

TO: HEARINGS OFFICER

**FROM: LISA ANDERSON-OGILVIE, AICP, DEPUTY COMMUNITY
DEVELOPMENT DIRECTOR AND PLANNING ADMINISTRATOR**

**SUBJECT: APPEAL OF CLASS 2 WIRELESS COMMUNICATIONS SITING
PERMIT CASE NO. WS221-05; 4500-4699 LIBERTY RD S - 97302;
AMANDA NO. 21-111680-ZO**

APPELLANT: Alan M Sorem, Saalfeld Griggs PC, on behalf of Tim Jennings,
Roth IGA Foodliner, Inc.

APPLICANT: AT&T doing business as New Cingular Wireless PCS LLC

AGENT: Meredith Hewett, J5 Infrastructure Partners

ISSUE:

Shall the Hearings Officer affirm the decision, affirm the decision with additional conditions or modifications, remand the decision to the Planning Administrator for further action, or reverse the decision?

RECOMMENDATION

Based upon the Facts and Findings contained in this staff report, staff recommends that the Hearings Officer AFFIRM the Planning Administrator's decision approving the request to replace an existing utility pole and install a small cell wireless communications facility on the replacement pole, subject to conditions of approval in the September 16, 2021 WS221-05 decision.

BACKGROUND

The proposal would replace an existing 35 foot 2 inch utility pole in the right-of-way on the western side of the 4500-4699 Liberty Road S block adjacent to 4555 Liberty Road S (Marion County Assessor Map and Tax Lot 083W09AC03900) in the CR (Retail Commercial) zone with a 30 foot utility pole, install equipment on the pole, and attach an antenna at the top with a maximum height of 36 feet. A vicinity map showing the subject utility pole is included as **Attachment 1**.

On September 16, 2021, the Planning Administrator issued a decision approving a Class 2 Wireless Communications Siting Permit for the subject property. The decision is included as **Attachment 2**. Comments received from Tim Jennings for Roth IGA Foodliner, Inc., during the comment period are included as Attachment E within the decision.

On October 1, 2021, a timely notice of appeal was filed by Alan M Sorem, Saalfeld Griggs PC, on behalf of Tim Jennings, Roth IGA Foodliner, Inc. The notice of appeal is

included as **Attachment 3**. The appellant asserted that the City has failed to provide adequate findings, the decision is not supported by substantial evidence, and the City has misapplied applicable laws. The appellant requested that staff provide the appeal letter to the City Councilors and Mayor so they are aware that the appellant requested that Council call up the appeal. Staff notified the appellant that Council received notice of the decision on September 23, the decision appeared on the Council agenda September 27, Council did not call it up, and, pursuant to SRC 300.1050(c), Council may not review the decision at this point.

On October 6, 2021, the Deputy Community Development Director and Planning Administrator sent Council the appeal letter, notified Council that the appellant requested that their appeal be heard by the City Council, explained that the wireless siting permit was no longer reviewable by the City Council, and stated that the appeal would be heard by the Hearings Officer.

The public hearing before the City of Salem Hearings Officer is scheduled for November 10, 2021, at 5:30 p.m. in the Salem City Council Chambers, Civic Center Room 240, located at 555 Liberty Street SE. Notice of public hearing was sent by mail to surrounding property owners pursuant to Salem Revised Code (SRC) requirements on October 21, 2021. Public hearing notice was posted on the property on October 29, 2021 pursuant to SRC requirements.

SUMMARY OF RECORD

The following items are submitted to the record and are available upon request: All materials submitted by the applicant, including any applicable professional studies such as traffic impact analysis, geologic assessments, and stormwater reports; any materials and comments from public agencies, City departments, neighborhood associations, and the public; and all documents referenced in this report.

SHOT CLOCK FOR WIRELESS SITING PERMIT

The Federal Communications Commission (FCC) has established shot clocks for timely review of applications for wireless communications facilities. The application was submitted on June 23, 2021. Staff sent a notice of incompleteness July 2, 2021. The applicant submitted some of the requested information on July 21, 2021 and additional requested information on August 2, 2021 and August 3, 2021. Due to miscommunications regarding whether the applicant had provided adequate documentation of exemption from review by the State Historic Preservation Office (SHPO), staff did not deem the application complete until August 23, 2021.

The applicant states that, under Section 332 of the federal Telecommunications Act of 1996, and relevant FCC Orders, the City must review and act on the Application within 90 days from July 21, 2021, plus any applicable tolling period. The decision date of September 16, 2021 and associated effective date of October 2, 2021 would have complied with the 90-day shot clock. However, due to the appeal, the City has not fully approved or denied the Application.

The shot clock of 90 days for review of an application for attachment of Small Wireless Facilities using a new structure was established in FCC 18-133, the Declaratory Ruling and Third Report and Order In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment.

When the appeal was filed, the Case Manager informed the applicant that she would be unavailable for the earliest possible appeal hearing date on October 27, 2021 and that the next available hearing date would be November 10, 2021. In the interest of cooperation and to preserve AT&T's statutory rights, the City and AT&T agreed to extend the shot-clock deadline until 11:59 p.m. on November 30, 2021. Unless the applicant grants another extension, the final decision must be issued by this time and date, which are prior to the state-mandated 120-day deadline.

COMMENTS RECEIVED AFTER APPEAL WAS FILED

The Sunnyslope Neighborhood Association submitted comments after the appeal, indicating support for the appellant (**Attachment 4**).

FACTS AND FINDINGS

The decision dated September 16, 2021 establishes findings related to the proposed approval of the Class 2 Wireless Communications Facility Siting Permit.

The following is a summary of the items raised by the appellant in the notice of appeal memo letter dated October 1, 2021, followed by a staff response.

1) Ownership of the Property.

Appellant's Statement: The applicant is identified in the decision as Meredith Hewett on behalf of New Cingular Wireless PCS, LLC (AT&T). The applicant and the City identify the communications facility as within the right-of-way. The City should be identified as the property owner and must consent to the application. There is no indication that any individual with the authority to consent to the Application on behalf of the City has done so. Applicant has not included into the record a lease agreement or any other instrument granting the Applicant standing to file the Application. Staff should never have deemed the application complete. The application must be denied unless this key evidentiary issue is addressed.

Applicant's Response: The applicant provided a letter of authorization from Wayne Wooten, Director – Access, Construction & Engineering, Pacific Northwest Market of New Cingular Wireless PCS, LLC, authorizing J5 Infrastructure Partners and Wireless Policy Group to represent, prepare documents, and serve as authorized contacts for New Cingular Wireless PCS, LLC (d/b/a AT&T Mobility Corporation) (**Attachment 5**). The applicant also provided a clarification of the roles of J5 Infrastructure Partners and Wireless Policy Group (**Attachment 6**).

Staff Response: New Cingular Wireless PCS, LLC, has an existing right-of-way use agreement (also known as a franchise agreement) signed by Wayne Wooten, Director of AT&T Mobility Corporation, Manager of New Cingular Wireless PCS, LLC, on May 8, 2018 and signed by the City Manager on June 4, 2018 (**Attachment 7**). The agreement allows New Cingular Wireless PCS, LLC (Grantee), and its successors and assigns to access City rights-of-way and structures located in City rights-of-way to install, construct, repair, replace, upgrade, maintain, and operate facilities for its mobile telecommunications system. Access to any structure is subject to receipt of written authorization from the owner of the subject structure. Staff assigned to review the permit were aware of the existing right-of-way use agreement and did not request a copy for the application file.

The City of Salem Public Works Department (PW) Franchise Team acts as the owner of the subject structure, a City-owned light pole, and requires certain permits for use of the light pole. Beginning on June 23, 2021 and continuing through July 22, 2021, Ms Hewett has submitted documents including a Work in Right-of-Way Permit Application, Right-of-Way Encroachment License Application, and a Franchise Utility Permit Application, and Work in Right-of-Way Permit Application. Public Works has not indicated any concerns that the submitted documentation is incomplete. No work will be authorized until all required permits are approved.

2) *Siting Priority.*

Appellant's Statement: Applicant did not provide evidence in the record demonstrating collocation cannot occur on an existing utility structure or other approved structure. Staff acknowledges this is a requirement to seek second priority siting but does not adopt specific findings outlining why collocation on an existing facility is impossible other than referencing Applicant's coverage maps. Applicant did not provide evidence in the record demonstrating why collocation on an existing facility is impossible, especially as the coverage on Applicant's coverage map covers a very large area, approximately a square mile or more. Moreover, Roth's is not appealing the new tower per se; rather, Roth's merely asks it to be located slightly to the south. Moving the center of the coverage map 100 feet will have no practical effect on the Applicant's coverage. Nowhere in the record is there any evidence regarding the analysis of existing utility structures or other existing support structures. There is not sufficient evidence in the record to support Staff's finding, and therefore, the finding is not adequate. The Decision must be reversed, and the Application must be denied.

Applicant's Response: The applicant provided a detailed Alternative Site Analysis (**Attachment 8**) to supplement the coverage map.

Staff Response: Staff does not have the technical expertise to challenge the coverage maps prepared by the applicant's professional radio frequency engineers, determine whether a particular location is the only location that would meet the applicant's coverage needs, or suggest other locations that could provide equivalent coverage. Staff has requested additional documentation from the applicant to

explain why a first priority siting -- collocation or attachment of an antenna or antenna array on a support tower, support structure, or utility structure – would not meet the applicant's coverage requirements and to document why the carrier did not select the utility pole to the south of the appellant's sign.

3) *Applicant is Proposing a Significant Enlargement of the Utility Structure in the ROW.*

Appellant's Statement: Staff lists the dimensions of both the existing utility structure and the proposed replacement. Applicant is proposing an increase in the dimensional standards of approximately 29%. There is no discussion regarding what would constitute an "enlargement" in the size of the utility structure in Staff's findings, or why this increase does not constitute an enlargement. Decision p. 14. Under the City's adjustment criteria, an adjustment of a standard over 20% requires additional justification because it has been determined by the City that such a deviation requires a higher level of scrutiny. That higher level of review is not present in the findings, demonstrating that the City has not provided an adequate finding supported by evidence in the record.

Staff Response: Staff assumes that the appeal letter is referring to page 11 of the decision (page 14 of the decision pdf), which references SRC 703.020(e)(2)(E): For replacement of a utility structure in right-of-way, the approval will not cause an increase in the number of utility structures in the right-of-way or cause an enlargement or expansion of an existing utility structure in the right-of-way.

Staff's findings in the decision stated:

The applicant's proposal replaces an existing utility pole inside right-of-way with a new pole that supports utility infrastructure. The proposed replacement utility structure will continue to perform the same function as the original utility structure. The proposal will not cause an increase in the number of utility structures on the property or cause any of the other existing utility structures to be enlarged or expanded.

Since adoption of SRC Chapter 703 in 2014, staff has interpreted 703.020(e)(2)(E) to mean that the utilization of a replacement utility structure may not create cascading impacts that would cause or require enlargement of any existing utility structure in the right-of-way. For example, the criterion would prohibit a carrier from employing a replacement electrical pole for a wireless facility if doing so would shift electrical facilities to an adjacent power pole and require enlargement of the adjacent power pole. Staff has not interpreted this criterion to prohibit a replacement structure that is larger than the structure it replaces or to require an adjustment for any replacement structure that exceeds the dimensions of the structure it replaces.

The applicable dimensional standards for a replacement utility structure are prescribed in SRC 703.060. The allowable height for a replacement utility structure in the right-of-way of a major arterial is found in SRC 703.060(a)(2)(A)(ii):

An original utility structure may be replaced with a replacement utility structure, provided that the combined height of the replacement structure, antenna mounting device, and antenna is no greater than 73 feet.

The applicant is proposing a replacement utility structure with a combined height of 36 feet, which meets the standard.

The allowable width of a replacement structure is found in SRC 703.020(b):

A replacement utility structure that is required to provide structural capacity to support an antenna or auxiliary support equipment shall be at least as wide as the engineering minimum required to provide the required support, and to meet safety standards promulgated by the Oregon Public Utility Commission.

A replacement light pole must often be larger in circumference than an existing light pole to support additional weight of attached antennas and equipment. The applicant provided plans and a structural analysis stamped by registered professional engineers, indicating that the replacement structure meets this standard.

4) The City Misstates the Application of Federal Law

Appellant's Statement: The City states that as a matter of federal law that the City as regulator is preempted from applying clear and objective standards to the Application. Without directly citing to the applicable regulation, it appears that the City is referencing the Middle-Class Tax Relief and Job Creation Act, which is commonly known as the "Spectrum Act," which is codified at 47 U.S.C. 1455. Where the Spectrum Act supersedes the City's authority in this area, Staff must clearly explain what standards are superseded and why. The Spectrum Act does not remove all review responsibilities from the City. Without such additional explanations, these findings are inadequate.

Applicant's Response: The applicant provided a diagram of equipment that would be contained in the proposed micro enclosure equipment cabinet (**Attachment 9**).

Staff Response: Page 7 of the decision (page 10 of the decision pdf) lists these standards of SRC 703.050:

Equipment, other than optical fibers, wires or cables, attached to a utility structure shall: (i) Project no more than 18 inches from the surface of the utility structure; (ii) Be less than or equal to 24 inches in height; (iii) Be mounted a minimum of 15 feet above ground level on a utility structure located in the right-of-way between the sidewalk and the street improvement or a minimum of ten feet above ground level on a utility structure located in the right-of-way between the sidewalk and the property line abutting the right-of-way or a minimum of ten feet above ground level on a utility structure located outside the right-of-way.

Page 8 of the decision (page 11 of the decision pdf) includes findings indicating which standards are superseded and references the applicable FCC standards:

The proposed equipment projects more than 18 inches from the surface of the pole. The largest equipment cabinet is 44 inches high, 20 inches deep, and 21 inches wide. It must be mounted several inches from the pole to allow safe climbing. The FCC standards adopted in 2019 for small wireless facilities (Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-133 (rel. Sept. 27, 2018); 83 Fed. Reg. 51867 (Oct. 15, 2018) ("FCC Order")) supersede the City's development standards. The FCC Order allows a total volume of no more than 28 cubic feet, with no dimensional limitations on individual pieces of equipment or cabinet sizes. The proposed equipment would occupy a volume less than 28 cubic feet.

The Planning Administrator has previously determined for similar applications that an adjustment application is not required for the equipment cabinets that exceed the dimensions of SRC 703.050, provided that the proposed equipment meets the dimensional standards of "Small Wireless Facilities" established in FCC Order 18-133:

"Small Wireless Facilities," as used herein and consistent with section 1.1312(e)(2), encompasses facilities that meet the following conditions:

- (1) The facilities—
 - (i) are mounted on structures 50 feet or less in height including their antennas as defined in section 1.1320(d), or
 - (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
 - (iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
- (2) Each antenna associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in section 1.1320(d)), is no more than three cubic feet in volume;
- (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume.

The applicant's plans indicate that the total height of the replacement structure is 36 feet; the antenna is 2.29 cubic feet in volume; and the equipment cabinet attached to the pole is approximately 10.7 cubic feet, and other equipment attached to the pole is approximately 1.26 cubic feet, for a total of 11.96 cubic feet. The proposed facility is well within the allowable dimensions under the FCC Order.

The FCC Order allows aesthetic requirements under certain circumstances. FCC 18-133, paragraph 87, states:

...aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment. For example, a minimum spacing requirement that has the effect of materially inhibiting wireless service would be considered an effective prohibition of service.

Due to the equipment needed for the proposed facility, including radios of a certain size as shown in **Attachment 9**, compliance with the City's maximum 18-inch projection and 24-inch height limitation is not technically feasible. Strict enforcement of the City's 24-inch standard would materially inhibit the applicant's ability to competitively offer wireless service in the City.

5) Request for City Council to Review the Decision

Appellant's Statement: In addition to the assignments of error raised above, approval of the Application raises long term policy questions that the City Council has an interest in clarifying before allowing New Cingular Wireless PCS, LLC (AT&T) carte blanche to site wireless communications facilities without regard for neighboring property owners or consideration of reasonable requests for modification of proposals.

When reviewing this proposal, the City is acting as both a manager of improvement projects within the ROW as well as the property owner for the Application. In this role, the City must consent to the Applicant's Application. It also has an interest as the manager of the City's property to ensure that the improvements constructed within the ROW are in the best interests of the public and the surrounding property owners. As in any land use decision within the City of Salem, the comprehensive plan policies should guide the City's policy decisions. Of particular relevance is one of the key objectives of the Salem Area Comprehensive Plan (SACP), which is to "promote a desirable balance and location of land uses in the Salem community, and relate these uses to the transportation network and location of public facilities." SACP p. 1. Additionally, Statewide Planning Goal 1 and its corresponding goal in the SACP provide specific direction for local Jurisdictions to encourage and enable citizen involvement. SACP p. 43. These policies remain central to the City's land use process regardless of the applicant or the property owner on a given application.

Roth's, a longtime member of the community, raised a reasonable concern during the public comment period regarding the proposed location of the Communications

Facility and offered a reasonable alternative solution. While the SACP is not explicitly incorporated into the approval criteria, when the City is reviewing proposed development in the ROW, it should at a minimum consider the implications of proposed development within the ROW and the impact that development will have on surrounding property owners as well as seek solutions when the public raises reasonable concerns. The City is not merely a regulator in this case.

The City Councilors, as elected representatives of the public, have an interest in making sure that the policies adopted by the City in the SACP are applied consistently to development throughout the City. Roth's respectfully requests that the City Council call up the Application and consider the long-term implications this laissez-faire approach will have as the siting of wireless communications facilities becomes increasingly common throughout our community.

Staff Response: New Cingular Wireless PCS, LLC (AT&T) is subject to an existing right-of-way use agreement with the City, the applicable provisions of the City's wireless communications facility chapter, and federal laws.

After the wireless industry began to request antenna deployments within public rights-of-way, City Council worked with several carriers to develop right-of-way use agreements (also known as a franchise agreements). New Cingular Wireless PCS, LLC, has an existing right-of-way use agreement (**Attachment 7**).

In order to create consistent development standards for facilities in rights-of-way for all carriers, and to revise out-of-date provisions regarding commercial wireless communications facility applications, Council approved a code amendment in 2014 that resulted in the standards and criteria of SRC Chapter 703. The amendment was approved after an extensive public involvement process that included stakeholder work sessions with wireless industry representatives and utility providers, meetings with neighborhood associations, Citywide mailed notice, open houses, a joint Planning Commission/Council work session, a Planning Commission public hearing, and a Council public hearing.

The case manager for this decision has been the Planning Division's primary contact for wireless communication facilities since 2010, was the lead planner responsible for the wireless code amendment process culminating in 2014, processes nearly all of the City's wireless communications facility land use applications and building permits, conducts zoning inspections of wireless communications facilities, and trains other planners to review wireless communication facility applications. Application submittal requirements, criteria, and standards are applied consistently to wireless communication facility applications throughout the City.

The policy issues raised by the appellant would be more appropriately addressed through a code amendment. Staff encourages the appellant to participate in the public involvement process for any future amendment to SRC Chapter 703.

5) Conclusion.

Appellant's Statement: Roth's is not opposed to the addition of the Communications Facility along the frontage of the Property; it is simply requesting a minor relocation that will not have an impact on its reader board. Roth's is committed to working with the City and the Applicant to find a mutually beneficial solution to this issue and is happy to do so in a timely manner.

Staff Response: While staff appreciates the appellant's desire to find a mutually beneficial solution, the appellant's desired solution cannot be accomplished merely by imposing a condition on the decision that requires the applicant to relocate the proposed facility to the south of the existing sign. There is no applicable standard or federal standard that requires the replacement utility structure to be located at a minimum distance or certain angle from the appellant's sign. For the applicant to relocate the facility to another utility pole as the appellant suggests, a new application would be required. The applicant would be required to commit time and money to determine whether an alternate location would provide required coverage and/or capacity without interfering with existing and previously approved facilities; if the location meets the applicant's requirements, the applicant would be required to prepare revised documents including, but not limited to, a survey, site plans, engineering, and coverage analysis; and the applicant would be required to submit a new Class 2 Wireless Communications Facility Siting Permit application with a new review fee. If a new application is submitted, staff must send notice to property owners and tenants within 250 feet of the new proposed location, conduct a new review, and issue a new decision.

Conclusion

The proposed design meets the applicable standards and criteria of the Salem Revised Code.

RECOMMENDATION

Based upon the Facts and Findings contained in this staff report, staff recommends that the Hearings Officer AFFIRM the Planning Administrator's decision approving the request to replace an existing utility pole and install a small cell wireless communications facility on the replacement pole, subject to conditions of approval in the September 16, 2021 WS221-05 decision (**Attachment 2**).

Prepared by Pamela Cole, Planner II

Application Deemed Complete Date: August 23, 2021
State Mandated Decision Date: December 21, 2021

Attachments:

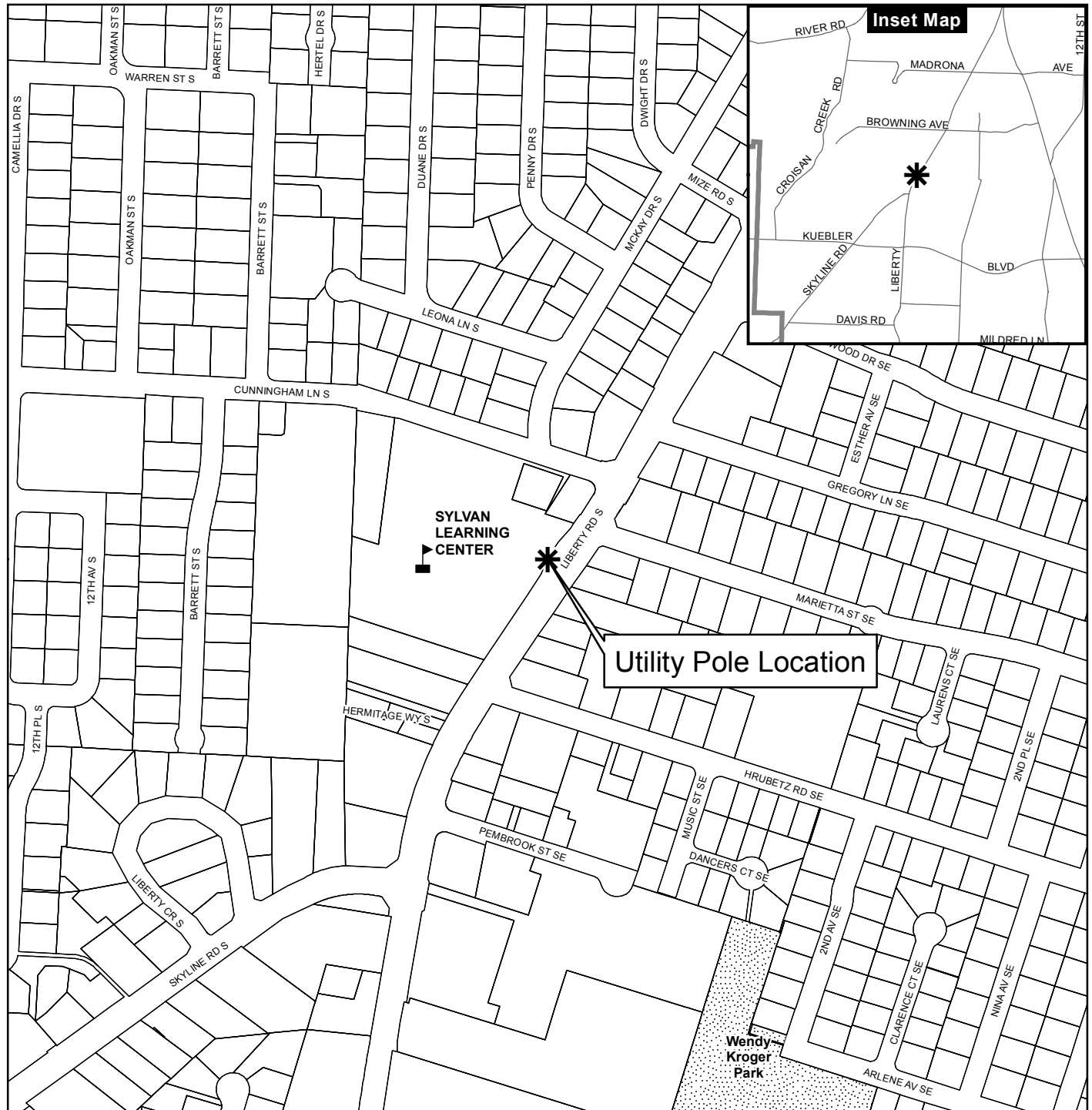
1. Vicinity Map
2. Class 2 Wireless Permit WS2-21-05 Decision
3. Notice of Appeal
4. Sunnyslope Neighborhood Association Comments

5. Letter of Authorization from New Cingular Wireless PCS, LLC (AT&T) to J5 Infrastructure Partners
6. Clarification of J5 Infrastructure Partners and Wireless Policy Group Roles
7. New Cingular Wireless PCS, LLC, Right-of-Way Use Agreement
8. Applicant's Alternative Site Analysis
9. Diagram of Micro Enclosure Equipment and Cabinet

Vicinity Map

Adjacent to 083W09AC03900

West side of the 4500-4699 block of Liberty Road S



Legend

- | | |
|-----------------------|---------------------------|
| Taxlots | Outside Salem City Limits |
| Urban Growth Boundary | Historic District |
| City Limits | Schools |

Parks

CITY OF Salem
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Community Development Dept.

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NOTICE OF DECISION

PLANNING DIVISION
555 LIBERTY ST. SE, RM 305
SALEM, OREGON 97301
PHONE: 503-588-6173
FAX: 503-588-6005



*Si necesita ayuda para comprender esta informacion, por favor llame
503-588-6173*

DECISION OF THE PLANNING ADMINISTRATOR

CLASS 2 WIRELESS PERMIT CASE NO.: WS221-05

APPLICATION NO.: 21-111680-ZO

NOTICE OF DECISION DATE: September 16, 2021

SUMMARY: Replace an existing utility pole and install a small cell wireless communications facility on the replacement pole.

REQUEST: Class 2 Wireless Communications Facility Siting Permit to replace an existing 35 foot 2 inch utility pole in the right-of-way on the western side of the 4500-4699 Liberty Road S block adjacent to 4555 Liberty Road S (Marion County Assessor Map and Tax Lot 083W09AC03900) in the CR (Retail Commercial) zone with a 30 foot utility pole, install equipment on the pole, and attach an antenna at the top with a maximum height of 36 feet.

APPLICANT: Meredith Hewett on behalf of New Cingular Wireless PCS LLC (AT&T)

LOCATION: 4500-4699 Liberty Road S, Salem OR 97302

CRITERIA: Salem Revised Code (SRC) Chapters 703.020(e)(2) – Wireless communications facility siting permits

FINDINGS: The findings are in the attached Decision dated September 16, 2021.

DECISION: The **Planning Administrator APPROVED** Class 2 Wireless Permit Case No. WS221-05 subject to the following conditions of approval:

- Condition 1:** An obsolete wireless communications facility shall be removed by the owner within six months of the date the facility ceases to be operational.
- Condition 2:** All wireless communications facilities shall be operated and maintained in compliance with all radio frequency emission standards specified by the Federal Communications Commission.
- Condition 3:** All wireless communications facilities shall be installed and maintained in accordance with applicable federal, state, and local laws.
- Condition 4:** All wireless communications facilities shall allow for the attachment or collocation of additional facilities to the greatest extent possible, unless such attachment or collocation interferes with the owner's wireless communications facilities, jeopardizes the physical integrity of a structure with which a wireless communications facility is associated, or the owner refuses to consent to the attachment or collocation of additional wireless communications facilities.

- Condition 5:** Vegetation that is either removed or destroyed as a result of construction shall be replanted with appropriate plant materials as prescribed in SRC Chapter 807.
- Condition 6:** Prior to making any opening or cut in any right-of-way, an owner shall obtain approval from the City Engineer.
- Condition 7:** After construction, maintenance, or repair of any wireless communications facility, an owner shall leave any right-of-way disturbed by such activity in as good or better condition than it was before the commencement of such work. The owner shall promptly complete restoration work and promptly repair any damage caused by such work at its sole cost and expense. When any opening or cut is made by the owner in the pavement of right-of-way, the owner must promptly refill the opening or cut, and restore the surface to a condition satisfactory to the City Engineer, in accordance with public works construction standards.
- Condition 8:** Prior to performing any excavation in right-of-way to underground any auxiliary support equipment, all necessary city permits shall be obtained and all appropriate notice given to any franchisees, licensees and grantees, other city departments, and other governmental units that own or maintain facilities which may be affected by the excavation.
- Condition 9:** All undergrounding and excavation work must comply with the Oregon Utility Notification Law, ORS 757.542-757.562 and 757.993, and all rules and regulations promulgated thereunder.
- Condition 10:** All excavations made by an owner in right-of-way shall be properly safeguarded for the prevention of accidents and must be done in compliance with all applicable federal, state, and local laws and regulations.
- Condition 11:** Except for short or temporary durations during testing or during operation in emergency situations, noise generating equipment associated with wireless communications facilities shall not produce sound levels in excess of standards established in SRC Chapter 93.
- Condition 12:** No City tree may be pruned or removed, no construction within the Critical Tree Zone of a City tree may occur, and no tree may be planted on City property, unless a permit is obtained from Public Works pursuant to SRC Chapter 86.

The rights granted by the attached decision must be exercised, or an extension granted, by October 2, 2023, or this approval shall be null and void.

Application Deemed Complete:	<u>August 23, 2021</u>
Notice of Decision Mailing Date:	<u>September 16, 2021</u>
Decision Effective Date:	<u>October 2, 2021</u>
State Mandate Date:	<u>December 21, 2021</u>

Case Manager: Pamela Cole, pcole@cityofsalem.net, 503-540-2309

This decision is final unless written appeal and associated fee (if applicable) from an aggrieved party is filed with the City of Salem Planning Division, Room 320, 555 Liberty Street SE, Salem OR 97301, or by email at planning@cityofsalem.net, no later than 5:00 p.m. Friday, October 1, 2021. The notice of appeal must contain the information required by SRC 300.1020 and must state where the decision failed to conform to the provisions of the applicable code section, SRC Chapter(s) 703. The appeal fee must be paid at the time of filing. If the appeal is untimely and/or lacks the proper fee, the appeal will be rejected. The Hearings Officer will review the appeal at a public hearing. After the hearing, the Hearings Officer may amend, rescind, or affirm the action, or refer the matter to staff for additional information.

The complete case file, including findings, conclusions and conditions of approval, if any, is available for review by contacting the case manager, or at the Planning Desk in the Permit Application Center, Room 305, City Hall, 555 Liberty Street SE, during regular business hours.

<http://www.cityofsalem.net/planning>

***Si necesita ayuda para comprender esta informacion, por favor llame
503-588-6173***

BEFORE THE PLANNING ADMINISTRATOR OF THE CITY OF SALEM

**CLASS 2 WIRELESS COMMUNICATIONS FACILITY SITING PERMIT
CASE NO. WS221-05
DECISION**

IN THE MATTER OF APPROVAL OF)	CLASS 2 WIRELESS COMMUNICATIONS
WIRELESS COMMUNICATIONS)	FACILITY SITING PERMIT
FACILITY SITING PERMIT)	
CASE NO. WS221-05)	
WESTERN RIGHT-OF-WAY OF THE)	
4500-4699 LIBERTY ROAD S BLOCK)	SEPTEMBER 16, 2021

In the matter of the application for a Class 2 Wireless Communications Facility Siting Permit submitted by Meredith Hewett of J5 Infrastructure Partners, on behalf of the applicant New Cingular Wireless PCS LLC (doing business as AT&T), the Planning Administrator, having received and reviewed evidence and the application materials, makes the following findings and adopts the following order as set forth herein.

REQUEST

Summary: Replace an existing utility pole and install a small cell wireless communications facility on the replacement pole.

Request: Class 2 Wireless Communications Facility Siting Permit to replace an existing 35 foot 2 inch utility pole in the right-of-way on the western side of the 4500-4699 Liberty Road S block adjacent to 4555 Liberty Road S (Marion County Assessor Map and Tax Lot 083W09AC03900) in the CR (Retail Commercial) zone with a 30 foot utility pole, install equipment on the pole, and attach an antenna at the top with a maximum height of 36 feet.

A vicinity map illustrating the location of the property is attached hereto and made a part of this staff report (**Attachment A**).

FINDINGS

1. Class 2 Wireless Communications Facility Siting Permit Applicability

The existing utility pole and the proposed utility pole are utility structures according to the definition of SRC 703.005: any utility pole, guy or support pole, utility pole extension, light standard, light pole or other similar pole that is suitable for the installation of wireless communications facilities. The proposed replacement of a utility structure for the purpose of attachment of an antenna or antenna array is a second priority siting according to SRC 703.010(c). SRC 703.020(b) requires a Class 2 Wireless Communications Facilities Siting Permit for any second priority siting.

2. Background

A Class 2 Wireless Communications Facility Siting Permit was submitted on June 23, 2021 by Meredith Hewett of J5 Infrastructure Partners, on behalf of the applicant New Cingular Wireless PCS LLC (doing business as AT&T). Additional information was requested from the applicant on July 2, 2021. The application was deemed complete for processing on August 23, 2021.

In accordance with procedural requirements of SRC 300.520(b), staff mailed a Notice of Filing and Request for Comments on August 23, 2021 with a comment deadline of September 7, 2021. Notice of the application was posted on the property on August 24, 2021 in accordance with SRC 300.520(b). The 120-day state-mandated deadline is December 21, 2021.

The applicant's proposed site plans are included as **Attachment B**, elevations depicting the proposed facility are included as **Attachment C**, and photo simulations are included as **Attachment D**.

Summary of Record:

The following items are submitted to the record and are available upon request: All materials submitted by the applicant, including any applicable professional studies; any materials and comments from public agencies, City departments, neighborhood associations, and the public; and all documents referenced in this report.

Homeowners Association

The subject property is not located within an active Homeowners Association.

Neighborhood Association Comment

Notice of the application was provided to the Sunnyslope Neighborhood Association (Sunnyslope) pursuant to SRC 300.520(b)(1)(B)(v), which requires notice to be sent to any City-recognized neighborhood association whose boundaries include, or are adjacent to, the subject property. No comments were received from Sunnyslope.

Public Comment

Notice was also provided, pursuant to SRC 300.520(b)(1)(B)(iii), (vi), & (vii), to all property owners and addresses within 250 feet of the utility structure. The subject property was posted pursuant to SRC 300.520(b)(2).

- Roth IGA Foodliner Inc., commented that the proposed location would be closer to their existing freestanding reader board sign, be significantly larger in circumference than the existing light pole, and increase visual obstruction of the sign and suggested that the applicant pursue alternative solutions such as replacing a different light pole south of the reader board (**Attachment E**).

Applicant response: Roth's suggests an alternative location for AT&T's proposed small wireless facility in case number WS221-05. AT&T's proposed small wireless facility meets the City's applicable siting standards as designed, including being located on the highest priority street classification in the vicinity, a major arterial. See Section 703.030. Roth's does not identify any decision criteria relevant to its comments, and the City's code does not prefer Roth's proposed alternative location over AT&T's proposed location. AT&T's project complies

with all relevant criteria, and the City can easily find that AT&T has satisfied its code requirements.

Staff response: The City's criteria and standards for wireless facility siting permits do not require a replacement pole to be installed in the same position as the existing pole, be the same circumference as the existing pole, or be placed to eliminate all visual obstructions to features on abutting properties.

The criteria for replacement of a utility structure in right-of-way specify that a proposal may not cause an increase in the number of utility structures in the right-of-way or cause an enlargement or expansion of an existing utility structure in the right-of-way. Replacement poles are often placed a few feet from existing poles to minimize disruption of utility services during construction. The existing pole is about 39 feet north/northwest of the sign, and the proposed pole would be about 36 feet north/northwest of the sign. At the completion of the project, only one utility structure will remain, meeting the applicable criterion.

The applicable standards allow a replacement pole that is larger in circumference than the existing pole. The applicant's elevation drawings indicate that the circumference of the proposed pole is approximately 10 inches at the base, 7.25 inches at 22 feet above grade (even with the base of the equipment cabinet), and 6 inches at 30 feet above grade (the base of the antenna shroud); the circumference of the existing pole is approximately 7.75 inches at the base, 5.5 inches at 22 feet above grade, 4.5 inches at 30 feet above grade, and 4 inches at the top height of 35 feet 2 inches. The increase in pole circumference is approximately 29 percent at the base, 32 percent at 22 feet above grade, and 33 percent at 30 feet above grade. A replacement light pole must often be larger in circumference than an existing light pole to support additional weight of attached antennas and equipment. The applicable standard requires that a replacement utility structure that is required to provide structural capacity to support an antenna or auxiliary support equipment shall be at least as wide as the engineering minimum required to provide the required support, and to meet safety standards promulgated by the Oregon Public Utility Commission. The applicant provided plans and a structural analysis stamped by registered professional engineers, indicating that the replacement structure meets this standard.

The applicable standards do not prohibit visual obstruction of features on abutting properties. Staff compared the known sign display surface area with approximate areas that the existing and proposed poles would obstruct. The most recently approved permit records for the Roth's sign indicate that the top of the highest sign cabinet is 25 feet above grade, the bottom of the lower sign cabinet is 15 feet above grade, and the combined display surface area of the two cabinets is 136 square feet, not including the areas of the small signs that are often placed below the two cabinets. If the existing and replacement poles were directly north of the center of the Roth's sign, the existing pole would obstruct approximately 4.7 square feet (3.5 percent) of the sign cabinet area, and the proposed pole and equipment enclosure would obstruct approximately 12.2 square feet (9.0 percent) of the sign cabinet area. However, because the existing and proposed pole are 39 feet or 36 feet from the sign, respectively, and pedestrians and drivers approach at an oblique angle, the percentage of visual obstruction would vary depending on the viewer's location. Using Google street view to approximate the position of a driver in the right southbound lane, staff estimates that the existing light pole would not obstruct the sign when a driver is 0 to 105 feet north of the sign, and the proposed replacement pole would not obstruct the sign when a driver is approximately 0 to 90 feet north of the sign. The visual obstruction is minimal.

The proposal meets the applicable criteria and standards. Therefore, the City cannot require the applicant to replace a different light pole in order to reduce visual obstruction of the Roth's sign.

City Department Comments:

The Public Works Department reviewed and approved the proposal.

The Building and Safety Division reviewed the proposal and had no concerns.

The Fire Department reviewed the proposal and had no concerns.

Public and Private Service Provider Comments:

PGE, the owner of the utility pole, received notice of the proposal and had no comments.

3. Analysis of Class 2 Wireless Communications Facility Siting Permit Approval Criteria

SRC 703.020(e)(2) states that a Class 2 wireless communications facility siting permit shall be granted only if each of the following criteria is met:

- (A) The proposed utility structure meets the standards in this Chapter.
- (B) For replacement of a utility structure outside right-of-way, the proposed wireless communications facility cannot practicably be located on an existing or modified structure outside right-of-way.
- (C) For replacement of a utility structure outside right-of-way, the approval will not cause an increase in the number of utility structures on the property or cause an enlargement or expansion of an existing utility structure on the property.
- (D) For replacement of a utility structure in right-of-way, the proposed wireless communications facility cannot practicably be located on an existing structure inside or outside right-of-way or on a modified or replacement structure outside right-of-way.
- (E) For replacement of a utility structure in right-of-way, the approval will not cause an increase in the number of utility structures in the right-of-way or cause an enlargement or expansion of an existing utility structure in the right-of-way.

The existing and proposed utility structures are located in public right-of-way; therefore, criteria B and C are not applicable to this application.

Criterion A: The proposed utility structure meets the standards in this Chapter.

Finding: With conditions of approval, the proposed development complies with all applicable development standards of the Salem Revised Code, as described below.

Wireless Communications Facilities (SRC Chapter 703) Standards

SRC 703.010(b) - Collocation Required: All wireless communications facilities located in right-of-way shall be collocated or attached to replacement utility structures. All wireless communications facilities located outside of right-of-way shall be collocated, unless the collocation would interfere with other wireless communications facilities located on the same structure or jeopardize the physical integrity of the structure upon which collocation will be

made, consent cannot be obtained for the collocation on a structure, or the available structures do not provide sufficient height to obtain coverage or capacity objectives.

Applicant's Statement: The proposed (SWF) small wireless facility on the west side of Liberty Road S, approximately 250 feet south of Cunningham Lane S, is a proposed collocation on a replacement City of Salem streetlight.

Finding: The proposed facilities will be attached to a utility structure that will replace an existing utility structure.

SRC 703.010(c) - Siting Priority: Wireless communications facilities shall be sited according to the following priority, by descending order of preference:

- (1) First priority: collocation or attachment of an antenna or antenna array on a support tower, support structure, or utility structure;
- (2) Second priority: replacement of a utility structure for the purpose of attachment of an antenna or antenna array;
- (3) Third priority: substantial change in the physical dimensions of a support tower or replacement with a support tower that represents a substantial change in the physical dimensions of the original support tower;
- (4) Fourth priority: construction of a new support tower.

Applicant's Statement: The proposed (SWF) small wireless facility on the west side of Liberty Road S, approximately 250 feet south of Cunningham Lane S, is a proposed collocation on a replacement City of Salem streetlight (C8309A-1253) making it a second priority site per SRC 703.010(c), 703.010(c)(2) and 703.030(b)(1)(B)(ii).

Finding: Collocation is defined in SRC 703.005(g) as the mounting or installation of an antenna on an existing support structure, utility structure, or support tower. A first priority siting is a collocation or an attachment of an antenna or antenna array on existing support tower, support structure, or utility structure. Because the existing utility structure will be replaced, the proposal is for a second priority siting rather than a first priority siting, and the applicant is required to document that replacement of the existing utility structure is necessary because the proposed antennas cannot be collocated or attached to an existing support tower, utility structure or support tower. The application submittal requirements for a Class 2 Wireless Communications Facility Siting Permit include documentation that placement at a first-priority site is not feasible and coverage maps or capacity documentation showing any gap in the provider's service and minimum height or configuration of the facility needed to fill the gap. The applicant's submittal fulfills the requirements, and the proposal meets the standards.

SRC 703.030 - Replacement Utility Structure Development Standards:

(b) *Class 2.* The replacement of a utility structure shall comply with the following siting standards:

(1) *Inside right-of-way.*

- (A) All wireless communications facilities located in the right-of-way shall be collocated or attached to a replacement utility structure.
- (B) Wireless communications facilities proposed to be sited in the right-of-way shall be sited according to the following priorities, in descending order of preference. If the priority is not followed, the owner must demonstrate why a higher priority is not

available for use. For purposes of this subsection, streets shall have the classification set forth in the Salem Transportation System Plan.

- (i) First priority: parkway or freeway;
- (ii) Second priority: major arterials;
- (iii) Third priority: minor arterials;
- (iv) Fourth priority: collectors;
- (v) Fifth priority: local streets.

Applicant's Statement: The proposed (SWF) small wireless facility on the west side of Liberty Road S, approximately 250 feet south of Cunningham Lane S, is a proposed collocation on a replacement City of Salem streetlight (C8309A-1253) making it a second priority site per SRC 703.010(c), 703.010(c)(2) and 703.030(b)(1)(B)(ii).

Finding: The applicant provided propagation maps indicating that the proposed location in the right-of-way of a major arterial street (Liberty Road S) will provide the required coverage. No higher-classification streets are available in the vicinity. The applicant's submittal fulfills the requirements, and the proposal meets the standard.

SRC 703.060 - Replacement Utility Structure Development Standards:

Height - Inside the right-of-way, an original utility structure may be replaced with a replacement utility structure that is taller than the original structure, provided that the combined height of a replacement structure, antenna mounting device, and antenna is no greater than:

- (i) 78 feet for a replacement structure located on a parkway or freeway;
- (ii) 73 feet for a replacement structure on a major arterial;
- (iii) 63 feet for a replacement structure on a minor arterial; or
- (iv) 53 feet for a replacement structure located on a collector street or local street.

Width - A replacement utility structure that is required to provide structural capacity to support an antenna or auxiliary support equipment shall be at least as wide as the engineering minimum required to provide the required support, and to meet safety standards promulgated by the Oregon Public Utility Commission.

Surface and Coloration - A replacement structure shall be painted, coated, or given a surface application that is similar to the color and surface texture of the existing utility structure or original structure.

External cables and wires - All external cables and wires shall be placed in conduit or painted or colored to match the replacement structure.

Lighting - Unless the existing utility structure or original structure was lighted, a replacement structure shall not be lighted.

Finding: The combined height of the replacement structure, antenna mounting device, and antennas would be 36 feet, which is below the maximum combined height of 73 feet for a major arterial street. The applicant provided stamped plans and a structural analysis from registered professional engineers confirming that the proposed antennas will not jeopardize the physical integrity of the replacement pole. The proposed replacement would be metal, as is the existing streetlight pole. The proposed cables and wires will be placed in conduit or run inside the pole. The new pole and new light arm color and finish will match the existing pole. New equipment is to be painted to match the replacement light pole. The proposed structure will have a light arm (luminaire) with a standoff that matches the existing. The proposed utility structure meets the standards.

SRC 703.040 - Antenna Development Standards:

Antennas attached to utility structures shall comply with the following development standards:

Physical integrity - The antennas shall not jeopardize the utility structure's physical integrity.

Guy poles - Antennas shall not be located on guy poles.

Mounting - Antennas and antenna mounting devices placed below the top of the utility structure shall be mounted in one of the following configurations:

(A) Flush with the utility structure; or

(B) On extension arms that are no greater than three feet in length.

Surface and Coloration - Antennas must be painted, coated, or given a surface application that is similar to the color and surface texture of the utility structure so as to minimize visual impact as much as reasonably possible.

Lighting - Unless required by the FAA or the Oregon Aeronautics Division, antennas shall not be lighted.

Finding: The applicant provided stamped plans and a structural analysis from registered professional engineers confirming that the proposed antennas will not jeopardize the physical integrity of the replacement pole. The existing and proposed pole are not guy poles. The antenna will be mounted at the top of the utility structure and located inside a concealment. The proposed antenna concealment will be painted to match the replacement pole. The proposed antenna meets the standards.

SRC 703.050 - Auxiliary Support Equipment Development Standards:

Screening - Equipment associated with antennas on utility structures inside right-of-way and not installed on the utility structure shall be installed within an underground vault or in not more than one above ground cabinet with a combined height plus width plus depth no greater than 120 linear inches.

Equipment, other than optical fibers, wires or cables, attached to a utility structure shall:

(i) Project no more than 18 inches from the surface of the utility structure;

(ii) Be less than or equal to 24 inches in height;

(iii) Be mounted a minimum of 15 feet above ground level on a utility structure located in the right-of-way between the sidewalk and the street improvement or a minimum of ten feet above ground level on a utility structure located in the right-of-way between the sidewalk and the property line abutting the right-of-way or a minimum of ten feet above ground level on a utility structure located outside the right-of-way.

Vision Clearance - Auxiliary support equipment installed above ground shall meet the vision clearance area requirements of SRC 76.170 (SRC 805).

External cables and wires - All external cables and wires for auxiliary support equipment shall be placed in conduit or painted to match the tower, building, support structure, or utility structure, as applicable.

Coloration - Equipment installed on a utility structure shall be non-reflective and painted, coated or given a surface application that is identical to the color and surface texture of the utility structure. Other equipment shall be non-reflective and painted natural earth or leaf tones or otherwise colored or surfaced so as to blend with the surrounding environment.

Lighting - Motion detecting security lighting is allowed for auxiliary support equipment, but shall be the minimum necessary to secure the auxiliary support equipment, shall not illuminate adjacent properties in excess of 0.4 foot candles measured directly beneath the security lighting, at ground level, and shall be shielded to prevent direct light from falling on adjacent properties.

Finding: The proposed equipment projects more than 18 inches from the surface of the pole. The largest equipment cabinet is 44 inches high, 20 inches deep, and 21 inches wide. It must be mounted several inches from the pole to allow safe climbing. The FCC standards adopted in 2019 for small wireless facilities (*Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-133 (rel. Sept. 27, 2018); 83 Fed. Reg. 51867 (Oct. 15, 2018) ("FCC Order")) supersede the City's development standards. The FCC Order allows a total volume of no more than 28 cubic feet, with no dimensional limitations on individual pieces of equipment or cabinet sizes. The proposed equipment would occupy a volume less than 28 cubic feet.

The proposed auxiliary support equipment is shown on the pole at 22 feet above grade at the lowest point, exceeding the minimum height of 15 feet above grade for a utility structure in the right-of-way between the sidewalk and the street improvement and exceeding the minimum of ten feet above ground level on a utility structure located in the right-of-way between the sidewalk and the property line abutting the right-of-way.

The proposed equipment will not be located within any vision clearance areas. External wires and cables not located inside the pole will be placed in conduit. The proposed equipment is to be painted to match the replacement pole and will not have security lighting. The proposed equipment meets the applicable standards.

SRC 703.080 - Conditions: Every wireless communications facility siting permit shall be subject to the following conditions:

- Condition 1:** An obsolete wireless communications facility shall be removed by the owner within six months of the date the facility ceases to be operational.
- Condition 2:** All wireless communications facilities shall be operated and maintained in compliance with all radio frequency emission standards specified by the Federal Communications Commission.
- Condition 3:** All wireless communications facilities shall be installed and maintained in accordance with applicable federal, state, and local laws.
- Condition 4:** All wireless communications facilities shall allow for the attachment or collocation of additional facilities to the greatest extent possible, unless such attachment or collocation interferes with the owner's wireless communications facilities, jeopardizes the physical integrity of a structure with which a wireless communications facility is associated, or the owner refuses to consent to the attachment or collocation of additional wireless communications facilities.
- Condition 5:** Vegetation that is either removed or destroyed as a result of construction shall be replanted with appropriate plant materials as prescribed in SRC Chapter 807.
- Condition 6:** Prior to making any opening or cut in any right-of-way, an owner shall obtain approval from the City Engineer.

- Condition 7:** After construction, maintenance, or repair of any wireless communications facility, an owner shall leave any right-of-way disturbed by such activity in as good or better condition than it was before the commencement of such work. The owner shall promptly complete restoration work and promptly repair any damage caused by such work at its sole cost and expense. When any opening or cut is made by the owner in the pavement of right-of-way, the owner must promptly refill the opening or cut, and restore the surface to a condition satisfactory to the City Engineer, in accordance with public works construction standards.
- Condition 8:** Prior to performing any excavation in right-of-way to underground any auxiliary support equipment, all necessary city permits shall be obtained and all appropriate notice given to any franchisees, licensees and grantees, other city departments, and other governmental units that own or maintain facilities which may be affected by the excavation.
- Condition 9:** All undergrounding and excavation work must comply with the Oregon Utility Notification Law, ORS 757.542-757.562 and 757.993, and all rules and regulations promulgated there under.
- Condition 10:** All excavations made by an owner in right-of-way shall be properly safeguarded for the prevention of accidents and must be done in compliance with all applicable federal, state, and local laws and regulations.
- Condition 11:** Except for short or temporary durations during testing or during operation in emergency situations, noise generating equipment associated with wireless communications facilities shall not produce sound levels in excess of standards established in SRC Chapter 93.

Use and Development Standards – CR (Retail Commercial) Zone:

SRC 522.005 - Uses:

Permitted, special, conditional and prohibited uses in the CR zone are set forth in SRC 522.005, Table 522-1.

Finding: The proposed development is a wireless communication facility. Wireless communication facilities are allowed in the CR zone per SRC 522.005, Table 522-1, subject to SRC Chapter 703.

Natural Resources

SRC 86 – Trees on City Owned Property: SRC Chapter 86 provide a unified, consistent, and efficient means for the planning, planting, maintenance, and removal of trees located on city property, including rights-of-way, and to limit the adverse impacts to city trees and city infrastructure. No City trees appear to be affected by the proposed project. However, to ensure that this proposal is in compliance with the requirements of SRC Chapter 86, the following condition is necessary:

- Condition 12:** No City tree may be pruned or removed, no construction within the Critical Tree Zone of a City tree may occur, and no tree may be planted on City

property, unless a permit is obtained from Public Works pursuant to SRC Chapter 86.

SRC 808 - Preservation of Trees and Vegetation: The City's tree preservation ordinance, under SRC Chapter 808, provides that no person shall remove a significant tree (Oregon White Oak greater than 24 inches in diameter at breast height) (SRC 808.015) or a tree or native vegetation in a riparian corridor (SRC 808.020), unless the removal is excepted under SRC 808.030(a)(2), undertaken pursuant to a permit issued under SRC 808.030(d), undertaken pursuant to a tree conservation plan approved under SRC 808.035, or permitted by a variance granted under SRC 808.045. No protected trees or native vegetation have been identified on the site plan for removal.

SRC 809 - Wetlands: The Salem-Keizer Local Wetland Inventory (LWI) shows no wetland areas in the project area.

SRC 810 - Landslide Hazards: A geological assessment or report is required when regulated activity is proposed in a mapped landslide hazard area. The applicant's proposal does not appear to disturb any portion of a mapped landslide hazard area with regulated activities; therefore, a geological assessment is not required.

Airport Overlay Zone

SRC 602.020 - Development Standards: Development within the Airport Overlay Zone must comply with the development standards applicable in underlying zone and the development standards set forth in this section. The development standards in this section are in addition to, and not in lieu of, all other applicable development standards in the underlying zone. Where the development standards in this section conflict with the development standards applicable in the underlying zone or any other overlay zone, the more restrictive development standards shall be the applicable development standard.

Finding: The replacement utility structure would be located outside of the Airport Overlay Zone and airport building restriction areas.

Historic Preservation

Jason Allen, the Historic Preservation Specialist for the State Historic Preservation Office (SHPO) issued a general interpretation regarding FCC exemptions from Section 106 review (June 12, 2020). He stated that a pole replacing an existing utility pole is considered a new structure and this type of installation is classified as a Tower and therefore exemptions from 106 review are based upon Section III of the 2004 Nationwide Programmatic Agreement.

Applicant's Statement: This is being submitted as a Class 2 application; this will be a replacement structure in a non-historic district. Per the parameters outlined within the document known as 2004 Nationwide PA, Section ii.A.14 this proposal is classified as a Tower because no new structures would be placed except in the event of this installation for the purpose of supporting the equipment.

Finding: The applicant submitted a Small Cell Wireless Section 106 Exemption Form that was reviewed and approved by the City's Historic Preservation Program Manager / Historic Preservation Officer & City Archaeologist.

Criterion D: For replacement of a utility structure in right-of-way, the proposed wireless communications facility cannot practicably be located on an existing structure inside or outside right-of-way or on a modified or replacement structure outside right-of-way.

Finding: The application submittal requirements for a Class 2 Wireless Communications Facility Siting Permit include documentation that placement at a first-priority site (an existing structure inside or outside right-of-way) is not feasible and coverage maps or capacity documentation showing any gap in the provider's service and minimum height or configuration of the facility needed to fill the gap. The applicant's submittal fulfills the requirements, and the proposal meets this criterion.

Criterion E: For replacement of a utility structure in right-of-way, the approval will not cause an increase in the number of utility structures in the right-of-way or cause an enlargement or expansion of an existing utility structure in the right-of-way.

Finding: The applicant's proposal replaces an existing utility pole inside right-of-way with a new pole that supports utility infrastructure. The proposed replacement utility structure will continue to perform the same function as the original utility structure. The proposal will not cause an increase in the number of utility structures on the property or cause any of the other existing utility structures to be enlarged or expanded.

4. Based upon review of SRC Chapter 703, the applicable standards of the Salem Revised Code, the findings contained herein, and due consideration of comments received, the application complies with the requirements for an affirmative decision.

ORDER

Final approval of Class 2 Wireless Communications Facility Siting Permit Case No. 21-05 is hereby **APPROVED** subject to SRC Chapter 703, the applicable standards of the Salem Revised Code, conformance with the approved site plan (**Attachment B**), the proposed elevation drawings (**Attachment C**), and the following conditions of approval:

- Condition 1:** An obsolete wireless communications facility shall be removed by the owner within six months of the date the facility ceases to be operational.
- Condition 2:** All wireless communications facilities shall be operated and maintained in compliance with all radio frequency emission standards specified by the Federal Communications Commission.
- Condition 3:** All wireless communications facilities shall be installed and maintained in accordance with applicable federal, state, and local laws.
- Condition 4:** All wireless communications facilities shall allow for the attachment or collocation of additional facilities to the greatest extent possible, unless such attachment or collocation interferes with the owner's wireless communications facilities, jeopardizes the physical integrity of a structure with which a wireless communications facility is associated, or the owner refuses to consent to the attachment or collocation of additional wireless communications facilities.

- Condition 5:** Vegetation that is either removed or destroyed as a result of construction shall be replanted with appropriate plant materials as prescribed in SRC Chapter 807.
- Condition 6:** Prior to making any opening or cut in any right-of-way, an owner shall obtain approval from the City Engineer.
- Condition 7:** After construction, maintenance, or repair of any wireless communications facility, an owner shall leave any right-of-way disturbed by such activity in as good or better condition than it was before the commencement of such work. The owner shall promptly complete restoration work and promptly repair any damage caused by such work at its sole cost and expense. When any opening or cut is made by the owner in the pavement of right-of-way, the owner must promptly refill the opening or cut, and restore the surface to a condition satisfactory to the City Engineer, in accordance with public works construction standards.
- Condition 8:** Prior to performing any excavation in right-of-way to underground any auxiliary support equipment, all necessary city permits shall be obtained and all appropriate notice given to any franchisees, licensees and grantees, other city departments, and other governmental units that own or maintain facilities which may be affected by the excavation.
- Condition 9:** All undergrounding and excavation work must comply with the Oregon Utility Notification Law, ORS 757.542-757.562 and 757.993, and all rules and regulations promulgated thereunder.
- Condition 10:** All excavations made by an owner in right-of-way shall be properly safeguarded for the prevention of accidents and must be done in compliance with all applicable federal, state, and local laws and regulations.
- Condition 11:** Except for short or temporary durations during testing or during operation in emergency situations, noise generating equipment associated with wireless communications facilities shall not produce sound levels in excess of standards established in SRC Chapter 93.
- Condition 12:** No City tree may be pruned or removed, no construction within the Critical Tree Zone of a City tree may occur, and no tree may be planted on City property, unless a permit is obtained from Public Works pursuant to SRC Chapter 86.



Pamela Cole, Planner II, on behalf of
Lisa Anderson-Ogilvie, AICP
Planning Administrator

Attachments: A. Vicinity Map
B. Site Plans
C. Proposed Elevations
D. Photo simulations
E. Comments Submitted by Roth's

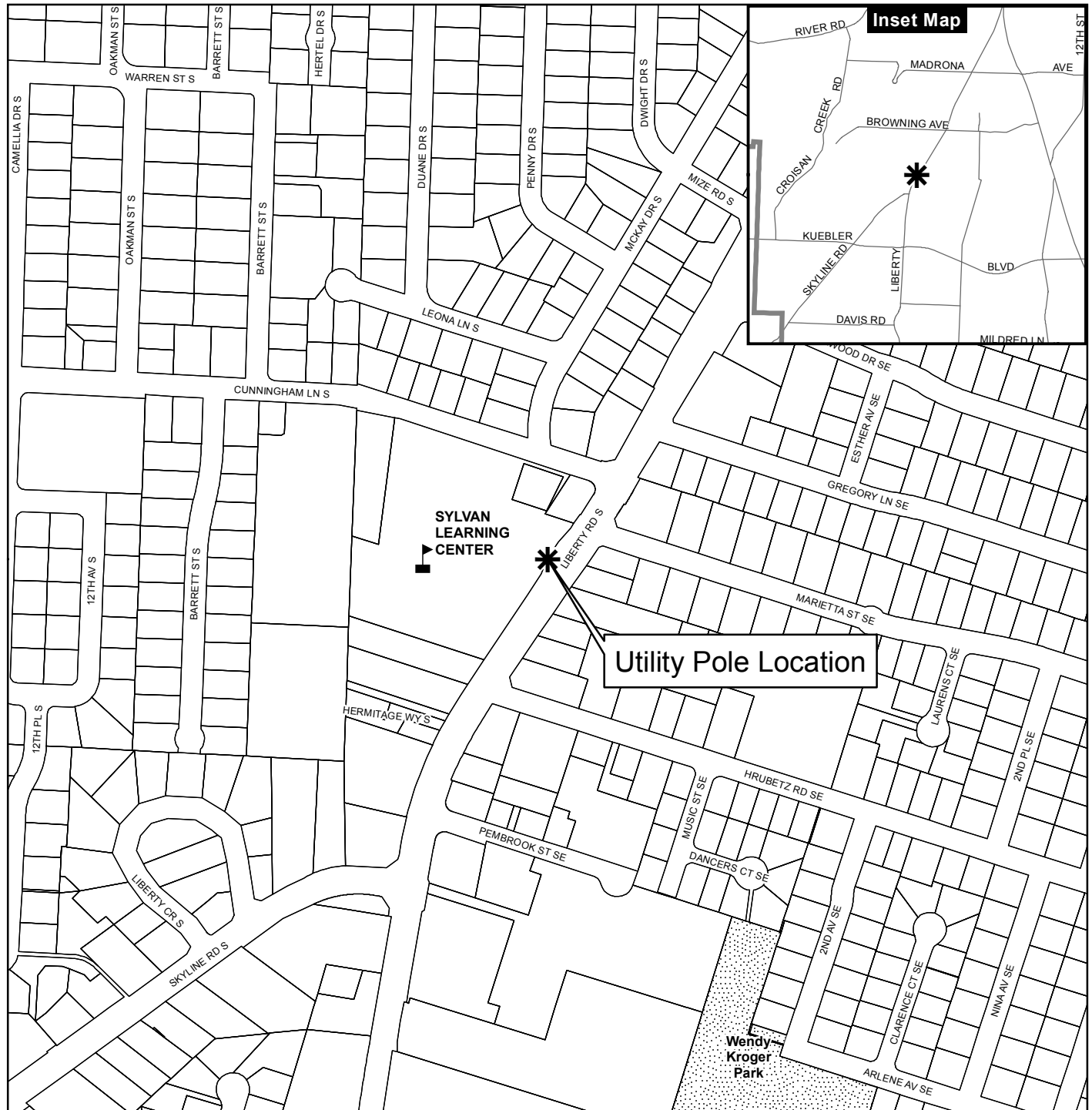
<http://www.cityofsalem.net/planning>

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Vicinity Map

Adjacent to 083W09AC03900

West side of the 4500-4699 block of Liberty Road S



Legend

- | | |
|-----------------------|---------------------------|
| Taxlots | Outside Salem City Limits |
| Urban Growth Boundary | Historic District |
| City Limits | Schools |

Parks

CITY OF Salem
AT YOUR SERVICE
Community Development Dept.

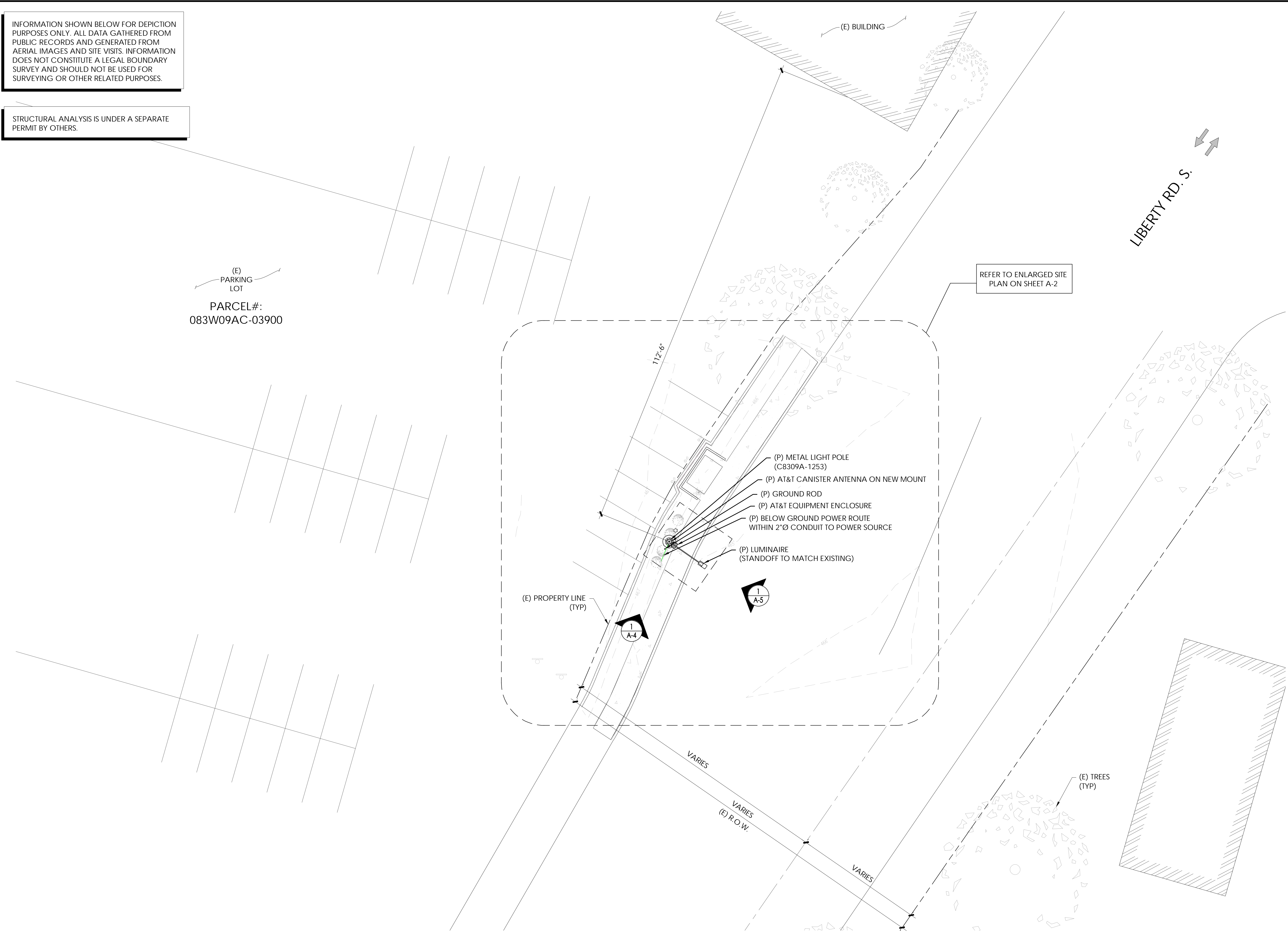
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0 100 200 400 Feet



INFORMATION SHOWN BELOW FOR DEPICTION PURPOSES ONLY. ALL DATA GATHERED FROM PUBLIC RECORDS AND GENERATED FROM AERIAL IMAGES AND SITE VISITS. INFORMATION DOES NOT CONSTITUTE A LEGAL BOUNDARY SURVEY AND SHOULD NOT BE USED FOR SURVEYING OR OTHER RELATED PURPOSES.

STRUCTURAL ANALYSIS IS UNDER A SEPARATE PERMIT BY OTHERS.



(E) PARKING LOT
PARCEL#:
083W09AC-03900

REFER TO ENLARGED SITE
PLAN ON SHEET A-2

LIBERTY RD. S.

PREPARED FOR



19801 SW 72ND AVE.
TUALATIN, OR 97062

Vendor:

J5 INFRASTRUCTURE
PARTNERS
2030 MAIN ST.
SUITE 200
IRVINE, CA 92614
J5 PROJECT ID: P-052193

Vendor:

Vendor:

DRAWN BY: MDA

CHECKED BY: JMM

REV	DATE	DESCRIPTION
0	07/06/21	100% CDs

Licenser:



"I HEREBY CERTIFY THAT THESE PLANS WERE PREPARED BY ME OR UNDER MY DIRECT SUPERVISION AND THAT I AM DULY REGISTERED ENGINEER UNDER THE LAWS OF THE STATE OF OREGON."

AT&T Site ID:

CRAN_RWOR_SALEM_049D

26783-049D

1050 CANDLELIGHT DR.
EUGENE, OR 97402

Sheet Title:

OVERALL SITE
PLAN

Sheet Number:

A-1

- NOTE:
1. NEW POLE COLOR AND FINISH TO MATCH EXISTING POLE.
 2. NEW LIGHT ARM COLOR AND FINISH TO MATCH EXISTING POLE.
 3. NEW EQUIPMENT TO BE PAINTED WITH RF TRANSPARENT, UV RESISTANT, OUTDOOR RATED PAINTED TO MATCH REPLACEMENT LIGHT POLE.
 4. CONTRACTOR SHALL RE-INSTALL ALL EXISTING STREET SIGNS AS NEEDED ON NEW POLE.
 5. CONTRACTOR TO INSTALL ENCLOSURE ON STREET SIDE.
 6. INSTALL RF WARNING SIGNS PER MANUFACTURER SPECIFICATIONS AS REQUIRED BY LAW OR BY THE POLE OWNER. NO ADDITIONAL SIGNAGE WILL BE POSTED.
 7. PRESERVE THE CLIMBING SPACE ON THE FIELD SIDE OF THE POLE
 8. FIBER TO BE PROVIDED BY OTHERS UNDER SEPARATE PERMIT.
 9. ALL LANDSCAPING AND SPRINKLERS SHALL BE RESTORED TO ORIGINAL CONDITION.
 10. ANY DISTURBED CONCRETE/BRICKWORK IN EXISTING SIDEWALK TO BE REPAIRED TO MATCH CURRENT CONDITIONS.

STRUCTURAL ANALYSIS OF EXISTING/NEW POLES BY OTHERS.

AT&T IS RESPONSIBLE FOR MAKE READY COORDINATION AND CONSTRUCTION.

(E) PARKING LOT

PARCEL#:
083W09AC-03900



PREPARED FOR



19801 SW 72ND AVE.
TUALATIN, OR 97062

Vendor:



2030 MAIN ST.
SUITE 200

IRVINE, CA 92614

J5 PROJECT ID: P-052193

Vendor:

Vendor:

DRAWN BY: MDA

CHECKED BY: JMM

REV	DATE	DESCRIPTION
0	07/06/21	100% CDs

Licenser:



"I HEREBY CERTIFY THAT THESE PLANS WERE PREPARED BY ME OR UNDER MY DIRECT SUPERVISION AND THAT I AM DULY REGISTERED ENGINEER UNDER THE LAWS OF THE STATE OF OREGON."

AT&T Site ID:

CRAN_RWOR_SALEM_049D

26783-049D

1050 CANDLELIGHT DR.
EUGENE, OR 97402

Sheet Title:

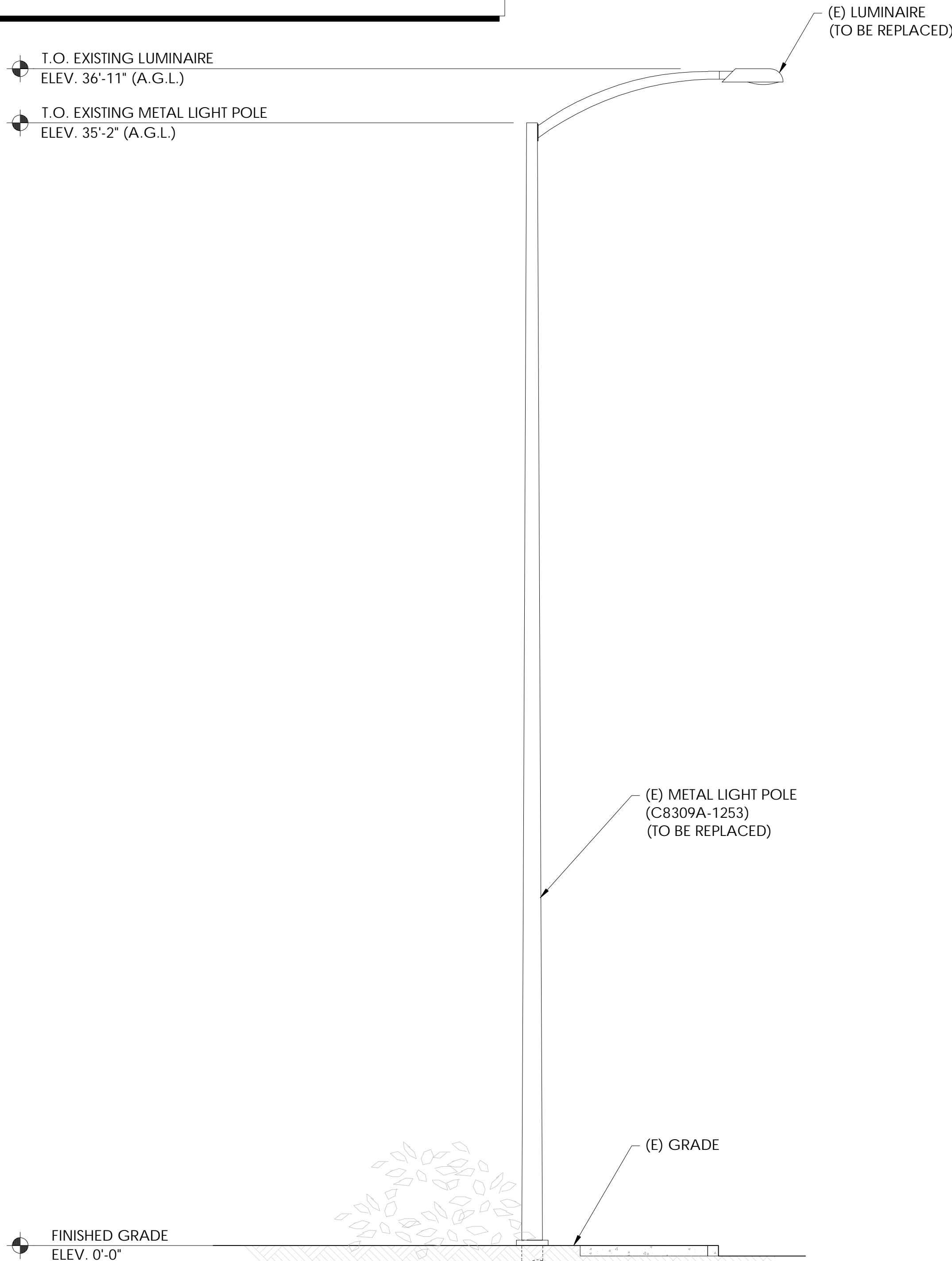
ENLARGED SITE
PLAN

Sheet Number:

A-2

- NOTE:
1. NEW POLE COLOR AND FINISH TO MATCH EXISTING POLE.
 2. NEW LIGHT ARM COLOR AND FINISH TO MATCH EXISTING POLE.
 3. NEW EQUIPMENT TO BE PAINTED WITH RF TRANSPARENT, UV RESISTANT, OUTDOOR RATED PAINTED TO MATCH REPLACEMENT LIGHT POLE.
 4. CONTRACTOR SHALL RE-INSTALL ALL EXISTING STREET SIGNS AS NEEDED ON NEW POLE.
 5. CONTRACTOR TO INSTALL ENCLOSURE ON STREET SIDE.
 6. INSTALL RF WARNING SIGNS PER MANUFACTURER SPECIFICATIONS AS REQUIRED BY LAW OR BY THE POLE OWNER. NO ADDITIONAL SIGNAGE WILL BE POSTED.
 7. PRESERVE THE CLIMBING SPACE ON THE FIELD SIDE OF THE POLE
 8. FIBER TO BE PROVIDED BY OTHERS UNDER SEPARATE PERMIT.
 9. ALL LANDSCAPING AND SPRINKLERS SHALL BE RESTORED TO ORIGINAL CONDITION.
 10. ANY DISTURBED CONCRETE/BRICKWORK IN EXISTING SIDEWALK TO BE REPAIRED TO MATCH CURRENT CONDITIONS.

STRUCTURAL ANALYSIS OF EXISTING/NEW POLES BY OTHERS.

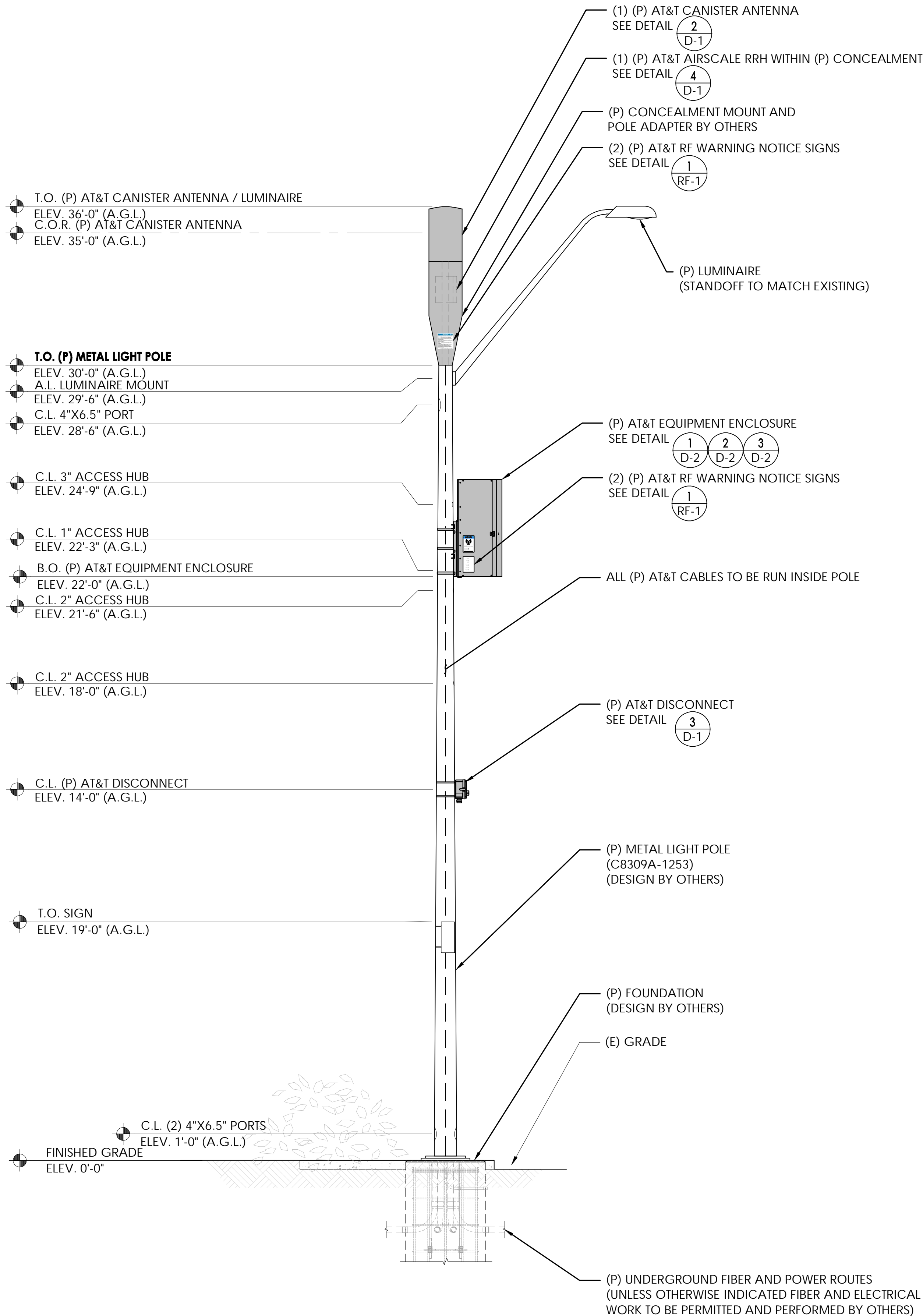


EXISTING SOUTHWEST ELEVATION

24"x36" SCALE: 3/8" = 1'-0"



2



PROPOSED EAST ELEVATION

24"x36" SCALE: 3/8" = 1'-0"



1

PREPARED FOR



19801 SW 72ND AVE.
TUALATIN, OR 97062

Vendor:



2030 MAIN ST.
SUITE 200
IRVINE, CA 92614

J5 PROJECT ID: P-052193

Vendor:

Vendor:

DRAWN BY: MDA

CHECKED BY: JMM

REV	DATE	DESCRIPTION
0	07/06/21	100% CDs

Licensors:



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OF OREGON."

AT&T Site ID:

CRAN_RWOR_SALEM_049D

26783-049D

1050 CANDLELIGHT DR.
EUGENE, OR 97402

Sheet Title:

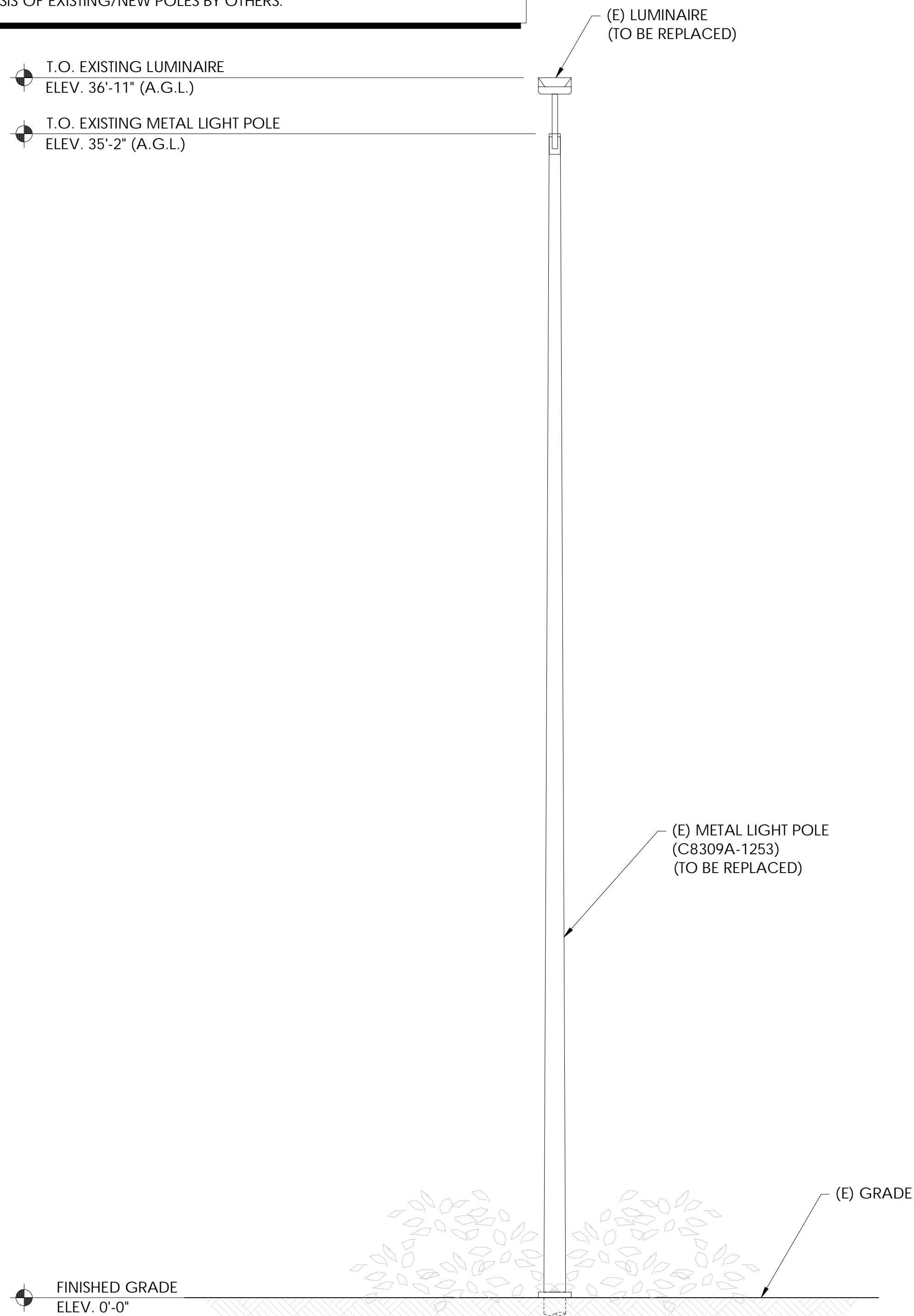
ELEVATIONS

Sheet Number:

A-4

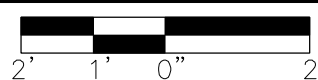
- NOTE:
1. NEW POLE COLOR AND FINISH TO MATCH EXISTING POLE.
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STRUCTURAL ANALYSIS OF EXISTING/NEW POLES BY OTHERS.



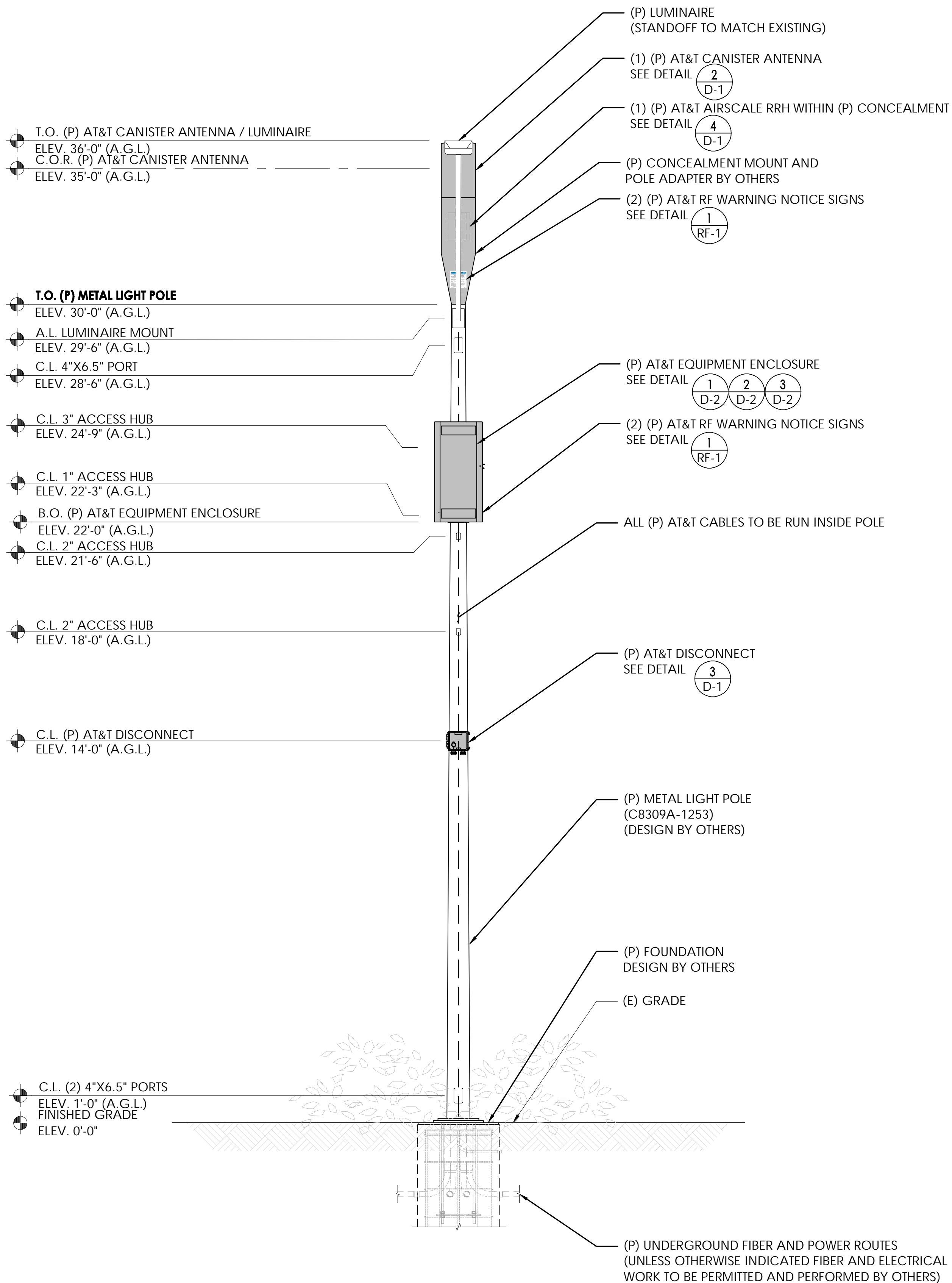
EXISTING NORTH ELEVATION

24"x36" SCALE: 3/8" = 1'-0"

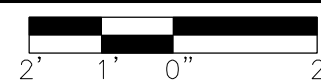


2

PROPOSED NORTH ELEVATION



24"x36" SCALE: 3/8" = 1'-0"



1

PREPARED FOR



19801 SW 72ND AVE.
TUALATIN, OR 97062

Vendor:



2030 MAIN ST.
SUITE 200
IRVINE, CA 92614

J5 PROJECT ID: P-052193

Vendor:

Vendor:

DRAWN BY: MDA

CHECKED BY: JMM

REV	DATE	DESCRIPTION
0	07/06/21	100% CDs

Licenser:



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AT&T Site ID:

CRAN_RWOR_SALEM_049D

26783-049D

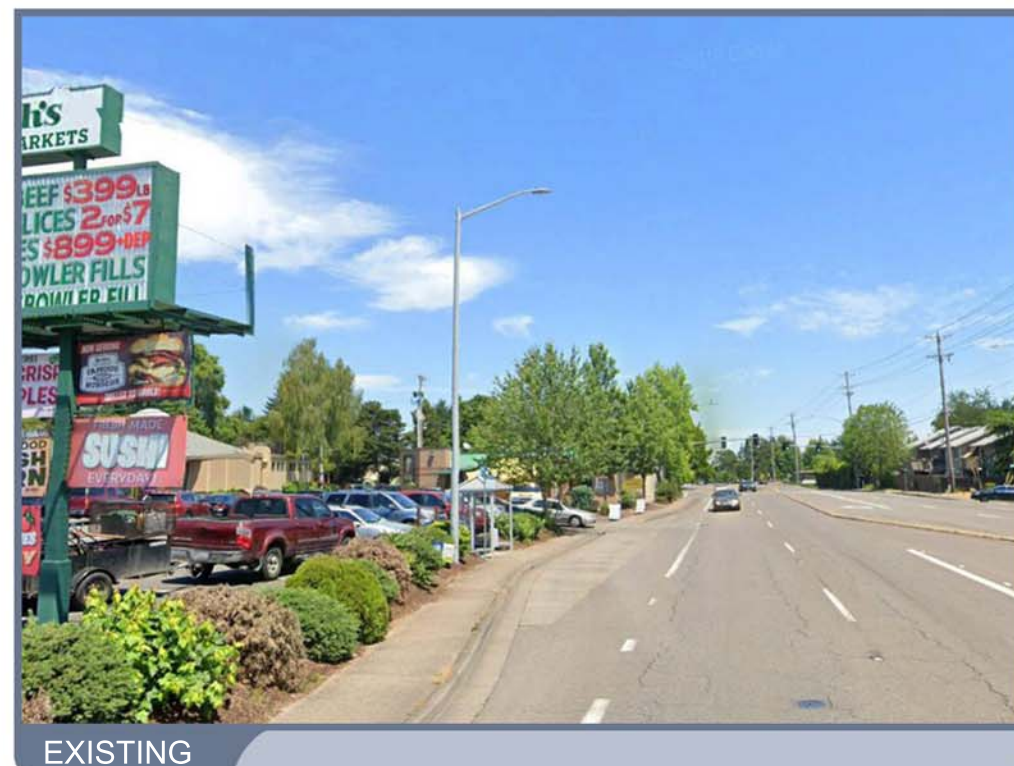
1050 CANDLELIGHT DR.
EUGENE, OR 97402

Sheet Title:

ELEVATIONS

Sheet Number:

A-5



REQUEST FOR COMMENTS***Si necesita ayuda para comprender esta informacion, por favor llame 503-588-6173*****REGARDING:** Class 2 Wireless Permit Case No. WS221-05**PROJECT ADDRESS:** 4500-4699 Liberty Road S, Salem OR 97302**AMANDA Application No.:** 21-111680-ZO**COMMENT PERIOD ENDS:** Tuesday, September 7, 2021 at 5:00 P.M.

REQUEST: Class 2 Wireless Communications Facility Siting Permit to replace an existing 35 foot 2 inch utility pole in the right-of-way on the western side of the 4500-4699 Liberty Road S block adjacent to 4555 Liberty Road S (Marion County Assessor Map and Tax Lot 083W09AC03900) in the CR (Retail Commercial) zone with a 30 foot utility pole, install equipment on the pole, and attach an antenna at the top with a maximum height of 36 feet.

The Planning Division is interested in hearing from you about the attached proposal. Staff will prepare a Decision that includes consideration of comments received during this comment period. We are interested in receiving pertinent, factual information such as neighborhood association recommendations and comments of affected property owners or residents. The complete case file, including all materials submitted by the applicant and any applicable professional studies such as traffic impact analysis, geologic assessments, and stormwater reports, are available upon request.

Comments received by 5:00 p.m., Tuesday, September 7, 2021, will be considered in the decision process. Comments received after this date will be not considered. *Comments submitted are public record. This includes any personal information provided in your comment such as name, email, physical address and phone number. Mailed comments can take up to 7 calendar days to arrive at our office. To ensure that your comments are received by the deadline, we recommend that you e-mail your comments to the Case Manager listed below.*

CASE MANAGER: Pamela Cole, Planner II, City of Salem, Planning Division; 555 Liberty St SE, Room 305, Salem, OR 97301; Phone: 503-540-2309; E-Mail: pcole@cityofsalem.net.

For information about Planning in Salem, please visit: <http://www.cityofsalem.net/planning>

PLEASE CHECK THE FOLLOWING THAT APPLY:

- ☐ 1. I have reviewed the proposal and have no objections to it.
- ☒ 2. I have reviewed the proposal and have the following comments: Please see attached.

Name/Agency: Roth IGA Foodliner, Inc.Address: 4895 Indian School Rd NE, Salem, OR 97305Phone: 503.393.7684Email: TimJennings@Roths.comDate: September 7, 2021**IMPORTANT: IF YOU MAIL COMMENTS, PLEASE FOLD AND RETURN THIS POSTAGE-PAID FORM**

September 7, 2021

Pamela Cole, Planner II
City of Salem Planning Division
555 Liberty Street SE, Room 305
Salem, OR 97301

Dear Ms. Cole:

Roth I.G.A. Foodliner, Incorporated ("Roth's") requests a change to the proposed utility pole in Class 2 Wireless Permit Case No. WS221-05 to prevent obstruction of its reader board sign ("the Sign") reflected in the Photo Simulation. Roth's is a long-time tenant of the property located at 4555 Liberty Road S, Salem OR 97302 and the anchor tenant for the Shopping Center at such property. Roth's made a significant investment in the reader board sign to enable travelers on Liberty Road to see its advertised products.

The proposed location of the new utility pole is three feet closer to the Sign than the current utility pole. The photo simulation below reflects the proposed equipment attachment at the same height as the Sign. This new equipment will effectively obstruct the view of the Sign from drivers headed south on Liberty Road. The pictures in the Photo Simulation in the City's proposal was taken while facing north on Liberty Road. Please refer to the photos below, which faces south on Liberty Road, so that the true impact on the Sign can be better seen. The image on the right does not take into account that the Cellular pole would be significantly larger in circumference than the existing light pole. This would mean that more of the Readerboard sign would be blocked from the driver's view.



CURRENT VIEW



BLOCKING VIEW

Silverton • McMinnville • Monmouth • Stayton
Salem (Lancaster, Vista, Sunnyslope, West Salem and Hayesville)

Page 2, September 7, 2021

One alternative might be to leave the current light pole as is by Roth's Readerboard and replace the light pole farther to the south. You can see in this picture, this light pole is a significant distance from both the Sunnyslope Shopping Center Readerboard and the Roth's Readerboard.



An alteration to the location and/or configuration of the utility pole is necessary to prevent the visual obstruction. Roth's would be happy to work with the City on determining alternative solutions. The contact information for Roth's is:

Roth I.G.A. Foodliner, Incorporated
Attn: Tim Jennings
Address: 4895 Indian School Road, NE; Salem, OR 97305
Phone: 503-393-4684
Email: TimJennings@Roths.com

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Jennings'.

Tim Jennings
Vice President of Operations



LAND USE APPEAL APPLICATION

1. GENERAL DATA REQUIRED *[to be completed by the appellant]*

WS221-05

September 16, 2021

Case # Being Appealed

Decision Date

4500-4699 Liberty Road S, Salem OR 97302

Address of Subject Property

Roth I.G.A. Foodliner, Incorporated, 4895 Indian School Road, NE; Salem, OR 97305

Appellants Mailing Address with zip code

503.393.7684

TimJennings@Roths.com

~~503.393.4684~~

503.508.7539

Appellant's E-mail Address

Day-time Phone / Cell Phone

Appellant's Representative or Professional to be contacted regarding matters on this application, if other than appellant listed above:

Alan M. Sorem / Saalfeld Griggs

PO Box 470, Salem, OR 97308

Name

Mailing Address with ZIP Code

asorem@sglaw.com

503-399-1070

E-Mail Address

Day-time Phone / Cell Phone

2. SIGNATURES OF ALL APPELLANTS

Signature:  Date: 10.01.21

Printed Name: Tim Jennings

Signature: _____ Date: _____

Printed Name: _____

3. REASON FOR APPEAL Attach a letter, briefly summarizing the reason for the Appeal. Describe how the proposal does not meet the applicable criteria as well as verification establishing the appellants standing to appeal the decision as provided under SRC 300.1010

FOR STAFF USE ONLY

Received By: Pamela Cole

Date: 10/1/2021

Receipt No: 21 111680 00 ZO

Appeal Deadline: 5:00 PM 10/1/2021

Case Manager: Pamela Cole



October 1, 2021

VIA ELECTRONIC MAIL: PCole@cityofsalem.net
Original to follow via hand delivery

Pamela Cole, Planner II
City of Salem, Planning Division
555 Liberty Street SE, Room 305
Salem, Oregon 97301

RE: Appeal of Class 2 Wireless Permit Case No. WS221-05
Our File No: 41419-00001

Dear Ms. Cole:

Roth I.G.A. Foodliner, Incorporated, a duly formed Oregon Business Corporation (herein "**Roth's**"), has engaged me to represent it in its appeal of the Planning Administrator decision issued on September 16, 2021 (the "**Decision**"), for the application identified as Class 2 Wireless Permit Case No. WS221-05, Application No. 21-111680-ZO (the "**Application**"). The Decision approves the replacement of a streetlight within the City of Salem's (the "**City**") right-of-way (the "**ROW**") on the western side of the 4500-4699 block of Liberty Road South, adjacent to 4555 Liberty Road South in Salem (the "**Property**") and the siting of a new wireless communications facility and an associated antenna on the replacement pole (the "**Communications Facility**").

One of Roth's grocery stores is located at 4555 Liberty Road S, and Roth's received the Notice of Filing issued by the City on August 23, 2021. In response, Roth's, through Tim Jennings, its Vice President of Operations, submitted a letter into the record on September 7, 2021 (the "**Comment**"), before the close of the public comment period. The Comment included a request for a minor relocation of the Communications Facility to prevent interference with Roth's reader board. The Comment outlined the increased interference that the Communications Facility would have on Roth's existing reader board and proposed an alternative location approximately one hundred feet (100') to the south of the proposed location, but still adjacent to the Property. The Comment was provided in response to the analysis by City

Park Place, Suite 200
250 Church Street SE
Salem, Oregon 97301

Post Office Box 470
Salem, Oregon 97308

tel 503.399.1070
fax 503.371.2927

www.sglaw.com

staff ("**Staff**") of the interference with the reader board, which was confined to a single point along the ROW. Roth's provided additional evidence regarding the full impact of the proposed location and an alternative location as a means of a compromise. As Roth's raised a specific issue in writing before the close of the public comment period, it has standing to appeal the Decision.

I. Assignments of Error

The City Has Failed to Provide Adequate Findings to Support the Decision, the Decision is not Supported by Substantial Evidence, and the City has Misapplied Applicable Laws.

1. Ownership of the Property

The applicant is identified in the Decision as Meredith Hewett on behalf of New Cingular Wireless PCS, LLC (AT&T) (the "**Applicant**"). The Applicant and the City identify the Communications Facility as within the ROW. The City should be identified as the property owner and must consent to the Application. There is no indication that any individual with the authority to consent to the Application on behalf of the City has done so. Applicant has not included into the record a lease agreement or any other instrument granting the Applicant standing to file the Application. Staff should have never deemed the Application complete. The Application must be denied unless this key threshold evidentiary issue is addressed.

2. Siting Priority

Applicant did not provide evidence in the record demonstrating collocation cannot occur on an existing utility structure or other approved structure. Staff acknowledges this is a requirement to seek second priority siting but does not adopt specific findings outlining why collocation on an existing facility is impossible other than referencing Applicant's coverage maps. Applicant did not provide evidence in the record demonstrating why collocation on an existing facility is impossible, especially as the coverage on Applicant's coverage map covers a very large area, approximately a square mile or more. Moreover, Roth's is not appealing the new tower per se; rather, Roth's merely asks it to be located slightly to the south. Moving the center of the coverage map 100 feet will have no practical effect on the Applicant's coverage. Nowhere in the record is there any evidence regarding the analysis of existing utility structures or other existing support structures. There is not sufficient evidence in the record to support Staff's finding, and therefore, the finding is not adequate. The Decision must be reversed, and the Application must be denied.

3. Applicant is Proposing a Significant Enlargement of the Utility Structure in the ROW

Staff lists the dimensions of both the existing utility structure and the proposed replacement. Applicant is proposing an increase in the dimensional standards of approximately 29%. There is no discussion regarding what would constitute an "enlargement" in the size of the utility structure in Staff's findings, or why this increase does not constitute an enlargement. *Decision p. 14*. Under the City's adjustment criteria, an adjustment of a standard over 20% requires additional justification because it has been determined by the City that such a deviation requires a higher level of scrutiny. That higher level of review is not present in the findings, demonstrating that the City has not provided an adequate finding supported by evidence in the record.

4. The City Misstates the Application of Federal Law

The City states that as a matter of federal law that the City as regulator is preempted from applying clear and objective standards to the Application. Without directly citing to the applicable regulation, it appears that the City is referencing the Middle-Class Tax Relief and Job Creation Act, which is commonly known as the "*Spectrum Act*," which is codified at 47 U.S.C. 1455. Where the Spectrum Act supersedes the City's authority in this area, Staff must clearly explain what standards are superseded and why. The Spectrum Act does not remove all review responsibilities from the City. Without such additional explanations, these findings are inadequate.

II. Request for City Council to Review the Decision

In addition to the assignments of error raised above, approval of the Application raises long term policy questions that the City Council has an interest in clarifying before allowing New Cingular Wireless PCS, LLC (AT&T) carte blanche to site wireless communications facilities without regard for neighboring property owners or consideration of reasonable requests for modification of proposals.

When reviewing this proposal, the City is acting as both a manager of improvement projects within the ROW as well as the property owner for the Application. In this role, the City must consent to the Applicant's Application. It also has an interest as the manager of the City's property to ensure that the improvements constructed within the ROW are in the best interests of the public and the surrounding property owners. As in any land use decision within the City of Salem, the comprehensive plan policies should guide the City's policy decisions. Of particular relevance is one of the key objectives of the Salem Area Comprehensive Plan (SACP), which is to "promote a desirable balance and location of land uses in the Salem community, and relate these uses to the transportation network and location of public facilities." *SACP p. 1*. Additionally, Statewide Planning Goal 1 and its corresponding goal in the SACP provide specific direction for local jurisdictions to encourage and enable citizen involvement. *SACP p. 43*. These policies remain central to the City's land use process regardless of the applicant or the property owner on a given application.

Roth's, a longtime member of the community, raised a reasonable concern during the public comment period regarding the proposed location of the Communications Facility and offered a reasonable alternative solution. While the SACP is not explicitly incorporated into the approval criteria, when the City is reviewing proposed development in the ROW, it should at a minimum consider the implications of proposed development within the ROW and the impact that development will have on surrounding property owners as well as seek solutions when the public raises reasonable concerns. The City is not merely a regulator in this case.

The City Councilors, as elected representatives of the public, have an interest in making sure that the policies adopted by the City in the SACP are applied consistently to development throughout the City. Roth's respectfully requests that the City Council call up the Application and consider the long-term implications this laissez-faire approach will have as the siting of wireless communications facilities becomes increasingly common throughout our community.

III. Conclusion

Roth's is not opposed to the addition of the Communications Facility along the frontage of the Property; it is simply requesting a minor relocation that will not have an impact on its reader board. Roth's is committed to working with the City and the Applicant to find a mutually beneficial solution to this issue and is happy to do so in a timely manner.

Please do not hesitate to contact my office regarding any questions or concerns you may have.
We look forward to working with you to find a resolution.

Sincerely,

A handwritten signature in blue ink that reads "Alan Sores". The signature is written in a cursive, flowing style.

ALAN M. SOREM
asorem@sglaw.com
Voice Message #303

AMS/MYG:jsm/mam
Enclosures
cc: Client

Pamela Cole

From: EVAN WHITE <epwhitehouse@comcast.net>
Sent: Tuesday, October 5, 2021 11:07 AM
To: Pamela Cole
Cc: Alan Alexander; Linda Miller; Sue Heecox; margaret@sglaw.com; mhewett@j5ip.com; ko3199@att.com; Henry Neugass
Subject: Wireless Permit Case No. W5221-05

Dear Ms. Cole:

By an e-mail vote, the board of the Sunnyslope Neighborhood Association supports this appeal by Roths and asks that Council call this matter up for review.

The applicant admits that they did not seek to work with either the Sunnyslope Neighborhood Association or the adjacent Faye Wright Neighborhood Association.

The applicant also apparently did not seek to work with the management of Roths, which is a very important neighborhood business and the anchor tenant of the Sunnyslope Shopping Center.

Many of our neighbors have limited incomes and would be harmed by a wireless facility that obscures timely information about weekly food sales and specials.

Please confirm that you have received this e-mail supporting the appeal. Thank you for your service to our City.

*Evan White
Land Use Co-Chair
Sunnyslope Neighborhood Association*



Wayne Wooten
*Director – Access, Construction
& Engineering
Pacific Northwest Market*

AT&T
19801 SW 72nd Avenue
Tualatin, OR 97062

T: (503) 593-4668
ww5870@att.com
www.att.com

November 3, 2021

New Cingular Wireless PCS, LLC ("AT&T")
19801 SW 72nd Avenue
Tualatin, OR 97062

RE: Letter of Authorization – Third-Party Vendors; Oregon Small Cell Program

Dear Sir or Madam,

Please accept this letter as our formal authorization for both J5 Infrastructure Partners and Wireless Policy Group to represent, prepare documents, and serve as an authorized contacts for New Cingular Wireless PCS, LLC ("AT&T" or "AT&T Mobility") in the state of Oregon, pertaining to the application, permitting and deployment of Small Cells ("Nodes") for the AT&T cRAN Program.

If you have any questions, please feel free to contact me directly at (503) 593-4668.

Sincerely,

DocuSigned by:

6034ADEF68234B3

Wayne Wooten
Director – Access, Construction & Engineering, Pacific Northwest Market
New Cingular Wireless PCS, LLC

Hi Pamela,

To follow up on your request for clarification regarding the permitting team for New Cingular Wireless PCS, LLC ("AT&T") and to supplement AT&T's Letter of Authorization, I provide the following:

In the Oregon market for small cells (AT&T's cRAN program):

- ***J5 Infrastructure Partners*** is responsible for obtaining small cell project entitlements, such as land use and right-of-way permits and site-specific pole-owner approvals for locating AT&T's small cell facilities. *J5 is the primary point of contact for pending site-specific applications.*
- ***Wireless Policy Group, LLC*** is on point for agreements/licenses (franchise and attachment) and supports J5's permitting efforts when needed.

RIGHT-OF-WAY USE AGREEMENT

This Right-of-Way Use Agreement (hereinafter "Agreement") is entered into by and between the City of Salem, an Oregon municipal corporation (hereinafter "City") and New Cingular Wireless PCS, LLC, a Delaware limited liability company qualified to do business in the State of Oregon (hereinafter "Grantee"), collectively referred to herein as the "Parties."

SECTION 1. NATURE AND TERM OF GRANT

A. Grant of Authority. The City does hereby grant to Grantee, and Grantee's successors and assigns, as approved by the City of Salem under Section 13 of this Agreement, the privilege and authority to access City Rights-of-Way and Structures located in City Rights-of-Way to install, construct, repair, replace, upgrade, maintain, and operate Facilities for Grantee's Mobile Telecommunications System in, upon, under, and over the surface of City Rights-of-Way. Access to any Structure is subject to receipt of written authorization from the owner of the subject Structure. Grantee shall use its Mobile Telecommunications System solely to provide services as defined in this Agreement. Grantee represents that it has applied for and received any and all regulatory authority that is required to provide Mobile Telecommunications Services.

1. This Agreement does **not** authorize Grantee to:

- a. Operate a cable system as defined by 47 U.S.C. §522(7);
- b. Provide video programming, as defined by 47 U.S.C. §522 (20); or
- c. Provide telecommunications service as defined in Oregon Revised Statutes ("ORS") 759.005(8).

2. Nothing in this Agreement shall preclude Grantee from entering into a contract for the use of any portion of its Mobile Telecommunications System with any Person or other entity for any services, whether specified herein or not, provided that said Person or entity is another franchisee, licensee, grantee or said Person has assumed responsibility for obtaining any required authority from the City.

B. Effective Date. The Effective Date of this Agreement shall be the first day of the full calendar month following the date on which both Parties sign this Agreement. If both Parties sign on the first day of any calendar month, that date shall be the Effective Date. (e.g., if both Parties sign on June 1, June 1 shall be the Effective Date, however if one Party signs on June 1 and the other Party signs on June 15, July 1 shall be the Effective Date.)

C. Duration. This Agreement, and all rights and obligations pertaining thereto, shall be effective for a period of five (5) years, as measured from its Effective Date, unless terminated sooner as provided herein. This Agreement shall renew automatically for two (2) additional five (5) year renewal terms unless terminated as set forth in Section 14 or Section 16 below, or unless either Party communicates in writing their decision not to renew the Agreement not less than one hundred eighty (180) days before the expiration of the five (5) year term.

- D. Agreement Not Exclusive. This Agreement is not exclusive. The City expressly reserves the right to grant rights to other Persons, as well as the right in its own name as a municipality, to use the Rights-of-Way for similar or different purposes allowed Grantee hereunder, by lease, franchise, permit, or otherwise.
- E. Charter and General Ordinances to Apply. To the extent authorized by law, this Agreement is subject to the Charter of the City of Salem and general ordinance provisions passed pursuant thereto, affecting matters of general City concern and not merely existing contractual rights of Grantee, now in effect or hereafter made effective, provided that Grantee's existing Facilities will be subject to any new ordinance provisions when Grantee is making a "substantial change," as defined in SRC 703, to such Facilities, unless deferral of such new ordinance provisions create a risk to public health, safety, property, or general welfare, or such change is mandated by law. Nothing in this Agreement shall be deemed to waive the requirements of the various codes, ordinances, resolutions, and administrative rules of the City regarding permits, fees to be paid, or the manner of construction.

SECTION 2. DEFINITIONS

For the purpose of this Agreement, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular include the plural number. The word "shall" is always mandatory and not merely directory.

1. "Attached Facilities" or "Macro Wireless Facilities" means any Facilities owned by Grantee affixed to a Structure in accordance with the terms of this Agreement except Small Cell Facilities, optical fiber, wires, coaxial cable and the mounting hardware used to attach Small Cell Facilities, optical fiber, wires, and coaxial cable. Examples of Attached Facilities include but are not limited to antennas, telephone boxes, power boxes, and other equipment boxes and cabinets on Structures, and any wireless system with a cumulative total volume of all facilities on the structure that is larger than a Small Cell Facility.
2. "City" means the City of Salem, Oregon, a municipal corporation, and all of the territory within its corporate boundaries, as such may change from time to time.
3. "City Council" means the Council of the City of Salem.
4. "Facility" or "Facilities" means capital, equipment, and property, including but not limited to optical fiber, wires (including, without limitation, electrical and telephone utility wires, lines and cables), pipes, mains, conduits, ducts, pedestals, antennas, power boxes, power meters, mounting hardware, cabinets, equipment boxes, and electronic equipment owned or operated by Grantee and used for transmitting, receiving, distributing, providing, or offering Mobile Telecommunications Services over the spectrum of radio frequencies licensed by the Federal Communications Commission.
5. "Fees" means all fees payable by Grantee to the City pursuant to this Agreement.

6. "Ground Facilities" means any Facilities owned by Grantee that are not affixed to a Structure but are located in the Rights-of-Way. Ground Facilities include but are not limited to cabinets, power boxes, and other equipment boxes that cannot be located on a Structure for any reason.
7. "Guy Pole" or "Support Pole" means a pole that is used primarily to structurally support an electrical or telephone distribution or transmission pole, but has no energized conductors or telephone wires or Facilities attached.
8. "Hazardous Substance" has the meaning given in ORS 465.200(16).
9. "Mobile Telecommunications Service(s)" means commercial mobile radio service, as defined in Section 20.3 of title 47 of the Code of Federal Regulations as in effect on October 1, 2009.
10. "Mobile Telecommunications System" means all Facilities owned or used by Grantee for the purpose of providing Mobile Telecommunications Services and located in, upon, under, and/or above Rights-of-Way, excluding ducts, conduits, and vaults leased from another City franchisee, licensee, lessee or grantee.
11. "Original Structure" means a Structure located in the Rights-of-Way as of the Effective Date of this Agreement and has no Facilities attached to it or a Structure located in the Rights-of-Way that is replaced after the Effective Date of this Agreement, provided that such Structure is in the same location as the prior Original Structure and the City has determined that the Structure has not been replaced for the purpose of allowing Grantee to attach Facilities to it.
12. "Person" means any individual, sole proprietorship, partnership, association, corporation, or other form of organization authorized to do business in the State of Oregon and includes any natural person.
13. "Replacement Structure" means a Structure that a) replaces an existing Structure or Original Structure to accommodate Facilities; and b) does not result in an increase in the total number of utility, guy, or support poles in the Rights-of-Way.
14. "Rights-of-Way" means the surface of, and the space above and below, any existing utility easement, public street, road, alley, highway, sidewalk, or landscape strip within the City, used or intended to be used by the general public for travel, to the extent the City has the right to allow Grantee to use them.
15. "Small Cell Facilities" means Facilities owned by Grantee that are shorter range, wireless systems affixed to a structure with generally smaller components than traditional Macro Wireless Facilities and are deployed where suitable in flexible configurations to provide capacity and coverage. Small Cell Facilities must meet the following criteria:
 - a. Each antenna is located inside an enclosure of no more than three cubic feet in volume or, if in the case of an antenna that has exposed elements, the antenna and

- all of its exposed elements, if enclosed, could fit within an enclosure of no more than three cubic feet.
- b. All equipment associated with the Small Cell Facilities has a cumulative volume of no more than seventeen (17) cubic feet. The following associated equipment may be located outside the primary equipment enclosure and if so located, are not included in the calculation of equipment volume: Electric meter, telecommunication demarcation box, ground-based enclosures, battery back-up power systems, grounding equipment, power transfer switch, and cut-off switch.
 - c. The cumulative total of all Facilities on the structure associated with the Small Cell Facilities, including associated equipment outside the primary equipment enclosure, does not exceed twenty-one (21) cubic feet.
16. "Structure" means any utility pole, Guy Pole or Support Pole, utility pole extension, light standard, or other similar pole in the Rights-of-Way that is suitable for the installation of Facilities.
17. "Year," "Fiscal Year," "Annual," or "Annually" means the period consisting of twelve, full calendar months, beginning on July 1 and ending on June 30, unless otherwise provided in this Agreement.

SECTION 3. COMPENSATION AND AUDITING

- A. Amount. As compensation for the benefits and privileges granted under this Agreement, and in consideration of permission to use the Rights-of-Way of the City, Grantee shall pay to the City an annual fee through the duration of this Agreement for the right to install, construct, repair, replace, maintain, and/or operate any Facilities in the Rights-of-Way. The annual fee to the City will be paid in advance for the current Fiscal Year and is the greater of either: a) the Minimum Annual Fee of ten thousand dollars (\$10,000) (the "Minimum Annual Fee"); or b) the Right-of-Way Use Fee set forth below:
- 1. Right-of-Way Use Fees.
 - a. Grantee shall pay, as a Right-of-Way Use Fee, six thousand five hundred eighty dollars (\$6,580) per year per Structure that has any Attached Facilities as of July 1.
 - b. Grantee shall pay, as a Right-of-Way Use Fee, one thousand two hundred fifty dollars (\$1,250) per year per Structure that has any Small Cell Facilities as of July 1.
 - c. Grantee shall also pay, as a Right-of-Way Use Fee, one thousand five hundred seventy-nine dollars (\$1,579) per year for each Ground Facility located above ground as of July 1.
 - d. Pursuant to SRC 35.220, Grantee shall also pay a per linear foot Right-of-Way Use Fee for Facilities installed in the Rights-of-Way that are not Attached Facilities, Small Cell Facilities, or Ground Facilities (e.g., optical fiber, wires, pipes, conduits

- and ducts). Such per linear foot fee shall increase in an amount equal to any percentage increase in the Consumer Price Index for All Urban Consumers, all items in the West region, Size Class B/C, for the prior calendar year, unadjusted for seasonal variations, as determined by the Bureau of Labor Statistics of the Department of Labor. This Right-of-Way Use Fee shall apply only where the Grantee owes no Right-of-Way Use Fees pursuant to Subsection 3.A.1.c. If such Facilities are installed for less than one year, Grantee shall pay the entire amount of this portion of the Right-of-Way Use Fee for the year without prorating or otherwise discounting such payment.
- e. Except as otherwise provided in Subsection 3.A.1.d, the Right-of-Way Use Fees in this Agreement shall increase by four percent (4%) per year. This increase is applicable beginning July 1, 2019 and every July 1 thereafter for the term of this Agreement.
 - f. Grantee shall not be liable for Right-of-Way Use Fees for any Facility, including any Attached Facility, Small Cell Facility, or Ground Facility, after such Facility is removed from the Rights-of-Way, except for those Fees already paid or prorated for the Fiscal Year. Annual fees shall not be refundable in the event Facilities are removed after the Payment Date (as defined hereinafter).
2. Installation and Application Fee.
- a. There shall be a one-time Installation and Application Fee of two thousand dollars (\$2,000) payable to the City for each Structure that Grantee uses for Attached Facilities or Small Cell Facilities, and for each Ground Facility.
 - b. If Attached Facilities, Small Cell Facilities, or Ground Facilities will be located on or adjacent to a Local or Collector Street, then there shall be a separate one-time fee of two thousand dollars (\$2,000) for each such Facility payable to the City.
3. Pre-Agreement Negotiation and Administration Fee. Grantee shall pay the City five thousand dollars (\$5,000) for its pre-Agreement costs, including the negotiation and initial administration of this Agreement.
4. This Agreement shall not be considered as written authorization to attach Facilities to City-owned structures. Grantee must receive separate written authorization from the City to attach to City-owned structures. Any such fees, lease amount, or rent negotiated or otherwise required to be paid by Grantee for attaching Facilities to City-owned structures is not included in, nor shall offset, the annual fee or one-time fees as described in this Agreement.

B. Remittance Dates. Grantee shall pay the above Fees as follows:

- 1. The annual fee (the greater of the Minimum Annual Fee or the Right-of-Way Use Fee) shall be due and payable to the City on August 1 and on August 1 annually thereafter (the "Payment Date").

For the first year that this Agreement is in effect, the prorated Minimum Annual Fee shall be due and payable to the City within thirty (30) days of the Effective Date.

2. If Grantee installs any Facilities on or after July 1, the amount of this portion of the Right-of-Way Use Fee for that year shall be prorated for each month that the Facilities were present. Grantee shall owe the Right-of-Way Use Fee for the full month regardless of the day of the month that the Facilities were installed, unless otherwise provided in this Agreement. Such prorated Right-of-Way Use Fees shall be due and payable thirty (30) days after completion of installation.

For the first year that this Agreement is in effect, if the prorated Right-of-Way Use Fee is greater than the prorated Minimum Annual Fee, the difference between the two figures shall be payable to the City thirty (30) days after completion of the most recent installation. The prorated Right-of-Way Use Fee for subsequent installations during the first year shall be due and payable to the City thirty (30) days after completion.

3. The Installation and Application Fee shall be due and payable when plans for Facilities are submitted to the City for approval. The City shall not approve any plans for Facilities before this Installation and Application Fee is received.
 4. The Pre-Agreement Negotiation and Administration Fee shall be due and payable within thirty (30) days of the Effective Date of this Agreement.
- C. Late Payments. Any payment not paid in full when due shall be subject to a delinquency penalty charge of five percent (5%) of the unpaid amount. Failure to make full payment and penalty charges within sixty (60) days of the applicable Payment Date shall constitute a material breach of this Agreement. In addition, all overdue amounts including penalty charges shall bear interest at the rate of one percent (1%) per month, calculated and compounded monthly without proration, until received by the City.

D. Acceptance of Payment and Recomputation.

1. No acceptance of any payment made by Grantee shall be construed as an accord that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim the City may have for further or additional sums payable. All amounts paid under this Section 3 shall be subject to confirmation and recomputation by the City, provided that such audit and computation is initiated within three (3) years of the date any audited and recomputed payment is due. If no such audit or financial review is initiated within the three (3) year period, then any claim that the City might have had for additional compensation shall be forever waived. Grantee agrees to reimburse the City for:
 - a. The reasonable costs of such confirmation and recomputation if the City's recomputation discloses that Grantee had paid ninety-five percent (95%) or less of the Fees owing for the period of time at issue upon receipt of an invoice from the City showing such costs were actually incurred and directly related to the audit.

- b. One-half of the reasonable costs of such confirmation and recomputation if the City's recomputation discloses that Grantee had paid more than ninety-five percent (95%) but ninety-eight percent (98%) or less of the Fees owing for the period of time at issue.
 - c. Grantee shall have no obligation to pay the costs of confirmation and recomputation if the City's recomputation discloses that Grantee had paid more than ninety-eight percent (98%) of the Fees owing for the period of time at issue.
 - d. The City's costs that may be reimbursed under this Subsection 3.D. shall not exceed fifteen thousand dollars (\$15,000) per confirmation and recomputation.
 - e. If the City determines that Grantee made any underpayment, Grantee shall pay interest on the underpaid amounts as set forth in Subsection 3.C. above. If the City determines that Grantee made an underpayment exceeding five percent (5%) of the amount due, Grantee shall pay interest and the delinquency penalty pursuant to Subsection 3.C. above.
 - f. If Grantee disputes the City's determination of underpayment, Grantee shall immediately place the disputed amount into an interest-bearing escrow account at a financial institution acceptable to the City with instructions agreed to by the City until final resolution.
2. No acceptance of payment of Fees under this Agreement shall exempt Grantee from the payment of any other license, tax, or surcharge on the business, occupation, property, or income of Grantee that may be lawfully imposed by the City or any other taxing authority now in effect or hereafter made effective, except as may otherwise be provided in the ordinance or laws imposing such other license fee, tax, or charge.
 3. The City and its officers, agents, employees, and representatives shall have authority to arrange for and conduct reviews of Grantee's relevant financial obligations payable hereunder. The City may determine the scope of review in each instance. All amounts paid by Grantee shall be subject to review by the City provided that such review is requested within three (3) years from the date payment was due. City requests for reviews shall be in writing. At no cost to the City, Grantee shall provide or cause to be provided to the City, within the Salem metropolitan region and during normal business hours, copies of all information reasonably within the scope of the review within thirty (30) days from the date of the written request. If the City requests in writing that Grantee provide, or cause to be provided, copies of any information reasonably within the scope of the review, and Grantee fails within thirty (30) days of receipt of the request to provide, or cause to be provided, such information, then the three (3) year period shall be extended by one day for each day or part thereof beyond thirty (30) days that Grantee fails to provide, or fails to cause to be provided, such requested information.
- E. Holdover. Should Grantee continue to maintain and operate Facilities in the Rights-of-Way beyond the expiration date of this Agreement as set forth in Subsection 1.C., this Agreement shall revert to a month-to-month agreement subject to all of the terms and conditions

contained herein, except that the Right-of-Way Use Fees for the holdover period shall increase to one hundred fifty percent (150%) of the amount of the Fees due as of the last Payment Date prorated for each month of the holdover period. These Fees shall be due and payable within thirty (30) days of the end of each month of the holdover period.

SECTION 4. REPORTS.

- A. On or before August 1 of each calendar year that this Agreement is in effect, Grantee shall submit a written report to the City, verified by an officer or other authorized representative of the Grantee, which includes an accurate statement in both detailed and summarized form of the Grantee's Facilities in the Rights-of-Way, including any new Facilities constructed and any existing Facilities relocated. Grantee shall submit such report in a form reasonably satisfactory to the City.
- B. Within thirty (30) days of receipt of same, Grantee shall submit to the City copies of all decisions, orders, and judgments by any federal, state, and local court, regulatory agency, or other government body, in which Grantee is a party, which substantially and materially affects Grantee's obligations under this Agreement.
- C. Grantee shall make available to the City, upon not less than fourteen (14) days' prior written notice, such information or reports pertinent to enforcing the terms of this Agreement, in such form and at such time as the City may reasonably request.

SECTION 5. GENERAL INSURANCE AND BONDING PROVISIONS

A. Insurance.

- 1. Grantee shall obtain and maintain at all times during the term of this Agreement the following insurance policies that protect the Grantee and the City, as well as the City's officers, boards, commissions, and employees:
 - a. Commercial General Liability insurance with a limit of \$2,000,000 per occurrence for bodily injury and property damage and \$3,000,000 general aggregate including premises-operations, contractual liability, personal injury and products completed operations;
 - b. Commercial Automobile Liability insurance covering all owned, non-owned, and hired vehicles with a limit of \$2,000,000 each accident for bodily injury, and property damage; and
 - c. Workers' Compensation Insurance at all times during the term of this Agreement as may be required by the workers' compensation insurance and safety laws of the State of Oregon and amendments thereto.
 - d. Excess / Umbrella Insurance may be in excess of, or in substitution for, coverages required under Sections 5.A.1.a. and b. provided they meet the minimum requirements in this agreement.

- e. Grantee will provide at least thirty (30) days' prior written notice to the City, of cancellation or non-renewal of any required coverage that is not replaced. Grantee shall maintain continuous, uninterrupted coverage in the terms and amounts required upon and after the Effective Date of this Agreement.
2. Upon the Effective Date of this Agreement and prior to commencement of any work pursuant to this Agreement, Grantee shall file with the City the required certificate(s) of insurance with additional insured endorsements, which shall state the following:
 - a. The policy number, name of insurance company, name and address of the agent or authorized representative, name and address of insured, project name, policy expiration date, and required specific coverage amounts;
 - b. That Grantee's required Commercial General Liability insurance policy is primary in respect to any other valid or collectible insurance that the City may possess, including any self-insured retentions the City may have, and any other insurance the City does possess shall be considered excess insurance only and shall not be required to contribute with this insurance; and
 - c. That Grantee's Commercial General Liability insurance policy waives any right of recovery the insurance company may have against the City.
 - d. City's additional insured status shall (i) be limited to bodily injury, property damage or personal and advertising injury caused, in whole or in part, by Grantee, its employees, agents or independent contractors; (ii) not extend to claims for punitive or exemplary damages arising out of the acts or omissions of City, its employees, agents or independent contractors or where such coverage is prohibited by law or to claims arising out of the gross negligence of City, its employees, agents or independent contractors; and, (iii) not exceed Grantee's indemnification obligation under this Agreement, if any.
3. The certificate(s) of insurance with endorsements and notices shall name the City of Salem as Certificate Holder, and be mailed to the City at the address specified in Section 17.F below.
4. Each of the required insurance policies shall be with insurers authorized or permitted to do business in the State of Oregon, with an A-:VII or better rating for financial condition and financial performance by Best's Key Rating Guide, Property/Casualty Edition or an equivalent rating entity.
5. In lieu of the insurance policies required by Section 5.A.1., Grantee may provide proof of applicable self-insurance for any or all of the foregoing coverage requirements in an amount at least equal to the coverage requirements of Section 5.A.1. in a form acceptable to the City and subject to review and approval by the City. Grantee shall provide proof of self-insurance to the City upon the Effective Date of this Agreement and prior to commencement of any work pursuant to this Agreement and thereafter upon request by the City.

6. Severability of Interest. "Severability of interest" or "separation of insureds" clauses shall be made a part of the Commercial General Liability and Commercial Automobile Liability policies.
7. In order to account for increases in State Tort Claims Act limits, no more than once during any five (5) year period, the City shall have the right to require Grantee to increase the amounts of the insurance provided in the franchise. The City shall give Grantee not less than ninety (90) days' written notice of such requirement.

B. Faithful Performance Bond.

1. Upon the Effective Date of this Agreement and prior to commencement of any work pursuant to this Agreement, Grantee shall furnish proof of the posting of a faithful performance bond running to the City, with good and sufficient surety approved by the City, in the penal sum of one hundred thousand dollars (\$100,000), conditioned that Grantee shall well and truly observe, fulfill, and perform each and every term and condition of this Agreement. Should the Grantee place Facilities in the Rights-of-Way at more than ten (10) sites pursuant to this Agreement, the penal sum of the required faithful performance bond shall be increased by two thousand dollars (\$2,000) for each additional site. Grantee shall pay all premiums charged for the bond, and shall keep the bond in full force and effect at all times throughout the term of this Agreement, including, if necessary, the time required for removal of all of Grantee's Facilities installed in the City's Rights-of-Way. The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) days' prior written notice first being given to the City Manager. The bond shall be subject to the approval as to form by the City Attorney.
2. During the term of this Agreement, Grantee shall file with the City Manager a duplicate copy of the bond along with written evidence of payment of the required premiums. However, in no event shall the City exercise its rights against the performance bond under Section 5.B. until it has made a good faith effort to seek compliance with the terms of this Agreement or applicable permit.

- C. Construction Bond. During all times when Grantee is performing any construction work in, upon, under, or over the Rights-of-Way requiring a permit, Grantee shall post a faithful performance bond or irrevocable letter of credit in the manner and form required by SRC 77.120. The bond or letter of credit shall be conditioned that Grantee shall well and truly observe, fulfill and perform each term and condition under Section 7 of this Agreement and of any permit required by SRC Chapter 77. Grantee shall pay all premiums or other costs associated with maintaining the bond or letter of credit, and shall keep the same in full force and effect at all times during the construction work. The bond or letter of credit shall provide that it may be terminated one year after completion of the project and written acceptance by the Director of Public Works. For the duration of any construction work, Grantee shall file with the City a copy of the bond or letter of credit, along with written evidence of payment of the required premiums. The bond or letter of credit shall be subject to approval as to form by the City Attorney.

SECTION 6. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS

- A. General Indemnification. Grantee hereby agrees and covenants to indemnify, defend, save and hold the City, its officers, agents, and employees, harmless from any and all claims for injury, damage, loss, liability, cost, or expense, including court and appeal costs and reasonable attorney fees or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation, or any other act done pursuant to this Agreement, whether or not such act is permitted by this Agreement, by or for Grantee, its agents or employees, or by reason of any neglect or omission of Grantee to keep its Facilities in a safe condition, but not to the extent such claim arises out of or by reason of any negligence or willful misconduct by the City, its officers, agents, or employees. The City shall provide Grantee with prompt notice of any such claim, which Grantee shall defend with counsel of its own choosing, and no settlement or compromise of any such claim will be done by the City without the prior written approval of Grantee. Grantee and its agents, contractors and others shall consult and cooperate with the City while conducting its defense of the City.
- B. Relocation Indemnification. Grantee hereby agrees to indemnify, defend, save and hold harmless the City, its officers, agents, and employees for any and all damages, claims, additional costs, or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from Grantee's failure to remove, adjust, or relocate any of its Facilities in the Rights-of-Way in a timely manner in accordance with a relocation schedule furnished to Grantee by the City Engineer under this Agreement, unless Grantee's failure arises directly from the City's negligence or willful misconduct.
- C. Indemnification – Hazardous Substances. Notwithstanding any other provision of this Agreement, Grantee agrees to forever indemnify the City, its officers, agents, and employees, from and against any claims, damages, losses, liabilities, costs, and expenses of any kind whatsoever, whether direct or indirect, or pursuant to any state or federal law, statute, regulation, or order, for the removal or remediation of any leaks, spills, contamination or residues of Hazardous Substances, associated with, arising from or due to Grantee's structures or Facilities in the Rights-of-Way unless such leaks, spills, contamination or residue arise directly from the City's negligence or willful misconduct.
- D. General Limitation. Neither Party will be liable under this Agreement for consequential, indirect, or punitive damages (including lost revenues, loss of equipment, interruption, loss of service, or loss of data) for any cause of action, whether in contract, tort, or otherwise, even if the Party was or should have been aware of the possibility of these damages, whether under theory of contract, tort (including negligence), strict liability, or otherwise.

SECTION 7. CONSTRUCTION, REPLACEMENT, REPAIRS AND MAINTENANCE

- A. Permits. Grantee shall apply for and obtain all permits necessary for the construction, installation and operation of its Facilities in the Rights-of-Way. Grantee shall pay all applicable fees due for City construction permits. All construction and maintenance of any and all Grantee's Facilities within the Rights-of-Way incident to Grantee's provision of

Mobile Telecommunications Services shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee.

- B. Installation of Equipment. Grantee's Facilities shall be installed and maintained in accordance with the laws of the State of Oregon and the ordinances and standards of the City regulating such construction, installation and maintenance.
- C. Common Users. Grantee shall allow and encourage co-location by other users of the Rights-of-Way, provided such co-location does not interfere with Grantee's Facilities or jeopardize the physical integrity of the Structure and provided the owner of the Structure consents to such co-locations.
- D. Facility and Structure Standards. This subsection establishes standards for attaching Facilities to Structures and placing Facilities in the Rights-of-Way. Grantee shall comply with the requirements of the City's Wireless Communications Facilities Code, SRC Chapter 703.
 - 1. Street Trees. If a Structure on a Local or Collector Street is proposed by Grantee for replacement, Grantee shall submit the sum of two thousand dollars (\$2,000) to the City to fund street tree planting. The City's Public Works Department shall determine if a tree could be planted in the parking strip such that a mature tree canopy could develop around the Replacement Structure to reduce the visual impact of the Replacement Structure to the abutting property. If a tree cannot be planted with this result, then the Public Works Department shall deposit the funds into the Tree Canopy Preservation Fund for its use.
 - 2. Unless otherwise agreed to in writing by the City, Grantee shall locate all Facilities in accordance with applicable City codes and ordinances. The City shall, upon reasonable request of the Grantee and prior to Grantee's submission of any permits or applications for installing or placing new Facilities, participate in preliminary meetings and site visits and provide Grantee with a written determination of the required location of the Facilities. The City may not reject any subsequent permit or other application based solely on the location of Facilities included in the written determination provided pursuant to this Subsection if Grantee's permit or application places the Facilities in accordance with the City's written determination. Where an alternative location for Facilities placement, other than an underground location, is permitted, Grantee shall install such Facilities as directed by the City, including but not limited to any direction involving location, screening, and color of the Facilities, provided that the City and Grantee shall mutually agree on the alternate location of Facilities. Where an alternative location for Facilities placement, other than an underground location, is identified on a Minor Arterial, Local, or Collector Street, the height plus width plus depth of any cabinets or equipment boxes in the Rights-of-Way shall be no more than one hundred twenty (120) linear inches combined.
 - 3. Grantee may make excavations in the Rights-of-Way for any Facility needed for the maintenance or extension of its Mobile Telecommunications System, subject to obtaining the appropriate permits from the City. Prior to commencing such excavation work, Grantee shall apply for, and obtain, all appropriate permits from the City and give

appropriate notices to any franchisees, licensees, or grantees of the City, or departments of the City, or other units of government owning or maintaining facilities that may be affected by the proposed excavation.

4. In the event that emergency repairs are necessary for Grantee's Facilities in the Rights-of-Way, Grantee shall immediately notify the City of the need for such repairs. Grantee may immediately initiate such emergency repairs and shall apply for all appropriate permits the next business day following discovery of the emergency. Grantee shall comply with all Charter and ordinance provisions relating to such excavations or construction, including the payment of permit or license fees.
5. Locates. Grantee shall comply with the requirements of the Oregon Utility Notification Law, codified at ORS 757.542 to 757.562 and 757.993 (2013), and the rules and regulations promulgated thereunder.

E. Relocation.

1. The City shall have the right to require Grantee to change the location of its Facilities in the Rights-of-Way when the public convenience requires such change, and the expense thereof shall be paid solely by Grantee. The City shall provide Grantee not less than ninety (90) days' written notice prior to any such change of location. Should Grantee fail to remove or relocate any such Facilities by the date established by the City, the City may remove or relocate such Facilities, and the expense thereof shall be paid by Grantee, including all expenses incurred by the City due to Grantee's delay or failure. If the City requires Grantee to relocate its Facilities located within the City's Rights-of-Way, the City will make a reasonable effort to provide Grantee with an alternate location within the City's Rights-of-Way for the relocated Facilities.
2. The provisions of this Section 7.E. shall in no manner require or preclude Grantee from making any arrangements it may deem appropriate when responding to a request for relocation of its Facilities by any person or entity, other than the City, where the Facilities to be constructed by said person or entity are not or will not become City owned, operated or maintained Facilities.

F. Record of Installations.

1. Within thirty (30) calendar days of the Effective Date of this Agreement, and on August 1 annually thereafter, Grantee shall file a Radio Frequency Transmission Facility Registration Form, made available by the City, for each existing and new Facility that is installed on Structures in the Rights-of-Way. For existing Facilities, the form shall be filed within thirty (30) calendar days of the Effective Date of this Agreement. For new Facilities, the form shall be filed within thirty (30) calendar days of the date the Facility is installed or placed in the Rights-of-Way.
2. Within thirty (30) days following Grantee's acquisition of any Facilities in the Rights-of-Way, or upon any addition or annexation to the City of any area in which Grantee retains any such Facilities in the Rights-of-Way, Grantee shall submit to the City a written

statement describing all Facilities involved, whether authorized by agreement, license, permit, or any other form of prior right, and specifying the location of all such Facilities. Facilities acquired by Grantee shall immediately be subject to the terms of this Agreement, provided that Grantee shall have a reasonable period of time to bring such acquired Facilities into compliance with this Agreement. For purposes of calculating any compensation owed pursuant to Section 3 of this Agreement, any such acquired Facilities shall be treated as new installations and are subject to the Right-of-Way Use Fee and Installation and Application Fee from the date the acquisition or annexation becomes effective.

3. Radio frequency emission levels. Grantee's Facilities shall be operated and maintained so that the Facilities are in compliance with all radio frequency emission standards specified by the Federal Communications Commission.

G. Maps. Grantee shall maintain maps and data pertaining to its Facilities located in the City Rights-of-Way on file or made available at an office in the State of Oregon. The City shall be allowed to inspect all such maps and data pertaining to its Facilities located in the City Rights-of-Way at any time during regular business hours upon not less than five (5) business days' prior notice. Upon written request of the City and without charge, Grantee shall provide a map or maps consistent with this Section 7 to the City showing the locations as-built of its installed Mobile Telecommunications System in the City Rights-of-Way. Such as-built maps shall be provided to the City within ten (10) calendar days of receipt of City's written request. Such as-built maps shall be in a form acceptable to the City Engineer with adequate vertical and horizontal control defining the specific location of Grantee's Facilities. Except as required by law, the City shall not disclose or transmit any such as-built maps or related data to third parties unless permitted by Grantee, subject to Section 17.H.

H. Restoration After Construction. Grantee shall, after construction, installation, maintenance or repair of Facilities, leave the Rights-of-Way in as good or better condition in all respects as they were before the commencement of such construction, installation, maintenance, or repairs, excepting normal wear and tear. Grantee agrees to promptly complete restoration work and to promptly repair any damage caused by such work at its sole cost and expense. When any opening is made by Grantee in a hard surface pavement in any Rights-of-Way, Grantee shall promptly refill the opening and restore the surface to a condition satisfactory to the City Engineer in accordance with standards developed and adopted by the City Engineer. All excavations made by Grantee in the Rights-of-Way shall be properly safeguarded for the prevention of accidents. All of Grantee's work under this Section 7 shall be done in strict compliance with all applicable rules, regulations and ordinances of the City.

I. Tree Pruning. After obtaining a written permit from the City, Grantee may prune or cause to be pruned, using proper arboricultural practices in accordance with such permit, any tree in or overhanging the Rights-of-Way which substantially interferes with Grantee's Facilities. Except in emergencies, Grantee may not prune trees at a point below thirty (30) feet above sidewalk grade until ten (10) days after written notice has been given to the owner or occupant of the premises abutting the Rights-of-Way in or over which the tree is growing. For the purposes of this Subsection 7.I., an emergency exists when it is necessary to prune a

tree in order to protect the public from imminent danger. The owner or occupant of the premises abutting the Right-of-Way shall have seven (7) days from receipt of Grantee's written notice to prune such tree at his or her own expense. If the owner or occupant fails to do so, Grantee may prune such tree at its own expense.

- J. Compliance with City Codes. Grantee agrees that it is subject to and must obtain all approvals required by all applicable City codes, ordinances, resolutions, and administrative rules, including the Unified Development Code, now in effect or hereafter made effective, provided that Grantee's existing Facilities will be subject to any new ordinance provisions when Grantee is making a "substantial change," as defined in SRC 703, to such Facilities, unless deferral of such new ordinance provisions create a risk to public health, safety, property, or general welfare, or such change is mandated by law. This Agreement in no way creates or vests property rights in Grantee; and Grantee hereby waives any claims for damages based on Grantee's use of the City's Right-of-Way related to limitations imposed on, or affirmative actions required of, Grantee through application of the City's codes, ordinances, resolutions, and administrative rules affecting.

SECTION 8. RESERVATION OF CITY STREET RIGHTS

Nothing in this Agreement shall be construed to prevent the City from constructing sewers, widening streets, constructing sidewalks, grading, paving, repairing, and/or altering any Rights-of-Way or laying down, repairing or removing water mains or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as to not obstruct, injure, or prevent the unrestricted use and operation of Grantee's Facilities in the Rights-of-Way. However, if any of Grantee's Facilities interfere with the construction or repair of any Rights-of-Way or public improvement, including construction, repair, or removal of a sewer or water main, Grantee's Facilities shall be removed or replaced in the manner the City shall direct in accordance with Subsection 7.E. In the event of such relocation, the City will cooperate with Grantee to identify alternate locations within the Rights-of-Way. Any and all such removal or replacement shall be at the expense of Grantee; provided, however, that if the City pays for or reimburses the relocation costs of another telecommunications provider, under substantially similar circumstances, it may pay for or reimburse a proportionate share of Grantee's relocations costs to the extent permitted or allowed by the funding source and applicable laws. Should Grantee fail to remove, adjust, or relocate its Facilities by the date established by the City Engineer's written notice to Grantee, the City may cause and/or effect such removal, adjustment, or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by the City due to Grantee's delay.

SECTION 9. STREET VACATION

If any Rights-of-Way or portion thereof used by Grantee is vacated by the City during the term of this Agreement, unless the City Council specifically reserves to Grantee the right to continue its installation of Facilities in the vacated Rights-of-Way, Grantee shall, without expense to the City, forthwith remove its Facilities from such Rights-of-Way and restore, repair or reconstruct the Rights-of-Way where such removal has occurred, and place the Rights-of-Way in such condition as may be required by the City Council which shall be as good or better than the condition of such Rights-of-Way immediately prior to removal. In the event of any failure,

neglect or refusal of Grantee, after thirty (30) days' written notice by the City, to restore, repair, improve or maintain such Rights-of-Way, the City may do such work or cause it to be done, and the direct cost thereof, as found and declared by the City Council, shall be entered in the Docket of City Liens against any property of Grantee which City may choose, and such lien shall be enforced in like manner and with like effect as other liens entered in such docket.

SECTION 10. MAINTENANCE OF FACILITIES

Grantee shall construct, install, operate and maintain all Facilities necessary to control and carry on Grantee's Mobile Telecommunications Services so as to prevent injury to the City's property or property belonging to any Person within the City. Grantee, solely at its own expense, shall maintain, repair, renew, change, and improve said Facilities from time to time as may be necessary to accomplish this purpose. Grantee shall not construct its Mobile Telecommunications System in a manner that requires any customer, except the City, or any entity permitted by the City, to install in, upon, under, or over the City's Rights-of-Way any cables, ducts, conduits, or other facilities.

SECTION 11. DISCONTINUED USE OF FACILITIES

- A. Grantee may at any time for any reason discontinue use of or remove any or all of its Facilities from the City's Rights-of-Way. Whenever Grantee intends to discontinue use of its Facilities within all or part of a particular portion of the Rights-of-Way and does not intend to use said Facilities again for six (6) months or more, Grantee shall submit to the City for approval a completed application describing the Facility and the date on which Grantee intends to discontinue using the Facility. Grantee may remove the Facility within one hundred twenty (120) days of the date on which it discontinues use or request that the City permit it to remain in place. If Grantee is permitted to abandon its Facilities in place, upon consent of the City, the ownership of the Facilities to be abandoned shall transfer to the City, and Grantee shall have no further obligation or liability therefor. Notwithstanding Grantee's request that any such Facility remain in place, the City may require Grantee to remove the Facility from the Rights-of-Way or modify the Facility in order to protect the public health and safety or otherwise serve the public interest. The City may require Grantee to perform a combination of modification and removal of the Facility; provided, however, that Grantee may elect to remove its Facility entirely in the event the City requests any modification to it. Grantee shall complete such removal or modification in accordance with a reasonable schedule set by the City's Public Works Director and at Grantee's sole expense. Any such removal or modification shall be directed by, and to the satisfaction of, the Public Works Director. Until such time as Grantee removes or modifies the Facility as directed by the Public Works Director, or until the rights to and responsibility for the Facility are accepted by another person having authority to construct and maintain such Facility, Grantee shall be responsible for all necessary repairs and relocations of the Facility, as well as maintenance and restoration of the Rights-of-Way, in the same manner and degree as if the Facility were in active use, and Grantee shall retain all liability for such Facility.
- B. If Grantee discontinues use of Facilities on a Replacement Structure, and that Replacement Structure is taller than the Original Structure, Grantee shall return the Replacement Structure to the height of the Original Structure at Grantee's sole expense. Grantee shall have not less

than ninety (90) days nor more than one hundred eighty (180) days to return the Replacement Structure to the height of the Original Structure. In the alternative, after proper notice pursuant to this Agreement, Grantee may request, and the City may grant in its sole discretion, a waiver from this requirement.

SECTION 12. HAZARDOUS SUBSTANCES.

- A. Compliance with Applicable Law. Grantee shall comply with all applicable local, state, and federal laws, statutes, regulations, and orders concerning Hazardous Substances relating to its Mobile Telecommunications System or Facilities in the Rights-of-Way.
- B. Maintenance, Inspection, and Remediation. Grantee shall maintain and inspect its Mobile Telecommunications System and Facilities located in the Rights-of-Way. If Grantee discovers any Hazardous Substances in the course of Grantee's work on its Mobile Telecommunications System or Facilities in the Rights-of-Way, Grantee shall provide a written report of the discovery to the City within two (2) business days of the discovery. Grantee shall immediately proceed to remove and remediate, in accordance with all applicable local, state, and federal laws, any Hazardous Substances in the Rights-of-Way directly attributable to or caused by Grantee's Mobile Telecommunications System or Facilities or the acts or omissions of Grantee. Nothing in this Agreement transfers or is intended to transfer any liability to the City for removal or remediation of any such Hazardous Substances found in the Rights-of-Way.
- C. Construction, Modification, or Removal of Facilities. In the course of construction, installation, modification or removal of any of its Facilities in the Rights-of-Way, to the extent necessary to safely proceed with such work, Grantee shall remove and remediate Hazardous Substances encountered in the course of its activities in accordance with, and only to the extent required by, all applicable local, state, and federal laws, statutes, regulations, and orders. Grantee may use reasonable business efforts to recover its costs for such removal and disposal from all legally responsible third parties.

SECTION 13. CITY'S WRITTEN CONSENT REQUIRED FOR ASSIGNMENT, TRANSFER, MERGER, LEASE OR MORTGAGE

- A. Consent. Except as otherwise permitted by Section 13.B. and except to entities that control, are controlled by, or are under common control with Grantee, neither this Agreement nor any of Grantee's Facilities located in the Rights-of-Way by authority of this Agreement shall be sold, leased, mortgaged, assigned, merged, or otherwise transferred without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned, or delayed. Grantee shall give written notice to the City of any transfers to entities under common control within ten (10) calendar days of such transfers. The City's granting of consent in one instance shall not render unnecessary any subsequent consent in any other instance. Nothing contained in this Section 13.A. shall be deemed to prohibit the mortgage, pledge, or assignment of tangible assets of Grantee's Mobile Telecommunications System for the purpose of financing the acquisition of equipment for or the construction and operation of Grantee's Mobile Telecommunications System, within or outside the City, without the City's

consent, but any such mortgage, pledge, or assignment shall be subject to the City's other rights contained in this Agreement.

1. In determining whether the City will consent to any sale, lease, mortgage, assignment, merger, or transfer, the City may inquire into the technical, legal, and financial qualifications of the prospective party. Grantee shall assist the City in any such inquiry. The City may condition any sale, lease, mortgage, assignment, merger, or transfer upon such conditions related to the technical, legal, and financial qualifications of the prospective party to perform according to the terms of this Agreement, as it deems appropriate. The City shall not unreasonably withhold, condition, or delay, its consent to any such sale, lease, mortgage, assignment, transfer, or merger.
2. No sale, lease, mortgage, assignment, transfer, or merger for which the City's consent is required may occur until the successor, assignee, or lessee has complied with the requirements of Section 5, including but not limited to, providing certificates of insurance, unless the City Council waives such compliance by ordinance. Within ten (10) calendar days after execution and delivery of any instrument so consented to by the City, Grantee shall file with the City Manager an executed counterpart or certified copy thereof.

B. Transfers Without Consent in Ordinary Course of Business. Grantee shall not lease any of its Facilities without the City's prior written consent, which consent shall not be unreasonably withheld, conditioned, or delayed. However, and notwithstanding Section 13.A., hereof, Grantee may lease any portion of its Facilities in the ordinary course of its business without otherwise obtaining the City's consent, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating, or removing such Facilities. A lessee of Grantee's Facilities shall not obtain any rights under this Agreement. For the purposes of this Section, a capital lease shall be treated as a lease under this Section until the conclusion of the lease, when transfer of ownership occurs. At that point in time, the capital lease shall be treated as a sale under Section 13.B.1.

1. Notwithstanding Section 13.A.1, Grantee may sell portions of its Facilities in the ordinary course of its business, without otherwise obtaining the City's consent, so long as Grantee complies with the following conditions:
 - a. The sale is to the holder of a current, existing, valid agreement, franchise, permit, or lease with the City authorizing the purchaser to operate Facilities for offering Mobile Telecommunications Services in the City and in its Rights-of-Way.
 - b. Within fourteen (14) calendar days of the sale being executed and becoming final, Grantee shall provide written notice to the City, describing the Facilities sold by Grantee, identifying the purchaser of the Facilities, the location of the Facilities (in accordance with the requirements of Subsection 7.F.1.), and providing an executed counterpart or certified copy of the sales documents.
 - c. Grantee remains solely responsible for locating, servicing, maintaining, repairing, relocating, or removing its remaining Facilities.

- d. Within fourteen (14) calendar days of the sale being executed and becoming final, the purchaser of such Facilities shall file written notice to the City that it has assumed sole responsibility for locating, servicing, maintaining, repairing, relocating, or removing the purchased Facilities under the purchaser's current, existing, valid agreement, franchise, permit, or lease with the City and has agreed to timely pay the amounts due pursuant to Section 3 of this Agreement. The purchaser shall not obtain any of Grantee's rights under this Agreement.

SECTION 14. FORFEITURE AND REMEDIES

A. Forfeiture. In addition to any other rights set out elsewhere in this Agreement, the City reserves the right to declare a forfeiture of this Agreement and all of Grantee's rights arising hereunder, in the event that:

1. Grantee violates any material provision of this Agreement.
 - a. For purposes of this Section, the following are material provisions of this Agreement, allowing the City, without limitation, to exercise its rights under this Section or as set forth elsewhere in this Agreement:
 - (1) Grantee's failure to pay to the City any of the Fees required under this Agreement;
 - (2) The invalidation or any suspension of Grantee's payments of Fees to the City for use of the Rights-of-Way under this Agreement;
 - (3) Any failure by Grantee to submit timely reports regarding the calculation of its Fees to be paid to the City under Section 3 of this Agreement;
 - (4) Any failure by Grantee to maintain the liability insurance required under this Agreement;
 - (5) Any failure by Grantee to maintain the performance bond required under this Agreement; or
 - (6) Any failure by Grantee to otherwise fully comply with the requirements of Sections 3 through and including Section 17 of this Agreement.
2. Grantee is found by a court of competent jurisdiction to have perpetrated or practiced any fraud or deceit upon the City.
3. There is a final determination that Grantee has failed, refused, neglected or is otherwise unable to obtain and/or maintain any permit required by any federal or state regulatory body regarding Grantee's operation of its Mobile Telecommunications System within the City.

- B. Additional Remedies. In addition to any rights set out elsewhere in this Agreement, as well as its rights under the Salem Revised Code, the City reserves the right at its sole option to apply any of the following, alone or in combination:
1. Penalty. Impose a financial penalty of one thousand dollars (\$1,000) per violation (a separate and distinct offense shall be deemed committed each day on which a violation occurs or continues);
 2. Suspension. Suspend Grantee's rights under this Agreement, until Grantee corrects or otherwise remedies the violation;
 3. Revocation. The City or Grantee may revoke this Agreement in the event that any provision of the Agreement becomes invalid or unenforceable, and the City or Grantee expressly finds that such provision constituted a consideration material to the Agreement. The City or Grantee shall exercise its revocation rights under this Section 14.B.2. by providing not less than thirty (30) days' written notice prior to the effective date of the revocation and an opportunity to renegotiate acceptable provisions in accordance with Section 15.
- C. Determination of Remedy. In determining which remedy or remedies are appropriate, the City shall consider the nature of the violation, the person or persons burdened by the violation, the nature of the remedy required in order to prevent further similar violations, and any other matters the City deems appropriate in its sole discretion.
- D. Notice and Opportunity to Cure. The City shall give Grantee not less than thirty (30) days' prior written notice of its intent to exercise its rights under Section 14, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day notice period, or if Grantee initiates efforts satisfactory to the City to remedy the stated reason and those efforts continue in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated reason within the thirty (30) day notice period, or if Grantee does not undertake and/or maintain efforts satisfactory to the City to remedy the stated reason, then the City may impose any or all of the remedies available under this Section 14.

SECTION 15. RENEGOTIATION

In the event that any provision of this Agreement becomes invalid or unenforceable and the City or Grantee expressly finds that such provision constituted a consideration material to entering into this Agreement, the City and Grantee may mutually agree to renegotiate the terms of this Agreement. The Party seeking renegotiation shall serve on the other Party written notice of an offer to renegotiate. In the event the other Party accepts the offer to renegotiate, the Parties shall have ninety (90) days to conduct and complete the renegotiation. If both Parties agree to renegotiations under this Section, the Parties shall proceed in good faith and in a manner that is reasonable under the circumstances.

SECTION 16. TERMINATION AND REMOVAL OF FACILITIES

- A. If this Agreement is terminated or expires on its own terms and is not replaced by a new Agreement or similar authorization, Grantee shall remove its Mobile Telecommunications System and all Facilities from the City Rights-of-Way within one hundred twenty (120) days of such expiration or termination unless the City has, in writing, authorized abandonment in place. In determining whether to permit abandonment in place, the City shall consider Grantee's comments. Following consideration of any such comments, the City Manager may issue a written order permitting abandonment in place. If Grantee is permitted to abandon its Mobile Telecommunications System or any Facilities in place, the ownership of such Facilities permitted to be abandoned in place in the Rights-of-Way shall transfer to the City, and Grantee shall have no further obligation or liability therefor. The City may require Grantee to perform a combination of modification (for Facilities permitted to be abandoned in place) and removal of the Facilities; provided, however, that Grantee may elect to remove its Mobile Telecommunications System or Facilities entirely in the event the City requests any modification. Grantee shall complete such removal or modification in accordance with a reasonable schedule set by the City and at Grantee's sole expense. Any such removal or modification shall be directed by and to the satisfaction of the City's Public Works Director. Until such time as Grantee removes or modifies its Mobile Telecommunications System or Facilities as directed by the Public Works Director, or until the rights to and responsibility for the Mobile Telecommunications System or Facilities are accepted by another person having authority to construct and maintain the Mobile Telecommunications System or Facilities, Grantee shall be responsible for all necessary repairs and relocations of all Facilities, as well as maintenance and restoration of the Rights-of-Way, in the same manner and degree as if the Mobile Telecommunications System or Facilities were in active use, and Grantee shall retain all liability for the Mobile Telecommunications System and all Facilities.
- B. If this Agreement is terminated or expires on its own terms and is not replaced by a new Agreement or similar authorization, and if the City does not permit abandonment in place, Grantee shall return all Replacement Structures that are taller than the Original Structures to the height of the Original Structure at Grantee's sole expense. Grantee shall have not less than ninety (90) days nor more than one hundred and eighty (180) days to return the Replacement Structure to the height of the Original Structure. In the alternative, after proper notice pursuant to this Agreement, Grantee may request, and the City may grant in its sole discretion, a waiver from this requirement.

SECTION 17. MISCELLANEOUS

A. Compliance with Laws.

1. Both Grantee and the City shall comply with all applicable federal and state laws.
2. Subject to Subsection 7.J, Grantee shall comply with all applicable City ordinances, resolutions, rules, and regulations adopted or established pursuant to the City's lawful authority.

- B. Severability. If any Section, subsection, provision or clause of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state laws or regulations, the remainder of this Agreement shall not be affected.
- C. Regulation and Nonenforcement by the City. The City shall be vested with the power and authority to reasonably regulate the exercise of the privileges permitted by this Agreement in the public interest. Grantee shall not be relieved of its obligations to comply with any of the provisions of this Agreement by reason of any failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Agreement by reason of such failure or neglect.
- D. Force Majeure.
1. For purposes of this Section 17.D., the term Force Majeure shall mean acts of God, landslides, earthquakes, lightning, fires, hurricanes, volcanic activity, storms, floods, washouts, droughts, civil disturbances, acts of terrorism or of the public enemy, strikes, explosions, lockouts or other industrial disturbances, insurrections, public riots, or other similar events which are not reasonably within the control of the Parties hereto.
 2. If Grantee is wholly or partially unable to carry out its obligations under this Agreement as a result of Force Majeure, Grantee shall give the City prompt notice of such Force Majeure, describing the same in reasonable detail, and Grantee's obligations under this Agreement, other than for the payment of monies due, shall not be deemed in violation or default for the duration of the Force Majeure. Grantee agrees to use its best efforts to remedy as soon as possible, under the circumstances, Grantee's inability, by reason of Force Majeure, to carry out its responsibility and duties under this Agreement.
- E. Venue and Choice of Law.
1. Exclusive venue for litigation of any action arising under this Agreement shall be in the Circuit Court of the State of Oregon for Marion County unless exclusive jurisdiction is in federal court, in which case exclusive venue shall be in the United States District Court for the District of Oregon. Each Party hereto expressly waives any and all rights to maintain an action under this Agreement in any other venue, and expressly consents that, upon motion of the other Party, any case may be dismissed or its venue transferred, as appropriate, so as to effectuate this choice of venue.
 2. This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon, even if Oregon's choice of law rules would otherwise require application of the law of a different state.
- F. Notice. Whenever notice is required or permitted to be given under this Agreement, such notice shall be given in writing to the other Party by: a) personal delivery; b) sending via a reputable commercial overnight courier; c) mailing using registered or certified United States mail, return receipt requested, postage prepaid; or d) electronically confirmed facsimile transmission to the addresses or facsimile numbers set forth below:

If to the City: City Manager's Office
City of Salem, Oregon
555 Liberty St. SE, Room 220
Salem, Oregon 97301
FAX (503) 588-6354

With a copy to: City Attorney's Office
City of Salem, Oregon
555 Liberty St. SE, Room 205
Salem, Oregon 97301
FAX (503) 361-2202

If to Grantee: New Cingular Wireless PCS, LLC
Attn: Network Real Estate Administration
575 Morosgo Drive NE
Atlanta, Georgia 30324

With a copy to: New Cingular Wireless PCS, LLC
208 S. Akard Street
Dallas, TX 75202-4206

Any such notice or communication delivered by personal delivery shall be deemed to be given upon actual receipt. Any notice sent by overnight courier shall be deemed to be given five (5) calendar days after dispatch. Any notice sent by United States mail shall be deemed to be given five (5) calendar days after mailing. Any notice sent by facsimile transmission shall be deemed to be given when receipt of the transmission is generated by the transmitting machine. (or the first business day thereafter if faxed on a Saturday, Sunday or City holiday). To be effective against either Party, such facsimile transmission shall be confirmed by telephone notice to the other Party.

- G. Public Records. Documents and records submitted by Grantee to the City may be subject to public inspection under the Oregon Public Records Law, ORS 192.410 through 192.505. Grantee acknowledges it is responsible for becoming familiar with the provisions of the Oregon Public Records Law.
- H. Confidential Records. Grantee may identify information, submitted to the City as confidential, such as trade secrets, financial records, customer information, or technical information (as defined in ORS 192.501 or 192.502). Grantee shall prominently mark any information for which it claims confidentiality with the word "Confidential" on each page of such information prior to submitting such information to the City. Grantee shall also provide a written explanation as to why such information is confidential under state or federal law. The City shall treat any information so marked as confidential until the City receives any request for disclosure of such information. City shall make reasonable efforts to provide the Grantee notice of a request for information marked as confidential, including a copy of the

request, within ten (10) business days of receiving any such request. Grantee shall have five (5) business days within which to provide a written response to the City before the City will disclose any of the requested confidential information. The City shall retain the sole discretion to determine whether to release the requested confidential information, in accordance with applicable laws.

I. Amendments.

1. This Agreement may be amended only by written instrument executed with the same formalities as this Agreement.
2. The City has negotiated this Agreement in good faith, in reliance upon the information provided by Grantee regarding the scope of its authority to offer Mobile Telecommunications Services as defined in Section 2. In the event that Grantee actually receives authority to offer services outside the scope of this Agreement, or otherwise begins offering services outside the scope of those otherwise identified in this Agreement, Grantee shall immediately notify the City. Within ninety (90) days of receiving such notice, the City may either enter into negotiations with Grantee to revise or amend this Agreement to reflect such changed circumstances, or may proceed with early termination of this Agreement. The Parties will negotiate in good faith to revise the Agreement to authorize the expanded scope of services.

J. Interference. Grantee shall, at its expense, comply with all Federal Communications Commission Radio Frequency requirements in connection with the use, operation, maintenance, construction, and/or installation of its Facilities. If at any time during Grantee's occupancy of the Rights-of-Way, it is determined by the City that Grantee's transmission facilities are negatively impacting the City's communication facilities, Grantee agrees to cooperate with the City in addressing the negative impact. Grantee agrees to temporarily shut off power and transmission to and from the transmission facility that is causing a problem until the problem is resolved, provided that the City agrees to cooperate with and assist Grantee in installing a temporary replacement facility so as to avoid disruption of Grantee's service.

K. Unless otherwise specified in this Agreement, in the event of termination of this Agreement under Section 1.C. or forfeiture or revocation pursuant to Section 14, all indemnity rights, audit rights and confidentiality obligations shall survive for a period of three (3) additional years following the date of termination or forfeiture.

L. Grantee shall be responsible for obtaining all other necessary approvals, authorizations, and agreements to attach Facilities to Structures owned or controlled by any third party. Grantee acknowledges and agrees that the City is making no representation, warranty, or covenant whether any of the foregoing approvals, authorizations, or agreements are required or may be obtained by Grantee from any other Person.

M. Grantee acknowledges that it, and not the City, shall be responsible for compliance with all marking and lighting requirements of the Federal Aviation Administration (the FAA) or the Federal Communications Commission (the FCC). Grantee shall indemnify and hold the City

harmless from any fines or other liabilities caused by Grantee's failure to comply with such requirements. Should Grantee or the City be cited by either the FAA or the FCC because Grantee's Facilities or System are not in compliance and should Grantee fail to cure the conditions of noncompliance within the timeframe allowed by the citing agency, the City may either terminate this Agreement immediately on notice to Grantee or proceed to cure the conditions of noncompliance at Grantee's sole expense.

- N. Nondiscrimination. Grantee agrees that no person shall, on the grounds of race, religion, color, creed, national origin, sex, marital status, familial status, sexual orientation, gender identity, source of income, age or physical or mental disability suffer discrimination in the performance of this Agreement when employed by Grantee. Grantee agrees to comply with all applicable requirements of state and federal civil rights and rehabilitation statutes, rules and regulations. Further Grantee agrees not to discriminate against minority-owned, women-owned, or emerging small businesses in awarding subcontracts as required by ORS 279A.110.
- O. Captions. Throughout this Agreement, captions to sections are intended solely to facilitate reading and to reference the sections and provisions of this Agreement. The captions shall not affect the meaning and interpretation of this Agreement.
- P. Complete Agreement. This Agreement, including all attachments and laws, rules and regulations incorporated herein, constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof.

SECTION 18. OTHER AUTHORITY SUPERSEDED:

Upon the Effective Date of this Agreement, any and all authority to access the City Rights-of-Way and Structures located in the City Rights-of Way previously granted to Grantee by the City shall be superseded by this Agreement.

IN WITNESS WHEREOF the Parties have caused this Agreement to be signed in their respective names by their duly authorized representatives as of the dates set forth below.

CITY OF SALEM, OREGON

New Cingular Wireless PCS, LLC, a
Delaware limited liability company

By: 

Steven D. Powers, City Manager

By: AT&T Mobility Corporation
Its: Manager

By: 

Wayne Wooten, Director

Dated: 06/04/2018

Dated: 5.8.18

SALEM_049

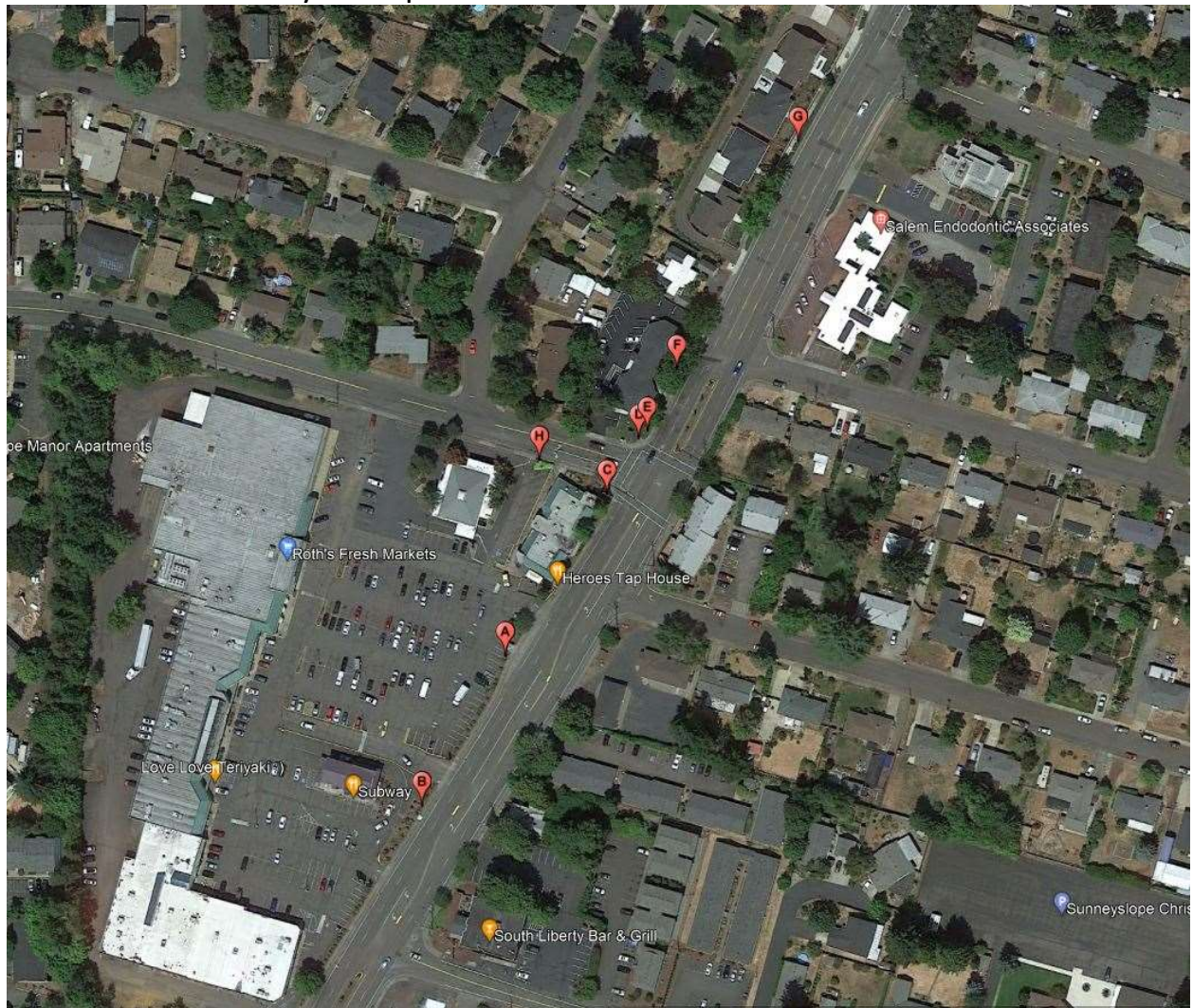
Alternative Site Analysis

ROW adjacent to 4555 Liberty St S

Proposed Small Cell

- AT&T is committed to providing and improving wireless telecommunications services and faster data rates throughout the City of Salem
- Rather than construct traditional macro facilities, AT&T is choosing to deploy very small facilities, called “small cells”, that can be installed on utility infrastructure in the public right-of-way.
- A small cell is low-powered cell site, which, when grouped with other small cells, can provide coverage in areas where traditional macro wireless facilities are discouraged/
- Small cells are effective tools to provide and improve critical wireless services with a minimal impact. By placing small cells in areas where AT&T’s existing facilities are constrained and where AT&T experiences high network traffic, AT&T can address existing and forecasted demands.
- Node SALEM_049 will improve signal quality and capacity within AT&T’s wireless network.

Alternative Site Analysis map



Pole A – Proposed location

City of Salem Streetlight - C8309A-1253

Chosen for its location to serve the businesses in the Sunnyslope Shopping Center and adjacent residents and businesses within an 800's radius, extending south to almost Skyline Rd S, north to Idylwood Dr SE.



·AT&T proposes to place Small Cell SALEM_049 on a city owned metal streetlight pole in the public ROW near 4555 Liberty St. S in Salem, OR. The pole is a preferred location located in the public right-of-way near the commercial district.

·AT&T has determined this location is viable

·The proposed facility is design to minimize visual impact by concealing the antenna.

·The proposed facility is a Second Priority site, the highest available preferred site in the area per City of Salem Code Sec. 703.010 (c)(2).



Existing light pole currently serves to illuminate Bus Stop ID 768 for Cherriots Line 18



Existing light pole currently serves to illuminate Bus Stop ID 768 for Cherriots Line 18



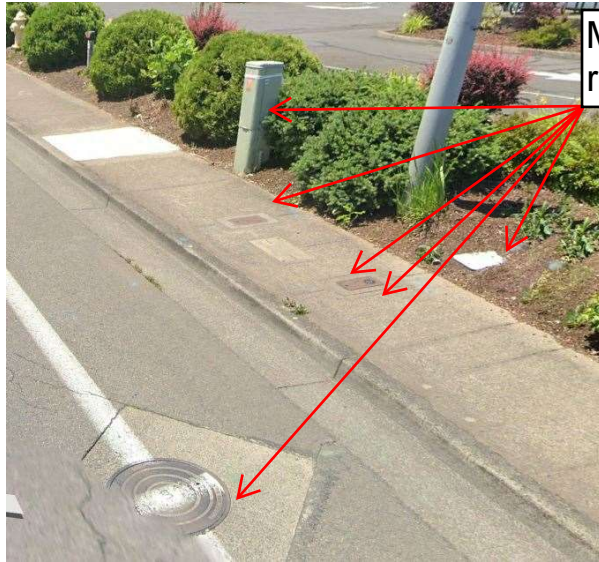
Pole B – Alternative Site 1

City of Salem Streetlight – C8309A-1254, near 4511 Liberty St S

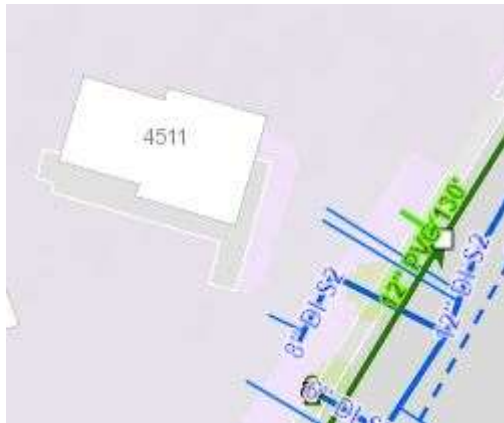
This pole is 200' south of the chosen location; an installation at this location would be less effective as it would overlap with a previously approved/permitted location. This location also would be at risk for underground utility coordination problems due to the amount of city services.

Previously permitted site approx. 1200' south near the SE corner of the 7-Eleven store creating a redundancy in service area. Requiring AT&T to use the alternative would materially inhibit its ability to provide and improve wireless services.





Multiple underground utility conflicts would require additional cost.



Previously approved site SALEM_051 will already improve service near this proposed alternative.

Pole C – Alternative Site 2

City of Salem Streetlight & Signal Pole – C8309A-38, near 4405 Liberty St S

Approx. 200' North of chosen location; this location would be challenging to approve due to the traffic signal and pedestrian signal on the pole. Requiring AT&T to use this alternative would materially inhibit its ability to provide and improve wireless services.



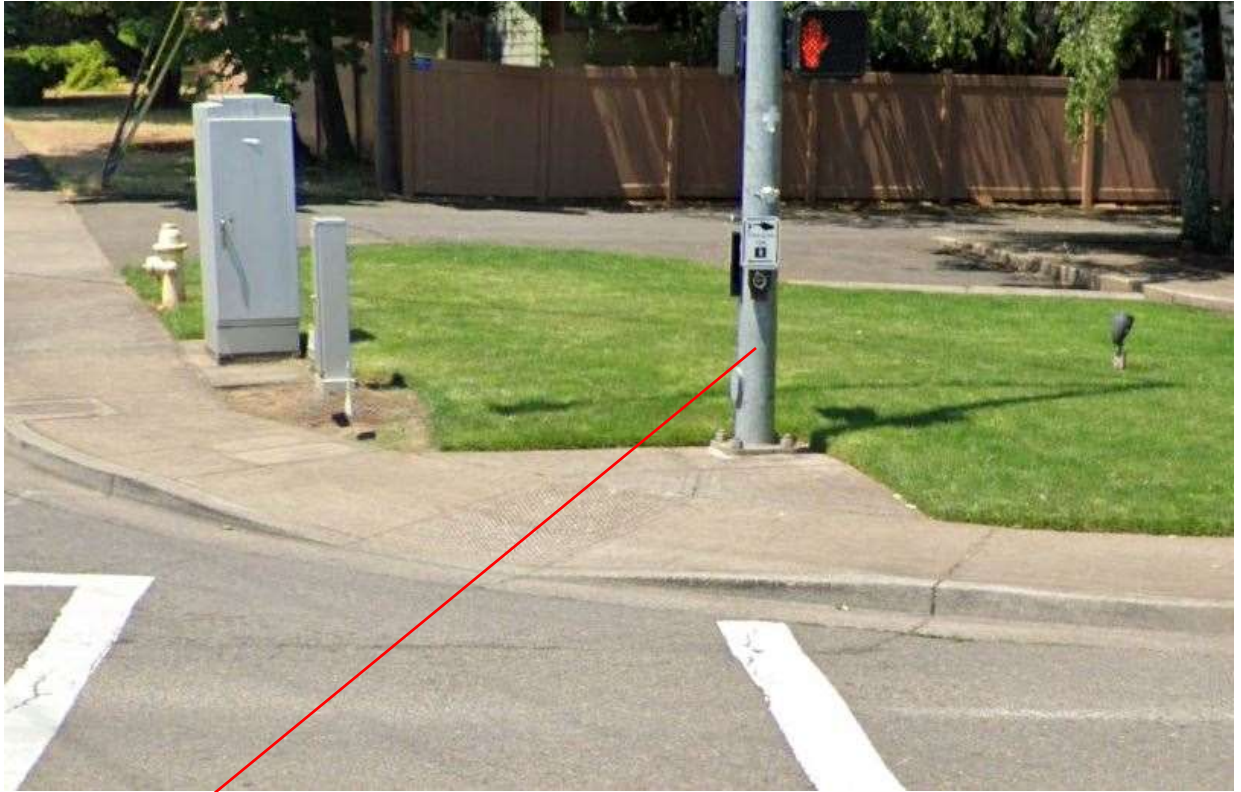


Pole D - Alternative Site 3

City of Salem Streetlight – C8309A-39, near 4395 Liberty St S

Approx. 300' north of chosen pole; this location would be challenging to approve due to the pedestrian signal on the pole. Requiring AT&T to use this alternative would materially inhibit its ability to provide and improve wireless services.

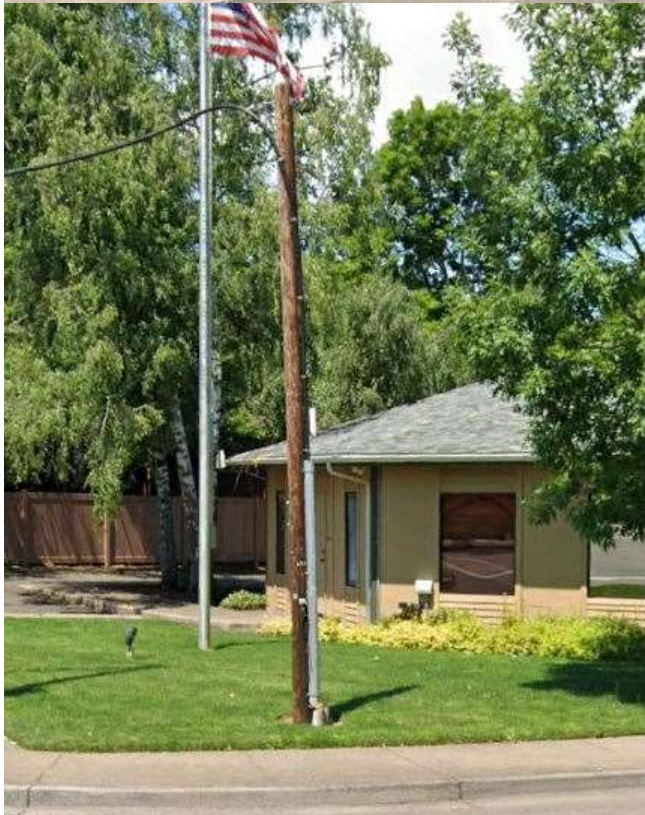




Pole E - Alternative Site 4

Wood Communications Pole, near 4395 Liberty St S

Approx. 300' North of chosen pole; this pole is owned & maintained by a telecommunications company. Pole is likely in Private Property, survey would verify. Pole replacement would be necessary, boring/trenching for power deliver probably also required. Proximity of landscape trees would interfere with efficacy of installation, requiring AT&T to use the alternative would materially inhibit its ability to provide and improve wireless services.





This pole may be outside of the ROW.

Pole F - Alternative Site 5

City of Salem Streetlight – C8309A-1252, near 4395 Liberty St. S

Approx. 400' North of chosen pole; this City of Salem Streetlight pole is enshrouded by landscape trees which would decrease efficacy of SWF. Requiring AT&T to use the alternative would materially inhibit its ability to provide and improve wireless services.



Luminaire





Pole G - Alternative Site 6

City of Salem Streetlight – C8309A-1251, near 4337 Liberty St S

Approx. 700' North of chosen pole; City of Salem Streetlight pole is nearing the outside perimeter of the area that is being identified for needed service improvements. Requiring AT&T to use the alternative would materially inhibit its ability to provide and improve wireless services.



(Residential Development
complete since imagery taken
Summer 2019)





Potential for underground utility conflict.

Pole H - Alternative Site 7

City of Salem Streetlight – C8309A-68, near 798 Skyline Rd S

Approx. 250' from chosen pole, PGE allows collocation only on poles that currently have “minimal loading”, minimal transformers and at least 6-8” available on the top of the pole. PGE wood poles that have any of the following conditions are excluded from collocation by PGE standards. (See pictures from PGE Utility Asset Management below for examples).

- Cluttered Cutouts
- Switch or double Dead-End
- 3 transformers on pole
- Transmission Pole
- Line and Buck Crossarms

Requiring AT&T to use these alternatives would materially inhibit its ability to provide and improve wireless services.



Cutouts







3 transformers



Proximity to driveway
presents strike risk.



Pole Not Suitable for Wireless Collocation			
			
Cluttered with cutouts	Switch on pole and double Dead-End	Metal Lightpole	3 transformers one pole

Poles Not Suitable for Wireless Collocation			
			
Double Dead-End	Transmission Pole	Line and Buck crossarms	Double Alley arms

PGE design exclusion exhibits provided from the PGE Utility Asset Management Criteria document

PGE Pole line East Side of Liberty St S.

The row of pole along the East Side of Liberty St S are all similar in structure to previously sited Pole H; and is precluded from selection by PGE standards.

PGE allows collocation only on poles that currently have “minimal loading”, minimal transformers and at least 6-8” available on the top of the pole. PGE wood poles that have any of the following conditions are excluded from collocation by PGE standards. (See pictures from PGE Utility Asset Management below for examples).

- Cluttered Cutouts
- Switch or double Dead-End
- 3 transformers on pole
- Transmission Pole
- Line and Buck Crossarms

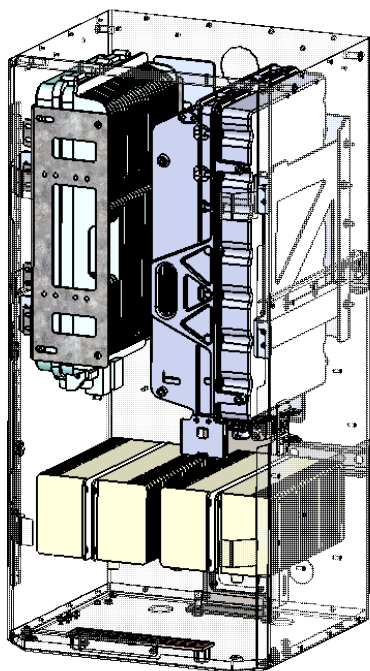
Requiring AT&T to use these alternatives would materially inhibit its ability to provide and improve wireless services.



Proposed Small Cell SALEM_049 – Conclusion

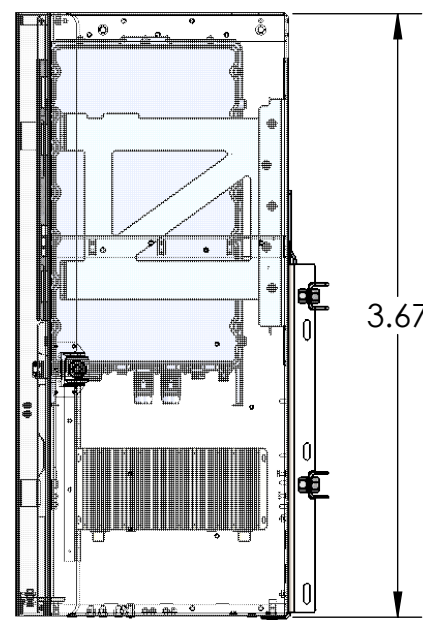
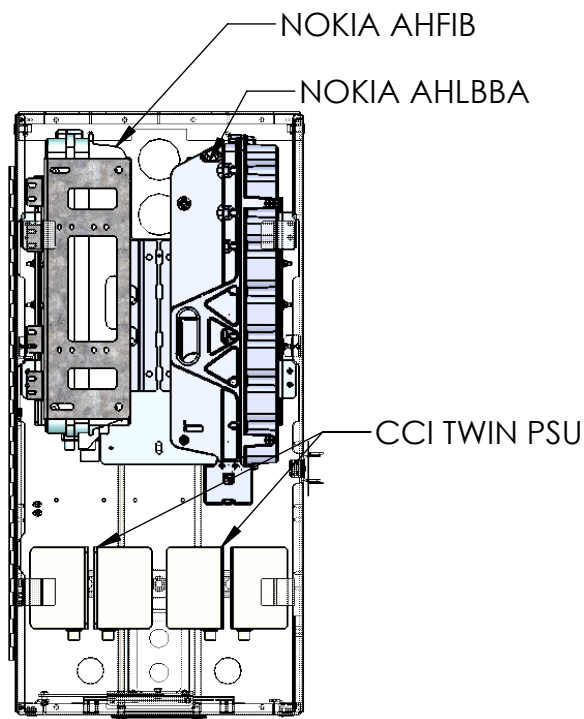
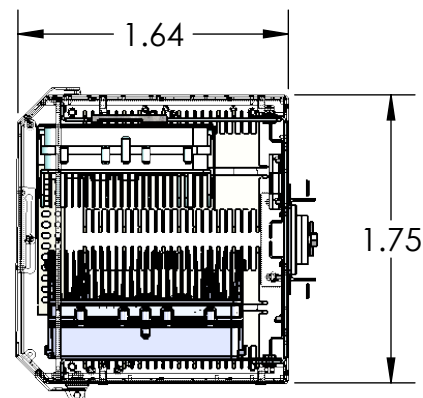
- Small Cell SALEM_049 is an integral part of an overall small cell solution to help close AT&T significant service coverage gap in this portion of Salem.
- Small Cell SALEM_049 will provide wireless telecommunications services and faster data rates to the area residents and local businesses.
- Small Cell SALEM_049 is the best available means to help AT&T provide and improve critical wireless services in the surrounding areas, adding low-power, low-profile equipment to utility infrastructure in the public right-of-way.

REVISIONS			
REV.	DESCRIPTION	BY	DATE
A	DRAWING RELEASE	MJP	04/23/2021



**ISOMETRIC VIEW
(DOOR REMOVED)**

$$1.64 \times 1.75 \times 3.67 = 10.53 \text{ cu ft}$$



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DRAWN BY:
MJP

SHEET:
1 of 1

PART NUMBER:
REMI AHLBBA + AHFIB LAYOUT-01

CHECKED BY:

SCALE:

DESCRIPTION:
METRO CELL, MICRO ENCLOSURE

DATE:

MATERIAL:

DRAWING TYPE:

REVISION:

FINISH:

WEIGHT:

A

COMMScope®

ALL DIMENSIONS ARE IN INCHES U.O.S.
TOLERANCES UNLESS OTHERWISE SPECIFIED:

.X = ± .12 ANGLES ±2°
.XX = ± .06 FRACTIONS ±1/32
.XXX = ± .031

REMOVE BURRS AND BREAK EDGES .005

DO NOT SCALE THIS PRINT