Eugene Hearings Official

AGENDA

Phone: 541-682-5377
www.eugene-or.gov/hearingsofficial

Meeting Location:
Harris Hall – Lane County Public Service Building
125 East 8th Avenue

The Eugene Hearings Official welcomes your interest in these agenda items. Feel free to come and go as you please at any of the meetings. This meeting location is wheelchair-accessible. For the hearing impaired, FM assistive-listening devices are available or an interpreter can be provided with 48 hours notice. To arrange for these services, contact the Planning Division at (541)682-5481.

WEDNESDAY, JULY 16, 2014
(5:00 p.m.)

I. PUBLIC HEARING ON THREE APPEALS FILED AGAINST THE PLANNING DIRECTOR'S CONDITIONAL APPROVAL FOR AT& T WIRELESS AT REST HAVEN CEMETERY (SR 13-5)

Assessors Map: 18-03-18-00 **Tax Lot:** 300

Decision: Site Review approval with conditions for a 120-foot "mono-pine" cell tower with an associated variance to allow above-ground ancillary facilities.

Appellants:
1. Charles Wiper III, represented by Aaron Notebloom, Arnold Gallagher
2. Walter and Nancy Meyer
3. John Koenig and Deborah Toobert

Lead City Staff: Becky Taylor, Associate Planner
Telephone: (541) 682-5437
E-mail: becky.g.taylor@ci.eugene.or.us

Public Hearing Format:

1. Staff introduction/presentation
2. Public testimony from applicant and others in support of application.
3. Comments or questions from interested persons who neither are proponents nor opponents of the proposal.
4. Testimony from appellants and others in opposition to application.
5. Staff response to testimony.
6. Questions from Hearings Official.
7. Rebuttal testimony from applicant.
8. Closing of public hearing.

The Hearings Official will not make a decision at this hearing. The Eugene Code requires that a written decision must be made within 15 days of close of the public comment period. To be notified of the Hearings Official's decision, fill out a request form at the public hearing or contact the lead City staff as noted above. The decision will also be posted at www.eugene-or.us/hearingsofficial.

AGENDA ITEM SUMMARY
July 16, 2014

To: Fred Wilson, Eugene Hearings Official

From: Becky Taylor, Associate Planner, Eugene Planning Division

Subject: Appeal of Planning Director's Decision: AT&T at Rest Haven Cemetery (SR 13-5)

BACKGROUND INFORMATION

On June 10, 2014, the Planning Director granted Site Review approval with nine conditions for the installation of a new telecommunications tower, designed to look like a fir tree (a "mono-pine"), with a variance to allow the associated ancillary equipment to be above ground, on the northwest portion of an existing 70-acre cemetery, known as Rest Haven Memorial Park. The area of request (the lease area to AT&T) is approximately 1,500 square feet (30 feet by 50 feet) of the existing 6,000 square foot soil retention area for the cemetery.

The northern portion of the property, involved in this request, is zoned PL, Public Land. Telecommunication facilities require Site Review approval in the PL zone, per Eugene Code (EC) 9.5750(5). The Telecommunication Standards at EC 9.5750 apply to the subject request, in addition to the Site Review requirements at EC 9.8440. The City's Telecommunication Standards are consistent with the Federal Telecommunications Act of 1996. The Act prohibits cities and states from discriminating among telecommunications providers and from erecting barriers to a provider's entry into a local market.

The Planning Director's written decision granting Site Review approval is attached for reference, as it provides background information and findings regarding compliance with the applicable approval criteria (see Attachment A).

Prior to the Planning Director's decision being issued on June 10, 2014, two public comment periods were held, on February 24, 2014 and May 5, 2014. During the initial public comment period, numerous letters and emails in opposition to the proposed telecommunications tower were submitted. Staff determined that there was not sufficient evidence from the applicant to adequately address the neighborhood concerns; consequently, the applicant filed an extension to prepare responsive information. The second public comment period was provided for review and comment on the applicant's supplemental application materials. During the second public comment period, staff also visited the site with the property owner.

The key issue under review during this second public comment period was related to compatibility. Specifically, visual and noise impacts associated with the proposed tower and ancillary equipment. Based on comments from the neighbors, the applicant revised the design of the proposed facility so that it would blend in with the surrounding trees. The basis for determining compatibility was that the

tower was being designed to look like a tree within a stand of trees. To address that basic principle, the Planning Director's decision imposed conditions to ensure that the mono-pine design would blend in with the surrounding trees (Condition of Approval #3) and would ensure that the surrounding trees remain as screening (i.e. Condition of Approval #1). The Planning Director's decision established additional conditions to minimize off-site impacts (e.g. Conditions of Approval #4, 5, and 6, regarding noise). Based on evidence submitted by all parties, staff determined that the proposed design, coupled with the various conditions of approval, will ensure compliance with the applicable criteria.

On June 11, 2014, notice of the decision was provided in accordance with Eugene Code (EC) 9.7220, which established an appeal deadline of June 23, 2014.

APPEAL

On June 23, 2014, three appeals were filed: by the property owner, Charles Wiper III (Wiper), represented by Aaron Notebloom of Arnold Gallagher PC; and by two property owners in the area, Walter Meyer (Meyer), at 3987 Brae Burn Drive, and John Koenig and Deborah Toobert (Koening/Toobert), at 3968 Brae Burn Drive. The Wiper appeal essentially challenges the conditions of approval imposed by the Planning Director, while the Meyer and Koenig/Toobert appeals (opponents) challenge the approval itself. The opponents request reversal of the approval primarily on compatibility issues; conversely, the owner challenges the conditions of approval that were intended to address the compatibility issues.

As explained in the background information provided above, compatibility was the primary focus of the Planning Director's decision. The cross-appeals, with the proponent of the telecommunications facility (the property owner, Mr. Wiper) indicating that the Planning Director's decision went too far in conditioning the approval, coupled with the opponents suggesting that the Planning Director's decision fell short of ensuring compatibility.

The written appeal statements are attached for reference (see Attachments B, C, and D). Staff has prepared a summary response to the appeal issues in Attachment E.

The public hearing for this appeal is scheduled for July 16, 2014. Public notice of the appeal hearing was mailed in accordance with applicable code requirements on June 24, 2014. The decision on this Site Review appeal is subject to the procedural requirements of Eugene Code (EC) Sections 9.7600 through 9.7635. The public hearing for this appeal will be conducted according to quasi-judicial hearing procedures described at EC 9.7065 through 9.7095. Pursuant to EC 9.7630, the Hearings Official shall affirm, reverse, or modify the Planning Director's decision based on the applicable Site Review approval criteria at EC 9.8440 and the applicable code requirements that were in effect at the time the application was submitted, on August 8, 2013.

Staff notes that public testimony on the appeals must be specific to the appeal issues identified by the appellants. No new issues may be considered. Another important clarification for the Hearings Official is that this appeal is the first evidentiary hearing on this matter. As such new evidence is allowed, provided such evidence is limited to the issues raised on appeal.

Since the submittal of the appeal, staff has received no additional letters in response to the appeal notice. Any written testimony or other evidence submitted between the date of this memorandum and

the appeal hearing will be forwarded for consideration as part of the decision on this appeal. In addition to any public testimony or other evidence that may be forwarded or presented at the upcoming public hearing, please review the attached items from the application file.

ATTACHMENTS

Attachment A	Planning Director's Decision
Attachment B	Charles Wiper III / Aaron Notebloom Appeal Statement
Attachment C	Walter Meyer Appeal Statement
Attachment D	John Koenig and Deborah Toobert Appeal Statement
Attachment E	Summary of Appeal Issues and Staff Response

The entire record of materials for the subject application, including the public hearing exhibits, is available for review at the Eugene Planning Division offices.

FOR MORE INFORMATION

Please contact Becky Taylor, Associate Planner, Eugene Planning Division, by phone at (541) 682-5437, or e-mail at becky.g.taylor@ci.eugene.or.us

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FINDINGS AND DECISION OF THE PLANNING DIRECTOR

SITE REVIEW APPROVAL FOR A NEW TELECOMMUNICATIONS TOWER FOR AT&T WIRELESS AT REST HAVEN CEMETERY (SR 13-5)

Application Summary:
Site Review approval to establish a 120-foot "mono-pine" cell tower with an associated variance to allow above-ground ancillary facilities.

Property Owner/Applicant:
Property Owner: Charles Wiper
Applicant: Brandon Olsen, New Cingular Wireless PCS, LLC
Applicant's Representative: Paul Slotemaker, Smartlink Zoning Manager

Lead City Staff:
Becky Taylor, Associate Planner, Eugene Planning Division, (541) 682-5437

Subject Property/Location/Zoning:
Location: West side of Rest Haven Cemetery at 3900 Willamette Street
Tax Lot: 300 of Assessor's Map 18-03-18-00
Zoned: PL Public Land

Relevant Dates:
Application submitted on August 8, 2013; application deemed complete on February 14, 2014; decision issued on June 10, 2014.

Background and Present Request

The applicant is requesting Site Review approval to install a new telecommunications tower, designed to look like a fir tree (a "mono-pine"), with a variance to allow the associated ancillary equipment to be above ground, on the northwest portion of an existing 70-acre cemetery, known as Rest Haven Memorial Park. The area of request (the lease area to AT&T) is approximately 1,500 square feet (30 feet by 50 feet) of the existing 6,000 square foot soil retention area for the cemetery. For a vicinity map and a detail of the area of request, see Attachment A.

Although the cemetery is privately-owned, the northern portion of the property, involved in this request, is zoned PL, Public Land. Telecommunication facilities require Site Review approval

in the PL zone, per Eugene Code (EC) 9.5750(5). The Telecommunication Standards at EC 9.5750 apply to the subject request, in addition to the Site Review requirements at EC 9.8440. The Telecommunication Standards are consistent with the Federal Telecommunications Act of 1996. The Act prohibits cities and states from discriminating among telecommunications providers and from erecting barriers to a provider's entry into a local market.

The applicant states that the proposed facility is needed to improve network quality and capacity to serve the coverage area, within a one-mile radius of the site. AT&T states that they have poor service in this area. Additional details of the proposal are included on the applicant's plans, and are further addressed in the applicant's written statement and supporting documentation, all of which are included as part of the public record and located in the application file for reference.

The Site Review is subject to the Type II land use application procedures, which are primarily addressed at Eugene Code (EC) 9.7200 through EC 9.7230. The following evaluation also addresses details of the proposal in the context of compliance with the applicable approval criteria and related standards.

Public Notice/Referrals

Upon deeming the application complete, the Planning Division mailed public notice on February 24, 2014, in accordance with the applicable requirements of EC 9.7210. In response to this notice, the City received numerous letters and emails in opposition to the proposed telecommunications tower. The testimony opposing the tower raised aesthetic and livability concerns with the proposed location, as well as concerns about noise and emissions.

During the comment period, staff forwarded the public concerns regarding noise and emissions to the City's consultant, Carl Bloom, Environmental Analysis, LLC. The consultant's response is included in the application file with an email and attachment dated March 4, 2014. Overall, the consultant confirms that the applicant's proposal complies with the applicable regulations. The property owner's attorney, Aaron Noteboom, also submitted a letter regarding the tower on March 6, 2014.

In response to the numerous concerns identified by the public during this initial comment period, on March 27, 2014, the applicant filed an extension to prepare responsive information. Following receipt of the applicant's supplemental materials on May 2, 2014, the City mailed a second public notice on May 5, 2014, soliciting comments until May 19, 2014. Again, the City received numerous comments opposed to the applicant's proposal. However, two letters of support were also submitted. An index of public testimony received during each public comment period is provided as Attachment B. Copies of all the testimony considered as part of the record before the Planning Director in this Site Review decision are provided in the application file, for reference.

During the second comment period, the applicant submitted additional information on May 19, 2014, responding to some of the latest public testimony. In particular, the applicant

acknowledged that noise would escape from the top of the eight-foot tall concrete walled equipment enclosure; therefore, the applicant expressed a willingness to install an acoustical panel roof over the emergency generator. While the generator is the greatest source of noise associated with the proposed telecommunication facilities, the applicant also explained the limited use of the generator; hence the sound would be intermittent rather than constant. The applicant also explained how undergrounding the equipment would provide little to no perceptible improvement on reducing noise levels.

The applicant has requested a variance to undergrounding the ancillary facilities. As discussed in the variance evaluation, staff concluded that undergrounding the proposed equipment could result in adverse impacts to the surroundings. The additional equipment associated with undergrounding the facilities, such as additional elevators and air conditioning equipment, create noise. Further, establishment of an underground vault could have significant impact on trees in the adjacent buffer area, which are critical in maintaining an adequate visual buffer. The following decision places additional conditions to require additional sound mitigation and measurement and to ensure tree preservation and restoration of the surrounding area.

With regard to concerns about a constant blinking of a light on the tower, the applicant clarified that the tower would not be lit and that lighting would be limited to a service light within the walled equipment enclosure. The applicant also provided clarification that the use of batteries on the site is limited and designed to avoid contaminating the surroundings. Staff relayed some of this information to concerned neighbors by telephone and confirmed that the City cannot consider property values, which is outside the scope of the applicable approval criteria.

Staff also conducted a site visit with the property owner and submitted related photos and tree bark and needle samples from the area of request during the open record period. Staff acknowledged that some, but not all, of the surrounding trees had branches beginning about 50 feet above grade, and asked the applicant if the design could accommodate lower branches as well as a darker color of brown for the pole to more closely resemble trunks of the area. The applicant submitted paint samples and updated the photo simulations using the Sherwin Williams Chateau Brown (SW 7510) color.

The overwhelming majority of opposing testimony received from the public was about potential health effects associated with radio waves. Staff explained to several neighbors how the City does not have the authority to impose more stringent standards than the federal regulations. The City also does not have the authority to dictate a new location for the facility. The scope of the City's review is limited to whether the applicant's proposal (i.e. the design and location) meets the applicable approval criteria.

The Planning Division also provided information concerning the applications to other appropriate City departments, public agencies, service providers, and the affected neighborhood group. All referral comments received by the Planning Division are included in the application file for reference, and addressed in the context of applicable approval criteria and standards in the following evaluation.

Site Review Evaluation

In accordance with EC 9.8440, the Planning Director shall approve, conditionally approve, or deny the Site Review application based on compliance with the listed criteria. Those criteria are provided below (**in bold**), including findings addressing compliance with each. Various conditions of approval and informational items are included where appropriate.

> **EC 9.8440(1):**
> **The site review plan's general design and character is reasonably compatible with surrounding properties, as it relates to building locations, bulk and height, noise, glare and odors.**

To meet this approval criterion, the proposed telecommunication facilities must be designed to be reasonably compatible with surrounding properties, based on the proposed location of the facility, its design (i.e. bulk and height) and character (i.e. noise, glare, and odors). Further, the telecommunication standards at EC 9.5750 provide detailed expectations on several design and operational characteristics, which are addressed later in this report under approval criterion EC 9.8440(5)(k). It is also noted that the applicant requests a variance from the telecommunication standard that requires ancillary facilities to be undergrounded in the PL zone. The variance criteria are included in the telecommunication standards, which are also evaluated at EC 9.8440(5)(k). Given the requested variance, the above approval criterion places greater importance of compatibility on the ancillary facilities.

Location -- The telecommunication facilities are proposed to be located on the northwest portion of an existing 70-acre cemetery, called Rest Haven Memorial Park. The proposed lease area for the telecommunication facilities is 1,500 square feet of an existing 6,000 square foot soil reclamation area for the cemetery. The soil reclamation area is to be surrounded with an eight-foot tall concrete wall; beyond that, the area is surrounded by existing vegetation that consists of fir and pine trees and understory vegetation.

The applicant's plan (Drawing C-2) identifies trees (shows the location, species, and size) immediately surrounding the area of request. Between the soil reclamation area and the residences to the west, the applicant's plans call out nine trees, which are a mix of Douglas fir and pine trees that range from 97 to 122 feet in height. The nearest residential homes are located approximately 175 feet west of the proposed tower. These homes are located anywhere from 10 to 24 feet higher than the grade of the proposed tower location, as the land slopes up to the west.

The opponents argue that the activity on the cemetery (frequent visitors) and the adjacent residences make the subject property entirely unsuitable for the proposed use. Several neighbors requested that the tower be moved further from the property line. The Toepels claimed that the cemetery has enough unused area to move the tower elsewhere. Walt Meyers recommended that the tower be moved near the existing offices for the cemetery, which is close to the same elevation as the proposed location.

Despite these requests, however sensible, the City's review is limited to the current proposal. The City can only review the proposed location for compliance with the applicable approval criteria and standards. Nevertheless, staff relayed the neighbors' request to the applicant and suggested that moving the facilities away from the residences could resolve many of the neighbor's concerns. Staff noted, however, that moving the facilities would require a new application for either: a new Site Review for a different location in the northern portion of the site, which zoned PL; or, a Conditional Use Permit if located on the southern portion of the site, which is zoned R-1, Low-Density Residential.

The applicant's conclusion that the facilities are not allowed in the R-1 zone is not entirely accurate; they are allowed, subject to Conditional Use Permit approval, which involves a more rigorous set of approval criteria and a public hearing process. As such, the regulatory framework establishes a preference for locating telecommunication facilities in the zones that have fewer procedural requirements. In fact, when locating a telecommunications facility in the R-1 zone, applicants are required to demonstrate that they cannot locate within alternative zone, such as PL, within the area.

With regard to the zoning of the subject property, Jerry Joffe called into question the Public Land zoning of the area of request, which he requested investigation of because the cemetery is a private operation. Staff confirms that the property is zoned PL, consistent with the current Metro Plan designation for the subject property, which was similarly applied to other privately-held cemeteries. As part of the City's Envision Eugene process, the City initiated changing the designation of several Public Land and Public Open Space properties to Low Density Residential uses, partly due to those lands being in private ownership. Although that action is currently pending, the city is required to review the application based on the regulations in effect at the time the application was filed. As such, the PL zoning regulations are applicable to this request.

As for other public concerns regarding the location of the proposed facilities, Sat Hari Kahalsa, Charles and Barbara Nugent, and John Koenig cited a separation clause from Lane County Code 16.264(e)(ii), which requires towers to be located 1,200 feet from any dwelling or school, unless the affected home owner submits written approval. The applicant also noted this restriction as a reason for not locating outside City limits. Staff confirmed that Lane County Code does not apply within City limits. The Eugene Code (EC) does not have this separation clause, but EC 9.5750(7)(a) requires cell towers to be located at least 2,000 from each other. Jerry Joffe asserted that the tower was only being located in Eugene because it had lower standards than Lane County.

In response to the applicant's proposal and the public concerns, staff has paid particular attention to the design and operating characteristics of the facility in its proposed location. The existing soil reclamation area is surrounded by large trees and is suitable for a tower that would be designed to look like a tree. Being nestled amongst a stand of trees, rather than being out in the open, addresses the South Hills Study policy at EC 9.9640(3)(e), which requires development to blend in with the natural characteristics of the area; refer to the findings at EC 9.8440(6), which are incorporated by reference.

Further, the existing trees surrounding the mono-pine will help to obscure views of the proposed facilities. In this way, the proposed facilities are appropriately located on the subject property to minimize visual impacts. Given the importance of the surrounding trees, the applicant's request to locate the ancillary facilities above ground also helps to minimize excavation. Based on the public comment received and following a site visit of the proposed location and immediate surroundings, additional conditions are necessary to ensure compatibility, as discussed below.

The key to the proposed facilities blending in with the surrounding trees is to ensure that those trees will survive construction impacts and be maintained over the long-term. Several neighbors also questioned how the surrounding trees would be protected. Sat Hari Kahalsa asked how the surrounding trees would be preserved or if the property owner would be allowed to remove the trees if it is determined that they are obstructing the signal. Mic Wagoner expressed concern with the surrounding trees being damaged by the process of building the tower and noted that if trees are removed in the future, the screening and blending function of those trees will be lost. Mike Miles stated that there were gaps in the existing vegetated buffer between his house and the property, such that the proposed facilities would not be adequately screened.

Staff observed that several trees in the nearby area appeared dead or hazardous. Staff also observed gaps in the vegetative screen, as indicated by the public testimony. (See "Written Summary of Site Visit Conducted on May 13, 2014" provided in the application file.) To ensure that the mono-pole is screened by trees within this buffer area over the long-term and as well as reasonably possible, and as further required by the tree preservation, removal, and replacement standards at EC 9.8440(2), the following conditions are necessary:

- The applicant shall revise the final site plans to provide a comprehensive tree preservation, removal, and replacement plan for the area shown on Attachment C that includes the following elements:

  <u>Assessment of Existing Conditions</u>
  - An inventory prepared by a certified arborist of the location, species, and health of all trees.

  <u>Mitigating Existing Deficiencies</u>
  - Instructions that require the removal of all dead or hazardous trees (as confirmed by the arborist in the inventory required above, and as identified in the photos provided in Attachment D) and the replacement of each tree removed with two trees of the same species that are at least 2 inches in caliper or 5 feet in height trees, prior to any construction activities occurring on the site.
  - A restoration plan developed by a certified arborist or landscape architect to provide vegetated screening where there are currently gaps along the west boundary of the buffer area (as shown in Attachment D).

Assessment of Proposed Conditions

- Show the extent of excavation and other subsurface impacts associated with the facility installation, along with a delineation and analysis of impacts of the critical root zones (CRZ's) of the trees closest to the impact area.

Minimizing Impacts

- Provide an assessment, as supported by a certified arborist, with recommendations for mitigating tree impacts. The recommendations shall include construction techniques and other measures as necessary to minimize impacts and ensure long-term protection of the trees.
- Prior to any ground-disturbing or construction activities occurring on the site, protective fencing shall be installed, at the direction of a certified arborist, around the preservation trees. The revised final site plans shall show the location of the tree protection fencing.
- During all construction activities, protective fencing shall be in place surrounding the preservation trees and a certified arborist shall supervise any work occurring near the CRZ's delineated on the final site plans. The arborist shall have the authority to take action to further minimize impacts to trees, such as pruning roots that are encountered during excavation.

Bulk and Height -- With the above conditions to ensure long-term survival of the surrounding tree buffer, the bulk and height of the facilities will be similar to the immediate surroundings, which are a stand of fir and pine trees that buffer the area from the abutting residences. The height of the mono-pine (120 feet) is similar to the height of the surrounding trees (97 to 122 feet). As such, it will blend in reasonably well with the surroundings, rather than stick out. The bulk of the mono-pine is also similar to a fir tree. As discussed above, the nearest existing pine tree serves as the model for the mono-pine design.

The applicant states that the proposed mono-pine will be custom designed with an extra heavy branch canopy to maximize the screening of the proposed and future antennas (see applicant's elevation drawing A-2.1). The applicant submitted a branch sample of the mono-pine (see Attachment E) to show the exact colors and the variety of the needle lengths, which closely resembles a branch sample of an existing pine tree collected from the subject property (see Attachment F). Staff asked the applicant if the design could accommodate lower branches as well as a darker color of brown for the pole to more closely resemble trunks of the area. The applicant submitted paint samples and updated the photo simulations using the Sherwin Williams Chateau Brown (SW 7510) color.

During the second public comment period, the applicant refined the design in response to staffs' site visit findings. AT&T is proposing to install additional branches 20 feet above grade level (rather than 50 feet). The applicant also added to the branch thickness to further blend in with the surrounding trees and to further obscure the pole. In addition to the extra branches, the applicant agreed to select the referenced paint color (SW 7510) to better match the color of

the bark of the nearby trees. To ensure that these elements of the design are included in the final product, the following condition of approval is necessary:

- The applicant shall update and revise the final site plans (specifically Drawing Number A-2.1 showing the design elevation details) to show the proposed extra thick branches beginning at 20 feet above grade, and to note that the pole shall be painted with the color Sherwin Williams Chateau Brown (SW 7510). The final design shall be consistent with the applicant's revised submittals including samples and photo simulations provided in the record.

The applicant's updated photo simulations showing what the proposed mono-pine would look like when fully built out provide compelling evidence that the mono-pine will blend in with the surroundings reasonably well. The applicant coordinated with the manufacturer to ensure the photo simulations accurately represent what the proposed facility will look like. The applicant's photo simulation consultant, Tim Bradley Imaging, confirmed that great care was taken to ensure the accuracy of the height and location of the proposed mono-pine in the photo simulations. The height and location of the proposed mono-pine in the photo simulations were also verified with the use of a balloon and a laser range finder to verify the height.

The base of the pole and ancillary facilities will also be enclosed in an 8-foot concrete wall. Walt Meyer submitted a diagram shown the line of sight between his home, which is located higher than, and within view of, the proposed facility, to support his claim that the 8-foot wall will not completely hide the base equipment. He explains how the applicant responds to the aesthetics of the tower, but not of the ground equipment. Sat Hari Kahalsa requested a safety fence to keep humans and animals from getting too close to the cell tower.

The telecommunications buffering standard at EC 9.5750(7)(e) requires existing vegetation to be preserved to the maximum extent possible, which is addressed by the conditions above, and also requires landscaping to be placed completely around the transmission tower and ancillary facilities located at ground level, except as required to access the facility. The applicant's landscape plan (Sheet L-1) only proposes seven new shrubs at the southwest portion of the facility. To address this standard and the general compatibility of the proposed facilities, the following condition of approval is necessary:

- The final site plans shall be revised to show new landscaping abutting the entire exterior perimeter of the 8-foot tall concrete wall enclosure. As required by EC 9.5750(7)(e), the landscaping shall consist of evergreen vegetation with a minimum planted height of six feet and placed densely so as to form a screen. The final site plan shall note that all landscaping shall be kept healthy and well maintained as long as the telecommunication facility remains on the subject site.

<u>Noise</u> -- The applicant provided two acoustical reports prepared by SAA Acoustics, dated December 2, 2013 and April 9, 2014. Both reports conclude that the proposed facility complies with the 45dBA sound level standard established for telecommunication facilities at EC

9.5750(7)(f). The later report was provided in response to compelling public testimony provided against the first report. In particular, Walt Meyer called into the question the accuracy of the noise assessment, due to the elevation change between his home and the facility that would enable sound to travel over the wall to his home; as such, he states that, without noise barrier reduction, the sound pressure at his property will be 55dBA, which is above the allowable 45dBA.

The City hired a third-party consultant, Carl Bloom, to review the applicant's acoustical report and Mr. Meyer's testimony. The City's consultant confirmed that the elevation change would allow a more direct "line-of-sight" transmission of sound. In a worst-case noise level, the City's consultant concluded that the nose levels would increase by 8dBA, to 37dBa at a distance of 145 feet, which is still within the City's code limit of 45dBA.

The City's consultant noted that noise from the emergency generator would increase by 12dBA, to 55dBA, substantially over the code limit. The consultant also noted, however, that emergency equipment has been considered exempt from the City's code limit in the context of other building permit processes. Staff finds that there is no explicit exemption, particularly when Site Review approval is required which involves a more subjective review of compatibility, specifically with regard to noise. As such, staff concludes that the sound from the generator should be further mitigated, even if it is operated infrequently.

The applicant's second report, dated April 9, 2014, responded to the public comments in detail. Regarding reflective surfaces, the distance and location of the equipment relative to the walls do not present a condition where reflected sound energy would increase noise levels to the properties to the west. Predicted noise levels provided in the updated report also accounted for the elevation change between the subject property and the residents to the west.

For clarity, the applicant identifies two sound producers involved in the proposed facilities: the radio equipment cabinets and the emergency generator. The cabinets, which contain the electronics necessary to operate the wireless facility, will be operational 24 hours a day and produce very little noise. The acoustical report predicts a sound level of 29dBA at the nearest residential property lines to the west. The applicant states that this sound level is comparable to a "quiet house at night."

The applicant explains how the emergency generator is needed to operate the facility in the event of a power outage, which can be when emergency communications are needed most. Outside of emergency power outages, the generator will operate during a test cycle that occurs once a week for an hour during daytime hours, which will produce 44dBA at the nearest residential property lines to the west. The applicant says that 44dBA is similar to a "quiet library."

For comparative purposes, staff provides a sampling of noises (source: Galen Carol Audio at www.gcaudio.com):

0dB	weakest sound heard
30dB	whisper at quiet library heard at a distance of 6 feet
50dB	a normal conversation heard at a distance of 3 feet
80dB	telephone dial tone
98dB	hand drill
107dB	power mower at 3 feet
110dB	power saw at 3 feet
194dB	loudest sound possible

Some of the louder sounds noted above are typical sounds in residential neighborhoods, particularly the lawnmower. Similarly, leaf blowers are an occasional loud sound in neighborhoods, which produces 70dBA at 50 feet (according to www.nonoise.org). The World Health Organization recommends a general daytime outdoor noise level of 55 dBA or less, but 45dBA to meet sleep criteria.

During the second comment period, the applicant submitted additional information on May 19, 2014, responding to some of the latest public testimony. In particular, the applicant acknowledged that noise would escape from the top of the 8-foot tall concrete wall equipment enclosure; therefore, the applicant expressed a willingness to install an acoustical panel roof over the emergency generator. While the generator is the greatest source of noise associated with the proposed telecommunication facilities, the applicant also explained the limited use of the generator; hence the sound would be intermittent rather than constant. The applicant also explained how undergrounding the equipment would provide little to no perceptible improvement on reducing noise levels. If the applicant's suggested acoustical panel roof were added over the emergency generator, the sound level would be dropped between 5 and 10dBA.

In evaluating the requested variance, staff concluded that undergrounding the proposed equipment could result in adverse impacts to surrounding properties. Given the anticipated noise levels, there is no evidence that undergrounding would provide any further perceptible benefit. Conversely, undergrounding could require additional elevators and air conditioning equipment which could add further noise sources. More importantly, establishment of an underground vault could have significant impact on trees in the adjacent buffer area which are critical in maintaining an adequate visual buffer. Therefore, compliance with the noise standard is best accomplished with a condition of approval requiring additional sound mitigation around the generator, sufficient to ensure the sound levels do not exceed 45dBA at the nearest property line.

There are several factors (namely, the level of public concern, the applicant's requested variance from undergrounding the ancillary facilities, the theoretical versus actual noise levels, and the competing evidence) that require additional conditions.

The proposed concrete wall not only provides visual buffering, it is also relied upon by the applicant for noise mitigation. In addition to the concrete wall around the soil reclamation area,

the applicant's plans show an interior enclosure for the proposed telecommunication facilities; both need to be in place prior to operation of the equipment. Therefore, the following conditions of approval are necessary.

- The applicant shall provide a full enclosure with sound attenuation for the generator that effectively reduces the sound level to a maximum of 45dBA at the nearest property line. The design details of the required enclosure shall be provided on revised final site plans, along with certification from an acoustical engineer.

- After facility installation, the applicant shall provide another noise report of the actual readings necessary to verify that the assumptions of the above condition are met. If the sound level at the nearest property line exceeds 45dBA, then additional mitigation shall be provided.

- At no time shall the facilities be allowed to operate at a level exceeding 45dBA at the nearest property line.

- The 8-foot tall concrete walls as shown on the applicant's plans shall be installed around the facilities before they become operational. This includes the wall around the entire perimeter of the soil reclamation area as well as the interior wall enclosure for the proposed telecommunications facility.

There will be no lights on the tower and no evidence of odors from the proposal. Based on the above findings and conditions of approval, this criterion is met.

<u>EC 9.8440(2):</u>
Proposed lots, buildings, streets, parking lots, recreation areas, and other proposed uses are designed and sited to minimize impacts to the natural environment by addressing the following:

(a) <u>Protection of Natural Features</u>.

1. **For areas not included on the City's acknowledged Goal 5 inventory, the preservation of significant natural features to the greatest degree attainable or feasible, including:**
   a. **Significant on-site vegetation, including rare plants (those that are proposed for listing or are listed under State or Federal law), and native plant communities.**
   b. **All documented habitat for all rare animal species (those that are proposed for listing or are listed under State or Federal law).**
   c. **Prominent topographic features, such as ridgelines and rock outcrops.**
   d. **Wetlands, intermittent and perennial stream corridors, and riparian areas.**

e. **Natural resource areas designated in the <u>Metro Plan</u> diagram as "Natural Resource" and areas identified in any city-adopted natural resource inventory.**

2. **For areas included on the City's acknowledged Goal 5 inventory the applicant shall show that it has given due consideration to the preservation of attractive and distinctive historical and natural features.**

The subject property is included on the City's adopted Goal 5 inventory as a scenic site, noted as a "cemetery" and having "plentiful and prominent vegetation" (see <u>Metro Plan</u> Working Papers, 1978, Figure H-2). As such, subsection (a)2 applies. The proposal is to locate the mono-pine cell tower in an area previously developed as a soil retention area and no removal of natural features is proposed. Therefore, due consideration has been given to the preservation of surrounding vegetation as a natural feature. This criterion is met.

(b) **<u>Tree Preservation</u>. The proposed project shall be designed and sited to preserve significant trees to the greatest degree attainable or feasible, with trees having the following characteristics given the highest priority for preservation:**

1. **Healthy trees that have a reasonable chance of survival considering the base zone or special area zone designation and other applicable approval criteria;**
2. **Trees located within vegetated corridors and stands rather than individual isolated trees subject to windthrow;**
3. **Trees that fulfill a screening function, provide relief from glare, or shade expansive areas of pavement;**
4. **Trees that provide a buffer between potentially incompatible land uses;**
5. **Trees located along the perimeter of the lot(s) and within building setback areas;**
6. **Trees and stands of trees located along ridgelines and within view corridors;**
7. **Trees with significant habitat value;**
8. **Trees adjacent to public parks, open space and streets.**
9. **Trees along water features.**
10. **Heritage trees.**

As shown in the applicant's materials, there are 19 existing trees in the immediate vicinity of the proposed cell tower. The applicant is not proposing to remove any of the trees surrounding the lease site. The "mono-pine" telecommunications tower and ancillary equipment are proposed in an area that has been previously developed. The tree preservation conditions established previously at EC 9.8440(1), which are incorporated by reference, will ensure that the proposal will not result in trees dying as a result of additional critical root zone impacts around lease site.

(c) **<u>Restoration or Replacement</u> (To the extent applicable, restoration or replacement shall be in compliance with the planting and replacement standards of EC 6.335 and rules adopted there under.)**

1. **For areas not included on the city's acknowledged Goal 5 inventory, the proposal mitigates, to the greatest degree attainable or feasible, the loss of significant natural features described in criteria (a) and (b) above, through the restoration or replacement of natural features such as:**
   a. **Planting of replacement trees within common areas; or**
   b. **Re-vegetation of slopes, ridgelines, and stream corridors; or**
   c. **Restoration of fish and wildlife habitat, native plant habitat, wetland areas, and riparian vegetation.**
2. **For areas included on the city's acknowledged Goal 5 inventory, any loss of significant natural features described in criteria (a) and (b) above shall be consistent with the acknowledged level of protection for the features.**

Subsection (c)2 applies as the subject property is included on the City's adopted Goal 5 inventory as a scenic site, noted as a "cemetery" and having "plentiful and prominent vegetation" (see <u>Metro Plan</u> Working Papers, 1978, Figure H-2). As noted above, there is no loss of significant natural features as a result of the proposal, so no additional mitigation or replacement is required by this criterion. This criterion is met.

(d) **<u>Street Trees</u>. If the proposal includes removal of any street tree(s), removal of those street tree(s) has been approved, or approved with conditions according to the process at EC 6.305 of this code.**

No removal of street trees is proposed. This criterion is not applicable.

(e) **<u>Parking</u>. There is a need for parking in the area and the proposed parking area will provide shared parking.**

There is no proposed parking as part of this development. This criterion is not applicable.

<u>EC 9.8440(3):</u>
The proposal provides safe and adequate transportation systems through compliance with all of the following:

(a) **Compliance with EC 9.6800 through EC 9.6875 Standards for Streets, Alleys, and Other Public Ways.**

Many of the street standards at EC 9.6800 through EC 9.6875 do not apply to the subject development because no new streets are proposed or required. Access to the cell tower lease site will be via an existing driveway off of 40th Avenue which currently provides access to the Rest Haven site. As the traffic increase resulting from the facility will be negligible (i.e. limited to one maintenance visit per month), the proposal does not create the need for new street

connections. Public Works referral comments included in the file otherwise confirm that the remaining standards at EC 9.6800 through EC 9.6875 are either met or inapplicable.

(b) Pedestrian, bicycle and transit circulation, including related facilities, as needed among buildings and related uses on the development site, as well as to adjacent and nearby residential areas, transit stops, neighborhood activity centers, office parks, and industrial parks, provided the city makes findings to demonstrate consistency with constitutional requirements. "Nearby" means uses within 1/4 mile that can reasonably be expected to be used by pedestrians, and uses within 2 miles that can reasonably be expected to be used by bicyclists.

As the proposal is for a telecommunications tower, pedestrian, bicycle and transit circulation are not needed on site or to adjacent areas.

EC 9.8440(4):
The proposal will not be a significant risk to public health and safety, including but not limited to soil erosion, slope failure, stormwater or flood hazard, or an impediment to emergency response.

A significant amount of opposing testimony asserts that radio emissions from the tower would have negative impacts on surrounding properties, and negative health impacts on people and wildlife. As noted below in the telecommunications standards (and consistent with the Federal Telecommunications Act), the City must defer to Federal standards in regards to non-ionizing electromagnetic radiation (NIER) emissions. The City has employed a third-party consultant to review the applicant's information regarding emissions and confirm they are far below the maximum allowable threshold.

With regard to risk of flood, Public Works staff confirms no proposed structures are within a regulated special flood hazard area. The development itself will not result in unreasonable risk of flood per the stormwater management evaluation at EC 9.8440(5)(j). Due to the level nature of the lease site, soil erosion and slope failure are unlikely, however as noted a geotechnical analysis will be provided prior to the building permit.

The applicant notes that the proposed facility is a passive, unoccupied use, which will only generate approximately one vehicle trip a month for maintenance. The applicant states that improved service provided by the proposed facility will ensure improved reliability and access to emergency services, such as fire and police, particularly when traditional landline phones are inaccessible or not working. As a result, the applicant asserts that this facility will improve emergency response.

Given the available information, this criterion is met.

EC 9.8440(5):
The proposal complies with all of the following standards (An approved adjustment to a standard pursuant to the provisions beginning at EC 9.8015 of this land use code constitutes compliance with the standard.):

(a) EC 9.2000 through 9.3915 regarding lot dimensions and density requirements for the subject zone.

The lot dimensions are not being changed by the proposed development. As this use is not residential, no density requirements are applicable. This standard is met.

(b) EC 9.6500 through 9.6505 Public Improvement Standards.

In regards to EC 9.6500 Easements, the site improvements do not generate the need for a public easement. In regards to EC 9.6505 Improvements–Specifications, the applicant proposes no public improvements, and Public Works staff confirms that none are required.

(c) EC 9.6706 Development in Flood Plains through EC 9.6709 Special Flood Hazard Areas - Standards.

These standards do not apply because the subject property is not located within a special flood hazard area as mapped by the Federal Emergency Management Agency (FEMA).

(d) EC 9.6710 Geological and Geotechnical Analysis.

These standards do not apply to the site review because site slopes are less than five percent and no public improvements are proposed or required.

(e) EC 9.6730 Pedestrian Circulation On-Site.

This criterion applies only to institutional, office, commercial, industrial and multi-family development and therefore does not apply to this proposal.

(f) EC 9.6735 Public Access Required.

Referral comments from Public Works included in the file otherwise confirm compliance with applicable access management requirements. This criterion is met.

(g) EC 9.6750 Special Setback Standards.

No special setbacks are needed; no right of way or easements are required.

(h) EC 9.6775 Underground Utilities.

The applicant's written statement and site plans indicate that all new utilities will be placed underground consistent with these standards. EWEB referral comments included in the file note that electrical facilities are in and near the site but not in close proximity to the lease area and new easements may be required to serve the site.

(i) EC 9.6780 Vision Clearance Area.

This criterion is not applicable since the development site is not located at a street intersection.

(j) EC 9.6791 through 9.6797 regarding stormwater flood control, quality, flow control for headwaters area, oil control, source control, easements, and operation and maintenance.

The proposed facility will be located within an approved soil retention enclosure and will not add new impervious surfaces. The proposed facility will rely on the existing drainage patterns within the 70-acre property.

(k) All other applicable development standards for features explicitly included in the application.

The standards for telecommunications facilities beginning at EC 9.5750 are applicable to the proposed new cell tower. To provide context, the purpose of the standards is also included below but does not serve as approval criteria for the request.

EC 9.5750 Telecommunication Devices-Siting Requirements and Procedures.

(1) Purpose. The provisions of this section are intended to ensure that telecommunication facilities are located, installed, maintained and removed in a manner that:

- **(a) Minimizes the number of transmission towers throughout the community;**
- **(b) Encourages the collocation of telecommunication facilities;**
- **(c) Encourages the use of existing buildings, light or utility poles or water towers as opposed to construction of new telecommunication towers;**
- **(d) Recognizes the need of telecommunication providers to build out their systems over time; and**
- **(e) Ensures that all telecommunication facilities, including towers, antennas, and ancillary facilities are located and designed to minimize the visual impact on the immediate surroundings and throughout the community, and minimize public inconvenience and disruption. Nothing in this section shall apply to amateur radio antennas, or facilities used exclusively for the transmission of television and radio signals.**

(2) Siting Restricted. No telecommunication facility, as defined in this land use code, may be constructed, modified to increase its height, installed or otherwise located within the city except as provided in this section. Depending on the type and location of the telecommunication facility, the telecommunication facility shall be either an outright permitted use, subject to site review procedures, or require a conditional use permit.

(b) Site Review. A telecommunication facility which, pursuant to subsections (3) or (5) of this section is subject to site review shall be processed in accordance with the site review procedures of this land use code. The criteria contained in this section, as well as the criteria contained in EC 9.8440 Site Review Approval Criteria - General shall govern approval or denial of the site review application. In the event of a conflict in criteria, the criteria contained in this section shall govern. No development permit shall be issued prior to completion of the site review process, including any local appeal.

(5) Construction of Transmission Tower. Construction of a transmission tower, or a modification of an existing transmission tower to increase its height, shall be allowed as follows:

(b) Site Review. Such construction shall require site review approval in the PL, C-2, C-3 and S-WS zones.

The applicant seeks Site Review approval for the construction of a new transmission tower in the PL, Public Land zone.

(6) Application Requirements.

(b) Construction of Transmission Tower. In addition to standard required application material, an applicant for a transmission tower shall submit the following information; additional application material is required, as specified in paragraph (c) below, for applications requiring a site review or conditional use process:

1. A description of the proposed tower location, design and height.

Details of the location, design and height are provided at EC 9.8440(1), which includes additional findings and conditions.

2. The general capacity of the tower in terms of the number and type of antennas it is designed to accommodate.

The applicant states that the tower will be designed to accommodate 36 panel antennas and 3 microwave dish antennas.

3. **Documentation demonstrating compliance with non-ionizing electromagnetic radiation (NIER) emissions standards as set forth by the Federal Communications Commission (FCC).**

There was significant public testimony provided regarding the negative health impacts from the emissions on people and wildlife surrounding the area. Consistent with the Telecommunications Act, consistency with standards set forth by the Federal Communications Commission (FCC) must be demonstrated, but a locality cannot further limit emissions.

The applicant provided a report as Exhibit H, which includes the documentation demonstrating compliance with non-ionizing electromagnetic radiation (NIER) emission standards as set forth by the Federal Communications Commission (FCC). This report was subsequently reviewed by Environalysis, LLC, on behalf of the City of Eugene, as required at EC 9.5750(11). The review concluded that "The information in the applicant's proposal is sufficient to determine that the noise and NIER impacts of the project fall well within regulatory limits set by Federal jurisdictions. No special conditions need to be applied to mitigate noise or NIER emissions."

Public testimony noted that due to the slope of surrounding areas, the emissions impact would be greater on some houses. Staff sent this testimony to Environalysis LLC for further analysis. The consultant concluded that the actual maximum public exposure from the project at that neighboring location would be only slightly more than that stated in the NIER report (0.467% of the FCC standard versus the reported 0.3637%), far below the maximum allowable threshold.

4. **A signed agreement, as supplied by the city, stating that the applicant will allow collocation with other users, provided all safety, structural, and technological requirements are met. This agreement shall also state that any future owners or operators will allow collocation on the tower.**

A signed agreement has been provided by AT&T that will allow collocation with other users, provided all safety, structural and technological requirements are met. This agreement is included in Exhibit I of the applicant's materials.

5. **Documentation that the ancillary facilities will not produce sound levels in excess of those standards specified in subsection (7) of this section, or designs showing how the sound is to be effectively muffled and reduced pursuant to those standards.**

The applicant submitted two acoustical reports. The findings and conditions at EC 9.8440(1), which are incorporated by reference, will ensure that the ancillary facilities will not produce sound levels in excess of the 45dBA maximum standard.

6. **A landscape plan drawn to scale showing proposed and existing landscaping, including type, spacing, size and irrigation methods.**

The applicant provided a landscape plan (Exhibit D, Sheet L-1) that shows existing and proposed landscaping. As proposed, the landscaping does not meet the applicable standards. The findings and conditions at EC 9.8440(1), which are incorporated by reference, will ensure compliance with the applicable landscape standards.

7. **Plans showing the connection to utilities/right-of-way cuts required, ownership of utilities and easements required.**

The applicant's site plans (Exhibit A, Sheet A-1), show utilities and existing easements. EWEB comments indicate an easement may be required at a future date.

8. **Documents demonstrating that necessary easements have been obtained.**

No easements are required at this time. EWEB indicated they may need a future easement. This can be obtained at a future date, if required by EWEB for utility installation.

9. **Plans showing how vehicle access will be provided.**

The applicant's plans (Drawing C-2.3) shows a proposed 15-foot wide access and utility easement between Densmore Road, at the intersection of West 40th Avenue, and the proposed lease area.

10. **Signature of the property owner(s) on the application form or a statement from the property owner(s) granting authorization to proceed with development permit and land use processes.**

The property owner, Charles Wiper on behalf of Rest Haven Cemetery, signed the initial application form.

11. **Documents demonstrating that the FAA has reviewed and approved the proposal, and Oregon Department of Aviation has reviewed the proposal. Alternatively, when a site review or conditional use process is required, submit a statement documenting that notice of the proposal has been submitted to the FAA and Oregon Department of Aviation. The site review or conditional use process may proceed and approval may be granted for the proposal as submitted, subject to FAA approval. If FAA approval requires any changes to the proposal as initially approved, then that initial approval shall be void. A new application will need to be submitted, reviewed and approved through an additional site review or conditional use process. No development permit application shall be submitted without documents demonstrating FAA review and approval and Oregon Department of Aviation review.**

FAA and ODA approvals have been provided as Exhibit G of the application.

(c) <u>Site Review and Conditional Use Permit Applications</u>. In addition to the application requirements specified in paragraph (b) above, applications for site review or conditional use permits also shall include the following information:

1. A visual study containing, at a minimum, a graphic simulation showing the appearance of the proposed tower, antennas, and ancillary facilities from at least 5 points within a 3 mile radius. Such points shall be chosen by the provider with review and approval by the planning director to ensure that various potential views are represented.

The applicant has provided a photo simulation showing the appearance of the proposed tower from 5 different views. Following concerns raised by the public and staff, the applicant provided additional, revised photo simulations. Refer to EC 9.8440(1) for staff's analysis of this evidence in the record.

2. Documentation that alternative sites within a radius of at least 2000 feet have been considered and have been determined to be technologically unfeasible or unavailable. For site reviews, alternative sites zoned C-4, I-1, I-2, and I-3 must be considered. For conditional use permits, alternative sites zoned PL, C-2, C-3, C-4, I-1, I-2, I-3 and S-WSmust be considered.

There are no alternative sites zoned C-4, I-1, I-2 or I-3 within 2000 feet.

3. Evidence demonstrating collocation is impractical on existing tall buildings, light or utility poles, water towers, existing transmission towers, and existing tower facility sites for reasons of structural support capabilities, safety, available space, or failing to meet service coverage area needs.

The applicant provided pictures of surrounding residential areas and utility poles, along with a radio frequency engineering report (see Exhibit K of the applicant's materials), to confirm that the height of the surrounding buildings and utility poles are not sufficient to meet coverage needs.

4. A current overall system plan for the city, showing facilities presently constructed or approved and future expansion plans.

The applicant provided (as Exhibit L) the locations of existing towers and noted the locations of future planned towers.

5. **A statement providing the reasons for the location, design and height of the proposed tower or antennas.**

The applicant provided a radio frequency engineering report (Exhibit K) stating the reasons for the location, design and height of the proposed tower or antennas.

(7) <u>Standards for Transmission Towers and Antennas</u>. Installation, construction or modification of all transmission towers and antennas shall comply with the following standards, unless a variance is obtained pursuant to the provisions of subsection (9) of this section:

(a) <u>Separation Between Transmission Towers</u>. No transmission tower may be constructed within 2000 feet of any pre-existing transmission tower. Tower separation shall be measured by following a straight line from the portion of the base of the proposed tower which is closest to the base of any pre-existing tower. For purposes of this paragraph, a tower shall include any transmission tower for which the city has issued a development permit, or for which an application has been filed and not denied. Transmission towers constructed or approved prior to February 26, 1997 may be modified to accommodate additional providers consistent with provisions for collocation in this section.

Based on available information, the nearest tower is located over a mile to the south of the proposed location. There are no pre-existing transmission towers within 2,000 feet.

(b) <u>Height Limitation</u>: Transmission tower heights shall be governed by this section except as provided for below. No transmission tower shall exceed the maximum heights provided below. In no case shall a variance be granted from the limitations of subparagraphs (1) through (4) below.

1. **In any zones, no transmission tower shall exceed the height limitations established for buildings and structures in the specified areas surrounding Skinner Butte contained in EC 9.6715 <u>Height Limitation Areas</u> of this land use code to protect views to and from Skinner Butte.**

The proposed tower is not within the Height Limitation Area shown on EC Map 9.6715(3). This standard does not apply.

2. **In any zone within the area east of Willagillespie Road, south of Cal Young Road, west of Oakway Road, and north of Southwood Lane and Country Club Road, no transmission tower shall exceed 75 feet in height to protect views to and from Gillespie Butte.**

The proposed transmission tower is not located within this area; this standard is not applicable.

3. **If located within a PL, C-2, C-3, C-4, R-4, I-1, I-2, I-3 or S-WS zone, the height limitation for that zone shall apply.**

The proposed 120-foot telecommunications tower is within a PL, Public Land zone. EC Table 9.2684 establishes no maximum height in the PL zone; however, EC 9.2685(1) further restricts building heights within 50 feet of a residential zone to the height limitations of the abutting residential zone. The adjacent lands are zoned R-1, Low-Density Residential, which has a building height maximum of 30 feet. This restriction does not apply to the proposal, however, because the facilities are located over 50 feet from the residential zone.

4. **If located within a C-1, S (other than S-WS) or GO zone, the maximum height of a transmission tower, including antennas, is 100 feet.**

The proposed tower is within a PL zone. This standard does not apply.

5. **If located within an R-1 zone, the maximum height of a transmission tower, including antennas, is 75 feet, unless a variance is granted pursuant to the provisions of subsection (9) of this section. In no event shall a variance be granted to construct such a tower in excess of 100 feet.**

The proposed tower is within a PL zone. This standard does not apply.

(c) **<u>Collocation</u>. New transmission towers shall be designed to accommodate collocation of additional providers:**

1. **New transmission towers of a height of 80 feet or more shall be designed to accommodate collocation of a minimum of 2 additional providers either outright or through future modification to the tower.**

The proposed transmission tower is 120 feet in height. As noted in the applicant's written statement, the tower is designed to allow 2 additional providers.

2. **New transmission towers of a height of at least 60 feet and no more than 80 feet shall be designed to accommodate collocation of a minimum of 1 additional provider either outright or through future modification to the tower.**

The transmission tower is proposed to be 120 feet. This standard does not apply.

(d) **<u>Setback</u>. The following setbacks from adjacent property lines and adjacent streets shall be required unless a variance is granted pursuant to the provisions of subsection (9) of this section:**

3. If located within an R-1, PL, C-1 and GO zone, the transmission tower shall be set back from the adjacent public streets a minimum number of feet equal to the height of the tower.

As shown on the applicant's site plans (Sheet A-1.1) the tower is setback 128 feet from the nearest adjacent public street (Densmore Road, to the west), which exceeds the height of the 120-foot tall tower.

(e) **<u>Buffering</u>. In all zones, existing vegetation shall be preserved to the maximum extent possible. In the C-4, I-1, I-2 and I-3 zones, no buffering is required beyond that required by this land use code. In all other zones, landscaping shall be placed completely around the transmission tower and ancillary facilities located at ground level except as required to access the facility. Such landscaping shall consist of evergreen vegetation with a minimum planted height of 6 feet placed densely so as to form a screen. Landscaping shall be compatible with other nearby landscaping and shall be kept healthy and well maintained.**

While the applicant shows existing vegetation and an 8-foot wall surrounding the base of the facility, the proposal does not include perimeter landscaping completely around the facility as required by this standard. The findings and condition at EC 9.8440(1), which are incorporated by reference, will ensure that landscape buffering is installed as required by EC 9.5750(7)(e).

(f) **<u>Noise Reduction</u>. In R-1, R-2, R-3, R-4, C-1, and GO and in all other zones when the adjacent property is zoned for residential use or occupied by a dwelling, hospital, school, library, or nursing home, noise generating equipment shall be sound-buffered by means of baffling, barriers, or other suitable means to reduce sound level measured at the property line to 45dBa.**

The adjacent property is zoned R-1 and is in residential use with occupied dwellings. The findings and conditions at EC 9.8440(1), which are incorporated by reference, will ensure that the sound levels will not exceed 45dBa at the property line.

(g) **<u>Status of Location</u>. No permit may be issued for the location of a new telecommunications facility within an R-1 or C-1 zone unless the lot on which it is to be placed is vacant or developed with a non-residential use at the time the permit application is submitted. This restriction does not apply within other zones.**

The property is zoned PL, this standard is not applicable.

(h) **<u>Lighting</u>. No lighting shall be permitted on transmission towers except that required by the Federal Aviation Administration. No high intensity white lights may be located on transmission towers in an R-1, C-1, or PRO zone.**

The application materials confirm that no lighting of the tower is required by FAA regulations and that the only proposed lighting will be for maintenance purposes within the wall enclosure for the facility.

(i) **<u>Color</u>. The transmission tower and attached antennas shall be unpainted galvanized steel or painted neutral colors or such shades as are appropriate and compatible with the surrounding environment, as approved by the city.**

The color and other design details of the mono-pine are conditioned at EC 9.8440(1) to ensure compatibility with the surrounding environment; those findings and conditions are incorporated by reference.

(j) **<u>Viewshed.</u> The transmission tower shall be located down slope from the top of a ridgeline so that when viewed from any point along the northern right-of-way line of 18th Avenue, the tower does not interrupt the profile of the ridgeline or Spencer Butte. In addition, a transmission tower shall not interrupt the profile of Spencer Butte when viewed from any location in Amazon Park. Visual impacts to prominent views of Skinner Butte, Judkins Point, and Gillespie Butte shall be minimized to the greatest extent possible. Approval for location of a transmission tower in a prominent view of these Buttes shall be given only if location of the transmission tower on an alternative site is not possible as documented by application materials submitted by the applicant, and the transmission tower is limited in height to the minimum height necessary to provide the approximate coverage the tower is intended to provide.**

The mono-pine telecommunications tower is proposed to be 120 feet tall. Based on the available evidence, the proposed tower will not interrupt the profile of the South Hills ridgeline or Spencer Butte. The tower location is not in a prominent view of Spencer Butte as the location is down slope, in a group of trees and will be designed to blend in as a pine tree. Prominent views of Skinner's Butte, Judkins Point and Gillespie Butte will not be affected. As noted in Radio Frequency Engineering Report and attachments (Exhibit K) which show existing and proposed service coverage, alternative sites have been evaluated and the tower is the minimum height necessary to provide the intended coverage.

(k) **<u>Display.</u> No signs, striping, graphics or other attention getting devices are permitted on the transmission tower or ancillary facilities except for warning and safety signage with a surface area of no more than 3 square feet. Such signage shall be affixed to a fence or ancillary facility and the number of signs is limited to no more than 2.**

The applicant's written statement notes that there will be no signs, striping or graphics associated with the facility. To ensure continued compliance with this standard, the following condition is warranted:

- The applicant's site plans shall be revised to include the following note "No signs, striping, graphics or other attention getting devices are permitted on the transmission tower or ancillary facilities except for warning and safety signage with a surface area of no more than 3 square feet. Such signage shall be affixed to a fence or ancillary facility and the number of signs is limited to no more than 2."

With this condition, the standard is met.

(8) **<u>Standards for Ancillary Facilities</u>. All ancillary facilities shall comply with the standards of subsections (7)(e) and (7)(f) of this section. In addition, all ancillary facilities within an R-1, PL, C-1, GO, and PRO zone must be located underground to the maximum extent technology allows, unless a variance is obtained pursuant to the provisions of subsection (9) of this section. This restriction does not apply within other zones.**

The subject property is zoned PL and the applicant is requesting a variance to the underground requirement pursuant to subsection (9)(c) of this section.

(9) **<u>Variance</u>.**

(a) **Any variance to the requirements of this section shall be granted only pursuant to the following provisions. The criteria for granting a variance shall be limited to this section, and shall not include the standard variance criteria beginning at EC 9.8750 <u>Purpose of Variances</u>.**

(c) **The city may grant a variance to the setback and undergrounding requirements of subsections (7)(d) or (8) upon finding that stealth design, proposed landscaping, configuration of the site, or the presence of mature trees obviates the need for compliance.**

The applicant requests a variance to the undergrounding requirements. The proposed stealth design is for a mono-pine tower that blends in with the surrounding trees. The ancillary facilities are proposed within an 8-foot tall concrete wall, which is largely surrounded by existing vegetation. The findings and conditions at EC 9.8440(1), which are incorporated by reference, require the following to ensure compliance with the variance approval criteria: more landscaping to be installed around the outside of the wall (for a complete perimeter screen,

except as necessary for access); preservation and restoration of the existing vegetated buffer beyond the wall (to remove/replace dead/hazardous trees, to fill in the existing gaps in the vegetation, and to establish long-term tree protection measures); and additional sound mitigation for the ancillary facilities (to enclose the generator) with post-operational reporting. The variance is granted in this instance, based on the available evidence and contingent upon the applicant's compliance with these additional requirements.

(10) <u>Removal of Facilities</u>.

(a) All transmission towers and antennas shall be removed by the person who constructed the facility, by the person who operates the facility, or by the property owner, within 6 months of the time that the facilities have ceased being used to transmit, receive or relay voice and data signals to or from wireless communication devices. The city manager may grant a 6-month extension where a written request has been filed, within the initial 6-month period, to reuse the tower or antennas.

(b) If a transmission tower is located within an R-1, PL, C-1 or GO zone, the provisions of subparagraph (a) also shall apply to the tower substructure and all above ground ancillary facilities.

(c) The city may require the posting of an open ended bond before development permit issuance to insure removal of the transmission tower, substructure or antennas after the facility no longer is being used.

To ensure removal of facilities in compliance with this standard, the following condition of approval is warranted:

- The following note shall be added to the final site plan "All transmission towers, antennas, the tower substructure and all above ground ancillary facilities shall be removed by the person who constructed the facility, by the person who operates the facility, or by the property owner, within 6 months of the time that the facilities have ceased being used to transmit, receive or relay voice and data signals to or from wireless communication devices. The city manager may grant a 6-month extension where a written request has been filed, within the initial 6-month period, to reuse the tower or antennas".

As conditioned, this standard is met.

(11) <u>Application Review and Fees</u>. The city manager shall retain one or more consultants to verify the accuracy of statements made in connection with an application for a building or land use permit for a telecommunications facility. Notwithstanding any other provision of this code, the city manager shall require the applicant to pay, as part of the application fees, an amount sufficient to recover all of the city's costs in retaining the consultant(s).

As previously discussed, Carl Bloom of Environalysis, LLC, was retained to verify the accuracy of statements made in connection with the site review application, including verifying the accuracy of the noise reports and emissions reports.

EC 9.8440(6):
The proposal complies with applicable adopted plan policies beginning at EC 9.9500.

The adopted plans applicable to the subject property are the Eugene-Springfield Metropolitan Area General Plan (Metro Plan) and the South Hills Study. The policies of those plans that are subject to review under this approval criterion are only those listed at EC 9.9560 and EC 9.9630, respectively. Staff finds that none of the Metro Plan policies listed at EC 9.9560 serve as mandatory approval criteria for the subject request and notes that the polices specific to the environment are directed toward local government actions, rather than specific development proposals.

The only directly applicable policy of the South Hills Study under this criterion appears to be EC 9.9640(3)(e), which requires that "developments be reviewed in terms of scale, bulk and height to insure that development blends with rather than dominates the natural characteristics of the south hills area." To a large extent, the intent of this policy is also addressed by the Site Review approval criterion at EC 9.8440(1), which specifically addresses scale, bulk and height of the proposed development relative to its surroundings. This policy further clarifies that the expectation on blending in with the surroundings is specific to the natural characteristics of the south hills area (i.e. blending in with nearby trees).

The proposed mono-pine design is considered a stealth design for the setting, which is within a stand of trees of similar height. As discussed previously at EC 9.8440(1), the applicant provided greater detail regarding the design, in response to public concerns, including an actual section of the tower (branch sample), paint samples, and refined photo simulations. Staff has also imposed conditions at EC 9.8440(1) to further ensure that the design blends in with the natural surroundings. Based on those findings and conditions, which are incorporated by reference, this policy is met.

EC 9.8440(7):
Any additional specific factors applied at the time the /SR designation was applied.

Site Review is a requirement based on the proposed use. No site review zoning overlay exists on the property. This criterion is not applicable.

Decision
Based on the available information and evidence, and based on the preceding findings of compliance with applicable approval criteria and standards, the Site Review application, which includes a variance, is APPROVED subject to the following conditions.

Conditions of Approval

1. The applicant shall revise the final site plans to provide a comprehensive tree preservation, removal, and replacement plan for the area shown on Attachment C that includes the following elements:

   Assessment of Existing Conditions
   - An inventory prepared by a certified arborist of the location, species, and health of all trees.

   Mitigating Existing Deficiencies
   - Instructions that require the removal of all dead or hazardous trees (as confirmed by the arborist in the inventory required above, and as identified in the photos provided in Attachment D) and the replacement of each tree removed with two trees of the same species that are at least 2 inches in caliper or 5 feet in height trees, prior to any construction activities occurring on the site.
   - A restoration plan developed by a certified arborist or landscape architect to provide vegetated screening where there are currently gaps along the west boundary of the buffer area (as shown in Attachment D).

   Assessment of Proposed Conditions
   - Show the extent of excavation and other subsurface impacts associated with the facility installation, along with a delineation and analysis of impacts of the critical root zones (CRZ's) of the trees closest to the impact area.

   Minimizing Impacts
   - Provide an assessment, as supported by a certified arborist, with recommendations for mitigating tree impacts. The recommendations shall include construction techniques and other measures as necessary to minimize impacts and ensure long-term protection of the trees.
   - Prior to any ground-disturbing or construction activities occurring on the site, protective fencing shall be installed, at the direction of a certified arborist, around the preservation trees. The revised final site plans shall show the location of the tree protection fencing.
   - During all construction activities, protective fencing shall be in place surrounding the preservation trees and a certified arborist shall supervise any work occurring near the CRZ's delineated on the final site plans. The arborist shall have the authority to take action to further minimize impacts to trees, such as pruning roots that are encountered during excavation.

2. The final site plans shall be revised to show new landscaping abutting the entire exterior perimeter of the 8-foot tall concrete wall enclosure. As required by EC 9.5750(7)(e), the landscaping shall consist of evergreen vegetation with a minimum planted height of six feet and placed densely so as to form a screen. The final site plan shall note that all

landscaping shall be kept healthy and well maintained as long as the telecommunication facility remains on the subject site.

3. The applicant shall update and revise the final site plans (specifically Drawing Number A-2.1 showing the design elevation details) to show the proposed extra thick branches beginning at 20 feet above grade, and to note that the pole shall be painted with the color Sherwin Williams Chateau Brown (SW 7510). The final design shall be consistent with the applicant's revised submittals including samples and photo simulations provided in the record.

4. The applicant shall provide a full enclosure with sound attenuation for the generator that effectively reduces the sound level to a maximum of 45dBA at the nearest property line. The design details of the required enclosure shall be provided on revised final site plans, along with certification from an acoustical engineer.

5. After facility installation, the applicant shall provide another noise report of the actual readings necessary to verify that the assumptions of the above condition are met. If the sound level at the nearest property line exceeds 45dBA, then additional mitigation shall be provided.

6. At no time shall the facilities be allowed to operate at a level exceeding 45dBA at the nearest property line.

7. The 8-foot tall concrete walls as shown on the applicant's plans shall be installed around the facilities before they become operational. This includes the wall around the entire perimeter of the soil reclamation area as well as the interior wall enclosure for the proposed telecommunications facility.

8. The applicant's site plans shall be revised to include the following note "No signs, striping, graphics or other attention getting devices are permitted on the transmission tower or ancillary facilities except for warning and safety signage with a surface area of no more than 3 square feet. Such signage shall be affixed to a fence or ancillary facility and the number of signs is limited to no more than 2."

9. The following note shall be added to the final site plan "All transmission towers, antennas, the tower substructure and all above ground ancillary facilities shall be removed by the person who constructed the facility, by the person who operates the facility, or by the property owner, within 6 months of the time that the facilities have ceased being used to transmit, receive or relay voice and data signals to or from wireless communication devices. The city manager may grant a 6-month extension where a written request has been filed, within the initial 6-month period, to reuse the tower or antennas."

Post Approval

Pursuant to EC 9.7220, the Planning Director's decision regarding this Type II application is effective on the 13th day after notice of the decision is mailed, unless appealed according to the procedures in EC 9.7605.

Pursuant to EC 9.7230, within 18 months of the effective date of the approval, a Site Review Performance Agreement is required, followed by an application for development permit; otherwise, this approval will expire, unless the applicant submits a modification application to extend the expiration period.

This approval does not relieve the applicant of complying with other applicable code provisions or Oregon Revised Statutes, which may otherwise govern the development of the subject property.

Approval Date: 6/10/14

Approved By:

Gabriel Flock, Senior Planner, for Eugene Planning Director

Attachments

Attachment A	Vicinity Map & Area of Request Detail
Attachment B	Index of Public Testimony
Attachment C	Tree Preservation Area
Attachment D	Mitigating Existing Deficiencies
Attachment E	Sample of Mono-Pine Branch
Attachment F	Sample of Pine Branch from Site

Attachment A: Vicinity Map & Area of Request Detail

Vicinity Map (not to scale)

Area of Request Detail (not to scale)

Attachment B: Public Comment Index

The City initially mailed public notice on February 14, 2014, soliciting public comments until March 10, 2014. In response to the numerous concerns identified by the public during this initial comment period, on March 27, 2014, the applicant filed an extension to prepare responsive information. Following receipt of the applicant's supplemental materials on May 2, 2014, the City mailed a second public notice on May 5, 2014, soliciting comments until May 19, 2014. An index testimony received during each public comment period is provided below. The actual testimony is provided in the application file.

First Public Comment Period (February 14 – March 10, 2014) – All Opposed

- Allison Hassler, email dated March 11, 2014
- Hanna Mitchell and Hannah Hibbard, email dated March 10, 2014 with attached "Birds Harmed by Radio-Frequency Radiation"
- Michelle Pellitier, email dated March 10, 2014
- John Pellitier, email dated March 10, 2014
- Adalbert and Mildred Toepel, letter dated March 10, 2014
- Susan Manske and Gary Apsel, email dated March 10, 2014
- Jonathan and Stephanie Dignan, email dated March 10, 2014
- David Steel, email dated March 10, 2014
- Walter and Nancy Meyer, email and attached letter dated March 7, 2014
- Cheryl Roffe, email dated March 7, 2014
- Mike Miles and Patricia Harding, letter dated March 5, 2014 with attachments
- Barbara and Charlie Nugent, letter dated March 7, 2014
- John Koenig and Deborah Toobert, letter dated March 3, 2014

Second Public Comment Period (May 5, 2014 – May 19, 2014)

Favorable Testimony

- Robert Binz, email dated May 17, 2014
- Robert Breeden, letter dated May 19, 2014

Opposing Testimony

- Sat Hari Khalsa, email dated May 19, 2014
- Charles and Barbara Nugent, email dated May 19, 2014, letters dated May 18, 2014 and May 16, 2014
- John Koenig, two emails dated May 2, 2014 and email dated April 28, 2014
- Adalbert and Mildred Toepel, letter dated May 17, 2014
- Leslie Hunter, email dated May 18, 2014
- Andrew and Naella Cissna, email dated May 8, 2014
- Sarah Johnston, email dated May 19, 2014
- Stephanie Thompson, email dated May 19, 2014
- Donald and Martha Noonan, email dated May 8, 2014
- Patricia and Charles Wagoner, email dated May 13 and May 17, 2014 (requested mailing address)

Attachment B: Public Comment Index

- Kim Wilson, email dated May 18, 2014
- Jonathan Dignan, emails dated April 29, 2014
- Robin Ingram, email dated April 30, 2014
- Walter and Nancy Meyer, email dated May 9, 2014 with attached letter
- Dianne Moore, email dated May 19, 2014
- Wanda Walker, email dated May 19, 2014
- Troy Christie, email dated May 19, 2014
- Tricia Mercer, email dated May 19, 2014
- Stuart Roach, email dated May 19, 2014
- Kimberly K Penn RN, email dated May 18, 2014 (requested mailing address)
- Tyler Wood, email dated May 19, 2014 (requested mailing address)
- Stephen Eiring, email dated May 19, 2014
- Susan Manske, email dated May 19, 2014
- Steven Ritter, email dated May 19, 2014
- Jerry Joffe, email and attached letter dated May 19, 2014
- Mike Miles:
    - Email dated May 19, 2014, 4:16 p.m. with attachment
    - Email dated May 19, 2014, 2:54 p.m.
    - Letter dated May 19, 2014
    - Email dated May 18, 2014, 11:26 pm. With attachments
    - Email dated May 18, 2014, 10:02 p.m. with attachments
    - Email dated May 16, 2014
    - Email dated May 15, 2014, 1:16 p.m.
    - Email dated May 15, 2014, 12:55 p.m.
    - Email dated May 2, 2014

Attachment C

AT&T @ Rest Haven (SR 13-5)

0 15 30 60 Ft

Caution:
This map is based on imprecise source data, subject to change, and for general reference only.

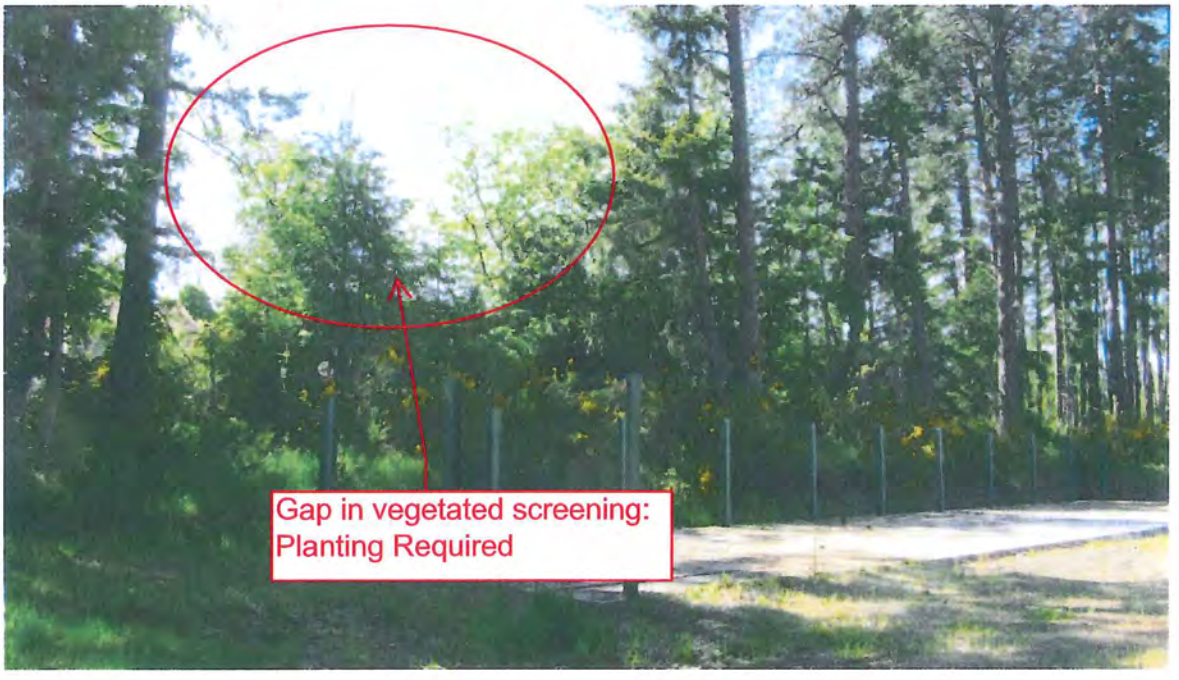
June 04, 2014

Eugene

Attachment D: Mitigating Existing Deficiencies

View Looking Generally Northwest (including posts/area of future wall enclosure)

View Looking Generally West/NW (including posts/area for future wall enclosure)



Excerpt of May 13, 2014 Site Visit

Attachment E: Sample of Mono-Pine Branch

Attachment F: Sample of Pine Branch from Site

Natural Branch Sample from Site w/Pines Needles (in Sunlight)

Natural Branch Sample w/Pine Needles (Indoors)

Eugene Planning

APPEAL OF PLANNING DIRECTOR DECISION

The appeal of an initial Hearings Official or Historic Review Board decision provides for a review of a quasi-judicial decision by a higher review authority specified in the Land Use Code. In general, the appeal procedures allow for a review of the original application, the Hearings Official or Historic Review Board decision, the appeal application, and any facts or testimony relating to issues and materials that were submitted before or during the initial quasi-judicial public hearing process. The Hearings Official or Historic Review Board decision may be affirmed, reversed, modified, or remanded by the Planning Commission.

Please check one of the following:

- ☐ Adjustment Review, Minor
- ☐ Adjustment Review, Major
- ☐ Code Interpretation
- ☐ Hazardous Materials Review
- ☐ Historic Property Alteration
- ☐ Historic Property Demolition
- ☐ Historic Property Move
- ☐ Modification of a Conditional Use Permit
- ☐ Modification of a PUD Tentative
- ☐ Modification of a PUD Final
- ☐ Modification of a Site Review
- ☐ Modification of a Standards Review
- ☐ Modification of a Subdivision Plan
- ☐ Modification of a Willamette Greenway
- ☐ Partition Tentative
- ☐ Partition Final
- ☐ PUD Final
- XX Sit e Review
- ☐ Standards Review
- ☐ Subdivision Tentative
- ☐ Subdivision Final
- ☐ Traffic Impact Analysis
- ☐ Vacation Improved Public R-O-W
- ☐ Vacation Improved Public Easement
- ☐ Unimproved Public R-O-W with Re-dedication
- ☐ Variance

City File Name: Site Review Approval for a New Telecommunications Tower for AT&T at Rest Haven Cemetery

City File Number: Sr 13-5

Date of Hearings Official or Historic Review Board Decision: Planning Director Decision June 10, 2014

Date Appeal Filed: June 23, 2014

(This date must be within 12 days of the date of the mailing of the Planning Director's decision.)

☒ Attach a written appeal statement. The appeal statement shall include a written statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how the Hearings Official or Historic Review Board failed to properly evaluate the application or make a decision consistent with the original application. Please contact Planning staff at the Permit and Information center, 99 West 10th avenue, 541-682-5377, for further information on the appeal process.

☒ A filing fee must accompany all Hearing's Official and Historic Review Board appeals. The fee varies depending upon the type of application and is adjusted periodically by the City Manager. Check with Planning staff at the Permit and Information Center to determine the required fee or check on the web at: www.eugeneplanning.org

Planning & Development
Planning Division
99 W. 10TH Avenue, Eugene, OR 97401
P 541.682.5377 * F 541.685.5572

Acknowledgment
I (we), the undersigned, hereby acknowledge that I (we) have read the above appeal form, understand the requirements for filing an appeal of a planning director decision, and state that the information supplied is as complete and detailed as is currently possible, to the best of my (our) knowledge.

APPELLANT:

Name (print): Charles Wiper, III Phone: (541) 345-8521

Company/Organization: Charles Wiper Inc.

Address: 3900 Willamette St

City/State/Zip: Eugene, OR 97405

Signature:

APPELLANT'S REPRESENTATIVE:

Name (print): Aaron J. Noteboom

Company/Organization: Arnold Gallagher PC

Address: 800 Willamette St, Ste 800

City/State/Zip: Eugene, OR 97401 E-mail (if applicable): anoteboom@arnoldgallagher.com

Phone: (541) 484-0188 Fax: (541) 484-0536

Signature:

IF this appeal is being filed by the affected recognized neighborhood association, complete the following:

Name of Association:

BEFORE THE CITY OF EUGENE HEARING OFFICIAL

APPEAL OF PLANNING DIRECTOR'S DECISION APPROVING A CELL TOWER SUBJECT TO CONDITIONS	STATEMENT OF ISSUES

PROJECT NUMBERS: SR 13-5

HEARINGS OFFICIAL: _____

APPELLANT: Charles Wiper Inc.

APPELLANT'S ATTORNEY: Aaron Noteboom
Arnold Gallagher, PC
800 Willamette Street, Suite 800
Eugene, Oregon 97401

APPEAL REQUEST: Appellant appeals the Planning Director's decision on Site Review Approval for a New Telecommunications Tower for AT&T Wireless at Rest Haven Cemetery (SR 13-5) dated June 10, 2014 ("PD Decision") pursuant to EC 9.7600 *et seq.* for the reasons and on the grounds set forth herein.

STAFF REVIEWER: Becky Taylor, Associate Planner

APPEAL FEE: $250.00

I. STANDING:

The Appellant is the property owner, submitted written comments and is adversely affected by the PD Decision and therefore, has standing pursuant to EC 9.7605(1)(b),(d) & (f). This appeal is timely because Appellant submitted this Statement of Issues, along with the City's appeal application form and fee, within 12 days of the PD Decision as required by EC 9.7605(1).

II. STATEMENT OF ISSUES ON APPEAL:

For the reasons stated below, the Planning Director ("PD") failed to properly evaluate the application or make a decision consistent with the applicable criteria:

<u>ASSIGNMENT OF ERROR # 1:</u> Cell Towers are an allowed use in both the PL and R-1 zone and therefore, are *per se* reasonably compatible under EC 9.8440(1) when they met meet all objective criteria. Accordingly, the PD did not have authority to impose further screening conditions for a use that has already been determined by the City to be reasonably compatible and where there is no separate screening requirement outside of those found in the telecommunications standards. (PD Decision, Pg 4-11)

EC 9.440(1) requires that:

> The site review plan's general design and character is reasonably compatible with surrounding properties, as it relates to building locations, bulk and height, noise, glare and odors.

In order to find compliance with this approval criterion, the PD imposed Condition of Approval #1 which purports to require a "comprehensive tree preservation, removal and replacement plan for the area shown on Attachment C" (PD Decision, Pg 28). The area on attachment C is labeled as a "Tree Preservation Area" and encompasses an area that measures 131 feet to the north of the existing soil reclamation facility, 62 feet to the west of the soil reclamation facility, an unspecified distance to the eastern side of the cemetery road paralleling the eastern wall of the soil reclamation facility and some undefined distance to the south of the southern border of the soil reclamation area. The total area in attachment C is roughly 1.5 acres whereas the proposed cell tower cite is for only 1,500 square feet or 0.034 acres.

The effect and limits of Condition of Approval #1 are not readily apparent on the face of the condition[1]; however, it appears to impose a condition that could prohibit the land owner from removing any trees within the identified area other than those that are dead or hazardous. The practical effect of Condition of Approval #1 is to impose a 1.5 acre conservation easement in exchange for the permitted use. The PD believed that this condition was necessary to "ensure that the mono-pole is screened by trees within this buffer area over the long-term . . . [.]" The proposed condition of approval and the PD's application of the requirements of EC 9.440(1) are nevertheless inconsistent with prior cell tower applications approved under the Eugene Code, LUBA's decision on this issue and the plain language of the code.

The question of whether a cell tower was "reasonably compatible" with its surrounding R-1 neighborhood was at issue in *Northgreen Property LLC v. City of Eugene, et al.*, 2012 WL 1143469 (March 5, 2012). *Northgreen* involved the proposed installation of a 75 foot cell tower on the north end of a 58 acre private golf course in north Eugene in an area

[1] One issue that needs to be clarified is whether and to what extent Condition of Approval #1 requires preservation of trees with the identified area.

zoned R-1. Like this case, the applicant sought a variance to locate the equipment aboveground. Nearby home owners and the owners of a 222 unit apartment complex located 100 feet away from the proposed tower objected arguing that the tower was not reasonably compatible with an R-1 neighborhood and was not adequately screened as required by EC 9.8320(12) and (3).[2] The *Northgreen* Hearings Official ultimately approved the proposed towering finding that:

> "Compatibility is a subjective standard. What one person believes is compatible another person might believe is very incompatible.
>
> The City Council has already determined that telecommunications towers are permissible in the R-1 zone and there is no restriction in other zones against locating a cell tower any distance from the R-1 zone or any other residential uses. The telecommunications standards in EC 9.5750 have standards for height, setbacks, color, lighting, and use of the tower for display of signs. These telecommunications standards were established to provide clear criteria for providers to meet, but also provide a discretionary process to provide for public input on a case-by-case basis. The proposed tower complies with the height, setbacks, color and lighting standards."

Because the City Code allowed cell towers in the R-1 zone and because it met the objective criteria of the City Code, the Hearings Official and LUBA determined that proposed cell tower was reasonably compatible.

Under a separate screening requirement (EC 9.8320(3)) applicable to towers in the R-1 zone (and not towers in the PL zone), the Hearing Official imposed a condition that required the applicant to place trees on the properties of those neighbors who requested them. The *Northgreen* Hearing Official's decision was upheld on appeal by the Planning Commission and the Oregon Land Use Board of Appeals.

Unlike *Northgreen,* EC 9.440(1), at issue here, does not impose a separate screening requirement for cell towers such that they be "adequately screened" from surrounding properties. EC 9.440(1) provides that the general design be "reasonably compatible" with surrounding properties as it relates to "bulk and height" and "glare." There is no question that the cell tower is compatible or comparable in terms of bulk and height with other trees located in the area. There is no requirement then to screen a tower designed to replicate a tree that is of similar bulk and size as other trees in the area just as there is no requirement to screen a two story building from other two story buildings in the area. Nor will the cell tower result in any glare which would arguably require some screening or other mitigating

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[2] EC 9.8320(3) requires that, "The PUD will provide adequate screening from surrounding properties including, but not limited to, anticipated building locations, bulk, and height."

EC 9.8320(12) requires that, "The proposed development shall be reasonably compatible and harmonious with adjacent and nearby land uses."

measures. The differences in this case from *Northgreen* (which approved a cell tower in R-1) are notable. Here, the tower is over 200ft away from the nearest residence which is twice as far as in *Northgreen.* In this case, there are only 3 or 4 residences to the west of the proposed tower along Densmore Road that are potentially affected and even then only minimally, if at all. In *Northgreen,* there were hundreds of residences that were affected. Further, *Northgreen* involved a traditional cell tower structure as opposed to this case which involves a stealth mono-pine design which will be specially modified to add additional branches to obscure the pole and arrays and specially painted to better match the trees in the area. Finally, in this case the proposed tower is located in the PL zone which is one of the most preferred zone for cell towers as indicated by the fact that approval is done through site review.

Screening in this case is addressed under the telecommunications standard EC 9.5750(7)(e) which provides in relevant part that

> "Buffering. . . . In all other zones, landscaping shall be placed completely around the transmission tower and ancillary facilities located at ground level except as required to access the facility. <u>Such landscaping shall consist of evergreen vegetation with a minimum planted height of 6 feet placed densely so as to form a screen</u>. . . .[.]"(emphasis added)

The only requirement for screening a cell tower in a PL zone is a 6 foot tall vegetative screen around the tower and ancillary facilities at ground level. That is accomplished by Condition of Approval #2. Absent some other express provision, such as EC 9.8320(3) for cell towers in the R-1 zone requiring "adequate screening", the PD cannot impose a greater and contradictory screening requirement than that found in EC 9.5750(7)(e) cited above. EC 9.5750(2)(b) provides that where there is a conflict between the requirements for telecommunications standards (i.e. the screening standards in EC 9.5750(7)(e)) and site review (i.e. reasonable compatibility, EC 9.440(1)), then the telecommunications standards control. EC 9.5750(2)(b).

Similarly, the PD's finding that Condition of Approval #1 is necessary to ensure compliance with the South Hill's Study is also in error.[3] The PD noted that the South Hill's Study instructs that, "developments be reviewed in terms of scale, bulk and height to insure that development blends with rather than dominates the natural characteristics of the south hills area." (PD Decision, Pg 27) The standard is that the proposed development, "blend with and not dominate" the natural characteristics, in this case the trees. There is nothing in that standard that mandates or allows the PD to require preservation of the surrounding natural characteristics (i.e. trees). There is no question that the bulk, height, and scale of the proposed tower blends with and does not dominate the trees that are within the area. That in turn does not mean, nor give the PD authority to require, that each and every tree in the area must remain.

[3] The South Hills Study is made applicable by virtue of the site review standards. EC 9.8440(6). Again, where there is a conflict between the telecommunications standards and the site review standards, the telecommunication standards control.

For the foregoing reasons, the PD erred and Condition of Approval #1 must be struck in its entirety.

<u>ASSIGNMENT OF ERROR # 2:</u> To the extent the HO determines that some level of tree preservation, removal and replacement is required to demonstrate compliance with the applicable approval criteria, the PD erred because the exactions imposed by Condition of Approval #1 are unconstitutional.

Condition of Approval # 1 is in effect a conservation easement that prohibits future development (requiring certain tree removal) on over 1.5 acres of property notwithstanding that the proposed tower will only occupy .034 acres. In other words, as a condition for obtaining development approval of a small portion of its property, the PD is requiring the property owner to set aside an area over 40 times the size of the developed property as a "tree preservation area." On its face, the proposed exaction is not roughly proportionate to the potential impact on the public and is therefore, unconstitutional. *See Dolan v. City of Tigard,* 512 US 374 (1994)(to avoid being unconstitutional, the condition must have an essential nexus to a legitimate governmental interest and must be related in its nature and extent to the impacts of the development; the condition must be "roughly proportionate" to the development impacts); *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). Moreover, there is no rationale in the PD decision which would justify such a large exaction. *Art Piculell Group v. Clackamas County,* 142 Or App 327, 331(1996)(confirming that *Dolan,* "clearly places the 'burden' of demonstrating rough proportionality on the governmental body imposing the condition, rather than leaving the burden on the applicant . . . [.'")

When reading the PD decision, it is clear that the PD's concern is with the visual impact of the tower on the 3 to 4 houses lying along Densmore Road to the west of the proposed development site.[4] Yet, the proposed preservation area includes vast amounts of property to the north, east and west of the development site which are simply not required to mitigate the potential impact on the neighbors to the west. There is no essential nexus between screening the few neighbors to the west and requiring preservation of trees to the north, south and east. Further, there is no proportionality between the preservation area to the west and the residences to be screened. As the PD Decision notes, there are roughly nine trees along the western boundary which act to screen the tower from the neighboring property, yet the identified preservation area extends well beyond those trees without any justification and sets aside large swaths of property. The PD decision also fails to consider that the current trees could be replaced by some other permitted form of development that

[4] See PD Decision, Pg 4 "The applicant's plan (Drawing C-2) identifies trees (shows the location, species, and size) immediately surrounding the area of request. Between the soil reclamation area and the residences to the west, the applicant's plans call out nine trees, which are a mix of Douglas fir and pine trees that range from 97 to 122 feet in height. The nearest residential homes are located approximately 1-75 feet west of the proposed tower. These homes are located anywhere from 10 to 24 feet higher than the grade of the proposed tower location, as the land slopes up to the west."

would also serve to effectively screen the adjacent residences (e.g. future residential development). If the concern is with adjacent off-site residences potentially viewing the tower, then it does not matter whether the tower is screened by trees or other permissible development (e.g. houses). If the City is set on trees as a screen, then the City could, within constitutional, limits impose a requirement that the applicant plant street trees along Densmore or offer to those adjacent residents who so desire to plant screening on their property similar to the condition imposed in *Northgreen.* That would be an acceptable alternate condition of approval to Condition of Approval #1. To the extent that some level of screening is required to mitigate the visual impact of the tower to the neighbors to the west, that condition must be roughly proportionate to the development impact – as written, Condition of Approval # 1 is not and therefore, is an unconstitutional exaction that must be struck in its entirety.[5]

<u>ASSIGNMENT OF ERROR # 3:</u> The PD erred by failing to determine whether existing on site vegetation satisfied the screening requirement in EC 9.5750(7)(e). To the extent the existing vegetation did not satisfy Conditional of Approval #2, the PD erred by impermissibly mandating that the vegetative screen abut the "entire exterior perimeter of the 8-foot concrete wall enclosure."

EC 9.5750(7)(e) provides that,

> "Buffering. In all zones, existing vegetation shall be preserved to the maximum extent possible. In the C-4, I-1, I-2 and I-3 zones, no buffering is required beyond that required by this land use code. In all other zones, landscaping shall be placed completely around the transmission tower and ancillary facilities located at ground level except as required to access the facility. Such landscaping shall consist of evergreen vegetation with a minimum planted height of 6 feet placed densely so as to form a screen. Landscaping shall be compatible with other nearby landscaping and shall be kept healthy and well maintained."

To ensure compliance with this standard the PD imposed Condition of Approval #2 which provides,

> "The final site plans shall be revised to show new landscaping <u>abutting the entire exterior perimeter of the 8-foot tall concrete wall enclosure</u>. As required by EC 9.5750(7)(e), the landscaping shall consist of evergreen vegetation with a minimum planted height of six feet and placed densely so as to form a screen. The final site plan shall note that all landscaping shall be kept healthy and well maintained as long as the telecommunication facility remains on the subject site."(emphasis added)

[5] The property owner reserves its right to recommend additional alternate conditions of approval.

As a preliminary matter, the PD erred by narrowly considering the area "around the transmission tower" as the area "abutting the exterior perimeter" of the soil reclamation wall and therefore, failed to consider whether the already existing vegetation surrounding the perimeter of the proposed tower location satisfied this criterion. The substantial evidence in the record shows that it does.[6]

To the extent that additional screening is required, the PD erred by requiring the vegetative screen to be placed around the outside perimeter of the soil reclamation wall. The location of the screening is the applicant's choice. The applicant should be allowed to place the some or all of the screening within the soil reclamation facility itself. The property owner may wish to utilize the eastern facing wall of the soil reclamation facility as a memorial wall at some future point. Requiring that the vegetation be placed in front of the wall, prevents the property owner from doing so. The vegetative screen could just as easily be placed inside the eastern wall and still meet the criteria while allowing the property owner the future use of the eastern wall.[7] Condition of Approval #2 should be eliminated in its entirety because the requirement of EC 9.5750(7)(e) is met by existing vegetation. To the extent further screening is required, Condition of Approval #2 should be modified to eliminate the requirement that the screen abut the entire exterior perimeter of the concrete wall and allow for the screen to be located inside the soil reclamation wall at the election of the property owner.

<u>ASSIGNMENT OF ERROR #4</u>: The PD erred by failing to expressly allow the cell tower to be constructed up to the maximum allowable height of 128 feet to encourage collocation of other cellular providers.

The purposes of the telecommunications provisions of the Eugene Code are to,

"to ensure that telecommunication facilities are located, installed, maintained and removed in a manner that:

(a) Minimizes the number of transmission towers throughout the community;

(b) Encourages the collocation of telecommunication facilities."

Key to accomplishing the foregoing purposes is to ensure that each tower that is built allows for the maximum effective collocation of other service providers on the tower. It is critical then that each tower be allowed to be constructed to the maximum allowable height to ensure that other service providers will actually collocate their facilities on the lower

[6] Clearly, this standard is imposed to screen, through vegetation, the base of the tower and any ancillary facilities located there. The property owner submits that as a practical matter the already approved 8 ft concrete wall more effectively screens the base of the tower than 6 ft vegetation. Nevertheless, the standard appears to require the use of vegetation.

[7] There should be flexibility within the condition. For example, the property owner may initially choose to plant the vegetative screen outside the perimeter of the eastern wall and then relocate the vegetation to the interior perimeter, if and when, at some future point the eastern wall is used as a memorial wall.

portion of the tower and not seek new towers of their own. The current proposal calls for three sets of antennae arrays (each approximately 8 to 10 feet high) allowing for the collocation of 2 additional carriers. The substantial evidence in the record demonstrates that the performance of the cell tower declines at the lower heights. Adding an additional 8 feet, effectively bumps up each array to the next higher level resulting in a corresponding increase in performance.

There is no express limitation on height in the PL zone. The limitation on height is a function of the setback requirement which provides that a "tower shall be set back from the adjacent public streets a minimum number of feet equal to the height of the tower." EC 9.5750(7)(d)(3). In this case, the tower is setback 128 feet from Densmore Road which in turn limits the height of the tower to not more than 128 feet. Although the plans currently call for a 120 foot tower,[8] the PD Decision should be modified to expressly allow the Applicant to construct a tower up to 128 feet to encourage the collocation of telecommunications facilities reducing the pressure to construct additional towers in less desirable locations such as the adjacent R-1 neighborhoods.

III. CONCLUSION

For all of the reasons stated herein, the PD erred and the PD Decision must be modified as provided herein and APPROVED.

DATE: June 23, 2014.

ATTORNEY FOR APPELLANT

Aaron L. Noteboom, OSB #040051

[8] The additional 8 feet of height is negligible, if any, in terms of visual impact to surrounding properties and is consistent with the height of trees in the area and therefore, does not substantively affect any other approval criteria.

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JUN 23 2014
CITY OF EUGENE
PLANNING DIVISION

Eugene Planning

APPEAL OF PLANNING DIRECTOR DECISION

The appeal of an initial Hearings Official or Historic Review Board decision provides for a review of a quasi-judicial decision by a higher review authority specified in the Land Use Code. In general, the appeal procedures allow for a review of the original application, the Hearings Official or Historic Review Board decision, the appeal application, and any facts or testimony relating to issues and materials that were submitted before or during the initial quasi-judicial public hearing process. The Hearings Official or Historic Review Board decision may be affirmed, reversed, modified, or remanded by the Planning Commission.

Please check one of the following:

- ☐ Adjustment Review, Minor
- ☐ Adjustment Review, Major
- ☐ Code Interpretation
- ☐ Hazardous Materials Review
- ☐ Historic Property Alteration
- ☐ Historic Property Demolition
- ☐ Historic Property Move
- ☐ Modification of a Conditional Use Permit
- ☐ Modification of a PUD Tentative
- ☐ Modification of a PUD Final
- ☐ Modification of a Site Review
- ☐ Modification of a Standards Review
- ☐ Modification of a Subdivision Plan
- ☐ Modification of a Willamette Greenway
- ☐ Partition Tentative
- ☐ Partition Final
- ☐ PUD Final
- ☑ Sit e Review
- ☐ Standards Review
- ☐ Subdivision Tentative
- ☐ Subdivision Final
- ☐ Traffic Impact Analysis
- ☐ Vacation Improved Public R-O-W
- ☐ Vacation Improved Public Easement
- ☐ Unimproved Public R-O-W with Re-dedication
- ☐ Variance

City File Name: AT&T Wireless at Rest Haven Cemetery

City File Number: SR 13-5

Date of Hearings Official or Historic Review Board Decision: June 10, 2014

Date Appeal Filed: June 23, 2014

(This date must be within 12 days of the date of the mailing of the Planning Director's decision.)

☐ Attach a written appeal statement. The appeal statement shall include a written statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how the Hearings Official or Historic Review Board failed to properly evaluate the application or make a decision consistent with the original application. Please contact Planning staff at the Permit and Information center, 99 West 10th avenue, 541-682-5377, for further information on the appeal process.

☐ A filing fee must accompany all Hearing's Official and Historic Review Board appeals. The fee varies depending upon the type of application and is adjusted periodically by the City Manager. Check with Planning staff at the Permit and Information Center to determine the required fee or check on the web at: www.eugeneplanning.org

www.eugene-or.gov/planning

Acknowledgment
I (we), the undersigned, hereby acknowledge that I (we) have read the above appeal form, understand the requirements for filing an appeal of a planning director decision, and state that the information supplied is as complete and detailed as is currently possible, to the best of my (our) knowledge.

APPELLANT:

Name (print): Walt Meyer Phone: (503) 360-7515

Company/Organization:

Address: 3987 Brae Burn Drive

City/State/Zip: Eugene, Oregon 97405

Signature: W Meyer

APPELLANT'S REPRESENTATIVE:

Name (print):

Company/Organization:

Address:

City/State/Zip: E-mail (if applicable):

Phone: Fax:

Signature:

IF this appeal is being filed by the affected recognized neighborhood association, complete the following:

Name of Association:

June 23, 2014

City of Eugene
Planning and Development
99 West 10th Avenue
Eugene, Oregon 97401

Attention: Planning Director

Subject: Appeal of Planning Director's Decision
AT&T Wireless at Rest Haven Cemetery (SR 13-5)

The decision to conditionally approve the application for construction of a wireless cell tower is hereby appealed. The basis for the appeal is that the proposed facility is not reasonably compatible with the adjacent property.

In the review of the application, the City acknowledges that the screening is inadequate. However, the approval is premised on the condition that additional landscaping will be installed and maintained. An identical requirement was placed on the approval of the construction of the maintenance facility by Rest Haven. However, after more than 20 years, landscaping to screen the facility has never been properly installed or maintained the facility is both visible and an eyesore. Please see the attached photographs.

The applicant is required to document that alternative sites within a radius of at least 2,000 feet have been considered and have been determined to be technologically unfeasible or unavailable. The area adjacent to the administration office is a more appropriate site and can be implemented with no impact on adjacent property. In the response to comments the applicant stated the following:

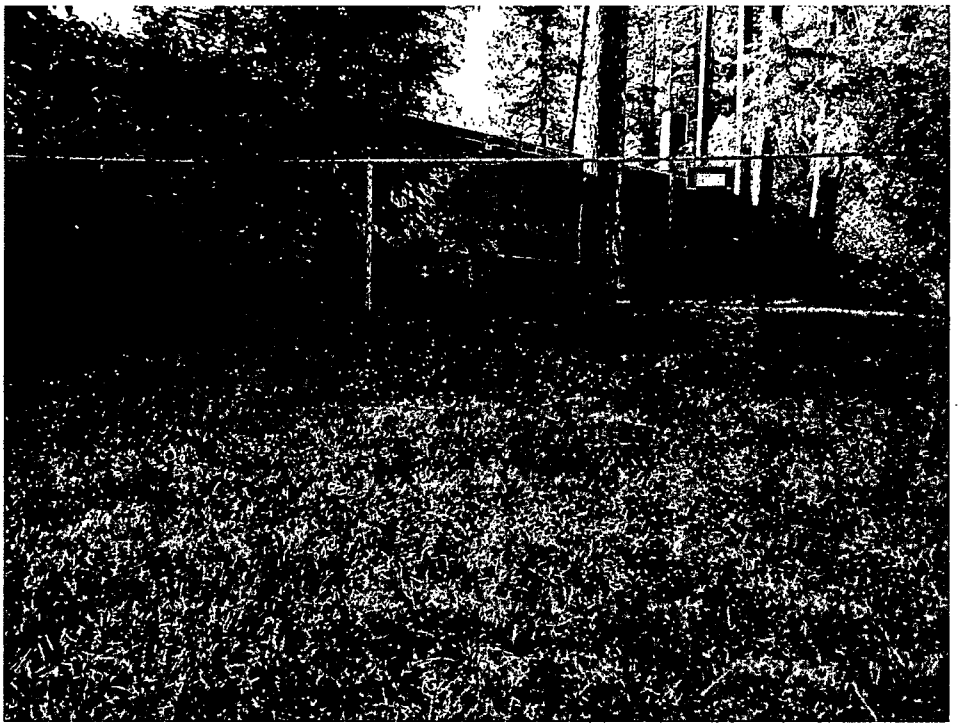
> *"Unfortunately the location of the R-1 zone boundary prevents a new tower locating near the administration building."*

The City in its review stated that this conclusion is not accurate. Furthermore, there is some land to the east of the administration building zoned PL. However, since the entire Rest Haven property is slated by the City to be zoned R-1, the siting of the tower needs to be based on minimizing impact on existing homes and not on the basis of arbitrary zoning boundaries that are currently in the process of being modified. In summary, all of the Rest Haven Property will soon be zoned R-1 so the tower needs to be placed where it is compatible with adjacent development.

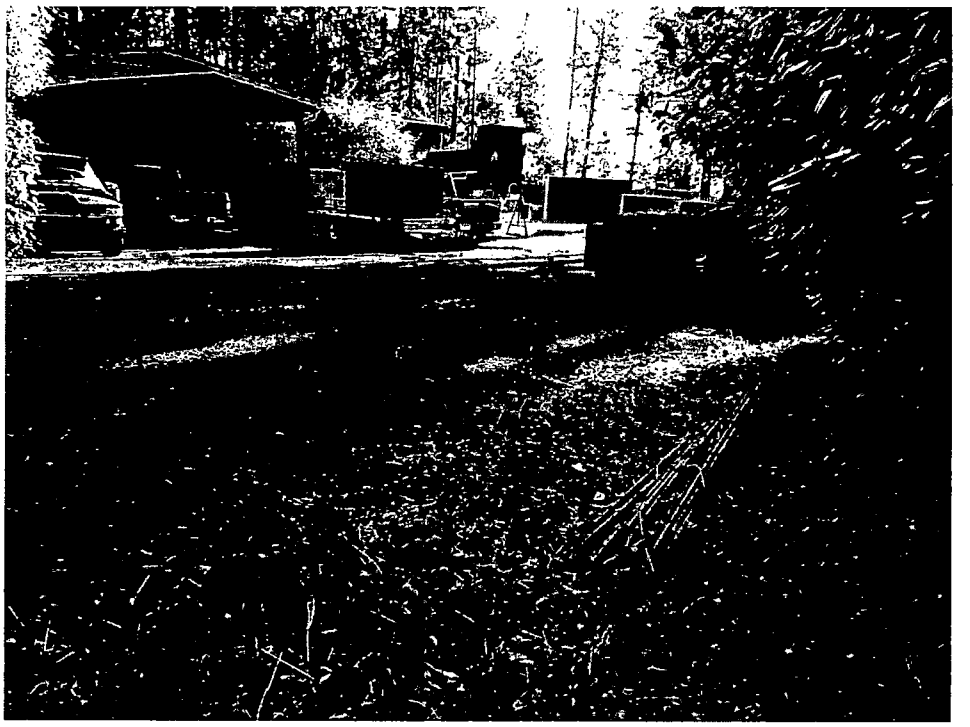
Since the City is limited to review only the existing proposal, the only mechanism available to the City is to deny this application. Once denied, the City and applicant can coordinate the application process at an alternative site near the administration building.

Sincerely,

Walter J. Meyer
3987 Brae Burn Drive
Eugene, Oregon 97405



Landscaping screening at the existing maintenance building



View of maintenance area from adjacent property

Planning
Receipt

Planning & Development
Planning Division
99 West 10th Avenue
Eugene, OR 97401
(541) 682-5377

Date: 6/23/14

Received From: WALTER MEYER

Address:

Method of Payment:
- ☐ Cash
- ☒ Check
- ☐ Visa/MC

Amount Received: $ 250.00

Phone: ( )

Project: SR 135

Enter amount:

Annexation	$	Subdivision, Tentative	$
Appeal	$ 250.00	Subdivision, Final	$
Conditional Use Permit	$	Traffic Impact Analysis	$
Legal Lot Verification	$	Vacations (all)	$
Lot Validation	$	Willamette Greenway Permit	$
Partition, Tentative	$	Zone Change	$
Partition, Final	$	Other	$
Property Line Adjustment	$	Fire Review Fee	$
PUD Tentative	$	**Subtotal**	$ 250.00
PUD Final	$	***Administrative Fee (except appeals)***	$
Site Review	$	**TOTAL**	$ 250.00

Staff Initials: KEW

Updated: Oct 2013

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Attachment C: Meyer Appeal

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CITY OF EUGENE
BUILDING & PERMIT SERVICE
99 WEST 10TH AVE 682-5086
REG-RECEIPT:3-0005631 Jun 23 2014
CASHIER: RMW

==========

Appeal of Planning App De SR 13-5	$250.00
TOTAL DUE:	$250.00

RECEIVED FROM:
WALTER MEYER

Check:	$250.00
Total tendered:	$250.00
Change due:	$.00

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Eugene Planning

APPEAL OF PLANNING DIRECTOR DECISION

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Please check one of the following:

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- ☐ Adjustment Review, Major
- ☐ Code Interpretation
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- ☐ Traffic Impact Analysis
- ☐ Vacation Improved Public R-O-W
- ☐ Vacation Improved Public Easement
- ☐ Unimproved Public R-O-W with Re-dedication
- ☐ Variance

City File Name: AT&T WIRELESS AT REST HAVEN CEMETERY

City File Number: SR 13-005

Date of Hearings Official or Historic Review Board Decision: 11 JUNE 2014

Date Appeal Filed: 23 JUNE 2014

(This date must be within 12 days of the date of the mailing of the Planning Director's decision.)

☒ Attach a written appeal statement. The appeal statement shall include a written statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how the Hearings Official or Historic Review Board failed to properly evaluate the application or make a decision consistent with the original application. Please contact Planning staff at the Permit and Information center, 99 West 10th avenue, 541-682-5377, for further information on the appeal process.

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Acknowledgment
I (we), the undersigned, hereby acknowledge that I (we) have read the above appeal form, understand the requirements for filing an appeal of a planning director decision, and state that the information supplied is as complete and detailed as is currently possible, to the best of my (our) knowledge.

APPELLANT:

Name (print): John Koenig & DEBORAH TOOBERT Phone: 541-343-0707

Company/Organization: CITY OF EUGENE CITIZENS & NEIGHBORHOOD RESIDENTS

Address: 3968 BRAEBURN DR.

City/State/Zip: EUGENE, OREGON 97405-4973

Signature: John O. Koenig Deborah J. Toobert

APPELLANT'S REPRESENTATIVE:

Name (print):

Company/Organization:

Address:

City/State/Zip: E-mail (if applicable):

Phone: Fax:

Signature:

IF this appeal is being filed by the affected recognized neighborhood association, complete the following:

Name of Association:

City of Eugene-Written Appeal Statement
Appeal of Planning Director Decision
23 June 2014

File Name: AT&T Wireless at Rest Haven Cemetery
File Number: SR-13-005
Type: Site Review and Request for Variance
Location: 3900 Willamette Street, Tax Lot 00300

Site Review Evaluation: (EC 9.8440(1) states that "The site review plan's general design and character is reasonably compatible with surrounding properties as it relates to building locations, bulk and height, noise, glare and odors".

We maintain that the site review plan's general design and character is NOT reasonably compatible with surrounding properties and the Hearing Official failed to properly evaluate the application in this regard. The "surrounding properties" are single family residential homes (Zone R1). They are not the conifer trees that grow in the vicinity of the proposed tower. These trees cannot be defined as properties...they all exist on only one property-the cemetery. The residential homes on the true surrounding properties are a maximum of 30' to 35' in height. The proposed installation would be a tower 120 ft. in height plus an equipment building surrounded by an 8' concrete wall. This is essentially an industrial grade structure proposed to be plopped down in a residential neighborhood. It is in no way compatible. We know of no home in the area that consists of a 120 ft. communication tower and a windowless building surrounded by a monolithic concrete wall.

Further, the proposed "monopole pine tree" does not resemble a natural tree in that the top of this tower tree will be much wider than the base to accommodate 36 panel antennas and 3 microwave dishes. There is no way this many structures at 120 ft. can be hidden and disguised as a natural tree. Natural trees narrow at the top to an apex, they don't bulk out. And it's very possible that 36 panel antennas will provide quite significant glare during daylight hours when the sun is striking the structure. Further, the needles of this fake tree do not resemble those of a ponderosa pine...they are much shorter and artificial looking (refer to the photos in the site review approval document). Also, unlike the needles and branches of living trees these artificial ones will age and fade in color and texture, possibly break off and generally deteriorate becoming even more of an eyesore to the neighborhood. This issue was not addressed nor were there any requirements imposed for the tower owner to maintain the monopine in an appropriate manner to correct any deterioration.

On pages 3-4 of the decision document, the Hearing Officer states "The city can only review the proposed location for compliance with the applicable approved criteria and standards"...thereby precluding considering more appropriate sites within the cemetery adjacent to the administration building, the north half of which is in the PL Zone. But we maintain the site is defined as Tax Lot 00300, 3900 Willamette Street so that the City may, as a condition of approval for the tower, require it be placed elsewhere on the site, i.e. adjacent the administration building and away from the residential area where it is presently contemplated. We can find nowhere in the Eugene City Code that requires the land use hearing officer to not recommend alternative locations for a proposed development within a given defined site.

In addition we maintain that the variance from the code requirement to underground the proposed equipment was incorrectly granted. In part the reasoning was that such underground installation would require "additional elevators and air conditioning" that would increase noise levels. This is preposterous. With only one site visit per month by maintenance personnel, why are elevators needed....stairs would work perfectly well and are completely silent. Further, whether above or below ground, air conditioning will be required for the equipment. In fact, a below ground installation would

result in greater soil insulation of the structure thereby reducing the need for heating and cooling equipment. And we maintain the excavation for such an underground facility would not unduly harm the root structures of adjacent trees in the buffer area. The cemetery has many large healthy trees in spite of the fact that hundreds if not thousands of grave excavations have been undertaken in direct vicinity of many of these trees without harming them.

Under "Mitigating Existing Deficiencies" in the approval document, replacement of each tree removed due to disease or blow down will be with two trees of the same species that are at least 2 inches in caliper (diameter?) and 5 ft. in height. This is laughable. How are such small trees going to provide effective screening after tower construction. Not for decades will that happen. Meanwhile the residential neighborhood is stuck with a highly visible ugly tower. Contrary to what the applicant declares, the monopole pine will not blend in with adjacent trees. The real trees are not that close together. In fact spacing is quite far apart where the tower will be placed making the structure stand out like a sore thumb, especially visible from our house and patio.

Site Review Evaluation: EC 9.8440(4): The approval document states that the City of Eugene hired a third party consultant (Carl Bloom, Environalysis, LLC of Seattle, Washington) to evaluate the NIER emissions from the proposed tower. However there is no indication of the qualifications of this consultant to make such evaluations (is he a professional licensed electrical engineer that specializes in radio and cell phone installations?) and certainly no indication that he actually visited the site. It appears he relied solely on the applicants (AT&T) data (not exactly unbiased data) instead of taking his own measurements to define the topographical characteristics of the neighborhood as well as the emissions from the tower. Certainly he did not measure the height of the second story of our house and compare that to the height of the antennas on the tower in order to determine the effective radiation we will be exposed to. And why is the City hiring a consultant based in Seattle instead of Eugene or at least Portland?

In conclusion, we ask the Appeals Hearing officer to overturn approval for this cell tower installation. For the reasons outlined above, it is totally inappropriate for a residential location. Short of that, the applicant should be required to place his ancillary facilities underground as the City Code dictates. No variance to this requirement should be granted. Finally, the City consultant, Carl Bloom, should be required to pay a site visit as well as to make height measurements of nearby residential structures in order to accurately calculate how directly they will be in the path of radiated signals and what the energy level might be at those sites to determine if they are within FCC guidelines.

Submitted by:
John Koenig and Deborah Toobert
3968 Braeburn Drive
Eugene, Oregon 97405-4973
541-343-0707 (Home phone)

Planning Receipt

Planning & Development
Planning Division
99 West 10th Avenue
Eugene, OR 97401
(541) 682-5377

Date: 6/23/14

Received From: John Koenig

Address: 39688 Brace Point Dr. Eugene, OR 97405

Method of Payment:
- [ ] Cash
- [x] Check # 59688
- [ ] Visa/MC

Phone: (541) 343.0707

Amount Received: $ 250.00

Project: AT&T Wireless (SR13-5)

Enter amount:

Annexation	$	Subdivision, Tentative	$
Appeal	$ 250.00	Subdivision, Final	$
Conditional Use Permit	$	Traffic Impact Analysis	$
Legal Lot Verification	$	Vacations (all)	$
Lot Validation	$	Willamette Greenway	$
Partition, Tentative	$	Zone Change	$
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PUD Tentative	$	**Subtotal**	$ 250.00
PUD Final	$	***Administrative Fee (except appeals)***	$ —
Site Review	$	**TOTAL**	$ 250.00

Staff Initials: DCZ

CITY OF EUGENE
BUILDING & PERMIT SERVICE
99 WEST 10TH AVE 682-5086
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CASHIER: NLR

Appeal of Planning App De SR 13-5 Rest Haven Cell Tower	$250.00
TOTAL DUE:	$250.00

RECEIVED FROM:
JOHN KOENIG

Check:	$250.00
Total tendered:	$250.00
Change due:	$.00

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APPEAL ISSUES AND STAFF RESPONSE

Three appeals were filed by the following individuals: the property owner (Wiper), an abutting property owner (Meyer), and the owners of property in the area (Koenig/Toobert). As listed below, Appeal Issues 1 through 4 are from the Wiper appeal; Appeal Issues 5 and 6 are from the Meyer appeal; and Appeal Issues 7 through 12 are from the Koenig/Toobert appeal.

The common theme of the appeals is compatibility of the proposed telecommunication facilities with the surroundings, pursuant to Site Review approval criterion EC 9.8440(1); Appeal Issues 1, 2, 3, 5, 7, and 11 relate to compatibility and the Planning Director's Condition of Approval #1. The other appeal issues are not based on the approval criteria, as discussed further below.

1. ***First Assignment of Error (Wiper Appeal): Cell Towers are an allowed use in both the PL and R-1 zone and therefore, are per se reasonably compatible under EC 9.8440(1) when they meet all objective criteria. Accordingly, the Planning Director did not have authority to impose further screening conditions for a use that has already been determined by the City to be reasonably compatible and where there is no separate screening requirement outside those found in the telecommunication standards.***

Summary:

The appellant (Wiper) cites *Northgreen Property LLC v. City of Eugene, et al.,* 2012 WL 114369, which involved a cell tower on a golf course in the R-1 Low-Density Residential zone. The appellant summarizes that case as follows: because the City code allowed cell towers in the R-1 zone and because it met the objective criteria of the City code, the Hearings Official and LUBA determined that the proposed cell tower was reasonably compatible. The appellant asserts that there should be no screening requirement for the proposed cell tower to address compatibility, under Site Review approval criterion EC 9.8440(1); in regards to the screening required in the *Northgreen* case, the appellant notes that there was a separate screening requirement under the Planned Unit Development approval criterion at EC 9.8320(3). The appellant also notes that the telecommunication standards at EC 9.5750(7)(e) establish landscape screening as being 6 feet in height around the facility. The appellant ultimately challenges Condition of Approval #1, which requires a tree preservation area surrounding the proposed facility. The appellant also asserts that this condition is not necessary to ensure compliance with the South Hills Study, stating that tree preservation condition does not directly correlate to the policy that "development blend, rather than dominate, the natural characteristics of the south hills area."

Staff Response:

Per EC 9.5750(5), the telecommunications tower use in the PL zone requires Site Review approval; it is not an outright permitted use. Site Review involves inherently subjective approval criteria that require reasonable compatibility with the surroundings. This discretionary review is required in addition to (i.e. *above and beyond*) the telecommunication standards that govern outright permitted uses (e.g. towers in C-4, I-1, I-2, and I-3 zones). There is no conflict between the requirement for reasonable compatibility and the telecommunication standard that requires a 6-foot perimeter landscape screen (as the appellant asserts). The appellant's reading of the *Northgreen* case makes a similar assertion about the role of clear and objective standards versus the discretionary criteria of a land use

application. The appellant seems to confuse the terminology between two different approval processes and criteria for that of the PUD (which requires "adequate screening") and Site Review (which requires "reasonable compatibility"). In effect, the arguments attempt to limit the scope of EC 9.8440(1) and the applicable policy of the South Hills Study, such that the City could never even consider the need for additional vegetative screening beyond what may be required by other basic standards. That reading would render the requirements under EC 9.8440(1) and the South Hills Study as largely meaningless, and would eliminate the primary intent behind requiring Site Review approval rather than permitting towers outright or only subject to the telecommunication standards.

For reference, the Planning Director's decision addresses the issue of reasonable compatibility under EC 9.8440(1), at pages 4-11. The related South Hills Study policy is addressed under EC 9.8440(6), on page 27 of the decision. In summary, the tower was found to be compatible, in large part because it was screened by existing trees. Condition of Approval #1 was imposed to ensure that the screening would be maintained for the duration of the proposed use. As such, the tower would blend in with the surroundings appropriately based on the approval criteria and the South Hills Study policy. If the existing trees were removed, the proposed tower would not be reasonably compatible and would dominate views in the area. In other words, the application would fail to comply with the approval criteria without the condition of approval.

2. ***Second Assignment of Error (Wiper Appeal): To the extent the Hearings Official determines that some level of tree preservation, removal and replacement is required to demonstrate compliance with the applicable approval criteria, the Planning Director erred because the exactions imposed by Condition of Approval #1 are unconstitutional.***

Summary:
The appellant (Wiper) claims that Condition of Approval #1 is "in effect a conservation easement that prohibits future development (requiring certain tree removal) on over 1.5 acres of property notwithstanding that the proposed tower will only occupy .034 acres. The appellant acknowledges that the Planning Director's concern is with the visual impact of the tower on the abutting homes to the west, but questions why the required preservation area includes "vast amounts of property" to the north, east, and south. The appellant notes that the Planning Director identified nine trees along the western boundary which act to screen the tower from neighboring properties, yet identified a preservation area that extends well beyond those trees without any justification. The appellant also states that the current trees could be replaced by some other permitted form of development that would also serve to effectively screen the adjacent residences, such as future residential development. The appellant notes that if the City is set on trees as a screen, then street trees could be planted along Densmore or, as similar to the condition imposed in *Northgreen*, offered to those adjacent residents who want screening to provide it on their property.

Staff Response:
The appellant's references to *Dolan* and related case law (takings, constitutional findings, rough proportionality, nexus etc.) do not apply because Condition of Approval #1 is not taking land for public use. Nevertheless, the comparative exercise provided by the appellant is useful in evaluating the required tree preservation area relative to the tower impacts, as addressed in the Planning Director's

on pages 6 and 7. As the findings demonstrate, the intent of Condition of Approval #1 was to ensure that the mono-pine would blend in reasonably well with the surroundings. The condition was established based on a thorough analysis of the available information and evidence provided to the Planning Director, as an appropriate means of regulating the proposed use in compliance with the approval criteria.

With regard to the tree preservation area delineated in Attachment C of the Planning Director's decision, the height of the tower (120 feet) was carefully considered. Instead of merely delineating a 120-foot radius around the proposed facilities as the potential area of impact that would need to be mitigated through vegetated screening, actual conditions were taken into account, as detailed below.

To the west, the 62-foot distance identified from the west property line to the western boundary of the soil reclamation area coincides with the existing vegetation between those two features. As noted in the Planning Director's decision, neighbors to the west indicated that they could already see into the soil reclamation area given the grade change (the neighbors are higher) and the gaps in the existing vegetation. To the north, the 131-foot distance identified from the north edge of the soil reclamation area coincides with the north boundary of the westerly property within view of the proposed facilities. (The eastern portion of the tax lot boundaries for the three properties on the west side of Densmore Road are shown on Attachment C of the Planning Director's decision, for reference.)

The east and south boundaries of the required tree preservation area are not dimensioned; instead, those boundaries vary to coincide with the existing trees surrounding the soil reclamation area. The east boundary of the tree preservation area roughly coincides with the existing paved roadway; similarly, the southern boundary coincides with the access from West 40th Avenue, at the intersection with Densmore Road. Although the east and south boundaries face the cemetery, the existing trees along those margins of the soil reclamation area serve as a backdrop of views from the west, and were considered by the Planning Director to be a critical component in helping to ensure the tower would be reasonably compatible and blend in with the surroundings.

3. ***Third Assignment of Error (Wiper Appeal): The Planning Director erred by failing to determine whether existing on site vegetation satisfied the screening requirement in EC 9.5750(7)(e). To the extent the existing vegetation did not satisfy Condition of Approval #2, the Planning Director erred by impermissibly mandating that the vegetative screen abut the "entire exterior perimeter of the 8-foot concrete wall enclosure."***

Summary:
The appellant (Wiper) asserts that the applicant (AT&T) should be allowed to place some or all of the screening within the soil reclamation facility itself (on the inside of the concrete wall), directly around the telecommunication facilities. The appellant wants to reserve his ability to use the face of the wall for cemetery uses, such as utilizing the eastern facing wall of the soil reclamation facility as a memorial wall at some point in the future. Ultimately, the appellant wants Condition of Approval #2 to be removed, stating that the existing surrounding vegetation fulfils this screening standard.

Staff Response:
The Planning Director did not fail to determine whether existing on site vegetation satisfied the screening requirement of EC 9.5750(7)(e), because the standard does not provide for that kind of consideration. The standard is as follows:

> EC 9.5750(7)(e) Buffering. In all zones, existing vegetation shall be preserved to the maximum extent possible. In the C-4, I-1, I-2 and I-3 zones, no buffering is required beyond that required by this land use code. In all other zones, landscaping shall be placed completely around the transmission tower and ancillary facilities located at ground level except as required to access the facility. Such landscaping shall consist of evergreen vegetation with a minimum planted height of 6 feet placed densely so as to form a screen. Landscaping shall be compatible with other nearby landscaping and shall be kept healthy and well maintained.

Staff notes that the first sentence of the above standard emphasizes the need to establish preservation of existing vegetation. It does not, however, say that existing vegetation can be relied upon in lieu of new plantings. Instead, the above standard provides explicit instructions about this new landscaping – to be placed completely around the tower and ancillary facilities, and consist of 6-foot tall evergreen vegetation. The last sentence of the above standard only says that the new landscaping needs to be compatible with existing nearby landscaping. The word compatible implies that the two (existing and proposed vegetation) would coexist.

No evidence has been provided to show that the required landscaping would be incompatible with the existing landscaping. The above standard has no associated Adjustment Review or Variance provision to enable the consideration of an alternative. Without a proposed means of compliance with this standard from the applicant, the Planning Director's decision imposed a condition to address the standard, rather than denying the application for failure to comply (as only a few shrubs were proposed near the entrance of the walled soil reclamation area). The condition appeared to be reasonable because when staff visited the site, there appeared to be ample room between the existing vegetation and the area where the wall would be to plant the required vegetation.

4. ***Fourth Assignment of Error (Wiper Appeal): The Planning Director erred by failing to expressly allow the cell tower to be constructed up to the maximum allowable height of 128 feet to encourage collocation of other cellular providers.***

Summary:
The appellant (Wiper) apparently wants the tower to be taller to enhance the service performance of additional service providers that could potentially collocate on the tower. The appeal cites the telecommunication purpose statements that encourage collocation of telecommunication facilities and minimize the number of transmission towers. To fulfill that purpose, the appellant asserts that the tower must be the maximum height allowable. The appellant states that the additional eight feet in height for a 128 foot tall tower would not violate any standards, as the tower is setback from the property line 128 feet (i.e. the standards require that the setback must be at least equal to the tower height).

Staff Response:
Staff understands the appellant's intent; however, the application materials and all of the evidence provided for the Planning Director's review were based on the proposal for 120-foot tall tower. As discussed in the decision, the most compelling evidence provided by the applicant to demonstrate compatibility was the set of photo simulations of the 120-foot tower within the existing stand of trees. The photo simulations were carefully produced using balloon testing to verify the actual height of the tower (see April 25, 2014 letter from Tim Bradley Imaging for details). No such data was provided for a 128-foot tower, and there is no evidence that the proposed monopole design could accommodate the additional eight feet of height without affecting the branch design and other details that were the basis for the Planning Director's approval.

Staff also notes that the telecommunication standards at EC 9.5750(7)(c) specifically address the collocation requirement for the proposed tower. The standard requires new towers of 80 feet or more to be designed to accommodate collocation of a minimum of 2 additional providers, and in this case the applicant's evidence shows that the standard will be met for the proposed 120-foot tower. There is no information in the applicant's materials to suggest that the standard would not be met without the additional 8 feet in height for lack of adequate performance. Here, the appellant makes an unsupported assertion that performance would be better for future collocation with the additional height, but provides no other evidence that would be needed to show how it would meet other approval criteria.

5. ***Fifth Assignment of Error (Meyer Appeal): The basis for this appeal is that the proposed facility is not reasonably compatible with the adjacent property.***

Summary:
The appellant (Meyer) states that the approval is premised on the condition that additional landscaping will be installed and maintained, but that an identical requirement was placed on the approval of the construction of the maintenance facility by Rest Haven has never been properly installed or maintained.

Staff Response:
As discussed above regarding Appeal Issue 2, the Planning Director's basis for approval was finding that the tower designed to look like a tree would blend in with an existing stand of surrounding trees. The condition imposed was to ensure that stand would remain as screening. Enforcement and compliance with past requirements for the cemetery is not relevant to the present case.

6. ***Sixth Assignment of Error (Meyer Appeal): The applicant is required to document that alternative sites within a radius of 2,000 feet have been considered and have been determined to be technologically unfeasible or unavailable.***

Summary:
The appellant (Meyer) asserts that this requirement should apply *within* the cemetery site, as he states that the area adjacent to the administration office is a more appropriate site and can be implemented with no impact on adjacent property.

Staff Response:
The requirement being challenged is an application requirement for the construction of a transmission tower that requires Site Review approval at EC 9.5750(6)(c)2:

> Documentation that alternative sites within a radius of at least 2,000 feet have been considered and have been determined to be technologically unfeasible or unavailable. For site reviews, alternative sites zoned C-4, I-1, I-2, and I-3 must be considered. For conditional use permits, alternative sites zoned PL, C-2, C-3, C-4, I-1, I-2, I-3 and S-WS must be considered.

The above standard does not include any basis for the Planning Director to select a preferred location on a given site. Here, the applicant provided the required documentation thereby meeting the standard. The applicant submitted an alternative sites analysis (see May 2, 2014 letter from Paul Slotemaker, Zoning Manager, Smartlink LLC). Page 3 of that letter also includes an "Onsite Alternative Site Analysis," which discusses further the limitations within the cemetery property in response to testimony suggesting that the tower should be located elsewhere on the property.

7. ***Seventh Assignment of Error (Koenig/Toobert Appeal): The Planning Director failed to properly evaluate the application in regards to "surrounding properties" under approval criterion EC 9.8440(1), which are homes, not trees.***

Summary:
The appellant (Koenig/Toobert) states that the location, bulk, and height of the tower is not reasonably compatible with the surrounding properties, which are homes, not trees – as trees are not properties. The appellant compares the height of the homes (30 to 35 feet) to the tower (120 feet). The appellant states that "this is essentially an industrial grade structure proposed to be plopped down in a residential neighborhood" and that it is "in no way compatible."

Staff Response:
As discussed extensively in the decision and above with respect to Appeal Issues 1 and 2, the surrounding trees were appropriately considered as screening necessary to establish compatibility with the surrounding properties. The proposed facility is not considered to be an industrial use, but rather, as a utility or communication use that is subject to telecommunication standards and Site Review approval within the PL zone.

8. ***Eight Assignment of Error (Koenig/Toobert Appeal): The Planning Director failed to address the long term maintenance of the monopine.***

Summary:
The appellant (Koenig/Toobert) states that, unlike the needles and branches of living trees, these artificial ones will age and fade in color and texture, possibly break off and generally deteriorate becoming even more of an eyesore to the neighborhood.

Staff Response:
The Site Review approval would be implemented through an approved site plan showing the tower design elements with a performance agreement that would allow the City to enforce consistency with the plan and related conditions of approval. In the future, neighbors could complain to the City if the tower were deteriorating and the performance agreement would enable the City to proceed with enforcement for corrective actions.

9. ***Ninth Assignment of Error (Koenig/Toobert Appeal): The Planning Director erred in concluding that "the city could only review the proposed location for compliance with the applicable approval criteria and standards."***

Summary:
The appellant (Koenig/Toobert) states that "we can find nowhere in the Eugene City Code that requires the land use hearing officer to not recommend alternative locations for a proposed development within a given defined site."

Staff Response:
The application requirements for telecommunication towers at EC 9.5750(6)(b)1 require "a description of the proposed tower location, design, and height." Provided the applicant submits the necessary materials, the city is obligated to determine whether the applicant's proposal meets the required criteria or not. As discussed previously, all the application materials and evidence considered by the Planning Director were based on the proposed location. No evidence was provided to show how an alternate location would meet the applicable approval criteria and standards. As discussed in Appeal Issue 6, alternate locations were considered by the applicant, but were determined to be infeasible.

10. ***Tenth Assignment of Error (Koenig/Toobert Appeal): The Planning Director erred in granting a variance to undergrounding the ancillary equipment.***

Summary:
The appellant (Koenig/Toobert) objects to the Planning Director's findings that undergrounding would require additional elevators and air conditioning that would increase noise levels because maintenance personnel would only employ this equipment once a month; further, they question why elevators would be necessary when stairs would work just as well. They state that air conditioning would be required regardless, and that the greater soil insulation would reduce the need for heating and cooling the equipment. The appellant also states that undergrounding would not unduly harm the root structures of the adjacent trees, noting that the cemetery has many large healthy trees in spite of grave excavations undertaken in the direct vicinity.

Staff Response:
While the appellant challenges the findings of the applicant's consultant's, no further evidence has been provided to support the assertions. The Planning Director relied on the most credible evidence on these technical matters, which were provided by the applicant.

11. ***Eleventh Assignment of Error (Koenig/Toobert Appeal): The Planning Director's Condition of Approval #1 for mitigating existing deficiencies in the existing tree buffer does not provide effective screening.***

Summary:
The appellant (Koenig/Toobert) states that the condition "is laughable" because new trees are not going to provide screening for decades and, in the meantime, the residential neighborhood is going to be "stuck with a highly visible ugly tower." The appellant also states that the existing trees are not that close together, so the tower will not blend in with the adjacent trees, "making the structure stand out like a sore thumb."

Staff Response:
An explanation of the Planning Director's rationale and the basis for Condition of Approval #1 is provided in detail above, with respect to Appeal Issues 1 and 2.

12. ***Twelfth Assignment of Error (Koenig/Toobert Appeal): The Planning Director's decision says the City hired a third party consultant (Carl Bloom), but there is no evidence of his qualifications.***

Summary:
In addition to credentials, the appellant challenges whether the City's third-party consultant visited the site and whether he relied solely on the applicant's data instead of taking his own measurements.

Staff Response:
This appeal issue is not based on an approval criterion or standard, but instead on a procedural requirement at EC 9.5750(11) Application Review and Fees, which states:

> The city manager shall retain one or more consultants to verify the accuracy of statements made in connection with an application for a building or land use permit for a telecommunications facility. Notwithstanding any other provision of this code, the city manager shall require the applicant to pay, as part of the application fees, an amount sufficient to recover all of the city's costs in retaining the consultant(s).

The standard does not establish criteria for the qualifications of the consultant, nor does it provide instruction on how the consultant verifies the accuracy of the statements. Nonetheless, the City has relied upon the services of Carl Bloom, Environalysis, LLC to review building permits and land use applications involving telecommunication facilities and ensure compliance with this requirement. The professional qualifications and findings of the City's consultant in this case are included in the record.