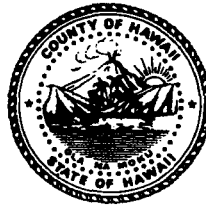


Harry Kim  
Mayor

Roy Takemoto  
Managing Director



Thomas Raffiyy, Chair  
John Replogle, Vice-Chair  
Gilbert Aguinaldo  
Dean Au  
Joseph Clarkson

## County of Hawai'i

### WINDWARD PLANNING COMMISSION

Aupuni Center • 101 Pauahi Street, Suite 3 • Hilo, Hawai'i 96720  
Phone (808) 961-8288 • Fax (808) 961-8742

**NOV 20 2020**

Ms. Katherine A. Garson, Esq.  
Carlsmith Ball  
121 Waiānuenue Avenue  
Hilo, HI 96720

Dear Ms. Garson:

**SUBJECT: Use Permit No. (USE 19-000082)**  
**Applicant: New Cingular Wireless PCS, LLC dba AT&T Mobility**  
**Permitted Use: Allows the Construction of 105-Foot Tall Monopine**  
**Telecommunication Tower with Related Equipment**  
**Tax Map Key: 1-5-023:040**

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The Windward Planning Commission, at its meeting on November 5, 2020, reviewed and considered the adoption of the Amended Findings of Fact, Conclusions of Law and Decision and Order for approval of a Use Permit to allow the construction of a non-manned telecommunication facility consisting of a 105-foot tall monopine with related equipment within a 1,054-square foot portion of a 20-acre property situated in the County's Open zoning district. The property is situated northeast of the Maku'u Drive-17th Avenue intersection in the Hawaiian Paradise Park Subdivision, Kea'au, Puna, Hawai'i.

The Commission voted and adopted the enclosed Amended Findings of Fact, Conclusions of Law, and Decision and Order for Use Permit Application No. 19-000082.

Should you have any questions, please contact Jeff Darrow of the Planning Department at 961-8158.

Sincerely,

Thomas Raffiyy, Chairman  
Windward Planning Commission

LNewCingularWirelessUSE19-082AFOFCOLD&Owpc

**NOV 23 2020**

Ms. Katherine A. Garson, Esq.  
Carlsmith Ball  
Page 2

Enclosure: Findings of Fact, Conclusions of Law, and Decision and Order

cc: Mr. Andrew Tomlinson, J5 Infrastructure  
Department of Public Works  
Department of Water Supply  
County Real Property Tax Division  
State Land Use Commission  
State Department of Transportation  
State DLNR-HPD  
Plan Approval Section  
GIS Section  
US Fish & Wildlife Service

BEFORE THE COUNTY OF HAWAI'I  
WINDWARD PLANNING COMMISSION

Application of

NEW CINGULAR WIRELESS PCS, LLC  
DBA AT&T MOBILITY

TMK (3) 1-5-023:040

Use Permit No. 19-000082

AMENDED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND DECISION  
AND ORDER FOR USE PERMIT  
APPLICATION NO. 19-000082

**AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER  
FOR USE PERMIT APPLICATION NO. 19-000082**

NEW CINGULAR WIRELESS PCS, LLC DBA AT&T MOBILITY

("AT&T"/"Applicant"), filed an Application for a Use Permit for a proposed telecommunications facility consisting of a non-manned 100 foot tall monopine (105-feet with branches) and related equipment located northeast of Maku'u Drive-17<sup>th</sup> Avenue intersection in Hawaiian Paradise Park Subdivision, Kea'au, Puna, Hawai'i, TMK: (3) 1-5-023:040 ("Property"). The Windward Planning Commission of the County of Hawai'i ("Commission") having heard the testimony provided by the public and AT&T at its hearings on February 6, 2020, March 5, 2020 and October 1, 2020; having considered the entire record herein; hereby amends and replaces the June 4, 2020 Findings of Fact, Conclusions of Law and Decision and Order for Denial of Use Permit Application No. 19-000082 with the following findings of fact and conclusions of law.

**I. FINDINGS OF FACT**

**A. Procedural Matters**

1. On November 5, 2019, the applicant filed an application, which included thirteen (13) attachments, with the County of Hawai'i Planning Department ("Department").
2. On November 27, 2019, the Department accepted the Application for processing.
3. By memorandum dated December 6, 2019, with copies of the Application enclosed, the Department solicited comments on the Application to various County, State, and Federal agencies. The agencies included were the Department of Public Works Engineering Division (Hilo), Real Property Tax, Fire Department, Department of Environmental Management, Police Department, Civil Defense, Department of Public Works Building Division, State Department of Land and Natural Resources Land and Engineering Divisions, State Health Department, the U.S. Fish and Wildlife Service, and the Hawaiian Paradise Park Community Association.
4. In December 2019 and January 2020, the Department received comments on the Application from the County of Hawai'i Department of Public Works Engineering Division, State Department of Health, and U.S. Fish and Wildlife Service. The remainder of the agencies had no comment or no response.
5. On January 29, 2020, Michael Yee, Planning Director, sent his background report and recommendation on the Application to the Commission. The Planning Director recommended the Use Permit 19-000082 be approved with conditions.
6. On February 6, 2020, the Commission held a hearing on the Application in the Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i.

7. On February 6, 2020, the Applicant, represented by Andrew Tomlinson, presented oral testimony and answered questions from the Commission.

8. On February 6, 2020, the Commission heard public testimony in opposition of the Application from Crystal Schiszler, Fred Kalaukoa, Kevin Reinke, Albert Schiszler, Jaerick Medeiros-Garcia, and Jose Romero.

9. On February 6, 2020, the Commission continued the hearing to the March 5, 2020.

10. On February 21, 2020, the Hawai'i County Fire Department submitted a letter in support of AT&T's application.

11. On February 24, 2020, the Hawai'i County Police Department submitted a letter in support of AT&T's application.

12. On March 5, 2020, the Commission held the continued hearing on the Application in the Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i.

13. On March 5, 2020, the Applicant, represented by Andrew Tomlinson, presented oral testimony and answered questions from the Commission.

14. On March 5, 2020, the Commission heard public testimony in opposition of the Application from Jose Romero, Barry Gingold, Ryoko Osaka, Delbert Grace, Sariah Evans, Kevin Malmgren, Barbara Hoglund, Fred Kalaukoa, Albert Schiszler, and Jaerick Medeiros-Garcia.

15. On March 5, 2020, the Commission moved and seconded that the application for Use Permit Docket No. Use 19-000082 be denied based on a playground, parking lot, and basketball court being located within the fall-radius of the 105-foot telecommunications tower and the Applicant failed to show proper legal access to the Property.

16. On June 4, 2020, the Windward Planning Commission issued its Findings of Fact, Conclusions of Law and Decision and Order for Denial of Use Permit Application No. 19-000082.

17. On July 2, 2020, AT&T filed a Complaint in the United States District Court for the District of Hawai'i, Civil No. 1:20-CV-00297 ("Federal Court Action"), against the Windward Planning Commission, County of Hawai'i; Thomas Raffipy, in his official capacity as Chairman of the Commission; and the County of Hawai'i Planning Department and alleged, inter alia, that the Commission's denial of the Application violated federal law, was based on the misapplication of state and local law, and that the findings and legal conclusions made by the Commission were unsupported and/or contradicted by the record.

18. On September 8, 2020, United States Magistrate Judge Kenneth J. Mansfield issued an Order Granting Parties' Request Pursuant to Stipulation to Stay Action to Allow Further Consideration by the Windward Planning Commission, County of Hawai'i which stayed the Federal Court Action for further consideration, evaluation, deliberation and action by the Commission pursuant to HRS 91-14(e)..

19. On September 29, 2020, on behalf of AT&T, Andrew Tomlinson submitted a letter to the Commission that, inter alia, included a Revised Plot Plan showing the monopine's relocation approximately 10 feet from its originally proposed location further to the northeast, within the area licensed from the Hawai'ian Paradise Park Owners Association which will move it further away from the abandoned basketball court and from the playground on the Property.

20. On October 1, 2020, the Commission held a meeting to further consider AT&T's application for Use Permit 19-000082.

21. At the October 1, 2020 meeting, the Commission heard public testimony in opposition to the Application from Naomi Melamed, Martha Stevens, Eugene Elmer and Debra Green.

22. At the October 1, 2020 meeting, the Commission heard public testimony in support of the Application from Kazuo Todd, Battalion Chief with the Hawai'i County Fire Department, Major Andrew Burian, with the Hawai'i County Police Department, and Jennifer Meyers.

23. At the October 1, 2020 meeting, the Applicant, represented by Andrew Tomlinson, presented oral testimony and answered questions from the Commission.

24. At the October 1, 2020 meeting, AT&T presented the Revised Plot Plan and testified that the monopine's relocation would be approximately thirteen feet and two inches (13' 2") from its originally proposed location, and would be moved further to the northeast and further away from the abandoned basketball court and from the playground on the Property. (Exhibit A of AT&T's September 29, 2020 letter).

25. AT&T presented an annotated map at the October 1, 2020 meeting showing the distance from the center of the relocated monopine and extending out in a radius of 105 feet. The map indicates that the location of the playground and abandoned basketball court to be outside of a 105 foot radius of the relocated monopine. Based on this relocation, the proposed monopine will be approximately 151 feet from the playground area and approximately 124 feet from the closest abandoned basketball hoop. (Exhibit B of AT&T's September 29, 2020 letter).

26. AT&T has legal access to the Property, as evidenced by a signed Letter of Authorization from the President of the Hawaiian Paradise Park Homeowners Association

("HOA") which was attached to AT&T's application, and further evidenced by a signed License Agreement with the HOA which was submitted to the Commission at the June 4, 2020 meeting.

27. At the October 1, 2020 meeting, the Commission moved and seconded that the application for Use Permit Docket No. Use 19-000082 be approved based on the Planning Director's recommendation with conditions and the agreement by AT&T to move the monopine tower approximately thirteen feet and two inches (13' 2") further away from the abandoned basketball court and the playground area, as shown in Exhibit A of the Revised Plot Plan attached to AT&T's September 29, 2020 letter to the Commission.

28. The Commission voted 5-0 to approve the motion.

29. Any conclusion of law hereinafter determined to be a finding of fact shall be deemed herein as a finding of fact.

**B. Proposed Project**

1. The Applicant requested a Use Permit to allow the construction of a new, non-manned telecommunication facility, which includes a 100-foot tall self-supporting monopine tower (105-foot tall with branches) and antenna array consisting of three (3) sectors with four (4) antennas per sector (for a total of twelve (12) antennas), thirty-six (36) remote radio heads, six (6) surge suppressors, and one (1) global positioning system (GPS) antenna. No exterior lighting is proposed for the site. The tower will be painted pine green and designed to blend with the surrounding character of the rural subdivision.

2. In addition to the tower and antennas, the 1,054-square foot (34' x 31') leased area would be used for accessory ground facilities located within an enclosed, pre-fabricated 8' x 16' walk-in cabinet shelter. The leased area will be enclosed with a 6-foot high chain-link fence with landscaped buffer, green privacy slats, and a 10-foot wide locked access gate. Green privacy slats in the chain link fence surrounding the ground equipment are designed to mitigate visual impacts.



3. The proposed facility would be unmanned, and maintenance and repair activities will be performed by a technician on a periodic basis, typically once a month within normal working hours.

**C. Description of Property and Surrounding Areas**

1. The property is rectangular in shape and sits at an elevation of 165 feet.

2. The 20-acre property structures include the HPP Association office building, a meeting hall/community center building ("Community Center"), and accessory buildings, which were permitted with Special Permit No. 78-309 in 1978. These structures and the proposed facility are situated in the front of the property closest to Maku'u Drive.

3. The rear half of the lot is heavily vegetated with non-native trees and shrubs.

4. The property has driveways from 16<sup>th</sup> Avenue, Maku'u Drive and 17<sup>th</sup> Avenue.

5. The proposed facility is about 208 feet from the Community Center.

6. Also located at the front of the property is a playground, parking lot, and an abandoned basketball court with the rims removed.

7. The basketball court is between the Community Center and proposed facility.

8. The playground and parking lot are located in front of the Community Center on the 17<sup>th</sup> Avenue side of the building.

9. The Revised Plot Plan as shown in Exhibit A of AT&T's September 29, 2020 letter to the Commission moves the monopine tower approximately thirteen feet and two inches (13' 2") to the northeast further away from the abandoned basketball court and

playground area which will result in the relocated monopine to be approximately 151 feet from the playground area and approximately 124 feet from the closest abandoned basketball hoop.

10. The playground, parking lot, and basketball court are located outside of a 105-foot-radius of the center of the telecommunications tower.

11. ***Surrounding Zoning/Land Uses:*** Surrounding properties within the subdivision are zoned A-1a and are developed with single-family dwellings or vacant. The closest dwelling is located about 235 feet southwest of the proposed lease area.

12. ***Flood Zone:*** The subject property is located in Zone X, which is an area determined to be outside the 500-year floodplain.

13. ***Agricultural Lands of Importance to the State of Hawai'i (ALISH):*** Unclassified.

14. ***Land Study Bureau's Detailed Land Classification System:*** "E" or "Very Poor" soils.

15. ***U.S.D.A. Soil Survey:*** Pahoe hoe lava flows (rLW), which has no soil covering and is typically bare of vegetation except for 'ōhi'a trees, lichens and mosses.

16. ***Flora/Fauna Resources:*** A biological screening report of the property was conducted by ACE Environmental in May 2019. The report determined that the biological resources of the area have been altered by development and that no threatened or endangered species were found on the property. Three indigenous species were found on the property: whiskfern moa, *Nephrolepis cordifolia* fern and hala trees. Additionally, in a memo dated January 6, 2020, the US Fish and Wildlife Service stated that it is possible that the endangered Hawaiian hoary bat may roost or nest in woody plants and trees on the property or in the area, due to the presence of tall trees throughout the subdivision, and that seabirds may transit the project area when flying to upland breeding colonies. The US Fish and Wildlife service recommended several measures to avoid or minimize the project's impact on these species.

17. ***Archaeological/Historical/Cultural Resources:*** A cultural resources review and field inspection were completed by ACE Environmental in May 2019 and found no historic properties in the lease area. The Department of Land and Natural Resources-State Historic Preservation Division (SHPD) concurred with this determination in a letter dated September 4, 2019 (See Attachment 11 of Application).

18. ***Scenic and Visual Resources:*** The General Plan identifies views of Mauna Kea and Mauna Loa from various Puna subdivisions as an example of natural beauty in the Puna district. The surrounding properties within the subdivision are heavily vegetated with medium to tall non-native trees which blocks views of these mountains. Additionally, the proposed telecommunications tower will be painted to blend in with the surrounding landscape, which will lessen any adverse visual impacts on surrounding properties.

19. ***Public Access:*** There is no public access to the mountains or the shoreline that runs through the subject property.

**D. State and County plans**

1. ***State Land Use District:*** Agricultural.

2. ***GP LUPAG MAP:*** Rural.

3. ***County Zoning:*** Open.

4. ***Puna Community Development Plan (CDP):*** The Puna CDP was adopted by the Hawai'i County Council, Ordinance 08 116, on September 10, 2008. Under Public Safety and Sanitation Services in the plan, Action 3.4.3(e) states, "Encourage enhancement of cell phone service to expand coverage to more remote areas."

5. ***Special Management Area:*** The property is not located within the Special Management Area and is located about two (2) miles from the nearest coastline.

**E. Public Services and Facilities**

1. **Roadway Access:** Access to the facility will be from 17<sup>th</sup> Avenue, a private road that is maintained by the Hawaiian Paradise Park Community Association, and a two-lane gravel road with grass shoulders within a 40-foot right-of-way. A 12-foot wide driveway will lead from 17<sup>th</sup> Avenue to the lease area.

2. **Water:** The proposed use does not require water.

3. **Wastewater:** This use will not generate wastewater.

4. **Utilities:** Electrical and telephone services are available to the site.

5. **Essential Utilities and Services:** All essential utilities are available to the subject property. Police and Fire are available are about five (5) miles away in Pāhoa.

**F. Alternative Sites**

1. The Applicant considered three alternative sites, but these sites did not have available antenna space at the required height to satisfy FirstNet requirements.

**II. CONCLUSIONS OF LAW**

Based upon the foregoing findings of fact, the Commission makes the following Conclusions of Law, including mixed findings of fact and conclusions of law:

A. Any finding of fact hereafter determined to be a conclusion of law shall be deemed herein as a conclusion of law. Any conclusion of law determined to be a finding of fact shall be deemed herein as a finding of fact.

B. The Commission has jurisdiction over this Use Permit application pursuant to Chapter 25 (Zoning Code) of the Hawai'i County Code 1983, (2016 edition), as amended.

C. In considering a Use Permit for any proposed use, Rule 7 of the Planning Commission relating to Use Permits requires that such action conform to the following guidelines:

1. The granting of the proposed use shall be consistent with the general purpose of the zoning district, the intent and purpose of the Zoning Code and the County General Plan.

2. The granting of the proposed use shall not be materially detrimental to the public welfare nor cause substantial adverse impact to the community's character or to surrounding properties; and

3. The granting of the proposed use shall not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, police and fire protection and other related infrastructure.

D. The Planning Director shall advise the Planning Commission on all planning and land use matters, pursuant to Hawai'i County Charter Section 6-7.2 (b)(1).

E. The Planning Director recommended approval of AT&T's Use Permit application with conditions as indicated in his report dated January 27, 2020.

F. Under 47 U.S.C. §332(c)(7)(B)(iii), any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities must be supported by substantial evidence in a written record.

G. Under 47 U.S.C §332(c)(7)(B)(i)(II), the Commission is prohibited from regulating the placement, construction, or modification of personal wireless service facilities that prohibit or has the effect of prohibiting the provision of personal wireless services.

H. Under 47 U.S.C. §332(c)(7)(B)(iv), concerns regarding the environmental or health effects of radio frequency emissions cannot be the basis for the denial of a telecommunications use permit.

I. At the October 1, 2020 hearing, the Commission voted 5-0 to approve AT&T's Use Permit Application, based on the Planning Director's recommendation with conditions and AT&T's Revised Plot Plan, as shown in Exhibit A of AT&T's September 29, 2020 letter to the Commission. The Commission's approval incorporates the Planning Director's reasoning, as stated in the following findings of facts, and mixed findings of fact and conclusions of law.

J. The granting of the proposed use shall be consistent with the general purpose of the zoning district, the intent and purpose of the Zoning Code and the County General Plan. The Use Permit process provides an avenue to review and analyze a proposed project on a case-by-case basis relative to infrastructure and impacts on surrounding properties and existing uses, as well as consistency with the goals and policies of the General Plan.

K. The Land Use Pattern Allocation Guide (LUPAG) Map component of the General Plan is a representation of the document's goals and policies to guide the coordinated growth and development of the County. It reflects a graphic depiction of the physical relationship among the various land uses. The LUPAG Map establishes the basic urban and non-urban form for areas within the County. The General Plan designation for this property is Rural, which includes existing subdivisions in the State Land Use Agricultural and Rural districts that have a significant residential component. These subdivisions may contain small farms, wooded areas, and open fields as well as residences. Allowable uses within these areas, with appropriate zoning, may include commercial facilities that serve the residential and agricultural uses in the

area, and community and public facilities. The request is consistent with the Land Use, Economic, and Public Utilities elements of the General Plan.

L. The telephone is an essential means of voice communication for the majority of residents in Hawai'i County. However, over the last decade, the County has seen acceleration in the development of telecommunication technology and a transformation of the telecommunications industry. In addition to traditional phone communication, the telecommunications industry now includes technologies such as wireless cellular and digital mobile phones, and the internet. During the last decade, wireless telecommunications has experienced a dramatic decrease in cost and a phenomenal increase in availability. Changes in technology and competition in the industry have made wireless communication more affordable to the general public.

M. Advances in telecommunications are not without cost or concerns. One such concern is the construction and location of telecommunication towers. Telecommunication towers are the physical structures to which antennas are attached to facilitate wireless communication. Because of the need for a clear line-of-site, telecommunication towers are usually located in areas with minimum obstructions between the tower and its area of service. Line-of-site refers to the imaginary line between a mobile phone antenna and a telecommunication tower. If there are impediments between the mobile phone antenna and the telecommunication tower, there may be signal degradation or signal loss. For example, the loss of line-of-sight occurs when a person uses a mobile phone while driving through a tunnel. Most often, communication is lost or unclear. The line-of-sight requirement often necessitates the conspicuous location of many telecommunication towers. Consequently, the

telecommunications tower is usually much taller than the surrounding structures or vegetation and may negatively impact the scenic nature of a given area.

N. A standard in the Public Utilities element of the General Plan states that in the development and placement of telephone facilities, such as lines, telecommunications and cellular towers, poles, and substations, the design of the facilities shall consider the existing environment, and scenic view and vistas shall be considered and preserved where possible. The General Plan identifies views of Mauna Kea and Mauna Loa from various Puna subdivisions as an example of natural beauty in the Puna district. The surrounding properties within the subdivision are heavily vegetated with medium to tall non-native trees which blocks views of these mountains. Additionally, the proposed telecommunication tower will be painted to blend in with the surrounding landscape which will lessen any adverse visual impacts on surrounding properties.

O. The Puna Community Development Plan (CDP) was adopted by the Hawai'i County Council on September 10, 2008. The request is consistent with Action 3.4.3(e) under the Public Safety and Sanitation Services section in the plan, which states, "Encourage enhancement of cell phone service to expand coverage to more remote areas."

P. Both the General Plan and Puna Community Development Plan discuss the importance of protecting native species in order to maintain an ecological balance for the well-being of the island. In their memo dated January 6, 2020, the US Fish and Wildlife Service (USFWS) recommended several measures to avoid or minimize project impacts to threatened, listed and endangered species that may roost, nest or flyover the area. The Planning Director agrees these measures should be implemented. Thus, to avoid possible impacts on these species that are protected under the Endangered Species Act, which is administered by the USFWS, the



applicant will be required to implement mitigation measures as conditions of this permit. Based on the above, the request is consistent with the general purpose of the zoned district, the intent and purpose of the Zoning Code and the County of Hawai'i General Plan.

Q. The granting of the proposed use shall not be materially detrimental to the public welfare nor cause substantial, adverse impact to the community's character or to surrounding properties. The proposed facility will be located on a 1,054-square foot portion in the southwest corner of the 20-acre property. The property includes the HPP Association office building, a meeting hall/community center building, and accessory buildings. Properties located immediately to the north, east and west of the subject property are zoned A 20a. Surrounding properties within the subdivision are zoned A-1a and are developed with single-family dwellings or vacant. The closest dwelling is located about 235 feet southwest of the lease area and the proposed facility is about 208 feet from the meeting hall/community center building. Thus, it is unlikely any noise from the ground equipment would adversely affect neighbors. To reduce visual impacts on surrounding properties, the tower will be built as a 'monopine' to look like a pine tree, ground equipment will be surrounded by a 6-foot high chain-link fence with green privacy slates and the proposed telecommunication tower will be painted to blend in with the surrounding landscape. Additionally, the 105-foot tall (with branches) monopine tower will be set back 100 feet from 17th Avenue. With implementation of these measures, it is unlikely that there will be a significant adverse impact to the community's character or to surrounding properties.

R. It is anticipated that the approval of the telecommunication tower will be beneficial to the community as it will provide increased cell phone coverage in the area and will be a significant resource for emergency services. Therefore, based on the above, the proposed

use shall not be materially detrimental to the public welfare nor cause substantial, adverse impact to the community's character or to surrounding properties.

S. The granting of the proposed use will not unreasonably burden public agencies to provide roads and streets, sewer, water, drainage, school improvements, police and fire protection and other related infrastructure. Only electrical and telephone services are required for the proposed use and those utilities will be supplied via overhead lines into the lease area. Access to the subject property from 17th Avenue is sufficient since this is a non-manned facility that will generate very little traffic. Water and wastewater disposal are not required for the proposed use and fire and police services are available from stations in Pāhoa and Kea'au. Finally, the applicant will be required to meet all applicable agency requirements, including the Federal Communications Commission and the Federal Aviation Administration.

T. In addition to the criteria for granting a Use Permit, the request is not contrary to Chapter 205A, Hawai'i Revised Statutes, relating to Coastal Zone Management Area. The subject property is located over about 2 miles to the nearest shoreline and is not located in the Special Management Area, and therefore will not be impacted by coastal hazards and beach erosion. There are no identified coastal recreational resources, coastal scenic and open space resources, coastal ecosystems, and beach or marine resources in the area. Thus, the proposed request will not adversely impact coastal resources. In a letter dated September 4, 2019, the Department of Land and Natural Resources-State Historic Preservation Division (SHPD) determined that no historic properties will be affected by the proposed use. Additionally, there is no record of a designated public access to the shoreline or mountain areas that traverses the property and no gathering or other traditional practices have been documented.

U. Lastly, this approval is made with the understanding that the applicant remains responsible for complying with all other applicable governmental requirements in connection with the approved use, prior to its commencement or establishment upon the subject properties. Additional governmental requirements may include the issuance of building permits, the installation of approved wastewater disposal systems, compliance with the Fire Code, installation of improvements required by the American with Disabilities Act (ADA), among many others. Compliance with all applicable governmental requirements is a condition of this approval; failure to comply with such requirements will be considered a violation that may result in enforcement action by the Planning Department and/or the affected agencies.

V. Based on the above, it is recommended that the request to construct a non-manned telecommunication facility consisting of 105-foot tall monopine with related equipment be approved by the Planning Commission. Approval of this request is subject to the following conditions:

1. The applicant, its successors or assigns shall be responsible for complying with all stated conditions of approval.
2. Construction and operation of the telecommunication facility shall be conducted in a manner that is substantially representative of plans and details as contained within the Use Permit application dated November 5, 2019 and representations made to the Windward Planning Commission.
3. Construction of the telecommunication facility shall be completed within five (5) years from the effective date of this permit. Prior to construction, the applicant, successors or assigns shall secure Final Plan Approval for the proposed development from the Planning Director in accordance with Section 25 2 71(c)(3), 25-2-72, 25-2-74 and 25-4-12,

Chapter 25 (Zoning Code), Hawai'i County Code. Plans shall identify proposed structures, fire protection measures, access easements and any fencing associated with the use. The antenna plans shall be stamped by a licensed structural engineer.

4. Prior to commencement of operation of the facility, the applicant shall secure and finalize any building permits for the proposed use required by the Department of Public Works Building Division.

5. Co-location of antennas upon the existing tower and the addition of related support and ground equipment is allowed and encouraged within the parameters of the tower height and ground lease area as approved by the Planning Commission without amendment of this permit or further Plan Approval. Co-location beyond the parameters approved by this permit but that results in less than a 'substantial change' to the tower height and ground lease area, as defined by the Federal Communication Commission, is allowed without amendment of this permit, provided Plan Approval has been issued by the Planning Director for the co-location. Co-location that results in a 'substantial change' to the tower height and ground lease area, as defined by the Federal Communication Commission, requires an amendment of this permit.

6. To protect any Hawaiian hoary bats in the vicinity of the property, barbed wire fencing shall not be used in the permit area and woody vegetation over 15 feet in height shall not be disturbed, trimmed or removed during bat birthing and pup rearing season of June 1st to September 15<sup>th</sup>, without first conducting surveys for bat nests and coordinating with US Fish and Wildlife Service (USFWS) if nests are found. Surveys shall be conducted by a qualified biologist.

7. To protect any seabirds (Hawaiian petrels, Newell's shearwaters and band-rumped storm petrel) in the vicinity of the property, any lighting shall be fully shielded so that

the bulb can only be seen from below bulb height. The lights shall be turned off when human activity is not occurring in the lighted area.

8. To prevent the spread of Rapid 'Ōhi'a Death, a survey of the proposed site shall be conducted two weeks prior to any tree cutting to determine if there are any infected 'ōhi'a trees. If infected 'ōhi'a are suspected at the site, the applicant shall contact the appropriate agencies at UH-Hilo and USDA for further guidance. If 'ōhi'a trees will be cut during construction, the applicant shall follow procedures as determined by US Fish and Wildlife Service.

9. To prevent the spread of harmful invasive species, the applicant shall follow biosecurity protocols as determined by US Fish and Wildlife Service.

10. In the unlikely event that surface or subsurface historic resources, including human skeletal remains, structural remains (e.g. rock walls, terraces, platforms, etc.), cultural deposits, marine shell concentrations, sand deposits, or sink holes are identified during the demolition and/or construction work, cease work in the immediate vicinity of the find, protect the find from additional disturbance and contact the State Historic Preservation Division at (808) 933-7651. Subsequent work shall proceed upon an archaeological clearance from the DLNR-HPD when it finds that sufficient mitigative measures have been taken.

11. The applicant shall comply with all applicable rules, regulations and requirements of the affected agencies for the proposed development, including the Federal Aviation Administration and Federal Communications Commission. All exterior lighting shall be shielded.

12. Within 120 days of the permanent abandonment of the tower, the applicant shall remove the tower and its antenna and accessory structures (including the equipment

building and the fence), down to, but not including, the concrete foundation. The applicant shall immediately provide written notification to the Planning Director of the termination of the telecommunication tower and related improvements and the removal of all structures.

13. An initial extension of time for the performance of conditions of the permit may be granted by the Planning Director upon the following circumstances:

a. Non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicant, successors or assigns, and that are not the result of their fault or negligence.

b. Granting of the time extension would not be contrary to the General Plan or the Zoning Code.

c. Granting of the extension would not be contrary to the original reasons for the granting of the permit.

d. The time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year).

W. Should any of the conditions not be met or substantially complied with in a timely fashion, the Director may initiate procedures to revoke the permit.

### III. DECISION AND ORDER

Based on the above Amended Findings of Fact and Conclusions of Law, and the evidence presented at and in connection with the hearings of February 6, 2020, March 5, 2020 and October 1, 2020,

1. IT IS HEREBY DECIDED AND ORDERED BY THE WINDWARD PLANNING COMMISSION that Use Permit Application No. 19-000082 is hereby GRANTED based on the Planning Director's recommendation for approval with conditions, and the Revised Plot Plan presented by AT&T in its September 29, 2020 letter to the Commission. This Amended Findings of Fact, Conclusions of Law, and Decision and Order For Use Permit Application No. 19-000082 hereby replaces in full the June 4, 2020, Findings of Fact, Conclusions of Law and Decision and Order for Denial of Use Permit Application No. 19-000082.

DATED: Hilo, Hawai'i, **NOV 05**, 2020.

By 

Thomas Rafferty, Chairman  
Windward Planning Commission  
County of Hawai'i