable rather than mandatory. If an applicant seeks an injunction to force a decision within a presumptively reasonable shot clock time, the local government may show it needs more time under the circumstances (*City of Portland*, 969 F.3d at 1043).

A right-of-way user's work may require additional permits other than right-of-way use permits before the work may begin. Local governments must coordinate these permitting processes, since the FCC's shot clocks for wireless facility applications apply to all approvals necessary for deployment of a wireless facility (FCC 18-133, ¶¶ 132-137 (2018 WL 4678555)). For example, a facility may require a right-of-way use permit, a building permit, an excavation permit, and an agreement for use of a city-owned pole. Action on all of these components must take place within the applicable shot clock.

Some states have adopted their own timelines for small wireless facilities in public rights-of-way (see Small Cells State Laws Chart and Quick Compare: Small Cell State Laws). Cities in these states must follow state timelines if they are shorter than the FCC shot clocks.
END DRAFTING NOTE

Section 1.12 **Preferred locations.**

(a) *Order of preference.* The following locations, in the order listed, are the preferred locations for installation of wireless facilities in public rights-of-way:

(i) Industrial areas;

(ii) Commercial areas [except for commercial areas within [a historic district/[OTHER DISTRICTS]]]; and

(iii) [OTHER AREAS.]

(b) *Non-preferred locations.* A wireless facility may be permitted in a location other than a preferred location identified in this section if the applicant provides evidence showing that:

(i) Adequate coverage can be maintained, existing services can be improved, or new services can be added only if facilities are placed in a non-preferred location; or

(ii) The proposed facility will meet all applicable requirements for the non-preferred location and will complement the character of the surrounding area.

Drafting Note: Preferred Locations

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Cities often want to keep wireless communications facilities out of areas like residential neighborhoods or districts with planned streetscapes. However, banning facilities from these areas could result in challenges claiming that a city is violating the TCA by effectively prohibiting the provision of communications services. Designating preferred locations while still allowing installations in non-preferred locations encourages providers to collaborate with the local government to achieve the objectives of both parties.
END DRAFTING NOTE

Section 1.13 **Placement and design standards.**

Drafting Note: Placement and Design Standards

In this section, the government lays out its expectations for how wireless facilities in rights-of-way should look and fit into the community. It includes restrictions on the dimensions of facilities and other provisions governing their appearance, along with their impact on public safety and pedestrian access. This is the government's chance to ensure that new facilities in the right-of-way will be tailored to the community's overall aesthetic plan or preferences.

Aesthetics

Counsel should be confident of local government authority to impose aesthetic regulations under state law (see Practice Notes, Local Government Regulation of Telecommunications Facilities: State Laws). Additionally, under a 2018 FCC Declaratory Ruling, aesthetic requirements for small wireless facilities are permissible only if they are reasonable and published in advance (FCC 18-133, ¶ 86 (2018 WL 4678555)).

Other provisions in the FCC's 2018 action ruled that aesthetic requirements must be objective and no more burdensome than those applied to other types of infrastructure deployments. However, the Ninth Circuit overturned these criteria in *City of Portland* (969 F.3d at 1041). Under the TCA, aesthetic requirements must still avoid unreasonable discrimination among providers of functionally equivalent services (47 U.S.C. § 332(c)(7)(B)(i)(I)).

For more information on the 2018 FCC Declaratory Ruling, see Practice Note, FCC Restrictions on Regulation of Small Wireless Facilities.

Publication Requirements

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The FCC indicated that aesthetic requirements for small wireless facilities should be published within 180 days of the date of the 2018 Declaratory Ruling's publication in the Federal Register (FCC 18-133, ¶ 89). The Declaratory Ruling was published in the Federal Register on October 15, 2018. Therefore, local governments that had already adopted aesthetic requirements should have published the requirements by April 15, 2019. However, the FCC's Ruling does not contain language prohibiting local governments from enforcing aesthetic requirements that are adopted, amended, or published after that date. Regardless of the adoption or publication date, regulators should not enforce aesthetic requirements that have not yet been published.

The FCC's publication requirements do not specify the manner of publication. Presumably, a local government may publish aesthetic standards in print or online format, as long as they are made public before they are enforced. Having current standards available online for as long as they are in effect provides applicants the opportunity to become familiar with them before developing proposals for approval.

Specialized Standards

Some communities may have different aesthetic standards for different parts of town. This is often the case when a community includes a historic district or other areas where alternative design standards are in effect. To the extent FCC restrictions and state laws allow, local governments can modify the placement and design provisions in this section as necessary to refer to those standards when they apply.

Exceptions

The FCC's restrictions on aesthetic standards may cause many local governments to rethink their previously adopted regulations. As an alternative to abandoning aesthetic requirements, local governments should consider employing a mechanism for granting exceptions when FCC restrictions would override them (see Drafting Note, Waivers).

END DRAFTING NOTE

All wireless facilities in the public rights-of-way are subject to the following standards:

(a) No new poles or other support structures will be allowed in areas where utilities are underground.

Drafting Note: Undergrounding

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The FCC addresses undergrounding in a 2018 Declaratory Ruling. The FCC's Ruling:

- Holds that a requirement that all wireless facilities be placed underground would amount to an effective prohibition of service.
- Considers a requirement that materially inhibits service an effective prohibition of service, even if it does not go so far as requiring all wireless facilities to be underground.
- Applies the same criteria to undergrounding requirements as the Ruling applies to general aesthetic requirements (see Drafting Note, Aesthetics).

(FCC 18-133, ¶ 90 (2018 WL 4678555).)

The drafter should revise the language in this subsection if it would effectively require all wireless facilities to be underground or would otherwise conflict with the FCC's Ruling.
END DRAFTING NOTE

(b) Subject to the provisions of Section 1.15, collocation of facilities is generally preferred over new support structures if it can be accomplished in a way that better complements the character of the surrounding area.

(c) Each new or modified wireless facility in a public right-of-way must be compatible in size, mass, and color to similar facilities in the immediate area, with a goal of minimizing the physical and visual impact on the area. New poles must be no more than [16/[NUMBER]] inches in diameter with a surface that is powder-coated and [black or dark green/[COLOR]] in color, unless another color would blend better with the surrounding area. Notwithstanding the foregoing, a new facility or support structure must be designed using camouflaging techniques that make it as unobtrusive as possible if:

(i) It is not possible or desirable to match the design and color of a new facility or support structure with the existing support structures in the immediate area; or

(ii) Existing support structures in the area are out of character with a streetscape plan or other aesthetic plan that has been adopted by the City.

(d) A wireless facility must not:

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(i) Obstruct, impede, or hinder vehicular, pedestrian, or bicycle travel or public safety within a public right-of-way, except for authorized temporary lane or sidewalk closures;

(ii) Obstruct the legal use of a public right-of-way by utility providers and other authorized right-of-way users;

(iii) Result in a violation of the federal Americans with Disabilities Act; or

(iv) Violate other right-of-way management provisions adopted by the City.

(e) To the extent possible, a wireless facility should be located and designed so as to avoid interference with right-of-way maintenance activities and government services such as:

(i) Grass mowing, brush collection, tree trimming, and landscaping maintenance;

(ii) Trash collection;

(iii) Maintenance of streets, pavement, sidewalks, and bicycle lanes; and

(iv) Maintenance of other facilities in the rights-of-way.

(f) New support structures are prohibited adjacent to:

(i) Any street that is [50/[NUMBER]] feet or less in width, excluding additional lanes at intersections; and

(ii) Developed or undeveloped lots zoned for [single family] residential use.

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(g) New poles must not be made of wood.

(h) New support structures and ground level appurtenances must be at least [five[NUMBER]] feet from the curb or nearest traffic lane to reduce the risk of being struck by a motor vehicle or bicycle.

(i) The height of a wireless facility in a public right-of-way may not exceed the lesser of:

(i) The tallest existing communications facility, including support structures, in the public right-of-way within [300/[NUMBER]] feet of the new facility; or

(ii) [50/[NUMBER]] feet above ground level.

(j) Communications equipment that is mounted on a utility pole may not extend more than [14/[NUMBER]] inches past the edge of the pole. Such equipment must be at least [16/[NUMBER]] feet above ground level if projecting toward the street, and at least [8/[NUMBER]] feet above ground level if projecting in any other direction.

(k) Whenever possible, wiring and cabling must be internally contained within a support structure, buried underground, or otherwise concealed.

(l) A support structure for a wireless facility must be at least [NUMBER] feet from any other support structure in a public right-of-way.

Drafting Note: Minimum Spacing Requirements

The FCC addresses minimum spacing requirements in a 2018 Declaratory Ruling (FCC 18-133, ¶ 91 (2018 WL 4678555)). The FCC acknowledges that some spacing requirements may be reasonable aesthetic requirements. However, it holds that spacing requirements should be evaluated under the same standards it applies to general aesthetic requirements (see Drafting Note, Aesthetics).

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END DRAFTING NOTE

(m) Ground level equipment cabinets and shelters may not be higher, wider, or deeper than [3.5/[NUMBER]] feet.

(n) Ground level equipment cabinets and shelters must not be placed:

(i) Within [50/[NUMBER]] feet of a street corner or intersection;

(ii) Within any area that will interfere with the sight triangle at an intersection;

(iii) Within [50/[NUMBER]] feet of a driveway; or

(iv) Within any area that will create traffic visibility loss to drivers, pedestrians, or bicyclists.

(o) Ground level equipment cabinets and shelters must be secured to prevent public safety risks and unauthorized access to equipment and wiring. Equipment cabinets and shelters must also be:

(i) Screened with landscaping or other means, with such screening to be permanently maintained by the owner of the facility; or

(ii) Designed to blend with and match the character of the surrounding area.

(p) Ground level equipment cabinets and shelters with a volume of [NUMBER] cubic feet or more must be at least [NUMBER] feet from any other ground level equipment cabinets or shelters in a public right-of-way.

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(q) Facilities must be designed to prevent interference with public safety communications, traffic signal systems, or other government communications. If a potential problem is identified, the City may require applicants to provide a technical evaluation to identify any potential interference and implement corrective solutions to resolve the problem.

(r) All facilities must be designed by a qualified engineer licensed by the State of [STATE] and must meet all applicable building and electrical code standards.

(s) To the extent applicable, the standards established in this section shall remain in effect the entire time a facility remains in a public right-of-way.

Section 1.14 **Waivers.**

With the approval of the [director of the [DEPARTMENT NAME] department/city manager/[ADMINISTRATOR]/[BOARD NAME]], a permit issued under this article may allow a waiver from the standards established herein if the waiver will not be detrimental to the public health, safety, or welfare and meets one of the following criteria:

(a) *Material inhibition of service.* The applicant submits documentation showing that:

(i) Denial of a permit for a wireless facility proposed for installation by the applicant will materially inhibit the applicant's ability to provide communications services; and

(ii) The applicant will take measures to minimize any negative physical, visual, or other impact from deviating from the standards established herein.

(b) *Purpose and intent findings.* The decision to issue the permit includes a finding that alternative standards will better serve the purpose and intent of this article as set forth in Section 1.01.

Drafting Note: Waivers

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Regulators should keep in mind that the TCA preempts local regulations that prohibit or have the effect of prohibiting telecommunications service. However, the law specifically provides that state and local government still maintain their ability to manage public rights-of-way. (47 U.S.C. § 253.) The FCC has held that effective prohibition occurs when a requirement materially inhibits a provider's ability to:

- Fill a coverage gap.
- Introduce new services.
- Improve existing services.

(FCC 18-133, ¶ 37 (2018 WL 4678555).)

Balancing good right-of-way management with providers' needs may call for compromises in some situations. Regulations should provide leeway for common sense exceptions to otherwise applicable standards (see Practice Note, Small Wireless Facilities in Public Rights-Of-Way: Waivers). A mechanism that allows waivers of local standards provides a way out if the standards would conflict with FCC restrictions. This approach allows local regulators to make a case-by-case determination regarding whether aesthetic standards comply with FCC restrictions when applied to a specific proposal.

END DRAFTING NOTE

Section 1.15 **Collocation of facilities.**

(a) *Collocation with non-municipal facilities.* Collocation with facilities or support structures owned by parties other than the City is subject to the following:

(i) Where an existing facility or support structure other than a facility or support structure owned by the City can potentially accommodate collocation of a new wireless facility, collocation will be required unless:

(A) The applicant submits substantial evidence supporting the unsuitability of the collocation;

(B) The owner of the existing facility or support structure is unwilling to accommodate the applicant's equipment and cannot be required to cooperate; or

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(C) The [director of the [DEPARTMENT NAME] department/city manager/[ADMINISTRATOR]/[BOARD NAME]] determines that installing a new support structure or collocation with a City facility is preferable to collocation with another facility or support structure.

(ii) Authorization for collocation on a facility or support structure owned by a party other than the City will be voided if the facility or support structure is destroyed, removed, relocated, or replaced, unless:

(A) The owner of the collocated facility obtains a new right-of-way use permit; or

(B) The facility or support structure accommodating the collocation is replaced with a facility or support structure comparable in size, mass, appearance, and placement, as determined by the director of the [DEPARTMENT NAME] department.

(b) *Collocation with municipal facilities.* A wireless facility may be attached to a City-owned pole or collocated with another City-owned facility in a public right-of-way only if the owner of the wireless facility has entered into a duly authorized agreement with the City. Each such agreement must include nondiscriminatory terms providing for the payment of an annual fee pursuant to Section 1.23 or in-kind contributions in lieu of annual fee payments to the City. Upon approval of an agreement by the [city manager/[ADMINISTRATOR]/[GOVERNING BODY]] and issuance of a right-of-way use permit and all other applicable permits, an applicant may collocate a wireless facility on the following, in order of preference:

(i) Non-decorative street lights;

(ii) Non-decorative traffic signal structures; or

(iii) Other City-owned facilities.

(c) *Collocation of municipal equipment on wireless facilities.* The City may require a permit holder under this Article to allow placement of a street light, camera, and other equipment on a support structure owned by the permit holder if the structure can safely accommodate such equipment without interfering with the permit holder's use of the structure. Unless otherwise agreed, the City will maintain ownership of all such street lights, cameras, and other equipment and will be solely responsible for their installation, operation, and maintenance. The owner of a support structure on which City equipment has been placed may be eligible for a waiver or reduction in the fee required under Section 1.23 herein.

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Drafting Note: Collocation of Facilities

Collocation of facilities can be a useful tool for preventing clutter in the rights-of-way. While collocation often involves poles, communications equipment can also be located on other structures, such as billboards. Collocation may depend on the willingness of the owners of potentially suitable support structures, along with owners of equipment already collocated on the structures. In some cases, state or local regulations may require a support structure owner to accommodate collocations unless the owner can provide proof that the collocation will be unsuitable.

The local government may want to accommodate collocations on its own poles or other structures in the rights-of-way, subject to agreements that provide for compensation. The FCC has found an annual charge of $270 per facility to be a presumptively reasonable fee for right-of-way access or attachment to municipally-owned structures in a right-of-way (FCC 18-133, ¶ 79 (2018 WL 4678555)). (For more information on these fees, see Drafting Note, Right-of-Way Use and Attachment Fees.) Alternatively, the government may want to require wireless facility owners to allow collocation of street lights, cameras, and other equipment that serves the government.

Maintenance of Shared Facilities

When facilities are collocated, the facility owners should have a clear understanding about how future maintenance needs will be addressed. The local government can adopt regulations that set out the respective maintenance and cost responsibilities, or it can require those responsibilities to be addressed in user agreements. As a condition of approval for facilities that are to be collocated, the local government can require facility owners to submit a plan for addressing shared facility maintenance issues. For more information, see Practice Note, Small Wireless Facilities in Public Rights-Of-Way: Maintenance of Shared Facilities.
END DRAFTING NOTE

Section 1.16 **Performance and maintenance security.**

Upon approval of an application and as a condition for issuance of a permit, the applicant must submit financial security, in an amount and form acceptable to the [finance/[DEPARTMENT NAME]] department, pursuant to its written requirements, to ensure that:

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(a) The permittee and the permitted facility will comply with the approved plans, all conditions of approval, and all applicable provisions of this article at all times throughout its occupancy of the rights-of-way.

(b) All damage to the right-of-way and other facilities within the rights-of-way as a result of the work done in the rights-of-way by the applicant will be repaired as required under Section 1.19.

(c) All costs of removal, relocation, or modification of the facility will be covered if required by the City under Section 1.27.

(d) All costs of removal, storage, and disposition will be covered if the facility is abandoned, pursuant to Section 1.28.

Drafting Note: Performance and Maintenance Security

Many local governments require financial security from right-of-way users to guarantee that all remediation work will be completed and all permit conditions will be honored. The government should develop a formula or system for determining the amount of the security. The amount should be reasonable but sufficient to cover any work left undone by the right-of-way user. Input from public works, utilities, engineering, and other departments with an interest in the rights-of-way can assist in calculating the appropriate amount. These same stakeholders should weigh in if there is a need to draw on the security or to determine if the security amount can be reduced. To make sure this happens, the department in charge of enforcing the security requirement can distribute periodic reports and conduct status update meetings.

The government should also establish standards for the types of security it will accept. Options include:

- A deposit in the form of a certified or cashier's check.
- A letter of credit from a financial institution.
- A performance bond from an insurance provider.

Since it is generally more cumbersome to collect proceeds from performance bonds, many local governments prefer one of the other types of security. In any case, the government should accept security only from institutions that meet established criteria. Providing forms for letters of credit and bonds also assures that the security favorably addresses the government's concerns.

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END DRAFTING NOTE

Section 1.17 **Indemnification.**

(a) Each permittee and each owner of a wireless facility in a public right-of-way is responsible for and must indemnify, hold harmless, and defend the City and its elected and appointed officials, employees, and agents against any claims, lawsuits, judgments, costs, penalties, liens, losses, expenses, fees, proceedings, actions, demands, causes of action, and liability of any nature, resulting from the actions or failure to act of the permittee, facility owner, or their agents, employees, contractors, or subcontractors.

(b) The obligation to indemnify, hold harmless, and defend established under this section includes:

(i) Personal or bodily injury, including death; and

(ii) The cost of repairs or replacement of any property damaged or destroyed.

(c) The obligation to indemnify, hold harmless, and defend established under this section extends to any act or omission of the permittee or facility owner, its officers, agents, employees, contractors, or subcontractors arising out of, but not limited to, the construction, installation, operation, maintenance, or removal of the permittee's or owner's communications facilities in a right#of#way.

(d) The obligation to indemnify, hold harmless, and defend established under this section includes, but is not limited to, the obligation to pay judgments, injuries, liabilities, damages, reasonable attorneys' fees, reasonable expert fees, court costs, and all other reasonable costs of indemnification.

(e) The obligations to indemnify, hold harmless, and defend established under this section are solely for the benefit of the City and are not intended to create or grant any rights, contractual or otherwise, to benefit any other person or entity.

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(f) A permittee or owner of a wireless facility in a public right-of-way must promptly notify the City of any known claim or demand arising out of the construction, installation, operation, maintenance, or removal of the permittee's or owner's facility.

(g) The requirements established in this section will remain in effect the entire time a facility remains in a public right-of-way and through any restoration work required as a result of the removal of the facility.

Section 1.18 **Insurance.**

(a) *Insurance required.* At all times during the construction, installation, occupancy, and removal of a permittee's communications facility in a right-of-way, the permittee must maintain insurance coverage with an insurance company that is authorized to do business in the State of [STATE][and has an A.M. Best rating of "A" or better].

(b) *Coverages.* The insurance required under this section includes coverage for employer's liability, personal injury, contractual liability, premises liability, medical damages, and underground, explosion, and collapse hazards, at or above the following coverage levels:

(i) Worker's compensation and employer's liability insurance - As required by [STATE] law.

(ii) Comprehensive general liability - $[NUMBER] per occurrence, combined single limit; $[NUMBER] in the aggregate.

(iii) Commercial automobile liability - $[NUMBER] per occurrence, combined single limit, each accident for all owned, non#owned, and hired vehicles involved in operations under this article.

(iv) Commercial excess or umbrella liability - Commercial excess or umbrella liability coverage may be used in combination with primary coverage to achieve the required limits of liability.

(c) *Changes in coverage requirements.* Notwithstanding the foregoing, the [city manager/ [ADMINISTRATOR]] is authorized to establish new insurance coverage requirements from time to time as may be needed to minimize risk to the City and provide adequate compensation to potential claimants.

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(d) *Other insurance requirements.* The insurance required under this Section must be primary coverage for losses covered by the policies. The policies must designate the City as an additional named insured under each of the insurance policies required under this section, except for worker's compensation. Prior to issuance of a permit as required by Section 1.03, a prospective permittee must provide proof of insurance coverage acceptable to the City's [finance/[DEPARTMENT NAME]] department, identifying the City as an additional named insured. The permittee must not cancel any required insurance coverage without obtaining alternative insurance in conformance with this section. The permittee must provide the City with at least 30 days advance written notice of any material changes or cancellation of any required insurance policy.

(e) *Contractors and subcontractors.* The permittee shall require each of its contractors and subcontractors employed in the construction, installation, maintenance, operation, or removal of a communications facility in a public right-of-way to maintain the same types and levels of insurance coverage that are required of the permittee under this section.

(f) *Continuation of requirements.* The requirements established in this section shall remain in effect the entire time a facility remains in a public right-of-way and through any restoration work required as a result of the removal of the facility.

Section 1.19 **Restoration of right-of-way.**

(a) *Damage.* The owner of a wireless facility in a public right-of-way must:

(i) Restore the right-of-way, including the street, sidewalk, and other surfaces, to the condition as it existed prior to any work done by or on behalf of the owner, or as otherwise directed by the [DEPARTMENT NAME] department;

(ii) Replace or restore trees, shrubs, or other vegetation or landscaping features damaged as a result of the work; and

(iii) Repair any damage occurring as a result of the work to:

(A) Any facilities within the right-of-way; and

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(B) The property of any third party.

(b) *Timeframe.* Restoration, repairs, or replacements required under this section must be completed:

(i) Within [10/[NUMBER]] calendar days of completion of the work done by or on behalf of the owner, or within [10/[NUMBER]] calendar days' notice by the director of the [DEPARTMENT NAME] department, whichever occurs first.

(ii) Within such alternative timeframe as may be set by the director when the director determines that:

(A) A different timeframe will better serve the public interest or avoid an unreasonable hardship to the owner of the facility; or

(B) Damage resulting from the work was not discovered until sometime after the completion of the work.

(c) *Compensation in lieu of repairs.* Notwithstanding the foregoing, the director of the [DEPARTMENT NAME] department may require the owner to compensate the City for the reasonable amount of any damages to City property in lieu of restoration, repairs, or replacement by the owner. The director may impose this requirement if:

(i) The owner fails to respond to a notice by the director of the restoration, repairs, or replacement required;

(ii) Current conditions pose an imminent danger to the public; or

(iii) The director otherwise determines that the public good will be better served if the City or another party completes the restoration, repairs, or replacement.

Section 1.20 **Graffiti abatement.**

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The owner of a wireless facility in a public right-of-way must remove all graffiti on the facility and any related equipment as soon as practical, but not later than [14/[NUMBER]] calendar days from the date the owner receives notice from the City.

Section 1.21 **Change in ownership.**

When the ownership of a wireless facility or network in a public right-of-way changes, the new owner:

(a) Becomes the holder of any previously issued right-of-way use permit for the facility or network;

(b) Assumes all responsibilities of a permit holder and owner of the facility or network as set forth in this article;

(c) Must notify the [DEPARTMENT NAME] department within [30/NUMBER] days of the change in ownership; and

(d) Must provide the [DEPARTMENT NAME] department the name, title, mailing address, telephone number, and email address of the primary and secondary contact persons in matters related to the operation and maintenance of the facility or network.

Drafting Note: Change in Ownership

The local government must know who owns the facilities in the public rights-of-way. If the ownership of a wireless facility or network in a right-of-way changes, the government will need contact information for the new owner as soon as possible. This information allows the government to contact the responsible party if a facility:

- Does not comply with regulations or permit conditions.
- Must be removed, relocated, or modified to accommodate a public project or to facilitate response to an emergency (see Section 1.27).

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- Appears to have been abandoned (see Section 1.28).

END DRAFTING NOTE

Section 1.22 **Annual reporting requirements.**

Each owner of a wireless facility or network in a public right-of-way must file an annual report with the [DEPARTMENT NAME] department. The [DEPARTMENT NAME] department shall establish the due date, reporting standards, and format for the annual report. The report must include:

(a) The name, title, mailing address, telephone number, and email address of the primary and secondary contact persons in matters related to the operation and maintenance of the facility or network;

(b) The status of all pending projects involving the rights-of-way, including estimated timetables and completion dates;

(c) As-built maps depicting the location of all facilities and appurtenances in the rights-of-way;

(d) Verification of compliance with FCC guidelines on radio frequency radiation emissions;

(e) Ongoing proof of compliance with insurance and financial security requirements; and

(f) Such additional information as may be required by the [DEPARTMENT NAME] department to fully assess the status of each facility and verify that the right-of-way is not occupied by equipment that is not permitted or no longer needed.

Section 1.23 **Right-of-way use and attachment fees.**

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(a) *Annual fee.* For each wireless communications facility in a public right-of-way or attached to a City-owned structure in a public right-of-way, an annual fee will be assessed. The [GOVERNING BODY] shall establish right-of-way use and attachment fee rates and due dates by resolution. The right-of-way use and attachment fees must be paid by or on behalf of the owner of the facility, regardless of whether the facility is in use. Each facility owner shall itemize all wireless facilities in the public rights-of-way on forms to be provided by the City and shall apply the applicable rate to determine the amount due.

(b) *Late payment.* A [10/[NUMBER]] percent late payment penalty shall be imposed against any owner of a wireless communications facility who fails to pay any fee due under this section within 30 days of the date on which the fee is due.

(c) *Removal.*When a wireless communications facility has been removed, no further fees will be due. [The owner of a wireless communications facility that has been removed from the public right-of-way may request a pro rata refund of any fees paid for the year in which the facility was removed. Upon verification of the removal of the facility and the refund due, the City will process a refund payment. A $[50/[NUMBER]] processing fee will be deducted from the refund payment, provided that when an owner requests a cumulative refund for multiple facilities that have been removed, the total processing fee will be $[50/[NUMBER]].]

(d) *Corrections.* The City or its duly authorized agents may audit the itemization of wireless communications facilities and payment calculations provided by an owner to verify their accuracy. If the City determines that the owner has paid less than the amount due, the City will bill the owner for the additional amount due[, plus a [10/[NUMBER]] percent late payment charge]. At the City's request, the owner will provide all records necessary to verify the owner's calculations to the City or its agents.

(e) *Fee waivers and reductions.* The fee required under this section may be waived or reduced for communications facilities shared with the City, including facilities used for placement of lights, cameras, or other equipment on poles or other support structures that are subject to this article. A waiver or reduction in the fee otherwise due from the owner of the facility will be effective only if established in a written agreement between the owner and the City.

Drafting Note: Right-of-Way Use and Attachment Fees

The TCA allows state and local governments to require telecommunications providers to pay for the use of public rights-of-way if the compensation is:

- Fair and reasonable.

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- Charged on a competitively neutral and nondiscriminatory basis.
- Publicly disclosed.

(47 U.S.C. § 253(c).)

The FCC has found an annual charge of $270 per facility to be a presumptively reasonable fee for right-of-way access or attachment to municipally-owned structures in a right-of-way (FCC 18-133, ¶ 79). As with application fees, a city may adopt higher right-of-way use or attachment fees only if the fees meet these FCC criteria:

- The higher fees are reasonable approximation of costs incurred by the city.
- Those costs themselves are reasonable.
- The fees are non-discriminatory.

Rather than adopting fees in the ordinance establishing regulations for wireless facilities, a city should consider setting fees by separate action such as a resolution. In the event changing conditions warrant setting new fee amounts, a city can revise its fees more easily if they are not part of a codified ordinance.

The FCC's presumptively reasonable fees apply to small wireless facilities. If a facility in the right-of-way is not "small", as defined by the FCC, the local government could presumably charge higher fees.

Legislation in some states also either preempts these fees or sets limits on the amount local governments may charge. Local governments in these states are limited to the fees established by state law if they are lower than the FCC's presumptively reasonable fees (see Small Cells State Laws Chart and Quick Compare: Small Cells State Laws).

Timing

When establishing annual fee requirements, counsel should consult with personnel who will be collecting the fees to determine the optimal collection schedule. The due date may be based on:

- The date the right-of-way use permit was issued or date installation of the facility was completed.
- A set date for all permittees.
- A staggered schedule that spreads out collections evenly through the year.

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If fees are collected at a time other than the date the permit is issued or the facility is completed, the government should consider collecting a prorated amount for the first partial year of right-of-way use.
END DRAFTING NOTE

Section 1.24 **Noncompliance with reporting and fee payment requirements.**

It is a violation of this article if the owner of a wireless facility allows the facility to remain in a public right-of-way unless the annual report required under Section 1.22 has been filed within [60/[NUMBER]] days of the date due and the fees and late payment penalties assessed under Section 1.23 for the wireless facility are paid within [60/[NUMBER]] days of the date on which the fees were due. A wireless facility for which an annual report or fee payment are delinquent will be considered abandoned pursuant to Section 1.28 if the facility remains in the right-of-way more than [60/[NUMBER]] days following the due date.

Section 1.25 **Inspections.**

(a) *Inspection of work in progress and upon completion.* The City or its authorized agents shall have the right to inspect work performed in the public rights-of-way by or on behalf of a permit holder at any time while the work is in progress and upon completion of the work. Each permit holder shall notify the [DEPARTMENT NAME] department when the permitted work is complete.

(b) *Ongoing inspections by permit holder.* Each permit holder shall conduct an inspection of each permitted facility at least once every [four/[NUMBER]] years after completion of the permitted work. On the written request of the director of the [DEPARTMENT NAME] department, a permit holder shall conduct an interim inspection of a permitted facility at any time, based on the director's determination that a facility may pose a threat to the public health, safety, or welfare. Within [30/[NUMBER]] days of completion of each inspection, the permit holder must submit a report from a qualified licensed engineer to the [DEPARTMENT NAME] department, verifying the structural integrity and safe operation of all facility components or identifying any remediation work needed.

(c) *Ongoing inspections by City.* The City or its authorized agents will have the right to inspect any wireless communications facility in a public right-of-way, including aerial facilities and underground facilities, to ensure general health and safety with respect to the facility and to determine compliance with the terms of this article, the conditions of any permits for the facility, and other applicable laws and regulations. Any owner of a wireless communications facility in the public right-of-way must cooperate with all such inspections and provide all reasonable and relevant information requested by the City as part of its inspection.

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(d) *Remediation.* A permit holder or facility owner must complete remediation of any deficiencies identified in an inspection conducted by the permit holder or the City, including repairs or alterations necessary to:

(i) Prevent health or safety risks;

(ii) Correct violations of applicable codes or permit conditions; and

(iii) Resolve or prevent interference with any public utilities, public safety communications, traffic signal systems, or other government communications or facilities.

(e) *Completion of repairs and alterations.* A permit holder or facility owner required to complete remediation work under this section must complete such work within [60/[NUMBER]] calendar days after the inspection date; provided that the [DEPARTMENT NAME] department may:

(i) Require an earlier completion date for remediation work if it determines that the need for repair or alterations is more urgent.

(ii) Extend the completion deadline if it determines that public health and safety will not be jeopardized. The [DEPARTMENT NAME] department may require interim health and safety measures as a condition of the extension.

Section 1.26 **Revocation of permit.**

(a) *Basis for revocation*. The director of the [DEPARTMENT NAME] department may revoke the permit for a wireless facility if the director determines that:

(i) The permit holder has knowingly provided false or erroneous information on the permit application or on a required annual report or inspection report; or

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(ii) The permit holder has violated any of the provisions of this article or any of the conditions imposed on issuance of the permit.

(b) *Notice of violation*. Prior to revoking a permit for a violation, the director will provide the permit holder written notice of the violation or violations, using the most recent contact information provided to the City by the permit holder. If the violation or violations are not corrected within [15/[NUMBER]] calendar days after the written notice is dispatched, the director will revoke the permit, provided that:

(i) The director may prescribe a shorter period for correction of violations and revocation of the permit if:

(A) The director determines that the public health and safety require a shorter notice period; or

(B) The permit holder has already failed to complete repairs or alterations called for in conjunction with an inspection of the facility under Section 1.25.

(ii) The director may allow a longer period when correction of violations is reasonably expected to take more than [15/[NUMBER]] calendar days. The [DEPARTMENT NAME] department may require interim health and safety measures when a longer notice period is allowed.

(c) *Effect of revocation.* Upon revocation of a permit under this section, the permit holder must remove the facility for which the permit was issued, including all related equipment and appurtenances, except for any equipment or appurtenances lawfully used by another user; provided, however, that the director of the [DEPARTMENT NAME] department may direct the permit holder to leave support structures or other components in place when necessary for the public good. A facility that is not removed as required under this section will be treated as abandoned, pursuant to Section 1.28.

Section 1.27 **Required removal, relocation, or modification of facilities.**

(a) *Notice.* Within [90/[NUMBER]] calendar days following written notice from the City, the owner of a wireless facility within a public right-of-way must, at its own expense, protect, support, temporarily or permanently disconnect, remove, relocate, change, or alter the position of the facility whenever the City has determined that such action is reasonably necessary for the operations of the City or the construction, repair, maintenance, or installation of any public improvement in or upon the public right-of-way. If the owner of the facility fails to take action as required within [90/[NUMBER]] calendar days following written notice from the City, the City may arrange

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for such action to be taken and charge the owner for all costs associated with such action. The owner shall pay any such charges within [30/[NUMBER]] calendar days of the date the owner is billed by the City.

(b) *Emergency removal or relocation*. The City retains the right and privilege to move, remove, or modify any wireless facility located within a public right-of-way, as the City may determine to be necessary, appropriate, or useful in response to any public health or safety emergency or any interference with public safety communications, traffic signal systems, or other government communications. If circumstances permit, the City will notify the owner of the facility and provide an opportunity to move, remove, or modify the facility prior to initiating action. If the facility is moved, removed, or modified by the City, the City will notify the owner of the facility of the action taken by the City. If the facility is collocated on property owned by a third party, the City may rely on the third party to move, remove, or modify the wireless facility. The City will have no responsibility for:

(i) The cost of re-installation, repair, restoration, or replacement of any wireless facility cut or moved pursuant to this section; or

(ii) Any related expenses or loss in revenues incurred by the owner or any other party.

(c) *Contact person.* Any notice provided to the City under this section will be sent to the primary contact person, as identified in the owner's most recent annual report on file with the City, or if no annual report has been filed, on the application for a permit for the facility or other notice provided by the owner to the director of the [DEPARTMENT NAME] department. In the event the contact information provided to the City is no longer current, it is the facility owner's responsibility to provide the revised contact information to the director of the [DEPARTMENT NAME] department.

Drafting Note: Required Removal, Relocation, or Modification of Facilities

Facilities in public rights-of-way must sometimes make way for public purposes such as new public improvements, maintenance of existing improvements, or emergency response needs. Regulations should include provisions requiring facility owners to accommodate these needs. A local government representative should coordinate all removal, relocation, and modification work so the government's work can be completed expeditiously. Regulations should also assign the cost of these removals, relocations, and modifications to the right-of-way user, rather than burdening taxpayers. (See Practice Note, Small Wireless Facilities in Public Rights-Of-Way: Relocations and Alterations.)

Before requiring or undertaking removal, relocation, or modification of a wireless facility, the local government should:

- Communicate with the facility owner if possible to determine the most efficient solution.
- Weigh the need for the action against the potential damage or service disruptions it may cause.
- Avoid service interruptions that may constitute an effective prohibition of telecommunications services (see Drafting Note, Avoiding Effective Prohibition).

END DRAFTING NOTE

Section 1.28 **Abandonment of facilities.**

(a) *Facilities considered abandoned.* If the use of a wireless facility within a public right-of-way is discontinued, the facility will be considered abandoned and the owner of the facility must notify the director of the [DEPARTMENT NAME] department within [90/[NUMBER]] calendar days. A facility will also be considered abandoned if:

(i) A permit for the facility has been revoked; or

(ii) The holder of the permit for the facility has failed to file an annual report or pay right-of-way use or attachment fees as required by this article.

(b) *Effect of abandonment.* If a wireless facility in the right-of-way is considered abandoned, the director of the [DEPARTMENT NAME] department may direct the owner of the facility to remove all or any portion of the facility and complete such additional remedial measures as may be necessary for the restoration of the right-of-way or the public health, safety, or welfare. If the owner fails to take such actions within [90/[NUMBER]] calendar days after the owner has been directed to do so, the City may remove the facility, complete all necessary remedial measures, and charge the owner for removal, storage, disposition, and right-of-way remediation costs. The owner must pay any such charges within [30/[NUMBER]] calendar days of the date they are billed by the City. Alternatively, the director may require that an abandoned facility or components of an abandoned facility remain in place if removal would cause damage to public property or if the facility or components can be used by the City or serve a public purpose.

Section 1.29 **Policies and procedures.**

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The [city manager/[ADMINISTRATOR]] is authorized to establish or approve written policies and procedures consistent with this article as the [city manager/[ADMINISTRATOR]] deems necessary to carry out the intent and purposes of the provisions herein. The City shall publish these policies and procedures on its website. An applicant, permit holder, facility owner, or an agent of any such person who fails to follow such policies and procedures is in violation of this article. The policies and procedures established or approved by the [city manager/[ADMINISTRATOR]] under this section may include, but are not limited to, standards that address:

(a) Construction and maintenance of wireless facilities;

(b) Stormwater management and erosion control measures;

(c) Utility coordination;

(d) Avoidance of interference with right-of-way maintenance activities;

(e) Tree management;

(f) Traffic safety; and

(g) Other issues involving public health, safety, or welfare.

Drafting Note: Policies and Procedures

Some city ordinances provide comprehensive details about every aspect of work in rights-of-way. However, there are advantages to limiting an ordinance to a basic framework and authorizing an administrator to adopt policies and procedures that support that framework. It is relatively simple to amend and supplement administrative policies and procedures as compared to an ordinance. This also allows administrators to quickly address issues that were

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not foreseen when the ordinance was enacted. Some examples of matters that administrative policies and procedures might address include:

- Requirements for signs identifying the permit holder and related contact information at work sites.
- Limitations on working hours.
- Specific restrictions on traffic lane and sidewalk closures, including:
  - prohibitions of closures during certain hours or for more than a certain duration when possible; and
  - directions for storing materials and equipment while work is pending.
- Guidelines for tree protection and landscaping installation.
- Stormwater management and erosion control measures.
- Notice requirements for maintenance, repairs, or removal of facilities in the rights-of-way.
- Coordination of construction with existing utilities in the rights-of-way.
- Requirements for disposal of waste materials.

END DRAFTING NOTE

Section 1.30 **Appeals.**

(a) *Appeals to [city manager/[ADMINISTRATOR]].* An applicant, permit holder, or owner of a wireless facility may appeal any action taken by the director of the [DEPARTMENT NAME] department under this article, including denial of a permit, issuance of a notice of violation, or revocation of a permit. The appeal must be filed with the [city manager/[ADMINISTRATOR]] within [five/[NUMBER]] business days of the director's action. Within [a reasonable time/[NUMBER] business days] of receipt of a timely appeal, the [city manager/[ADMINISTRATOR]] will schedule a meeting with the applicant, permit holder, or facility owner and the director of the [DEPARTMENT NAME] department or their representatives to consider the relevant facts. The director's action will be upheld unless the [city manager/[ADMINISTRATOR]] determines the director acted unreasonably or in error. The [city manager's/[ADMINISTRATOR]'s] decision to uphold, reverse, or modify the action of the director of the [DEPARTMENT NAME] department will be issued within [a reasonable time under the circumstances/[NUMBER] business days].

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(b) *Final action.* Actions taken by the [city manager/[ADMINISTRATOR]] [or the [BOARD NAME]] under this article are final, subject to any judicial remedy available to an applicant, permit holder, or owner of a wireless facility.

Drafting Note: Appeals

Generally, parties challenging local government decisions must exhaust potential administrative remedies before a court will consider a lawsuit. Allowing parties to appeal administrative decisions provides a process that may result in a resolution short of litigation. Even if litigation is likely, an administrative appeal process gives the government a preview of the challenges that will be raised.
END DRAFTING NOTE

Section 1.31 City's authority to take legal action.

The city attorney is authorized to file suit on behalf of the City in any court of competent jurisdiction or take other appropriate legal action to enjoin or abate a violation of this article. This authorization shall be cumulative and in addition to any other civil or criminal penalty provisions. The City, acting through the city attorney or any other attorney representing the city, may file an action in a court of competent jurisdiction to recover damages from the owner or the agent of the owner of a wireless facility in an amount adequate for the City to undertake any activity necessary to bring about compliance with this article and to compensate the City for any costs previously incurred to enforce the standards in this article.

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TOWN OF FOUNTAIN HILLS

STAFF REPORT

Meeting Date: 06/09/2025 **Meeting Type:** Planning and Zoning Commission
Agenda Type: **Submitting Department:** Development Services
Prepared by: John Wesley, Development Services Director
Staff Contact Information: John Wesley, Development Services Director

Request to Planning and Zoning Commission (Agenda Language): **REVIEW AND DISCUSS:** Ordinances and requirements associated with regulating small cell wireless facilities in the public right-of-way.

Staff Summary (Background)

In 2017, the State of Arizona adopted rules regarding the placement and regulation of small wireless facilities (SWF) located in the public right-of-way. In response, local jurisdictions across the state adopted local procedures in keeping with these State requirements. The State's regulations are in ARS 9-591-600. Copies of those requirements are attached.

Following the requirements of the State, Fountain Hills adopted what is now Article 16-2, Small Wireless Facilities, in the Town Code to regulate this activity in the Town's rights-of-way. In addition, the Town also adopted by resolution a Wireless Facilities License Agreement, Wireless Facilities Standard Terms and Conditions, and Small Wireless Facilities in the Right-of-Way Design Standards and Guidelines. These various documents provide the details on what is required to establish and maintain a small wireless facility in the Town's right-of-way. Copies of each of these documents are attached to this report.

When the Town contracted with Mr. Campanelli to prepare a new ordinance addressing wireless telecommunications and antennas, he included provisions for regulation of small wireless facilities in the draft ordinance provided to the Town. A copy of this draft ordinance is attached.

Following is a brief review and summary of these documents. The full documents are attached. Also provided below are a few regulations staff found in other Arizona communities that may be of interest to the Commission.

State Statutes

9-591 Definitions

1. "Antenna" means communications equipment that transmits or receives electromagnetic radio frequency signals and that is used in providing wireless services.
19. "Small wireless facility" means a wireless facility that meets both of the following qualifications:
    (a) All antennas are 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 the antenna's exposed elements could fit within an imaginary enclosure of not more than six cubic feet in volume.

(b) All other wireless equipment associated with the facility is cumulatively not more than twenty-eight cubic feet in volume, or fifty cubic feet in volume if the equipment was ground mounted before August 9, 2017. The following types of associated ancillary equipment are not included in the calculation of equipment volume pursuant to this subdivision:

(i) An electric meter.

(ii) Concealment elements.

(iii) A telecommunications demarcation box.

(iv) Grounding equipment.

(v) A power transfer switch.

(vi) A cutoff switch.

(vii) Vertical cable runs for the connection of power and other services.

25. "Wireless services" means any services that are provided to the public and that use licensed or unlicensed spectrum, whether at a fixed location or mobile, using wireless facilities.

26. "Wireless services provider" means a person that provides wireless services. Wireless services provider does not include a special taxing district.

9-592 Applicability; wireless provider; use of right-of-way

A. This section applies to the activities of a wireless provider within a right-of-way.

E. An authority shall establish and make available rates, fees and terms for all of the following, within six months after August 9, 2017 or three months after receiving the first request by a wireless provider, whichever is later:

1. The construction, installation, mounting, maintenance, modification, operation or replacement of a utility pole or monopole by a wireless provider in a right-of-way.

2. The collocation of a small wireless facility by a wireless provider in a right-of-way.

3. The collocation of a wireless facility on or within a monopole by a wireless provider in a right-of-way.

I. Subject to subsection K, paragraph 2, subdivision (c) of this section, a new, replacement or modified utility pole that is associated with the collocation of small wireless facilities and that is installed in the right-of-way is not subject to zoning review and approval under section 9-594 if the utility pole does not exceed the greater of either:

1. Ten feet in height above the tallest existing utility pole, other than a utility pole supporting only wireless facilities, that is in place on August 9, 2017, that is located within five hundred feet of the new, replacement or modified utility pole and that is in the same right-of-way within the jurisdictional boundary of the authority, but not more than fifty feet above ground level.

2. Forty feet above ground level.

J. New small wireless facilities collocated on a utility pole or wireless support structure in the right-of-way are not subject to zoning review and approval if they do not extend more than ten feet above the utility pole or wireless support structure and do not exceed fifty feet above ground level.

K. An authority may require an application under this section for the installation of new, replacement or modified utility poles associated with the collocation of small wireless facilities. An authority shall approve an application unless the authority finds that the utility pole fails to comply with any of the following:

1. Applicable codes.

2. Local code provisions or regulations that concern any of the following:

(a) Public safety.

(b) Objective design standards and reasonable stealth and concealment requirements.

(c) Undergrounding requirements that prohibit the installation of new or the modification of existing utility poles or monopoles in a right-of-way without prior approval, if such requirements include a waiver, zoning or another process that addresses requests to install such new utility poles or monopoles or modify such existing utility poles or monopoles and do not prohibit the replacement of utility poles or monopoles.

3. Requirements that are imposed by a contract between an authority and a private property owner and that concern design standards applicable to utility poles in the right-of-way.

4. The authority's public safety and reasonable spacing requirements that concern the location of new utility poles in a right-of-way.

L. An authority shall process applications under subsection K of this section in compliance with applicable law. If an authority fails to approve or deny an application within the time frame specified by applicable law, the application shall be deemed approved. Any application fee is subject to the requirements provided in section 9- 593, subsection J. The total application fee, if allowed, may not exceed seven hundred fifty dollars.

M. The construction, installation, mounting, maintenance, modification, operation or replacement for which a permit is granted shall be completed within one hundred eighty days after the permit issuance date, unless the authority and wireless provider agree to extend this period or a delay is caused by a lack of commercial power at the site.

9-593 Applicability; colocation of small wireless facilities

B. Except as provided in this section and sections 9-592, 9-594, 9-595, 9-597, 9-598 and 9-599, as applicable, an authority may not prohibit, regulate or charge for the collocation of small wireless facilities.

C. Subject to this section and section 9-592, subsection J, a small wireless facility is classified as a permitted use and is not subject to zoning review or approval if the small wireless facility is collocated in a right-of-way in any zone.

G. An authority may not:

1. Directly or indirectly require an applicant to perform services that are unrelated to the collocation for which approval is sought, such as in-kind contributions to the authority, including reserving fiber, conduit or pole space on the wireless provider's monopole or utility pole for the authority.

2. Require an applicant to provide more information to obtain a permit than the authority requires of a communications service provider that is not a wireless provider and that requests to attach facilities to a structure. An authority may require the applicant to certify that the small wireless facilities to be collocated comply with the federal communications commission's regulations concerning radio frequency emissions referenced in 47 United States Code section 332(c)(7)(B)(iv).

3. Institute, either expressly or de facto, a moratorium on filing, receiving or processing applications or issuing permits or other approvals, if any, for the collocation of a small wireless facility.

4. Require an application for routine maintenance or the replacement of small wireless facilities with small wireless facilities that are substantially similar or the same size or smaller. An authority may require a permit to work within a right-of-way for such activities, if applicable. A permit issued pursuant to this paragraph is subject to the requirements of this section.

L. This article does not allow a person to collocate small wireless facilities on a privately owned utility pole, a privately owned wireless support structure or private property without the consent of the property owner.

5-594 Structures subject to zoning;

A. The following activities that take place inside of a right-of-way are subject to this section and all of the authority's codes and regulations, including the authority's zoning codes and other regulatory processes governing use of the rights-of-way, unless the activities are exempt from zoning review and approval under section 9-592, subsection I or J or section 9-593, subsection C:

1. The installation of new monopoles, utility poles or wireless facilities.
2. The collocation of wireless facilities.

B. Notwithstanding any provision in this article to the contrary, the construction, installation, maintenance, modification, operation or replacement of a monopole or associated wireless facility in a right-of-way is subject to all of the authority's codes and regulations, including the authority's zoning codes and other regulatory processes governing use of the rights-of-way.

C. An authority shall:

1. Accept and process applications for the modification of existing or the installation of new monopoles, utility poles or wireless facilities and the collocation of wireless facilities.
2. Within thirty days after receiving an application, notify the applicant whether the application is complete. If an application is incomplete, the authority must specifically identify the information missing from the application.
3. Process each complete application on a nondiscriminatory basis. A complete application is deemed approved if the authority fails to approve or deny the application within one hundred fifty days after receipt of an application for the modification of existing or the installation of new monopoles, utility poles or wireless facilities or within ninety days after receipt of a complete application for the collocation of wireless facilities. The time period for approval may be tolled to accommodate timely requests for information required to complete the application or may be extended by mutual agreement between the applicant and authority.
4. If a complete application is denied, notify the applicant in writing and provide substantial supporting evidence of the reason for denial in the written record. The written notification of the denial and the supporting evidence shall be publicly released contemporaneously. There must be a reasonable basis for the denial of an application. An authority may not deny an application if the denial is discriminatory against the applicant with respect to the placement of the facilities of other wireless providers.

D. An authority may not:

1. Require an applicant to submit information about the applicant's business decisions regarding the need for the monopole, utility pole or wireless facilities.
2. Require an applicant to submit information about, or evaluate an applicant's business decisions regarding, the applicant's service, customer demand for service or quality of service.
3. Institute, either expressly or de facto, a moratorium on filing, receiving or processing applications or issuing decisions for modifications or installations that are not a permitted use.

E. An authority, in addition to other rights the authority has under federal, state or local law, may:

1. Adopt reasonable requirements regarding the appearance and concealment of facilities, including those relating to materials used for arranging, screening or landscaping.
2. Adopt setback or fall zone requirements that are substantially similar to setback or fall zone requirements that are imposed on other types of commercial structures of a similar height.
3. Charge an application fee. Any application fee is subject to the requirements provided in section 9-593, subsection J. The total application fee, if allowed, may not exceed one thousand dollars for the modification of existing or the installation of new monopoles or utility poles or for the collocation of wireless facilities.
4. Charge a rate or fee for the use of the right-of-way for the installation of a monopole and associated wireless facility that is limited to not more than the direct and actual costs of managing the right-of-way and that is not in the form of a franchise or other fee based on revenue or customer counts.

9-596. Scope of local authority

A. Subject to this article and applicable federal law, an authority may exercise zoning, land use, planning and permitting authority and the authority's police power within the authority's territorial boundaries, including for the installation, modification and replacement of wireless support structures and utility poles.

The key language in all of this is in 5-592. In E, cities and towns are directed to establish the terms for allowing construction of new wireless provider facilities and colocation on existing facilities in the right-of-way. I and J state new poles up to 40' in height and colocation on poles up to 50' in height are not subject to local zoning.

Current Town Ordinance and Supporting Documents

Following the adoption of the State's new regulations in 2017, the Town drafted and approved the required local regulations. Because the facilities would be in street rights-of-way and not subject to zoning regulations, the Town chose to place the ordinance in Chapter 16, Streets and Sidewalks, of the Town Code. The provisions regulating SWF are in Article 16-2, Small Wireless Facilities. In particular, Section 16-2-3 sets forth the requirements and process for review and approval of these facilities. In order to obtain approval for placing these facilities in the Town's right-of-way, an applicant must sign a Facility Lease Agreement, comply with the Wireless Facilities Standard Terms and Conditions and the Town's Design Standards and Guidelines, and receive an Encroachment Permit. The actual regulations for the installation and maintenance of SWF in the Town's rights-of-way are contained in the Terms and Conditions and the Design Standards documents.

Wireless Facility Lease Agreement

The lease agreement primarily addresses six topics related to the areas of the ROW being leased:

1. Establishment of the boundary of the area leased and the provider's responsibilities within that area;
2. Provision of a site plan that shows the improvements that will be placed in the right-of-way;
3. Agreement with the Terms;
4. Lease payments;
5. Compliance with the use restrictions in the Terms; and,
6. Granting of an Encroachment Permit.

Wireless Facilities Standard Terms and Conditions

This document provides the details on how a SWF in the right-of-way is to be developed and operated. This is a legal contract document, not an ordinance. The focus of Planning Commission review will be on the sections that address the physical impacts of the use. Sections to focus attention on are:

1. Definitions.
5. Use Restrictions
6. Wireless Provider's Improvements
8. Maintenance and Utilities
13. Insurance
18. Compliance with Law

Small Wireless Facilities in the Right-of-Way Design Standards and Guidelines

This document sets minimum standards for the design of SWF facilities within the public right-of-way. The adopted standards are based on whether the SWF is being located on an existing pole (streetlight, traffic signal, or utility pole) or is installing a new structure in the right-of-way. All of these standards and guidelines are open for update and modification based on the input and direction of the Commission.

Campanelli Ordinance SWF in the ROW

The request to Mr. Campanelli was to include regulations for SWF in the right-of-way as part of the ordinance. Section 17-3 of that draft ordinance lists four application types, two of which address SWF.

Application Type I addressed colocation of SWF. SWF's being colocated on an existing pole in the public right-of-way are allowed subject to approval of a building permit. No other review criteria or standards were included.

Application Type III addressed new SWF not in the right-of-way and required review through a Special Use Permit.

None of the proposed application types in this draft ordinance addressed new SWF in the right-of-way.

Sample of SWF Requirements from other Arizona Cities and Towns

Each city and town in Arizona has had to develop their own regulation to address SWF in the right-of-way. Staff has reviewed the regulations in several other communities to see if they are providing any regulations that the Town may want to consider adding to our regulations. A few ideas that have been identified are:

Paradise Valley

- Administrative SWF applications go to Planning Commission for review of siting and site specific design at a public hearing. Notice is sent to property owners within 500'.
- Staff can examine the proposed location and an area within 100' radius for the best location that still meets the cover and capacity requirements based on the following criteria:
    - Not in sight triangle of street or driveway
    - Setback as far as possible from sidewalk or street curb
    - Setback from habitable structures on private property equal to height of structure
    - Placed to blend with landscaping
- RF frequency performance standards and monitoring requirements that include: “Existing SWF plus cumulative: Maximum estimate of RF power density levels (spatially averaged per FCC Guidelines) measured in the SWF RF environment to be inclusive of any other significant contributors to the RF environment (i.e. co-located SWF). Definition of “Significant Contributors” to be any contributor >5% of the FCC Public limit at any measurement location.”

Sedona

- No antenna attached to a freestanding pole in the right-of-way, other than as a collocation with an existing power, light or other utility pole, or unless installed as a concealed facility, shall be permitted within 50 feet of any principal residential structure as measured from the location of the small wireless facility to the nearest wall of a residential structure. Small wireless facilities shall maintain a minimum 25-foot distance from the primary doorway of businesses or residences measured from the outer door frame.
- Whenever small wireless facilities must be placed in a right-of-way with residential uses on one or both sides, neither poles, equipment, antennas nor other structures shall be placed in front

of a residential structure. If a right-of-way has residential structures on only one side, the small wireless facilities shall be located on the opposite side of the right-of-way whenever possible. All small wireless facilities shall be sited to minimize visual impacts to adjacent properties and viewsheds.

- The city may deny an application subject to this section if the proposed small wireless facility, ground equipment, or new, modified, or replaced pole:
  i. Materially and demonstrably interferes with the safe operation of traffic control equipment;
  ii. Materially and demonstrably interferes with sight lines or clear zones for transportation or pedestrians;
  iii. Materially fails to comply with the Americans with Disabilities Act or similar federal, state, or local laws, standards and regulations regarding pedestrian access or movement;
  iv. Fails to comply with applicable codes, standards and regulations, including the city's design standards; or
  v. Fails to comply with the provisions in this section.

Related Ordinance, Policy or Guiding Principle

N/A

Risk Analysis

N/A

Recommendation(s) by Board(s) or Commission(s)

N/A

Staff Recommendation(s)

There is no recommendation at this time. The purpose of this agenda item is to introduce the Commission to the existing ordinance and associated documents for regulating SWF in the right-of-way, have initial discussion about these rules, and seek direction on how the Commission would like to proceed with review and potential modifications of these requirements.

SUGGESTED MOTION

No motions will be made at this time, but the Commission may give direction to staff on steps to take to review and update the ordinance and associated documents.

Attachments

State Statutes

Article 16-2

Supporting Documents

Draft Campanelli Ordinance

591. Definitions

In this article, unless the context otherwise requires:

1. "Antenna" means communications equipment that transmits or receives electromagnetic radio frequency signals and that is used in providing wireless services.

2. "Applicable codes" means uniform building, fire, electrical, plumbing or mechanical codes that are adopted by a recognized national code organization or local amendments to those codes that are enacted to address threats of destruction of property or injury to persons and to an extent that is not inconsistent with this article.

3. "Applicant" means any person that submits an application and that is a wireless provider.

4. "Application" means a request that is submitted by an applicant to an authority for a permit to collocate small wireless facilities or to approve the installation, modification or replacement of a utility pole or wireless support structure.

5. "Authority" means any city, town, special district or political subdivision of this state that is authorized to make legislative, quasijudicial or administrative decisions concerning an application. Authority does not include any state court that has jurisdiction over an authority and does not include a county, special taxing district, or electric cooperative.

6. "Authority utility pole" means a utility pole that is owned or operated by an authority and that is in a rightofway. Authority utility pole does not include a utility pole for electric distribution.

7. "Cable operator" has the same meaning prescribed in section 9505 and includes a video service provider. Cable operator does not include a special taxing district.

8. "Collocate" or "collocation" means to install, mount, maintain, modify, operate or replace wireless facilities on, within or adjacent to a wireless support structure or utility pole.

9. "Communications service" means cable service as defined in 47 United States Code section 522(6), information service as defined in 47 United States Code section 153(24), telecommunications service as defined in 47 United States Code section 153(53) or wireless service.

10. "Communications service provider" means a cable operator, a provider of information service as defined in 47 United States Code section 153(24), a telecommunications carrier as defined in 47 United States Code section 153(51) or a wireless services provider.

11. "Fee" means a onetime charge.

12. "Law" means any federal, state or local law, statute, common law, code, rule, regulation, order or ordinance.

13. "Monopole" means a wireless support structure that is not more than forty inches in diameter at the ground level and that has all of the wireless facilities mounted on the pole or contained inside of the pole.

14. "Permit" means written permission required by an authority to install, mount, maintain, modify, operate or replace a utility pole or monopole, to collocate a small wireless facility on a utility pole or wireless support structure or to collocate wireless facilities on a monopole.

15. "Person" means an individual, corporation, limited liability company, partnership, association, trust or other entity or organization, including an authority.

16. "Private easement" means an easement or other real property right that is only for the benefit of the grantor and grantee and the grantor's or grantee's successors and assigns.

17. "Rate" means a recurring charge.

18. "Rightofway" means the area on, below or above a public roadway, highway, street, sidewalk, alley or utility easement. Rightofway does not include a federal interstate highway, a state highway or state route under the jurisdiction of the department of transportation, a private easement, property that is owned by a special taxing district, or a utility easement that does not authorize the deployment sought by the wireless provider.

19. "Small wireless facility" means a wireless facility that meets both of the following qualifications:

(a) All antennas are 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 the antenna's exposed elements could fit within

an imaginary enclosure of not more than six cubic feet in volume.

(b) All other wireless equipment associated with the facility is cumulatively not more than twentyeight cubic feet in volume, or fifty cubic feet in volume if the equipment was ground mounted before August 9, 2017. The following types of associated ancillary equipment are not included in the calculation of equipment volume pursuant to this subdivision:

(i) An electric meter.

(ii) Concealment elements.

(iii) A telecommunications demarcation box.

(iv) Grounding equipment.

(v) A power transfer switch.

(vi) A cutoff switch.

(vii) Vertical cable runs for the connection of power and other services.

20. "Special taxing district" means a special district formed pursuant to title 48, chapter 11, 12, 17, 18, 19, 20 or 22.

21. "Utility pole" means a pole or similar structure that is used in whole or in part for communications services, electric distribution, lighting or traffic signals. Utility pole does not include a monopole.

22. "Wireless facility":

(a) Means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including both of the following:

(i) Equipment associated with wireless communications.

(ii) Radio transceivers, antennas, coaxial or fiber-optic cables, regular and backup power supplies and comparable equipment, regardless of technological configuration.

(b) Includes small wireless facilities.

(c) Does not include the structure or improvements on, under or within which the equipment is collocated, wireline backhaul facilities, coaxial or fiberoptic cable that is between wireless support structures or utility poles or coaxial or fiberoptic cable that is otherwise not immediately adjacent to, or directly associated with, an antenna.

(d) Does not include WiFi radio equipment described in section 9506, subsection I or microcell equipment described in section 9584, subsection E.

23. "Wireless infrastructure provider" means any person that is authorized to provide telecommunications service in this state and that builds or installs wireless communications transmission equipment, wireless facilities, utility poles or monopoles but that is not a wireless services provider. Wireless infrastructure provider does not include a special taxing district.

24. "Wireless provider" means a cable operator, wireless infrastructure provider or wireless services provider.

25. "Wireless services" means any services that are provided to the public and that use licensed or unlicensed spectrum, whether at a fixed location or mobile, using wireless facilities.

26. "Wireless services provider" means a person that provides wireless services. Wireless services provider does not include a special taxing district.

27. "Wireless support structure":

(a) Means:

(i) A freestanding structure, such as a monopole.

(ii) A tower, either guyed or selfsupporting.

(iii) A sign or billboard.

(iv) Any other existing or proposed structure designed to support or capable of supporting small

wireless facilities.

(b) Does not include a utility pole.

9-592. Applicability; wireless provider; use of right-of-way; rates, fees and terms; right to access; damage and repair

A. This section applies to the activities of a wireless provider within a right-of-way.

B. An authority may not enter into an exclusive arrangement with a wireless provider for use of a right-of-way for any of the following:

1. The construction, installation, maintenance, modification, operation or replacement of utility poles or monopoles.

2. The collocation of small wireless facilities on utility poles or wireless support structures.

3. The collocation of wireless facilities on monopoles.

C. An authority may charge a wireless provider a rate or fee for the use of a right-of-way for the construction, installation, maintenance, modification, operation or replacement of a utility pole in the right-of-way or the collocation of a small wireless facility in the right-of-way, only if the authority charges other communications service providers or publicly, cooperatively or municipally owned utilities for the use of the right-of-way and the authority has the legal authority to do so. If an authority charges a rate or fee pursuant to this section, the rate or fee for a wireless provider must be:

1. Limited to not more than the direct and actual cost of managing the right-of-way.

2. Competitively neutral in regard to other users of the right-of-way, including investor-owned, authority-owned or cooperatively owned entities, unless other users are exempt from such rates or fees under applicable law.

D. A rate or fee charged pursuant to subsection C of this section may not do any of the following:

1. Result in a double recovery where existing rates, fees or taxes already recover the direct and actual costs of managing a right-of-way.

2. Be in the form of a franchise or other fee based on revenue or customer counts.

3. Be unreasonable or discriminatory.

4. Exceed an annual amount equal to fifty dollars multiplied by the number of small wireless facilities that are in the authority's geographic jurisdiction and that are placed by the wireless provider in the right-of-way.

E. An authority shall establish and make available rates, fees and terms for all of the following, within six months after August 9, 2017 or three months after receiving the first request by a wireless provider, whichever is later:

1. The construction, installation, mounting, maintenance, modification, operation or replacement of a utility pole or monopole by a wireless provider in a right-of-way.

2. The collocation of a small wireless facility by a wireless provider in a right-of-way.

3. The collocation of a wireless facility on or within a monopole by a wireless provider in a right-of-way.

F. The rates, fees and terms established pursuant to subsection E of this section must be made available for acceptance by a wireless provider. At the wireless provider's option, a wireless provider may request different or additional terms that the parties shall negotiate in good faith. Documents that reflect rates, fees and terms with each wireless provider are public records. Rates, fees and terms must comply with this article, and the terms:

1. May not be unreasonable or discriminatory.

2. May include requirements applicable to other users of the right-of-way.

3. May require that the wireless provider's operation of the small wireless facilities in the right-of-way does not interfere with the authority's public safety communications.

4. Subject to subsection K of this section and section 9-593, subsection F, may not require the placement of small wireless facilities on any specific utility pole or category of poles or require multiple antenna systems

on a single utility pole.

5. Subject to subsection K of this section and section 9-593, subsection F, may not limit the placement of small wireless facilities by minimum separation distances.

G. Agreements between authorities and wireless providers that are in effect on August 9, 2017 and that relate to the collocation of small wireless facilities in the right-of-way, including the collocation of small wireless facilities on authority utility poles, remain in effect, subject to applicable termination provisions. The wireless provider may accept the rates, fees and terms established under subsections E and F of this section for small wireless facilities and utility poles that are the subject of an application submitted after the rates, fees and terms become effective.

H. Subject to this section and the approval of an application, if required, a wireless provider may do any of the following:

1. Collocate small wireless facilities.

2. Construct, install, modify, mount, maintain, operate and replace utility poles that are associated with the collocation of small wireless facilities along, across, on and under the right-of-way.

3. Construct, install, modify, mount, maintain, operate and replace monopoles that are associated with the collocation of wireless facilities along, across, on and under the right-of-way. The installation, modification and replacement of monopoles are subject to review under section 9-594 regardless of the height of the monopole.

I. Subject to subsection K, paragraph 2, subdivision (c) of this section, a new, replacement or modified utility pole that is associated with the collocation of small wireless facilities and that is installed in the right-of-way is not subject to zoning review and approval under section 9-594 if the utility pole does not exceed the greater of either:

1. Ten feet in height above the tallest existing utility pole, other than a utility pole supporting only wireless facilities, that is in place on August 9, 2017, that is located within five hundred feet of the new, replacement or modified utility pole and that is in the same right-of-way within the jurisdictional boundary of the authority, but not more than fifty feet above ground level.

2. Forty feet above ground level.

J. New small wireless facilities collocated on a utility pole or wireless support structure in the right-of-way are not subject to zoning review and approval if they do not extend more than ten feet above the utility pole or wireless support structure and do not exceed fifty feet above ground level.

K. An authority may require an application under this section for the installation of new, replacement or modified utility poles associated with the collocation of small wireless facilities. An authority shall approve an application unless the authority finds that the utility pole fails to comply with any of the following:

1. Applicable codes.

2. Local code provisions or regulations that concern any of the following:

(a) Public safety.

(b) Objective design standards and reasonable stealth and concealment requirements.

(c) Undergrounding requirements that prohibit the installation of new or the modification of existing utility poles or monopoles in a right-of-way without prior approval, if such requirements include a waiver, zoning or another process that addresses requests to install such new utility poles or monopoles or modify such existing utility poles or monopoles and do not prohibit the replacement of utility poles or monopoles.

3. Requirements that are imposed by a contract between an authority and a private property owner and that concern design standards applicable to utility poles in the right-of-way.

4. The authority's public safety and reasonable spacing requirements that concern the location of new utility poles in a right-of-way.

L. An authority shall process applications under subsection K of this section in compliance with applicable law. If an authority fails to approve or deny an application within the time frame specified by applicable law, the

application shall be deemed approved. Any application fee is subject to the requirements provided in section 9-593, subsection J. The total application fee, if allowed, may not exceed seven hundred fifty dollars.

M. The construction, installation, mounting, maintenance, modification, operation or replacement for which a permit is granted shall be completed within one hundred eighty days after the permit issuance date, unless the authority and wireless provider agree to extend this period or a delay is caused by a lack of commercial power at the site.

N. Approval of an application by an authority authorizes the applicant to do both of the following:

1. Undertake the requested deployment.

2. Subject to applicable relocation requirements, the authority's terms as described in this section and the wireless provider's right to terminate at any time, operate and maintain the wireless provider's new, modified or replacement utility pole for a period of not less than ten years, which must be renewed for equivalent durations unless the authority makes a finding that the new or modified utility pole does not comply with the requirements described in subsection K of this section.

O. An authority may require a wireless provider to repair all damage to the authority's property and the right-of-way that is caused by the activities of the wireless provider or the wireless provider's contractor while occupying, installing, repairing or maintaining small wireless facilities, wireless support structures or utility poles in the right-of-way and to return the damaged property to the same condition as before the damage pursuant to the competitively neutral, reasonable requirements and specifications of the authority. If the wireless provider fails to make the repairs required by the authority within a reasonable time after the authority provides written notice to the wireless provider, the authority may make the repairs and charge the applicable party the reasonable, documented cost of the repairs.

P. This article does not relieve a wireless provider from any applicable requirement to obtain a franchise, license or other permission to provide communications service or to install, place, maintain or operate facilities or structures that are not authorized by this article in the right-of-way to provide a communications service.

9-593. Applicability; collocation of small wireless facilities; permits; application; fee

A. This section applies to the activities of a wireless provider within a right-of-way.

B. Except as provided in this section and sections 9-592, 9-594, 9-595, 9-597, 9-598 and 9-599, as applicable, an authority may not prohibit, regulate or charge for the collocation of small wireless facilities.

C. Subject to this section and section 9-592, subsection J, a small wireless facility is classified as a permitted use and is not subject to zoning review or approval if the small wireless facility is collocated in a right-of-way in any zone.

D. An authority may require an applicant to obtain one or more permits to collocate a small wireless facility if the permit requirement is of general applicability and does not apply exclusively to wireless facilities. An applicant seeking to collocate multiple small wireless facilities within the jurisdiction of a single authority may file a consolidated application for the collocation of up to twenty-five small wireless facilities if the collocations each involve substantially the same type of small wireless facilities and substantially the same type of structure.

E. An application must include an attestation that the small wireless facilities will be collocated on the utility pole or wireless support structure and that the small wireless facilities will be operational for use by a wireless services provider to provide service within one hundred eighty days after the permit issuance date, unless the authority and the wireless provider agree to extend this period or a delay is caused by a lack of commercial power at the site.

F. An authority:

1. Shall accept applications for, process and issue permits to collocate small wireless facilities.

2. Within twenty days after receiving an application, shall determine and notify the applicant whether the application is complete. If an applicant is not notified within the twenty-day period, the application is deemed complete. If an application is incomplete, the authority must specifically identify the information missing from the application.

3. Shall process each application on a nondiscriminatory basis. A complete application is deemed approved if the authority fails to approve or deny the application within seventy-five days after receiving a complete application.

4. Shall approve an application unless the application does not meet the applicable codes, local code provisions or regulations that concern public safety, objective design standards for decorative utility poles or reasonable stealth and concealment requirements or public safety and reasonable spacing requirements concerning the location of ground-mounted equipment in a right-of-way. If an authority determines that applicable codes or local code provisions or regulations require that the utility pole or wireless support structure be replaced before the requested collocation, approval may be conditioned on such replacement of the utility pole or wireless support structure. The wireless provider's request for a replacement utility pole or wireless support structure will be processed pursuant to section 9-592.

5. If an application is denied, shall document the basis for the denial, including the specific code provisions, regulations or requirements on which the denial was based, and send the documentation to the applicant on or before the date that the application is denied. The applicant may cure the deficiencies identified by the authority and resubmit the application within thirty days after the denial without paying an additional application fee. The authority shall approve or deny the revised application within thirty days after receiving the revised application. Any subsequent review is limited to the deficiencies cited in the denial.

6. If an application includes multiple small wireless facilities, may remove small wireless facility collocations from the application and treat separately small wireless facility collocations for which incomplete information has been provided or that do not qualify for consolidated treatment or that are denied. The authority may issue separate permits for each collocation that is approved in a consolidated application.

G. An authority may not:

1. Directly or indirectly require an applicant to perform services that are unrelated to the collocation for which approval is sought, such as in-kind contributions to the authority, including reserving fiber, conduit or pole space on the wireless provider's monopole or utility pole for the authority.

2. Require an applicant to provide more information to obtain a permit than the authority requires of a communications service provider that is not a wireless provider and that requests to attach facilities to a structure. An authority may require the applicant to certify that the small wireless facilities to be collocated comply with the federal communications commission's regulations concerning radio frequency emissions referenced in 47 United States Code section 332(c)(7)(B)(iv).

3. Institute, either expressly or de facto, a moratorium on filing, receiving or processing applications or issuing permits or other approvals, if any, for the collocation of a small wireless facility.

4. Require an application for routine maintenance or the replacement of small wireless facilities with small wireless facilities that are substantially similar or the same size or smaller. An authority may require a permit to work within a right-of-way for such activities, if applicable. A permit issued pursuant to this paragraph is subject to the requirements of this section.

H. Collocation for which a permit is granted shall be completed within one hundred eighty days after the permit issuance date, unless the authority and the wireless provider agree to extend this period or a delay is caused by the lack of commercial power at the site.

I. Approval of an application by an authority allows the applicant to do both of the following:

1. Collocate the small wireless facilities.

2. Subject to applicable relocation requirements, the wireless provider's right to terminate at any time and the authority's terms described in section 9-592, operate and maintain the small wireless facilities for a period of not less than ten years, which must be renewed for equivalent durations unless the authority makes a finding that the small wireless facilities do not comply with the applicable codes or local code provisions or regulations described in subsection F, paragraph 4 of this section.

J. An authority may charge an application fee that is limited to the actual, direct and reasonable costs that are incurred by the authority and that relate to the granting or processing of an application. An application fee shall be reasonably related in time to the incurring of such costs. If such costs are already recovered by existing fees,

rates or taxes that are paid by a wireless provider, an authority may not charge an application fee to recover such costs. An application fee may not include:

1. Third-party travel expenses that are incurred to review an application.

2. The direct payment or reimbursement of third-party rates or fees that are charged on a contingency basis or pursuant to a result-based arrangement.

K. The total application fee, if allowed, may not exceed one hundred dollars each for up to five small wireless facilities addressed in an application and fifty dollars for each additional small wireless facility addressed in the application.

L. This article does not allow a person to collocate small wireless facilities on a privately owned utility pole, a privately owned wireless support structure or private property without the consent of the property owner.

9-594. Structures subject to zoning; time frames; application; fees

A. The following activities that take place inside of a right-of-way are subject to this section and all of the authority's codes and regulations, including the authority's zoning codes and other regulatory processes governing use of the rights-of-way, unless the activities are exempt from zoning review and approval under section 9-592, subsection I or J or section 9-593, subsection C:

1. The installation of new monopoles, utility poles or wireless facilities.

2. The collocation of wireless facilities.

B. Notwithstanding any provision in this article to the contrary, the construction, installation, maintenance, modification, operation or replacement of a monopole or associated wireless facility in a right-of-way is subject to all of the authority's codes and regulations, including the authority's zoning codes and other regulatory processes governing use of the rights-of-way.

C. An authority shall:

1. Accept and process applications for the modification of existing or the installation of new monopoles, utility poles or wireless facilities and the collocation of wireless facilities.

2. Within thirty days after receiving an application, notify the applicant whether the application is complete. If an application is incomplete, the authority must specifically identify the information missing from the application.

3. Process each complete application on a nondiscriminatory basis. A complete application is deemed approved if the authority fails to approve or deny the application within one hundred fifty days after receipt of an application for the modification of existing or the installation of new monopoles, utility poles or wireless facilities or within ninety days after receipt of a complete application for the collocation of wireless facilities. The time period for approval may be tolled to accommodate timely requests for information required to complete the application or may be extended by mutual agreement between the applicant and authority.

4. If a complete application is denied, notify the applicant in writing and provide substantial supporting evidence of the reason for denial in the written record. The written notification of the denial and the supporting evidence shall be publicly released contemporaneously. There must be a reasonable basis for the denial of an application. An authority may not deny an application if the denial is discriminatory against the applicant with respect to the placement of the facilities of other wireless providers.

D. An authority may not:

1. Require an applicant to submit information about the applicant's business decisions regarding the need for the monopole, utility pole or wireless facilities.

2. Require an applicant to submit information about, or evaluate an applicant's business decisions regarding, the applicant's service, customer demand for service or quality of service.

3. Institute, either expressly or de facto, a moratorium on filing, receiving or processing applications or issuing decisions for modifications or installations that are not a permitted use.

E. An authority, in addition to other rights the authority has under federal, state or local law, may:

1. Adopt reasonable requirements regarding the appearance and concealment of facilities, including those relating to materials used for arranging, screening or landscaping.

2. Adopt setback or fall zone requirements that are substantially similar to setback or fall zone requirements that are imposed on other types of commercial structures of a similar height.

3. Charge an application fee. Any application fee is subject to the requirements provided in section 9-593, subsection J. The total application fee, if allowed, may not exceed one thousand dollars for the modification of existing or the installation of new monopoles or utility poles or for the collocation of wireless facilities.

4. Charge a rate or fee for the use of the right-of-way for the installation of a monopole and associated wireless facility that is limited to not more than the direct and actual costs of managing the right-of-way and that is not in the form of a franchise or other fee based on revenue or customer counts.

F. An applicant's business decisions regarding the type and location of wireless facilities, monopoles or utility poles or the technology to be used are presumed to be reasonable. This presumption does not apply to the height or appearance of wireless facilities, monopoles or utility poles. An authority may consider the height of such structures in the zoning or other regulatory review, provided that the authority does not unreasonably discriminate between the applicant and other communications service providers that install wireless facilities.

G. Subject to applicable relocation requirements, the authority's terms described in section 9-592 and the wireless provider's right to terminate at any time, the approval term of an application shall be for a period of not less than ten years, which must be renewed for equivalent durations unless the authority makes a finding that the structure or facilities do not comply with the applicable codes or terms of the zoning or other regulatory process approval. Construction of the approved structure or facilities shall be completed within one hundred eighty days after the permit issuance date, unless the authority and the wireless provider agree to extend this period or a delay is caused by the lack of commercial power at the site.

9-595. Access to authority utility poles; rates and fees; collocations for other commercial projects or uses

A. An authority may not enter into an exclusive arrangement with any person for the right to attach to authority utility poles.

B. The rates and fees for the collocation of small wireless facilities on authority utility poles shall be nondiscriminatory regardless of the services provided by the collocating person.

C. The rate to collocate small wireless facilities on authority utility poles may not exceed fifty dollars per authority utility pole, per year.

D. An authority shall establish and make available rates, fees and terms for the collocation of small wireless facilities on authority utility poles within six months after August 9, 2017 or three months after receiving a request to collocate the first small wireless facility on such poles, whichever is later. The rates, fees and terms shall be made available for acceptance by a wireless provider. At the wireless provider's option, a wireless provider may request different or additional terms that the parties shall negotiate in good faith. Documents reflecting rates, fees and terms with each wireless provider shall be made publicly available. The rates, fees and terms shall comply with the following requirements:

1. The rates, fees and terms must be nondiscriminatory, competitively neutral and commercially reasonable and comply with this section and section 9-592, subsections E and F. Requests for collocating a small wireless facility on an authority utility pole will be processed pursuant to section 9-593. The authority may require a wireless provider to replace the authority utility pole if the authority determines that applicable codes or local code or regulatory provisions that concern public safety require replacement of the authority utility pole. The wireless provider's request to install a replacement utility pole will be processed pursuant to section 9-592. The authority shall retain ownership of the utility pole.

2. Terms must reasonably accommodate power supply and electric metering for the small wireless facility.

E. An authority may prohibit, regulate and charge for the collocation of a wireless facility on a wireless support structure owned by the authority.

9-596. Scope of local authority

A. Subject to this article and applicable federal law, an authority may exercise zoning, land use, planning and permitting authority and the authority's police power within the authority's territorial boundaries, including for the installation, modification and replacement of wireless support structures and utility poles.

B. An authority does not have any jurisdiction or authority over the design, engineering, construction, installation or operation of any small wireless facility located in an interior structure or on the site of any campus, stadium or athletic facility that is not owned or controlled by the authority, other than to require compliance with applicable codes.

C. This article does not authorize this state or any political subdivision of this state, including an authority, to require small wireless facility deployment or to regulate wireless services.

D. If an authority determines that a utility pole, monopole or wireless support structure of a wireless provider will be relocated to accommodate a public project, all wireless facilities deployed on such utility pole, monopole or wireless support structure shall be relocated at no cost to the authority.

9-597. Dispute resolution

A court of competent jurisdiction in this state shall determine all disputes arising under this article.

9-598. General requirements for use of the right-of-way

Structures and facilities deployed by wireless providers pursuant to this article shall be constructed, maintained and located as to not obstruct, endanger or hinder the usual travel or public safety on the right-of-way, damage or interfere with any other utility facilities in the right-of-way or interfere with a utility's use of the utility's facilities in the right-of-way. Construction and maintenance by the wireless provider shall comply with the national electrical safety code and all applicable laws and regulations for the protection of underground and overhead utility facilities. An authority shall treat a wireless provider's facilities located within a right-of-way on an equal basis with other utility facilities, except that an authority may adopt reasonable regulations to address the separation of the wireless provider's facilities from the other utility facilities within the right-of-way to prevent any damage to or interference with such other utility facilities or interference with a utility's use of the utility's facilities located or to be located within the right of way.

9-599. Applicability

This article does not:

1. Affect the authority of a special taxing district, investor-owned electric utility or electric cooperative that owns, controls or operates utility poles or wireless support structures to deny, limit, restrict or determine the rates, fees, terms and conditions for the use of or attachment to its utility poles or wireless support structures by a wireless provider.

2. Confer on any authority any zoning, land use, planning, permitting or other regulatory authority over the utility poles, wireless support structures or small wireless facilities owned, controlled or operated by a special taxing district, investor-owned electric utility or electric cooperative or the installation of such utility poles, wireless support structures or small wireless facilities by a special taxing district, investor-owned electric utility or electric cooperative.

3. Amend, modify or otherwise affect any private easement. Any and all rights for the use of a right-of-way are subject to the rights granted pursuant to any private easement.

9-600. Antenna use; private property; applicability

A. If an antenna is installed on property within the exclusive use or control of the antenna user whether the user has a direct or indirect ownership or leasehold interest in the property, an authority may not:

1. Unreasonably delay or prevent installation, maintenance or use of the antenna.

2. Unreasonably increase the cost of installation, maintenance or use of the antenna.

3. Prevent reception of acceptable signal quality.

B. This section applies to antennas that are not larger than one meter in diameter and installed on private property and are designed to receive video programming services via broadband radio service or to receive or transmit wireless signals other than via satellite.

C. This section does not apply to antennas used to transmit signals to and or receive signals from multiple customer locations.

Article 16-2
Small Wireless Facilities

Sections:

16-2-1 Purpose
16-2-2 Definitions
16-2-3 Small Wireless Facilities in the Public Right-of-Way
16-2-4 Rates and Fees

Section 16-2-1 Purpose

The intent and purpose of this article is to facilitate the development and installation of small wireless facilities in the Town of Fountain Hills to supplement existing wireless communications networks and to increase capacity in high demand areas, while simultaneously promoting and preserving the health, safety, and general welfare of the residents of the Town and protecting and preserving the aesthetic qualities of the natural and built environment of the Town. Through this article, the Town seeks to balance the need for increased wireless communications capacity with the need for reasonable standards to preserve the aesthetic values of the Town and to ensure the safe placement of small wireless facilities. (18-01, Added, 02/20/2018)

Section 16-2-2 Definitions

The definitions contained in A.R.S. § 9-591 are incorporated by this reference and shall apply to this article as if fully set forth here. (18-01, Added, 02/20/2018)

Section 16-2-3 Small Wireless Facilities in the Public Right-of-Way

This section permits the installation of small wireless facilities in the right-of-way subject to the following requirements:

A. No monopoles, utility poles associated with small wireless facilities, or small wireless facilities shall be collocated, installed, modified, or replaced in the public right-of-way unless the following requirements are met:

1. The applicant participates in a pre-application conference with the Department of Development Services;
2. An Application is submitted to and approved by the Town pursuant to this section;
3. All Town requirements as set forth in this article are met;

4. All other applicable codes and requirements are met;

5. A Wireless Facility License Agreement is signed; and

6. A Wireless Facility Encroachment Permit issued.

B. The collocation, installation, modification, maintenance, and replacement of monopoles, utility poles associated with small wireless facilities, or small wireless facilities in the public right-of-way shall be subject to and comply with reasonable requirements, including the Wireless Facilities Standard Terms and Conditions, the Town's Design Standards and Guidelines, and any site-specific requirements developed based upon consultation with the Town through the site review and permitting process.

C. The Development Services Department shall prescribe and provide a regular form of Application for use by applicants for the collocation, installation, modification, maintenance, and replacement of monopoles, utility poles associated with small wireless facilities, or small wireless facilities in the public right-of-way. The Application shall include such information and details as the Department deems necessary to establish the exact location, nature, dimensions, duration and purpose of the proposed monopoles, utility poles, or small wireless facilities in the public right-of-way.

D. The Application shall be accompanied by maps, sketches, diagrams or similar exhibits. The accompanying materials shall be of the size and in the quantity prescribed by the Development Services Department and of sufficient clarity to illustrate the location, dimensions, nature and purpose of the proposed monopoles, utility poles associated with small wireless facilities, or small wireless facilities in the public right-of-way and its relation to existing and proposed facilities in the right-of-way.

E. No changes shall be made in the location, dimensions, character or duration of the monopoles, utility poles associated with small wireless facilities, or small wireless facilities in the public right-of-way as granted by the permit except upon written authorization of the Development Services Department.

F. Approval of an Application is contingent upon the applicant demonstrating compliance with the Wireless Facilities Standard Terms and Conditions, the Town's Design Standards and Guidelines, and any site-specific requirements developed based upon consultation with the Town through the site review and permitting process.

G. An applicant may appeal denial of an Application to the Town Council by following this procedure: Within seven calendar days of the denial of an Application, an applicant shall file a notice of appeal, in writing, with the Town Clerk. The Town Council may affirm, modify, or reverse the action from which the appeal is taken.

H. Upon approval of an Application, a Wireless Facility Encroachment Permit will be issued for each monopole, utility pole associated with small wireless facilities, or small wireless facility included in the Application. However, nothing in this article shall be construed to exempt monopoles, utility poles associated with small wireless facilities, or small wireless facilities in the public right-of-way from the requirements of Article 16-1 as an encroachment in the public right-of-way.

I. The collocation, installation, modification, maintenance, and replacement of monopoles, utility poles associated with small wireless facilities, or small wireless facilities shall be subject to rates and fees pursuant to Section 16-2-4 of this article. (18-01, Added, 02/20/2018)

Section 16-2-4 Rates and Fees

A. The Town Council shall, by ordinance or resolution, set and amend any rate, rate component, charge, or fee authorized by state law for the use of the public right-of-way and Town utility poles in connection with small wireless facilities including:

1. Fees for special use permit applications
2. Fees for collocation applications;
3. Fees for the use of the right-of-way;
4. Rates for the use of the Town's utility poles;
5. Fees for Encroachment Permit Applications;
6. Fees to recover legal costs resulting from enforcement to any noncompliance including, but not limited to, administrative expenses, investigation, testing, legal proceedings and filings, and continued monitoring; and
7. Other fees as the Town may determine necessary to carry out the requirements contained herein.

B. All rates and fees set or amended pursuant to this article shall be reasonable and shall not exceed the amounts permitted by state law.

C. The Town shall publish and make available its schedule of rates and fees.

D. These fees relate solely to the matters covered by this article and are separate from all other fees, fines and penalties chargeable by the Town. (18-01, Added, 02/20/2018)

The Fountain Hills Town Code is current through Ordinance 24-19, passed October 1, 2024.

Disclaimer: The town clerk's office has the official version of the Fountain Hills Town Code. Users should contact the town clerk's office for ordinances passed subsequent to the ordinance cited above.

Town Website: www.fh.az.gov

Hosted by General Code.

RESOLUTION NO. 2018-18

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, ADOPTING THE WIRELESS FACILITY LICENSE AGREEMENT AND THE WIRELESS FACILITIES STANDARD TERMS AND CONDITIONS FOR LOCATING WIRELESS FACILITIES WITHIN TOWN RIGHTS-OF-WAY, THE 2018 TOWN OF FOUNTAIN HILLS WIRELESS FACILITIES IN THE RIGHT-OF-WAY DESIGN STANDARDS AND GUIDELINES, AND AMENDING THE TOWN COMPREHENSIVE FEE SCHEDULE; AND DECLARING AN EMERGENCY.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, as follows:

SECTION 1. That the Wireless Facility License Agreement is hereby approved in the form as set forth in Exhibit "A", attached hereto and incorporated herein by reference.

SECTION 2. That the Wireless Facilities Standard Terms and Conditions are hereby approved in the form as set forth in Exhibit "B", attached hereto and incorporated herein by reference.

SECTION 3. That the 2018 Town of Fountain Hills Wireless Facilities in the Right-of-Way Design Standards and Guidelines are hereby approved in the form as set forth in Exhibit "C", attached hereto and incorporated herein by reference.

SECTION 4. That the proposed amendments to the Fee Schedule, initially posted as Development Services Department Fees, are now included in Public Works Department Fees as Encroachment/Engineering Permit Fees.

SECTION 5. That the Town Comprehensive Fee Schedule, of the Fiscal Year 2017-2018 Adopted Budget is hereby amended by adding the line items set forth in Exhibit "D", attached hereto and incorporated herein by reference.

SECTION 6. That the Mayor, the Town Manager, the Town Clerk and the Town Attorney are hereby authorized and directed to execute all documents and take all steps necessary to carry out the purpose and intent of this Resolution.

SECTION 7. Because of the urgent need for the implementation of the Town's regulations concerning small wireless facilities, and the immediate operation of this Resolution is necessary for the preservation of the public peace, health and welfare, an emergency is hereby declared to exist and this Resolution shall be in full force and effect from and after its passage and approval by the Mayor and Council as required by law and

is hereby exempt from the referendum provisions of the Constitution and laws of the State of Arizona.

PASSED AND ADOPTED by the Mayor and Council of the Town of Fountain Hills, February 20, 2018.

FOR THE TOWN OF FOUNTAIN HILLS: **ATTESTED TO:**

Linda M. Kavanagh

Bevelyn J. Bender, Town Clerk

REVIEWED BY: **APPROVED AS TO FORM:**

Grady E. Miller, Town Manager

FOR:
Fredda J. Bisman, Town Attorney

CERTIFICATION

I, Bevelyn J. Bender, the duly appointed Clerk of the Town of Fountain Hills, Arizona, do hereby certify that the above and foregoing Resolution No. 2018-18 was duly passed by the Mayor and Council of the Town of Fountain Hills, Arizona, at a regular meeting held on February 20, 2018, and the roll call of the vote thereon was 6 Ayes, 0 Nays, and that the Mayor and 5 Councilmembers were present thereat.

Bevelyn J. Bender

Bevelyn J. Bender, Town Clerk
Town of Fountain Hills, Arizona

EXHIBIT A
TO
RESOLUTION NO. 2018-18

[Wireless Facility License Agreement]

See following pages.

Town License#_____

Wireless Provider's Name:

_____

WIRELESS FACILITY LICENSE AGREEMENT

THIS WIRELESS FACILITY LICENSE AGREEMENT (the "License Agreement") is made and entered into this _____day of_____,20___ ("Effective Date"), by and between the Town of Fountain Hills, an Arizona municipal corporation ("Town"), and _____, a _____ ("Wireless Provider").

RECITALS

A. The Town of Fountain Hills "Wireless Facilities Standard Terms and Conditions" sets out various recitals and terms (collectively the "Terms").

B. Town holds interests in certain parcels of land (the "Street Parcels") comprising street Right- of-way within the Town of Fountain Hills.

C. This License Agreement allows Wireless Provider to use certain limited portions of Town's specific Street Parcels pursuant to an approved Wireless Facilities Encroachment Permit ("Encroachment Permit").

D. The portions of the Street Parcels that this License Agreement permits Wireless Provider to use (the "Use Areas") are defined in the package of maps and related materials (the "Boundary Plan") attached to each Encroachment Permit Application.

E. Wireless Provider desires to install and operate on the Use Areas the wireless telecommunications receiving, processing and transmitting devices and related electronic equipment that is specified on each Site Plan (the "Communications Equipment") subject to the requirements of this License Agreement and associated Encroachment Permit. The Communications Equipment is limited to the actual electronic equipment, portable cabinets for such equipment, enclosures, and antennas ("Antennas") utilized for wireless communications, all as shown on the drawings (the "Site Plans") attached to each Encroachment Permit. Notwithstanding anything in this License Agreement or associated Encroachment Permit to the contrary, the Communications Equipment excludes any item not shown on the approved Site Plan.

F. The volume of the Enclosure and the above ground portion of its pad shall be

as shown in the Site Plan incorporated into each Encroachment Permit Application and shall be limited as stated on that Site Plan.

G. The Street Parcel in each Encroachment Permit Application shall state whether it is currently improved with an electrical, traffic signal, street light, or antenna support pole (the "Utility Pole") which is owned by Town, and the approximate height of the Utility Pole.

H. In the Encroachment Permit Application, the Wireless Provider will indicate whether it proposes to use the existing Utility Pole, replace the existing Utility Pole, or install a new Utility Pole that Town or Wireless Provider will own. If the Utility Pole is owned by a third-party, the Wireless Provider shall provide documentation confirming the third-party owners' consent for Wireless Provider's use of the Utility Pole.

I. In order to install the Communications Equipment, Wireless Provider desires to construct supporting improvements and perform all other work shown on the Site Plan (collectively the "Project") for each site.

J. Wireless Provider shall complete the entire Project and put the Communications Equipment in full operation no later than one hundred eighty (180) days after the date of the issuance of the Encroachment Permit (the "Completion Deadline") for each site.

K. Town desires to grant to Wireless Provider the right to install, maintain, operate and repair the Communications Equipment (the "Permitted Uses") subject to the requirements of this License Agreement and as specified in each specific Encroachment Permit granted pursuant to this License Agreement.

NOW, THEREFORE, for and in consideration of the foregoing, the amounts hereinafter to be paid by Wireless Provider, and the covenants and agreements contained herein to be kept and performed by Wireless Provider, and other good and valuable consideration, Town and Wireless Provider agree as follows:

I. LICENSE TERMS

1. License Terms. Town hereby grants to Wireless Provider a license to use the Use Areas as follows:

1.1 Terms Incorporated. The Terms (as defined in the Recitals above) are all incorporated by reference as if set out in full herein. WIRELESS PROVIDER WARRANTS AND REPRESENTS THAT WIRELESS PROVIDER HAS READ AND AGREES TO THE TERMS. Capitalized terms used but not defined in this License Agreement shall have the meanings assigned by the Terms.

1.2 Terms Application. Wireless Provider shall comply with all of the Terms. Without limitation, the Terms shall apply to the Use Areas as follows:

1.2.1 Wireless Provider's Boundary Plan Responsibility. It is Wireless Provider's responsibility before submitting any Encroachment Permit Application authorized by this License Agreement to ensure that the Boundary Plan is prepared as follows:

1.2.1.1 Wireless Provider shall insure that the Boundary Plan clearly depicts all portions of the Street Parcel that Wireless Provider desires to use and that each such area is clearly shown on the Boundary Plan and labeled to clearly indicate which of the categories of Exclusive Areas or Shared Areas set out in the Terms applies to the area.

1.2.1.2 If the Boundary Plan does not clearly show any portion of the Street Parcel as one of the categories of Exclusive Areas or Shared Areas set out in the Terms, then such portion of the Street Parcel is not part of the Use Areas and Wireless Provider may not use such portion of the Street Parcel, even if the use is discussed in the Terms.

1.2.1.3 Any Exclusive Area or Shared Area described or named in the Terms that is not clearly depicted and correctly labeled on the Boundary Plan is excluded from this License Agreement and Encroachment Permit and unavailable for Wireless Provider's use.

1.2.1.4 Any portion of the Boundary Plan or the Site Plan that indicates a Wireless Provider's use of the Street Parcel that is not one of the Exclusive Areas or Shared Areas specifically enumerated in the Terms is excluded from this License Agreement and Encroachment Permit and not available for Wireless Provider's use.

1.2.1.5 All work, improvements and equipment within an Exclusive Area or Shared Area is limited to the purposes enumerated in the Terms for that particular Exclusive Area or Shared Area.

1.2.1.6 This License Agreement and Encroachment Permit does not allow use of any land other than the specified portions of the Street Parcel that are Exclusive Areas or Shared Areas.

1.2.1.7 Any change to the Boundary Plan after Town issues the Encroachment Permit is void unless it is memorialized in a formal amendment to this License Agreement.

1.2.2 Site Plan. It is Wireless Provider's responsibility before submitting any Encroachment Permit Application authorized by this License Agreement to ensure that the Site Plan correctly shows the work that Wireless Provider intends to perform, that the Site Plan correctly shows all improvements and equipment that Wireless Provider intends be located on the Use Areas, that the Site Plan shows no work, improvements or equipment outside the Exclusive Areas and Shared Areas properly depicted and labeled on the Boundary Plan, and that all work, improvements and equipment is encompassed within the purposes enumerated in the Terms for that particular Exclusive Area or Shared Area. Any

work, improvements or equipment not conforming to all the foregoing is prohibited, even if it is clearly shown on the Site Plan or discussed in the Terms. Any refinement or other change to the Site Plan after Town issues a Encroachment Permit is void unless Wireless Provider obtains Town's approval of the change pursuant to the plans approval processes set out in the Terms and pursuant to all applicable regulatory requirements.

1.2.3 Term of Agreement. The term of this Agreement is as stated in the Terms.

1.2.4 Wireless Provider's Payments. Wireless Provider shall pay to Town the amounts described in the Terms.

1.2.5 Use Restrictions. Wireless Provider shall comply with the use restrictions set out in the Terms.

1.2.6 Encroachment Permits. This Agreement constitutes an "Encroachment Permit" under Chapter 16-1-4.F of the Town of Fountain Hills Town Code to the extent of granting permission for the Communications Equipment to exist on the Street Parcel but not to allow any construction or other work of any description in the Right-of-way or to allow obstruction of traffic or alteration of Town's improvements. Before performing any work on the Right-of-way, Wireless Provider shall obtain the following additional encroachment permits, as applicable:

1.2.6.1 Permission to work in the Right-of-way.

1.2.6.2 Traffic control plan.

1.2.6.3 Any other applicable permits regarding work in the Right-of-way.

1.2.7 Compliance with Law. Wireless Provider acknowledges that this License Agreement or any issued Encroachment Permit does not constitute, and Town has not promised or offered, any type of waiver of, or agreement to waive (or show any type of forbearance, priority or favoritism to Wireless Provider with regard to) any law, ordinance, power, regulation, tax, assessment or other legal requirement now or hereafter imposed by the Town of Fountain Hills or any other governmental body upon or affecting Wireless Provider's use of the Street Parcel. For example, Wireless Provider shall comply with all zoning, building and Right-of-way codes, ordinances and policies.

2. Permitted Uses. Town hereby grants to Wireless Provider the right to install, maintain, operate and repair the Communications Equipment (the "Permitted Uses") subject to the requirements of this License Agreement and as specified in each specific Encroachment Permit granted pursuant to this License Agreement.

3. Annual Blanket Encroachment Permit for Incidental Work at a Site: On or before January 1 of each calendar year, the Wireless Provider shall submit an application for a

Blanket Encroachment Permit to perform incidental and routine maintenance work at any site in the Town's Right-of-way. The Blanket Encroachment Permit shall only cover such activities as checking and inspecting communications equipment and antennas, changing circuit packs and cards, cleaning the cabinets and immediate area, and other similar activity. The Blanket Encroachment Permit does not include any work that requires the replacement of cabinets, antennas, or communications equipment, or any excavation, trenching, or concrete or roadway cutting within the Boundary Plan use area.

4. Town's Initial Information. Unless and until Town gives notice otherwise, Town's contract administrator shall be the Development Services Director.

5. Wireless Provider's Initial Information. Unless and until Wireless Provider gives notice otherwise:

5.1 Wireless Provider's network operations center phone number as required by the Terms is (____)_____.

5.2 Wireless Provider's address for notices as required by the Terms shall be:

_____

_____

_____

5.3 Wireless Provider's billing address for routine billing invoices as required by the Terms shall be:

_____

_____

_____

EXECUTED as of the date first given above.

TOWN: Town of Fountain Hills,
an Arizona municipal corporation

By: _____

_____

Town Manager

WIRELESS PROVIDER: _____

a _____

By: _____
Name: _____
Its: _____

EXHIBIT B
TO
RESOLUTION NO. 2018-18

[Wireless Facilities Standard Terms and Conditions]

See following pages.

WIRELESS FACILITIES STANDARD TERMS AND CONDITIONS

The Common Council of the Town of Fountain Hills ("Town") has adopted the following recitals, terms and conditions (collectively, the "Terms") to govern the use of Town owned right-of-way for the placement of wireless facilities by a Wireless Provider as defined by the Arizona Revised Statutes, Section 9-591, et. seq. These Terms are effective as of _____, 2018, and may be amended only upon approval of the Town Council.

RECITALS

a. Town owns the public street and alley rights-of-way and public utility easements within the boundaries of the Town of Fountain Hills that are designed for use by utility companies for installation, operation and repair of water, electrical and other utilities pursuant to franchise, licenses or other agreements between utility companies and Town (collectively the "Right-of-way").

b. Town is the owner of certain street lights and traffic signals (individually a "Utility Pole" or collectively "Utility Poles") located in the Right-of-way (as hereinafter defined).

c. Pursuant to A.R.S. 9-591, et seq., one or more Wireless Providers may desire to establish and operate a network of Small Wireless Facilities to enhance wireless service coverage within the Town.

d. Town anticipates that one or more Wireless Providers may desire to install Small Wireless Facilities on the Town's Utility Poles, install new and replacement Utility Poles capable of supporting Small Wireless Facilities, and in certain cases and where permitted by the Town's Code, install other Small Wireless Facilities or monopole towers in the Right-of-way.

e. Wireless Providers agree to comply with the Town's Right-of-way use requirements as provided in these Terms. Furthermore, Wireless Providers agree to file the appropriate applications and secure the appropriate licenses and permits required by the Town for placement of Wireless Facilities within the Town's boundaries.

f. Town Utility Poles approved for Small Wireless Facilities shall retain their primary governmental purpose, and use of the Right-of-way by Wireless Providers shall not interfere with the Town's use thereof. The primary purpose of these Terms is to protect the health, safety and welfare of the public, and to protect the value of and physical integrity of publicly-owned property and assets.

g. Because Town's existing streetlight poles and traffic signal poles are not designed to safely support the additional weight and stress of Wireless Facilities, Wireless Service Providers shall be required to provide poles designed to support these facilities to replace existing poles prior to attaching Wireless Facilities.

TERMS

1. DEFINITIONS. For the purposes of the Terms:

"Antenna" means communications equipment that transmits or receives electromagnetic radio frequency signals and that is used in providing wireless services.

"Application Fee" means the Town's encroachment permit application, review and other fees related to the issuance of the permit.

"Base Use Fee" means the amount that the Company shall pay to Town for each year of this license for use of Town Right-of-way and Town-owned Pole, as set out in the current fee schedule.

"Communications Equipment" means any and all electronic equipment at the Small Wireless Facility location that processes and transports information from the antennas to the Wireless Provider's network.

"Competing Users" means entities that own the water pipes, cables and wires, pavement, and other facilities which may be located within the Right-of-way. The Competing Users include without limitation, the Town, the State of Arizona and its political subdivisions, the public, and all manner of utility companies and other existing or future users of the Use Areas.

"Encroachment Permit" means a permit issued pursuant to Chapter 16 of the Fountain Hills Town Code allowing a a utility pole, monopole, small wireless facility or wireless support structure to be placed in the Town's Right-of-way pursuant to the Wireless Provider's License Agreement.

"FCC" means the Federal Communications Commission.

"FCC Rules" means all applicable radio frequency emissions laws and regulations.

"FCC OET Bulletin 65" means the FCC's Office of Engineering & Technology Bulletin 65 that includes the FCC Radio Frequency Exposure Guidelines.

"License Agreement" means the license incorporating these Terms for Wireless Providers to install and operate Wireless Facilities in the Town's Right-of-way.

"Monopole" means a wireless support structure that is not more than forty inches in diameter at the ground level and that has all of the wireless facilities mounted on the pole or contained inside of the pole.

"RF" means radio frequency.

"RF Letter" means a letter attesting to the Wireless Provider's compliance with FCC RF exposure guidelines from the Wireless Provider's senior internal

engineer.

"Right-of-way" as defined for wireless sites in A.R.S. §9-591(18) means the area on, below or above a public roadway, highway, street, sidewalk, alley, or utility easement. Right-of-way does not include a Federal Interstate Highway, a state highway or state route under the jurisdiction of the Department of Transportation, a private easement, property that is owned by a special taxing district, or a utility easement that does not authorize the deployment sought by the wireless provider.

"Site Documents" means the depiction of the use area, schematic plans and map showing location of the installation of the Wireless Facility in the Right-of-way, including but not limited to the title report of the use area, vicinity map, site plan, elevations, technical specifications and the cubic feet of the non-antenna wireless equipment.

"Small Wireless Facility" as defined in A.R.S. §9-591(19), means a Wireless Facility that meets both of the following qualifications:

a. All antennas are located inside an enclosure of not more than six (6) 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 not more than six (6) cubic feet in volume.

b. All other wireless equipment associated with the facility is cumulatively not more than twenty-eight (28) cubic feet in volume, or fifty (50) cubic feet in volume if the equipment was ground mounted before the effective date of this section. The following types of associated ancillary equipment are not included in the calculation of equipment volume pursuant to this subdivision:

    i. An electric meter.

    ii. Concealment elements.

    iii. A telecommunications demarcation box.

    iv. Grounding equipment.

    v. A power transfer switch.

    vi. A cutoff switch.

    vii. Vertical cable runs for the connection of power and other services.

"Supplemental Parcel Agreement" means an agreement authorizing the Wireless Provider to use property outside of the Town's Right-of-way, whether

owned by the Town or a third-party.

"Third Party Areas" means the portions of the Right-of-way, such as canal crossings or other areas that for any reason have limited Right-of-way dedications or that have regulatory use restrictions imposed by a third party.

"Violation Use Fee" means the types of fees that the Town has available to remedy certain breaches of the License Agreement by a Wireless Provider.

"Wireless Facility" as defined in A.R.S. §9-591(22):

a. Means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including both of the following:

   i. Equipment associated with wireless communications.

   ii. Radio transceivers, antennas, coaxial or fiber-optic cables, regular and backup power supplies and comparable equipment, regardless of technological configuration.

b. Includes small wireless facilities.

c. Does not include the structure or improvements on, under or within which the equipment is collocated, wireline backhaul facilities, coaxial or fiber-optic that is between wireless support structures or utility poles or coaxial or fiber-optic cable that is otherwise not immediately adjacent to, or directly associated with, an antenna.

d. Does not include Wi-Fi radio equipment described in Section 9-506, Subsection I or microcell equipment described in Section 9-584, Subsection E.

"Wireless Infrastructure Provider" as defined in A.R.S. §9-591(23) means any person that is authorized to provide telecommunications service in this state and that builds or installs wireless communications transmission equipment, wireless facilities, utility poles or monopoles but that is not a wireless service provider. Wireless Infrastructure Provider does not include a special taxing district.

"Wireless Provider" as defined in A.R.S. §9-591(24) means a Cable Operator, Wireless Infrastructure Provider or Wireless Services Provider.

"Wireless Provider's Improvements" means all improvements installed by the Wireless Provider, including, but not limited to: all elements of the Wireless Facility, all screening elements, any landscaping plants or materials, and any

other elements provided by the Wireless Provider in the approved License Agreement.

"Wireless Services" as defined in A.R.S. §9-591(25) means any services that are provided to the public and that use licensed or unlicensed spectrum, whether at a fixed location or mobile, using wireless facilities.

"Wireless Services Provider" as defined in A.R.S. §9-591(26) means a person that provides wireless services. Wireless Services Provider does not include a special taxing district.

"Wireless Support Structure" as defined in A.R.S. §9-591(27):

a) Means:

i. A freestanding structure, such as a monopole.

ii. A tower, either guyed or self-supporting.

iii. A sign or billboard.

iv. Any other existing or proposed structure designed to support or capable of supporting small wireless facilities.

v. Does not include a utility pole.

2. USE AREAS.

Upon approval of a License Agreement, Town grants to Wireless Service Provider the right to install Wireless Facilities in the Town's Right-of-way upon issuance of an Encroachment Permit for each Use Area as set forth below:

2.1 Limitations. Notwithstanding anything herein to the contrary, the Use Areas include and are limited to only certain areas that Wireless Provider is permitted to exclusively use and occupy (the "Exclusive Area") and certain areas that Wireless Provider is permitted to use on a shared basis (the "Shared Area"). The Use Areas are defined by the Boundary Plan.

2.2 Use Areas Boundary. The Use Areas is the smallest geometric shape that includes the Exclusive Areas and the Shared Areas. The Use Areas exclude other parts of the Street Parcel or and all other land. Wireless Provider shall not occupy or use any other portion of the Street Parcel or adjoining lands. An approved License Agreement or any associated Encroachment Permit(s) does not allow any use by Wireless Provider of land outside the Street Parcel. If any portion of Wireless Provider's work, improvement or equipment is to be located on other land, then such work, improvements and equipment are prohibited unless Wireless Provider first obtains from the owner of said land (including Town, if applicable) a Supplemental Parcel Agreement allowing such work, improvements and equipment.

2.3 Exclusive Areas. The Exclusive Areas are limited to the following, if and as defined by the Boundary Plan:

2.3.1 The land area defined as "Enclosure" on the Boundary Plan to be used by Wireless Provider solely for the enclosure housing the electronic ground equipment shown on the Site Plan (the "Enclosure"). Such area is confined to the actual area occupied by the exterior structure and the interior of the enclosure. If the Boundary Plan does not show a clearly defined and correctly labeled "Enclosure" area, then no enclosure area is available for Wireless Provider's use and any enclosure for Wireless Provider's use must be located outside the Street Parcel and authorized by a Supplemental Parcel Agreement.

2.3.2 The area on the Pole defined as "Antennas" on the Boundary Plan to be used by Wireless Provider solely for mounting the Antennas. Such area is confined to the Town approved elevations and locations actually occupied by the Antennas and their supporting brackets. If the Boundary Plan does not show a clearly defined and correctly labeled "Antennas" area, then no main antennas area is available for Wireless Provider's use and any main antennas for Wireless Provider's use must be located outside the Street Parcel and authorized by a Supplemental Parcel Agreement.

2.4 Shared Areas. Shared Areas are limited to the following areas, if and as defined by the Boundary Plan:

2.4.1 A motor vehicle Parking space (the "Parking Space") at the "Parking Space" location described on the Boundary Plan to be used by Wireless Provider solely for parking a service vehicle to service the Communications Equipment and for ingress and egress to that Parking Space.

2.4.2 No temporary construction area is provided by these Terms, an approved License Agreement or Encroachment Permit. Wireless Provider must obtain from Town a separate written document giving Wireless Provider permission to work in the Right-of-way, as described elsewhere herein.

2.4.3 An underground cable route (the "Signal Route") labeled as the "Signal Route" described on the Boundary Plan from the Enclosure to the Antenna to be used by Wireless Provider solely for underground radio frequency lines between the Enclosure and the Antenna. Notwithstanding the preceding sentence, the portion of the Signal Route upon the Pole shall not be underground but shall be within the Pole. If the Boundary Plan does not show a clearly defined and correctly labeled "Signal Route" area, then no signal route area is available for Wireless Provider's use and any signal

route for Wireless Provider's use must be separately authorized by Town.

2.5 Power and Telephone Service. Nothing herein grants permission for Wireless Provider to use any portion of power, telephone or other service routes, if any. Wireless Provider acknowledges that use of the public street Right-of-way or public utility easements for these purposes, if any, is governed by Town's normal Right-of-way rules and policies, and by the franchise agreements between the Town and the electrical and telephone service providers.

2.6 Rights in Adjacent Land. Wireless Provider's rights are expressly limited to the real property defined as the "Use Areas" an issued Encroachment Permit. Without limitation, in the event any public Right-of-way or other public or private property at or adjacent to the Use Areas is owned, dedicated, abandoned or otherwise acquired, used, improved or disposed of by Town, such property shall not accrue to Wireless Provider but shall be the Town's property and not subject to the Use Areas.

2.7 Variation in Area. In the event the Use Areas consist of more or less than any stated area, Wireless Provider's obligations hereunder shall not be increased or diminished.

2.8 Condition of Title. Wireless Provider shall not have power to amend, modify, terminate or otherwise change the Site Documents or create new Site Documents.

2.8.1 Town does not warrant its own or any other person's title to or rights to use the Use Areas or any other property.

2.8.2 Wireless Provider shall pay, indemnify, defend and hold harmless Town and its agents and representatives of, from and against any and all claims, demands, damages, expenses, interest or penalties of any kind or nature whatsoever, including attorneys', arbitrators' and experts' fees and court costs that arise from or relate to Wireless Provider's non-compliance with the Site Documents.

2.9 Condition of Use Areas. The Use Areas are being made available in an "as is" condition without any express or implied warranties of any kind, including without limitation any warranties or representations as to their condition or fitness for any use.

2.10 No Real Property Interest. Notwithstanding any provision hereof to the contrary, and notwithstanding any negotiation, correspondence, course of performance or dealing, or other statements or acts by or between the parties, Wireless Provider's rights herein are limited to use and occupation of the Use Areas for the Permitted Uses.

2.11 Limited Rights in Use Areas. Wireless Provider's rights in the Use Areas are limited to the specific rights expressly granted in Wireless Provider's approved License Agreement.

2.12 Reserved Right and Competing Users and Activities. Notwithstanding anything herein to the contrary, Town specifically reserves to itself and excludes from any Encroachment Permit a non-exclusive delegable right (the "Reserved Right") over the entire Use Areas for all manner of real and personal improvements and for streets, sidewalks, trails, landscaping, utilities and every other land use of every description. Without limitation:

2.12.1 Competing Users. Wireless Provider accepts the risk that Town and others (the "Competing Users") may now or in the future install their facilities in the Use Areas in locations that make parts of the Right-of-way unavailable for Wireless Provider's use.

2.12.2 Competing Activities. Wireless Provider accepts the risk that there may now or in the future exist upon the Use Areas all manner of work and improvements upon the Use Areas (the "Competing Activities"). The Competing Activities include without limitation any and all laying construction, erection, installation, use, operation, repair, replacement, removal, relocation, raising, lowering, widening, realigning or other dealing with any or all of the following, whether above, upon or below the surface of the Use Areas and whether occasioned by existing or proposed uses of the Right-of-way or existing or proposed uses of adjoining or nearby land:

2.12.2.1 All manner of streets, alleys, sidewalks, trails, ways, traffic control devices, subways, tunnels, trains and gates of every description, and all manner of other transportation facilities and their appurtenances.

2.12.2.2 All manner of pipes, wires, cables, conduits, sewers, pumps, valves, switches, conductors, connectors, poles, supports, access points and guy wires of every description, and all manner of other utility facilities and their appurtenances.

2.12.2.3 All manner of drains, bridges, viaducts, overpasses, underpasses, culverts, markings, balconies, porches, overhangs and other encroachments of every description and all manner of other facilities and their appurtenances.

2.12.2.4 All other uses of the Right-of-way that Town may permit from time to time.

2.12.3 Town's Rights Cumulative. All of Town's Reserved Rights under various provisions of the License Agreement, these Terms and Encroachment Permits shall be cumulative to each other.

2.12.4 Use Priorities. These Terms do not grant to Wireless Provider or establish for Wireless Provider any exclusive rights or priority in favor of Wireless Provider to use the Use Areas. Wireless Provider shall not obstruct or interfere with or prevent any Competing User from using the Use Areas.

2.12.5 Regulation. Town shall have full authority to regulate use of the Use Areas and to resolve competing demands and preferences regarding use of the Use Areas and to require Wireless Provider to cooperate and participate in implementing such resolutions. Without limitation, Town may take any or all of the following into account in regulating use of the Use Areas:

2.12.5.1 All timing, public, operational, financial and other factors affecting existing and future proposals, needs and plans for Competing Activities.

2.12.5.2 All other factors Town may consider relevant, whether or not mentioned in the License Agreement, these Terms and Encroachment Permit(s).

2.12.5.3 Differing regulatory regimes or laws applicable to claimed rights, public benefits, community needs and all other factors relating to Competing Users and Competing Activities.

2.12.6 Communications Equipment Relocation. Upon one hundred eighty (180) days' notice from Town, Wireless Provider shall temporarily or permanently relocate or otherwise modify the Communications Equipment Relocation (the "Relocation Work") as follows:

2.12.6.1 Wireless Provider shall perform the Relocation Work at its own expense when required by Town's town manager or designee.

2.12.6.2 The Relocation Work includes all work determined by Town to be necessary to accommodate Competing Activities, including without limitation temporarily or permanently removing, protecting, supporting, disconnecting or relocating any portion of the Communications Equipment.

2.12.6.3 Town may perform any part of the Relocation Work that has not been performed within the allotted

time. Wireless Provider shall reimburse Town for its actual costs in performing any Relocation Work. Town has no obligation to move Wireless Provider's, Town's or others' facilities.

2.12.6.4 Town and not Wireless Provider shall be entitled to use any of Wireless Provider's facilities that are abandoned in place or that are not relocated on Town's request.

2.12.6.5 All Relocation Work shall be subject to and comply with all other provisions of the License Agreement.

2.12.7 Disruption by Competing Users. Neither Town nor any agent, contractor or employee of Town shall be liable to Wireless Provider, its customers or third parties for any service disruption or for any other harm caused them or the Communications Equipment due to Competing Users or Competing Activities.

2.12.8 Emergency Disruption by Town. Town may remove, alter, tear out, relocate or damage portions of the Communications Equipment in the case of fire, disaster, or other emergencies if Town's town manager or designee deems such action to be reasonably necessary under the circumstances. In such event, neither Town nor any agent, contractor or employee of Town shall be liable to Wireless Provider or its customers or third parties for any harm so caused to them or the Communications Equipment. When practical, Town shall consult with Wireless Provider in advance to assess the necessity of such actions and to minimize to the extent practical under the circumstances damage to and disruption of operation of the Communications Equipment. In any event, Town shall inform Wireless Provider after such actions. Wireless Provider's work to repair or restore the Communications Equipment shall be Relocation Work.

2.12.9 Public Safety. If the Communications Equipment or any other Wireless Provider equipment, improvements or activities present any immediate hazard or impediment to the public, to Town, to Town's equipment or facilities, to other improvements or activities within or without the Use Areas, or Town's ability to safely and conveniently operate the Right-of-way or perform Town's utility, public safety or other public health, safety and welfare functions, then Wireless Provider shall immediately remedy the hazard, comply with Town's requests to secure the Street Parcel, and otherwise cooperate with Town at no expense to Town to remove any such hazard or impediment. Wireless Provider's work crews shall report the Use Areas within four (4) hours of any request by Town under this paragraph (the "RF Safety Paragraph").

2.13 Third Party Permission. There may be portions of the Right-of-way or other areas that for any reason have limited Right-of-way dedications or that have regulatory use restrictions imposed by a third party ("Third Party"). Areas subject to such restrictions or regulations by Third Parties are referred to as "Third Party Areas" and communications equipment may not be built without permission from the Third Party or Third Parties that have property rights or regulatory authority over a specific Third Party Area. Wireless Provider's right to use any Use Areas shall be suspended, but not its obligations with respect thereto, during any period that a Third Party Permission is not in effect.

3. DURATION; EXTENSIONS.

3.1 Term. The original term of each License Agreement shall be for a period of ten (10) years commencing on the effective date stated therein ("Initial Term"). The Term of any associated Encroachment Permits issued to Wireless Provider shall be the same as Wireless Provider's approved License Agreement.

3.2 Extensions. The term of the License Agreement may be extended for one (1) additional ten (10) year period ("Extension Term") subject to consent by Town and Wireless Provider, which either may withhold in its sole and absolute discretion. Both Town and Wireless Provider shall be deemed to have elected to extend unless Town or Wireless Provider, respectively, gives notice to the contrary to the other at least ninety (90) days prior to the end of the initial Term.

3.3 Holding Over. In any circumstance whereby Wireless Provider would remain in possession or occupancy of the Use Areas after the expiration of this License Agreement (as extended, if applicable), such holding over shall not be deemed to operate as a renewal or extension of the License Agreement or Encroachment Permits, but shall only create a use right from month to month that may be terminated at any time by Town upon thirty (30) days' notice to Wireless Provider, or by Wireless Provider upon sixty (60) days' notice to Town.

3.4 Town's Right to Cancel. Notwithstanding anything contained herein to the contrary, Town shall have the unconditional right, with or without cause, to terminate any Encroachment Permit for reasons including but not limited to street widening, Right-of-way abandonment, or development that may impact the location of the site, upon one hundred eighty (180) days' prior written notice given at any time after the first one hundred eighty (180) days.

3.5 Wireless Provider's Right to Cancel. Wireless Provider shall have the unilateral right to terminate any License Agreement without cause upon thirty (30) days' prior written notice. Wireless Provider has no right to terminate any time after an event of default by Wireless Provider has occurred (or an event has occurred that would become a default after passage of time or giving of notice).

3.6 Removal and Restoration Obligations. Upon expiration or termination of any License Agreement or Encroachment Permit, or any abandonment of any Wireless Facilities, Wireless Provider shall remove its Wireless Facilities from the Right-of-way, at is sole cost and expense as provided in Section 12.4 hereto.

4. WIRELESS PROVIDER'S PAYMENTS.

Wireless Provider shall make payments to Town as follows:

4.1 Use Fee Items. Wireless Provider shall pay to Town each of the following separate and cumulative amounts (collectively the "Use Fees"):

4.1.1 An annual amount (the "Base Use Fee").

4.1.2 An amount (the "Application Fee") based on Wireless Provider's application and permit review and other costs as set out below.

4.1.3 An amount (the "Violation Use Fee") based on certain breaches by Wireless Provider of the License Agreement as set out below.

4.1.4 All other amounts required by the License Agreement.

4.2 Base Use Fee Amount. The amount of Base Use Fee Wireless Provider shall pay to Town for each year of this Agreement shall be the total of all applicable fee line items for wireless communications facilities (including without limitation "antenna base fee" and "ground equipment fee", as applicable) as set out in the then current fee schedule as it may be amended from time to time by Town's town council.

4.3 Application Fee Amount. The amount of the Application Fee for Small Wireless Facilities under A.R.S. § 9-592 shall be Seven Hundred Fifty Dollars ($750.00) and the Application Fee for wireless sites under A.R.S. § 9-594 shall be One Thousand Dollars ($1000.00). Nothing herein shall prevent the Town from charging any other applicable fees ordinarily charged by the Town for review of plans, issuance of permits, and inspection of Wireless Provider's work upon the Use Areas (including, without limitation, encroachment permits, traffic control fees, technology fees) as set out in the then current fee schedule as it may be amended from time to time by Town's town council.

4.4 Use Fees Cumulative. All items of Use Fees shall be cumulative and separate from each other.

4.5 Use Fee Schedule. Provider shall pay all Use Fees at the times and in the amounts specified by Town's normal processes. Town's failure to collect

any item of the Use Fees does not waive Wireless Provider's liability for such Use Fee, nor shall such failure be deemed a waiver by the Town to collect such Use Fee thereafter.

4.6 Letter of Credit. The Initial Letter of Credit amount shall be based upon the Wireless Provider's good faith projection of the number of sites to be constructed within the Town of Fountain Hills during the current calendar year. The Initial Letter of Credit shall be received by the Town before any construction and encroachment permits are issued as follows:

4.6.1 The amount of the letter of credit shall be as follows: Thirty Thousand Dollars ($30,000.00) for up to ten (10) wireless sites; Sixty Thousand Dollars ($60,000) for eleven (11) to twenty (20) wireless sites; One Hundred Five Thousand Dollars ($105,000) for twenty one (21) to thirty five (35) wireless sites; One Hundred Eighty Thousand Dollars ($180,000) for thirty six (36) to sixty (60) wireless sites; Three Hundred Thousand Dollars ($300,000) for sixty one (61) to one hundred (100) wireless sites; Four Hundred Fifty Thousand Dollars ($450,000) for one hundred one (101) to one hundred fifty (150) wireless sites; Six Hundred Seventy Five Thousand Dollars ($675,000) for one hundred fifty one (151) to two hundred twenty five (225) wireless sites; One Million Fifty Thousand Dollars ($1,050,000) for two hundred twenty six (226) to three hundred fifty (350) wireless sites; One Million Five Hundred Thousand Dollars ($1,500,000) for three hundred fifty one (351) to five hundred (500) wireless sites; Two Million Two Hundred Fifty Thousand Dollars ($2,250,000) for five hundred one (501) to seven hundred fifty (750) wireless sites; and Three Million Dollars ($3,000,000) for seven hundred fifty one (751) to one thousand (1,000) wireless sites. If the number of Wireless Provider's wireless sites is more than one thousand (1,000), the Three Million Dollar ($3,000,000) letter of credit shall remain in effect and the letter of credit for the wireless sites in excess of one thousand sites shall be calculated using the schedule provided in this subsection.

4.6.2 The Town will determine at least once annually if the number of Wireless Provider's wireless sites that are licensed require that the letter of credit be upgraded to a higher amount. If Town requires a new letter of credit, it shall provide formal notice in writing to the Wireless Provider. The Wireless Provider must provide the new letter of credit within 45 days of receiving written notice.

4.6.3 The letter of credit is a security deposit for Wireless Provider's performance of all of its obligations under these Terms within the Town of Fountain Hills.

4.6.4 The letter of credit shall meet the requirements listed on Exhibit "B" attached hereto.

4.6.5 Wireless Provider shall provide and maintain the letter of credit during the entire term of the License Agreement as follows:

4.6.5.1 Wireless Provider shall cause the original letter of credit to be delivered to Town's Development Services Director.

4.6.5.2 Wireless Provider shall pay all costs associated with the letter of credit, regardless of the reason or manner such costs are required.

4.6.5.3 Within ten (10) business days after Town gives Wireless Provider notice that Town has drawn on the letter of credit, Wireless Provider shall cause the letter of credit to be replenished to its prior amount.

4.6.6 Town may draw on the letter of credit upon any Event of Default, and in the following circumstances whether or not they are an Event of Default:

4.6.6.1 Wireless Provider fails to cause the letter of credit to be renewed, extended, increased in amount or otherwise maintained as required by these Terms.

4.6.6.2 Wireless Provider fails to make monetary payments as required by these Terms.

4.6.6.3 The issuer of the letter of credit fails to immediately honor a draft on the letter of credit or otherwise repudiates or fails to honor the letter of credit.

4.6.7 Town shall also have such additional rights regarding the letter of credit as may be provided elsewhere in the License Agreement.

4.7 Late Fees. Any fee payable under this Agreement is deemed paid only when Town actually receives good cash payment. Should any fee not be paid on or before the date due, a late fee shall be added to the amount due in the amount of the greater of ten percent (10%) of the amount due, or One Hundred Dollars ($100.00). Furthermore, any fee that is not timely paid shall accrue simple interest at the rate of one and one-half percent (1 ½ %) per month from the date the amount first came due until paid. Wireless Provider expressly agrees that the foregoing represent fair and reasonable estimates by Town and Wireless Provider of Town's costs (such as accounting, administrative, legal and processing costs, etc.) in the event of a delay in payment of the fee. Town shall have the right to allocate payments received from Wireless Provider among Wireless Provider's obligations.

4.8 Fee Amounts Cumulative. All amounts payable by Wireless Provider hereunder or under any tax, assessment or other existing or future ordinance, law or other contract or obligations to the Town of Fountain Hills or the State of Arizona shall be cumulative and payable in addition to each other payment required hereunder, and such amounts shall not be credited toward, substituted for, or setoff against each other in any manner.

5. USE RESTRICTIONS.

Wireless Provider's use and occupation of the Use Areas shall in all respects conform to all and each of the following cumulative provisions:

5.1 Permitted Uses. Wireless Provider shall use the Use Areas solely for the Permitted Uses and shall conduct no other activity at or from the Use Areas without Town's prior written consent, which may be withheld in Town's sole and absolute discretion.

5.2 Enclosure Use. Wireless Provider shall use the Enclosure solely for locating utility cabinets and housing the Communications Equipment used for the Antennas.

5.3 Small Wireless Facility. Wireless Provider may install a Small Wireless Facility, as defined in A.R.S. 9-591(19), to be limited to:

5.3.1 All antennas, including the antenna's exposed elements, are located inside an enclosure of not more than six (6) cubic feet in volume, and

5.3.2 All other wireless equipment associated with the facility is cumulatively not more than twenty-eight (28) cubic feet in volume.

5.3.3. The following ancillary equipment is not included in the equipment volume: electric meter, concealment elements, telecom demarcation box, grounding equipment, power transfer switch, cutoff switch, and vertical cable runs.

5.4 Communications Operations Restriction. Pursuant to A.R.S. 9-592(F)(3), Wireless Provider shall not install, operate, or allow the use of equipment, methodology or technology that interferes or is likely to interfere with the optimum effective use or operation of Town's existing or future fire, emergency or other communications equipment, methodology or technology (i.e., voice or other data carrying, receiving or transmitting equipment). If such interference should occur, Wireless Provider shall immediately discontinue using the equipment, methodology or technology that causes the interference until Wireless Provider takes corrective measures to alter the Communications Equipment to eliminate such interference. Any such corrective measures shall be made at no cost to Town. Wireless Provider shall give to Town advance written notice containing a list of the radio frequencies Wireless Provider is

using at the Use Areas and shall give advance written notice to Town of any change in frequencies.

5.5 Other Equipment. Wireless Provider shall not disturb or otherwise interfere with any other antennas or other equipment Town or an authorized third party may have already installed or may yet install upon the Street Parcel.

5.6 Signs. All signage is prohibited except in compliance with the following requirements:

5.6.1 Wireless Provider shall install and thereafter maintain the following signs and other markings as reasonably determined by Town from time to time:

5.6.1.1 All signs and markings required for safe use of the Use Areas by Town, Wireless Provider and other persons who may be at the Use Areas at any time for any reason.

5.6.1.2 Any signage Town may request directing parking, deliveries and other vehicles and other users to comply with this License Agreement.

5.6.1.3 Warning signs listing only Wireless Provider's name, permanent business address, telephone number, emergency telephone number, and any information required by law.

5.6.2 All signage not expressly allowed by these Terms is prohibited.

5.6.3 The location, size, content and style of each sign shall be subject to the provisions of the applicable sign ordinance and shall comply with Town's sign programs as the same may change from time to time. Wireless Provider shall update signs, at Wireless Provider's sole cost and expense, as required to comply with changes in the applicable sign ordinance and Town's sign programs.

5.6.4 Wireless Provider shall design, make, install and maintain all signage in a first class, professional manner without broken panels, faded or peeling paint or other damage. Town reserves the right to require Wireless Provider to install, at Wireless Provider's cost, new or updated signage if the existing signage is not compliant with this Agreement.

5.6.5 Wireless Provider shall bear all costs pertaining to the erection, installation, operation, maintenance, replacement and removal of all signs including, but not limited to, the application for

and obtaining of any required sign, building or other permits regardless of the reason for any such activity, even if such activity is required by Town pursuant to these Terms.

5.6.6 The requirements of this paragraph apply to all signs, designs, monuments, decals, graphics, posters, banners, markings, and other manner of signage.

5.7 Wireless Provider's Lighting. Except for security lighting temporarily operated with Town's approval from time to time, Wireless Provider shall not operate outdoor lights at the Use Areas.

5.8 Noise. Except during construction permitted under the License Agreement and for burglar alarms and other safety devices, outdoor loud speakers, sirens or other devices for making noise are prohibited. All equipment shall be operated so that sound coming therefrom is compliant with Section 11-1-7 of the Town Code and does not exceed the ambient noise level at the boundary of the Street Parcel. The preceding sentence does not apply to use of normal, properly maintained construction equipment used as permitted by the approved License Agreement or permit issued to Wireless Provider by the Town, to infrequent use of equipment that is as quiet or quieter than a typical well maintained gasoline powered passenger automobile, to use of an air conditioning unit that is no noisier than a typical well maintained residential air conditioning unit.

5.9 Limited Access. It is Wireless Provider's and not Town's responsibility to keep unauthorized persons from accessing the Communications Equipment and the Exclusive Areas.

5.10 Standards of Service. Wireless Provider shall operate the Use Areas in a first-class manner, and shall keep the Use Areas attractively maintained, orderly, clean, neat and tidy at all times. Wireless Provider shall not allow any person or persons in or about the Use Areas related to Wireless Provider's operations who shall fail to be clean, courteous, efficient and neat in appearance.

5.11 Wireless Provider's Agent. Wireless Provider shall at all times retain on call available to Town by telephone an active, qualified, competent and experienced person to supervise all activities upon the Use Areas and operation of the Communications Equipment. Wireless Provider's agent shall be authorized to represent and act for Wireless Provider in matters pertaining to all emergencies and the day-to-day operation of the Right-of-way and all other matters affecting a License Agreement or Encroachment Permit. Wireless Provider shall also provide notice to Town of the name, street address, electronic mail address, and regular and afterhours telephone number of a person to handle Wireless Provider's affairs and emergencies at the Right-of-way. Any change shall be given in writing to Town's Development Services Director in the manner stated for notices required herein.

5.12 Coordination Meetings. Wireless Provider shall meet with Town and other Right-of-way users from time to time as requested by Town to coordinate and plan construction on the Use Areas and all matters affected by these Terms.

5.13 Toxic Substances. Wireless Provider's activities upon or about the Use Areas shall be subject to the following regarding any hazardous or toxic substances, waste or materials or any substance now or hereafter subject to regulation under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601, et seq., the Arizona Hazardous Waste Management Act, A.R.S. §§ 49-901, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, et seq., the Toxic Substances Control Act, 15 U.S.C. §§ 2601, et seq., or any other federal, state, county, or local law pertaining to hazardous substances, waste or toxic substances and their reporting requirements (collectively "Toxic Substances"):

5.13.1 Wireless Provider understands the hazards presented to persons, property and the environment by dealing with Toxic Substances. Town has made no warranties as to whether the Use Areas contain actual or presumed asbestos or other Toxic Substances.

5.13.2 Within twenty-four (24) hours after discovery by Wireless Provider of any Toxic Substances, Wireless Provider shall report such Toxic Substances to Town in writing. Within fourteen (14) days thereafter, Wireless Provider shall provide Town with a written report of the nature and extent of such toxic substances found by Wireless Provider.

5.13.3 Disturbance of Toxic Substances. Prior to undertaking any construction or other significant work, Wireless Provider shall cause the Use Areas to be inspected to prevent disturbance of potential asbestos or other Toxic Substances. Prior to any work of any description that bears a material risk of disturbing potential asbestos or other Toxic Substances, Wireless Provider shall cause the contractor or other person performing such work to give to Town written notice by the method described in these Terms to the effect that the person will inspect for Toxic Substances, will not disturb Toxic Substances, and will indemnify, defend and hold Town harmless against any disturbance in Toxic Substances in the course of the contractor's or other person's work. Wireless Provider shall cause any on-site or off-site storage, inspection, treatment, transportation, disposal, handling, or other work involving Toxic Substances by Wireless Provider in connection with the Use Areas to be performed by persons, equipment, facilities and other resources who are at all times properly and lawfully trained, authorized, licensed, permitted and otherwise qualified to perform such services. Wireless Provider shall promptly deliver to Town

copies of all reports or other information regarding Toxic Substances.

5.14 Required Operation. During the entire term of the License Agreement and associated Encroachment Permit(s), and any renewals or extensions thereof, Wireless Provider shall actively and continuously operate the Communications Equipment twenty-four (24) hours per day, seven (7) days per week, for the Permitted Uses. Notwithstanding anything contained in this paragraph to the contrary, the operation requirements of this paragraph shall be effective commencing on the completion of the Project and shall continue through the date the License Agreement terminates or expires for any reason. In the event of relocation of the Communications Equipment or damage to the Use Areas severe enough that the Communications Equipment cannot reasonably be operated during repairs, the operation requirements of this paragraph shall be suspended during the time specified by these Terms for accomplishing repair of such damage or relocation of the Communications Equipment. Wireless Provider may temporarily cease operating the Communications Equipment for short periods necessary to test, repair, service or upgrade the Communications Equipment. Notwithstanding the foregoing to the contrary, any suspension in operations, whether or not authorized pursuant to the License Agreement, shall not serve to extend any Term of the License Agreement.

5.15 Actions by Others. Wireless Provider shall be responsible to ensure compliance with the License Agreement by all persons using the Right-of-way through or under Wireless Provider.

6. WIRELESS PROVIDER'S IMPROVEMENTS.

All of Wireless Provider's improvements and other construction work whether or not specifically described herein upon or related to the Use Areas (collectively "Wireless Provider's Improvements") shall comply with the following:

6.1 Wireless Provider's Improvements. Wireless Provider's Improvements include without limitation, all modification, replacement, repairs, installation, construction, grading, structural, utility, lighting, plumbing, sewer or other alterations, parking or traffic alterations, removal, demolition or other cumulatively significant construction or similar work of any description and all installation or alteration of the Communications Equipment.

6.2 Zoning and Similar Approval Process. The zoning processes, building permit processes, Right-of-way management policies and similar regulatory requirements that apply to Wireless Provider's Improvements are completely separate from the plans approval processes set forth in these Terms. Wireless Provider's satisfaction of any requirement set forth these Terms does not substitute for compliance with any regulatory requirement. Wireless Provider's satisfaction of any regulatory requirement does not substitute for compliance with any requirement of these Terms. Wireless Provider must make all

submittals and communications regarding the requirements of these Terms through Town's Development Services Director and not through other staff. Wireless Provider shall be responsible to directly obtain all necessary permits and approvals from any and all governmental or other entities having standing or jurisdiction over the Use Areas. Wireless Provider bears sole responsibility to comply with all stipulations and conditions that are required in order to secure such rezoning and other approvals. Notwithstanding anything in this paragraph to the contrary, to the extent regulatory requirements and requirements of these Terms are identical, compliance with regulatory requirements shall constitute compliance with these Terms and vice versa.

6.2.1 Batching Sites for Approval. Only sites that do not have a new or a replacement pole required for the antennas, and do not have any underground cables, conduit, and foundations, are eligible for batch processing of the applications.

6.3 Relationship of Plans Approval to Regulatory Processes. Wireless Provider's submission of plans under these Terms, Town's approval of plans for purposes of these Terms, and the plans approval process herein shall be separate and independent of all development, zoning, design review and other regulatory or similar plans submittal and approval processes, all of which shall continue to apply as provided under state law, in addition to the requirements of these Terms and its approvals. BUILDING PERMITS, ZONING CLEARANCES, OR ANY OTHER GOVERNMENTAL REVIEWS OR ACTIONS DO NOT CONSTITUTE APPROVAL OF ANY PLANS FOR PURPOSES OF THE LICENSE AGREEMENT.

6.4 Town's Fixtures and Property. Wireless Provider shall not remove, alter or damage in any way any improvements or any personal property of Town upon the Use Areas without Town's prior written approval. In all cases, Wireless Provider will repair any damage or other alteration to Town's property caused by Wireless Provider or its contractors, employees or agents to as good or better condition than existed before the damage or alteration.

6.5 Design Requirements. All Wireless Provider's Improvements shall comply with the following design requirements:

6.5.1 All Wireless Provider's Improvements shall be contained entirely within the Use Areas and without any encroachment or dependence upon any other property, except for permitted utility service.

6.5.2 Any changes to utility facilities shall be strictly limited to the Use Areas, shall not affect utilities used by Town or any authorized users thereof, and shall be undertaken by Wireless Provider at its sole cost and expense.

6.5.3 The Antennas and other Communications Equipment shall be properly designed, installed and maintained so as not to create a

risk of damage to the Pole, to persons or property upon or using the Street Parcel or Town's other property.

6.5.4 To the extent requested by Town, Wireless Provider's plans shall include a description of construction methods employed to address environmental issues affecting or affected by the Use Areas and protect other facilities at the Street Parcel and surrounding properties.

6.5.5 All specifications set forth in the Town of Fountain Hills's Design Standards for Small Wireless Facilities in the Right-of-Way, attached here to as Exhibit "A."

6.6 Approval Required. Wireless Provider shall not construct any Wireless Provider's Improvements (including work on adjacent public lands, if applicable) without having first received an executed License Agreement, written plans approval from Town and any and all permits deemed necessary by the Town. Such consent requirement shall apply to all improvements, furnishings, equipment, fixtures, paint, wall treatments, utilities of every description, communications cabling and other construction work of any description as described in all plans heretofore or hereafter delivered by Wireless Provider to Town. Such consent requirement does not apply to work to the Communications Equipment confined completely inside the Enclosure and not visible, audible, or otherwise discernible outside the Enclosure.

6.7 Effect of Plans Approval. Wireless Provider shall submit engineering and construction plans to the Town for review and approval. Town's approval of plans submitted shall be for purposes of these Terms only and shall constitute irrevocable approval (but only at the level of detail of the applicable stage of the review process) of the matters plainly shown on the plans approved. Town shall not reject subsequent plans to the extent the matter to which Town objects was plainly shown on plans previously approved by Town. However, Town is not precluded from objecting to matters not previously approved, changes to plans, matters not previously clearly disclosed on approved plans, or refinements or implementation of matters previously approved.

6.8 Plans Required. Wireless Provider's design of all Wireless Provider's Improvements shall occur in three stages culminating in final working construction documents for the Wireless Provider's Improvements (the "Final Plans"). The three stages are, in order of submission and in increasing order of detail, as follows:

6.8.1 Conceptual plans showing the general layout, locations, elevations, configuration, and capacities of all significant improvements, topographical features, pedestrian and vehicular ways, buildings, utilities, and other features significantly affecting the appearance, design, function or operation of each element of Wireless Provider's Improvements.

6.8.2 Preliminary plans showing all surface finishes and treatments, finished elevations, general internal and external design (including without limitation colors, textures and materials), mechanical, communications, electrical, plumbing and other utility systems, building materials, landscaping and all other elements necessary prior to preparation of final working construction documents and showing compliance with all requirements of these Terms. The preliminary plans shall show all detail necessary prior to preparation of Final Plans.

6.8.3 Final Plans. In addition to the information that Town required for Preliminary plans, the Final Plans shall include a title report for the Use Area and the Shared Use Area, engineering design documents for the pole foundation, pole structural design, and other generally required engineering specifications for construction drawings or "CD" plans for permits.

6.9 Approval Process. The following procedure shall govern Wireless Provider's submission to Town of all plans for Wireless Provider's Improvements, including any proposed changes by Wireless Provider to previously approved plans:

6.9.1 All plans Wireless Provider submits under these Terms shall show design, appearance, capacity, views, and other information reasonably deemed necessary by Town for a complete understanding of the work proposed, all in detail reasonably deemed appropriate by Town for the level of plans required herein.

6.9.2 Wireless Provider shall deliver all plans submissions for non-regulatory approvals required herein directly to Town's Development Services Director and shall clearly label the submissions to indicate that they are submitted pursuant to the Terms and not for building permits, zoning or other approvals. Each submittal of plans by Wireless Provider for Town's review shall include five (5) complete sets of the plans on paper and, if requested, two (2) copies of the plans in electronic form.

6.9.3 All construction plans shall be prepared by qualified registered professional engineers.

6.9.4 Town and Wireless Provider shall endeavor to resolve design and construction issues to their mutual satisfaction but, in the event of an impasse for any reason or however arising, in light of Town's ownership and other uses of the Use Areas, and as a condition of Town's entering into a License Agreement or issuing an Encroachment Permit, final decision authority regarding all design and construction issues shall rest with Town.

6.9.5 All Wireless Provider's Improvements shall comply with all requirements of law, any applicable insurance contracts and these Terms.

6.10 Cost of Wireless Provider Improvements. All Wireless Provider's Improvements shall be designed and constructed by Wireless Provider at Wireless Provider's sole cost and expense, including without limitation any alteration or other change to Town's equipment or other improvements or property that may occur. In no event shall Town be obligated to compensate Wireless Provider in any manner for any of Wireless Provider's Improvements or other work provided by Wireless Provider during or related to the term of any approved License Agreement and Encroachment Permit(s). Wireless Provider shall timely pay for all labor, materials, work, and all professional and other services related thereto and shall pay, protect, indemnify, defend and hold harmless Town and Town's employees, officers, contractors and agents against all claims related to such items. Wireless Provider shall bear the cost of all work required from time to time to cause the Use Areas and Town's adjoining property (if directly affected by Wireless Provider's work) to comply with local zoning rules, the Americans with Disabilities Act, building codes and all similar rules, regulations and other laws if such work is required because of work performed by Wireless Provider, by Wireless Provider's use of the Use Areas, or by any exercise of the rights granted to Wireless Provider under this License Agreement or associated Encroachment Permit(s).

6.11 Improvement Quality. Any and all work performed on the Use Areas by Wireless Provider shall be performed in a workman-like manner meeting or exceeding the best practices of similar facilities in Maricopa County, Arizona, and shall be diligently pursued to completion and in conformance with all building codes and similar rules. All of Wireless Provider's Improvements shall be high quality, safe, fire resistant, modern in design, and attractive in appearance, all as approved by Town through the plans approval processes described in these Terms in addition to any zoning, building code or other regulatory processes that may apply.

6.12 Ownership of Wireless Provider's Improvements. All Wireless Provider's Improvements (including without limitation poles and lights) except the Communications Equipment shall be and become part of the real property of Town as the same is constructed or installed.

6.13 Damage During Work. Upon performing any work upon the Right-of-way, Wireless Provider shall simultaneously restore the Right-of-way to its prior condition, as directed by Town and repair any holes, mounting surfaces or other damage whatsoever to the Right-of-way. Such work shall include revegetation and appropriate irrigation systems for revegetated areas.

6.14 Replacement Pole. If Town approves a Wireless Provider proposal to install Antennas on a Town owned pole, then in addition to the other requirements, the following shall apply:

6.12.1 Wireless Provider shall provide and deliver to Town a replacement pole, including mast arm, so that a replacement is immediately available to Town in case the original pole is damaged.

6.12.2 If Town uses a replacement pole, then Wireless Provider shall provide another replacement pole.

6.12.3 Upon installation of a replacement pole, the Town will determine if the original pole, mast arm(s), signal head(s), and light fixture(s) shall be delivered by Wireless Provider to the Town's Corporation Yard or if the Wireless Provider shall dispose of the original pole, mast arm, signal head and light fixture.

6.12.4 All performance under this paragraph shall be at Wireless Provider's expense. Town owns the original pole and all replacement poles.

6.15 Coordination with Encroachment Permit. The Street Parcel is located in Town's public street Right-of-way. Wireless Provider shall obtain encroachment permits at Wireless Provider's expense as follows:

6.15.1 Wireless Provider shall perform no construction work in the Right-of-way without obtaining from Town a permit giving permission to work in the Right-of-way.

6.15.2 Wireless Provider shall not alter or modify its antennas, wireless equipment or any improvements without submitting plans or drawings of the proposed alteration or modification to Town and obtaining approval from Town's Development Services Director.

6.15.3 Wireless Provider shall not perform any work on its own antennas or wireless equipment without first obtaining from Town an encroachment permit giving it permission to work in the Right-of-way.

6.15.4 Wireless Provider shall not in any way obstruct pedestrian or vehicular traffic within the Right-of-way without first obtaining from Town a permit giving permission to obstruct traffic.

6.16 Time for Completion. Wireless Provider shall diligently and expeditiously pursue to completion the construction of all approved Wireless Provider's Improvements. Wireless Provider shall complete construction of all Wireless Provider's Improvements no later than one hundred eighty (180) days of permit issuance unless Town and Wireless Provider agree to extend this period or a delay is caused by a lack of commercial power at the site. If Town, in its sole examination of the construction activity at a site, determines that Wireless Provider has not substantially performed construction at a site within one hundred eighty (180) days of the permit issuance date, Town may require the Wireless Provider to cease construction and resubmit the site for approval.

6.17 Construction Notification. Town may establish requirements for notification of nearby residents and property owners prior to construction.

6.18 Work Time and Manner Restrictions. All installation, construction, maintenance, inspection, repair and other work of any kind shall be done in a manner that does not disrupt traffic (except in compliance with appropriate permits) or nearby land uses. Without limitation, such work shall be done in compliance with applicable Town policies and directions from time to time, taking into account the various sensitivities of traffic, tourism, events, adjoining land uses, other Right-of-way uses, and all other needs and concerns that are likely to be affected by Wireless Provider's work.

7. RF SAFETY FOR TOWN'S EMPLOYEES.

Prior to performing any work on a wireless site in the Right-of-way, an employee or authorized agent of the Town will contact Wireless Provider's Network Operations Center (the NOC") whose information shall be located on the ground equipment or on the pole. The Town's employee or agent shall identify himself or herself as an employee or agent of Town and the need for the RF to be turned off at the site for a specified period to perform maintenance or repair work at the site. Upon completion of the work, the Town's employee shall contact the NOC and inform them that the site may activate the RF signals.

Furthermore, as Town's employees, agents, and representatives must have uninterrupted and safe access to the Right-of-way and all structures located thereon, Wireless Provider must comply with at least one of the following safety protocols:

7.1 Provide access to a "kill switch" for each wireless site that the Town's employees, agents, or representatives can use to turn off all power to the Wireless Provider's Facilities while Town's work is performed at the location.

7.2 Within 24 hours of a request, agree to send a technician with an RF monitor to confirm that all RF emitting equipment has, in fact, been deactivated, and to install all appropriate lockout tags and devices.

8. MAINTENANCE AND UTILITIES.

Except as expressly provided below, Wireless Provider shall be solely responsible for all maintenance, repair and utilities for the Use Areas during the term of an approved License Agreement and associated Encroachment Permit(s). Without limitation, Wireless Provider shall perform the following:

8.1 Maintenance by Town. Town has no maintenance or repair obligations for the Communications Equipment or other Wireless Provider's Improvements.

8.2 Maintenance by Wireless Provider. Wireless Provider shall at all times repair and maintain the Use Areas at Wireless Provider's sole expense in a first-class, sound, clean, safe and attractive manner, meeting or exceeding the manner of maintenance at first class comparable facilities in Maricopa County, Arizona, as determined in Town's reasonable discretion. The preceding sentence does not require Wireless Provider to repair or maintain Town's facilities at the Use Area unless such work is attributable in whole or in part to Wireless Provider's use of the Use Areas.

8.3 Utility Service. Wireless Provider shall contract for and pay all charges, fees, deposits and other amounts for electricity and telephone and other data communication service to the Use Areas at the rates applicable thereto. Wireless Provider shall use no other utilities at the Use Areas, unless otherwise authorized by Town.

8.4 Utility Interruptions. Town is not responsible for any interruption of utilities to or upon the Use Areas or other difficulties related to utilities at the Use Areas.

8.5 Right of Inspection. Town shall be entitled to inspect all construction, reconstruction or installation work and to make such tests as it deems necessary to ensure compliance with the terms herein and any applicable laws and regulations. All Town plans reviews, inspections, standards and other rights and actions with relation to Wireless Provider's Improvements are for Town's sole and exclusive benefit and neither Wireless Provider nor any other person shall rely thereon or have any rights related thereto. The preceding sentence does not prevent Wireless Provider from relying on consents, permits or approvals Town may grant based on Town's plans, reviews, and inspections. This right of access is in addition to access rights for Town inspectors or other employees and officers acting within their legal authority.

8.6 Construction Notification. Town may establish requirements for Wireless Provider to notify nearby residents prior to construction.

8.7 Blue Stake. Wireless Provider shall register with and comply with the local Blue Stake program.

9. BREACH BY WIRELESS PROVIDER.

Wireless Provider shall comply with, perform and do each obligation required of Wireless Provider herein and shall cause all persons using the Use Areas through or under Wireless Provider or these Terms to do the same. Wireless Provider's failure to do so shall be a material breach by Wireless Provider of these Terms.

9.1 Events of Default. All License Agreements and Encroachment Permits are approved upon the condition that each and every one of the following events herein shall be deemed an "Event of Default" by Wireless Provider of Wireless Provider's material obligations under these Terms:

9.1.1 If Wireless Provider shall be in arrears in the payment of Use Fee and shall not cure such arrearage within ten (10) days after Town has notified Wireless Provider of such arrearage.

9.1.2 If Wireless Provider shall fail to operate the Communications Equipment (except during specific periods expressly excused herein) for a period of five (5) consecutive days or a total of thirty (30) days within any twelve (12) month period.

9.1.3 If Wireless Provider shall fail to maintain any insurance required under these Terms. Notwithstanding the preceding sentence, such failure shall not be a default if, within ten (10) days after notice from Town, Wireless Provider provides to Town the required insurance and the required evidence thereof. Such insurance must cover the past for a period adequate that there is no gap in the insurance coverage required by these Terms.

9.1.4 If the Wireless Provider's right to use a Utility Pole expires or is terminated for any reason.

9.1.5 If Wireless Provider does not commence and diligently pursue to completion each required stage of construction of the site within the times required herein. The times specified for concluding each stage of required construction have been established far enough in advance, and have taken into account the likelihood of construction delays, so that no cure period is provided.

9.1.6 If Wireless Provider shall be the subject of a voluntary or involuntary bankruptcy, receivership, insolvency or similar proceeding or if any assignment of any of Wireless Provider's or such other person's property shall be made for the benefit of creditors or if Wireless Provider or such other person dies or is not regularly paying its debts as they come due (collectively a "Wireless Provider Insolvency").

9.1.7 If the issuer of any letter of credit shall fail for any reason to timely and fully honor any request by Town for funds or other performance under the instrument and Wireless Provider fails to cause the issuer, or some other person, to honor the request within ten (10) days after Town notifies Wireless Provider that such request has not been honored.

9.1.8 If Wireless Provider shall fail to obtain or maintain any licenses, permits, or other governmental approvals pertaining to the Right-of-way or timely pay any taxes pertaining to the Right-of-way and does not cure such failure within thirty (30) days.

9.1.9 If Town shall be exposed to any liability, obligation, damage, cost, expense, or other claim of any description, whether or not asserted, unless Wireless Provider gives immediate notice to Town of Wireless Provider's commitment to indemnify, defend and hold Town harmless against such claim, and Wireless Provider does in fact promptly commence and continue to indemnify, defend and hold Town harmless against such claim.

9.1.10 If Wireless Provider shall fail to meet its obligations under the RF Safety Paragraph.

9.1.11 If Wireless Provider shall engage in a pattern of repeated failure (or neglect) to timely do or perform or observe any provision contained herein. After Town has once given notice of any failure by Wireless Provider to comply with its obligations set forth in these Terms, the following shall constitute a repeated failure by Wireless Provider to comply with such provision:

h. 9.1.11.1 Another failure to comply with any provision of these Terms during the following thirty (30) day period.

i. 9.1.11.2 Three (3) or more failures to comply with any provision of these Terms during any ninety (90) day period.

j. 9.1.11.3 Six (6) or more failures to comply with any provision of these Terms during any twelve (12) month period.

9.1.12 If Wireless Provider shall fail to or neglect to timely and completely do or perform or observe any other provisions herein and such failure or neglect shall continue for a period of thirty (30) days after Town has notified Wireless Provider in writing of such failure or neglect.

9.2 Town's Remedies. Upon the occurrence of any Event of Default or at any time thereafter, Town may, at its option and from time to time, exercise at Wireless Provider's expense any or all or any combination of the following cumulative remedies in any order and repetitively at Town's option:

9.2.1 Terminate the License Agreement or any or all Encroachment Permits due to Wireless Provider's breach or for any other reason, however, such termination does not terminate Wireless Provider's obligations arising during the time simultaneous with or prior to or the termination, and in no way terminates any of Wireless Provider's liability related to any breach of these Terms.

9.2.2 Pay or perform, for Wireless Provider's account, in Wireless Provider's name, and at Wireless Provider's expense, any or all payments or performances required hereunder to be paid or performed by Wireless Provider.

9.2.3 Abate at Wireless Provider's expense any violation of these Terms.

9.2.4 Notwithstanding anything under these Terms to the contrary, unilaterally and without Wireless Provider's or any other person's consent or approval, draw upon, withdraw or otherwise realize upon or obtain the value of any letter of credit, escrowed funds, insurance policies, or other deposits, sureties, bonds or other funds or security held by Town or pledged or otherwise obligated to Town by Wireless Provider or by any third party (whether or not specifically mentioned herein) and use the proceeds for any remedy permitted by these Terms.

9.2.5 Require an additional security deposit adequate in Town's sole discretion to protect Town and the Right-of-way.

9.2.6 Require that the Wireless Provider remedy any and all violations and pay any and all outstanding fees in full (before accepting applications for new Encroachment Permits).

9.2.7 Assert, exercise or otherwise pursue at Wireless Provider's expense any and all other rights or remedies, legal or equitable, to which Town may be entitled, subject only to the limitation set out below on Town's ability to collect money damages in light of the Violation Use Fee.

9.3 Violation Use Fee. Wireless Provider and Town agree that Wireless Provider's failure to comply with the provisions herein will result in damages to Town, including but not limited to expenses related to administrative costs, staff time, field work and inspections, legal services, etc. Wireless Provider's failure to comply with the provisions herein will result in damages in an amount that is and will be impracticable to determine. Therefore, the parties have agreed that Wireless Provider shall pay the Violation Use Fee set out below in accordance with the following (the "Violation Fee Provisions"):

9.3.1 Violation Use Fee is only intended to remedy damages that Town suffers because of Wireless Provider's breach of this Agreement. Wireless Provider's payment of Violation Use Fee does not in any way excuse any breach by Wireless Provider of these Terms or limit in any way Town's obtaining any other legal or equitable remedy provided by these Terms or otherwise for such breach. For example, Wireless Provider's obligation to pay Violation Use Fee does not in any way detract from Wireless Provider's indemnity and insurance obligations under these Terms, which shall apply according to their terms in addition to Wireless Provider's obligation to pay Violation Use Fee.

9.3.2 Town may elect to draw upon the letter of credit to collect the Violation Use Fee.

9.3.3 The Violation Fee Provisions and the amount of the Violation Use Fee per day or part thereof are as follows:

9.3.3.1 The amount of Six Hundred Dollars ($600.00) per day for Wireless Provider's failure to properly restore the public Right-of-way or to correct related violations of specifications, code, ordinance or standards within ten (10) business days after Town's notice to correct such defects. Such Violation Use Fee shall be in addition to any cost the Town may incur to restore the Right-of-way or correct the violation.

9.3.3.2 The amount of Five Hundred Dollars ($500.00) per instance of any other action or non-action by the Wireless Provider contrary to these Terms herein and that is not cured after three (3) business days' notice.

9.3.4 Violation Use Fees shall be assessed as follows:

9.3.4.1 If Town determines that Wireless Provider is liable for Violation Use Fee, then Town shall issue to Wireless Provider a notice of Town's assessing a Violation Use Fee. The notice shall set forth the nature of the violation and the amount of the assessment.

9.3.4.2 Wireless Provider shall pay the Violation Use Fee within ten (10) days after Town's notice. However, if the Violation Use Fee amount exceeds Five Thousand Dollars ($5,000), then the following shall apply:

9.3.4.2.1 Wireless Provider shall have thirty (30) days after the notice to pay the Violation Use Fee or give Town notice contesting the assertion of noncompliance.

9.4 Reimbursement of Town's Expenses. Wireless Provider shall pay to Town within thirty (30) days after Town's demand any and all amounts expended or incurred by Town in performing Wireless Provider's obligations (upon Wireless Provider's failure to perform the same after notice from Town) together with interest thereon at the rate of twelve percent (12%) per annum from the date expended or incurred by Town.

10. BREACH BY TOWN.

Notwithstanding anything in these Terms to the contrary, if Town at any time is required to pay to Wireless Provider any amount or render any performance, such amount or performance is not due until thirty (30) days after notice by Wireless Provider to Town that the amount has become payable or that the performance is due. In the event a cure cannot be effected during that period, Town shall not be in default so long as Town commences cure during the period and diligently prosecutes the cure to completion provided such cure must be completed within sixty (60) days after the notice.

10.1 Right to Setoff and Credit. In addition to its other rights and remedies Town shall have the right to setoff and credit from time to time and at any time, any and all amounts due from Wireless Provider to Town, whether pursuant to these Terms herein or otherwise, against any sum which may be due from Town to Wireless Provider.

11. NON-WAIVER.

Wireless Provider acknowledges Wireless Provider's unconditional obligation to comply with these Terms herein. No failure by Town to demand any performance required of Wireless Provider under these Terms herein, and no acceptance by Town of any imperfect or partial performances under these Terms herein, shall excuse such performance or impair in any way Town's ability to insist, prospectively and retroactively, upon full compliance with these Terms herein. No acceptance by Town of Use Fee payments or other performances hereunder shall be deemed a compromise or settlement of any right Town may have for additional, different or further payments or performances as provided for in these Terms. Any waiver by Town of any breach of condition or covenant herein contained to be kept and performed by Wireless Provider shall not be deemed or considered as a continuing waiver and shall not operate to bar or otherwise prevent Town from declaring a default for any breach or succeeding or continuing breach either of the same condition or covenant or otherwise. No statement, bill or notice by Town or Wireless Provider concerning payments or other performances due hereunder, or failure by Town to demand any performance hereunder, shall excuse Wireless Provider from compliance with its obligations nor estop Town (or otherwise impair Town's ability) to at any time correct such notice and/or insist prospectively and retroactively upon full compliance with the License Agreement. No waiver of any description (INCLUDING ANY WAIVER OF THIS SENTENCE OR PARAGRAPH) shall be effective against Town unless made in writing by a duly authorized representative of Town specifically identifying the particular provision being waived and specifically stating the scope of the waiver. WIRELESS PROVIDER EXPRESSLY DISCLAIMS AND SHALL NOT HAVE THE RIGHT TO RELY ON ANY SUPPOSED WAIVER OR OTHER CHANGE OR MODIFICATION, WHETHER BY WORD OR CONDUCT OR OTHERWISE, NOT CONFORMING TO THIS PARAGRAPH.

12. TERMINATION.

The following provisions shall apply at the expiration of the term or earlier termination of each License Agreement and Encroachment Permit:

12.1 Surviving Obligations. Expiration or termination of a License Agreement or Encroachment Permit does not terminate Wireless Provider's obligations existing or arising prior to or simultaneous with, or attributable to, the termination or events leading to or occurring before termination.

12.2 Delivery of Possession. Wireless Provider shall cease using the Use Areas associated with the expired or terminated License Agreement or Encroachment Permit. Wireless Provider shall, without demand, peaceably and quietly quit and deliver up the Use Areas to Town thoroughly cleaned, in good repair with the Use Areas maintained and repaired and in as good order and condition, reasonable use and wear excepted, as the Use Areas now are or in such better condition as the Use Areas may hereafter be placed.

12.3 Confirmation of Termination. Upon expiration or termination of a License Agreement or Encroachment Permit for any reason, Wireless Provider shall provide to Town upon demand recordable disclaimers covering the Use Areas executed and acknowledged by Wireless Provider and by all persons claiming through this License Agreement, Encroachment Permit or Wireless Provider any interest in or right to use the Use Areas.

12.4 Removal of Improvements. Wireless Provider shall remove all Communications Equipment and restore the Use Areas including Utility Pole, mast arms, luminaires, or wireless support structure to its prior condition, or to a condition matching Town's surrounding land and improvements, as directed by Town, at Wireless Provider's expense prior to normal expiration of the term of a License Agreement or Encroachment Permit; or within sixty (60) days after early termination of a License Agreement or Encroachment Permit. Without limitation, such work shall include revegetation and appropriate irrigation systems for revegetated areas. Notwithstanding anything in the License Agreement and these Terms to the contrary, Town may elect to require Wireless Provider to leave any or all construction or other items (except the Communications Equipment) in place, and all such items shall be owned by Town. Unless Town directs otherwise, all wiring, pipes and conduits shall be left in good and safe condition, in working order, with each end properly labeled and enclosed in proper junction boxes.

12.5 Prior Improvements. This article also applies to any improvements that Wireless Provider may have made to the Use Areas.

13. INSURANCE.

During the entire term of any License Agreement or Encroachment Permit, Wireless Provider shall insure its property and activities at and about the Use Areas and shall provide insurance and indemnification as follows:

13.1 Insurance Required. Not later than the date of this License Agreement, and at all times thereafter when Wireless Provider is occupying or using the Use Areas in any way, Wireless Provider shall obtain and cause to be in force and effect the following insurance:

13.1.1 Commercial General Liability. Commercial general liability insurance with a limit of Ten Million and No/100 Dollars ($10,000,000.00) for each occurrence, a limit of Ten Million and No/100 Dollars ($10,000,000.00) for products and completed operations annual aggregate, and a limit of Ten Million and No/100 Dollars ($10,000,000.00) general aggregate limit per policy year. The policy shall cover liability arising from premises, operations, independent contractors, products, completed operations, personal injury, bodily injury, advertising injury, and liability assumed under an "insured contract" including this License Agreement. The policy will cover Wireless Provider's liability under the indemnity provisions set forth in these Terms. The policy shall contain a "separation of insured's" clause.

13.1.2 Automobile Liability. Automobile liability insurance with a limit of One Million Dollars ($1,000,000) for each occurrence covering any and all owned, hired, and non-owned vehicles assigned to or used in any way in connection with Wireless Provider's use of the Right-of-way. Without limitation, such insurance shall cover hazards of motor vehicle use for loading and off loading.

13.1.3 Workers' Compensation. Such workers' compensation and similar insurance as is required by law and employer's liability insurance with a minimum limit of One Hundred Thousand Dollars ($100,000) for each accident, One Hundred Thousand Dollars ($100,000) disease for each employee, Five Hundred Thousand Dollars ($500,000) policy limit for disease. All contractors and subcontractors must provide like insurance.

13.1.4 Special Risk Property. Unless waived by Town in writing, all risk property insurance covering damage to or destruction of all real and personal improvements to the Right-of-way, including without limitation, all improvements existing upon the Right-of-way prior to this License Agreement or hereafter constructed in an amount equal to full replacement cost of all such improvements. Such insurance shall be special causes of loss policy form (minimally including perils of fire, lightning, explosion, windstorm, hail, smoke, aircraft, vehicles, riot, civil commotion, theft, vandalism, malicious mischief, collapse and flood). Coverage shall include pollutant clean up and removal with minimum limits coverage of Fifty-Thousand Dollars ($50,000.00).

13.1.5 Other Insurance. Any other insurance Town may reasonably require for the protection of Town and Town's employees, officials, representatives, officers and agents (all of whom, including Town, are collectively "Additional Insureds"), the Right-of-way, surrounding property, Wireless Provider, or the activities carried on or about the Right-of-way. Such insurance shall be limited to insurance a reasonable person owning, leasing, designing, constructing, occupying, or operating similar facilities might reasonably purchase.

13.2 Policy Limit Escalation. Town may elect by notice to Wireless Provider to increase the amount or type of any insurance to account for inflation, changes in risk, or any other factor that Town reasonably determines to affect the prudent amount of insurance to be provided.

13.3 Form of All Insurance. All insurance provided by Wireless Provider with respect to the Right-of-way, whether required in these Terms or not, shall meet the following requirements:

13.3.1 "Occurrence" coverage is required.

13.3.2 If Wireless Provider uses any excess insurance then such excess insurance shall be "follow form" equal to or broader in coverage than the underlying insurance.

13.3.3 Policies must also cover and insure Wireless Provider's activities relating to the business operations and activities conducted away from the Right-of-way.

13.3.4 Within five (5) business days of receiving a written request from the Town, Wireless Provider shall provide copies of insurance certificates, insurance policies, formal endorsements or other documentation acceptable to Town that all insurance coverage required herein is provided.

13.3.5 Wireless Provider's insurance shall be primary insurance with respect to claims arising out of Wireless Provider's operations, activities and obligations set forth in these Terms.

13.3.6 All policies, including workers' compensation, shall waive transfer rights of recovery (subrogation) against Town, and the other Additional Insureds.

13.3.7 All deductibles, retentions, or "self-insured" amounts shall be subject to the following:

13.3.7.1 Wireless Provider shall be solely responsible for any self-insurance amount or deductible.

13.3.7.2 Such amounts shall not exceed in total One Hundred Thousand Dollars ($100,000.00) per loss. At such times as Wireless Provider's net worth is more than One Hundred Million Dollars ($100,000,000.00), such limit shall be One Million and No/100 Dollars ($1,000,000.00).

13.3.7.3 Any self-insured exposure shall be deemed to be an insured risk under this License Agreement.

13.3.7.4 Wireless Provider shall provide to the beneficiaries of all such amounts no less insurance protection than if such self-insured portion was fully insured by an insurance company of the quality and caliber required hereunder.

13.3.7.5 The right to self-insure is limited and specific to Wireless Provider and does not extend to Wireless Provider's contractors or others.

13.3.8 All policies except workers' compensation must name Town and the other Additional Insureds as additional insureds. Wireless Provider shall cause coverage for Additional Insureds to be incorporated into each insurance policy by endorsement with respect to claims arising out of Wireless Provider's operations, activities and obligations under the License Agreement.

13.3.9 All policies must require the insurer to provide Town with at least thirty (30) days' prior notice of any cancellation. The insurer's duty to notify Town of changes in coverage shall not include phrases such as "endeavor to" or "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives."

13.3.10 All policies shall require that notices be given to Town in the manner specified for notices to Town set forth in the License Agreement and these Terms.

13.4 Insurance Certificates. Wireless Provider shall evidence all insurance by furnishing to Town certificates of insurance annually and with each change in insurance coverage. Certificates must evidence that the policy described by the certificate is in full force and effect and that the policy satisfies each requirement of these Terms applicable to the policy. For example, certificates must evidence that Town and the other Additional Insureds are additional insureds. Certificates must also be in an industry standard form reasonably acceptable to Town. Wireless Provider shall provide updated certificates at Town's request.

13.5 Acceptable Insurers. All insurance policies shall be issued by insurers acceptable to Town. At a minimum, all insurers shall be duly licensed (or

qualified unlicensed non-admitted insurer) by the State of Arizona, Department of Insurance. At a minimum, all insurers shall have and maintain an A.M. Best, Inc. rating of B++ 6.

13.6 No Representation of Coverage Adequacy. By requiring insurance herein, Town does not represent that coverage and limits will be adequate to protect Wireless Provider. Town reserves the right to review any and all of the insurance policies and/or endorsements cited in these Terms but has no obligation to do so. Failure to demand such evidence of full compliance with the insurance requirements set forth in these Terms or failure to identify any insurance deficiency shall not relieve Wireless Provider from, nor be construed or deemed a waiver of, Wireless Provider's obligation to maintain the required insurance at all times.

13.7 Risk of Loss. Wireless Provider assumes the risk of any and all loss, damage or claims related to Wireless Provider's use of the Right-of-way or other property of Town, Wireless Provider or third parties throughout the term of any License Agreement or Encroachment Permit. Wireless Provider shall be responsible for any and all damage to its property and equipment related to the License Agreement or Encroachment Permit.

13.8 Insurance to be Provided by Others. Wireless Provider shall cause its contractors or other persons occupying, working on or about, or using the Right-of-way pursuant to these Terms to be covered by their own or Wireless Provider's insurance as required by these Terms. The required policy limits for commercial general liability insurance provided by such persons shall be One Million Dollars ($1,000,000) for each occurrence, One Million Dollars ($1,000,000) for products and completed operations annual aggregate, and Two Million Dollars ($2,000,000) general aggregate limit per policy year. This paragraph does not apply to persons who do not actually perform physical labor in the Right-of-way (such as Wireless Provider's consulting design engineers).

14. INDEMNITY.

In addition to all other indemnities and other obligations hereunder, to the fullest extent permitted by law, throughout the term of any License Agreement or Encroachment Permit and until all obligations and performances under or related to the License Agreement (including these Terms) are satisfied and all matters described in this Paragraph are completely resolved, Wireless Provider and all other persons using, acting, working or claiming through or for Wireless Provider (if they or their subcontractor, employee or other person or entity hired or directed by them participated in any way in causing the claim in question) shall jointly and severally indemnify, defend and hold harmless Town and all other Additional Insureds for, from and against any and all claims or harm related to Wireless Provider's use of the Right-of-way or the rights granted to Wireless Provider with respect to the Right-of-way or Wireless Provider's exercise of its rights under these Terms (the "Indemnity"). Without limitation, the Indemnity shall include and apply to any and all allegations, demands, judgments, assessments, taxes, impositions, expenses, proceedings, liabilities,

obligations, suits, actions, claims (including without limitation claims of personal injury, bodily injury, sickness, disease, death, property damage, destruction, loss of use, financial harm, or other impairment), damages, losses, expenses, penalties, fines or other matters (together with all attorney fees, court costs, and the cost of appellate proceedings and all other costs and expenses of litigation or resolving the claim) that may arise in any manner out of any use of the Right-of-way or other property pursuant to any License Agreement or Encroachment Permit or any actions, acts, errors, mistakes or omissions relating to work or services in the performance of or related to the License Agreement, including without limitation any injury or damages or cause of action claimed or caused by any employees, contractors, subcontractors, tenants, subtenants, agents or other persons upon or using the Right-of-way or surrounding areas related to Wireless Provider's exercise of its rights under this License Agreement, including without limitation, claims, liability, harm or damages caused in part by Town or any other Additional Insured or anyone for whose mistakes, errors, omissions or negligence Wireless Provider or Town may be liable (collectively, "Claims"). As a condition to Town's approval of any License Agreement or Encroachment Permit, Wireless Provider specifically agrees that to the extent any provision of this paragraph is not fully enforceable against Wireless Provider for any reason whatsoever, this Paragraph shall be deemed automatically reformed to the minimal extent necessary to cause it to be enforceable to the fullest extent permitted by law. The Indemnity shall also include and apply to any environmental injury, personal injury or other liability relating to Wireless Provider's use of real property under the License Agreement or any Encroachment Permits. Notwithstanding the foregoing, the Indemnity does not apply to Claims arising only from the sole gross negligence or intentionally wrongful acts of Town or to Claims that the law prohibits from being imposed upon the indemnitor.

15. CONDEMNATION.

The following shall govern any condemnation of any part of or interest in the Use Areas and any conveyance to Town or another condemnor in avoidance or settlement of condemnation or a threat of condemnation:

15.1 Termination for Condemnation. The Encroachment Permit for the Use Area shall terminate on the date (the "Condemnation Date") that is the earlier of the date title vests in the condemnor, or the date upon which the condemnor is let into possession. Notwithstanding the foregoing, if Town reasonably determines that the Use Areas continue to be suitable for Wireless Provider to conduct the Permitted Uses, Town may elect to cause the Encroachment Permit to continue to remain in effect as to the part of the Use Areas not taken and the Use Fee shall not be reduced or abated. Nevertheless, if Wireless Provider reasonably determines that the Use Areas are not suitable for Wireless Provider to conduct the Permitted Uses, then the Encroachment Permit shall terminate.

15.2 Condemnation Proceeds. Wireless Provider hereby assigns and transfers to Town Wireless Provider's entire interest in all condemnation damages, interest, severance damages, and any other payments or proceeds of any kind relating to the condemnation (collectively the "Condemnation

Proceeds"). Wireless Provider shall execute and deliver to Town assignments or other instruments requested by Town confirming such assignment and transfer. Wireless Provider shall immediately pay to Town any Condemnation Proceeds Wireless Provider may receive. The Condemnation Proceeds shall not include relocation benefits, if any, awarded specifically to Wireless Provider to cover expenses of relocating Wireless Provider's business located at the Use Areas at the time of the condemnation, or any compensation specifically awarded to Wireless Provider for any taking of the Communications Equipment itself. Any repair, relocation or similar costs relating to the Communications Equipment shall be borne by Wireless Provider.

15.3 Power to Condemn. Wireless Provider acknowledges that Town and others from time-to-time may use the power to condemn the Use Areas or any interest therein or rights thereto. Town has not relinquished any right of condemnation or eminent domain over the Use Areas. Town does not warrant that Town will not condemn the Use Areas during the term of this License Agreement, but Town does not presently have intentions to condemn the Use Areas.

16. DAMAGE TO OR DESTRUCTION OF USE AREAS.

The following provisions shall govern damage to or destruction of the Use Areas by fire, flood, explosion, the elements, the public enemy, or other casualty (collectively "Casualty Damage"):

16.1 Damage to Wireless Provider's Improvements. Wireless Provider shall commence restoring the Casualty Damage to Wireless Provider's Improvements within thirty (30) days after any Casualty Damage occurs. Wireless Provider shall complete the restoration work within thirty (30) days after commencement. Such work shall be subject to the plans approval process and all other requirements for Wireless Provider's Improvements. Wireless Provider shall perform all restoration work at Wireless Provider's sole cost and expense.

16.2 Monthly Restoration Work Report. Wireless Provider shall provide to Town no later than the tenth day of each month a written narrative report of the progress of the restoration work.

17. WIRELESS PROVIDER'S RECORDS.

During the entire term of any License Agreement, Wireless Provider shall keep records and provide information to Town as follows:

17.1 Scope of Information. Unless otherwise specified, all of Wireless Provider's recordkeeping and disclosure obligations under this article are limited to the following (collectively the "Covered Information"):

17.1.1 The status of the construction, repair or restoration of Wireless Provider Improvements.

17.1.2 Information indicating whether Town or Wireless Provider is in compliance with the terms herein.

17.2 Records Inspection. At Wireless Provider's expense, Wireless Provider shall:

17.2.1 Permit and assist Town and its representatives upon twenty-one (21) days' notice to inspect, audit, and copy Wireless Provider's records of Covered Information.

17.2.2 Make the records of Covered Information (and reasonable accommodations for Town's audit and inspection) available to Town at Wireless Provider's offices in Maricopa County, Arizona.

17.2.3 Cause Wireless Provider's employees and agents and accountants to give their full cooperation and assistance in connection with Town's access to the Covered Information.

17.3 Record Retention. Wireless Provider shall preserve records of the Covered Information in a secure place at Wireless Provider's corporate headquarters in the continental United States for a period ending seven (7) years after the time period reported by the records.

17.4 Record Media Included. Town's and Wireless Provider's rights and obligations regarding the Covered Information apply regardless of the type of media, materials, or data repositories that may contain the Covered Information. Town shall have access to Covered Information contained, without limitation, in records, books, papers, documents, recordings, computer data, contracts, logs, notes, ledgers, correspondence, reports, drawings, and memoranda, and any and all other sources, records and repositories of Covered Information.

17.5 Reports. Wireless Provider shall deliver to Town written reports (and, if requested by Town, a presentation to Town's governing council or designee) covering such Covered Information as Town may request from time to time.

17.6 Standards for Records. Wireless Provider shall maintain a standard, modern system of recordkeeping for the Covered Information and shall keep and maintain proper and accurate books and other repositories of information relating to the Covered Information.

18. COMPLIANCE WITH LAW.

Wireless Provider shall perform its obligations under the License Agreement (including these Terms) and any Encroachment Permit in accordance with all federal, state, county and local laws, ordinances, regulations or other rules or policies as are

now in effect or as may hereafter be adopted or amended. Without limiting in any way the generality of the foregoing, Wireless Provider shall comply with all and each of the following:

18.1 Applicability of Municipal Law. Without limitation, Wireless Provider shall comply with municipal laws as follows:

18.1.1 Wireless Provider acknowledges nothing set forth herein or by approval of a License Agreement or issuance of an Encroachment Permit constitutes, and Town has not promised or offered, any type of waiver of, or agreement to waive (or show any type of forbearance, priority or favoritism to Wireless Provider with regard to) any law, ordinance, power, regulation, tax, assessment or other legal requirement now or hereafter imposed by the Town of Fountain Hills or any other governmental body upon or affecting Wireless Provider, the Use Areas, or the Street Parcel or Wireless Provider's use of the Use Areas, the Street Parcel or the Right-of-way.

18.1.2 All of Wireless Provider's obligations hereunder are in addition to, and cumulative upon (and not to any extent in substitution or satisfaction of), all existing or future laws and regulations applicable to Wireless Provider.

18.1.3 Town by approving this License Agreement or any Encroachment Permit cannot, and has not, relinquished or limited any right of condemnation or eminent domain over the Right-of-way or any other property related to the License Agreement or Encroachment Permit, or within the Right-of-way.

18.1.4 The approval of this License Agreement or issuance of any Encroachment Permit cannot and does not impair Town's, power to enact, apply or enforce any laws or regulations, or exercise any governmental powers affecting in any way Wireless Provider, the Use Areas, the Street Parcel, or the Right-of-way.

18.1.5 Town's rights and remedies under this License Agreement and any Encroachment Permit for Wireless Provider's failure to comply with all applicable laws supplement and are in addition to and do not replace otherwise existing powers of the Town of Fountain Hills or any other governmental body.

18.1.6 Wireless Provider's rights under this License Agreement and any Encroachment Permit are further subject to all present and future building restrictions, regulations, zoning laws, and all ordinances, resolutions, rules and orders of all bodies, bureaus, commissions and bodies of any municipal, county, state, or federal authority, now or hereafter having jurisdiction over the Use Areas or

Wireless Provider's use thereof. Wireless Provider shall comply with all of the foregoing.

18.2 Radio Frequency Compliance Requirements. Wireless Provider shall document, report and confirm its compliance with Federal Communications Commission ("FCC") Radio Frequency Exposure Guidelines (FCC OET Bulletin 65) and all other applicable radio frequency emissions laws and regulations in effect from time to time (collectively, the "FCC Rules") as follows:

18.2.1 Wireless Provider shall cause its senior internal engineer responsible for compliance with the FCC Rules to deliver to Town a written letter (the "RF Letter"), as follows:

18.2.1.1 The RF Letter shall attest that Wireless Provider's operation of the Communications Equipment is in compliance with the FCC Rules. A statement from Wireless Provider declaring exemption from reporting to FCC is not acceptable to comply with the requirements of this paragraph.

18.2.2 Wireless Provider shall maintain records of radio frequency measurements and Communications Equipment performance in accordance with the FCC Rules.

18.2.3 Wireless Provider shall also evidence and demonstrate its compliance with the FCC Rules in such manner and at such intervals as the Town of Fountain Hills Zoning Ordinance and other applicable laws and regulations may mandate.

18.3 Use Area Regulations. Town reserves the right to adopt, amend and enforce against Wireless Provider rules and regulations governing the operation of the Street Parcel, including the Use Areas, Wireless Provider's activities therein and thereon, and the public areas and facilities used by Wireless Provider in connection therewith.

18.4 Taxes, Liens and Assessments. In addition to all other amounts herein provided and to the extent consistent with applicable law, Wireless Provider shall pay, when the same become due and payable, all taxes and general and special fees, charges and assessments of every description that during the term of any License Agreement or Encroachment Permit may be levied upon or assessed upon or with respect to Wireless Provider's use of the Right-of-way, the operations conducted therein, any amounts paid or other performances required by these Terms by either party, and all possessory interest in the Right-of-way and Wireless Provider's improvements and other property thereon. Wireless Provider shall pay, indemnify, defend and hold harmless Town from any and all such obligations, including any interest, penalties and other expenses which may be imposed, and from any lien therefor or sale or other proceedings to enforce payment thereof.

18.5 Permits. Nothing in these Terms relieves Wireless Provider of the obligation to obtain permits, licenses and other approvals from Town or other units of government that are required for the erection, construction, reconstruction, installation, operation or maintenance of the Communications Equipment or provision of telecommunications services; or from compliance with applicable municipal codes, ordinances, laws and policies, such as zoning and land use ordinances and regulations, pavement cut and restoration ordinances and regulations, subdivision and project improvement ordinances, curb cut permits, building permits, Right-of-way permits, encroachment permits, traffic control permits and the like.

19. ASSIGNABILITY.

The License Agreement or Encroachment Permit(s) are not assignable by Wireless Provider (and any assignment shall be void and vest no rights in the purported assignee) unless the assignment is made in strict compliance with the following:

19.1 Assignments Affected. Every assignment of any of Wireless Provider's interest in the Right-of-way, the License Agreement, Encroachment Permit(s) or these Terms or any of Wireless Provider's rights or interests hereunder is prohibited unless Wireless Provider first receives from Town notice of Town's consent to the assignment, where Town's consent to such assignment not to be unreasonably withheld, conditioned, or delayed. All references in these Terms to assignments by Wireless Provider or to assignees shall be deemed also to apply to all of the following transactions, circumstances and conditions and to all persons claiming pursuant to such transactions, circumstances and conditions:

19.1.1 Any voluntary or involuntary assignment, conveyance or transfer of Wireless Provider's right to use the Right-of-way under this License Agreement or any interest or rights of Town under this License Agreement, in whole or in part.

19.1.2 Any voluntary or involuntary pledge, lien, mortgage, security interest, judgment, claim or demand, whether arising from any contract, any agreement, any work of construction, repair, restoration, maintenance or removal, or otherwise affecting Wireless Provider's rights to use the Right-of-way (collectively "Liens").

19.1.3 Any assignment by Wireless Provider of any interest in the License Agreement or Encroachment Permit(s) for the benefit of creditors, voluntary or involuntary.

19.1.4 A Wireless Provider Insolvency.

19.1.5 The occurrence of any of the foregoing by operation of law or otherwise.

19.1.6 The occurrence of any of the foregoing with respect to any assignee or other successor to Wireless Provider.

19.2 Pre-approved Assignments. Subject to certain conditions hereafter stated, Town hereby consents to certain assignments (the "Pre-approved Assignments"). Only the following assignments are Pre-approved Assignments:

19.2.1 Complete Assignment of License Agreement and Encroachment Permits. Wireless Provider's complete assignment of all of Wireless Provider's rights and Interests in the Right-of-way, the approved License Agreement and all Encroachment Permits to a single assignee who meets all of the following requirements, as determined by Town in Town's reasonable discretion (a "Qualified Operator"):

19.2.1.1 The assignee has experience, management, credit standing and financial capacity and other resources equal to or greater than Wireless Provider's and adequate to successfully perform the obligations set forth herein.

19.2.1.2 The assignee is experienced in the management and operation of similar projects.

19.2.1.3 The assignee assumes all of Wireless Provider's obligations herein.

19.2.1.4 The assignee has a net worth of not less than Fifty Million and No/100 Dollars ($50,000,000.00).

19.2.2 Stock Transfers. The transfer of publicly traded stock, regardless of quantity.

19.2.3 Merger. The merger or consolidation of Wireless Provider with another entity that is a Qualified Operator.

19.2.4 Common Ownership Transfer. Wireless Provider's complete assignment of all of Wireless Provider's rights and interests in the Right-of-way, the approved License Agreement and Encroachment Permits to single assignee who is and remains a wholly owned subsidiary of Wireless Provider's sole owner as of the date of the License Agreement (or a wholly owned subsidiary of a wholly owned subsidiary of Wireless Provider's sole owner as of the date of the License Agreement).

19.3 Limitations on Assignments. Town's consent to any assignment, including without limitation, Pre-approved Assignments, is not effective until the following conditions are satisfied:

19.3.1 Except for the sale of stock, Wireless Provider shall provide to Town a complete copy of the document assigning its interests, or other such documentation acceptable to the Town.

19.3.2 Each assignee must execute an assumption of the License Agreements and/or the Encroachment Permits in form acceptable to Town.

19.3.3 Each Pre-approved Assignment must satisfy all other requirements of these Terms pertaining to assignments.

19.4 Assignment Remedies. Any assignment without Town's consent shall be void and shall not result in the assignee obtaining any rights or interests. Town may, in its sole discretion and in addition to all other remedies available to Town under these Terms or otherwise, and in any combination, terminate any and all of the License Agreement and Encroachment Permits, collect Use Fees from the assignee and/or declare the assignment to be void, all without prejudicing any other right or remedy of Town under these Terms. No cure or grace periods shall apply to assignments prohibited under these Terms or to enforcement of any provision under these Terms against an assignee who did not receive Town's consent.

19.5 Effect of Assignment. Prior to any effective assignment, each assignee must execute an assumption of each License Agreement and Encroachment Permit in the form attached hereto as Exhibit "C." No action or inaction by Town shall be deemed a waiver of the prohibition on assignments or any other provision herein, or the acceptance of the assignee, Wireless Provider or occupant as Wireless Provider, or a release of Wireless Provider from the further performance by Wireless Provider of the provisions of these Terms. Consent by Town to an assignment shall not relieve Wireless Provider from obtaining Town's consent to any further assignment. No assignment shall release Wireless Provider from any liability hereunder.

19.6 Enforceability after Assignment. No consent by Town shall be deemed to be a novation. Town's consent to any assignment does not in any way expand or modify the terms set forth in these Terms or waive, diminish or modify any of Town's rights or remedies under the License Agreement or any Encroachment Permit. The terms set forth in these Terms shall be enforceable against Wireless Provider and each successor, partial or total, and regardless of the method of succession, to Wireless Provider's interest hereunder. Each successor having actual or constructive notice of the License Agreement, these Terms or any Encroachment Permit shall be deemed to have agreed to the preceding sentence.

19.7 Grounds for Refusal. Except for the Preapproved Assignments, no assignment of the License Agreement or any Encroachment Permit by Wireless Provider is contemplated or bargained for. Without limitation, Town has the right to impose upon any consent to assignment such conditions and requirements as Town may deem appropriate.

19.8 Consent to Assignments. Wireless Provider shall attach to each Pre-approved Assignment a copy of Wireless Provider's notice to Town of the Pre-approved Assignment and other required documents. Wireless Provider shall attach to each other assignment, a copy of Town's notice to Wireless Provider of Town's consent to the assignment. These Terms shall continue to be enforceable according to its terms in spite of any provisions of any documents relating to an assignment.

19.9 Assignment Fee. Wireless Provider shall pay to Town in advance the sum of Five Hundred Dollars ($500) as a nonrefundable fee for legal, administrative and other expenses related to every Pre-approved Assignment (other than the sale of publicly traded stock) or to any request for a consent to assignment, whether or not Town grants such request.

20. MISCELLANEOUS.

The following additional provisions apply to these Terms:

20.1 Amendments. These Terms may not be amended except by a formal writing executed by all of the parties.

20.2 Dates. Any reference to a year shall refer to a calendar year unless a fiscal year is specifically stated. Sunday, Saturday and Arizona legal holidays are holidays for purposes of the License Agreement and issued Encroachment Permits.

20.3 Time of Essence. Time is of the essence of each and every provision of the License Agreement and issued Encroachment Permits.

20.4 Severability. If any provision of these Terms shall be ruled by a court or agency of competent jurisdiction to be invalid or unenforceable for any reason, then:

20.2.1 The invalidity or unenforceability of such provision shall not affect the validity of any remaining provisions of these Terms.

20.2.2 These Terms shall be automatically reformed to secure to the parties the benefits of the unenforceable provision, to the maximum extent consistent with law.

20.5 Conflicts of Interest. No officer, representative or employee of Town shall have any direct or indirect interest in the License Agreement or any Encroachment Permit, nor participate in any decision relating to the License Agreement or any Encroachment Permit that is prohibited by law. Notwithstanding the foregoing, pursuant to A.R.S. § 38-511, the Town of Fountain Hills may cancel the License Agreement or any Encroachment Permit, without penalty or further obligation, if any person significantly involved in

initiating, negotiating, securing, drafting or creating the License Agreement or associated Encroachment Permits on behalf of the Town is, at any time while the License Agreement or Encroachment Permits is in effect, or any extension thereof, an employee, agent or consultant to Wireless Provider in any capacity.

20.6 No Partnership. The transactions and performances contemplated hereby shall not create any sort of partnership, joint venture or similar relationship between the parties.

20.7 Nonliability of Officials and Employees. No official, representative or employee of Town shall be personally liable to any party, or to any successor in interest to any party, in the event of any default or breach by Town or for any amount which may become due to any party or successor, or with respect to any obligation of Town or otherwise under the terms of any License Agreement or related to any License Agreement or Encroachment Permit.

20.8 Notices. Notices hereunder shall be given in writing delivered to the other party or mailed by registered or certified mail, return receipt requested, postage prepaid or a national overnight express courier (such as Federal Express or UPS) to the addresses set forth in the License Agreement and to the Town as follows:

If to Town:
Town of Fountain Hills
16705 E. Avenue of the Fountains
Fountain Hills, AZ 85268
Attn: Town Manager

Copy to:
Town of Fountain Hills
16705 E. Avenue of the Fountains
Fountain Hills, AZ 85268
Attn: Development Services Director

Town of Fountain Hills
16705 E. Avenue of the Fountains
Fountain Hills, AZ 85268
Attn: Town Attorney

By notice from time to time, a person may designate any other street address within Maricopa County, Arizona as its address for giving notice hereunder. Service of any notice (i) if by registered or certified ail shall be deemed to be complete three (3) days (excluding Fridays, Saturday, Sunday and legal holidays) after the notice is deposited in the United States mail or (ii) if by overnight courier upon receipt.

20.9 Construction. Whenever the context of these Terms requires herein the singular shall include the plural, and the masculine shall include the feminine.

20.10 Funding. This subparagraph shall control notwithstanding any provision of the License Agreement or any exhibit or other agreement or document related hereto. If funds necessary to fulfill Town's obligations under the License Agreement or any Encroachment Permit are not appropriated by the Town of Fountain Hills Town Council, Town may terminate the License Agreement or any Encroachment Permit, by notice to Wireless Provider. Town shall use best efforts to give notice of such a termination to Wireless Provider at least thirty (30) days prior to the end of Town's then current fiscal period. Termination in accordance with this provision shall not constitute a breach of the License Agreement or Encroachment Permit by Town. No person will be entitled to any compensation, damages or other remedy from Town if the License Agreement or any Encroachment Permit is terminated pursuant to the terms of this subsection.

20.11 Paragraph Headings. The paragraph headings contained herein are for convenience in reference and not intended to define or limit the scope of any provision of the License Agreement.

20.12 No Third Party Beneficiaries. No person or entity shall be a third party beneficiary to the License Agreement or shall have any right or cause of action hereunder. Town shall have no liability to third parties for any approval of plans, Wireless Provider's construction of improvements, Wireless Provider's negligence, Wireless Provider's failure to comply with the provisions of these Terms (including any absence or inadequacy of insurance required to be carried by Wireless Provider).

20.13 Exhibits. All Exhibits specifically stated to be attached hereto as specified herein are hereby incorporated into and made an integral part of the License Agreement for all purposes.

20.14 Attorneys' Fees. If any action, suit or proceeding is brought by either party hereunder to enforce the License Agreement or any issued Encroachment Permit or for failure to observe any of the covenants of the License Agreement,

these Terms or any issued Encroachment Permit, or to vindicate or exercise any rights or remedies hereunder, the prevailing party in such proceeding shall be entitled to recover from the other party such prevailing party's reasonable attorneys' fees and other reasonable litigation costs (as determined by the court (and not a jury) in such proceeding).

20.15 Approvals and Inspections. All approvals, reviews and inspections by Town are for Town's sole benefit and not for the benefit of Wireless Provider, its contractors, engineers or other consultants or agents, or any other person.

20.16 Legal Workers. If and to the extent A.R.S. § 41-4401 is applicable, Wireless Provider shall comply with laws regarding workers as follows:

20.16.1 Wireless Provider warrants to Town that Wireless Provider and all its subcontractors will comply with all federal immigration laws and regulations that relate to their employees and that Wireless Provider and all its subcontractors now comply with the E-Verify Program under A.R.S. § 23-214(A).

20.16.2 A breach of the foregoing warranty by Wireless Provider shall be deemed a material breach of the License Agreement and any issued Encroachment Permit that is subject to penalties up to and including termination of this License Agreement and any issued Encroachment Permits.

20.16.3 Town retains the legal right to inspect the papers of any employee of Wireless Provider or any subcontractor who works on a Use Area pursuant to License Agreement and any Encroachment Permit to ensure that they or the subcontractor is complying with the warranty given above.

20.16.4 Town may conduct random verification of Wireless Provider's and its subcontractors' employment records to ensure compliance with the warranty given above.

20.16.5 Wireless Provider shall indemnify, defend and hold Town harmless for, from and against all losses and liabilities arising from any and all violations of the warranty given above.

EXHIBIT A

[TOWN'S DESIGN GUIDELINES]

See following pages

2018

Town of Fountain Hills

Small Wireless Facilities in the Right-of-Way

Design Standards & Guidelines

Town of Fountain Hills
Design Standards, Concepts and Requirements
Small Wireless Facilities in the Right-of-Way

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Definitions
Standard Design Requirements for Small Wireless Facility

"Antenna" means communications equipment that transmits or receives electromagnetic radio frequency signals and that is used in providing wireless services.

"Antenna Mounting Bracket" means the hardware required to secure the antenna to the pole.

"Antenna Mounting Post" means the vertical post or pipe that the antenna mounting bracket is mounted to in order for the antenna to be attached to the pole.

"Antenna Shroud" means the three-sided cover that is mounted at the base of the antenna to conceal the appearance of the cables and wires from the hand-hole port on the pole to the bottom-fed antenna.

"Canister Antenna" means the canister or cylinder style housing used to conceal the antenna(s), amplifier(s), radio(s), cables, and wires at the top of a pole.

"Communications Equipment" means any and all electronic equipment at the Small Wireless Facility location that processes and transports information from the antennas to the Wireless Provider's network.

"Dog House" means the plastic or metal attachment to the base of a pole that covers the transition point of underground cables and wires to the vertical section of the pole.

"Ground Mounted Equipment" means any communications equipment that is mounted to a separate post or to a foundation on the ground.

"Light Emitting Diode" also referred to as "LED" is a type of lighting fixture installed on Town streetlight and traffic signal poles.

"Light Fixture" means the lighting unit or luminaire that provides lighting during the evening hours or during the hours of darkness.

"Luminaire Mast Arm" means the horizontal post that attaches the light fixture to the streetlight pole or traffic signal pole.

"Omni-directional Antenna" also referred to as an "omni antenna" this antenna is round in shape, like a pipe, and may be about one (1) inch diameter up to about six (6) inches diameter.

"Outside Diameter" also referred to as "OD" means the points of measurement, using the outer edges of a pole, pipe or cylinder.

"Panel Antenna" means the style of antenna that is rectangular in shape and with dimensions that are generally four (4) feet to eight (8) feet in height, by eight (8) inches to twelve (12) inches wide, and four (4) inches to nine (9) inches deep.

"Remote Radio Heads (RRH) / Remote Radio Units (RRU)" means the electronic devices that are used to amplify radio signals so that there is increased performance (farther distance) of the outgoing radio signal from the antenna.

"Right-of-way" as defined for wireless sites in A.R.S. §9-591(18) means the area on, below or above a public roadway, highway, street, sidewalk, alley, or utility easement. Right-of-way does not include a Federal Interstate Highway, a state highway or state route under the jurisdiction of the Department of Transportation, a private easement, property that is owned by a special taxing district, or a utility easement that does not authorize the deployment sought by the wireless provider.

"Sight Distance Easements" means the area of land adjacent to an intersection, driveway or roadway that has restrictive uses in order to preserve the view of oncoming or crossing vehicular and pedestrian traffic by drivers in vehicles attempting to merge with traffic or enter a roadway.

"Sight Visibility Triangles" means the traffic engineering and safety concept that requires clear view by the driver of a vehicle to crossing traffic at a stop sign, driveway or intersection. In order to achieve clear visibility of the cross traffic, the land areas in the sight visibility triangle has specific maximum heights on landscaping, cabinets, and other potential view obstructions.

"Signal Head" means the "Red, Yellow and Green" light signals at a signal-controlled intersection.

"Signal Head Mast Arm" means the horizontal pole that has the signal heads mounted to it and attaches to the traffic signal pole.

"Small Wireless Facility" as defined in A.R.S. 9-591(19), means a Wireless Facility that meets both of the following qualifications:

(a) All antennas are located inside an enclosure of not more than six (6) 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 not more than six (6) cubic feet in volume.

(b) All other wireless equipment associated with the facility is cumulatively not more than twenty-eight (28) cubic feet in volume, or fifty (50) cubic feet in volume if the equipment was ground mounted before the effective date of this section. The following types of associated ancillary equipment are not included in the calculation of equipment volume pursuant to this subdivision:

(i) An electric meter.

(ii) Concealment elements.

(iii) A telecommunications demarcation box.

(iv) Grounding equipment.

(v) A power transfer switch.

(vi) A cutoff switch.

(vii) Vertical cable runs for the connection of power and other services.

"Stealth and Concealment Elements" means the use of shrouds, decorative elements, design concepts and faux elements so that a small wireless facility can be designed to blend in with the surrounding streetscape with minimal to any visual impact.

"Utility Pole" as defined in A.R.S. §9-591(21) means a pole or similar structure that is used in whole or in part for communications services, electric distribution, lighting or traffic signals. Utility pole does not include a monopole.

Town of Fountain Hills
Standard Design Requirements
Small Wireless Facility on Existing Streetlight

The following design standards shall apply, in addition to the *Common Standards Design Concepts, Requirements and Details* that is included in this document, to a Small Wireless Facility (SWF) proposed for a location with an existing Town-owned or third party-owned streetlight in the Town of Fountain Hills Right-of-way (ROW). These design standards are not exhaustive and the Town, as the owner, keeper and manager of the ROW retains the right to modify or adjust the requirements on a case-by-case basis.

A. Pole Criteria:

1. *Purpose of Streetlight Pole:* The primary purpose of the pole shall remain as a pole structure supporting a streetlight luminaire and related streetlight fixtures used to provide lighting to the Town ROW. The attachment of wireless equipment to an existing streetlight pole or to a replacement pole that impedes this primary purpose will not be approved.

2. *General Requirement:*

a) An SWF shall be designed to blend in with the surrounding streetscape with minimal to any visual impact.

b) A replacement pole shall match the Town of Fountain Hills standard streetlight pole for the location in which it is installed, as closely as possible, subject to more specific criteria below.

c) As specified in Section 6.14 of the Town of Fountain Hills's *Wireless Facilities Standard Terms and Conditions*, for each individual pole type or style used to support the wireless equipment, one spare replacement pole shall be provided by the wireless provider to Town in advance so the pole can be replaced promptly in case of a knockdown.

d) All plans shall be signed and sealed by a Professional Engineer licensed in the State of Arizona.

e) All other details in the Town of Fountain Hills street light design standards shall apply.

3. *Specific Criteria:*

a) New or Replacement Pole Height

A new or replacement pole may be installed without zoning review if one of the two height requirements is met:

1) Up to a ten (10) foot increase, not to exceed fifty (50) feet total (whichever is less), subject to the additional limitations in A.R.S. §9-592(I); or

2) Up to forty (40) feet above ground level, per A.R.S.§9-592(J).

b) Overall Height of Replacement Pole

1) The "base" height of an existing streetlight pole shall be the height of the vertical pole section from the existing grade. The height of the luminaire mast arm, if higher than the vertical pole section, shall not be used to determine the new overall height of the replacement pole.

2) If the antennas are the highest vertical element of the site, then the new overall height of the replacement pole is measured from the existing grade to the top of the canister, top of the omni-directional antenna, or the top of the panel antenna.

c) Increase in Outside Diameter (OD) of Pole

The non-tapered replacement pole outside diameter (OD) of the base section shall be equal to the top section, and the OD shall not exceed eight and five-eights (8-5/8) inches (the pole manufacturing industry standard OD for an 8 inch diameter pole) or a 100% increase in diameter of the original pole, whichever is less.

d) Luminaire Mast Arms

1) All luminaire mast arms shall be the same length as the original luminaire arm, unless the Town requires the mast arm to be different (longer or shorter) based upon the location of the replacement pole.

2) Unless otherwise approved, all luminaire mast arms shall match the arc (if applicable) and style of the original luminaire arm.

3) The replacement luminaire mast arm shall be at the same height above the ground as the existing luminaire.

e) Luminaire Fixtures

1) All replacement poles shall have the Town standard light-emitting diode (LED) light fixture installed.

2) All replacement light fixtures shall have a new Town standard photo-cell or sensor provided by the wireless provider.

f) Pole Foundation

1) All pole foundations shall conform to the Town's adopted standards and specifications on streetlight design and shall be modified for wireless communications equipment and cables.

2) The Town, in its sole discretion, may require the pole foundation design to be "worst case" for all soil conditions.

3) A separate, one-inch diameter conduit shall be installed in the pole foundation for the Town's luminaire wire and any additional Town wires or cables. The Town's conduit shall be trimmed to three (3) inches above the top of the pole foundation.

4) The height of the pole foundation shall be two (2) inches above finished grade. If the pole foundation encroaches into any portion of the sidewalk, then the pole foundation shall be flush with the sidewalk.

5) Shrouds for the streetlight pole mounting bolts may be required for the replacement pole.

g) Painting of Replacement Pole

1) If the replacement pole is an unpainted galvanized pole, the pole shall not be painted or have a finish unless otherwise specified by the Town.

2) For powder coated type poles, the wireless provider shall replace with same powder coated color and/or color combination per Town of Fountain Hills street light design standards or as otherwise required by the Town to minimize visual impact.

h) Painting Antennas and Mounting Equipment

1) All antenna mounting brackets and hardware, antenna mounting posts, cables, shrouds and other equipment mounted on a new or replacement unpainted galvanized pole shall be painted Sherwin Williams "Web Grey" (SW7075) color or equivalent, unless specified otherwise by the Town.

2) All antenna mounting brackets and hardware, antenna mounting posts, cables, shrouds and all other equipment mounted on a painted new or replacement pole shall be painted a color specified by the Town.

i) Wireless provider shall install pole numbers on each replacement pole (to match the number on the existing streetlight pole being replaced) per Town of Fountain Hills street light design standards.

Town of Fountain Hills
Standard Design Requirements
Small Wireless Facility on Traffic Signal Pole

The following design standards shall apply, in addition to the *Common Standards Design Concepts, Requirements and Details* included in this document, to a Small Wireless Facility (SWF) proposed for a location with an existing Town-owned traffic signal in the Town of Fountain Hills Right-of-way (ROW). These design standards are not exhaustive and the Town, as the owner and manager of the ROW retains the right to modify or adjust the requirements on a case-by-case basis.

A. Pole Criteria:

1. *Purpose of Traffic Signal Pole:* The primary purpose of the traffic signal pole shall remain as a pole structure supporting a traffic signal and related streetlight fixtures used to provide traffic control and lighting to the Town ROW. The attachment of wireless equipment to a new or replacement traffic signal pole that impedes this primary purpose will not be approved.

2. *General Requirement:*

a) An SWF shall be designed to blend in with the surrounding streetscape with minimal to any visual impact.

b) A replacement pole shall match the Town of Fountain Hills standard traffic signal pole, as closely as possible, subject to more specific criteria below.

c) As specified in Section 6.14 of the Town of Fountain Hills's *Wireless Facilities Standard Terms and Conditions*, for each individual pole type or style used to support the wireless equipment, one spare replacement pole shall be provided by Company to Town in advance so the pole can be replaced promptly in case of a knockdown.

d) All plans shall be signed and sealed by a Professional Engineer licensed in the State of Arizona.

e) All other details in the Town of Fountain Hills traffic signal design standards shall apply.

3. *Specific Criteria:*

a) New or Replacement Pole Height

A new or replacement pole may be installed without zoning review if one of the two height requirements is met:

1) Up to a ten (10) foot increase, not to exceed fifty (50) feet total (whichever is less), per A.R.S. §9-592(I); or

2) Up to forty (40) feet above ground level, per A.R.S. §9-592(J).

b) Overall Height of Replacement Pole

The height of the replacement pole is measured from grade to the top of the antenna canister or the top of the panel antennas if the antennas are the highest elements.

c) Increase in Outside Diameter (OD) of Pole
   1) If the replacement pole is a taper design, the diameter of the base section of the replacement pole OD shall not exceed twelve (12) inches or a 100% increase in the OD of the base section, whichever is less.
   2) If the replacement pole is non-tapered, then the diameter of the base section shall be equal to the top section and the OD shall not exceed twelve (12) inches or a 100% increase, whichever is less.

d) Signal Head Mast Arms
   1) The traffic signal head mast arms shall be the same length as the original signal head mast arm unless the Town requires the mast arm to be different (longer or shorter) based upon the location of the replacement pole.
   2) All signal head mast arms shall match the arc (if applicable) and style of the original signal head mast arm.

e) Luminaire Mast Arms
   1) All luminaire mast arms shall be the same length as the original luminaire arm unless the Town requires the mast arm to be different (longer or shorter) based upon the location of the replacement pole.
   2) All luminaire mast arms shall match the arc (if applicable) and style of the original luminaire arm.

f) Signal Heads
   1) All existing signal heads shall be replaced, at no cost to Town, with new light-emitting diode (LED) signal heads, per Town of Fountain Hills traffic signal design standards.
   2) All signal heads shall be procured from a Town approved signal heads supplier or manufacturer.

g) Luminaire Fixtures
   1) All replacement poles shall have the Town standard LED light fixture installed.
   2) All replacement light fixture shall have a new photo-cell or sensor installed to Town standard.

h) Other Town Elements on Signal Mast Arm or Pole
   All existing emergency signal detection units, video detection cameras, video cameras, cross walk service buttons, cross walk signals, and any other pedestrian or traffic devices shall be replaced with new units by wireless provider and installed at no cost to the Town. All equipment shall be procured from a list of Town approved suppliers.

i) Signs and Other Misc.
   All street name plates or signs, directional signs and any other Town

approved signs shall be replaced with new signs at no cost to the Town. All signs and attachments shall be procured from a list of Town approved suppliers.

j) Traffic Signal Pole Foundation

1) All pole foundations shall conform to the Town's standards and specifications on traffic signal pole design and shall be modified for wireless communications equipment, hand holes and cables.

2) The wireless provider shall install a three (3) inch diameter (OD) conduit in the pole foundation for the Town's cables and wires for the signal heads, luminaire and devices on the signal mast arm and luminaire mast arm. The Town's conduit shall be trimmed to three (3) inches above the top of the pole foundation.

3) In addition to the conduits for the Town's use inside the pole, the wireless provider shall install one of the two options for its cables and wires:

   a) One, six (6) inch diameter (OD) conduit in the pole foundation; or

   b) Two, four (4) inch diameter (OD) conduits in the pole foundation. The length of the conduit shall extend from the pole foundation to six (6) inches above the signal head mast arm.

4) Pole Foundation – Height Above Ground Level

   a) If the pole foundation is in a landscaped or unimproved area, the height of the caisson shall be two (2) inches above finished grade. However, if the pole foundation is adjacent to or within a sidewalk or ramp, the height of the pole foundation shall be flush with the surface of the immediate area.

   b) Shrouds for the traffic signal pole mounting bolts may be required for the replacement pole.

k) Painting of Pole, Antennas and Mounting Equipment

1) Specifications on paint color and painting process are provided in the Town of Fountain Hills traffic signal design standards.

2) For powder-coated traffic signal poles, the wireless provider shall replace with same powder-coated color and/or color combination, or as otherwise specified by the Town.

l) Construction of Traffic Signal

The installation work of the replacement traffic signal pole, including mast arms, signal heads and devices, must be performed by a Arizona licensed Traffic Signal Contractor with a minimum of five (5) years of experience installing traffic signals.

Town of Fountain Hills
Standard Design Requirements
Small Wireless Facility on Existing Utility Pole

The following design standards shall apply, in addition to the *Common Standards Design Concepts, Requirements and Details* that is included in this document, to a Small Wireless Facility (SWF) proposed for a location with an existing third party-owned utility pole in the Town of Fountain Hills Right-of-way (ROW). These design standards are not exhaustive and the Town, as the owner, keeper and manager of the ROW retains the right to modify or adjust the requirements on a case-by-case basis.

A. Pole Criteria:

1. *Purpose of Utility Pole:* The primary purpose of the pole shall remain as a pole structure supporting a cables and wires used to provide communications services and electric distribution in the Town ROW. The attachment of wireless equipment to an existing third party-owned utility pole that impedes this primary purpose will not be approved.

2. *General Requirement:*
   a) An SWF shall be designed to blend in with the surrounding streetscape with minimal to any visual impact.
   b) A SWF mounted on an existing third party-owned utility pole is subject to more specific criteria below.
   c) All plans shall be signed and sealed by a Professional Engineer licensed in the State of Arizona.

3. *Specific Criteria:*
   a) Replacement Pole Height

      A replacement pole may be installed without zoning review if one of the two height requirements is met:

      1) Up to a ten (10) foot increase, not to exceed fifty (50) feet total (whichever is less), per A.R.S. §9-592(I); or

      2) Up to forty (40) feet above ground level, per A.R.S.§9-592(J).

   b) Overall Height of Replacement Utility Pole
      1) The "base" height of an existing utility pole shall be the height of the vertical pole section from the existing grade.
      2) If the antennas are the highest vertical element of the site, then the new overall height of the replacement pole is measured from the existing grade to the top of the canister or the top of the panel antenna.

   c) Use of Existing Pole – Wood

1) An existing wood pole used for a SWF shall have the antennas contained within an eighteen (18) inch (OD) canister mounted at the top of the pole.
2) Unless otherwise approved, the cables and wires from the base of the pole to the antennas shall be installed in a conduit or cable chase outside of the pole, facing away from the street or away from on-coming traffic.
3) If a "dog house" (*see Exhibit C*) is required as a transition point connecting the underground cables and wires from the ground mounted equipment to the pole, the Town shall provide the maximum size, dimension and shape of the dog house on a case-by-case basis.

d) Use of Existing Pole – Metal
1) An existing metal pole used for a SWF shall have the antennas contained within an eighteen (18) inch (OD) canister mounted at the top of the pole.
2) Panel antennas on a metal pole shall have the same "RAD center" (center of radiation) so the antennas will be at the same height on the pole.
3) The cables and wires from the base of the pole to the antennas shall be installed inside of the pole.

e) Painting of Pole and Dog House
1) If the replacement pole is an unpainted galvanized pole, the pole shall not be painted or have a finish unless otherwise specified by the Town.
2) If the existing or replacement pole includes a dog house for the transition of the cables and wires to the pole, the dog house shall be painted the same color as the pole or a color specified by the Town.

f) Painting Antennas and Mounting Equipment
1) All antenna mounting brackets and hardware, antenna mounting posts, cables, shrouds and other equipment mounted on a new or replacement unpainted galvanized pole shall be painted Sherwin Williams "Web Grey" (SW7075) color or equivalent, unless specified otherwise by the Town.
2) All antenna mounting brackets and hardware, antenna mounting posts, cables, shrouds and all other equipment mounted on a painted new or replacement pole shall be painted a color specified by the Town.
3) If the antenna is mounted on a wood pole, the color of the antenna, antenna canister, mounting brackets and posts, shrouds and cable chases shall be painted a color specified by the Town that will closely match the color of the wood.

g) Ground Mounted Equipment
The Town may require the ground-mounted wireless equipment to be screened or concealed to reduce the visual impact to the surrounding area. The screening or concealment shall take into account the location of the site, the use of the immediate area, and the existing aesthetic elements surrounding the site.

Town of Fountain Hills
Standard Design Requirements
Wireless Facility on New Structures in ROW

The following design standards, in addition to the *Common Standards Design Concepts, Requirements and Details* that are included in this document, shall apply to a Wireless Facility that a wireless provider may install in the ROW that is not: 1) a replacement pole for an existing streetlight, 2) a replacement pole for an existing traffic signal or 3) a replacement pole for an existing utility pole.

The new wireless support structure, monopole or utility pole (the "New Structure") shall incorporate the highest level of stealth and concealment of the antennas and wireless equipment in order to minimize the visual impact of the site to the public.

A. Pole Criteria:

1. *Purpose of the New Structure:* The sole purpose of a new vertical element is to attach antennas for the provision of wireless services by a wireless provider in the Town's ROW.

2. *General Requirement:*
   a) The New Structure shall be designed to minimize the visual and aesthetic impact of the new vertical element and associated equipment upon the look, feel, theme, and use of the surrounding area.
   b) A wireless facility shall be designed to blend in with the surrounding streetscape and/or landscape with minimal to no adverse visual impact.
   c) The New Structure shall be architecturally integrated and compatible with the use of the surrounding area.
   d) The height of the New Structure cannot exceed the maximum allowed height of the zoning district that the site is proposed.
   e) All plans shall be signed and sealed by a Professional Engineer licensed in the State of Arizona.

3. *Specific Criteria:*
   a) New Structure Height. A New Structure may be installed without zoning review if one of the two height requirements are met, see A.R.S. §9-592(I) and A.R.S. §9-592(J):

      1) A.R.S. §9-592(I) states that the small wireless facility in the ROW is not subject to zoning review and approval in Section 9-594 if the utility pole does not exceed the greater of either:

         i. Ten feet in height above the tallest existing utility pole, other than a utility pole supporting only wireless facilities, that is in place on the effective date of this section, that is located within five hundred feet of the new, replacement or modified utility pole and

that is in the same right-of-way within the jurisdictional boundary of the authority, but no more than fifty feet above ground level.

ii. Forty feet above ground level.

2) A.R.S. §9-592(J) states that new small wireless facilities collocated on a utility pole or wireless support structure in the right-of-way are not subject to zoning review and approval if they do not extend more than ten feet above the utility pole or wireless support structure and do not exceed fifty feet above ground level.

b) Setbacks. Any New Structure subject to zoning review shall comply with all Town fall and setback requirements, including a 100% setback from all property lines, occupied structures, public roadways and sidewalks.

c) Overall Height of New Structure. The height of the New Structure is measured from existing grade to the highest point of the New Structure.

d) Stealth and Concealment Elements

1) New Structures shall be located in areas where they can blend into the existing built and natural environment, where existing landscape elements may assist with concealing the structure from view, and where the addition of the structure will least affect the view sheds from neighboring properties.

2) Depending upon the location of the New Structure and the character of the neighboring area, the Town may require additional landscaping to be installed in connection with the Town's approval of the application. The additional landscaping may include trees, mature vegetation, natural features or hardscaping.

3) The Wireless Provider shall conceal all equipment within a faux cactus structure, similar to the 22' to 40' tall Larsen Camouflage design (see Exhibit G) or as otherwise approved by the Town.

i. New Structures thus concealed shall comply with standard details, such as dimensions, colors and materials similar to existing faux cactus installations in the Town.

4) As part of the stealth and concealment elements of the New Structure, the Town may require the wireless provider to install street name plates, directional signs, and other decorative signs or artistic elements on the structure.

5) The wireless provider is solely responsible for the cost of all stealth and concealment elements and the installation of other elements required by the Town.

6) The wireless provider is responsible for the performance of and any costs incurred for regular upkeep, maintenance and replacement (if necessary) of these stealth and concealment elements.

e) Architectural Integration with Surrounding Area

1) The New Structure shall be designed in consultation with various internal Town stakeholders and may include external stakeholders.

2) The Town may require the New Structure to be constructed of a specific material or specific design that will enhance the stealth and concealment of the site.

f) Foundation

1) The foundation for the New Structure, if required, shall conform to civil and structural engineering standards acceptable to the Town, with design modifications for wireless communications equipment and cables.

2) Unless otherwise stated herein, the height of the New Structure foundation shall be two (2) inches above finished grade. However, if the New Structure foundation is adjacent to or within a sidewalk or ramp, the height of the pole foundation shall be flush with the surface of the immediate area.

3) Shrouds for the pole mounting bolts may be required.

4) If the New Structure is concealed as a faux cactus installation, the structure shall be installed to appear as part of the natural environment, and shall not be located on existing concrete such as sidewalks or curbs, nor shall concrete be placed around the base of the facility except as needed to anchor and support the structural elements of the structure. All such concrete and anchor devices shall be shielded from view by earth, rocks, decomposed granite and landscaping as required by the Town.

g) Painting

1) The Town shall identify the paint colors, location of paint and any decorative work that may be painted onto the New Structure or ground equipment.

2) If visible, the Town shall identify the paint colors for the antennas, antenna mounting brackets and posts, antenna shrouds, and cables.

3) The Town may require the New Structure or ground equipment to be painted using a powder-coat or other process.

h) Ground Mounted Equipment

The Town may require the ground-mounted wireless equipment to be sited and screened or concealed to reduce the visual impact to the surrounding area. The screening or concealment shall take into account the location of the site, the use of the immediate area, and the existing aesthetic elements surrounding the site.

Town of Fountain Hills
Small Wireless in the ROW
Common Standard Design Concepts, Requirements and Details

The following standard design requirements shall be applied to all new small wireless facilities in the Town's ROW, whether for a small wireless facility to be installed on an existing or replacement streetlight pole, an existing or replacement traffic signal pole, an existing or replacement utility pole, or on a New Structure.

A. Pole Design & Installation

1. Replacement Pole Clearances – Underground Utilities
   All ground-mounted electrical equipment shall maintain minimum horizontal clearance from underground utilities.
   - Clearance from water lines shall be at least six (6) feet.
   - Clearance from sewer lines shall be at least six (6) feet.
   - Clearance from telecommunications shall be at least one (1) foot.
   - Clearance from cable television lines shall be at least one (1) foot.
   - Clearance from all other underground infrastructure shall be at least six (6) feet.

   a) The Town, in its sole discretion, may grant a variance, upon approval by the Town Engineer, from these horizontal separation distances on a case-by-case basis. The approval of a variance is dependent factors specific to the site.

   b) In the case where there is an issue with horizontal separation from other underground utilities, the wireless provider may elect to work with the impacted utility to have lines, pipes or property moved so that minimum clearance is achieved. All relocation of Town-owned or a privately-owned utility shall be at the sole expense of the wireless provider.

2. Calculating the Base Height of an Existing Pole
   The base height, from which the calculation of the "increase in pole height" is referenced for determining the overall pole height, shall be calculated as follows:

   a) Streetlight Pole (*see Exhibit A1 and A2*)
      1) A streetlight with a separate luminaire mast arm mounted to the vertical pole shall use the top of the vertical pole as the base height.
      2) A streetlight, with the luminaire mast arm integrated (e.g. telescopic style pole) into the top vertical section of the pole, shall use the point on the pole where the mast arm is connected plus twenty-four (24) inches as the base height.

   b) Traffic Signal Pole (*see Exhibit B*)
      A traffic signal pole with a luminaire mast arm that is mounted above the

signal head mast arm to the pole shall use the top of the vertical portion of the pole as the base height.

3. Replacement Pole Clearance – Original Streetlight Pole or Traffic Signal Pole
   The minimum distance of the replacement pole from the original pole location shall be sixty (60) inches or more so that construction can occur safely. The Town may change this minimum distance on a case-by-case basis.

4. Replacement Pole Clearances – Sidewalks
   The new or replacement pole shall maintain twelve (12) inch minimum clearance distance from sidewalks. The Town, in its sole discretion, may increase that minimum clearance on a case-by-case basis to ensure the safe use of the sidewalk and adjacent area.

5. Sight Distance Easements (SDE) and Sight Visibility Triangles (SVT)
   All new and replacement poles shall be installed in a location that does not impair or interfere with SDE or SVT safety requirements as reasonable determined by the Town.

6. Cables, Wires and Jumpers
   a) All cables for the wireless equipment and antennas – except where such cables or wires attach to the ports in the antenna – shall be located inside a conduit, inside the caisson, or inside the pole, as appropriate. There shall not be any "dog house" or externally visible conduit or entry point of the cables unless specified by the Town.
   b) All cables for the wireless equipment and antennas shall exit the pole or conduit at a location, behind the antenna shroud, and shielded from view. It is the intent of the Town that the cables shall not be visible.
      1) See Exhibit D1 for examples of appropriately shielded cables.
      2) See Exhibit D2 for examples of unacceptable cabling.
   c) All electrical wires for the streetlight luminaire, traffic signal heads, and any Town device on the pole shall be new and connected to the existing power source.

7. Hand-holes
   a) All hand-hole locations shall be called out on the plans.
   b) All hand-holes near antennas shall have the top of the hand-hole no lower than the bottom height of the antennas.
   c) The bottom of the hand-hole should not exceed six (6) inches below the bottom of the antenna.

8. Wireless Facility Identification Information

a) A four (4) inch by six (6) inch Radio Frequency Safety notice may be mounted no less than twenty-four (24) inches from the bottom of the antenna, facing away from traffic.

b) The wireless provider may place on the pole a discreet site identification or number. The size, color and location of this identifier shall be determined by the Town.

c) The Town, as specified in the Wireless Facilities Standard Terms and Conditions, may require the wireless provider to place on the pole, in a discreet but accessible location, the telephone number of wireless provider's network operations center.

d) No wireless provider signs may be placed on a streetlight, traffic signal pole, wireless support structure, or a new or replacement pole except to the extent required by local, state or federal law or regulations.

9. Interference with Town Wireless Network

The Town has, or may have in the future, certain wireless devices in a network that connects traffic signals, community centers, water sites, and other locations for the Town's proprietary use. The selection of a location for a wireless site shall consider the potential interference of the Town's wireless network with RF from a wireless provider's proposed site.

10. Cable Chase and Dog Houses

The Town, in its sole discretion, shall determine if an exterior cable chase and dog house are aesthetically compatible with the pole and immediate area. The materials and paint color of the cable chase and dog house shall be determined on a case-by-case basis.

B. <u>Removal of Original Pole, Equipment and Pole Foundation</u>

1. Removal of Original Signal Pole, Mast Arm, Signal Heads and Luminaire

a) The Town shall determine what original components, (e.g., original pole, mast arm, signal heads and luminaire, etc.) shall be delivered by the wireless provider, at no cost to the Town, to a location specified by the Town.

b) If the Town accepts some of the original components, then only those components shall be delivered by the wireless provider to the Town and the remaining components shall be discarded by the wireless provider.

2. Removal of Original Streetlight or Traffic Signal Pole Foundation

The concrete pole foundation for the original streetlight or traffic signal pole shall be removed by the wireless provider as instructed by the Town:

a) Partial Removal

The original pole foundation shall be taken back to a level that is twelve (12) inches below existing grade and covered with four (4) inches of one-half (1/2") inch to three (3/4") quarter inch rock materials. The remaining eight (8) inches shall be native soil.

b) Complete Removal

If the entire original pole foundation must be removed, then all materials (concrete, rebar, metals, bolts, etc.) shall be removed. The Town's Inspector shall determine, on a case-by-case basis, the type of backfill material and compaction required – ranging from native soil that is compacted to a half (1/2) sack slurry for the entire depth, or a combination of native soil and slurry.

C. Antennas, RRH/RRU, Cables and Mounting on Pole:

1. *General Requirement:* All antennas shall be installed in a manner that minimizes the visual impact to the general public. In order to minimize the visual impact, wireless providers should use canister antennas, where possible and appropriate unless the Town's stealth and concealment requirements indicate otherwise. See Exhibit F. All work shall be performed in a professional manner that is consistent with the highest standards of workmanship.

2. *Specific Criteria:*

   a) Antenna Mounting Posts and Brackets

      1) All panel antennas shall be mounted directly to the pole or onto a mounting pole so that the distance from the "face" of the streetlight pole to the back of the antenna does not exceed nine (9) inches.

      2) All mounting posts shall be trimmed so that the poles do not extend higher than the top of the antenna or protrude lower than the antenna unless necessary to install the shroud.

      3) All pole attached wireless equipment must be a minimum ten (10) feet from the sidewalk elevation.

   b) Panel Antennas

      1) All panel antennas for a small cell site shall fit within an imaginary enclosure of not more than six (6) cubic feet in volume in accordance with A.R.S. §9-591(19)(a). (NOTE: This volume does not include antenna cable shrouds when required.)

      2) All panel antennas with exposed cables from the bottom of the antenna shall have a shroud installed on the antenna or antenna mounting posts to conceal the cables. (*see Exhibits D1 and D2*)

         a. The type of shroud may be a forty-five (45) degree angle (away from the bottom of the antenna; toward the pole) or a ninety (90) degree angle (parallel to the bottom of the antenna) depending on the location of the site.

         b. The shroud shall extend from the bottom of the antenna to two (2) inches below the bottom of the nearest hand-hole.

   c) Canister Antennas

1) All canister antennas shall fit within an imaginary enclosure of not more than six (6) cubic feet in volume. (Note: This volume does not include the canister as it is a stealth device and not the antenna.)
2) The canister shall be no larger than eighteen (18) inches in diameter (OD).
3) All canister antennas shall be located in a canister that is mounted to a base plate at the top of the vertical section of the replacement pole.
4) All cables protruding from the canister shall be concealed within the canister or by a shroud at the point where the canister is mounted to the base plate.

d) Remote Radio Heads (RRH) / Remote Radio Units (RRU)
Under State Law §9-591(19)(a), the RRH/RRU is not considered part of the antenna. If allowed, the RRH/RRU shall be calculated as part of "All other wireless equipment associated with this facility..." in A.R.S. §9-591(19)(b) that is subject to the twenty-eight (28) cubic feet maximum size for small cell sites.
1) On a case-by-case basis, the Town in its sole discretion and – upon reviewing the landscape in the immediate surrounding area, the location of the pole, and stealth options, may allow a site to have an RRH/RRU installed on the pole.

D. <u>Ground-mounted Equipment:</u>

1. *General requirement:* All ground-mounted equipment shall be installed in a manner that minimizes the visual and ingress/egress impact to the general public. All work shall be performed in a professional manner that is consistent with the highest standards of workmanship.

2. *Specific criteria:*
a) Sight Distance Easements (SDE) and Sight Visibility Triangles (SVT)
All ground-based wireless equipment shall be installed in a location that does not impair or interfere with SDE or SVT safety requirements. To ensure proper sight distance, all Town of Fountain Hills Traffic Engineering Standard Details shall apply.

b) Ground Equipment Location – Generally
All ground-based wireless equipment, including but not limited to equipment cabinets or power pedestals, shall be placed as far as practical to the back of the ROW while maintaining at least three (3) feet of ingress/egress in the ROW or public utility easement (PUE) around the equipment.

c) Ground Equipment Clearances—Underground Utilities
1) All ground-mounted electrical equipment shall maintain minimum <u>horizontal</u> clearance from below-ground utilities:
- Clearance from water lines shall be at least six (6) feet.
- Clearance from sewer lines shall be at least six (6) feet.

- Clearance from telecommunications shall be at least one (1) foot.
- Clearance from cable television lines shall be at least one (1) foot.
- Clearance from all other underground infrastructure shall be at least six (6) feet.

2) The Town, in its sole discretion, may grant a variance upon approval from the Town Engineer, from these horizontal separation distances on a case-by-case basis. The approval of a variance is dependent on factors specific to the site.

3) In the case where there is an issue with horizontal separation from other underground utilities, the wireless provider may elect to work with the impacted utility to have its lines, pipes or property moved so that minimum clearance is achieved. All relocation work of Town-owned or a privately-owned utility shall be at the sole expense of the wireless provider.

d) Ground Equipment Clearance – Sidewalks

The ground equipment shall maintain a minimum twelve (12) inch clearance distance from sidewalks. The Town, in its sole discretion, may increase the minimum clearance on a case-by-case basis to ensure the safe use of the sidewalk and adjacent area.

e) Compliance with Height Requirements

Evidence or documentation that, where the above-ground structure is over thirty-six (36) inches in height, given its proposed location, the structure will comply or be in compliance with applicable Town of Fountain Hills planning and zoning ordinances.

f) Screening of Ground Equipment

The Town requires that ground-mounted equipment be screened; the type of screening materials and design will be addressed on a case-by-case basis. See Exhibit E2 for general screening examples that the Town may consider on a case by case basis.

1) In cases when screening is not possible, the Town may specify the location, orientation or paint color of the ground-mounted equipment.
2) Town may require ground-mounted equipment to be located underground (except for the electricity meters, kill switches, etc.).

g) Decals and Labels

1) All equipment manufacturers' decals, logos and other identification information shall be removed unless required for warranty purposes.
2) The wireless provider of the site may place an "Emergency Contact" or "Network Operations Center" decal or emblem to the ground equipment.
3) The ground-mounted equipment shall not have any flashing lights, sirens

or regular noise other than a cooling fan that may run intermittently.

h) Equipment Cabinets on Residential Property

1) Residential Single-Family Lot

The Wireless Equipment and Ancillary Equipment listed in A.R.S. §9-591(19)(b) shall not exceed thirty-six (36) inches in height in the front yard of a residential single-family zoned property.

2) Air-conditioning Units

Unless otherwise specified by Town, a wireless equipment cabinet with air-conditioning (not a fan only) shall be enclosed by walls and setback a minimum of fifteen (15) feet from lots where the existing or planned primary use is a residential single-family dwelling.

i) Electric Company Meter

1) All electric company meters shall be installed in the ROW or PUE. The location of the meter equipment shall have minimum ingress and egress clearance from private property lines and driveways.

2) All electric company meters shall maintain minimum clearance from above-ground utility cabinets and below-ground utilities.

3) All electric company meters shall be installed in a location that does not impair or interfere with the SDE or SVT safety requirements of the Town.

4) The electric company meters shall be screened or contained within a "Myers-type" or "Milbank-type" pedestal cabinet that is painted to match the ground equipment or as specified by the Town. (*see Exhibit E*)

5) In the case where screening is not required, the Town may specify the paint color of the electric company meter cabinet on a case-by-case basis.

Town of Fountain Hills Contacts

For questions regarding the 2018 Town of Fountain Hills Design Standards, Concepts & Requirements for Wireless Facilities in the Right-of-Way, contact:

Town of Fountain Hills Development Services Director:

Robert Rodgers
480-816-5138

Exhibit A1

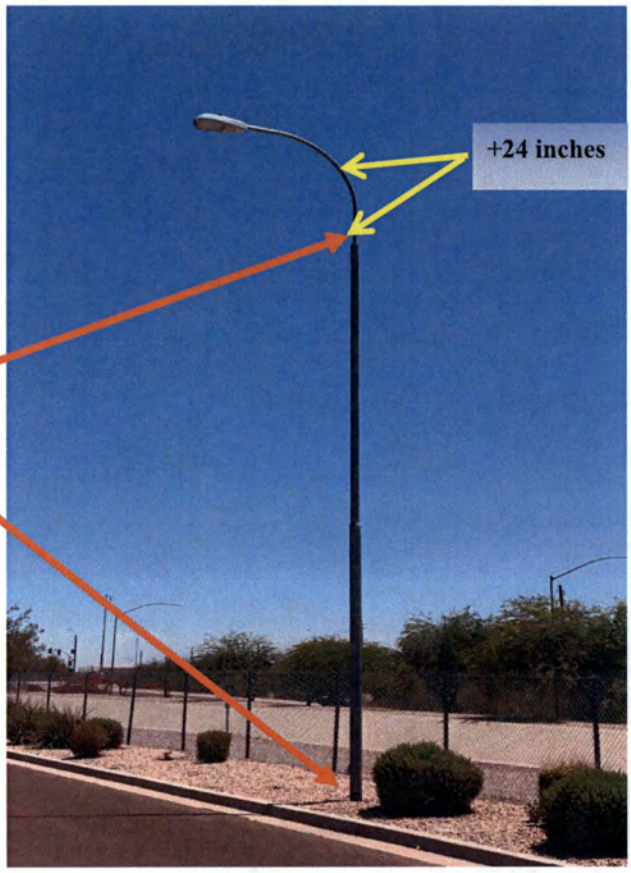
Calculation Points for Height of an Existing Streetlight with Separate Luminaire Mast Arm

The purple line next to the streetlight depicts the section of the existing streetlight pole that shall be used to calculate the height of the existing pole. The lines are not to scale and are solely used for illustrative purposes.

Exhibit A2

Calculation Points for Height of an Existing Streetlight with Integrated Luminaire Mast Arm

The "Connection Point" on an Existing Telescopic Style Streetlight Pole with an Integrated Luminaire Mast Arm



The top and Bottom Points on a telescopic Streetlight Pole to Calculate the Verticle Height of the Existing Streetlight Pole
Plus
Twenty-four (24) inches

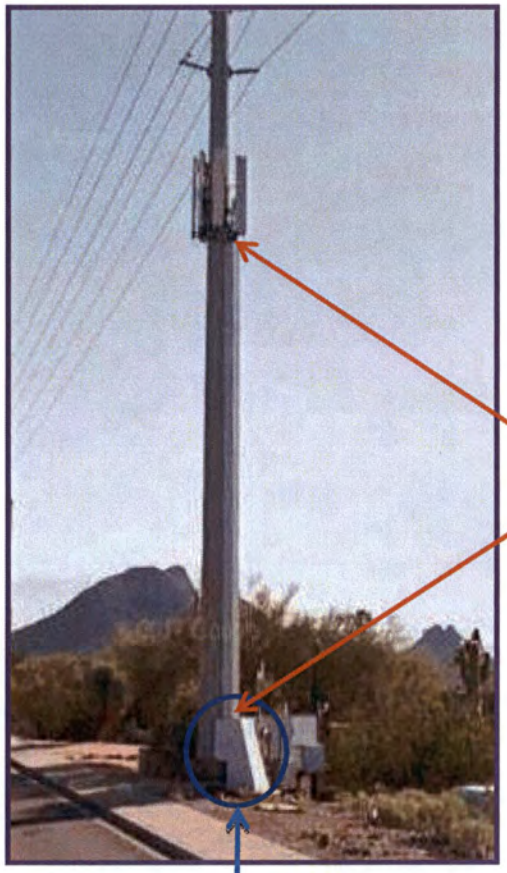
Exhibit B

Calculation Points for Height of Existing Traffic Signal Pole

The Top and Bottom Points on a Traffic Signal Pole to Calculate the Base Vertical Height of the Existing Pole

Exhibit C

Dog House – Cable Transition from Underground to Electric Utility Pole



External cable chase – the cables and wires are mounted underneath the chase.

"Dog House" with external cable chase installed at the base of a pole to cover the cables and wires when they cannot be installed inside the utility pole.

Exhibit D1

Antenna Shrouds – 45 Degrees

Exhibit D2

Antenna Shrouds – 90 Degrees

Exhibit D3

Unacceptable - Visible Cables

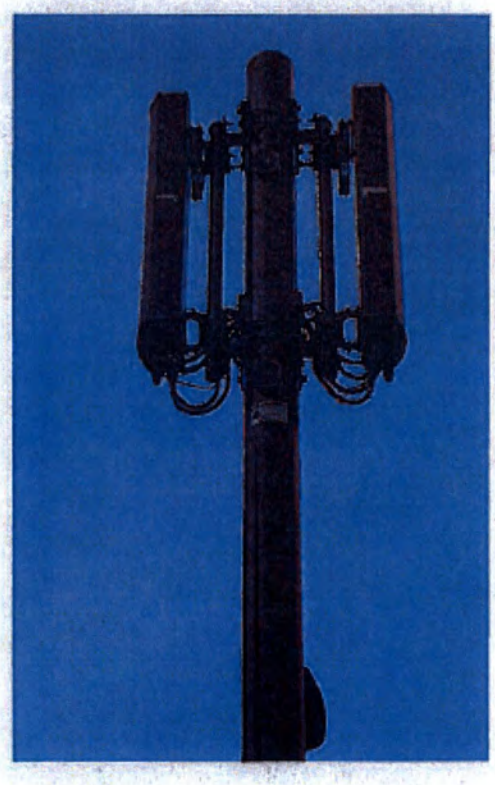


Exhibit E1

Examples of Electrical Meter Pedestals – "Myers" or "Milbank" Style

Exhibit E2

Ground Equipment Screening Examples

Exhibit E2

Ground Equipment Screening Examples (continued)

Exhibit F

Canister Antenna

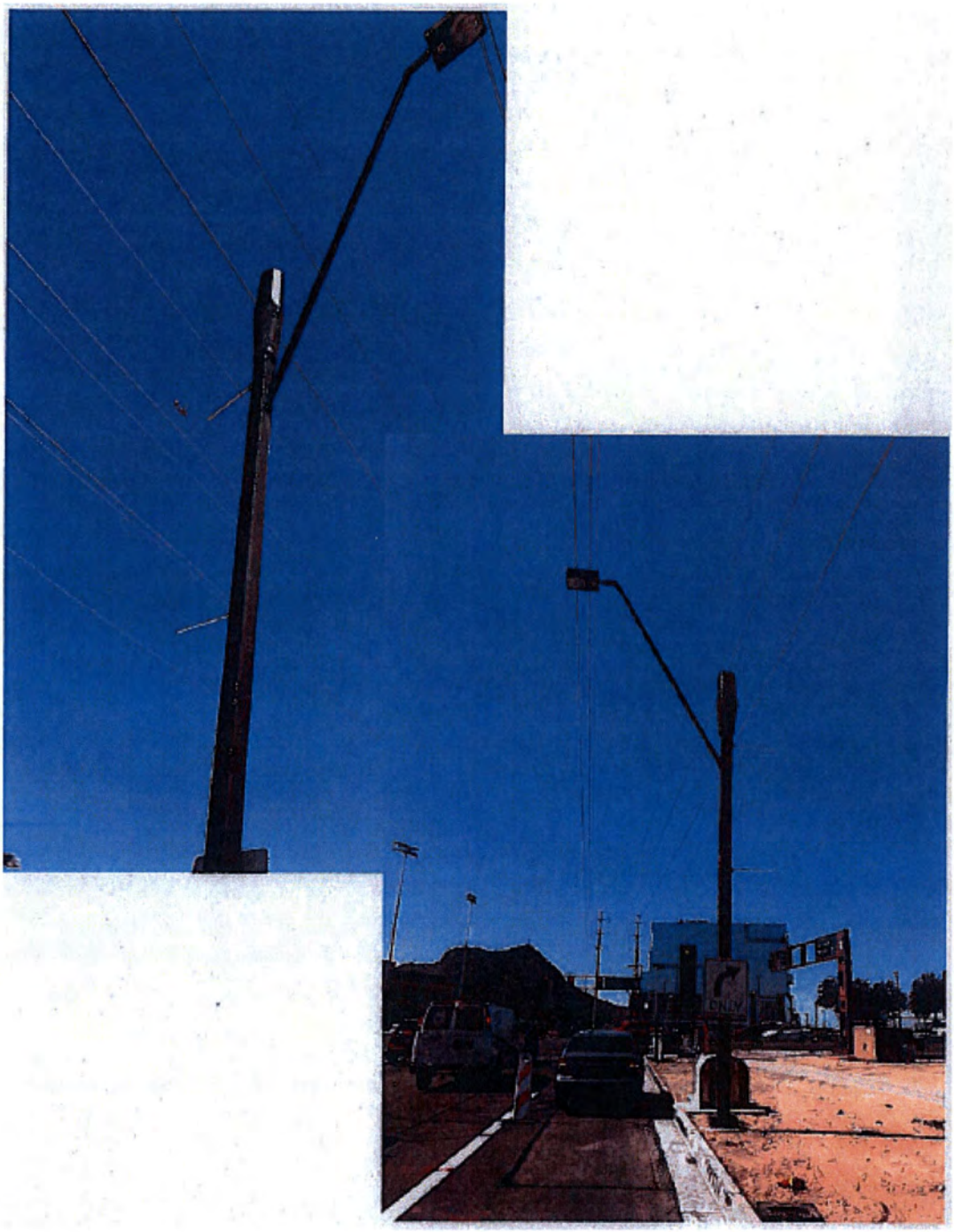
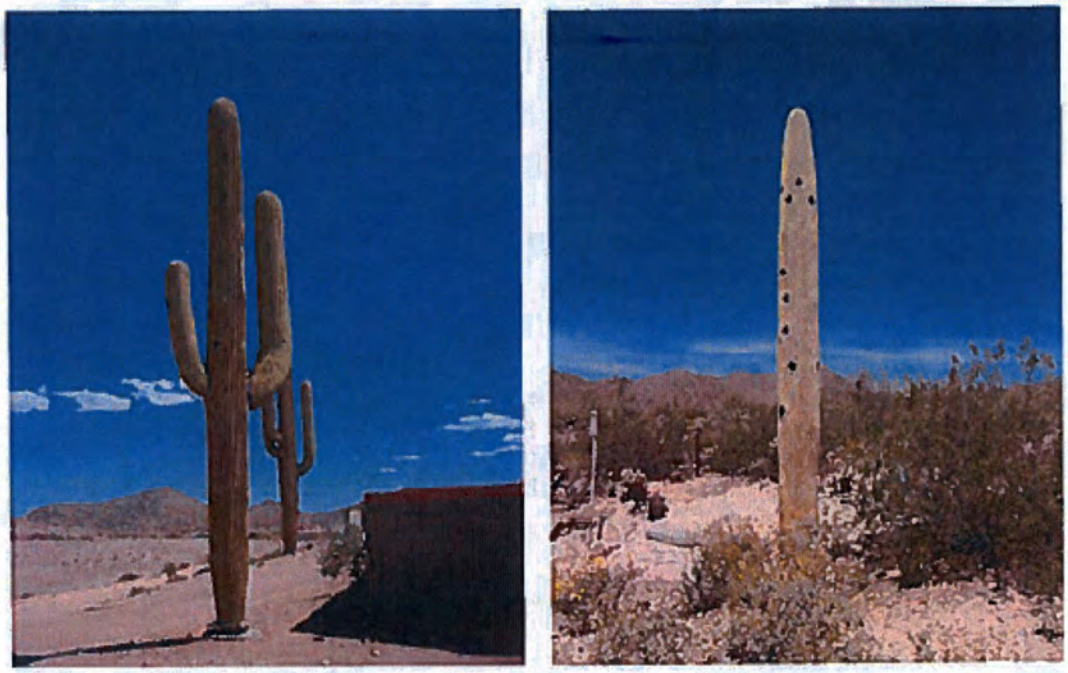


Exhibit G



Saguaros

The need for concealed sites is also prevalent in the desert southwest region. To serve this need we have developed a Saguaro Cactus. Utilizing an RF-friendly, naturalistic looking FRP shell, we are able to position antenna panels not only in the hollow shell of the upper main trunk, but also in the individual arms. This offers greater flexibility in terms of multiple panels per sector, horizontal separation, and centerline height.

Our Saguaros range from 10-40 feet tall, housing one to two antenna arrays. Scars, woodpecker holes and thousands of painted needles enhance the realism.

Even the birds can't tell the difference

EXHIBIT B

[LETTER OF CREDIT FORMS AND INSTRUCTIONS]

See following pages

Wireless Facility Irrevocable Letter of Credit Template

Instructions:

The following four (4) pages contain the template for an irrevocable letter of credit relating to wireless facilities to be located within Town rights-of-way.

Throughout the document there are blank spaces into which should be inserted the wireless facility provider name, bank name and letter of credit document name. Please insert this information where requested.

The irrevocable letter of credit number may not be available when the initial submission of the draft language for review is made. This can be inserted later when the letter is actually issued by the named financial institution.

Submit the draft irrevocable letter of credit, together with _____, to the Town's Development Services Director.

The issuer of the irrevocable letter of credit shall be a federally-insured financial institution, a member of the New York Clearing House Association or another commercial bank or trust company satisfactory to the Town, having a net worth and financial wherewithal also satisfactory to the Town.

As a reminder, any assurance submitted in a format other than the approved letter of credit template is subject to review by the Town Attorney and Town Development Services Director and may not be accepted.

FORM OF WIRELESS FACILITY LETTER OF CREDIT

[INSERT BANK NAME]
[INSERT LETTER OF CREDIT DOCUMENT NAME]

_____, 20___

Letter of Credit No._____ Initial Expiration Date: _____

Town of Fountain Hills
16705 E. Avenue of the Fountains
Fountain Hills, AZ 85268
Attn: Small Cell Administrator

At the request and for the account of our customer, **[Insert Wireless Facility Provider name]**, a(n) _____ ("Provider"), **[Insert Bank Name]** ("us", "we" or "Bank"), hereby establishes, in favor of Town of Fountain Hills, an Arizona municipal corporation ("Town"), this clean, irrevocable and unconditional **[Insert Letter of Credit Document Name]** ("Letter of Credit"). This Letter of Credit authorizes you to draw on us in amounts which in the aggregate shall not exceed the Stated Amount (herein so called) of _____Dollars ($_____).We hereby engage with you that draft(s) drawn and presented in compliance with the terms contained in this Letter of Credit will be duly honored upon presentation as stated above, on or before the expiration date hereof.

You may obtain the funds available under this Letter of Credit by presentment to us of your sight draft or drafts drawn on us in the form set forth as Exhibit "A" hereto, accompanied by copies of the original of this Letter of Credit and amendment(s) thereto, if any. Within ten (10) days after we honor your draft, you must make the original of this Letter of Credit available to us in Maricopa County, Arizona upon which we may endorse our payment.

Drafts may be presented by any of the following means:

By telefax to ( ) _____ - _____

By email to_____

By hand or overnight courier service delivery to:

[This address must be in Maricopa County, Arizona.]

_____

_____

_____

By hand or overnight courier service delivery to:

[This address need not be in Maricopa County, Arizona]

_____
_____
_____

This Letter of Credit is valid until _____, 201_ and shall thereafter be automatically renewed for successive one (1) year periods, unless, at least one hundred twenty (120) days prior to expiration, we notify you in writing, by either registered or certified mail, that we elect not to renew the Letter of Credit for such additional period. In the event of such notification, any then unused portion of the Letter of Credit shall be available upon your presenting to us your draft on or before the then- current expiration date.

If cancellation of this Letter of Credit is required before the expiry date stated herein (which may be extended from time to time either automatically as stated in Item 4 immediately above or by written amendment by us and acceptance by you), the original of this Letter of Credit and amendment(s) thereto, if any, must be returned to us accompanied by your letter requesting cancellation in the form attached hereto as Exhibit "B". This letter of credit may also be reduced upon our receipt of a reduction certificate, the form of Exhibit "B".

You may draw the full amount of this Letter of Credit or only part of it from time to time, in your discretion; provided, that the total of all drafts honored by us under this Letter of Credit shall not exceed the Stated Amount available to you under this Letter of Credit.

Unless otherwise expressly stated herein, this Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (2007 Revision), International Chamber of Commerce Publication No. 600.

Very truly yours,

[Insert Bank Name]

By:_____
Name:_____
Its:_____

EXHIBIT A

Drawn Under **[Insert Bank Name]**
[Insert Letter of Credit Document Name] No. _____

$_____ (U.S.) _____, 20__

To: **[Insert Bank Name]**

Drawn under **[Insert Bank Name] [Insert Letter of Credit Document Name]** No. _____.

I am the Development Services Director, and a duly authorized representative, of **Town of Fountain Hills**, an Arizona municipal corporation (the "Town"), the beneficiary of **[Insert Bank Name] [Insert Letter of Credit Document Name]** No. _____, and hereby certify that the amount drawn hereunder represents funds currently due the Town under separate agreement(s) with **[Insert Name of Provider]**.

Accordingly, please pay to the Town _____ Dollars ($_____).

Please make payment to the Town in the form of a wire deposit to:

If such deposit cannot be accomplished immediately for any reason, please make your payment in the form of a cashier's check issued by your institution and delivered to me at 16705 E Avenue of the Fountains Fountain Hills, AZ 85268, Attn: Development Services Director.

If there is any imperfection or defect in this draft or its presentation, please inform me immediately at (480) 816-5122 so that I may correct it. Also, please immediately notify the Town Attorney.

TOWN OF FOUNTAIN HILLS

By: _____
Name: _____
Its: Development Services Director

EXHIBIT B

Date:

_____ and _____
_____ _____
_____ _____
_____ _____

Ref: Letter of Credit No. _____

As parties to the above referenced Letter of Credit, we request that the following action(s) be taken as evidenced by our initials and signatures below:

Please initial:

_____ Reduce the amount from U.S. $_____ to U.S. $_____.

_____ Extend the expiration date from _____ to_____.

_____ Cancel this Letter of Credit effective immediately.

Enclosed herewith are the original Letter of Credit documents, including the amendment(s), if any, thereto.

(Note: If any of these documents are not included with this letter, you must specify each missing document and explain the reason why it is not being returned.)

_____
_____
_____

Town of Fountain Hills, an
Arizona municipal corporation

By:_____
Name:_____
Title:_____

_____, a(n) _____

By: _____
Name: _____
Title: _____

EXHIBIT C

[FORM OF ASSIGNMENT]

See following pages

Assumption Of Wireless Facility License Agreement

This assumption is made pursuant to Paragraph 19 of the Town of Fountain Hills Wireless Facilities Standard Terms and Conditions ("Terms"), incorporated by reference into that certain Wireless Facility License Agreement (the "License Agreement") between Town of Fountain Hills, an Arizona municipal corporation ("Town") and _____, a _____ ("Wireless Provider") dated _____, 20___.

_____, a _____ ("Assignee"), having acquired the rights of the Wireless Provider under the License Agreement, hereby assumes the License Agreement, agrees to be bound thereby, and obligates itself to fully perform the terms and conditions of the License Agreement, all in favor of Town.

ASSIGNEE WARRANTS AND REPRESENTS THAT ASSIGNEE HAS READ AND AGREES TO THE TOWN OF FOUNTAIN HILLS WIRELESS FACILITIES STANDARD TERMS AND CONDITIONS.

After the Date of this assumption, notices to Assignee shall be addressed as follows:

Assignee's network operations center phone number as required by the Terms is ( ) _____.

Assignee's address for notices as required by the Terms shall be:

_____
_____
_____

Assignee's billing address for routine billing invoices as required by the Terms shall be:

_____
_____
_____

Assignee understands that nothing in this Assumption serves to modify any provision (except for the Notice addresses, as provided above) or extend the Term of the License Agreement. The person signing this document on behalf of Assignee warrants to Town his authority to do so.

Dated: _____, 20_____

ASSIGNEE: _____,
a _____

By: _____
Its: _____

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 20__, by _____, _____ of _____, a _____.

_____
Notary Public

My Commission Expires:

_____
Date

EXHIBIT D
TO
RESOLUTION NO. 2018-18

[Amendments to Town Comprehensive Fee Schedule]

See following pages.

Description	Fee FY17-18
ENCROACHMENT/ENGINEERING PERMITS	
Small Wireless Facilities:	
ROW Use Fee	$50/year x number of small wireless facilities
Authority utility pole attachement	$50/year
Small Wireless Facilities collocation	$100 per SWF up to five
Small Wireless Facilities collocation	$50 for SWF over five
Batched applications for up to 25 SWF's	$100 per SWF up to five (at $100 each) ($500 maximum fee)
Batched applications for up to 25 SWF's	$50 per SWF 6 - 20 sites ($1000 maximum fee)
Applications for new, replacement or modified utility poles NOT subject to zoning review	Not to Exceed $750
Applications for new, replacement or modified utility poles and collocation of wireless facilities subject to zoning review	Not to Exceed $1000

PHOENIX 77018-1 430871v7

INDEX

§17	Personal Wireless Service Facilities
§17-1	Purpose and Legislative Intent
§17-2	Definitions; Word Usage
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§17-4	Shot Clock Periods
§17-5	Shot Clock Tolls, Extensions & Reasonable Delay Periods
§17-6	Application Requirements
§17-7	Design Standards
§17-8	Town Council Initial Review
§17-9	Hearings and Public Notices
§17-10	Factual Determinations to be Rendered by the Town Council
§17-11	Retention of Consultants
§17-12	Setback Requirements
§17-13	Height Restrictions
§17-14	Use Restrictions and Variances
§17-15	Environmental Impacts
§17-16	Historic Site Impacts
§17-17	*Force Majeure*
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§17-21	ADA Accommodations
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§17 Personal Wireless Service Facilities

This Chapter 17 is intended to repeal and replace all previous versions of, and amendments to, Chapter 17 ("Wireless Telecommunications Towers and Antennas") and Article 16-2 ("Small Wireless Facilities") of the Zoning Ordinance of the Town of Fountain Hills ("Town Code"), all of

which are hereby repealed and replaced in their entirety by this Chapter 17 et. seq., as of the effective date hereof.

No Personal Wireless Service Facility ("PWSF") shall be sited, constructed, reconstructed, installed, materially changed or altered, expanded, or used unless in conformity with this Chapter.

For the installation, construction, erection, relocation, substantial expansion, or material alteration of any PWSF that is not classified as a Small Wireless Facility as hereinafter defined and discussed, the Town shall require a special use permit and site plan approval pursuant to the provisions of this Chapter, which shall be applied for in accord with the procedure set forth in Chapter 2, §2.02, unless otherwise provided herein below.

The performance of maintenance, routine maintenance, in-kind replacement of components, and/or repairs (as defined herein) to an existing PWSF and/or existing personal wireless service equipment shall not require a special use permit.

Each application for a special use permit under this Chapter and each individual PWSF for which an application for a special use permit is submitted shall be considered based on the individual characteristics of each respective installation at each proposed location as an individual case. In other words, each installation at each proposed location shall be reviewed and considered independently for its own characteristics and potential impacts, irrespective of whether the proposed facility is designed and intended to operate independently or whether the installation is designed and/or intended to operate jointly as part of a Distributed Antenna System.

§17-1 Purpose and Legislative Intent

The purpose of this section is to promote the health, safety, and general welfare of the residents of the Town of Fountain Hills and to preserve the scenic, historical, natural, and man-made character and appearance of the Town while simultaneously providing standards for the safe provision, monitoring, and removal of cell towers and other personal wireless service facilities consistent with applicable federal, state and local laws and regulations.

Consistent with the balancing of interests which the United States Congress intended to embed with the federal Telecommunications Act of 1996 (hereinafter "the TCA"), Chapter 17 is intended to serve as a *Smart Planning Provision*, designed to achieve the four (4) simultaneous objectives of: (a) enabling personal wireless service providers to provide adequate personal wireless services throughout the Town so that Town residents can enjoy the benefits of same, from any FCC licensed wireless carrier from which they choose to obtain such services, while (b) minimizing the number of cell towers and/or other personal wireless service facilities needed to provide such coverage, (c) preventing, to the greatest extent reasonably practical, any unnecessary adverse impacts upon the Town's communities, residential areas, and individual homes, and (d) complying with all of the legal requirements which the TCA imposes upon the Town, when the Town receives, processes

Commented [JW1]: Similar language in heading of adopting ordinance

Commented [JW2]: See adopted ordinance Section 17.01 B. 1.

Commented [JW3]: Similar to Sec. 7.01 A

Commented [JW4]: Used in adopted ordinance Section 17.01 B. 2. a. - d.

and determines applications seeking approvals for the siting, construction and operation of cell towers and/or other personal wireless service facilities.

The Town seeks to minimize, to the greatest extent possible, any unnecessary adverse impacts caused by the siting, placement, physical size, and/or unnecessary proliferation of personal wireless service facilities, including, but not limited to, adverse aesthetic impacts, adverse impacts upon property values, adverse impacts upon the character of any surrounding properties and communities, adverse impacts upon historical and/or scenic properties and districts, and the exposure of persons and property to potential dangers such as structural failures, ice fall, debris fall, and fire.

The Town also seeks to ensure that, in applying this section, the Town Council ("Council") is vested with sufficient authority to require applicants to provide sufficient, accurate, and truthful probative evidence to enable the Council to render factual determinations consistent with both the provisions set forth herein below and the requirements of the TCA when rendering decisions upon such applications.

To achieve the objectives stated herein, the Town seeks to employ the "General Authority" preserved to it under Section 47 U.S.C.A. §332(c)(7)(A) of the TCA, to the greatest extent which the United States Congress intended to preserve those powers to the Town, while simultaneously complying with each of the substantive and procedural requirements set forth within subsection 47 U.S.C.A. §332(c)(7)(B) of the TCA.

§17-2 Definitions; Word Usage

For the purposes of this article, and where not inconsistent with the context of a particular section, the defined terms, phrases, words, abbreviations, and their derivations shall have the meanings provided in this section. When not inconsistent with the context, words in the present tense include the future tense, words used in the plural number include words in the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory. The definitions set forth herein shall supersede any definitions set forth within the Town Code, and the definitions set forth herein below shall control and apply to Chapter 17 and all subparagraphs herein.

ACCESSORY FACILITY OR ACCESSORY STRUCTURE
A facility or structure serving or being used in conjunction with a personal wireless services facility or complex and located on the same property or lot as the personal wireless services facility or complex or an immediately adjacent lot, including, but not limited to utility or transmission equipment storage sheds or cabinets.

ACHP
The Federal Advisory Council on Historic Preservation.

ADEQ
The Arizona Department of Environmental Quality.

ADEQUATE COVERAGE
As determined by the Town Council, adequate coverage means that a specific wireless carrier's personal wireless service coverage is such that the vast majority of its customers can successfully use the carrier's personal wireless service the vast majority of the time, in the vast majority of the geographic locations within the Town, that the success rate of using their devices exceeds 97%, and that any geographic gaps in a carrier's gaps in personal wireless services are not significant gaps, based upon such factors including, but not limited to, lack of significant physical size of the gap, whether the gap is located upon a lightly traveled or lightly occupied area, whether only a small number of customers are affected by the gap, and/or whether or not the carrier's customers are affected for only limited periods of time. A wireless carrier's coverage shall not be deemed inadequate simply because the frequency or frequencies at which its customers are using its services are not the most preferred frequency of the wireless carrier.

ANTENNA
An apparatus designed for emitting radiofrequency (RF) radiation to be operated or operating from a fixed location for personal wireless service.

Commented [JW5]: Similar definition in Section 17.02

APPLICANT
Any individual, corporation, limited liability company, general partnership, limited partnership, estate, trust, joint-stock company, association of two or more persons having a joint common interest, or any other entity submitting an application for a special use permit, site plan approval, variance, building permit, and/or any other related approval, for the installation, operation and/or maintaining of one or more personal wireless service facilities.

APPLICATION
Refers to all necessary and required documentation and evidence that an applicant must submit to receive a special use permit, building permit, or other approval for personal wireless service facilities from the Town.

BOARD OF ADJUSTMENT
The Board of Adjustment of the Town of Fountain Hills, established pursuant to §1.06 of the Zoning Ordinance with membership, powers, duties, and responsibilities as set forth in Article 28 of the Town Code.

COUNCIL OR TOWN COUNCIL
The Town Council of the Town of Fountain Hills.

CELL TOWER
A free-standing, guy-wired, or otherwise supported pole, tower, or other structure designed to support or employed to support equipment and/or antennas used to provide personal wireless

services, including, but not limited to, a pole, monopole, monopine, slim stick, lattice tower or other types of standing structures.

CEQ
The Council on Environmental Quality, as established under NEPA.

COLOCATION, CO-LOCATION, and/or CO-LOCATE
To install, mount or add new or additional equipment to be used for the provision of personal wireless services to a pre-existing structure, facility, or complex which is already built and is currently being used to provide personal wireless services by a different provider of such services, wireless carrier or site developer.

COMPLETE APPLICATION, COMPLETED APPLICATION
An application that contains all the necessary and required information, records, evidence, reports, and/or data necessary to enable an informed decision to be made with respect to an application. Where any information is provided pursuant to the terms of this Chapter and the Community Development Director, Engineer or the Town's expert or consultant or the Council determines, based upon information provided, that any additional, further, or clarifying information is needed as to one or more aspects, then the application will be deemed incomplete until that further or clarifying information is provided to the satisfaction of the Community Development Director, Engineer, Town Council or the Town's expert or consultant of the Council.

COMPLEX
The entire site or facility, including all structures and equipment, located at the site.

DBM (dBm)
DBM stands for decibel milliwatts, which is a concrete measurement of the wireless signal strength of wireless networks. Signal strengths are recorded in negative numbers and can range from approximately -30 dBm to -110 dBm. The closer the number is to 0, the stronger the cell signal.

DEPLOYMENT
The placement, construction, or substantial modification of a personal wireless service facility.

DISTRIBUTED ANTENNA SYSTEM, DAS
A network of spatially separated antenna nodes connected to a common source via a transport medium that provides personal wireless service within a geographic area.

EFFECTIVE PROHIBITION

A finding by the Town Council that if an application seeking approval for a specific new Personal Wireless Service Facility at a specific location, and a specific height, were to be denied, such denial would either: (a) prevent an identified Wireless Carrier from providing personal wireless services within a specific geographic area, or areas, within the Town, or (b) would prevent a specific

Wireless Carrier from constructing a sufficient number of such facilities necessary to enable it to provide Personal Wireless Services within the Town.

An effective prohibition shall not be found to exist if a Wireless Carrier has Adequate Coverage in a specified geographic area, such that its end-use customers can use their cellular telephones to connect to landlines using the Carrier's Personal Wireless Services; however, the frequencies are not the "most preferred" frequencies of the Carrier.

An effective prohibition shall also not be found to exist if an applicant fails to establish before the Town Council that any existing geographic gap or capacity deficiency in the specific Wireless Carrier's coverage cannot be remedied through a less intrusive means than what is being proposed, including, but not limited to, potential installations on alternative less intrusive sites, a shorter tower or facility, the incorporation of a more stealthy design, etc.

A finding of Effective Prohibition, or lack thereof, shall be based upon an applicant's submission of sufficient probative, relevant, and sufficiently reliable evidence and the appropriate weight the Town Council deems appropriate to afford.

ELEVENTH HOUR SUBMISSIONS
An applicant's submission of new and/or additional materials in support of an application less than five (5) business days before the expiration of an applicable shot clock or at an otherwise unreasonably short period of time before the expiration of the shot clock, making it impracticable for the Town Council to adequately review and consider such submissions due to their complexity, volume, or other factors, before the expiration of the shot clock.

ENURE
To operate or take effect. To serve to a person or party's use, benefit, or advantage.

EPA
The United States Environmental Protection Agency.

FAA
The Federal Aviation Administration or its duly designated and authorized successor agency.

FACILITY
A set of wireless transmitting and/or receiving equipment, including any associated electronics and electronics shelter or cabinet and generator.

FCC
The Federal Communications Commission.

GENERAL POPULATION/UNCONTROLLED EXPOSURE LIMITS
The applicable radiofrequency radiation exposure limits set forth within 47 CFR §1.1310(e)(1), Table 1 Section (ii), made applicable pursuant to 47 CFR §1.1310(e)(3).

HEIGHT
When referring to a tower, personal wireless service facility, or personal wireless service facility structure, the height shall mean the distance measured from the pre-existing grade level to the highest point on the tower, facility, or structure, including, but not limited to, any accessory, fitting, fitment, extension, addition, add-on, antenna, whip antenna, lightning rod or other types of lightning-protection devices attached to the top of the structure.

HISTORIC STRUCTURE
Any structure that is either on the National Register of Historic Places or is eligible for inclusion in the national register, irrespective of whether or not an application for inclusion onto the national register has been filed or not filed.

ILLEGALLY EXCESSIVE RF RADIATION or ILLEGALLY EXCESSIVE RADIATION
RF radiation emissions at levels that exceed the legally permissible limits set forth within 47 CFR §1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).

IN-KIND REPLACEMENT
The replacement of a malfunctioning component(s) with a properly functioning component of substantially the same weight, dimensions, and outward appearance.

MACROCELL
A cellular base station that typically sends and receives radio signals from large towers and antennas. These include traditionally recognized cell towers, typically ranging from 50 to 199 feet in height.

MAINTENANCE or ROUTINE MAINTENANCE
Plumbing, electrical or mechanical work that may require a building permit but that does not constitute a modification to the personal wireless service facility. It is work necessary to assure that a wireless facility and/or telecommunications structure exists and operates reliably and in a safe manner, presents no threat to persons or property, and remains compliant with the provisions of this chapter and FCC requirements.

NECESSARY or NECESSITY or NEED
What is technologically required for the equipment to function as designed by the manufacturer and anything less will result in prohibiting the provision of service as intended and described in the narrative of the application. “Necessary” or “need” does not mean what may be desired, preferred, or the most cost-efficient approach and is not related to an applicant’s specific chosen design standards or unspecified “coverage objectives.” Any situation involving a choice between or among alternatives or options is not a need or a necessity.

NEPA
The National Environmental Policy Act, 42 U.S.C. §4321, et seq.

NHPA
The National Historic Preservation Act, 54 U.S.C. 300101 et seq, and 36 CFR Part 800, et seq.

NODE, DAS NODE
A fixed antenna and related equipment installation that operates as part of a system of spatially separated antennas, all of which are connected through a medium through which they work collectively to provide personal wireless services, as opposed to other types of personal wireless facilities, such as macrocells, which operate independently.

NOTICE ADDRESS
An address, which is required to be provided by an applicant at the time it submits an application for a special use permit, at which the Town, Town Council, and/or Community Development Director or Engineer can mail notice, and the mailing of any notice to such address by first-class mail shall constitute sufficient notice to any and all applicants, co-applicants, and/or their attorneys, to satisfy any notice requirements under this Chapter, as well as any notice requirements of any other local, state and/or federal law.

NOTICE OF INCOMPLETENESS, NOTICE OF INCOMPLETE APPLICATION
A written notice, mailed by first class mail, to an applicant seeking approval for the installation of a PWSF, wherein the sender advises the applicant that its application is either incomplete, the wrong type of application, or is otherwise defective, and setting for the reason or reasons why the application is incomplete and/or defective.

NOTICE OF EFFECTIVE PROHIBITION CONDITIONS
A written notice, which is required to be provided to the Town at the time of the filing of any application by all applicants seeking any approval, of any type, for the siting, installation, and/or construction of a PWSF, wherein the respective applicant asserts, claims or intends to assert or claim, that a denial of their respective application, by any agent, employee, board or body of the Town, would constitute an "effective prohibition" within the meaning of the TCA, and concomitantly, that a denial of their respective application or request would violate Section 47 U.S.C. §332(c)(7)(B)(i)(II) of the TCA.

OCCUPATIONAL/CONTROLLED EXPOSURE LIMITS
The applicable radiofrequency radiation exposure limits set forth within 47 CFR §1.1310(e)(1), Table 1 Section (i), made applicable pursuant to 47 CFR §1.1310(e)(2).

PERSONAL WIRELESS SERVICE/PERSONAL WIRELESS SERVICES
Commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, within the meaning of 47 U.S.C. §332(c)(7)(c)(i), and as defined therein.

PERSONAL WIRELESS SERVICE FACILITY, PERSONAL WIRELESS SERVICES FACILITY or PWSF
A facility or facilities used for the provision of personal wireless services, within the meaning of 47 U.S.C. §332(c)(7)(c)(ii). It means a specific location at which a structure that is designed or intended to be used to house or accommodate antennas or other transmitting or receiving equipment is located. This includes, without limitation, towers of all types and all kinds of support structures, including but not limited to buildings, church steeples, silos, water towers, signs, utility poles, or any other structure that is used or is proposed to be used as a telecommunications structure for the placement, installation and/or attachment of antennas or the functional equivalent of such. It expressly includes all related facilities and equipment such as cabling, radios and other electronic equipment, equipment shelters and enclosures, cabinets, and other structures enabling the complex to provide personal wireless services.

PROBATIVE EVIDENCE
Evidence which tends to prove facts, and the more a piece of evidence or testimony proves a fact, the greater its probative value, as shall be determined by the Town Council, as the finder-of-fact in determining whether to grant or deny applications for special permits under this provision of the Town Code.

REPAIRS
The replacement or repair of any components of a wireless facility or complex where the replacement is substantially identical to the component or components being replaced, or for any matters that involve the normal repair and maintenance of a wireless facility or complex without the addition, removal, or change of any of the physical or visually discernible components or aspects of a wireless facility or complex that will impose new visible intrusions of the facility or complex as originally permitted.

RF
Radiofrequency.

RF RADIATION
Radiofrequency radiation. That being electromagnetic radiation, which is a combination of electric and magnetic fields that move through space as waves, and can include both Non-Ionizing radiation and Ionizing radiation.

SECTION 106 REVIEW
A review under Section 106 of the National Historic Preservation Act.

SETBACK
For purposes of special use permit applications, a setback shall mean the distance between (a) any portion of a personal wireless facility and/or complex, including but not limited to any and all accessory facilities and/or structures, and (b) the exterior line of any parcel of real property or part thereof which is owned by, or leased by, an applicant seeking a special use permit to construct or install a personal wireless facility upon such real property or portion thereof. In the event that an

applicant leases only a portion of real property owned by a landlord, the setback shall be measured from the facility to the line of that portion of the real property that is actually leased by the applicant, as opposed to the exterior lot line of the non-leased portion of the property owned by the landlord.

SHOT CLOCK
The applicable period, which is presumed to be a reasonable period within which the Town is generally required to issue a final decision upon an application seeking special use permit approval for the installation or substantial modification of a personal wireless services facility or structure to comply with Section 47 U.S.C. §332(c)(7)(B)(ii) of the TCA.

SHPO
The Arizona State Historic Preservation Office

SITE DEVELOPER or SITE DEVELOPERS
Individuals and/or entities engaged in the business of constructing wireless facilities and wireless facility infrastructure and leasing space and/or capacity upon, or use of, their facilities and/or infrastructure to *wireless carriers*. Unlike *wireless carriers*, site developers generally do not provide personal wireless services to end-use consumers.

SMALL CELL
A fixed cellular base station that sends and receives radio signals and is typically mounted upon poles or support structures at substantially lower elevations than macrocell facilities.

SMALL WIRELESS FACILITY
A personal wireless service facility that meets all of the following criteria

(a) The facility does not extend the height of an existing structure to a total cumulative height of more than fifty (50) feet from ground level to the top of the structure, and any equipment affixed thereto;
(b) Each antenna associated with the deployment is no more than three (3) cubic feet in volume;
(c) All wireless equipment associated with the facility, including any pre-existing equipment and any proposed new equipment, cumulatively total no more than twenty-eight (28) cubic feet in volume;
(d) The facility is not located on tribal land; and
(e) The facility will not result in human exposure to radiofrequency radiation in excess of the applicable FCC safety standards set forth within Table 1 of 47 CFR §1.1310(E)(1).

SPECIAL USE PERMIT
The official document or permit granted by the Town Council pursuant to which an applicant is allowed to file for and obtain a building permit to construct and use a personal wireless services facility, personal wireless service equipment, and/or any associated structures and/or equipment

which are used to house, or be a part of, any such facility or complex, or to be used to provide personal wireless services.

STATE
The State of Arizona.

STEALTH or STEALTH TECHNOLOGY
A design or treatment that minimizes adverse aesthetic and visual impacts on the land, property, buildings, and other facilities adjacent to, surrounding, and generally in the same area as the requested location of such personal wireless service facilities. This shall mean building the least visually and physically intrusive facility and complex under the facts and circumstances.

STRUCTURE
A pole, tower, base station, or other building, physical support of any form used for, or to be used for, the provision of personal wireless service.

SUBSTANTIAL EVIDENCE
Substantial Evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It means less than a preponderance but more than a scintilla of evidence.

TCA
The Telecommunications Act of 1996, 47 U.S.C. §332(c)

TOLLING or TOLLED
The pausing of the running of the time period permitted under the applicable shot clock for the respective type of application for a personal wireless services facility. Where a shot clock is tolled because an application has been deemed incomplete and timely notice of incompleteness was mailed to the applicant, the submission of additional materials by the applicant to complete the application will end the tolling, thus causing the shot clock period to *resume* running, as opposed to causing the shot clock to begin running *anew*.

TOWER, TELECOMMUNICATIONS TOWER
Any structure designed primarily to support one or more antennas and/or equipment used or designed for receiving and/or transmitting a wireless signal.

Commented [JW6]: Similar, longer definition in Section 17.02

TOWN
The Town of Fountain Hills.

TOWN CODE
The Zoning Code of the Town of Fountain Hills.

UNDERTAKING
Any application for a special use permit seeking Council approval for the installation of a personal wireless services facility licensed under the authority of the FCC shall constitute an undertaking within the meaning of NEPA, in accord with 42 CFR §137.289 and 36 CFR §800.16.

WIRELESS CARRIERS or CARRIER
Companies that provide Personal Wireless Services to end-use consumers.

ZONING ORDINANCE
The Zoning Ordinance of the Town of Fountain Hills, as codified in Chapter 1, §1.01 of the Town Code.

§17-3 Application Types

Commented [JW7]: Adopted ordinance Section 17.04 covers application types.

There shall be four (4) specific types of applications for special use permits under this section, which shall include Type I, Type II, Type III, and Type IV applications. It shall be the obligation of any applicant to explicitly and correctly identify which type of application they are filing.

1. Type I Applications Colocations of Small Wireless Facilities

Type I applications shall be limited to applications wherein an applicant seeks to co-locate a new small wireless facility, as defined in this Chapter, by installing new personal wireless service equipment upon an already existing small personal wireless services facility structure.

If the completed facility would still meet the physical limits and requirements to meet the definition of a small wireless facility after the installation of the new equipment, then the application to install such new equipment is a Type I application.

Type I applications for co-location of a small wireless facility in a public right of way as set forth in A.R.S. §9-592(J) and A.R.S. §9-593(C) shall be a permitted use with a building permit.

Type I applications for co-location of a small wireless facility in all other areas or zones shall require an applicant to obtain a special use permit from the Town Council.

2. Type II Applications Co-locations that do not meet the definition of a Small Wireless Facility.

Type II applications shall be limited to applications wherein an applicant is seeking to co-locate new personal wireless service equipment by installing such new wireless equipment upon an already existing personal wireless services facility structure, tower, or complex which does not meet the definition of a small wireless facility or which will not meet the definition of a small wireless facility if and when the proposed new personal wireless service equipment is installed upon the existing facility and/or structure. Type II applications for co-location of personal wireless

service facility equipment shall either be a permitted use with a building permit or a special use permit, as set forth below.

The co-location of personal wireless service facility equipment on an approved PWSF tower or PWSF structure on property within C-O Commercial Office Zoning District; C-C Common Commercial Zoning District; C-1 Neighborhood Commercial Professional District; C-2 Intermediate Commercial Zoning District; C-3 General Commercial Zoning District; IND-1 Planned Industrial Zoning District; IND-2 Light Industrial Zoning District; and UT Utility Zoning District is a permitted use subject to the issuance of a building permit, provided that the Town Engineer determines that the proposed co-location will not:

(a) Increase the approved height of the supporting structure by more than 15%;
(b) Cause the original approved number of antennas to be exceeded by more than 50%;
(c) Increase the original approved square footage of accessory buildings by more than 200 square feet;
(d) Add new or additional microwave antenna dishes;
(e) expand the footprint of said support structure; or
(f) potentially cause significant adverse impacts on the existing support structure or the surrounding area.

If the Town Engineer cannot make the findings above, special use permit and site plan approvals will be required in accord with the provisions of the Zoning Ordinance, and the Town Engineer shall refer the application to the Town Council, where it will be subject to the terms and conditions specified in the requirements and standards in this Chapter as part of the special use permit and site plan review process.

The co-location of personal wireless service facility equipment on an approved PWSF tower or PWSF structure on property within all other zoning districts shall require a special permit and site plan approvals as provided in this Chapter.

3. Type III Applications New Small Wireless Facilities

Type III applications shall be limited to applications seeking to install and/or construct a new small wireless facility, as defined in Section §17-2 hereinabove, which is not collocated in a public right of way.

Type III applications shall require applicants to obtain a special use permit and site plan approvals from the Town Council in all zoning districts.

4. Type IV Applications New Towers and All Other Wireless Facilities

Commented [JW8]: Adopted ordinance allows co-location in any district provided it meets the criteria below and is consistent with the adopted SUP if one was required.

Commented [JW9]: Modified to 10% or 20 feet in adopted ordinance based on established FCC critera

Commented [JW10]: Used in adopted ordinance Sections 17.04 A. 2. and 4.

Commented [JW11]: Adopted ordinance Section 17.04 B. 1. conveys the same requirement that the request does not meet the listed standards then it must receive public review.

Commented [JW12]: In the adopted code new small cell wireless not in the ROW are treated the same as any other wireless facility.

Commented [JW13]: This section is basically the same as adopted ordinance Section 17.04 B. Any application that does not meet the criteria in A for administrative review requires public review.

Type IV applications shall include applications for the installation of a new telecommunications tower, personal wireless service facility, complex, structure, or equipment that does not meet the criteria for Type I, Type II, or Type III applications.

Type IV applications shall require applicants to obtain a special use permit and site plan approvals from the Town Council in all zoning districts.

§17-4 Shot Clock Periods

To comply with the requirements of Section 47 U.S.C. §332(c)(7)(B)(ii) of the TCA, the following shot clock periods set forth herein below shall be presumed to be reasonable periods within which the Town Council shall render determinations upon special use permit applications for personal wireless service facilities.

The Town Council shall render determinations upon such applications within the periods set forth hereinbelow, unless the applicable shot clock period listed below is tolled, extended by agreement or the processing of the application is delayed due to circumstances beyond the Council and/or Town's controls, as addressed within subsections §17-15, §17-16, §17-17 and §17-18 herein below.

1. Type I Applications Colocations of Small Wireless Facilities
Sixty (60) Days

Unless extended by agreement, tolled, or subject to reasonable delays, the Town Council shall issue a written decision upon a Type I application within sixty (60) days from the date when the Town receives a Type I application.

Upon receipt of a Type I application, the Town Engineer shall review the application for completeness. If the Town Engineer determines the application is: (a) incomplete, (b) missing required application materials, (c) is the wrong type of application, or (d) is otherwise defective, then, within **ten (10) days** of the Town's receipt of the application, the Town Engineer, or their designee, shall mail the applicant a Notice of Incompleteness by first class mail, to the Notice Address provided by the applicant.

Within such Notice of Incompleteness, the Town Engineer shall advise the applicant, with reasonable clarity, of the defects within its application, including a description of such matters as what items are missing from the application and/or why the application is incomplete and/or defective.

The mailing of a Notice of Incomplete Application by the Town Engineer shall toll the sixty (60) day shot clock, which shall not thereafter resume running unless and until the applicant tenders an additional submission to the Town Engineer to remedy the issues the Town Engineer identified in the Notice of Incomplete Application, which they had mailed to the applicant. The submission of

Commented [JW14]: Shot clocks in adopted ordinance are addressed in Section 17.05 B.

Because of the different structure did not use the exact wording but included the same time frames.

any responsive materials by the applicant shall automatically cause the shot clock period to resume running.

If upon receipt of any additional materials from the applicant, the Town Engineer determines that the application is still incomplete and/or defective, then the Town Engineer shall, once again, mail a Notice of Incompleteness within **ten (10) days** of the applicant having filed its supplemental or corrected materials to the Town and the shot clock shall once again be tolled, and the same procedure provided for hereinabove shall be repeated.

2. Type II Applications Colocations on existing Towers, Structures, or other Facilities which do not meet the definition of a Small Wireless Facility. Ninety (90) Days

Unless extended by agreement, tolled, or subject to reasonable delays, the Town Council shall issue a written decision upon a Type II application within ninety (90) days from the date when the Town receives a Type II application.

Upon receipt of a Type II application, the Town Engineer shall review the application for completeness. If the Town Engineer determines the application is: (a) incomplete, (b) missing required application materials, (c) is the wrong type of application, or (d) is otherwise defective, then, within **thirty (30) days** of the Town's receipt of the application, the Town Engineer, or their designee, shall mail the applicant a Notice of Incompleteness by first class mail to the Notice Address provided by the applicant.

Within such Notice of Incompleteness, the Town Engineer shall advise the applicant, with reasonable clarity of the defects within its application, including a description of such matters as what items are missing from the application and/or why the application is incomplete and/or defective.

The mailing of a Notice of Incomplete Application by the Town Engineer shall toll the ninety (90) day shot clock, which shall not thereafter resume running unless and until the applicant tenders an additional submission to the Town Engineer to remedy the issues the Town Engineer identified in the Notice of Incomplete Application, which they had mailed to the applicant.

The submission of any responsive materials by the applicant shall automatically cause the shot clock period to resume running.

If upon receipt of any additional materials from the applicant, the Town Engineer determines that the application is still incomplete and/or defective, then the Town Engineer shall, once again, mail a Notice of Incompleteness within ten (10) days of the applicant having filed its supplemental or corrected materials to the Town. The shot clock shall be tolled again, and the same procedure provided hereinabove shall be repeated.

3. Type III Applications — New Small Wireless Facilities
Sixty (60) Days

Unless extended by agreement, tolled, or subject to reasonable delays, the Town Council shall issue a written decision upon a Type III application within sixty (60) days from the date when the Town receives a Type III application.

Upon receipt of a Type III application, the Town Engineer shall review the application for completeness. If the Town Engineer determines the application is: (a) incomplete, (b) missing required application materials, (c) is the wrong type of application, or (d) is otherwise defective, then, within **ten (10) days** of the Town's receipt of the application, the Town Engineer, or their designee, shall mail the applicant a Notice of Incompleteness by first class mail to the Notice Address that the applicant has provided.

Within such Notice of Incompleteness, the Town Engineer shall advise the applicant, with reasonable clarity, the defects within its application, including a description of such matters as what items are missing from the application, and/or why the application is incomplete and/or defective.

The mailing of a Notice of Incomplete Application by the Town Engineer shall toll the sixty (60) day shot clock, which shall not thereafter run unless and until the applicant tenders an additional submission to the Town Engineer to remedy the issues the Town Engineer identified in the Notice of Incomplete Application, which they had mailed to the applicant.

The submission of any responsive materials by the applicant shall automatically cause the shot clock period to start running anew, consistent the 47 CFR §1.6003(d).

If upon receipt of any additional materials from the applicant, the Town Engineer determines that the application is still incomplete and/or defective, then the Town Engineer shall, once again, mail a Notice of Incompleteness within **ten (10) days** of the applicant having filed its supplemental or corrected materials to the Town and the shot clock shall once again be tolled, and the same procedure provided for hereinabove shall be repeated.

4. Type IV Applications — New Towers and All Other Wireless Facilities
One Hundred Fifty (150) Days

Unless extended by agreement, tolled, or subject to reasonable delays, the Town Council shall issue a written decision upon a Type IV application within one hundred fifty (150) days from the date when the Town receives a Type IV application.

Upon receipt of a Type IV application, the Town Engineer shall review the application for completeness. If the Town Engineer determines the application is: (a) incomplete, (b) missing required application materials, (c) is the wrong type of application, or (d) is otherwise

defective, then, within **thirty (30) days** of the Town's receipt of the application, the Town Engineer, or their designee, shall mail the applicant a Notice of Incompleteness by first class mail to the Notice Address provided by the applicant.

Within such Notice of Incompleteness, the Town Engineer shall advise the applicant, with reasonable clarity, the defects within its application, including a description of such matters as what items are missing from the application, and/or why the application is incomplete and/or defective.

The mailing of a Notice of Incomplete Application by the Town Engineer shall toll the one hundred fifty (150) day shot clock, which shall not thereafter resume running unless and until the applicant tenders an additional submission to the Town Engineer to remedy the issues the Town Engineer identified in the Notice of Incomplete Application, which they had mailed to the applicant.

The submission of any responsive materials by the applicant shall automatically cause the shot clock period to resume running.

If, upon receipt of any additional materials from the applicant, the Town Engineer determines that the application is still incomplete and/or defective, then the Town Engineer shall, once again, mail a Notice of Incompleteness within **ten (10) days** of the applicant having filed its supplemental or corrected materials to the town, and the shot clock shall once again be tolled, and the same procedure provided hereinabove shall be repeated.

§17-5 Shot Clock Tolls, Extensions & Reasonable Delay Periods

Commented [JW15]: Adopted ordinance Section 17.05 B. 2.

Consistent with the letter and intent of Section 47 U.S.C. §332(c)(7)(B)(ii) of the TCA, each of the shot clock periods set forth within Section §17-4 hereinabove shall generally be presumed to be sufficient periods within which the Town Council shall render decisions upon special permit applications.
Notwithstanding same, the applicable shot clock periods may be tolled, extended by mutual agreement between any applicant and/or its representative and the Town Council, and the Town Council shall not be required to render its determination within the shot clock period presumed to be reasonable for each type of application, where the processing of such application is reasonably delayed, as described hereinbelow.

1. Tolling of the Applicable Shot Clock Due to Incompleteness and/or Applicant Error

As provided for within Section §17-4 hereinabove, in the event that the Town Engineer deems an application incomplete, the Town Engineer shall send a Notice of Incompleteness to the applicant to notify the applicant that its application is incomplete and/or contains material errors, and shall reasonably identify the missing information and/or documents and/or the error(s) in the application.

If the Town Engineer mails a Notice of Incompleteness as described hereinabove, the applicable shot clock shall automatically be tolled, meaning that the applicable shot clock period within which the Town Council is required to render a final decision upon the application shall immediately cease running, and shall not resume running, unless and until the Town receives a responsive submission from the applicant.

If and when the applicant thereafter submits additional information in an effort to complete its application, or cure any identified defect(s), then the shot clock shall automatically *resume* running, but shall not be deemed to start running *anew*.

The applicable shot clock period shall, once again, be tolled if the Town Engineer thereafter provides a second notice that the application is still incomplete or defective, despite any additional submissions which have been received by the Town, from the applicant, up to that point.

2. Shot Clock Extension by Mutual Agreement

The Town Council, in its sole discretion, shall be free to extend any applicable shot clock period by mutual agreement with any respective applicant. This discretion on the part of the Council shall include the Council's authority to request, at any time, and for any period of time the Council may deem reasonable or appropriate under the circumstances, consent from a respective applicant to extend the applicable shot clock period to enable the Council, the applicant, or any relevant third party, to complete any type of Undertaking or task related to the review, analysis, processing, and determination of the particular application, which is then pending before the Council, to the extent that any such Undertaking, task, or review is consistent with, or reasonably related to, compliance with any federal, state, or local law and/or the requirements of any provision of the Town Code, including but not limited to this Chapter.

In response to any request by the Council, the applicant, by its principal, agent, attorney, site acquisition agent, or other authorized representative, can consent to any extension of any applicable shot clock by affirmatively indicating its consent either in writing or by affirmatively indicating its consent on the record at any public hearing or public meeting. The Town Council shall be permitted to reasonably rely upon a representative of the applicant indicating that they are authorized to grant such consent on behalf of the respective applicant, on whose behalf they have been addressing the Council within the hearing process.

3. Reasonable Delay Extensions of Shot Clock Periods

The Town recognizes that there may be situations wherein, due to circumstances beyond the control of the Town and/or the Town Council, the review and issuance of a final decision upon a special permit application for a personal wireless facility cannot reasonably be completed within the application shot clock periods delineated within Section §17-4 hereinabove.

If, despite the exercise of due diligence by the Town and the Town Council, the determination regarding a specific application cannot reasonably be completed within the applicable shot clock period, the Council shall be permitted to continue and complete its review and issue its determination at a date beyond the expiration of the applicable period, if the delay of such final decision is due to circumstances including, but not limited to, those enumerated hereinbelow, each of which shall serve as a reasonable basis for a reasonable delay of the applicable shot clock period.

Commented [JW16]: Note: In adopted ordinance there are three additional provision stated in Section 17.05 B. 2. c. regarding the tolling of shot clocks.

Reasonable delays that may constitute proper grounds for extending the presumed sufficient periods for rendering determinations under the applicable shot clock periods may include but are not necessarily limited to, those set forth within Sections §17-15, §17-16, §17-17, and §17-18 herein below.

§17-6 Application Requirements

Commented [JW17]: Direct wording from this section was not used in the adopted ordinance, but most of the same requirements are included, differences are noted below.

See adopted ordinance Section 17.05 A for application requirements.

Applications for special use permits under this section shall be made to the Town Engineer, who shall initially determine whether or not the application is complete and/or free of defects upon receipt of the same.

If the Town Engineer determines that the application is defective or incomplete, they shall promptly mail a **Notice of Incompleteness** to the applicant, in accord with §17-4 to toll the applicable shot clock, to ensure that the Town and the Town Council are afforded sufficient time to review and determine each respective application.

Each application shall include the following materials, the absence of any one of which listed hereinbelow shall render the respective application incomplete:

1. Special Use Permit and Site Plan Applications

Commented [JW18]: Adopted ordinance Section 17.05 C. 3. states requirement to follow Section 2.02 for public review applications, includes site plan submittal.

Completed applications for a special use permit and site plan that shall identify all applicants, co-applicants, site developer(s), and wireless carrier(s) on whose behalf the application is being submitted, as well as the property owner of the proposed site.

2. Filing Fees

Commented [JW19]: Requirement to pay a fee is in adopted ordinance Section 17.05 A. 7.

The appropriate filing fees then being charged by the Town for applications for special use permit applications, site plan applications, and other related applications.

3. A "Notice Address"

Commented [JW20]: Contact information is a standard part of an application submittal, did not include this level of detail in the adopted ordinance.

A "Notice Address," that being a specific address to which the Town, Town Council, and/or Town Engineer may mail any type of notice, and that the mailing of same to such address shall constitute sufficient notice to any applicant, co-applicant, and/or their

attorney, to comply with any requirement under this section as well as any local, state and/or federal law

4. Proof of Authorization for Site Occupancy

Where an applicant is not the owner of the real property upon which it seeks to install its equipment or facility, it shall submit proof of authorization to occupy the site at issue. If the applicant is leasing all or a portion of real property upon which it intends to install its new facility or equipment, then the applicant shall provide a written copy of its lease with the owner of such property. The applicant may redact any financial terms contained within the lease, but it shall not redact any portion of the lease which details the amount of area leased nor the specific portion of the real property to which the applicant has obtained the right to occupy, access, or preclude others from entering.

Where an applicant seeks to Co-Locate new equipment into an existing facility, it shall provide a copy of its written co-location agreement with the owner of such pre-existing facility, from which it may redact any financial terms.

Commented [JW21]: Authorization by the property owner is a standard application requirement, did not include a specific requirement in the adopted ordinance.

5. A Drawn-To-Scale Depiction

The applicant shall submit drawn-to-scale depictions of its proposed wireless support structure and all associated equipment to be mounted thereon or to be installed as part of such facility, which shall clearly and concisely depict all equipment and the measurements of same to enable the Town Engineer to ascertain whether the proposed facility would qualify as a small wireless facility as defined under this Chapter.

If the applicant claims that its proposed installation qualifies as a small wireless facility within this Chapter, the drawn-to-scale depiction shall include complete calculations for all of the antennas and equipment of which the facility will be comprised, depicting that, when completed, the installation and equipment will meet the physical size limitations which enable the facility to qualify as a small wireless facility.

Commented [JW22]: Required in adopted ordinance Section 17.05 A. 5 and 6. a and 17.05 C. 3. a.

6. Site plan

The applicant shall submit a site plan and site plan application in accordance with §2.04 of the Zoning Ordinance. The site plan shall show all existing and proposed structures and improvements, including antennas, roads, buildings, guy wires and anchors, parking, and landscaping. It shall include grading plans for new facilities and roads. Any methods used to conceal the modification of the existing facility shall be indicated on the site plan.

Commented [JW23]: Required in adopted ordinance Section 17.05 A. 5 and 6. a and 17.05 C. 3. a.

7. Engineer's Report

To the extent that an application proposes the co-location of new equipment onto an existing tower or facility, the applicant shall provide an engineer's report certifying that

Commented [JW24]: See adopted ordinance Section 17.03 A. 12 and 13.

the proposed shared use will not diminish the structural integrity and safety of the existing structure and explaining what modifications, if any, will be required in order to certify to the above.

8. Environmental Assessment Form

A completed environmental assessment form (EAF) and a completed visual EAF addendum if required by ADEQ.

9. Visual Impact Analysis

A completed visual impact analysis, which, at a minimum, shall include the following:

(a) Small Wireless Facilities

For applications seeking approval for the installation of a small wireless facility, the applicant shall provide a visual impact analysis which shall include photographic images taken from the perspectives of the properties situated in closest proximity to the location being proposed for the siting of the facility, as well as those properties which would reasonably be expected to sustain the most significant adverse aesthetic impacts due to such factors as their close proximity to the site, their elevation relative to the site, the existence or absence of a "clear line of sight" between the tower location and their location.

(b) Telecommunications Towers and Personal Wireless Service Facilities which do not meet the definition of a Small Wireless Facility

For applications seeking approval for the installation of a telecommunications tower or a personal wireless service facility that does not meet the definition of a small wireless facility, the applicant shall provide:

(i) A "Zone of Visibility Map" to determine locations from where the new facility will be seen.

(ii) A visual impact analysis which shall include photographic images taken from the perspectives of the properties situated in closest proximity to the location being proposed for the siting of the facility, as well as those properties which would reasonably be expected to sustain the most significant adverse aesthetic impacts due to such factors as their close proximity to the site, their elevation relative to the site, the existence or absence of a "clear line of sight" between the tower location and their location.

Commented [JW25]: Not in adopted ordinance.

Commented [JW26]: See provisions in adopted ordinance Sections 17.03 A. 3. f., and 17.05 A. 6. a.

The photographic images shall depict the height at which the proposed facility shall stand when completed, including all portions and proposed attachments to the facility, including, but not limited to, the main support structure, all antennas, transmitters, whip antennas, lightning rods, t-bars, crossbars, and cantilever attachments which shall, in whole or in part, be affixed to it, any and all surrounding equipment compound(s), fencing, cellular equipment cabinets, transformers, transformer vaults and/or cabinets, sector distribution boxes, ice bridges, backup generators, switch boxes etc., to the extent that any of such compound and/or equipment will be visible from properties other than the property upon which the proposed tower and compound are to be installed.

The visual impact analysis shall include an assessment of alternative designs and color schemes, as well as an assessment of the visual impact of the proposed facility, taking into consideration any supporting structure which is to be constructed, as well as its base, guy wires, accessory structures, buildings, and overhead utility lines from abutting properties and streets.

10. Alternative Site Analysis

Commented [JW27]: See adopted ordinance Section 17.05 A. 6 h. and 17.05 C. 3. c.

A completed alternative site analysis of all potential less intrusive alternative sites which the applicant has considered, setting forth their respective locations, elevations, and suitability or unsuitability for remedying whatever specific wireless coverage needs the respective applicant or a specific Wireless Carrier is seeking to remedy by the installation of the new facility which is the subject of the respective application for a special use permit.

If, and to the extent that an applicant claims that a particular alternative site is unavailable, in that the owner of an alternative site is unwilling or unable to accommodate a wireless facility upon such potential alternative site, the applicant shall provide probative evidence of such unavailability, whether in the form of communications or such other form of evidence that reasonably establishes same.

The alternative site analysis shall contain:

(a) an inventory of all existing tall structures and existing or approved communications towers within a two-mile radius of the proposed site.
(b) a map showing the exact location of each site inventoried, including latitude and longitude (degrees, minutes, seconds), ground elevation above sea level, the height of the structure and/or tower, and accessory buildings on the site of the inventoried location.
(c) an outline of opportunities for shared use of an existing wireless facility as opposed to the installation of an entirely new facility.

(d) a demonstration of good-faith efforts to secure shared use from the owner of each potential existing tall structure and existing or approved communications tower, as well as documentation of the physical, technical, and/or financial reasons why shared usage is impractical in each case.

11. FCC Compliance Report

Commented [JW28]: See adopted ordinance Section 17.05 A. 6. j.

An FCC compliance report, prepared by a licensed engineer, and certified under penalties of perjury, that the content thereof is true and accurate, wherein the licensed engineer shall certify that the proposed facility will be FCC compliant as of the time of its installation, meaning that the facility will not expose members of the general public to radiation levels that exceed the permissible radiation limits which the FCC has set.

If it is anticipated that more than one carrier and/or user is to install transmitters into the facility, the FCC compliance report shall take into account anticipated exposure from all users on the facility and shall indicate whether or not the combined exposure levels will or will not exceed the permissible General Population Exposure Limits, or alternatively, the occupational Exposure Limits, where applicable.

Such FCC Compliance Report shall provide the calculation or calculations with which the engineer determined the levels of RF radiation and/or emissions to which the facility will expose members of the general public.

On the cover page of the report, the report shall explicitly specify: (a) Whether the applicant and their engineer are claiming that the applicable FCC limits based upon which they are claiming FCC compliance are the *General Population Exposure Limits* or the *Occupational Exposure Limits*. If the applicant and/or their engineer are asserting that the Occupational Exposure Limits apply to the proposed installation, they shall detail a factual basis as to why they claim that the higher set of limits is applicable, (b) The exact minimum distance factor, measured in feet, which the applicant's engineer used to calculate the level of radiation emissions to which the proposed facility will expose members of the general public. The minimum distance factor is the closest distance (i.e., the minimum distance) to which a member of the general public shall be able to gain access to the transmitting antennas mounted upon, or which shall be a part of, the proposed facility.

12. FCC License

Commented [JW29]: Not in adopted ordinance.

A copy of any applicable Federal Communications Commission license possessed by any carrier named as an applicant, co-applicant, or whose equipment is proposed for installation as of the time the application is being filed with the Town.

13. Effective Prohibition Claims

Commented [JW30]: Not in adopted ordinance.

The Town is aware that applicants seeking approvals for the installation of new wireless Facilities often assert that federal law, and more specifically the TCA, prohibits the local government from denying their respective applications.

In doing so, they assert that their desired facility is "necessary" to remedy one or more significant gaps in a carrier's personal wireless service, and they proffer computer generated propagation maps to establish the existence of such purported gaps.

The Town is additionally aware that, in August 2020, driven by a concern that propagation maps created and submitted to the FCC by wireless carriers were inaccurate, the FCC caused its staff to perform actual drive tests, wherein the FCC staff performed 24,649 tests, driving nearly ten thousand (10,000) miles through nine (9) states, with an additional 5,916 stationary tests conducted at 42 locations situated in nine (9) states.

At the conclusion of such testing, the FCC Staff determined that the accuracy of the propagation maps submitted to the FCC by the wireless carriers had ranged from as little as 16.2% accuracy to a maximum of 64.3% accuracy.

As a result, the FCC Staff recommended that the FCC no longer accept propagation maps from wireless carriers without supporting drive test data to establish their accuracy. A copy of the FCC Staff's 66-page report is made a part of this Chapter as Appendix 1. The Town considers it of critical import that applicants provide truthful, accurate, complete, and sufficiently reliable data to enable the Town Council to render determinations upon applications for new wireless facilities consistent with this Chapter's requirements and the TCA's statutory requirements.

Consistent with same, if, at the time of filing an application under this Chapter, an applicant intends to assert before the Town Council or the Town that: (a) an identified wireless carrier suffers from a significant gap in its personal wireless services within the Town, (b) that the applicant's proposed installation is the least intrusive means of remedying such gap in services, and/or (c) that under the circumstances pertaining to the application, a denial of the application by the Town Council would constitute an "effective prohibition" under Section 47 U.S.C. §332 the TCA, then, at the time of filing such application, the applicant shall be required to file a written statement which shall be entitled:

"**Notice of Effective Prohibition Conditions**"

If an applicant files a Notice of Effective Prohibition Conditions, then the applicant shall be required to submit Probative Evidence to enable the Town Council to reasonably determine: (a) whether or not the conditions alleged by the respective applicant exist, (b) whether there exists a significant gap or gaps in an identified wireless carrier's personal wireless services within the Town, (c) the geographic locations of any such gaps, and (d)

the geographic boundaries of such gaps, to enable the Town Council to determine whether granting the respective application would be consistent with the requirements of this Chapter and the legislative intent behind same, and whether or not Federal law would require the Town Council to grant the respective application, even if it would otherwise violate the Town Code, including, but not limited to, this Chapter.

The additional materials which the applicant shall then be required to provide shall include the following:

(a) Drive Test Data and Maps

If, and to the extent that an applicant claims that a specific wireless carrier suffers from a significant gap in its personal wireless services within the Town, the applicant shall conduct or cause to be conducted a drive test within the specific geographic areas within which the applicant is claiming such gap or gaps exist, for each frequency at which the carrier provides personal wireless services. The applicant shall provide the Town and the Town Council with the actual drive test data recorded during such drive test, in a simple format which shall include, in table format:

(i) the date and time for the test or tests,
(ii) the location, in longitude and latitude, of each point at which signal strength was recorded and
(iii) each signal strength recorded, measured in DBM, for each frequency.

Such data is to be provided in a separate table for each frequency at which the respective carrier provides personal wireless services to any of its end-use customers.

(iv) The applicant shall also submit drive test maps depicting the actual signal strengths recorded during the actual drive test for each frequency at which the carrier provides personal wireless services to its end-use customers.

If an applicant claims that it needs a "minimum" signal strength (measured in DBM) to remedy its gap or gaps in service, then for each frequency, the applicant shall provide three (3) signal strength coverage maps reflecting actual signal strengths in three (3) DBM bins, the first being at the alleged minimum signal strength, and two (2) additional three (3) DBM bin maps depicting signal strengths immediately below the alleged minimum signal strength claimed to be required.

By way of example, if the applicant claims that it needs a minimum signal strength of – 95 DBM to remedy its alleged gap in service, then the applicant shall provide maps depicting the geographic area where the gap is alleged to exist, showing the carrier's coverage at – 95 to -98 DBM, -99

to -101 DBM, and -102 to -104 DBM, for each frequency at which the carrier provides personal wireless services to its end-use customers.

(b) Denial of Service and/or Dropped Call Records

If and to the extent that an applicant claims that a specific wireless carrier suffers from a capacity deficiency or a gap in service that renders the carrier incapable of providing adequate coverage of its personal wireless services within the Town, then the applicant shall provide dropped call records and denial of service records evidencing the number and percentage of calls within which the carrier's customers were unable to initiate, maintain and conclude the use of the carrier's personal wireless services without actual loss of service, or interruption of service.

14. Estimate for Cost of Removal of Facility

Commented [JW31]: Not in adopted ordinance.

A written estimate for the cost of the decommissioning, and removal of the facility, including all equipment that comprises any portion or part of the facility, compound, and/or complex, as well as any accessory facility or structure, including the cost of the full restoration and reclamation of the site, to the extent practicable, to its condition before development in accord with the decommissioning and reclamation plan required herein

15. Property Owner Consent & Liability Acknowledgement

Commented [JW32]: Not in adopted ordinance.

A signed written consent from each owner of the subject real property upon which the respective applicant is seeking installation of its proposed personal wireless service facility, wherein the owner or owners both authorize the applicant to file and pursue its special use permit application and acknowledge the potential landowner's responsibility, under section §17-11 for engineering, legal and other consulting fees incurred by the Town.

§17-7 Design Standards

The following design standards shall apply to all applications for the siting, construction, maintenance, use, erection, movement, reconstruction, expansion, material change, or structural alteration of a personal wireless service facility.

1. Small Wireless Facilities

Commented [JW33]: Design standards for SWF in ROW covered in separate document. SWF not in ROW must meet the same design standards as other cell towers. See adopted ordinance Section 17.03 A. 3.

Small Wireless Facilities (SWF) shall be sited to inflict the minimum adverse impacts upon individual residential properties and, specifically, to minimize, to the greatest extent reasonably feasible, adverse aesthetic impacts upon residential homes or reductions in the property values of same.

SWFs attached to pre-existing wooden and non-wooden poles shall conform to the following criteria:

(a) Proposed antenna and related equipment shall meet:

(i) design standards which the Town may maintain and update as needed, provided that the Town makes its designed standards publicly available for review by any potential applicant seeking approval for the installation of an SWF within the Town, and
(ii) National Electric Safety Code (NESC) standards, and
(iii) National Electrical Code (NEC) standards.

(b) Antennas and antenna equipment, including but not limited to radios, cables, associated shrouding, disconnect boxes, meters, microwaves, and conduit, which are mounted on poles, shall be mounted as close to the pole as technically feasible. They shall not be illuminated except as required by municipal, federal, or state authority, provided this shall not preclude deployment on a new or replacement streetlight.

(c) Antennas and associated equipment enclosures must be camouflaged to appear as an integral part of the pole or be mounted as close to the pole as feasible. Conduits and cabinets shall cover all cables and wiring to the extent that it is technically feasible, if allowed by the pole owner. The number of conduits shall be minimized to the extent technically feasible. To the extent it is technically feasible, antennas, equipment enclosures, and all ancillary equipment, boxes, and conduits shall match the approximate material and design of the surface of the pole or existing equipment to which they are attached.

SWFs attached to replacement poles and new poles shall conform to the criteria set forth herein above for SWFs attached to pre-existing wooden and non-wooden poles but shall additionally conform to the following criteria:

(a) The Town prefers that wireless providers and site developers install SWFs on existing or replacement poles instead of installing new poles, and accordingly, to obtain approval for the installation of a new pole, the provider shall be required to document that installation on an existing or replacement pole is not technically feasible.

(b) To the extent technically feasible, all replacement poles and new poles and pole-mounted antennas and equipment shall substantially conform to the material and design of the pole being replaced, or in the case of a new pole, it shall conform to the nearest adjacent pole or poles.

(c) The height of replacement poles and new poles shall conform with the height limitations applicable to the district within which the applicant seeks to install their

proposed SWF unless the applicant obtains a variance to obtain relief from any such limitation(s).

2. Telecommunications Towers and Personal Wireless Service Facilities which do not meet the definition of a Small Wireless Facility

Commented [JW34]: Similar to provisions in adopted ordinance Section 17.03 A. 3.

The design of a proposed new telecommunications tower or personal wireless service facility shall comply with the following:

(a) The choice of design for installing a new personal wireless service facility or the substantial modification of an existing personal wireless service facility shall be chosen to minimize the potential adverse impacts that the new or expanded facility may, or is likely to, inflict upon nearby properties.

(b) Any new telecommunications tower shall be designed to accommodate future shared use by other communications providers.

(c) Unless specifically required by other regulations, a telecommunications tower shall have a finish (either painted or unpainted) that minimizes its degree of visual impact.

(d) Notwithstanding the height restrictions listed elsewhere in this chapter, the maximum height of any new telecommunications tower shall not exceed that which shall permit operation without artificial lighting of any kind or nature in accordance with municipal, state, and/or federal law and/or regulation. (e) Accessory Structures

(i) Accessory structures shall maximize the use of building materials, colors, and textures designed to blend with the natural surroundings. The use of camouflage communications towers may be required by the Council to blend the communications tower and/or its accessory structures further into the natural surroundings. "Camouflage" is defined as the use of materials incorporated into the communications tower design that give communications towers the appearance of tree branches and bark coatings, church steeples and crosses, sign structures, lighting structures, or other similar structures.

Commented [JW35]: Adopted ordinance Section 17.03 A. 3. e.

(ii) Accessory structures shall be designed to be architecturally similar, compatible with each other, and shall be no more than 12 feet high. The buildings shall be used only for housing equipment related to the particular site. Whenever possible, the buildings shall be joined or clustered so as to appear as one building.

(iii) No portion of any telecommunications tower or accessory structure shall be used for a sign or other advertising purpose, including but not limited to the company name, phone numbers, banners, and streamers, except the following. A sign of no greater than two square feet indicating the name of the facility owner(s) and a twenty-four-hour emergency telephone shall be

posted adjacent to any entry gate. In addition, "no trespassing" or other warning signs may be posted on the fence. All signs shall conform to the sign requirements of the Town.

(f) Towers must be placed to minimize visual impacts. Applicants shall place towers on the side slope of the terrain so that, as much as possible, the top of the tower does not protrude over the ridgeline, as seen from public ways.

Commented [JW36]: Adopted ordinance Section 17.03 A. 3. f.

(g) Existing vegetation. Existing on-site vegetation shall be preserved to the maximum extent possible. No cutting of trees shall take place on a site connected with an application made under this article prior to the approval of the special use permit use.

Commented [JW37]: Adopted ordinance Section 17.03 A. 3. g.

(h) Screening.

Commented [JW38]: Similar to adopted ordinance Section 17.03 A. 3. h.

(i) Deciduous or evergreen tree plantings may be required to screen portions of the telecommunications tower and accessory structures from nearby residential property as well as from public sites known to include important views or vistas.

(ii) Where a site adjoins a residential property or public property, including streets, screening suitable in type, size and quantity shall be required by the Town Council.

(iii) The applicant shall demonstrate to the approving board that adequate measures have been taken to screen and abate site noises, such as heating and ventilating units, air conditioners, and emergency power generators. Telecommunications towers shall comply with all applicable sections of this chapter as it pertains to noise control and abatement.

(i) Lighting. Telecommunications towers shall not be lighted except where FAA/FCC required lighting of the telecommunications towers necessary. No exterior lighting shall spill from the site in an unnecessary manner.

Commented [JW39]: Similar to adopted ordinance Section 17.03 A. 4.

(j) Access.

(a) Adequate emergency and service access shall be provided and maintained. Maximum use of existing roads, public or private, shall be made. Road construction shall always minimize ground disturbance and vegetation cutting to the top of fill, the top of cuts, or no more than 10 feet beyond the edge of any pavement. Road grades shall closely follow natural contours to assure minimal visual disturbance and reduce soil erosion potential.

(b) To the extent feasible, all network interconnections to and from the telecommunications site and all power to the site shall be installed underground. At the initial construction of the access road to the site, sufficient conduit shall be laid to accommodate the maximum possible number of telecommunications providers that might use the facility.

(k) Parking. Parking shall be provided to assure adequate emergency and service access. The Town Council shall determine the number of required spaces, but in no case shall the number of parking spaces be less than two spaces.

(l) Fencing. A fence shall adequately enclose the telecommunications tower and any accessory structures, the design of which shall be approved by the Town Council. The Town Council may waive this requirement if the applicant demonstrates that such measures are unnecessary to ensure the security of the facility.

Commented [JW40]: Similar to adopted ordinance Section 17.03 A. 10.

§17-8 Town Council Initial Review

Commented [JW41]: Not included in the adopted ordinance.

1. Initial Review

Upon the acceptance of an application that appears to be complete, the Town Engineer shall transmit the application to the Town Council for initial review.

The Town Council shall then conduct an initial review to consider whether or not to establish itself as Lead Agency pursuant to ADEQ and/or NEPA and whether or not a use or area variance is required for the proposed application such that a referral for an application to the Board of Adjustment will be required to be made after the Town Council has declared itself to serve as Lead Agency and during the process of the Town Council considering an ADEQ determination of environmental significance. That consideration of granting any required variances by the Board of Adjustment is done concurrently with the Town Council's review and consideration of special permit and site plan approval.

The Town Council shall then conduct a public hearing upon each application and render its determinations in accord with Sections §17-9 and §17-10 herein below and shall ultimately determine whether or not to grant each applicant a special use permit and/or site plan approval.

§17-9 Hearings and Public Notices

Commented [JW42]: Adopted ordinance just references the requirements in the ordinance for SUP, does not repeat the notice requirements.

1. Public Hearings

The Town Council shall conduct a public hearing upon each special permit application, except the Town Council shall have the authority to schedule such additional or more frequent public hearings as may be necessary to comply with the applicable shot clocks imposed upon the Town and the Town Council under the requirements of the TCA.

2. Required Public Notices

The Town Council shall ensure that both the public and property owners whose properties might be adversely impacted by the installation of a wireless facility receive Notice of any public hearing pertaining to same and shall ensure that they are afforded an opportunity to be heard concerning same.

Before the date scheduled for the public hearing, the Town Council shall cause to be published a

"**NOTICE OF PUBLIC HEARING FOR NEW WIRELESS FACILITY**"

Each "Notice of Public Hearing for New Wireless Facility" shall state the name or names of the respective applicant or co-applicants, provide a brief description of the personal wireless facility for which the applicant seeks a special permit and the date, time, and location of the hearing.

Each "Notice of Public Hearing for New Wireless Facility" shall be published both: (a) once per week for two successive weeks in the official newspaper of the Town of Fountain Hills and (b) by mailing copies of such notice to property owners, as provided for herein below.

The face of each envelope containing the notices of the public hearing shall state, in all bold typeface, in all capital letters, in a font size no smaller than 12 point, the words:

"**NOTICE OF PUBLIC HEARING FOR NEW WIRELESS FACILITY**"

For Type I and Type III applications, notices of public hearing shall be mailed to all property owners whose real properties are situated within 300 feet of any property line of the real property upon which the applicant seeks to install its new wireless facility. If the site for the proposed facility is situated on, or adjacent to, a residential street containing twelve (12) houses or less, the Town Council shall additionally mail a copy of such notices to all homeowners on that street, even if their home is situated more than 300 feet from any property line of the property upon which the applicant proposes to install its facility.

For Type II and Type IV applications, the applicant shall mail such notices of public hearing to all property owners whose real properties are situated within 1,500 feet of any property line of the real property upon which the applicant seeks to install its new wireless facility.

The applicant shall additionally post a notice upon the proposed site advising the public of the public hearing.

Prior to the date of the hearing, the respective applicant shall file an Affidavit of Mailing, attesting to whom the applicant mailed such notices and the content of the notices which were mailed to such recipients.

§17-10 Factual Determinations to be Rendered by the Town Council

Commented [JW43]: Not used in the adopted ordinance.

1. Evidentiary Standards

In determining special use permit applications for personal wireless service facilities, the Town Council shall have sole discretion to determine what probative evidence it shall require each applicant to produce in support of its application to enable the Council to make each of the factual determinations enumerated below.

By way of common examples of the types of evidence that the Council may require an applicant to produce are the following:

(a) where an applicant is not the owner of the real property upon which it proposes to install a new wireless facility, the Council can require the applicant to provide a copy of the applicant's lease with the property owner (including any schedules, property descriptions, appendices or other attachments), from which the applicant may censor or delete any financial terms which would be irrelevant to the factual issues which the Council is required to determine;

(b) where the Council deems it appropriate, the Council can require the applicant to perform what is commonly known as a "balloon test" and to require the applicant to publish a reasonably sufficient advance public notice of same to enable the Council, property owners, and the community, an opportunity to assess the actual adverse aesthetic impact which the proposed facility is likely to inflict upon the nearby properties and surrounding community;

(c) where the applicant asserts a claim that a proposed facility is necessary to remedy one or more existing significant gaps in an identified wireless carrier's personal wireless services, the Council may require the applicant to provide drive-test generated coverage maps, as opposed to computer-generated coverage maps, for each frequency at which the carrier provides personal wireless services, to show signal strengths in bins of three (3) DBM each, to enable the Council to assess the existence of such significant gaps accurately, and/or whether the carrier possesses adequate coverage within the geographic area which is the subject of the respective application.

Commented [JW44]: See adopted ordinance Section 17.05 C. 3. c. viii.

(d) where the applicant asserts that a potential less intrusive alternative location for a proposed facility is unavailable because the owner of the potential alternative site is incapable or unwilling to lease space upon such site to the applicant, the Council may require the applicant to provide proof of such unwillingness in the form of communications to and from such property owner, and/or a sworn affidavit wherein a representative of the applicant affirms, under penalty of perjury, that they attempted to negotiate a lease with the property owner, what the material terms of any such offer to the property owner were, when the offer was tendered, and how, if at all, the property owner responded to such offer.

The Council shall have sole discretion to determine, among other things, the relevance of any evidence presented, the probative value of any evidence presented, the credibility of any testimony provided, whether expert or otherwise, and the adequacy of any evidence presented.

The Council shall not be required to accept, at face value, any unsupported factual claims asserted by an applicant but may require the production of evidence reasonably necessary to enable the Council to determine the accuracy of any factual allegations asserted by each respective applicant.

Conclusory factual assertions by an applicant shall not be accepted as evidence by the Council.

2. Factual Determinations

Commented [JW45]: See adopted ordinance Section 17.05 C. for review and approval criteria.

To decide applications for special use permits under this Section, the Town Council shall render factual determinations, which shall include two (2) specific types of factual determinations, as applicable.

First, the Council shall render local zoning determinations according to Section (a) hereinbelow.

Then, if, and only if, an applicant asserts claims that:

(a) a denial of its application would effectively prohibit an identified Wireless Carrier from providing Personal Wireless Services within the Town, or

(b) its proposed wireless facility or installation *is necessary to remedy a significant gap in personal wireless services for an explicitly identified Wireless Carrier*, and that its proposed installation *is the least intrusive means of remedying a specifically identified significant gap or gaps*.

The Council shall then *additionally* render TCA determinations in accord with Section (b) herein below.

The Council shall separately record each factual determination it makes in a written decision and shall reference, or make note of, the evidence-based upon which it rendered each of its factual determinations.

Each factual determination made by the Council shall be based upon Substantial Evidence. For purposes of this provision, "Substantial Evidence" shall mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It means less than a preponderance but more than a scintilla of evidence.

Evidence that the Council may consider shall include any evidence submitted in support of an application and any evidence submitted by anyone opposing a respective application, whether such evidence is in written or photographic form or whether it is in the form of testimony by any expert, or any person who has personal knowledge of the subject of their testimony. The Council may, of course, additionally consider as evidence any information or knowledge which they, themselves, personally possess and any documents, records, or other evidence which is a matter of public record, irrespective of whether such public record is a record of the Town, or is a record of or is maintained by, another federal, state and/or other governmental entity and/or agency which maintains records which are available for, or subject to, public review.

The requirements for specific factual determinations set forth below are intended to enure to the benefit of the Town, its residents, and property owners, and not applicants.

If, and to the extent that the Town Council fails to render one or more of such determinations, that omission shall not constitute grounds upon which the respective applicant can seek to annul, reverse or modify any decision of the Town Council.

(a) LOCAL ZONING DETERMINATIONS

The Council shall make the following factual determinations as to whether the application meets the requirements for granting a special use permit under this Chapter.

(i) Compliance with §2.02

Whether the proposed installation will meet each of the conditions and standards set forth within §2.02 in the absence of which the Town Council is not authorized to grant a special use permit.

(ii) Potential Adverse Aesthetic Impacts

Whether the proposed installation will inflict a significant adverse aesthetic impact upon properties located adjacent to, or in close proximity to, the proposed site or any other properties situated in a manner that would sustain significant adverse aesthetic impacts by the installation of the proposed facility.

(iii) Potential Adverse Impacts Upon Real Estate Values

Whether the proposed installation will inflict a significant adverse impact upon the property values of properties that are located adjacent to, or in close proximity to, the proposed site or properties that are otherwise situated in a manner that would cause the proposed installation to inflict a significant adverse impact upon their value.

(iv) Potential Adverse Impact Upon the Character of the Surrounding Community

Whether the proposed installation will be incompatible with the use and/or character of properties located adjacent to or in close proximity to the proposed site or other properties situated in a manner that would cause the proposed installation to be incompatible with their respective use.

(v) Potential Adverse Impacts Upon Historic Properties or Historic Districts

Whether the proposed installation will be incompatible with and/or would have an adverse impact upon, or detract from the use and enjoyment of, and/or character of a historic property, historic site, and/or historic district, including, but not limited to, historic structures, properties and/or districts which are listed on, or are eligible for listing on, the National Register of Historic Places.

(vi) Potential Adverse Impacts Upon Ridgelines or Other Aesthetic Resources of the Town

Whether the proposed installation will be incompatible with and/or would have an adverse aesthetic impact upon or detract from the use and enjoyment of, and/or character of, recognized aesthetic assets of the Town, including, but not limited to, scenic areas and/or scenic ridgelines, scenic areas, public parks, and/or any other traditionally or historically recognized valuable scenic assets of the Town.

(vii) Sufficient Fall Zones

Whether the proposed installation shall have a sufficient fall zone and/or safe zone around the facility to afford the general public safety against the potential dangers of structural failure, icefall, debris fall, and fire.

(viii) Mitigation

Whether the applicant has mitigated the potential adverse impacts of the proposed facility to the greatest extent reasonably feasible. To determine mitigation efforts on the part of the applicant, the mere fact that a less intrusive site, location, or design would cause an applicant to incur additional expense is not a reasonable justification for an application to have failed to propose reasonable mitigation measures.

If, when applying the evidentiary standards set forth in subparagraph (a) hereinabove, the Town Council determines that the proposed facility would not meet the standards set forth within §2.02 or that the proposed facility would inflict one or more of the adverse impacts described hereinabove to such a substantial extent that granting the respective application would inflict upon the Town and/or its citizens and/or property owners the types of adverse impacts which this provision was enacted to prevent, the Town Council

shall deny the respective application for a special use permit unless the Council additionally finds that a denial of the application would constitute an Effective Prohibition, as provided for in Sections (b) and (c) immediately hereinbelow.

(b) TCA DETERMINATIONS

In cases within which an applicant has filed a "Notice of Effective Prohibition Conditions," the Town Council shall determine if a denial of the respective application would "Effectively Prohibit" a specifically identified Wireless Carrier from providing Personal Wireless Services within any geographic area or areas in the Town.

More specifically, the Town Council shall determine whether a denial of the specific application would either: (i) prevent *an identified* Wireless Carrier from providing personal wireless services *within a specific geographic area* or areas within the Town or (ii) would prevent a specific Wireless Carrier from constructing *a sufficient number* of such facilities necessary to enable it to provide Personal Wireless Services within the Town.

In determining whether a denial of any specific application would constitute an "Effective Prohibition," the Town Council shall determine: (1) whether an applicant has established that an identified Wireless Carrier suffers from one or more significant gaps in its Personal Wireless Services, and (2) whether its proposed installation is the least intrusive means of remedying any such gap or gaps.

(1) Significant Gap in Personal Wireless Services of an Identified Carrier

The Town Council shall determine whether the applicant has established, based upon probative evidence provided by the applicant and/or its representative, that a specific Wireless Carrier suffers from a significant gap in its personal wireless services within the Town.

In rendering such determination, the Council shall consider factors including, but not necessarily limited to:

(a) whether the identified Wireless Carrier, which is alleged to suffer from any significant gap in their personal wireless services, already provides Adequate Service in its Personal Wireless Services to its customers at any frequency being used by the carrier to provide personal wireless services to its end-use customers,
(b) whether any such alleged gap is relatively large or small in geographic size,
(c) whether the number of the carrier's customers affected by the gap is relatively small or large,
(d) whether or not the location of the gap is situated on a lightly traveled road, or sparsely or densely occupied area, and/or

(e) overall, whether the gap is relatively insignificant or otherwise relatively *de minimis*.

An Effective Prohibition shall not be found to exist under subparagraph (c) hereinbelow if a Wireless Carrier *has* adequate coverage in any specified geographic area, such that its end-use customers can use their cellular telephones to connect to landlines using the Carrier's Personal Wireless Services, but the frequency at which the customers are using such services is not the frequency *most desired* by the Carrier.

(2) Least Intrusive Means of Remedying Gap(s) in Service

The Town Council shall determine whether the applicant has established, based upon probative evidence provided by the applicant and/or its representative, that the installation of the proposed facility at the specific site proposed by the applicant and the specific portion of the site proposed by the applicant, and at the specific height proposed by the applicant, is the least intrusive means of remedying whatever significant gap or gaps which the applicant has contemporaneously proven to exist as determined by the Town Council based upon any evidence in support of, and/or in opposition to, the subject application.

In rendering such determination, the Council shall consider factors including, but not necessarily limited to:

(a) whether the proposed site is the least intrusive location at which a facility to remedy an identified significant gap may be located, and the applicant has reasonably established a lack of potential alternative less intrusive sites and lack of sites available for co-location,
(b) whether the specific location on the proposed portion of the selected site is the least intrusive portion of the site for the proposed installation
(c) whether the height proposed for the facility is the minimum height actually necessary to remedy an established significant gap in service,
(d) whether or not a pre-existing structure can be used to camouflage the facility and/or its antennas,
(e) whether or not, as proposed, the installation mitigates adverse impacts to the greatest extent reasonably feasible through the employ of Stealth design, screening, use of color, noise mitigation measures, etc., and/or
(f) overall whether or not there is a feasible alternative to remedy the gap through alternative, less intrusive substitute installations.

An Effective Prohibition shall also not be found to exist in subparagraph (c) hereinbelow if an applicant fails to establish before the Town Council that any existing geographic gap or capacity deficiency in the specific Wireless Carrier's coverage cannot be remedied

through a less intrusive means than what is being proposed, including, but not limited to, potential installations on alternative less intrusive sites, a shorter tower or facility, the incorporation of a more stealthy design, etc.

(c) Finding of Effective Prohibition or Lack of Effective Prohibition

After considering the evidence presented before it, the Town Council shall determine whether or not a denial of the respective application would constitute an effective Prohibition.

If the Town Council affirmatively determines that the applicant has failed to establish either: (i) that a denial of the application would prevent an identified Wireless Carrier from providing personal wireless services within a specific geographic area or areas within the Town or (ii) that a denial of the application would prevent a specific Wireless Carrier from constructing a sufficient number of such facilities necessary to enable it to provide Personal Wireless Services within the Town, then the Town Council shall find that a denial of the application does not constitute an Effective Prohibition.

If the Town Council affirmatively determines that: (i) a denial of the application would prevent an identified Wireless Carrier from providing personal wireless services within a specific geographic area or areas within the Town, or (ii) that a denial of the application would prevent a specific Wireless Carrier from constructing a sufficient number of such facilities necessary to enable it to provide Personal Wireless Services within the Town, then the Town Council shall find that a denial of the application would constitute an Effective Prohibition, and the Town Council shall grant the subject application, irrespective of whether or not the granting of same would otherwise be inconsistent with any other provision of this Section §17-10.

§17-11 Retention of Consultants

Commented [JW46]: Not used in adopted ordinance; however, adopted ordinance Sections 17.06 B. 2. a. and b. allow the Town to hire a consultant.

1. Use of Consultants

Where deemed reasonably necessary by the Town Council and/or the Town, the Town Council and/or the Town may retain the services of professional consultants to assist the Town Council in carrying out its duties in deciding special use permit applications for personal wireless service facilities. Where the Town Council uses the services of private engineers, attorneys, or other consultants for purposes of engineering, scientific, land use planning, environmental, legal, or similar professional reviews of the adequacy or substantive aspects of applications or of issues raised during the course of review of applications for special use permit approvals of personal wireless service facilities, the applicant and landowner, if different, shall be jointly and severally responsible for payment of all the reasonable and necessary costs incurred by the Town for such services.

That responsibility shall not exceed the actual cost to the Town of such engineering, legal, or other consulting services.

2. Advance Deposits for Consultant Costs

The Town and/or Town Council may require advance periodic monetary deposits held by the Town on account of the applicant or landowner to secure the reimbursement of the Town's consultant expenses. The Town Council shall establish policies and procedures for the fixing of escrow deposits and the management of payment from them. After the audit and approval of itemized vouchers by the Town Clerk as to the reasonableness and necessity of the consultant charges, the Town may make payments from the deposited funds for engineering, legal, or consultant services. Upon receiving a request by the applicant or landowner, the Town shall supply copies of such vouchers to the applicant and/or landowner reasonably in advance of audit and approval, appropriately redacted where necessary to shield legally privileged communications between Town officers or employees and the Town's consultant. When it appears that there may be insufficient funds in the account established for the applicant or landowner by the Town to pay current or anticipated vouchers, the Town shall cause the applicant or landowner to deposit additional sums to meet such expenses or anticipated expenses in accordance with policies and procedures established by the Town Council. Consultants shall undertake no review on any matter scheduled before the Town Council until the initial escrow deposit has been made or requested replenishment of the escrow deposit has been made. No reviewing agency shall be obligated to proceed unless the applicant complies with escrow deposit requirements.

3. Reasonable Limit Upon Consultant Expenses

A consultant expense or part thereof is reasonable in amount if it bears a reasonable relationship to the customary fee charged by engineers, attorneys, or planners within the region for services performed on behalf of applicants or reviewing boards in connection with comparable applications for land use or development.

The Town may also take into account any special conditions for consideration as it may deem relevant, including but not limited to the quality and timeliness of submissions on behalf of the applicant and the cooperation of the applicant and agents during the review process.

A consultant expense or part thereof is necessarily incurred if it was charged by the engineer, attorney or planner, or other consultants for a service that was rendered to assist the Town Council in: (a) making factual determinations consistent with the goals of protecting or promoting of the health, safety or welfare of the Town or its residents; (b) assessing potential adverse environmental impacts such as those identified within an ADEQ process; (c) accessing potential adverse impacts to historic properties, structures and/or districts, and/or (d) assessing and determining factual issues relevant to Effective Prohibition claims, as addressed herein, enabling the Council to best comply with the letter and intent of the provision of the TCA which is relevant thereto.

4. Audits Upon the Request of an Applicant

Upon request of the applicant or landowner, the Town Council shall review and audit all vouchers and determine whether such engineering, legal, and consulting expenses are reasonable in amount and necessarily incurred by the Town in connection with the review and consideration of a special use permit application for personal wireless service facility. In the event of such a request, the applicant or landowner shall be entitled to be heard by the Town Council on reasonable advance notice.

5. Liability for Consultant Expenses

For a land-use application to be complete, the applicant shall provide the written consent of all owners of the subject real property, both authorizing the applicant to file and pursue land development proposals and acknowledging potential landowner responsibility, under this section, for engineering, legal, and other consulting fees incurred by the Town. If different from the applicant, the owner(s) of the subject real property shall be jointly and severally responsible for reimbursing the Town for funds expended to compensate services rendered to the Town under this section by private engineers, attorneys, or other consultants. The applicant and the owner shall remain responsible for reimbursing the Town for its consulting expenses, notwithstanding that the escrow account may be insufficient to cover such expenses. No building permit or other permit shall be issued until reimbursement of costs and expenses determined by the Town to be due. In the event of failure to reimburse the Town for such fees, the following shall apply:

The Town may seek recovery of unreimbursed engineering, legal, and consulting fees by court action in an appropriate jurisdiction, and the defendant(s) shall be responsible for the reasonable and necessary attorney's fees expended by the Town in prosecuting such action.

Alternatively, and at the sole discretion of the Town, a default in reimbursement of such engineering, legal, and consulting fees expended by the Town shall be remedied by charging such sums against the real property that is the subject of the special use permit application by adding that charge to and making it a part of the next annual real property tax assessment roll of the Town. Such charges shall be levied and collected simultaneously and in the same manner as Town-assessed taxes and applied in reimbursing the fund from which the costs were defrayed for the engineering, legal, and consulting fees. Prior to charging such assessments, the owners of the real property shall be provided written notice to their last known address of record by certified mail, return receipt requested, of an opportunity to be heard and object before the Town Council to the proposed real property assessment, at a date to be designated in the notice, which shall be no less than 30 days after its mailing.

§17-12 Setback Requirements

1. Small Wireless Facilities

(a) Within C-O Commercial Office Zoning District; C-C Common-Commercial Zoning District; C-1 Neighborhood Commercial Professional District; C-2 Intermediate Commercial Zoning District; C-3 General Commercial Zoning District; IND-1 Planned Industrial Zoning District; IND-2 Light Industrial Zoning District; and UT Utility Zoning District, the minimum setback shall be fifty (50) feet, unless the facility is being installed upon a pre-existing utility pole or other utility structure.

(b) Within all residentially-zoned and other districts, all small wireless facilities shall be set back a minimum of three hundred (300) feet from any residential dwelling or structure unless the facility is being installed upon a pre-existing utility pole or is being co-located upon a pre-existing personal wireless service facility.

2. Cell Towers and all Personal Wireless Service Facilities that do not meet the definition of a Small Wireless Facility

(a) Each proposed wireless personal service facility and personal wireless service facility structure, compound, and complex shall be located on a single lot and comply with applicable setback requirements. Adequate measures shall be taken to contain on-site all icefall or debris from tower failure and preserve the privacy of any adjoining residential properties.

(b) Each lot containing a wireless personal service facility and personal wireless service facility structure, compound, and complex shall have the minimum area, shape, and frontage requirements generally prevailing for the zoning district where located in the Schedules of Regulations for Nonresidential and Residential Districts of this chapter, and such additional land if necessary to meet the setback requirements of this section.

(c) Cell towers and personal wireless service facilities that do not meet the definition of a small wireless facility shall maintain a minimum setback of a distance equal to one hundred ten (110%) percent of the height of the facility, for front yard setbacks, rear yard setbacks, and side yard setbacks, in all zoning districts.

§17-13 Height Restrictions

1. Small Wireless Facilities

Personal Wireless Service Facilities which meet the definition of a small wireless facility shall not exceed a maximum height of sixty (60) feet above ground elevation in C-O Commercial Office Zoning District; C-C Common-Commercial Zoning District; C-1 Neighborhood Commercial Professional District; C-2 Intermediate Commercial Zoning

Commented [JW47]: See adopted ordinance Section 17.03 B. for setback requirements.

Commented [JW48]: See adopted ordinance Section 17.03 B. for setback requirements

Commented [JW49]: See adopted ordinance Section 17.04 A. 7. c. for statement that towers in excess of max. building height for the district cannot be approved administratively. No max. height set.

District; C-3 General Commercial Zoning District; IND-1 Planned Industrial Zoning District; IND-2 Light Industrial Zoning District; and UT Utility Zoning District and shall not exceed a maximum height of forty-five (45) feet within all other zoning districts.

2. Non-Small Wireless Facilities

Personal Wireless Service Facilities which do not meet the definition of a small wireless facility shall not exceed a maximum height of one hundred fifty (150) feet above ground elevation in C-O Commercial Office Zoning District; C-C Common-Commercial Zoning District; C-1 Neighborhood Commercial Professional District; C-2 Intermediate Commercial Zoning District; C-3 General Commercial Zoning District; IND-1 Planned Industrial Zoning District; IND-2 Light Industrial Zoning District; and UT Utility Zoning District, and 100 feet above ground level in all other zoning districts.

§17-14 Use Restrictions and Variances

Commented [JW50]: Not used in adopted ordinance. Use variances are prohibited

1. Use Restrictions by Application Type and Zoning District

Type I applications No Use Variance Required

Type I applications for co-location of a small wireless facility in a public right of way as set forth in A.R.S. §9-592(J) and A.R.S. §9-593(C) shall be a permitted use with a building permit.

Type I applications for co-location of a small wireless facility in all other areas or zones shall require an applicant to obtain a special use permit from the Town Council.

Type II applications No Use Variance Required Unless Determined Otherwise

Applications for colocations of a wireless personal services facility, which do not meet the definition of a small wireless facility, shall be considered a special use permit in all districts and shall require a special use permit and a building permit but shall not require a use variance, unless the Town Council, in its sole discretion, determines that the proposed colocation will increase the overall intrusiveness of the site to a sufficient extent that its presence would no longer be compatible with the surrounding properties and/or surrounding community, in which case the Town Council shall issue a decision determining that the applicant shall be required to obtain a variance from the Board of Adjustment in accord with §2.07 of the Zoning Ordinance.

In rendering a determination of whether or not a variance shall be required, the Town Council shall consider, among other things: (a) the physical size, number, and potential intrusiveness of each new item of equipment to be installed as part of the proposed colocation, (b) the extent to which the installation of such equipment is to require or effectuate a significant physical expansion of the size or area of the facility or complex, (c) the extent to which the addition of such additional equipment will likely increase the

adverse aesthetic impact of the facility, and/or any other potentially significant adverse impacts which are likely to cause a significant increase in the overall intrusiveness of the wireless facility, and/or its compound or complex, such that it will no longer be reasonably compatible with the use of nearby or surrounding properties and/or that its presence would be incompatible with the character and use of the nearby properties and/or surrounding community.

If the Town Council determines that a variance is required for a specific proposed facility, then the applicant shall be required to file an application for a variance to the Board of Adjustment. The Board of Adjustment shall thereafter have the authority to (a) determine that no variance is necessary, (b) grant the application for a variance, or (c) deny the application for a variance.

Type III Applications No Use Variance Required

Applications for installing new Small Wireless Facilities that meet the criteria for Type III applications, which are not collocated in a public right of way, shall be considered a special use permit use in all districts. They shall require a special use permit and building permit but shall not require a variance unless they do not meet the applicable setback requirements or height limitation.

Type IV Applications Variance Requirements

Type IV applications seeking approval for the installation of a new cell tower and/or all other wireless facilities that are not a small wireless facility shall be a permitted use in all districts, which shall not need a use variance but shall require a special use permit, building permit, and area variance if the proposed facility does not meet the applicable height limitation and/or setback requirements.

§17-15 Environmental Impacts

Commented [JW51]: Not used in adopted ordinance.

If, and to the extent that, the Town Council determines a proposed installation bears the potential for a significant adverse impact upon the environment within the meaning of ADEQ and/or the NEPA, then the Council shall be expected to comply with the requirements of ADEQ in determining both (a) the extent of adverse impacts upon the environment and/or historic properties and (b) what mitigation measures the applicant should be required to undertake to minimize the adverse environmental impacts and/or adverse impacts upon historic sites, structures and/or districts.

If a respective applicant fails to obtain a review from the ADEQ and/or NEPA and opinion letters from the ADEQ and the FCC pertaining to its proposed installation prior to a first public hearing before the Town Council for the respective application, then the Town Council may make direct

requests to the ADEQ and the FCC for their review of the application. The Town Council may request SHPO and the FCC's review and input in completing the statutorilyrequired environmental impact analysis pursuant to ADEQ and NEPA.

In addition, the Town Council shall comply with the statutory requirements of ADEQ to complete an ADEQ review, make determinations of significance, and, where appropriate, require the applicant to complete a draft environmental impact statement and, if additionally appropriate, to thereafter complete a final environmental impact statement and analysis.

So long as the Town Council acts with reasonable diligence in completing its ADEQ and NEPA review, if compliance with the statutory requirements for environmental review requires a period of effort that extends beyond the expiration of the applicable shot clock period, the delays beyond such period shall be deemed reasonable.

§17-16 Historic Site Impacts

Commented [JW52]: Not used in adopted ordinance.

The Town Council shall consider the potential adverse impacts of any proposed facility upon any historic site, district, or structure consistent with the Town's historic preservation law requirements and comprehensive plan and ADEQ.

If, and to the extent that, the Town Council determines that a proposed installation bears the potential for a significant adverse impact on a historic site or a historic district within the meaning of ADEQ and/or the NHPA (especially if the historic site at issue is listed upon the National Register of historic places), then the Council shall comply with the requirements of both ADEQ and Town law in determining both: (a) the extent of adverse impacts upon the historic properties and (b) what mitigation measure might the applicant be required to undertake to minimize the adverse environmental impacts and/or adverse impacts upon historic sites, structures and/or district.

Should a respective applicant fail to obtain a SHPO and/or a Section 106 review under NHPA, and opinion letters from SHPO and the FCC pertaining to its proposed installation prior to a first public hearing before the Town Council for the respective application, then the Town Council shall make direct requests to SHPO and the FCC for their review of the application. They shall request SHPO and the FCC's review and input in completing the statutorily-required environmental/historic impact analysis pursuant to ADEQ and NHPA.

This request shall include, but not be limited to, a request to the FCC for a Section 106 review, as defined in this Chapter, as the Town recognizes each application for a special use permit for the installation of a personal wireless services facility shall constitute "an undertaking" for purposes of compliance with the National Historic Preservation Act.

In addition, the Town Council shall comply with the statutory requirements of ADEQ to complete a SEQ ADEQ RA review, make determinations of significance, and, where appropriate,

require the applicant to complete a draft environmental impact statement, and if additionally appropriate, to thereafter complete a final environmental impact statement and analysis.

So long as the Town Council acts with reasonable diligence in completing its ADEQ and NHPA review, if compliance with the statutory requirements for historic preservation review requires a period of effort that extends beyond the expiration of the applicable shot clock period, the delays beyond such period shall be deemed reasonable.

§17-17 *Force Majeure*

Commented [JW53]: Not used in adopted ordinance.

In the event that the rendering of a final decision upon a special use permit application under this Chapter is delayed due to natural and/or unnatural events and/or forces which are not within the control of the Town or the Town Council, such as the unavoidable delays experienced in government processes due to the COVID 19 pandemic, and/or mandatory compliance with any related federal or state government orders issued in relation thereto, such delays shall constitute reasonable delays which shall be recognized as acceptable grounds for extending the period for review and the rendering of final determinations beyond the period allotted under the applicable shot clock.

§17-18 *Eleventh Hour* Submissions

Commented [JW54]: Not used in adopted ordinance.

In the event that applicant tenders eleventh-hour submissions to the Town, the Council, and/or the Town Engineer in the form of (a) expert reports, (b) expert materials, and/or (c) materials which require a significant period for review due either to their complexity or the sheer volume of materials which an applicant has chosen to provide to the Council at such late point in the proceedings, the Town Council shall be afforded a reasonable time to review such late-submitted materials.

If reasonably necessary, the Town Council shall be permitted to retain the services of an expert consultant to review any late-submitted expert reports which were provided to the Council, even if such review or services extend beyond the applicable shot clock period, so long as the Council completes such review and retains and secures such expert services within a reasonable period of time thereafter and otherwise acts with reasonable diligence in completing its review and rendering its final decision.

§17-19 Prohibition Against Illegally Excessive Emissions and RF Radiation Testing

Commented [JW55]: Subsections 1 and 2 used in adopted ordinance Section 17-06 B. Otherwise, not used in adopted ordinance.

As disclosed on the FCC's public internet website, personal wireless services facilities erected at any height under 200 feet are not required to be registered with the FCC.

Of even greater potential concern to the Town is the fact that the FCC does not enforce the RF radiation limits codified within the CFR by either: (a) testing the actual radiation emissions of wireless Facilities either at the time of their installation or at any time thereafter, or (b) requiring

their owners to test them. *See* relevant excerpts from the FCC's public internet website annexed as Appendix 2.

This means that when wireless Facilities are constructed and operated within the Town, the FCC will have no idea where they are located and no means of determining, much less ensuring, that they are not exposing residents within the Town and/or the general public to Illegally Excessive levels of RF Radiation.

The Town deems it to be of critical importance to the health, safety, and welfare of the Town, its residents, and the public at large that personal wireless service facilities do not expose members of the general public to levels of RF radiation that exceed the limits which have been deemed safe by the FCC, and/or are imposed under CFR.

In accord with the same, the Town enacts the following RF Radiation testing requirements and provisions set forth herein below.

No wireless telecommunications facility shall at any time be permitted to emit illegally excessive RF Radiation as defined in §17-2 or to produce power densities that exceed the legally permissible limits for electric and magnetic field strength and power density for transmitters, as codified within 47 CFR §1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).
To ensure continuing compliance with such limits by all owners and/or operators of personal wireless service facilities within the Town, all owners, and operators of personal wireless service facilities shall submit reports as required by this section.

As set forth hereinbelow, the Town may additionally require, at the owner and/or operator's expense, independent verification of the results of any analysis set forth within any reports submitted to the Town by an owner and/or operator.

If an operator of a personal wireless service facility fails to supply the required reports or fails to correct a violation of the legally permissible limits described hereinabove, following notification that their respective facility is believed to be exceeding such limits, any special use permit or other zoning approval granted by the Town Council or any other body or representative of the Town is subject to modification or revocation by the Town Council following a public hearing.

1. Initial Certification of Compliance with Applicable RF Radiation Limits

   Within forty-five (45) days of initial operation or a substantial modification of a personal wireless service facility, the owner and/or operator of each Telecommunications antenna shall submit to the Town Engineer a written certification by a licensed professional engineer, sworn to under penalties of perjury, that the facility's radio frequency emissions comply with the limits codified within 47 CFR §1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).

   The engineer shall measure the emissions of the approved facility, including the cumulative impact from other nearby Facilities, and determine if such emissions are within the limits described hereinabove.

A report of these measurements and the engineer's findings with respect to compliance with the FCC's Maximum Permissible Exposure (MPE) limits shall be submitted to the Town Engineer.

If the report shows that the facility does not comply with applicable limits, then the owner and/or operator shall cease operation of the facility until the facility is brought into compliance with such limits. Proof of compliance shall be a certification provided by the engineer who prepared the original report. The Town may require, at the applicant's expense, independent verification of the results of the analysis.

2. Random RF Radiofrequency Testing

At the operator's expense, the Town may retain an engineer to conduct random unannounced RF Radiation testing of such Facilities to ensure the facility's compliance with the limits codified within 47 CFR §1.1310(e)(1) et seq.

The Town may cause such random testing to be conducted as often as the Town may deem appropriate. However, the Town may not require the owner and/or operator to pay for more than one test per facility per calendar year unless such testing reveals that one or more of the owner and/or operator's facilities are exceeding the limits codified within 47 CFR §1.1310(e)(1) et seq., in which case the Town shall be permitted to demand that the facility be brought into compliance with such limits, and to conduct additional tests to determine if, and when, the owner and/or operator thereafter brings the respective facility and/or facilities into compliance.

If the Town at any time finds that there is good cause to believe that a personal wireless service facility and/or one or more of its antennas are emitting RF radiation at levels in excess of the legal limits permitted under 47 CFR §1.1310(e)(1) et seq., then a hearing shall be scheduled before the Town Council at which the owner and/or operator of such facility shall be required to show cause why any and all permits and/or approvals issued by the Town for such facility and/or facilities should not be revoked, and a fine should not be assessed against such owner and/or operator.

Such hearing shall be duly noticed to both the public and the owner and/or operator of the respective facility or facilities at issue. The owner and/or operator shall be afforded not less than two (2) weeks' written notice by first-class mail to its Notice Address.

At such hearing, the burden shall be on the Town to show that, by a preponderance of the evidence, the Facilities emissions exceeded the permissible limits under 47 CFR §1.1310(e)(1) et seq.

In the event that the Town establishes same, the owner and/or operator shall then be required to establish, by clear and convincing evidence, that a malfunction of equipment caused their failure to comply with the applicable limits through no fault on the part of the owner/operator.

If the owner and/or operator fails to establish same, the Town Council shall have the power to and shall revoke any special use permit, variance, building permit, and/or any other form of zoning-related approval(s) which the Town Council, Board of Adjustment, Town Engineer and/or any other representative of the Town may have then issued to the owner and/or operator, for the respective facility.

In addition, the Town Council shall impose a fine of not less than $1,000, nor more than $5,000 for such violation of subparagraph 1. hereinabove, or, in the case of a second offense within less than five (5) years, a minimum fine of $5,000, nor more than $25,000.

In the event that an owner or operator of one or more personal wireless service facilities is found to violate subparagraph 1. hereinabove three or more times within any five (5) year period, then in addition to revoking any zoning approvals for the facilities which were violating the limits codified in 47 CFR §1.1310(e)(1) et seq., the Town Council shall render a determination within which it shall deem the owner/operator prohibited from filing any applications for any new wireless personal services facilities within the Town for a period of five (5) years.

§17-20 Bond Requirements, Removal of Abandoned Facilities and Reclamation

Commented [JW56]: Mostly, not used in adopted ordinance.

1. Bond Requirement

At or prior to the filing of an application for a special use permit for the installation of a new personal wireless service facility, each respective applicant shall provide a written estimate for the cost of the decommissioning and removal of the facility, including all equipment that comprises any portion or part of the facility, compound and/or complex, as well as any accessory facility or structure, including the cost of the full restoration and reclamation of the site, to the extent practicable, to its condition before development in accord with the decommissioning and reclamation plan required herein. The Town Council's Engineer shall review this estimate.

Upon receiving a special use permit approval from the Town Council and a building permit, prior to the commencement of installation and/or construction of such facility or any part thereof, the applicant shall file with the Town a bond for a length of no less than three (3) years in an amount equal to or exceeding the estimate of the cost of removal of the facility and all associated structures, fencing, power supply, and other appurtenances connected with the facility. The bond must be provided within thirty (30) days of the approval date and before any installation or construction begins.

Replacement bonds must be provided ninety (90) days prior to the expiration of any previous bond.

At any time the Town has good cause to question the sufficiency of the bond at the end of any three-year (3) period, the owner and/or operator of the facility, upon request by the Town, shall provide an updated estimate and bond in the appropriate amount.

Failure to keep the bonds in effect is cause for the removal of the facility at the owner's expense. Each facility will require a separate bond, regardless of the number of owners or location.

2. Removal of Abandoned Facilities

Any personal wireless service facility that is not operated or used for a continuous period of twelve (12) consecutive months shall be considered abandoned. At the owner's expense, the owner of said facility shall be required to remove the facility and all associated equipment buildings, power supply, fence, and other items associated with such facility, compound, and/or complex, and permitted with the facility.

If the facility is not removed within ninety (90) days, the bond secured by the facility owner shall be used to remove the facility and any accessory equipment and structures.

Commented [JW57]: Adopted ordinance Section 17.06 A. has similar language.

§17-21 ADA Accommodations

[Reserved]

§17-22 General Provisions

Commented [JW58]: Not used in adopted ordinance.

1. Balancing of Interests

The Town formally recognizes that, as has been interpreted by federal courts, when it enacted the TCA, Congress chose to preserve local zoning authority over decisions regarding the placement, construction, and modification of personal wireless facilities (47 U.S.C. §332(c)(7)(A)) subject only to the limitations set forth in subsection §332(c)(7)(b), consistent with the holding of the United States Court of Appeals in Sprint Telephony PCS v. County of San Diego, 543 F.3d 571 (9th Cir. 2008) and its progeny, and the Town has relied upon such federal courts' interpretations of the TCA in enacting Chapter §17 et seq.

The Town similarly embraces the Federal courts' determinations that the TCA as the Court additionally articulated in Sprint Telephony PCS v. County of San Diego, 543 F.3d 571 (9th Cir. 2008) This includes preserving to local governments, including the Town of Fountain Hills, the power to deny applications for the installation of wireless personal services facilities based upon traditional grounds of zoning denials, including, but not limited to, the potential adverse aesthetic impacts or a reduction in property values which the construction of any proposed structure may inflict upon nearby properties or the surrounding community.

This additionally includes the recognition that, under this balancing of interest test, "once an area is sufficiently serviced by a wireless service provider, the right to deny applications (for new wireless facilities) becomes broader" Crown Castle NG East LLC v. The Town of Hempstead, 2018 WL 6605857.

It is the intent of the Town that this Chapter be applied in a manner consistent with the balancing of interests codified within the TCA.

Consistent with same, the Town rejects and shall reject any current and/or future FCC interpretations of any provision of the TCA which are clearly inconsistent with, and/or are clearly contrary to, both the language of the TCA and binding decisions of the United States Court of Appeals for the Ninth Circuit and United States District Courts within the Ninth Circuit.

This includes a rejection of any FCC interpretations inconsistent with Sprint and any claims that the FCA legally prohibits the Town Council from denying a permit application based solely upon a claim that an applicant desires the installation of its new facility for "densification" of its existing personal wireless services, or to offer a new service, irrespective of whether or not the carrier already possesses adequate coverage within the Town, and irrespective of the potential adverse impact which the installation of such new facility or facilities would inflict upon the Town, its property owners, citizens and/or communities.

2. Conflict With Federal or State Laws

To the extent that any provision of this Chapter is found to conflict with any applicable federal or State law, it is the intent of the Town that the remaining portion of this Chapter, which has not been found to conflict with such law, be deemed to remain valid and in full force and effect.