

ORDINANCE NO. 1285

AN ORDINANCE AMENDING APPENDIX C (LAND USE AND ZONING CODE OF 2010), ARTICLE III (DISTRICT REGULATIONS), BY ADDING A NEW SECTION 3.3.1 K) ENTITLED “SMALL CELL WIRELESS COMMUNICATION FACILITIES”, INCORPORATED HEREIN BY REFERENCE AS ‘APPENDIX 1’”; PROVIDING DEFINITIONS; PROVIDING FOR PERMITS; AND PROVIDING FOR SEVERABILITY.

Sponsored by Councilor Lynda D. Aiman-Smith

WHEREAS, the Town of Silver City (“Town”) desires to encourage wireless infrastructure investment by providing a fair and predictable process for the deployment of small wireless facilities, while enabling the Town to promote the management of the rights-of-way in the overall interests of the public health, safety, and welfare, while also protecting the established community character of the Town; and

WHEREAS, the Town recognizes that small wireless facilities are critical to delivering wireless access to advanced technology, broadband and 9-1-1 services to homes, businesses and schools within the Town; and

WHEREAS, federal laws and regulations, wireless technology and consumer usage have reshaped the environment within which wireless communication facilities are permitted and regulated; and

WHEREAS, the Town acknowledges that small wireless facilities, including facilities commonly referred to as small cells, often may be deployed most effectively in the public rights-of-way; and

WHEREAS, the Federal Communication Commission (“FCC”) issued a Declaratory Ruling and Third Report and Order (FCC 18-133) (“Declaratory Ruling”), which makes it easier for wireless carriers to prevail over local government in court; and

WHEREAS, the Declaratory Ruling strengthens the position of wireless carriers that negotiate with local governments by limiting local authority over ancillary issues such as tower spacing, equipment design, and reducing the time limits local governments have to evaluate applications for placement of small cell wireless facilities in public rights-of-way; and

WHEREAS, the Town intends to fully comply with state and federal law while protecting the public’s interest in negotiating with wireless carriers, by amending Appendix C, Article III, Section 3.3.1 to be consistent with the Declaratory Ruling, by inserting a new Paragraph K).

NOW, THEREFORE, BE IT ORDAINED by the Town of Silver City Town Council, Silver City, New Mexico that Appendix C, Article III, Section 3.3.1, shall be amended by inserting a new Paragraph K) (and re-denominating the remaining lettered paragraphs as L)

through DD)), entitled “Small Cell Wireless Communication Facilities”, and incorporated herein by reference as “Appendix 1”, as follows:

APPENDIX 1 -- SMALL CELL WIRELESS COMMUNICATION FACILITIES

Sec. 1 Purpose.

- (a) To establish policies and procedures for the placement of small wireless facilities in rights-of-way within the Town, which will provide public benefit consistent with the preservation of the integrity, safe usage, community character, and visual qualities of the Town rights-of-way and the Town as a whole;
- (b) To prevent interference with the use of streets, sidewalks, alleys, parkways and other public ways and places;
- (c) To prevent the creation of visual and physical obstructions and other conditions that are hazardous to vehicular and pedestrian traffic;
- (d) To prevent interference with the facilities and operations of facilities lawfully located in rights-of-way;
- (e) To preserve the character of the neighborhoods in which facilities are installed;
- (f) To facilitate rapid deployment of small wireless facilities to provide the benefits of advanced wireless services;
- (g) To ensure Town zoning regulations are applied consistently with federal and state telecommunications laws, rules and regulations of the Federal Communications Commission (“FCC”) and controlling court decisions; and
- (h) To provide regulations which are specifically not intended to, and shall not be interpreted or applied to, (1) prohibit or effectively prohibit the provision of personal wireless services, (2) unreasonably discriminate among functionally equivalent service providers, or (3) regulate wireless communication facilities and wireless transmission equipment on the basis of the environmental effects of radio frequency emissions to the extent that such emissions comply with the standards established by the FCC.

Sec. 2 Definitions. As used in this Ordinance, the following terms shall have the meanings set forth below:

- (a) “Antenna” means communications equipment that transmits or receives electromagnetic radio frequency signals and that is used to provide wireless services.
- (b) “Antenna array” means a single or group of antenna elements, not including small wireless facilities, and associated mounting hardware, transmission lines, remote radio units, or other appurtenances which share a common attachment device such as a mounting frame or

mounting support structure for the sole purpose of transmitting or receiving wireless communication signals.

(c) “Applicable codes” means uniform building, fire, electrical, plumbing or mechanical codes adopted by a recognized national code organization and enacted by the Town, including the local amendments to those codes enacted by the Town solely to address imminent threats of destruction of property or injury to persons, to the extent that those amendments are consistent with the Wireless Consumer Advanced Infrastructure Investment Act (“Act”).

(d) “Applicant” means a wireless provider that submits an application.

(e) “Application” means a request submitted by an applicant to the Town for a permit to collocate one or more small wireless facilities or to approve the installation, modification or replacement of a utility pole or wireless support structure.

(f) “Collocate” or “collocation” means to install, mount, maintain, modify, operate or replace one or more wireless facilities on, in or adjacent to a building, wireless support structure or utility pole for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.

(g) “Design district” means an area zoned or otherwise designated by municipal ordinance and for which a municipality maintains and uniformly enforces unique design and aesthetic standards, including, but not limited to open spaces, parks, trails, and the areas designated as the Historic Overlay Zoning District as specified in Article IV, Section 4 of the Town’s Land Use Code, and areas designated as the Arts and Cultural District by municipal ordinance.

(h) “Distributed Antenna System” or “DAS” means a network consisting of equipment at a central hub site to support multiple antenna locations throughout the desired coverage area.

(i) “FAA” means the Federal Aviation Administration.

(j) “FCC” means the Federal Communications Commission.

(k) “Fee” means a one-time charge.

(l) “Historic district” means a group of buildings, properties or sites that fall within the category defined in 47 C.F.R. 1.1307(a)(4) and are: (a) listed in the national register of historic places or formally determined eligible for listing in that register by the keeper of the register in accordance with the nationwide programmatic agreement found in 47 C.F.R. Part 1, Appendix C; or (b) designated as a historic district in accordance with the Historic District and Landmark Act; or (c) listed by the New Mexico Historic Preservation Division in the Registers of Cultural Properties.

(m) “Law” means federal, state or local law.

(n) “Permit” means the written permission of the Town for a wireless provider to install, mount, maintain, modify, operate or replace a utility pole or to collocate a small wireless facility on a utility pole or wireless support structure.

(o) “Person” means an individual, corporation, limited liability company, partnership, association, trust or other entity or organization and includes the Town.

(p) “Rate” means a recurring charge.

(q) “Right-of-way” means the area on, below or above a public roadway, highway, street, sidewalk, alley or utility easement. Right-of-way does not include the area on, below or above a federal interstate highway, a state highway or route under the jurisdiction of the department of transportation, a private easement or a utility easement that does not authorize the deployment sought by a wireless provider.

(r) “Section” means the entirety of the Small Cell Wireless Communication Facilities ordinance as specified herein.

(s) “shot clock” means any period of time (a time limit) required by the FCC or specified in the Ordinance in which the Town is mandated to carry out an action.

(t) “Small wireless facility” or “small wireless facilities” mean(s) a wireless facility that:

(1) is mounted on structures fifty (50) feet or less in height including their antennas;
or

(2) is mounted on structures no more than ten percent (10%) taller than other adjacent structures; or

(3) does not extend existing structures on which they are located to a height of more than fifty (50) feet or by more than ten percent (10%), whichever is greater;

(4) has antennas that each are, or could fit, inside an enclosure no more than three (3) cubic feet in volume; and

(5) has other ground- or pole-mounted wireless equipment and any pre-existing associated equipment on the structure, not including the following, that are twenty-eight (28) or fewer cubic feet in volume:

(i) electric meter;

(ii) concealment elements;

(iii) telecommunications demarcation box;

(iv) grounding equipment;

- (v) power transfer switch;
 - (vi) cutoff switch;
 - (vii) vertical cable runs for the connection of power and other services; and
 - (viii) design elements required by the Town.
- (6) the facilities do not require antenna structure registration under federal law;
 - (7) the facilities are not located on Tribal land as defined under federal law; and
 - (8) the facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified under federal law.

(u) “Stealth design” means a design that minimizes the visual impact of wireless communication facilities by camouflaging, disguising, screening or blending into the surrounding environment. Examples of stealth design include, but are not limited to, facilities disguised as trees (monopines), flagpoles, utility and light poles, bell towers, clock towers, ball field lights and architecturally screened roof-mounted antennas or flush-mounted antennas that are either painted to match or enclosed in an architecturally-applicable box.

(v) “Tower” means any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site.

(w) “Town” means the Town of Silver City.

(x) “Town utility pole” means a utility pole, owned or operated by the Town, in a right-of-way.

(y) “Utility pole” means a pole or similar structure used in whole or in part for communications services, electricity distribution, lighting or traffic signals. Utility pole does not include a wireless support structure or electric transmission structure.

(z) “Wireless facility” means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including equipment associated with wireless communications; radio transceivers, antennas, coaxial or fiber-optic cables, regular and backup power supplies and comparable equipment, regardless of technological configuration; and includes a small wireless facility. Wireless facility does not include:

- (1) the structure or improvements on, under or within which the equipment is collocated;
- (2) a wireline backhaul facility, coaxial cable or fiber-optic cable between wireless support structures or utility poles; or
- (3) coaxial or fiber-optic cable otherwise not immediately adjacent to, or directly associated with, an antenna.

(aa) “Wireless infrastructure provider” means a person, other than a wireless services provider, that may provide telecommunications service in New Mexico and that builds or installs wireless communications transmission equipment, wireless facilities' utility poles or wireless support structures.

(bb) “Wireless provider” means a wireless infrastructure provider or wireless services provider.

(cc) “Wireless services” means services provided to the public that use licensed or unlicensed spectrum, either mobile or at a fixed location, through wireless facilities.

(dd) “Wireless services provider” means a person that provides wireless services.

(ee) “Wireless support structure” means a freestanding structure, including a monopole or guyed or self-supporting tower, but not including a utility pole.

(ff) “Wireline backhaul facility” means a facility used to transport services by wire from a wireless facility to a network.

Sec. 3 Exempt Facilities. The following are exempt:

- (a) FCC licensed amateur (ham) radio facilities;
- (b) Satellite earth stations, dishes or antennas used for private television reception not exceeding one (1) meter in diameter; and
- (c) A temporary, commercial wireless communication facility installed for providing coverage of a special event such as news coverage or sporting event, subject to approval by the Town. The facility shall be exempt from the provisions of this Section for up to one week before and after the duration of the special event.

Sec. 4 Permitted Use; Application and Fees.

- (a) Permitted Use. Collocation of a small wireless facility or a new or modified utility pole for the collocation of a small wireless facility shall be a permitted use subject to the other requirements of this Section.

(b) Permit Required. No person shall place a small wireless facility in the rights-of-way, without first filing a small wireless facility application and obtaining a permit therefore.

(c) Permit Application. All small wireless facility applications for permits filed pursuant to this Section shall be on a form, paper or electronic, provided by the Town.

(d) Application Requirements. The small wireless facility permit application shall be made by the wireless provider or its duly authorized representative and shall contain the following:

(1) The applicant's name, address, telephone number, and email address;

(2) The names, addresses, telephone numbers, and email addresses of all consultants, if any, acting on behalf of the applicant with respect to the filing of the application;

(3) A general description of the proposed work and the purposes and intent of the small wireless facility. The scope and detail of such description shall be appropriate to the nature and character of the work to be performed, with special emphasis on those matters likely to be affected or impacted by the work proposed;

(4) A small wireless facility shall comply with all applicable codes.

e) Routine Maintenance and Replacement. The Town may not require an application, approval or permit or impose a fee, rate or other charge for the routine maintenance of a small wireless facility, the installation, maintenance, operation, placement or replacement of a micro wireless facility that is, in accordance with applicable codes, suspended on cables strung between utility poles or wireless structures or the replacement of a small wireless facility with one that is similar in size to, the same size as or smaller than it as long as the wireless provider notifies the Town of the replacement at least ten (10) days before the replacement. As used in this subparagraph, "micro wireless facility" means a small wireless facility less than twenty-four inches long, fifteen inches wide and twelve inches high whose exterior antenna, if any, is less than eleven inches long. The Town may require a permit for routine maintenance or replacement of a small wireless facility in the rights-of-way that affect traffic patterns or require lane closures.

(f) Application Fees. The Town may charge an applicant an application fee in the amount of one hundred dollars (\$100) for each of up to five (5) small wireless facilities and fifty dollars (\$50) for each additional small wireless facility whose collocation is requested in a single application.

Sec. 5 Application Review.

(a) Review of Small Wireless Facility Applications.

(1) The Town shall review the application for a small wireless facility permit in light of its conformity with applicable regulations of this Section, and other applicable local ordinances, including, but not limited to the requirements found in Chapter 42, Article VII,

Section 42-210, of the Town's Code of Ordinances, and shall issue a permit on nondiscriminatory terms and conditions subject to the following requirements:

(i) Within ten (10) days of receiving an application for a small wireless facility, the Town must determine and notify the applicant whether the application is complete. If an application is incomplete, the Town must specifically identify the missing information in writing. Upon resubmission by the applicant, the Town has ten (10) days to notify the applicant again of an incomplete application and the shot clock will reset. Thereafter, the shot clock will be tolled only by mutual agreement between the Town and the applicant, or in cases where the Town determines upon a resubmission that the application is incomplete. The processing deadline is then tolled from the date the Town sends the notice of incompleteness to the date the applicant provides the missing information. The application is deemed complete if the applicant is not notified within the 10-day period subject to resetting the shot clock or tolling.

(ii) Make its final decision to approve or deny the application within sixty (60) days of receipt of an application for placement of small wireless facilities on an existing structure (subject to the resetting of the shot clock under federal law) and within ninety (90) days of receipt of an application for the placement of small wireless facilities on a new structure (subject to the resetting of the shot clock under federal law), and subject to the tolling provisions herein; and

(iii) Advise the applicant in writing of its final decision, and in the final decision document the basis for a denial, if any, including specific code provisions on which the denial was based, and send the documentation to the applicant. In the sixty (60) or ninety (90) days, as applicable, after the Town receives an application to collocate a small wireless facility on an existing structure or a new structure, the Town may provide public notice of the application and an opportunity for written public comment on the application, submit the written public comment to the applicant and request that the applicant respond to it. If the Town determines that applicable codes or laws require that a utility pole or wireless support structure be replaced before an application for collocation is approved, the Town may condition approval of the application on that replacement. The applicant may cure the deficiencies identified by the Town and resubmit the application within thirty (30) days of the denial without paying an additional application fee. The Town shall approve or deny the revised application within thirty (30) days of receipt of the amended application. The subsequent review by the Town shall be limited to the deficiencies cited in the original denial. The Town may require the applicant to certify that the small wireless facilities to be collocated conform with the FCC's regulations concerning radio frequency emissions.

(2) If the Town fails to act on an application within the sixty (60) or ninety (90) day review period, as applicable, subject to resetting the shot clock once and tolling, the application is deemed approved. The Town may also request an extension of the sixty (60) or ninety (90) day period, and the Town and the applicant may agree to extend that period. An applicant shall not unreasonably deny a Town's request to extend the period.

(3) The Town may only deny a completed application to collocate small wireless facilities if the application does not conform with applicable codes or local laws concerning:

- (i) public safety;
 - (ii) design for utility poles to the extent that the standards are objective;
 - (iii) stealth and concealment but only to the extent that the restrictions are reasonable;
- and
- (iv) the spacing of ground-mounted equipment in a right-of-way; or
 - (v) if there is non-conformance with design district or historic district requirements, including, but not limited to the requirements found in Chapter 42, Article VII, Section 42-210, of the Town's Code of Ordinances.

(4) An applicant seeking to collocate small wireless facilities may, at the applicant's discretion, file a consolidated application and receive a single permit for multiple small wireless facilities. Provided, that the Town's denial of one or more small wireless facilities in a consolidated application shall not delay the processing of any other small wireless facilities submitted in the same application.

(5) The Town may require an applicant to obtain one or more permits to collocate a small wireless facility in a right-of-way if the requirement is of general applicability to users of the right-of-way. An applicant seeking to collocate within the Town up to twenty-five (25) small wireless facilities, all of which are substantially the same type, on substantially the same types of structures, may file a consolidated application for the collocation of the facilities. An applicant shall not file with the Town more than one consolidated application in any five-business-day period. The applicant shall include in a consolidated application an attestation that, unless a delay in collocation is caused by the lack of commercial power or fiber at the site, the collocation will begin within one hundred eighty (180) days after the permit issuance date. The Town and provider may subsequently agree to extend that period.

Sec. 6 Small Wireless Facilities in the Right-of-Way; Maximum Height; Other Requirements.

(a) Maximum Size of Permitted Use. Small wireless facilities, and new or modified utility poles for the collocation of small wireless facilities, may be placed in the rights-of-way as a permitted use contingent upon the approval of an application by the Town and subject to the following requirements:

(1) A new replacement or modified utility pole associated with the collocation of a small wireless facility in the right-of-way is not subject to zoning review and approval, except for that which pertains to under-grounding prohibitions, unless the utility pole is higher than whichever of the following is greater: ten (10) feet plus the height in feet of the tallest existing utility pole excluding a utility pole supporting wireless facilities that is in place on the effective date of the Act, located within five hundred (500) feet of the new, replacement or modified

utility pole, in the same right-of-way, and fifty (50) or fewer feet above ground level or fifty (50) feet.

(2) New small wireless facilities in the rights-of-way may not extend:

(i) More than ten (10) feet above an existing utility pole in the rights-of-way in place as of the effective date of this Section; or

(ii) More than ten (10) feet above the height for a new utility pole.

(3) A small wireless facility collocated on a utility pole or wireless support structure that extends ten (10) or fewer feet above the pole or structure in a right-of-way in any zone is classified as a permitted use and is not subject to zoning review or approval.

(b) Application Required for a Utility Pole. An application for the installation of a new, replacement or modified utility pole for the collocation of a small wireless facility in the right-of-way is required. The application shall be approved unless the installation does not conform with:

(1) applicable codes or laws regarding public safety, design, or under-grounding prohibitions if those regulations require under-grounding by a date certain within one (1) year after the application, include a waiver of zoning or other processes and allow the replacement of utility poles;

(2) federal or state standards for pedestrian access or movement;

(3) design or historic district requirements, including, but not limited to the requirements found in Chapter 42, Article VII, Section 42-210, of the Town's Code of Ordinances;

(4) contractual requirements between the Town and a private property owner concerning the design of utility poles in the right-of-way; or

(5) the Town's laws concerning public safety and reasonable minimum spacing requirements for new utility poles in the rights-of-way.

(c) Application Processing. An application for a permit to install a new, replacement or modified utility pole for the collocation of a small wireless facility shall be processed within ninety (90) days after receipt of the application. If the Town fails to act on the application within that time period, subject to resetting the shot clock once and tolling, the application is deemed approved. The application fee shall be seven hundred fifty dollars (\$750).

Installation, modification or replacement shall begin within one hundred eighty (180) days after the permit issuance unless the Town and wireless provider agree to extend that time or a delay is caused by a lack of commercial power or fiber at the site. The new, modified or replacement utility pole may be maintained for ten (10) years and the permit will be renewed for one ten (10) year period unless the utility pole does not conform with applicable codes or local laws. At the

expiration of the permit renewal/extension, the permit shall lapse and a new application will be required.

(d) Zoning. Any wireless provider that seeks to install, modify, operate or replace a utility pole in the rights-of-way that exceeds the height or size limits contained in this Section shall be subject to applicable zoning requirements.

(e) Decorative Poles. A wireless provider shall be permitted to replace a decorative pole when necessary to collocate a small wireless facility, but any replacement pole shall reasonably conform to the design aesthetics of the decorative pole being replaced and shall be subject to local approval, which shall not be unreasonably denied.

(f) Underground District. In areas designated solely for underground or buried cable and utility facilities, the Town shall allow replacement of Town poles in the designated area. The wireless provider is permitted to seek a waiver of the undergrounding requirements for the placement of a new utility pole to support small wireless facilities.

(g) Historic and Design Districts. The Town may require as they pertain to small wireless facilities located in design districts or historic districts reasonable, technically feasible, non-discriminatory and technologically neutral design or concealment measures and reasonable measures for conforming to the design aesthetics of design districts or historic districts. Any such measures may not have the effect of prohibiting a wireless provider's technology.

Sec. 7 Effect of Permit.

(a) Authority Granted. A permit from the Town authorizes an applicant to undertake only certain activities in accordance with this Section 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.

(b) Permit Duration. Work described in a permit granted pursuant to this Section shall begin within one hundred eighty (180) days of the permit issuance date unless the Town and applicant agree to extend this period due to delay caused by the lack of commercial power or communications facilities. Subject to applicable relocation requirements and the applicant's right to terminate collocation at any time, the permit is valid for a period of ten (10) years, and will be renewed for one ten-year term unless the Town finds that the small wireless facility does not conform with applicable codes and local laws. At the expiration of the permit renewal/extension, the permit shall lapse and a new application will be required.

Sec. 8 Removal, Relocation or Modification of Small Wireless Facilities in the Right-of-Way.

(a) Notice. Within ninety (90) days following written notice from the Town, a wireless provider shall, at its own expense, protect, support, temporarily or permanently disconnect, remove, relocate, change or alter the position of any small wireless facilities within the rights-of-way whenever the Town has determined that such removal, relocation, change or alteration is

reasonably necessary for the construction, repair, maintenance, or installation of any Town improvement in or upon, or the operations of the Town in or upon, the rights-of-way.

(b) Emergency Removal. The Town retains the right and privilege to cut or move any small wireless facility located within the rights-of-way of the Town, as the Town may determine to be necessary, appropriate or useful in response to any public health or safety emergency. If circumstances permit, the Town 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 after cutting or removing a small wireless facility.

(c) Abandonment of Facilities. Upon abandonment of a small wireless facility or utility pole within the rights-of-way of the Town, the wireless provider shall notify the Town in writing of its intention to discontinue use of a small wireless facility or utility pole. The notice shall inform the Town of the time and the way in which the small wireless facility or utility pole will be removed. The wireless provider is responsible for the costs of the removal. The Town may require the wireless provider to return the property to its pre-installation condition according to the Town's reasonable and nondiscriminatory requirements and specifications. If the wireless provider does not complete the removal within forty-five (45) days after notice, the Town may complete the removal and assess the costs of removal against the wireless provider. The permit for the small wireless facility or utility pole expires upon removal.

(d) Damage and Repair. The Town may require a wireless provider or the provider's contractor to repair all damage to the Town's property or rights-of-way caused by the activities of the wireless provider or contractor and return the property and rights-of-way to their pre-damage condition according to the Town's requirements and specifications upon written notice of the requirements to the provider. If the wireless provider fails to make the repairs within a reasonable period after receiving the notice, the Town may effectuate those repairs and charge the provider the reasonable, documented cost of such repairs.

Sec. 9 Rates.

(a) Annual Rate for Use of Right-of-Way. The Town may charge a wireless provider for the provider's use of the right-of-way in constructing, installing, maintaining, modifying, operating or replacing a utility pole or in collocating a small wireless facility in the right-of-way an annual rate of two hundred fifty dollars (\$250) multiplied by the number of small wireless facilities placed by the wireless provider in the Town's right-of-way.

(b) Annual Rate Increase for Use of Right-of-Way. To the extent allowed by law, the Town may adjust the annual rate, but no more often than once a year and by no more than an amount equal to one-half the annual change, if any, in the most recent Consumer Price Index for all urban consumers for New Mexico, as published by the United States Department of Labor. The Town shall notify all wireless providers charged the pre-adjusted rate of the prospective adjustment and shall make the adjustment effective sixty (60) days or more following that notice.

(c) Annual Rate for Use of Town Utility Poles. The rate for collocation of a small wireless facility on a Town utility pole in the right-of-way shall be twenty dollars (\$20) per year.

Sec. 10 Attachment to or Utility Poles in the Right-of-Way.

(a) Placement of Small Wireless Facilities and Poles. Subject to the approval of an application by the Town, a wireless provider may collocate small wireless facilities and construct, install, modify, mount, maintain, operate and replace utility poles associated with the collocation of a small wireless facility along, across, on or under Town right-of-way. The Town shall not enter into an exclusive agreement with a wireless provider for the use of a right-of-way in constructing, installing, maintaining, modifying, operating or replacing a utility pole or collocating a small wireless facility on a utility pole or wireless support structure.

(b) Review of Applications. The Town shall process an application for approval to collocate a small wireless facility on a Town utility pole in accordance with this Section. The Town may condition the issuance of a permit on the wireless provider's replacement of the Town utility pole if applicable codes or local laws concerning public safety require that replacement. The Town shall process an application for a permit to install a replacement Town pole in accordance with this Section. The Town shall retain ownership of the replacement utility pole.

Sec. 11 Proper Placement.

(a) A wireless provider that deploys a utility pole or small wireless facility in a right-of-way shall construct, maintain and locate it so as not to obstruct travel, endanger the public or interfere with another utility facility in the right-of-way. The wireless provider's operation of a small wireless facility in the right-of-way shall not interfere with the Town's public safety communications. The wireless provider shall comply with the National Electric Safety Code and all applicable laws. The Town may, through its Public Works Department, adopt reasonable regulations concerning the separation of the wireless provider's utility poles and small wireless facilities from other utility facilities in the right-of-way.

(b) If the Town determines that a utility pole or the wireless support structure of a wireless provider must be relocated to accommodate a public project, the provider shall assume the cost of relocating the wireless facility deployed on the pole or structure.

(c) Without the Town's written consent, a wireless provider shall not install a new utility pole in a right-of-way adjacent to a street or thoroughfare that is fifty (50) feet wide or less and adjacent to single family residential lots or other multifamily residences or to undeveloped land designated for residential use by zoning or deed restrictions.

(d) Exempt From Zoning Review.

(1) Small wireless facilities, DAS, micro wireless facilities and other similar networks on poles in public rights-of-way, on Town-owned property, on private property, or on other structures, including stealth facilities, monopoles or replacement poles under fifty (50) feet that are located in the public rights-of-way for placement of small wireless facilities, DAS and other similar networks, are exempt from zoning review and shall be subject only to encroachment or building permits by administrative review.

(2) Notwithstanding any other provision of this Section, the Town may not require an applicant or provider to submit an application or pay a rate for:

(i) routine maintenance that does not require excavation or closing of sidewalks or vehicular lanes in a public right-of-way;

(ii) replacing or upgrading a small wireless facility, DAS, or other similar network with a facility that is substantially similar in size or smaller and that does not require excavation or closing of sidewalks or vehicular lanes in a public right-of-way;

(iii) temporary small wireless facilities, DAS or communications facilities placed for a period of not more than:

(a) twenty-one (21) days for temporary uses related to special events;

(b) ninety (90) days for temporary uses related to repair of facilities; or

(c) not more than ninety (90) days at any location within the Town after declaration of an emergency or a disaster by the Governor of

New Mexico.

(3) For purposes of the foregoing exemptions, a small wireless facility, DAS, other similar network, or pole is considered to be “substantially similar” if:

(i) the new or upgraded facility, including the antenna or other equipment element, will not be more than ten (10) percent larger on a one-time basis than the existing facility, provided that the increase may not result in the facilities exceeding the size limitations provided elsewhere in this Section;

(ii) the new or upgraded pole will not be higher than the existing pole;

(iii) the replacement or upgrade does not include replacement of an existing service pole;

(iv) the replacement or upgrade does not defeat existing concealment elements of the existing pole; and

(v) the determination of whether a replacement or upgrade is substantially similar is made by measuring from the dimensions of the small wireless facility or pole as approved by the Town.

(e) Collocation. Support structures for small wireless facilities or similar networks shall be capable of accommodating the collocation of other service providers.

(f) Signage. Signs located at the small wireless facilities, DAS, and similar networks shall be limited to ownership and contact information, FCC Antenna registration number (if required) and any other information as required by an applicable governmental authority. Commercial advertising is strictly prohibited.

(g) Accessory Equipment. Accessory equipment, including any buildings, cabinets or shelters, shall be used only to house equipment in support of the operation of the small wireless facility or its support structure. Any equipment not used in direct support of such operation shall not be stored on the site.

Sec. 12 General Requirements for Towers and Poles.

(a) Inventory of Existing Sites. Each applicant for a pole or tower exceeding the height limitation of the affected zoning district shall provide to the Community Development Department an inventory of its existing poles or towers that are either within the jurisdiction of the Town or within one (1) mile of the border thereof, including specific information about the location, height, and design of each pole or tower. The applicant shall only be required to provide this information in its first application following implementation of this Section, and not thereafter. The Community Development Department may share such information with other applicants applying for permits under this Section or other organizations seeking to locate poles or towers within the jurisdiction of the Town, provided, however, that the Community Development Department is not, by sharing such information, in any way representing or warranting that such sites are available or suitable.

(b) Lighting. Towers shall not be artificially lighted, unless required by the FAA or other applicable authority. If lighting is required, the lighting alternatives and design chosen must cause the least disturbance to the surrounding views.

(c) State or Federal Requirements. All towers and antennas must meet or exceed current standards and regulations of the FAA, the FCC, and any other agency of the state or federal government with the authority to regulate towers and antennas. If such standards and regulations are changed, then the owners of the towers and antennas governed by this Section shall bring such towers and antennas into compliance with such revised standards and regulations within six (6) months of the effective date of such standards and regulations, unless a different compliance schedule is mandated by the controlling state or federal agency.

(d) Building Codes; Standards. To ensure the structural integrity of towers, the owner of a tower shall ensure that it is maintained in compliance with standards contained in applicable state or local building codes and the applicable industry standards for towers, as amended from time to time. If, upon inspection, the Town concludes that a tower fails to comply with such codes and standards and constitutes a danger to persons or property, then upon notice being provided to the owner of the tower, the owner shall have thirty (30) days to bring such tower into compliance with such standards. Failure to bring such tower into compliance within said thirty (30) days shall constitute grounds for the removal of the tower at the owner's expense.

(e) Visual Impact. All towers, poles and small wireless facilities, including equipment enclosures, shall be sited and designed to minimize adverse visual impacts on surrounding properties and the traveling public to the greatest extent reasonably possible, consistent with the proper functioning of the structure or equipment. Such equipment enclosures shall be integrated through location and design to blend in with the existing characteristics of the site. Such enclosures shall also be designed to either resemble the surrounding landscape and other natural features where located in proximity to natural surroundings, or be compatible with the built environment, through matching and complimentary existing structures and specific design considerations such as architectural designs, height, scale, color and texture or be consistent with other uses and improvements permitted in the relevant zone.

(1) Towers shall either maintain a galvanized steel finish or, subject to any applicable standards of the FAA, be painted a neutral color so as to reduce visual obtrusiveness.

(2) At a tower site, the design of the buildings and related structures shall, to the extent possible, use materials, colors, textures, screening, and landscaping that will blend them into the natural setting and surrounding buildings.

(3) If an antenna is installed on a structure other than a tower, the antenna and supporting electrical and mechanical equipment must be of a neutral color that is identical to, or closely compatible with, the color of the supporting structure so as to make the antenna and related equipment as visually unobtrusive as possible.

(f) Use of Stealth Design. Concealment techniques in design districts and historic districts must be appropriate given the proposed location, design, visual environment, and nearby uses, structures, and natural features. Stealth design shall be designed and constructed to substantially conform to surrounding building designs or natural settings, so as to be visually unobtrusive.

(g) Building-mounted Equipment.

(1) All transmission equipment shall be concealed within existing architectural features to the maximum extent feasible. Any new architectural features proposed to conceal the transmission equipment shall be designed to mimic the existing underlying structure, shall be proportional to the existing underlying structure or conform to the underlying use and shall use materials in similar quality, finish, color and texture as the existing underlying structure.

(2) All roof-mounted transmission equipment shall be set back from all roof edges to the maximum extent feasible consistent with the need for “line-of-sight” transmission and reception of signals.

(3) Antenna arrays and supporting transmission equipment shall be installed so as to camouflage, disguise or conceal them to make them closely compatible with and blend into the setting or host structure.

(h) **Pole-mounted or Tower-mounted Transmission Equipment.** All pole-mounted or tower-mounted transmission equipment shall be mounted as close as possible to the pole or tower so as to reduce the overall visual profile to the maximum extent feasible consistent with safety standards.

(i) **Concealment of Pole-mounted Equipment.** All pole-mounted equipment must be reasonably concealed to the extent technically feasible in a manner that minimizes the visual impact of the pole-mounted equipment. The concealment method and materials must receive prior written approval from the Town, not to be unreasonably withheld. Antenna size limitations are exclusive of any concealment materials or fabrication. Concealment materials shall have a color and finish consistent and appropriate with the pole on which they are mounted.

(j) **Accessory Equipment.** All accessory equipment located at the base of a small wireless facility shall be located or placed (at the applicant's choice) in an existing building, underground, or in an equipment shelter that is (a) designed to blend in with existing surroundings, using architecturally compatible construction and colors; and (b) be located so as to be unobtrusive as possible consistent with the proper functioning of the small wireless facility.

(k) **Site Design Flexibility.** Individual small wireless facility sites vary in the location of adjacent buildings, existing trees, topography and other local variables. By mandating certain design standards, there may result a project that could have been less intrusive if the location of the various elements of the project could have been placed in more appropriate locations within a given site. Therefore, the small wireless facility and supporting equipment may be installed so as to best camouflage, disguise them, or conceal them, to make them more closely compatible with and blend into the setting or host structure.

(l) **Structural Assessment.** The owner of a proposed tower shall have a structural assessment of the tower conducted by a professional engineer, licensed in the State of New Mexico, which shall be submitted with the application for a permit.

(m) **Radio Frequency Emissions Compliance Report.** A Radio Frequency ("RF") emissions compliance report will be prepared, signed and sealed by a New Mexico-licensed professional engineer or a competent employee of the applicant, which assesses whether the proposed small wireless facility demonstrates compliance with the exposure limits established by the FCC. The employee of the applicant must be qualified in the field of RF emissions and provide satisfactory evidence of his/her qualifications to the Town.

(n) **Residential Provisions.**

(1) All small wireless facilities on residentially zoned property are encouraged to either be painted or treated the same color as the primary structure or the surface to which the facilities are attached.

(2) Screening or painting of roof-mounted structures is required on all sides of the residential property in which a small wireless facility is to be or is placed.

(o) Screening of Ground-mounted Equipment. Ground equipment and equipment enclosures outside of the right-of-way shall be screened by a screen wall, painted, and/or landscaped.

(1) Screening and equipment enclosures shall blend with or enhance the surrounding area in terms of scale, form, texture, materials, and color. Equipment shall be concealed as much as possible by blending into the natural and/or physical environment. All screening shall be at the reasonable discretion of the Town.

(2) When trees, bushes, rocks, and other forms of landscaping are used for screening, such landscaping must match the predominant landscaping form and species within one block of the facilities.

(p) Additional Screening Requirements. Any new, modified, or replacement poles installed in the right-of-way in conjunction with the installation of a small wireless facility, including any ground mounted equipment, electrical service meter, and screening shall:

(1) Be designed to blend in with the surrounding streetscape with minimal visual impact;

(2) Satisfy all required Americans with Disabilities Act requirements;

(3) Not impair or interfere with line of sight visibility; and

(4) Not block or obstruct existing roadway or commercial signage.

Sec. 13 Preferred Tower Locations.

(a) New small wireless facilities must, to the maximum extent feasible, be collocated on existing towers or other structures of a similar height to avoid construction of new towers.

(b) The Town encourages all applicants for new towers to follow siting priorities, from most-preferred (1) to least-preferred (8):

(1) Town-owned or operated property or facilities, not including rights-of-way;

(2) commercial and industrial zones;

(3) office zones;

(4) other non-residential zones;

(5) Town rights-of-way in non-residential zones;

(6) Town rights-of-way in residential zones;

(7) parcels of land in residential zones;

(8) designated design or historic districts.

(c) Collocation Consent. A written statement will be signed by a person with the legal authority to bind the applicant and the project owner, which indicates whether the applicant is willing to allow other transmission equipment owned by others to collocate with the proposed small wireless facility whenever technically and economically feasible and aesthetically desirable.

(d) Documentation. Applications submitted under this Section for small wireless facilities shall include the following materials:

(1) A color visual analysis that includes to-scale visual simulations that show unobstructed before-and-after construction daytime and clear-weather views from at least four angles, together with a map that shows the location of each view.

(2) A written analysis that explains how the proposed design complies with the applicable design standards under this Section to the maximum extent feasible. A design justification must identify all applicable design standards under this Section and provide a factually detailed reason why the proposed design either complies or cannot feasibly comply.

(3) A noise study, if requested by the Town.

(4) A scaled site plan clearly indicating the location, type, height and width of the proposed small wireless facilities, on-site land uses and zoning, adjacent land uses and zoning, separation distances, adjacent roadways, a depiction of all proposed transmission equipment, proposed means of access, setbacks from property lines, elevation drawings of the proposed small wireless facilities and any other structures, topography and utility runs.

(5) The setback distance between the proposed small wireless facility and the nearest residential unit, platted residentially zoned properties, and unplatted residentially zoned properties.

(6) The separation distance from other poles and towers within one (1) mile of the subject pole or tower, shall be shown on an updated site plan or map.

(7) If applicable, the method of camouflage and illumination.

(8) A written statement of purpose which shall minimally include: (1) a description of the objective to be achieved; (2) a to-scale map that identifies the proposed site location and the targeted service area to be benefited by the proposed project; and (3) full-color signal propagation maps with objective units of signal strength measurement that show the applicant's current service coverage levels from all adjacent sites without the proposed site, predicted service coverage levels from all adjacent sites with the proposed site, and predicted service coverage levels from the proposed site without all adjacent sites. These materials shall be reviewed and signed by a New Mexico-licensed professional engineer or a qualified employee of

the applicant. The qualified employee of the applicant shall submit his or her qualifications with the application.

Sec. 14 Independent Technical and Legal Review. Although the Town intends for Town staff to review administrative matters to the extent feasible, the Town may retain the services of independent experts of its choice to provide technical and legal evaluations of permit applications for small wireless facilities, towers and poles. The expert's review may include, but is not limited to (a) the accuracy and completeness of the items submitted with the application; (b) the applicability of analysis and techniques and methodologies proposed by the applicant; (c) the validity of conclusions reached by the applicant; and (d) whether the proposed small wireless facilities comply with the applicable approval criteria set forth in this Section. The applicant shall pay the actual, direct and reasonable cost for any independent consultant fees through a deposit, paid within ten (10) days of the Town's request. When the Town requests such payment, the application shall be deemed incomplete for purposes of application processing timelines until the deposit is received. In the event that such costs and fees do not exceed the deposit amount, the Town shall refund any unused portion within thirty (30) days after the final permit is released or, if no final permit is released, within thirty (30) days after the Town receives a written request from the applicant. If the costs and fees exceed the deposit amount, then the applicant shall pay the difference to the Town.

Sec.15 Safety Review.

(a) For the period beginning on the date a permit is issued and ending on the date the permitted work is accepted, the Town may perform a safety review of construction, reconstruction or installation of all small wireless facilities and poles as it deems necessary to ensure compliance with this Section and the Municipal Code. All Town plans, reviews, inspections, standards, and other rights and actions related to the wireless provider's improvements are for the Town's sole and exclusive benefit and neither the wireless provider nor any other person may rely on the Town's safety reviews or have any rights related to the reviews. The preceding sentence does not prevent the wireless provider from relying on consents, permits, or approvals the Town may grant based on the Town's plans, reviews, and inspections. As a condition of obtaining the permits authorized by this Section, the wireless provider grants the Town the right to access the wireless provider's small wireless facilities and poles. Except for emergencies, this right of access is limited to dates and times agreed to by the parties.

(b) To the extent allowed by law, the Town may recover the Town's costs incurred to perform such safety reviews.

Sec. 16 Final Inspection.

(a) A certificate of completion will only be granted upon satisfactory evidence that the small wireless facilities were installed in substantial compliance with the approved plans.

(b) If it is found that the small wireless facilities installation does not substantially comply with the approved plans, the applicant shall make any and all such changes required to bring the facilities into compliance promptly and in any event prior to putting the facilities in operation.

Sec. 17 Compliance.

- (a) All small wireless facilities must comply with all standards and regulations of the FCC and any state or other federal government agency with the authority to regulate those facilities.
- (b) The site and small wireless facilities, including all landscaping, fencing and related transmission equipment, must be maintained at all times in a neat and clean manner.
- (c) If any FCC, state or other governmental license or any other governmental approval to provide communication services is ever revoked as to any site permitted or authorized by the Town, the permittee must inform the Town of the revocation within thirty (30) days of receiving notice of such revocation.

Sec. 18 Indemnification. Each permit issued for small wireless facilities located in Town right-of-way or on other Town property shall be deemed to have as a condition of the permit a requirement that the wireless provider defend, indemnify and hold harmless the Town and its officers, agents, employees, volunteers, and contractors from any and all liability, damages, or charges (including attorneys' fees and expenses) arising out of claims, suits, demands, actions or causes of action that are caused by or result from the wireless provider's, or its agent's or contractor's, construction, performance, operation, maintenance, repair, replacement, removal, or restoration of the small wireless facilities.

Sec. 19 Laws, Rules and Regulations. This Ordinance shall be subject to all applicable laws, rules and regulations now or hereafter enacted.

Sec. 20 Severability. The various parts, sentences, paragraphs, sections and clauses of this Ordinance are hereby declared to be severable. If any part, sentence, paragraph, section or clause is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of the Ordinance shall not be affected thereby.

Sec. 21 Conflicts. In the event of a conflict between the provisions of this Section, federal laws, rules, regulations, FCC Orders or the Act, the more restrictive shall control. Any ordinance or parts thereof or other provisions of the Municipal Code in conflict with the provisions of this Ordinance are hereby repealed to the extent of such conflict.

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PASSED, ADOPTED, AND APPROVED by the Town Council of the Town of Silver City this 24th day of September, 2019.

(Seal)

/s/ _____
Ken Ladner, Mayor
Attest:
/s/ _____
Ann L. Mackie, Town Clerk