



# Council Business Meeting

September 19, 2023

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|--------------------|--|----------------------|
| <b>Agenda Item</b> | First Reading of Amendments to AMC 13.02 Rights-of-Way ordinance and the accompanying resolution for Design Standards and Applications Requirements regarding small cell wireless facilities |                      |
| <b>From</b>        | Douglas M McGeary  | Acting City Attorney |
| <b>Contact</b>     | <a href="mailto:Doug.mcgeary@ashland.or.us">Doug.mcgeary@ashland.or.us</a> and 541-552-2091  |                      |
| <b>Item Type</b>   | Requested by Council <input type="checkbox"/> Update <input type="checkbox"/> Request for Direction <input type="checkbox"/> Presentation <input checked="" type="checkbox"/>                |                      |

## **SUMMARY**

This office is returning with further revisions to amendments to the Right-Of-Way ordinance and a design standards resolution that are intended and necessary to guide the review and approval of small wireless facility applications consistent with FCC regulations. The ordinance is prepared for approval of First Reading.

## **POLICIES, PLANS & GOALS SUPPORTED**

## **BACKGROUND AND ADDITIONAL INFORMATION**

The previous ordinance presented to the Council was based on the model ordinances developed by the League of Oregon Cities (LOC) in response to settlements from federal lawsuits involving Oregon cities. These lawsuits arose from conflicts over local regulations that imposed restrictions on small cell facilities and older technologies. The LOC worked with the industry to reach compromises and develop these model ordinances. However, the Council has expressed a preference for an ordinance that imposes stricter limitations on an applicant's network configuration. The objective is to mitigate any possible legal challenges to the ordinance by ensuring compliance with the rights granted to applicants under FCC rules.

The proposed ordinance builds upon the model rules as a foundation but incorporates certain modifications to include definitions and standards that enable more stringent restrictions on an applicant's network configuration. Additionally, the ordinance includes a comprehensive severability clause to tackle potential challenges arising from stricter regulations.

Revisions have also been made to the model resolution for design standards. As a resolution, it offers greater flexibility compared to an ordinance, allowing for adjustments in response to changes in the law or to rectify problematic provisions that could potentially entangle the city in a lawsuit. Similar to the ordinance, it includes a severability clause, empowering the city to modify any directive while upholding strict limitations in all other aspects pertaining to the approval of an application. Concerned citizens of this ordinance have participated in its drafting, as have various industry organizations to ensure that the city does not draft an ordinance that clearly would invite litigation under the FCC rules.

The Council should carefully consider an ordinance that imposes stringent limitations on applicants, balanced against the potential risk of legal challenges. The area of law pertaining to FCC regulation is





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highly technical and constantly evolving due to rapid technological advancements. Defending such lawsuits can be costly, requiring specialized expertise to navigate the rules and apply the law during litigation. The League of Cities (LOC) provides assistance to cities in litigation of this nature, particularly if their model ordinance is being challenged. However, they may be less inclined to offer support for significant changes made to their model ordinance.

In the process of formulating this ordinance and resolution, your legal department has taken into consideration publicly available regulations that impose added constraints on the deployment of small cell wireless facilities. These regulations have been sourced from suggestions put forth by community advocates seeking more stringent guidelines. Working in collaboration with the City Manager, Legal has engaged in discussions and conducted meetings and phone calls with these interested parties and industry representatives to thoroughly assess and make additional refinements to the ordinance and resolution that include but are not limited to additional set back and aesthetic requirements, minimum standards and maximum compliance, public notices, updates in interpretation of FCC rules and from specific case law, *et. cet.*

Furthermore, in addition to the input received from the public and pertinent materials, we have sought experience and opinions from other jurisdictions using these type regulations and enlisted the expertise of a consultant who specializes in telecommunications engineering, radio frequency (RF) engineering, and legal matters surrounding this subject. With these evaluations we were better able to determine the appropriateness and feasibility of the proposed measures within the existing legal framework at the federal, state, and local levels.

The City has been asked to accommodate concerns from members of the public and we have as is evidenced by the substantial changes this ordinance and resolution have undergone since their initial presentation to the Council. The drafts presented here have evolved through a thorough evaluation process, involving both the model rules provided by the League of Cities (LOC) and the more stringent regulations. Our department firmly believes that these measures strike an appropriate balance by providing a responsible level of protection while also maintaining practicality in the implementation of local regulations concerning Small Cell Wireless Facilities.

## **FISCAL IMPACTS**

The City will collect fees for the review of small wireless facilities, as permitted by the FCC. The FCC has determined that the following fees are considered fair and reasonable:

- \$500.00 for non-recurring fees , including a single, up-front application for up to five small wireless facility sites, with an additional \$100.00 for each additional small wireless facility site beyond the initial five sites;
- \$1,000 for non-recurring fees for a new pole to support one or more small wireless facility;
- \$270.00 per year for all recurring fees<sup>2</sup> including any right-of-way access fee (e.g., encroachment permit) or fee for attachment to a municipality-owned structure in the public right-of-way.

## **DISCUSSION QUESTIONS**



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There may still be question related to:

1. How is this process different than a land use process for siting cell towers?
2. Are provisions of Attorney Campanelli ordinance incorporated in these two documents?
3. What Input was incorporated from other interested parties and experts, and is that still ongoing?
4. Are there applicants ready to file applications if this ordinance passes?
5. What are costs to the city to administer the application process, particularly related to noticing the public of pending applications? Do citizens have standing to appeal?
6. Can changes be made after the first reading?

## **ACTIONS, OPTIONS, AND POTENTIAL MOTIONS**

1. I move to approve First Reading of Ordinance No. 3213 AN ORDINANCE AMENDING AMC CHAPTER 13.02 PUBLIC RIGHTS-OF-WAY AND ESTABLISHING STANDARDS FOR SMALL WIRELESS FACILITIES IN THE RIGHTS-OF-WAY IN THE CITY OF ASHLAND and send it to Second Reading with accompanying Resolution for their enactment; OR
2. I move to revise the presented draft of Ordinance No. 3213 AN ORDINANCE AMENDING AMC CHAPTER 13.02 PUBLIC RIGHTS-OF-WAY AND ESTABLISHING STANDARDS FOR SMALL WIRELESS FACILITIES IN THE RIGHTS-OF-WAY IN THE CITY OF ASHLAND in the following ways, 1) \_\_2) \_\_3) \_\_etc.\_\_, and return the ordinance with the accompanying Resolution, for the ordinance to be approved for first reading; OR
3. I move to decline approval of Ordinance No. 3213 and accompanying Resolution.

## **STAFF RECOMMENDATIONS**

Staff recommends that Council approve First Reading of Ordinance No 3213 and send it to second Reading with accompanying Resolution for their enactment.

## **REFERENCES & ATTACHMENTS**

- AN ORDINANCE AMENDING AMC CHAPTER 13.02 PUBLIC RIGHTS-OF-WAY AND ESTABLISHING STANDARDS FOR SMALL WIRELESS FACILITIES IN THE RIGHTS-OF-WAY IN THE CITY OF ASHLAND
- A RESOLUTION FOR SMALL WIRELESS FACILITY DESIGN STANDARDS AND APPLICATION REQUIREMENTS FOR CITY RIGHTS-OF-WAY
- AT&T, Verizon, T Stakeholders Letter

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE AMENDING AMC CHAPTER 13.02 PUBLIC RIGHTS-OF-WAY AND ESTABLISHING STANDARDS FOR SMALL WIRELESS FACILITIES IN THE RIGHTS-OF-WAY IN THE CITY OF ASHLAND**

Annotated to show ~~deletions~~ and additions to the code sections being modified. Deletions are **~~lined through~~** and additions are **underlined**.

WHEREAS, Article 2. Section 1 of the Ashland City Charter provides:

Powers of the City. The City shall have all powers which the constitutions, statutes, and common law of the United States and of this State expressly or impliedly grant or allow municipalities, as fully as though this Charter specifically enumerated each of those powers, as well as all powers not inconsistent with the foregoing; and, in addition thereto, shall possess all powers hereinafter specifically granted. All the authority thereof shall have perpetual succession.

WHEREAS, the City desires to encourage wireless infrastructure investment by providing a fair and predictable process for the deployment of small wireless facilities, while enabling the City to promote the management of the rights-of-way in the overall interests of the public health, safety and welfare; and

WHEREAS, the City recognizes that small wireless facilities are needed to deliver wireless access and capacity to advanced technology, broadband and first responder services to homes, and businesses, as well as health care, public safety and educational services providers within the City; and

WHEREAS, the City recognizes that the wireless industry needs small wireless facilities, including facilities commonly referred to as small cells, deployed in the public rights-of-way; and

WHEREAS, the City further recognizes that the City must balance the benefits from small cell infrastructure with its aesthetic impact on the community in order to mitigate or avoid adverse visual impacts, encourage the deployment of infrastructure consistent with the surrounding built and natural environment, and preserve the City's historic and environmental resources to the extent feasible; and

WHEREAS, the City intends to adopt a new code consistent with local, state and federal laws, standards and requirements.

**THE PEOPLE OF THE CITY OF ASHLAND DO ORDAIN AS FOLLOWS:**

**SECTION 1.** Chapter 13.02 PUBLIC RIGHTS-OF-WAY of the Ashland Municipal Code is hereby amended and by adding the following Sections as follows:

## Chapter 13.02 PUBLIC RIGHTS-OF-WAY

### Sections:

- **13.02.010 Definitions**
- **13.02.020 Jurisdiction**
- **13.02.030 Scope of Regulatory Control**
- **13.02.040 Right-of-Way Encroachment**
- **13.02.050 Encroachment Permits**
- **13.02.060 Standards and Conditions**
- **13.02.070 Permit Issuance**
- **13.02.090 Revocation of Permits**
- **13.02.100 Removal of Encroachment**
- **13.02.110 Liability**
- **13.02.130 Obligations of the City of Ashland**
- **13.02.200 Appeals**
- **13.02.300 Standards For Small Wireless Facilities In The Rights-Of-Way.**
- **13.02.900 Penalties**

#### 13.02.010 Definitions



(1) For the purpose of Sections 13.02.010 – 13.02.200 in this chapter, the following mean:

A. *Encroach.* The act of a private individual **or person** extending from their abutting private property into a public right-of-way, public easement or public property.

B. *Encroachment.* Area in a public right-of-way, public easement or public property that is being encroached upon by a private individual.

C. *Encroachment Permit.* A revocable permit granted by the Public Works Director to allow permittee to encroach upon a public right-of-way, public easement or public property where compliance with this chapter can be demonstrated.

D. *Person.* Individual, corporation, association, firm, partnership, joint stock company, and similar entities.

E. *Public Easement.* An easement granted to the City for a public purpose, including, but not limited to the purpose of installing or maintaining public or private utility infrastructure for the provision of water, power, heat or telecommunications to the public.

F. *Public Property.* Real property owned by the City and open to the public for public use.

G. *Public rights-of-way*. Include, but are not limited to, streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements, and all other public ways or areas, including subsurface and air space over these areas.

H. *Public Works Director*. The City Public Works Director or his/her authorized designee.

I. Within the City: Territory over which the City now has or acquires jurisdiction for the exercise of its powers.

**(2) For purposes of Sections 13.02.300 – 13.02.200 in this chapter, the following mean:**

**(A) “Antenna” means the same as defined in 47 C.F.R. § 1.6002(b), as may be amended or superseded. The term includes an apparatus designed for the purpose of emitting radio frequencies (RF) to be operated or operating from a fixed location pursuant to Federal Communications Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under 47 C.F.R. Part 15.**

**(B) “Antenna Equipment” means the same as defined 47 C.F.R. § 1.6002(c), as may be amended or superseded, which defines the term to mean equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when co-located on a structure, is mounted or installed at the same time as such antenna.**

**(C) “Antenna Facility” means the same as defined in 47 C.F.R. § 1.6002(d), as may be amended or superseded, which defines the term to mean an antenna and associated antenna equipment.**

**(D) “Applicable codes” means uniform building, fire, safety, electrical, plumbing, or mechanical codes adopted by a recognized national code organization or state or local amendments to those codes that are of general application and consistent with state and federal law.**

**(E) “Applicant” means any person who submits an application as or on behalf of a wireless provider.**

**(F) “Application” means requests submitted by an applicant required (i) for permission to co-locate small wireless facilities; or (ii) to approve the installation, modification or replacement of a structure on which to co-locate a small wireless facility in the rights-of-way.**

**(G) “City Structure” means a structure located in the rights-of-way within the City’s jurisdictional boundaries that is owned, managed or operated by the City or any subdivision or instrumentality thereof, including municipal electric utilities. Including, but not limited to streetlights, traffic signals, utility poles, or building.**

**(H) “Co-locate” or “Collocation” means the same as defined in 47 C.F.R. § 1.6002(g), as may be amended or superseded, which defines that term to mean (1) mounting or installing an antenna facility on a preexisting structure, and/or (2) modifying a structure for the purpose of mounting or installing an antenna facility on that structure. “Co-locating” has a corresponding meaning.**

**(I) “Day” means calendar day. For purposes of the FCC shot clock, a terminal day that falls on a holiday or weekend shall be deemed to be the next immediate business day.**

**(J) “DBM” or “dBm” means decibel milliwatts, which is a measurement of the wireless signal strength of wireless networks.**

**(K) “Decorative pole” means a city structure that is specially designed and placed for aesthetic purposes.**

**(L) “Effective Prohibition” means, in reference to 47 U.S.C. § 253(a), a showing of an actual or effective prohibition of personal wireless services that materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment, rather than the mere possibility of prohibition.---**

**(M) “Gap” or “Service Gap” means, as applied to wireless communication functionality, a geographic area where existing radio-frequency signal levels and/or existing user capacity levels fall below or are reasonable expected in the near future to fall below, a defined threshold such that the provision of wireless service is or will become unreliable.**

**(N) “Historic district” means a group of buildings, properties, or sites that are either: (1) listed in the National Register of Historic Places or formally determined eligible for listing by the Keeper of the National Register in accordance with Section VI.D.1a.i-v of the Nationwide Programmatic Agreement codified at 47 C.F.R. Part 1, Appendix C; or, (2) a locally designated historic district as of the effective date of this Chapter or in a locally designated historic district existing when an application is submitted.**

**(O) “Illegally Excessive RF Radiation or Illegally Excessive Radiation” means radio frequency (RF) radiation emissions at levels that exceed the legally permissible limits set forth within 47 CFR 1.1310(e)(1), Table 1 Sections (i) and (ii), as made applicable pursuant to 47 CFR §1.1310(e)(3).**

**(P) “Macrocell” means a cellular base station that typically sends and receives radio signals from large towers and antennas. These include traditionally recognized cell towers, which typically range from 50 to 199 feet in height.**

**(Q) “Mitigation” or “Mitigate” means, as applied to wireless communication functionality, the effective removal, even if imperfectly, a Service Gap. The term does not encompass a failure to resolve isolated areas where, considering the overall nature and extent of a Service Gap, it is otherwise effectively removed.**

**(R) “Necessary” or “Necessity” Or “Need” means, as applied to wireless communication functionality, the existence of a Service Gap for which there is a reasonable expectation a proposed wireless facility can mitigate a Service Gap. “Necessary” or “need” does not mean what may be desired, preferred, or the most cost-efficient approach and is not related to an applicant’s specific chosen design standards. Any situation involving a choice between or among alternatives or options is not a need or a necessity.**

**(S) “Notice Of Effective Prohibition Conditions” means a written notice which is required to be provided to the City at the time of the filing of any application, by all applicants at seeking any approval, of any type, for the siting, installation and/or construction of a PWSF, wherein the respective applicant asserts, claims or intends the same, that a denial of their respective application, by any agent, employee, or appeal process by the City, would constitute an “effective prohibition” within the meaning of the TCA constituting a violation of Section 47 U.S.C. §332(c)(7)(B)(i)(II).**

**(T) “Occupational/Controlled Exposure Limits” means the applicable radiofrequency radiation exposure limits set forth within 47 CFR §1.1310(e)(1), Table 1 Section (i), made applicable pursuant to 47 CFR §1.1310(e)(2).**

**(U) “Permissions” means City authorized permits, agreements or licenses necessary for small wireless deployment.**

**(V) “Person” means an individual, corporation, limited liability company, partnership, association, trust, or other entity or organization, including the City.**

**(W) “Pole” means a type of structure in the rights-of-way that is or may be used in whole or in part by or for wireline communications, electric distribution, lighting, traffic control, signage, or similar function, or for co-locating of small wireless facilities; provided, such term does not include a tower, building or electric transmission structures.**

**(X) “RF Radiation” means radiofrequency radiation, that being electromagnetic radiation which is a combination of electric and magnetic fields that move through space as waves, and which can include both Non-Ionizing radiation and Ionizing radiation.**

**(Y) “Rights-of-Way” or “ROW” has the same definition as section (1)(G) in this Section.**

**(Z) “Routine Maintenance” means inspections, testing, repair, and modifications subject to Section 6409(a) that maintain functional capacity, aesthetic and structural integrity of a small wireless facility and/or the associated pole or structure.**

**(aa) “Setback” for purposes of special use permit applications, a setback means the distance measured in feet as a radius from the proposed facility as it may relate to the height of the facility and associated pole or structure, or to the exterior line of any property or structure indicated.**



**(bb) “Shot Clock” means the applicable period which is presumed to be a reasonable period within which the City is generally required to issue a final decision upon an application seeking special use permit approval for the installation or substantial modification of a small wireless facility facility or structure, to comply with Section 47 U.S.C. §§332(c)(7)(B)(ii)? of the TCA.**

**(cc) “Small wireless facility” means a facility that meets each of the following conditions per 47 C.F.R § 1.6002(l), as may be amended or superseded:**

- (1) The facilities (i) are mounted on structures 50 feet or less in height including the antennas, 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; and,**
- (2) Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume; and,**
- (3) All other wireless equipment associated with the structure, including wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; and,**
- (4) The facilities do not result in human exposure to radio frequency in excess of the applicable safety standards specified in 47 C.F.R. § 1.1307(b).**

**(dd) “Structure” means the same as defined in 47 C.F.R. § 1.6002(m), as may be amended or superseded, which defines that term as a pole, tower, or base station, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or comingled with other types of service).**

**(ee) “TCA” means the Telecommunications Act of 1996, 47 U.S.C. §332(c)**

**(ff) “Tolling” or “Tolled” means the pausing of the running of the time period permitted under the applicable shot clock for the respective type of application for a personal wireless services facility. When a shot clock is tolled because an application has been deemed incomplete and timely notice of incompleteness was mailed to the applicant, the submission of additional materials by the applicant to complete the application will end the tolling, thus causing the shot clock period to resume running versus re-starting the time from the beginning.**

**(gg) “Wireless Infrastructure Provider” means any person, including a person authorized to provide communications service in the state, that builds or installs wireless communication transmission equipment, wireless facilities, but that is not a wireless services provider.**

**(hh) “Wireless Provider” means a wireless infrastructure provider or a wireless services provider.**

**(ii) “Wireless Services Provider” means a person who provides personal wireless services (whether or not it is comingled with other services).**

13.02.020 Jurisdiction



**As relates to this Chapter 13.02,** the City has jurisdiction and exercises regulatory control over all public rights-of-way within the City under the authority of the City charter and state law.

13.02.030 Scope of Regulatory Control



The City has jurisdiction and exercises regulatory control over each public right-of-way whether the City has a fee, easement, or other legal interest in the right-of-way. The City has jurisdiction and regulatory control over each right-of-way whether the legal interest in the right-of-way was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure, or other means. **A permit from the City authorizes an applicant to undertake only certain activities in accordance with this Chapter and does not create a property right or grant authority to the applicant to impinge upon the rights of others who may already have an interest in the rights-of-way.**

13.02.040 Right-of-Way Encroachment



A. *Prohibition.* Except as provided in subsection **C** of this section, no person or entity may occupy or encroach on a public right-of-way without the permission of the City. The City grants permission to use public rights-of-way, by franchises, licenses, concessions and permits.

B. *Standard Forms.* Franchises, licenses, concessions and permits for use of public rights-of-way shall comply with all applicable requirements for occupancy or encroachment of such areas as set forth in AMC Chapter **13.03** and other applicable provisions of the Ashland Municipal Code. Franchises, licenses, concessions and permits shall be submitted on a City standard form franchise, license, concession, or permit template, together with required fees, if any. Such standard fees may be adopted and amended by resolution of the City Council.

C. *City Functional Items.* The City of Ashland is not required to obtain permits or other City authorizations to place City utilities, facilities or other structures in the right-of-way, including “functional items” intended for public usage. City functional items include, but are not limited to, a City standard bench, water fountain, planter box, garbage receptacle, ash can, bike rack, bollard, publication box, or other functional items identified by resolution of the City Council. The City Council resolution shall identify functional items and establish minimum standards for such items.

D. *Donated or Loaned Functional Items.* An abutting property owner together with the occupant may donate or loan to the City of Ashland a City standard functional item for use in an adjacent sidewalk permit area. Other persons or entities may also donate or loan functional items, for use in nonadjacent public areas. Items accepted on loan require insurance and a maintenance/hold harmless/indemnity agreement in a form approved by the City. Donated items do not require insurance or a maintenance agreement, but the donations must be accepted by the City to be

eligible for placement. The City Manager is delegated authority to accept or reject donations and loans for purposes of this chapter, in the Manager's sole discretion. After demonstrated compliance with this section, the City Public Works Director may authorize in writing the placement of a donated or loaned City standard functional item, in locations meeting, at a minimum, the clearance requirement of AMC Chapter [10.64](#) or in approved locations shown on an adopted Downtown Sidewalk Usage Map. Items not strictly complying with minimum standards for such City functional items, (e.g., a decorative art bench) may be permitted through the public art process in AMC Chapter [2.17](#). (Ord. 3192 § 91, amended, 11/17/2020; Ord. 3137, amended, 2017; Ord. 3028, amended, 08/03/2010; Ord. 2989, amended, 11/01/2009)

13.02.050 Encroachment Permits



*A. Permits Required for Encroachment; Exemptions.*

1. *Permits Required.* It shall be unlawful for any person to do any of the following without first obtaining a encroachment permit from the Public Works Director:

a. Erect or cause to be erected any structure, retaining wall, or fence in a public right-of-way, public easement, or public property, or

b. Place or maintain any landscaping materials or any type of fill in, over or upon any dedicated public right-of-way, public easement or public property.

**c. Permits for a small wireless facility are subject to sections AMC Chapter 13.02.300 – 315.**

2. *Specific Exemptions.* Certain encroachments are exempt from the permit requirement of AMC [13.02.020](#). Exempt encroachments are those which would have a minor impact on the present or planned use of the public right-of-way, public easement or public property and those which are expressly exempted herein. The following encroachments are exempt encroachments as long as they do not create a vision clearance hazard as defined in AMC [18.68.020](#):

a. Mailboxes and their enclosing structures,

b. Temporary signs and banners permitted by the Sign Code (AMC [18.96](#)),

c. Guard/handrails along edges of driveway approaches, walks, stairs, etc. that encroach in public right-of-way, and

d. Lawns, plants and approved street trees encroaching in public right-of-way that do not obstruct visibility for pedestrians, bicyclists and motorists.

3. *Additional Exemptions.* The Public Works Director may grant additional exemptions as long as the encroachment does not create a vision clearance hazard as defined in AMC [18.68.020](#).

*B. Application and Fee Required.*

1. Any person desiring to locate or maintain an encroachment shall submit an application to the Director of Public Works. The application shall include a description of the proposed encroachment and a scale drawing illustrating the nature and extent of the proposed encroachment and its relationship to adjoining properties. If the applicant is not the owner of the property that will be benefitted by the encroachment, the owner of the benefitted property shall also sign the application as a co-applicant. The Public Works Director may require an actual survey to determine the exact location of any public or private improvements that will be encroaching in the right-of-way. **The Public Works Director retains authority to verify assertions in all submittals by applicant and charge reasonable, cost-based reimbursement for such verification if deemed reasonably necessary.**

2. A fee in the amount established by resolution of the City Council shall be paid at the time of the application. **The City may require advance periodic monetary deposits to be held by the City on account of the applicant or landowner to secure reasonable and cost-based reimbursement of the City's consultant expenses to verify assertions in applicant's submittals.**

C. *Review of Application.* The Public Works Director shall conduct a review of the application for an encroachment permit to determine its compliance with the standards in AMC [13.02.060], and the Public Works Director shall request comments from affected City departments, **the City Manager.**, utility companies and agencies regarding the impact of the proposed encroachment. **In the case of an application for Small Cell Wireless facilities, within ten days of deeming such an application complete, the City shall mail a notice of a pending application to Owners of record for properties where the applicant's facility is located within a 100-foot Setback distance of a structure that is either inhabited or regularly occupied by persons. Failure to provide notice as provided in this section does not impact the validity of a final decision regarding an application.** (Ord. 3040, added, 11/16/2010; Ord. 3028, amended, 08/03/2010; Ord. 3009, amended, 04/20/2010)

13.02.060 Standards and Conditions



The Public Works Director may approve the issuance of an encroachment permit for an encroachment where compliance with standards **provided herein and relevant Design Standards for Small Wireless Facilities as set forth by resolution that** can be demonstrated or specific findings are made that the standard is not applicable. The Public Works Director may attach any conditions to the issuance of the permit that are required in any applicable planning approvals or reasonably related to ensuring compliance with this section, or other applicable City codes.

A. *Standards for Approval.*

1. Horizontal clearances of at least five (5) feet shall be maintained on all sides of all utilities including electrical power, communications, sewer, storm drain, and water. This distance shall be measured between proposed encroachments and existing or proposed utility lines, manholes, appurtenances, and fixtures, including but not limited to fire hydrants, above ground transformers, cabinets, and other structures. Clearances around water meters shall be at least one

(1) foot behind and two (2) feet from the sides when measured from the outside edges of the box. A larger horizontal clearance may be required if utilities mandate larger clearances for specific structures; for example, additional clearance may be required in front of electrical cabinets and transformers. Requests by utility providers for larger horizontal clearances or additional conditions shall be considered for inclusion into the permit. The applicant shall pay for relocation of the existing utility lines, manholes, appurtenances, and fixtures if this standard cannot be met.

2. Vertical clearances between utilities and natural landscape materials or structures placed below or above those facilities shall be the distance required by the affected utilities. Conditions requested by the utility providers shall be considered for inclusion into the permit.

3. Proposed encroachments, improvements and temporary measures shall not cover, prevent access to, or block the flow of water into inlets, basins, ditches, or drainage ways. Grading changes shall not otherwise alter the drainage patterns in the right-of-way without written approval of a grading and erosions control plan by the Public Works Director.

4. Sufficient space for off-street parking, loading, and pedestrian travel shall be maintained. The encroachment shall not result in a loss of area needed for parking, vehicular maneuvering, or pedestrian travel.

5. It is determined that the requested encroachment is consistent with the current use of the public right-of-way, easement or public property.

*B. Conditions.*

1. When the Public Works Director determines that allowing the requested encroachment may subject the City to potential liability, a condition of permit issuance shall be the filing with the City Risk Manager of a policy of insurance and form of policy by an insurance company licensed to do business in the State of Oregon. The policy shall protect the City, its officers, agents, and employees, and the abutting property owners, lessees and tenants from any and all claims for injury or damage to persons or property that might result from the placing and/or maintenance of the permitted encroachment. **The policy must not contain a pollutants exclusion clause.** The amount of the insurance policy shall be at least the limits of public body liability under the Oregon Tort Claims Act. The policy shall also contain a provision that the City Risk Manager shall be notified at least 30 days prior to any cancellation of such insurance. The permittee shall maintain the insurance for the term of the permit issued. Failure to maintain the insurance shall result in automatic revocation of the permit.

2. All work within the public right-of-way, public easement, or public property shall be consistent with engineering plans, profiles, specifications, and standards approved by the Public Works Director in accordance with City requirements **and relevant Design Standards for Small Wireless Facilities as set forth by resolution.**

3. The Public Works Director may place a limit on the time the proposed encroachment may be located in or on the right-of-way, public easement or public property.

4. To ensure that encroachments do not contribute to visual blight or create a safety hazard, conditions of permit approval may include a requirement that the encroachment be appropriately maintained.

5. The City may impose a charge for the use of the public right-of-way, public easement or public property. (Ord. 3040, added, 11/16/2010)

13.02.070 Permit Issuance



A. The Public Works Director may approve, modify and approve, or deny the application for an encroachment permit.

B. Ministerial decisions do not require interpretation or the exercise of policy or legal judgment in evaluating approval standards. Ministerial decisions include, but are not limited to, site plan approval of building or other specialty permits and final subdivision and planned unit development plans where there are no material deviations from the approved preliminary plans. Because no discretion is involved, ministerial decisions do not qualify as land use or limited land use decisions. **The process requires no notice to any party other than the applicant.** The Public Works Director's decision is final and not appealable by any party through the normal land use process. Ministerial decisions may be appealed as provided in AMC **13.02.200**.

13.02.090 Revocation of Permits



All right-of-way, easement or public property encroachment permits shall be revocable by the City at any time such revocation would be in the public interest. No grant of any permit, expenditure of money in reliance thereon, or lapse of time shall give the permittee any right to the continued existence of an encroachment or to any damages or claims against the City arising from a revocation.

Any permit issued under this section shall be automatically revoked if the permittee fails comply with any conditions of the permit, or fails to begin installation of the allowed encroachment within ninety (90) days after issuance of the permit unless an extension is requested prior to the expiration of the ninety (90) day period. (Ord. 3040, added, 11/16/2010)

13.02.100 Removal of Encroachment



Upon revocation, the permittee or any successor permittee shall, at the permittee's own expense, remove the permitted encroachment within thirty (30) days after written notice has been provided by the City unless a shorter period is specified in the notice of revocation.

If the permittee does not remove the encroachment and return the right-of-way, public easement or public property area to a condition satisfactory to the Public Works Director, the City shall do so and the permittee shall be personally liable to the City for any and all costs of returning the right-of-way, public utility easement or public property to a satisfactory condition, including the

removal of structures and reconstruction of streets and/or pathways. If the permittee fails to pay the City for the costs incurred after the City bills permittee, the costs shall be imposed as a lien upon the property. Payment of such costs shall not prevent the City from pursuing any other remedy available at law or pursuing any other penalty. (Ord. 3040, added, 11/16/2010)

13.02.110Liability



The permittee, and owner of the benefitted property if different than the permittee, shall be liable to any person who is injured or otherwise suffers damage by reason of any encroachment allowed in accordance with the provisions of this section. Furthermore, the permittee shall be liable to the City of Ashland, its officers, agents and employees, for any judgment or expense incurred or paid by the City, its officers, agents and employees, by reason of the existence of an approved encroachment. (Ord. 3040, added, 11/16/2010)

13.02.130Obligations of the City of Ashland



The exercise of jurisdiction and regulatory control over a public right-of-way by the City is not official acceptance of the right-of-way for public access and does not obligate the City to open or improve any part of the right-of-way. Upon improvement of any public right-of-way to city street standards, the City shall accept by resolution the improvement and maintain and repair such improvement to the standard to which it has been improved. For purposes of nuisance-type ordinances imposing obligations upon property owners, (e.g. snow removal, weeds and noxious vegetation, sidewalk maintenance) the City shall be responsible for compliance with such ordinances in public rights-of-way adjacent to or abutting city-owned or controlled real property. (Ord. 3040, amended, 11/16/2010)

13.02.200Appeals



The Uniform Administrative Appeals Process outlined in AMC 2.30 shall apply to all protests of encroachment permits. Failure to strictly comply with the applicable appeal requirements, including but not limited to the required elements for the written notice of appeal, time for filing of the notice of appeal, and payment of the applicable appeal fee, shall constitute jurisdictional defects resulting in the summary dismissal of the appeal. The Hearing Officer's decision is final and not appealable by any party through any land use process. The Hearing Officer's decision may only be appealed through a writ of review proceeding in Jackson County Circuit Court.

- A. **Federal or state law pre-empts any applicable time requirements dictated in AMC 2.30, and the Hearings Officer is permitted to adjust AMC 2.30 time period requirements to the extent that they can reasonably and practically accommodate pre-empting time requirements or, to the extent pre-empting time requirements cannot be reasonably met, deny an appeal.**
- B. **Persons other than applicant qualify as a party for appeal upon showing that they have a particularized injury or a direct and substantial interest in the matter being challenged.**

**13.02.300 Standards For Small Wireless Facilities In The Rights-Of-Way.**

**A. Where otherwise not provided in or contrary to this subsection for Wireless Facilities, all other provisions of AMC 13.02 Public Rights of Way remain applicable. The city will adopt additional specific design guidelines periodically for Small Wireless Facilities by resolution to remain responsive to changing laws and technology.**

**B. Severance. If a requirement of any section of this Ordinance is determined to be invalid, illegal, or unenforceable, it shall not affect the enforceability of any other provision of this Ordinance. Rather, the invalid, illegal, or unenforceable provision may be reasonably interpreted to the extent necessary so that it is valid, legal, and enforceable.**

### **13.02.301 Permitted Use; Application and Fees**

**(A) Permitted Use. The following uses within the rights-of-way shall be a permitted use, subject to compliance with the city's applicable design standards, administrative review only and issuance of a permit as set forth in this Chapter:**

**(1) Co-locating a small wireless facility; and,**

**(2) Placement of a new, modified, or replacement pole to be used for collocation of a small wireless facility.**

**(B) Permissions Required. Except as otherwise provided in this Chapter, no person shall place any small wireless facility described in Section 3(A) in the rights-of-way, without first filing an application for the facility and obtaining a city's permit, license, or agreement.**

**(C) Application Requirements. Application requirements and forms are subject to AMC 13.02.050 (B) and (C).**

**(D) Routine Maintenance and Replacement. An application shall not be required for: (1) routine maintenance; or (2) the replacement of a small wireless facility with another small wireless facility that is the same, substantially similar or smaller in size and weight and height. The City may require a permit for work within the right of way. Such a permit must be issued to the applicant on a non-discriminatory basis upon terms and conditions applied to any other person performing similar activities, regardless of technology, in the ROW.**

**(E) The City shall have the right to employ qualified city staff or third-party RF engineer to conduct a random and unannounced test of small wireless facility installations located within the City to certify their compliance with all FCC radio-frequency transmission power limits as they pertain to exposure of the general public at maximum operating power. The reasonable cost of such tests shall be paid by the Permittee.**

**(1) In the event that such city or independent tests reveal that any small wireless is transmitting RF radiation or is contributing to RF radiation in excess of FCC exposure guidelines as they pertain to the general public, the City shall notify the**



**Wireless Provider and all residents living within 1500 feet of the small cell installation(s) of the violation, and the Wireless Provider shall have forty-eight (48) hours to bring the SCF(s) into compliance. Failure to bring the SCF(s) into compliance and the City shall have the right, in addition to recovery costs for verifying non-compliance, to require the removal of such installation(s), as the City in its sole discretion may determine is in the public interest.**

**(F) Information Updates. Any amendment to non-material information contained in an application shall be submitted in writing to the City within thirty (30) days of the change.**

**(G) Application Fees. Application fees shall be set by resolution, but in no case shall fees exceed the following:**

**(1) \$500 for up to the first five small wireless facilities in the same application, with an additional \$100 for each small wireless facility beyond five in the same application, or fees that are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are nondiscriminatory.**

**(2) \$1000 for the installation, modification or replacement of a pole together with the co-locating of an associated small wireless facility in the rights-of-way that is a permitted use in accordance with this Chapter, or fees that are (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are nondiscriminatory.]**

### **13.02.303 Action on Administrative Permit Applications On Wireless Facilities**

**(A) The City must process all applications on a nondiscriminatory basis and may deny an application subject to this Chapter if the proposed small wireless facility or new, modified, or replaced pole:**

- (1) Fail to comply with AMC 13.02.060 Standards and Conditions.**
- (2) Materially and demonstrably interferes with sight lines or clear zones for transportation or pedestrians;**
- (3) Materially fails to comply with the Americans with Disabilities Act or similar federal, state, or local laws, standards and regulations regarding pedestrian access or movement;**
- (4) Fails to comply with FCC guidelines regarding Radio Frequency emissions;**
- (5) Fails to comply with applicable codes, standards and regulations, including the City's design standards; or**
- (6) Fails to comply with the provisions in this AMC 13.02.300 – 315.**

**(B) Unless the applicable shot clock period is tolled, extended by agreement or the processing of the application is delayed due to circumstances beyond the City's controls, the City will act on an application within the applicable shot clock and provide written notice to the applicant if the application is denied. The written notice shall state the reasons for denial, with reference to specific code provisions, ordinance, application instruction or otherwise publicly stated procedures on which the denial was based, and be sent to the applicant within five (5) days after the City denies the application or before the applicable shot clock expires, whichever occurs first.**

**(C) Batch Applications. The city may consider applications for multiple small wireless facilities according to common design elements and/or vicinity, as well as other measures to promote efficiency. Furthermore, such applications which includes deployment(s) that fall within co-locating on existing structures and deployment(s) on new structures shall be subject to a 90-day timeframe for approval as opposed to a 60-day timeframe.**

### **13.02.305 Small Wireless Facilities in the ROW; Maximum Height; Other Requirements**

- (A) Maximum Size of Permitted Use. Any wireless provider that seeks to install, modify, or replace facilities on a pole in the rights-of-way that exceeds the height limits contained in Section 13.02.010(2)(R), shall be subject to applicable requirements.**
- (B) Decorative Poles. Subject to this code and applicable design standards, a wireless provider is permitted to co-locate on or replace a decorative pole when necessary to co-locate a small wireless facility; provided that any such replacement pole shall, to the extent feasible, replicate the design of the pole being replaced.**
- (C) Historic District. Small wireless facilities or poles to support co-locating of small wireless facilities located in Historic Districts shall be designed to have a similar appearance, including coloring and design elements, if technically feasible, of other poles in the rights-of-way within 500 feet of the proposed installation. Any such design or concealment measures may not be considered part of the small wireless facility for purpose of the size restrictions in the definition of small wireless facility.**
- (D) Preferred or Disfavored Locations: As defined under AMC 18.2.1.020, preferred and disfavored locations for small cell wireless facilities are referenced as follows:
  - (1) Preferred Locations: Small cell wireless facilities are encouraged to be located within those Base Zones designated as Commercial, Employment, and Industrial.**
  - (2) Disfavored Locations: Small cell wireless facilities should discouraged from locations within those Base Zone designated as Residential and those areas within a 1500-foot radius of schools, medical facilities, or health facilities.****

### **13.02.307 Effect of Construction/Work Permit**

**(A) Permit Duration.**

**(1) A permit for construction granted pursuant to this Section shall be valid for a period of 180 days after issuance unless the City agrees to extend this period for good cause, including but not limited to delay caused by the lack of commercial power or**

communications facilities, or by other events outside of the reasonable control of the wireless provider.

(2) The installed facility is subject to applicable relocation requirements, modification, or termination for material non-compliance or change in law after notice and a reasonable opportunity to cure, and an applicant's right to terminate a permit at any time.

### 13.02.309 Removal, Relocation or Modification of Small Wireless Facility in the ROW

- A. Notice. Notice of removal of encroachment is subject to AMC 13.02.100.
- B. Removal or relocation of Facilities. If the City plans a project that would require utilities that includes small wireless facilities (together, the "parties") to remove or relocate their facilities that are located within the highway right of way, the city shall notify affected parties of the project in writing as soon as is practicable. The city will coordinate with the affected parties to discuss the project's scope, planning, design phase, costs, and schedule to minimize or eliminate costs to the public body and the parties. The city is not required to avoid or minimize costs to the parties in a way that materially affects performance of the project.
- C. Emergency Removal or Relocation of Facilities. The City retains the right and privilege to cut or move any small wireless facility located within the rights-of-way of the City in the event of an emergency, as the City may determine to be necessary, appropriate or useful in response to any imminent danger to public health, safety, or property. If circumstances permit, the City shall notify the wireless provider and provide the wireless provider an opportunity to move its own facilities prior to cutting or removing a facility and shall notify the wireless provider promptly after cutting or removing a small wireless facility.
- D. Damage and Repair. The City may require a wireless provider to repair all damage to the rights-of-way directly caused by the activities of the wireless provider and return the rights-of-way to its functional equivalence before the damage pursuant to the competitively neutral, reasonable requirements and specifications. If the wireless provider fails to make the repairs within days after written notice, the City may affect those repairs and charge the applicable party the actual, documented cost of such repairs.
- E. Abandonment of Facilities. Any small wireless facility that is no longer in use shall be removed by the Permittee within 30 days of deactivation.

### 13.02.311 Co-locating on City Structures in the ROW

(A) Co-locating on City Structures. Small wireless facilities may be co-located on city structures in the rights-of-way pursuant to this Chapter. No person will be permitted an exclusive arrangement or an arrangement which excludes otherwise qualified applicants to

attach to city structures in the rights-of-way. A person who purchases or otherwise acquires a City structure is subject to the requirements of this section.

(b) Make-Ready. The rates, fees, terms and conditions for the make-ready work to co-locate a small wireless facility on a pole owned or controlled by the City must be nondiscriminatory, competitively neutral, reasonable, comply with this Chapter and be subject to the following:

- (1) The City or any person owning, managing, or controlling the poles owned by the City will provide a good faith estimate for any make-ready work reasonably necessary to make a specific city pole suitable for attachment of the requested small wireless facility, including pole replacement if necessary, within 60 days after receipt of a completed request. Make-ready work including any pole replacement shall be completed within 60 days of written acceptance of the good faith estimate by the applicant.
- (2) The City or any person owning, managing, or controlling the poles owned by the city shall not require more make-ready work than required to meet applicable codes or may be reasonably necessary to avoid interference with other attachments on the pole . Fees for make-ready work shall not include costs related to pre-existing or prior damage and non-compliance. Fees for makeready work including any pole replacement shall not exceed actual and direct costs, or the amount charged to others for similar work and shall not include any revenue or Contingency based consultant fees or expenses of any kind.

#### 13.02.315 Rates for ROW and Co-locating on City Structures in the ROW

(A) The recurring rate for use of the ROW and attachment of small wireless facilities to a city structure in the ROW shall be subject to the following requirements:

- (1) *Annual Rate.* A wireless provider authorized to place small wireless facilities and any related pole in the rights-of-way will pay to the City compensation for use of the rights-of-way and co-locating on city structures in the ROW a rate that is based on (1) a reasonable approximation of costs, (2) those costs themselves are reasonable, and (3) are non-discriminatory. This rate, together with the one-time application fees, shall be the total compensation that the wireless provider is required to pay the city for the deployment of each small wireless facility in the ROW and any associated pole. The FCC's safe harbor rate is an aggregate annual rate not to exceed \$270 per small wireless facility. This fee is subject to change
- (2) *Payment Obligation Upon or After Facility Removal.* A wireless provider may remove one or more of its small wireless facilities at any time from the rights-of-way and city structures in the ROW with the required permits. The wireless provider will cease owing the City compensation, as of the date of removal, for such removed facilities.



Any person who violates any provision of this Chapter is subject to Section 1.08.020 of the Ashland Municipal Code. In addition to other legal and equitable remedies available to the City of Ashland:

A. Unless otherwise provided herein, violation of any section of this chapter AMC 13.02 is a Class II violation.

B. A knowing violation of 13.02.040 is punishable of not more than 30 days jail and/or \$500 fine. (Ord. 3137, amended, 2017)

The foregoing ordinance was first read by title only in accordance with Article X, Section 2(C) of the City Charter on the \_\_\_\_ day of September, 2023,

and duly PASSED and ADOPTED this \_\_\_\_ day of \_\_\_\_\_, 2023.

\_\_\_\_\_  
Dana Smith, Clerk of the Council *Pro Tem*

SIGNED and APPROVED this \_\_\_\_ day of \_\_\_\_\_, 2023.

\_\_\_\_\_  
Tonya Graham, Mayor

Reviewed as to form:

\_\_\_\_\_  
Douglas M McGeary, Acting City Attorney

**RESOLUTION NO. \_\_\_\_\_**

**A RESOLUTION TO ESTABLISH DESIGN STANDARDS AND APPLICATION REQUIREMENTS FOR AMC CHAPTER 13.02 SMALL WIRELESS FACILITIES IN THE RIGHTS-OF-WAY IN THE CITY OF ASHLAND**

WHEREAS, the City of Ashland has adopted Chapter 13.02.300 et sec establishing standards for small wireless facilities in the Rights-Of-Way to provide for the permitting process and mutual obligations of the city and the permittee for placement and operation of small wireless facilities; and

WHEREAS, the City recognizes that the City must further balance the benefits from small cell infrastructure with its aesthetic impact on the community in order to mitigate or avoid adverse visual impacts, encourage the deployment of infrastructure consistent with the surrounding built and natural environment, and preserve the City's historic and environmental resources to the extent feasible; and

WHEREAS, in order to maintain control of accumulative impacts of from various permittees utilizing the City's rights of way for placement and operation of their facilities, the city must adopt additional specific design guidelines periodically for Small Wireless Facilities to remain responsive to changing laws and technology; and

WHEREAS, such design controls are best established through resolution that allows for a more responsive process by which to make prompt and immediate changes to design specifications, restrictions and allowances on small wireless facilities given the likely advent of changes in laws and technology in this area of telecommunications.

THEREFORE, COMES NOW THE COUNCIL FOR THE CITY OF ASHLAND DOES RESOLVE AS FOLLOWS:

**Small Wireless Facility Design Standards and Application Requirements For City Rights-of-Way**

- A. **Definitions. Definitions for these design standards are those provided in AMC Chapter 13.02.300 Standards For Small Wireless Facilities In The Rights-Of-Way.**
- B. **General Requirements.**
  - a. **The applicant shall submit drawn-to-scale depictions of its proposed wireless support structure and all associated equipment to be mounted thereon, or to be installed as part of such facility, which shall clearly and concisely depict all equipment and the measurements of same, in order to determine whether the proposed facility qualifies as a small wireless facility as defined under AMC 13.02.010.**
    - i. **The drawn-to-scale depiction shall include complete calculations for the Antenna Facility that, when completed, the installation and equipment will meet the physical size limitations necessary to qualify as a small wireless facility.**

- b. Proposed installations will be compatible with the use and/or character of properties located adjacent to or in close proximity to the proposed site and avoid other properties situated in a manner that would cause the proposed installation to be incompatible with their respective use.
- c. The applicant shall apply mitigation measures to minimize the potential negative effects of the proposed facility to the greatest extent reasonably feasible. In determining the foregoing, the fact that a Preferred or a Disfavored Location, a less intrusive site, location, or design would lead to additional expenses for the applicant, by itself, will not be considered a reasonable mitigation effort.
- d. Small Cell Wireless Facilities shall be located, designed, constructed, treated, and maintained in accordance with AMC 18.4.10.040 Design Standards to the extent that they do not conflict or cannot be read in consistent with provisions of those standards provided herein.
- e. The applicant must conduct a thorough alternative site analysis of all potential sites that consider Preferred or Disfavored Locations, are less intrusive, and include the locations, elevations, and assessment of their suitability or unsuitability for addressing the specific wireless coverage needs that the applicant intends to address through the new facility installation.
  - i. In cases where an applicant asserts that a specific alternative location is not an option for a wireless facility due restrictions presented by the City's ordinances or as presented herein, the applicant must present substantive evidence of such unavailability. This evidence can take the form of communications or any other type of proof that sufficiently verifies the claim.
- f. Small cell wireless facilities shall maintain a minimum set-back distance from other uses to ensure against Illegally Excessive RF Radiation or Illegally Excessive Radiation, while maximizing the separation between the facility and other structures or areas of activity.
  - i. The applicant shall demonstrate that it has considered and calculated for a 1500' (one thousand five hundred foot) set-back distance for a proposed facility installation within Disfavored Locations before seeking a different setback distance under these rules.
  - ii. The set-back distance shall be calculated in a manner that accounts for the cumulative effects of multiple small cell wireless facilities within a given area, ensuring that the combined electromagnetic radiation levels remain within legally permissible limits.
  - iii. A licensed engineer must prepare and certify an FCC compliance report for the proposed facility's installation, confirming that it will not exceed the FCC's permissible radiation limits for the general public. If multiple carriers/users install transmitters, the report must consider the anticipated exposure from all users and indicate whether the combined exposure levels exceed the General Population Exposure Limits or the applicable Occupational Exposure Limits. The report must provide the calculation(s) used to determine the levels of RF radiation and/or emissions that the facility will expose the general public to.
    - 1. The report cover must specify whether the FCC compliance claims rely on the General Population Exposure Limits or the Occupational

Exposure Limits. If the Occupational Exposure Limits apply, the report must provide a factual basis for the claim. Additionally, the minimum distance factor, which is the closest distance a member of the public can access the transmitting antennas, measured in feet, must be included.

- iv. The set-back distance requirement shall be enforced by the appropriate regulatory authority, and compliance shall be verified through site inspections and electromagnetic radiation measurements conducted by authorized personnel.
- g. Should an applicant file an application under this Chapter and claim that: (a) they experience a significant gap in personal wireless services within the City, (b) their proposed installation is the least intrusive way to address the service gap, and/or (c) a denial of the application would constitute an "effective prohibition" under Section 47 U.S.C. §332 of the TCA, they must provide a written statement certified by a telecommunications engineering or radio frequency (RF) engineer possessing the necessary qualifications and expertise, along with the application entitled: "Notice of Effective Prohibition Conditions".
  - i. If a Notice of Effective Prohibition Conditions is issued, the applicant must provide substantive evidence to determine: (a) if the alleged conditions exist, (b) whether there is a significant gap(s) in a specific wireless carrier's personal wireless services within the City, (c) the geographic locations of any identified gaps, and (d) the geographic boundaries of the gaps. The purpose of this evidence is to assess compliance with AMC 13.02 and whether federal law requires granting the application, even if it would otherwise violate AMC 13.02, including the design standards stated in the ordinance.
  - ii. If an applicant claims a significant gap in its personal wireless services within the city, they must conduct or arrange for a drive test to be conducted in the specific geographic areas relevant to each frequency at which they provide such services. The applicant shall submit the actual drive test data obtained during the test in a simple format. The format should contain a separate table for each frequency at which the carrier provides personal wireless services to its end-use customers. The tables shall include:
    - 1. the date and time for the test or test,
    - 2. the location, in longitude and latitude of each point at which signal strength was recorded and
    - 3. each signal strength recorded, measured in DBM, for each frequency.
    - 4. the applicant shall submit drive test maps, depicting the actual signal strengths recorded during the actual drive test, for each frequency at which the carrier provides personal wireless services to its end-use customers.
      - a. If an applicant claims that it needs a "minimum" signal strength (measured in DBM) to remedy its gap or gaps in service, then for each frequency, the applicant shall provide three (3) signal strength coverage maps reflecting actual signal strengths in three (3) DBM bins, the first being at the alleged minimum signal strength, and two (2) additional



three (3) DBM bin maps depicting signal strengths immediately below the alleged minimum signal strength claimed to be required.

- h. To the extent that an applicant claims it is unable to provide sufficient coverage for its personal wireless services within the city due to a capacity deficiency or service gap, it must submit dropped call and denial of service records. These records shall show the number and percentage of instances in which the carrier's customers were unable to use their personal wireless services without experiencing an actual loss or interruption of service during call initiation, maintenance, and conclusion.
- i. Ground-mounted equipment in the right-of-way is discouraged, unless the applicant can demonstrate that pole-mounted equipment is not technically feasible, or the electric utility requires placement of equipment on the ground (such as an electric meter). If ground mounted equipment is necessary, then the applicant shall conceal the equipment in a cabinet, in street furniture or with landscaping.
- j. Replacement poles, new poles and all antenna equipment shall comply with the Americans with Disabilities Act ("ADA"), city construction and sidewalk clearance standards and city, state and federal laws and regulations in order to provide a clear and safe passage within, through and across the right-of-way. Further, the location of any replacement pole, new pole, and/or antenna equipment must comply with applicable traffic requirements, not interfere with utility or safety fixtures (e.g., fire hydrants, traffic control devices).
- k. Replacement poles shall be located as near as feasible to the existing pole. The abandoned pole must be removed within ten business days.
- l. Any replacement pole shall substantially conform to the material and design of the existing pole or adjacent poles located within the contiguous right-of-way unless a different design is requested and approved pursuant to Section H.
- m. No advertising, branding or other signage is allowed unless lawfully permitted and approved by the Public Works Director as a concealment technique or as follows:
  - i. Safety signage as required by applicable laws, regulations, and standards; and,
  - ii. Identifying information and 24-hour emergency telephone number (such as the telephone number for the operator's network operations center) on wireless equipment in an area that is visible.
- n. The total volume of multiple antennas on one structure shall not exceed fifteen (15) cubic feet, unless additional antenna volume is requested and approved pursuant to Section H.
- o. Antennas and antenna equipment shall not be illuminated except as required by municipal, federal or state authority, provided this shall not preclude deployment on a new or replacement streetlight.
- p. Small wireless facilities may not displace any existing street tree or landscape features unless in compliance with the Ashland Municipal Code and Land Use Code, and at minimum: (a) such displaced street tree or landscaping is replaced with native and/or drought-resistant trees, plants or other landscape features approved by the City, and (b) the applicant submits and adheres to a landscape maintenance plan or agrees to pay an appropriate in-lieu fee for the maintenance costs.

- C. Small Wireless Facilities Attached to Wooden Poles and Non-Wooden Poles with Overhead Lines. Small wireless facilities located on wooden utility poles and non-wooden utility poles with overhead lines shall conform to the following design criteria unless a deviation is requested and approved pursuant to Section H:
- a. Proposed antenna and related equipment shall meet:
    - i. The City's design standards for small wireless facilities.
    - ii. The pole owner requirements; and
    - iii. National Electric Safety Code ("NESC") and National Electric Code ("NEC") standards.
  - b. The pole at the proposed location may be replaced with a taller pole or extended for the purpose of accommodating a small wireless facility; provided that the replacement or extended pole, together with any small wireless facility, does not exceed 50 feet in height or 10 percent taller than adjacent poles, whichever is greater. The replacement or extended pole height may be increased if required by the pole owner, and such height increase is the minimum necessary to provide sufficient separation and/or clearance from electrical and wireline facilities. Such replacement poles may either match the approximate color and materials of the replaced pole or shall be the standard new pole used by the pole owner in the city.
  - c. To the extent technically feasible, antennas, equipment enclosures, and all ancillary equipment, boxes, and conduit shall match the approximate material and design of the surface of the pole or existing equipment on which they are attached, or adjacent poles located within the contiguous right-of-way. Near matches may be permitted by the City when options are limited by technical feasibility considerations, such as when high-frequency antennas cannot be placed within an opaque shroud but could be wrapped with a tinted film.
  - d. Antennas which are mounted on poles shall be mounted as close to the pole as technically feasible and allowed by the pole owner.
  - e. No antenna shall extend horizontally more than 20 inches past the outermost mounting point (where the mounting hardware connects to the antenna), unless additional antenna space is requested and approved pursuant to Section H.
  - f. Antenna equipment, including but not limited to radios, cables, associated shrouding, disconnect boxes, meters, microwaves and conduit, which is mounted on poles shall be mounted as close to the pole as technically feasible and allowed by the pole owner.
  - g. Antenna equipment for small wireless facilities must be attached to the pole, unless otherwise required by the pole owner or permitted to be ground-mounted pursuant to subsection (B)(a) above. The equipment must be placed in an enclosure reasonably related in size to the intended purpose of the facility.
  - h. All cables and wiring shall be covered by conduits and cabinets to the extent that it is technically feasible, if allowed by pole owner. The number of conduits shall be minimized to the extent technically feasible.
- D. Small Wireless Facilities Attached to Non-Wooden Light Poles and Non-Wooden Utility Poles without Overhead Utility Lines. Small wireless facilities attached to existing or replacement non-wooden light poles and non-wooden utility poles without overhead lines shall conform to the following design criteria unless a deviation is requested and approved pursuant to Section H:

- a. External Equipment. The antennas and associated equipment enclosures must be camouflaged to appear as an integral part of the pole or be mounted as close to the pole as feasible and must be reasonably related in size to the intended purpose of the facility and reasonable expansion for future frequencies and/or technologies, not to exceed the volumetric requirements described in Section A. If the equipment enclosure(s) is mounted on the exterior of the pole, the applicant is encouraged to place the equipment enclosure(s) behind any decorations, banners or signs that may be on the pole. Conduit and fiber must be fully concealed within the pole.
  - b. Concealed Equipment. All equipment (excluding disconnect switches), conduit and fiber must be fully concealed within the pole. The antennas must be camouflaged to appear as an integral part of the pole or be mounted as close to the pole as feasible.
  - c. Replacement Poles. Any replacement pole shall substantially conform to the material and design of the existing pole or adjacent poles located within the contiguous right-of-way unless a different design is requested and approved pursuant to Section H.
  - d. Pole Height. The height of any replacement pole may not extend more than 10 feet above the height of the existing pole unless such further height increase is required in writing by the pole owner.
- E. New Poles. Small wireless facilities may be attached to new poles that are not replacement poles under sections C or D, installed by the wireless provider, subject to the following criteria:
- a. Antennas, antenna equipment and associated equipment enclosures (excluding disconnect switches), conduit and fiber shall be fully concealed within the structure. If such concealment is not technically feasible, or is incompatible with the pole design, then the antennas and associated equipment enclosures must be camouflaged to appear as an integral part of the structure or mounted as close to the pole as feasible and must be reasonably related in size to the intended purpose of the facility, not to exceed the volumetric requirements in Section (A)(3).
  - b. To the extent technically feasible, all new poles and pole-mounted antennas and equipment shall substantially conform to the material and design of adjacent poles located within the contiguous right-of-way unless a different design is requested and approved pursuant to Section H.
  - c. New poles shall be no more than forty (40) feet in height unless additional height is requested and approved pursuant to Section H.
  - d. Wireless providers shall install small wireless facilities on existing or replacement poles instead of installing new poles, unless the wireless provider can document that installation on an existing or replacement pole is not technically feasible or otherwise not possible (due to a lack of owner authorization, safety considerations, or other reasons acceptable to the Public Works Director).
- F. Historic District Requirements.
- a. Small wireless facilities or poles to support co-locating small wireless facilities located in Historic Districts shall be designed to remain compatible with the existing integrity of the Historic District and shall have a similar appearance, including material and design elements, if technically feasible, of other poles in the rights-of-way within 500 feet of the proposed installation. Any such design or concealment measures may not be considered part of the small wireless facility for purpose of the size restrictions in the definition of small wireless facility.

- G. Strand Mounted Equipment. Strand mounted small wireless facilities are permitted, subject to the following criteria:**
- a. **Each strand mounted antenna shall not exceed 3 cubic feet in volume, unless a deviation is requested and approved pursuant to Section H.**
  - b. **Only 2 strand mounted antennas are permitted between any two existing poles.**
  - c. **Strand mounted devices shall be placed as close as possible to the nearest pole and in no event more than five feet from the pole unless a greater distance is required by the pole owner.**
  - d. **No strand mounted device will be located in or above the portion of the roadway open to vehicular traffic.**
  - e. **Strand mounted devices must be installed with the minimum excess exterior cabling or wires (other than original strand) to meet the technological needs of the facility.**
- H. Deviation from Design Standards.**
- a. **An applicant may obtain a deviation from these design standards if compliance with the standard: (a) is not technically feasible; (b) impedes the effective operation of the small wireless facility; (c) impairs a desired network performance objective; (d) conflicts with pole owner requirements; or (e) otherwise materially inhibits or limits the provision of wireless service.**
  - b. **When requests for deviation are sought under subsections (I)(1)(a)-(e), the request must be narrowly tailored to minimize deviation from the requirements of these design standards, and the Public Works Director must find the applicant's proposed design provides similar aesthetic value when compared to strict compliance with these standards.**
  - c. **Public Works Director may also allow for a deviation from these standards when it finds the applicant's proposed design provides equivalent or superior aesthetic value when compared to strict compliance with these standards.**
  - d. **The small wireless facility design approved under this Section H must meet the conditions of 47 C.F.R. Sec. 1.6002(l).**
  - e. **Public Works Director will review and may approve a request for deviation to the minimum extent required to address the applicant's needs or facilitate a superior design.**
- I. Applications Standards: As is applicable to Action on Administrative Permit Applications On Wireless Facilities under AMC 13.02.303:**
- a. **The city shall have in the case of co-location, 10 days, and in the case of new installations 90 days, from the receipt of the application to mail the applicant a Notice of Incompleteness by first class mail, and that recites a short and plain statement of the relevant defects from the above list giving cause to deny the application.**
- J. Appeals Rules. As is applicable to Appeals under AMC 3.02.200:**
- a. **If an application is being reviewed under AMC 13.02.300 to 13.02.315, however, the Hearing Officer may reject the application for a special use permit, provided that the Hearing Officer makes an additional determination supported by substantial evidence that the denial of the application would not result in an Effective Prohibition of personal wireless services.**
  - b. **If an applicant asserts an Effective Prohibition claim that: (a) its proposed wireless facility or installation is necessary to remedy a significant gap in personal wireless services for an explicitly identified wireless carrier, and (b) that its proposed installation is the least intrusive means of remedying a specifically identified**

significant gap or gaps, the Hearing Officer shall shall make the following factual determinations for ensuring TCA compliance:

- c. Adequate Personal Wireless Services Coverage. Whether the specific wireless carrier has adequate personal wireless services coverage within the geographic areas for which the applicant claims a significant gap exists in such coverage.
  - i. Significant Gap in Personal Wireless Services of an Identified Carrier. Whether the applicant has established, based upon substantive evidence, that a specific wireless carrier experiences a significant gap in its personal wireless services within the City.
    1. Factors for consideration are, but not limited to, (a) whether the identified wireless carrier that claims of a significant gap in its personal wireless services has adequate service in its personal wireless services at any frequency being used by the carrier to provide personal wireless services to its end-use customers, (b) whether any such alleged gap is relatively large or small in geographic size, (c) whether the number of the carrier's customers affected by the gap is relatively small or large, (d) whether or not the location of the gap is situated on a lightly traveled road, or sparsely or densely occupied area, and/or (d) overall, whether the gap is relatively insignificant or otherwise relatively de minimis. A significant gap in service is not established solely because the carrier's customers are not using the carrier's most desired frequency.
- d. Least Intrusive Means of Remedying Gap(s) in Service. The applicant must prove with substantive evidence that their proposed small wireless facility, at a specific site and/or portion of the site, and the height of the facility, is the least intrusive solution to address any significant gaps. The Hearing Officer will consider all supporting and opposing evidence to determine the existence of such gaps.
  - i. Factors for consideration are, but not limited to, (a) whether the proposed site is the least intrusive location at which a facility to remedy an identified significant gap may be located, and the applicant has reasonably established a lack of potential alternative less intrusive sites and lack of sites available for co-locating, (b) whether the specific location on the proposed portion of the selected site is a Preferred or Disfavored Location, (c) whether the specific location on the proposed portion of the selected site is the least intrusive portion of the site for the proposed installation (d) whether the height proposed for the facility is the minimum height actually necessary to remedy an established significant gap in service, (e) whether or not a pre-existing structure can be used to camouflage the facility and/or its antennas, (f) whether or not, as proposed, the installation mitigates adverse impacts to the greatest extent reasonably feasible, through the employ of stealth design, screening, use of color, noise mitigation measures, etc., and/or (g) overall whether or not there is a feasible alternative to remedy the gap through alternative, less intrusive substitute installations, such as the installation of multiple shorter installation, instead of a single small wireless facility.
- e. If, upon applying the evidentiary standards mentioned in AMC 13.02.200b, the Hearing Officer concludes that:
  - i. the applicant has not proven sufficient personal wireless coverage or the least intrusive solution to address any gaps, the application may be rejected. However, such denial will not be considered an "Effective Prohibition."

- ii. the applicant has proven both the existence of a significant gap in personal wireless services and that their proposed installation is the least intrusive means to address the gap(s), the application will be granted, irrespective of any findings under AMC 13.02.200b, to prevent an Effective Prohibition of personal wireless services.
- K. If a requirement of any section of this Design Standard is determined to be invalid, illegal, or unenforceable, it shall not affect the enforceability of any other provision contained herein. Rather, the invalid, illegal, or unenforceable provision shall be modified to the extent necessary so that it is valid, legal, and enforceable.

COMMENTARY

Application of the Rules

These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event LOC model rules apply.

Historical Notes

Conflicts over local regulations on small cell facilities and older technologies have led to numerous lawsuits. A significant lawsuit in Portland determined FCC regulation interpretations for small cell technology. The League of Oregon Cities (LOC) negotiated compromises and developed a model ordinance and resolution for small cell infrastructure within the ROW. The City attorney's office used the LOC's framework to create their own ordinance. The Council, however, has expressed a preference for an ordinance that imposes stricter limitations on an applicant's network configuration.

The City attorney has returned with an updated ROW ordinance that incorporates modifications, including definitions and standards for more stringent restrictions. It also features a comprehensive severability clause to address potential challenges arising from the stricter regulations, in which case any decision can utilize the LOC Model Rules as a safe harbor.

ORDINANCE MODIFICATIONS FROM LOC MODEL ORDINANCE:

AMC 13.02.010- Definitions

COMMENT

|  |   |
|--|---|
| <u>(J) "DBM" or "dBm"</u>  |   |
| <u>(L) "Effective Prohibition"</u>   | <u>This standard is developed from Federal 9th Circuit case law. Modified by FCC Order (Para. 37) This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities...an effective prohibition includes materially inhibiting additional services or improving existing services.</u> |
| <u>(M) "Gap" or "Service Gap"</u>  |   |
| <u>(O) "Illegally Excessive RF Radiation or Illegally Excessive Radiation"</u> |   |
| <u>(P) "Macrocell"</u>   |   |

|   |   |
|---|---|
| <u>(Q) “Mitigation” Or “Mitigate”</u>                   |   |
| <u>(R) “Necessary” or “Necessity” Or “Need”</u>         | <u>Standard that refines or removes ambiguity of essential terms.</u>   |
| <u>(S) “Notice Of Effective Prohibition Conditions”</u> | <u>References processes set forth in resolution.</u>  |
| <u>(T) “Occupational/ Controlled Exposure Limits”</u>   |   |
| <u>(X) “RF Radiation”</u>                               |   |
| <u>(aa) “Setback”</u>                                   | <u>In addition to ensuring RF radiation exposure levels are below the established safety guidelines established by the FCC, set back requirements are intended to ensure that small cell facilities do not obstruct traffic visibility or pose hazards. As for residential areas and for public facilities like schools, libraries, parks, or hospitals, set back distances are also intended to address aesthetic concerns and preserve the character of these areas and public spaces. The city establishes a 1,500’ setback standard that an the applicant can prove a lesser distance is necessary. See Resolution B.f.i.</u> |
| <u>(bb) “Shot Clock”</u>                                |   |
| <u>(ee) “TCA”</u>                                       |   |
| <u>(ff) “Tolling” or “Tolled”</u>                       |   |

AMC 13.02.050(B)(2) (Second sentence) Application and Fee Required. Although FCC set maximum fees that the City can charge, such rates are what a local government can charge without justification (a “safe harbor” amount.) This additional language sought by citizens and Council ensures the city’s reimbursement of its actual costs should the expense of application processing or verification of the applicant’s submissions become necessary.

AMC 13.02.050(C) (Second Sentence) Review of Application. This section provides review by other city departments and affected agencies. It also provides community notice, and under administrative rules of the city, the public may intervene and appeal the Public Works Director's decision. See AMC 13.02.200 Appeals.

AMC 13.02.060 Standards and Conditions. Design standards are specifically called out as more fully addressed in the Resolution. Similarly, references to small cell facilities is called out *infra* at AMC 13.02.060(B)(2).

AMC 13.02.070 Permit Issuance. Given this ordinance applies to the applicant's compliance with the criteria as it relates to the city's ROW, this appeal section applies primarily to the applicant. Third parties would not get notice much like they would not get notice of a power or cable company installing a power pole.

AMC 13.02.200 Appeals. Given this ordinance applies to the applicant's compliance with the criteria as it relates to the city's ROW, this appeal section applies primarily to the applicant. However, as provided under AMC 13.02.050, the process at least provides community notice, and under administrative rules of the city, the public may intervene and appeal the Public Works Director's decision. See AMC 13.02.200 Appeals.

AMC 13.02.300(B) Severance. This severance provision adds an ability for the city to modify interpretation of its ordinance consistent with the intent of the ordinance in a manner to allow greater flexibility or to avoid violation or preemption of state or federal law. Upon a decision to sever, the rules revert to the LOC model rules otherwise incorporated in Chapter 13.02 for safe harbor.

AMC 13.02.303(A)(4) Action on Administrative Permit Applications On Wireless Facilities. This provision is redundant as simply articulating what is already given under law but added for reemphasizing intent of the ordinance.

AMC 13.02.305(D) Preferred or Disfavored Locations. The city adds preferred and disfavored locations as goals for the applicant to meet but are not mandated in violation of FCC rules. As a policy, it recognizes and accounts for the varying sensitivities of populations in different zones— residential, commercial, and industrial. Concurrently, this provision establishes intent and policy that may be used to support findings and conclusions in a city's final decision.

13.02.307(A) Effect of Construction/Work Permit. Permit Duration. 180 days was added as FCC requirement for complying with shot clock minimums.

#### **RESOLUTION MODIFICATIONS FROM LOC MODEL RESOLUTION:**

In order to focus on imposing stricter regulations, the model resolution for Small Cell Wireless Facility Design Standards was developed with specific application requirements aimed at the applicant's network configuration application. The Resolution outlines the specific process for an applicant or opponent to provide substantive evidence to support or challenge the material claims, arguments, or legal theories presented by the parties involved in a case. Substantive evidence is weighted according to its relevance, reliability, that is understandable, and balanced. It may include witness testimony, documents, expert opinions, scientific research, or any other form of evidence that is directly relevant to the key facts or legal elements of the case.

§B. General Requirements (a) – (d) The design standards aim to enforce what the applicant's own engineering would outline to effectively plan a network configuration that is both feasible and purposeful. By doing so, the city eliminates the possibility for the applicant to claim that excessive detail is being requested. Consequently, the city incorporates its policy to control the size, mitigate adverse effects, and prioritize aesthetic considerations to the extent that they can be objectively measured, such as ensuring alignment with the character of neighboring properties and minimizing conflicts with other city land use design standards.

§B. General Requirements (e) The applicant is also required to conduct alternative site analysis according to the affirmative need for locating a facility rather than relying upon the applicant's ideal or favored alternative or its least cost alternative. The burden is placed on the applicant to demonstrate how alternatives are not feasible.

§B. General Requirements (f) The setbacks for the small cell wireless facility outlined in the resolution are not intended to bypass FCC regulations but rather to reinforce the FCC regulations that the applicant must comply with as per their requirements. Section B(f) places the responsibility on the applicant to ensure compliance, with the assistance of a licensed engineer who will report on the public's exposure to RF emissions.

§B. General Requirements (g) and (h) The resolution addresses any claims of gaps in personal wireless service by confining the arguments within the scope of what constitutes an "effective



prohibition" of service, leading to the denial of an application. This section serves both to aid the city's analysis and guide the resolution of the disputed issue. Once again, it is the responsibility of the applicant to present substantive evidence to the city's hearings officer, demonstrating how the city's decision violates federal law based on the various FCC rules, criteria, and interpretations established by the courts.

§I Application Standards. The remaining modifications to the MR are found in sections I through J, which outline the appeal process for the parties involved in case the applicant contests the city's regulations or decisions. Section I provides the city with time-period minimums to give the applicant notice that the applicant's application is incomplete thereby stopping the clock under FCC rules for the city to act on the application.

§J Appeal Rules. The appeal process for telecommunication rules is constrained by FCC regulations. Consequently, the Resolution introduces additional rules within the ROW ordinance that specifically pertain to Small Cell Wireless Facility, unlike other telecommunications, utilities, and industries that are not subject to such rules. These modifications place the responsibility on the applicant to demonstrate how the city's regulations impose an actual or effective prohibition on their ability to provide personal wireless services, significantly limiting or hindering their competitiveness with other wireless providers.

Furthermore, this section outlines the specific type of evidence that the city acknowledges for the applicant to substantiate gaps in their service. This evidence supports any claims they may have that challenge the city's requirement for them to demonstrate the least intrusive means of addressing those service gaps.

§K Severance. As a final safeguard, the requirement for the applicant to challenge a city's rule before filing a complaint with the FCC serves as an opportunity for the city to reevaluate its rule. The inclusion of a severance clause in the resolution further enhances this fail-safe measure. This version of a severance clause permits the interpretation of a contested provision in a way that renders it enforceable, whenever possible. In cases where such interpretation is not feasible, the hearings officer has the authority to separate the city's rule, revert to the model rule, and potentially prevent the applicant's dispute from escalating into litigation.

## CONCLUSION

By incorporating FCC rules for technical compliance and imposing stringent requirements on applicants to substantiate that the city's rules align with federal law, the proposed ordinance and resolution aim to minimize the potential conflict with telecommunication service providers, allowing the city to exercise its discretion in promoting its chosen priorities effectively.

Utilizing LOC (League of Oregon Cities) model rules for Small Cell Wireless Facility, the city has a reliable resource for regular updates to its ordinance and resolution. These model rules offer a cautious approach aimed at minimizing the risk of litigation while safeguarding the community's health and well-being and promoting the availability of broadband services.

In developing this ordinance and resolution, this office has considered publicly available ordinances that impose additional limitations on the deployment of small cell wireless facilities. Public feedback and other relevant materials have also been carefully evaluated to determine their relevance and feasibility within the current legal framework at the federal, state, and local levels. This ordinance and resolution represent the culmination of the LOC model rules and these more

**restrictive regulations, and it is believed that they provide a responsible level of protection within practical limits for local Small Cell Wireless Facility rules.**



*Via email to Douglas McGeary, Assistant City Attorney and Joseph Lessard, City Manager.*

**Re: Ashland OR Small Wireless Facilities Code Update**

Mrsrs. McGeary and Lessard:

On behalf of Verizon Wireless, AT&T, and T-Mobile, we are writing to express our request to participate as stakeholders in the process for adopting the Ordinance Amending AMC Chapter 13.02 Public Rights-Of-Way And Establishing Standards For Small Wireless Facilities In The Rights-Of-Way and Design Standards, currently scheduled to go before the Council for first reading later this month. An industry representative inadvertently found an online mention of the proposed code change and design standards a week ago and obtained copies of the draft language. As providers of wireless service in your city, we have a vested interest as stakeholders and respectfully request the opportunity to provide detailed comments on the code that will regulate small wireless facility builds so that Ashland's expanding service needs can be met going forward.

Federal law applicable to small wireless facilities ("**SWFs**") has been rapidly evolving in the last several years. In 2018, the Federal Communications Commission ("**FCC**") issued an Order regulating SWFs in public rights-of-way.<sup>1</sup> Many of Ashland's proposed code provisions conflict with the FCC's 2018 Order and may subject the city to legal risk should they be adopted. While we have not had sufficient time for a thorough review, the following issues are of significant concern to Verizon, AT&T, and T-Mobile:

1. Excessively large setbacks (more than the total length of four football fields) that address an intention to impermissibly regulate wireless facility location based on fear of health concerns;
2. Establishing unduly burdensome application requirements, such as alternative site analyses that includes **all** potential alternative sites, which require outsized and overly detailed review relative to the actual visual impacts of the SWFs;
3. Use of the "significant gap" test, when this test is explicitly rejected by the FCC's 2018 Small Cell Order<sup>2</sup> to establish an effective prohibition of service under the federal Telecommunications Act;

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<sup>1</sup> *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Report and Order, 33 FCC Rcd 9088, FCC 18-133 (2018), *affirmed in part and vacated in part*, *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied*, 594 U.S. \_\_\_, 141 S.Ct. 2855 (June 28, 2021)(No. 20-1354) ("*Small Cell Order*").

<sup>2</sup> *Id.* at ¶40.



4. Explicitly contradicting the FCC by disallowing unfavorable economic factors in eliminating alternative site candidates;
5. Requiring commercially unavailable "pollution insurance" for passive, unmanned facilities that do not emit any recognized polluting substances;
6. Requiring submittal of irrelevant drive test data which does not address the lack of network capacity that SWFs are designed to alleviate; and
7. Imposing technically infeasible design guidelines on size and placement of carrier equipment.

As we have just learned of the progress of the City's proposed Ordinance, we have not had adequate opportunity to review the draft language and provide detailed redlines to the City outlining and explaining the concerns we have regarding feasibility, compliance with federal law, and the policy outcomes of adopting such an unnecessarily restrictive code. We ask that the Council continue the September first reading date to allow an additional 30 days to provide meaningful input.

In other Oregon jurisdictions, we have been active participants in the code process with opportunities for written comment, stakeholder discussions with staff, and the chance to propose alternative language for troubling code sections that can achieve the City's goals while providing a workable path forward. The undersigned, on behalf of our companies, would request the same opportunity in the City of Ashland.

Sincerely,

A handwritten signature in black ink, appearing to read "Kim Allen".

Kim Allen, Wireless Policy Group  
Representative for Verizon Wireless

A handwritten signature in black ink, appearing to read "Gregory Busch".

Greggory Busch, Busch Law Firm  
Attorney representing AT&T

A handwritten signature in black ink, appearing to read "Areej Rajput".

Areej Rajput  
Corporate Counsel for T-Mobile