

ORDINANCE NO. 2019 - 60

AN ORDINANCE AUTHORIZING THE CITY MANAGER, OR HIS DESIGNEE, TO ACCEPT A NON-EXCLUSIVE EASEMENT FROM THE STATE OF OHIO (DAS FILE NO. 3180-A-2) ON BEHALF OF THE KENT STATE UNIVERSITY FOR THE EXPANDED USE OF A PERMANENT EASEMENT FOR THE AT&T CELL TOWER, AND DECLARING AN EMERGENCY.

WHEREAS, the State of Ohio will grant a non-exclusive easement, on behalf of the Kent State University, to the City of Kent for the expanded use of a permanent easement for the AT&T Cell Tower; and

WHEREAS, the term of this agreement shall be for five (5) years commencing on November 1, 2018 through October 31, 2023.

NOW, THEREFORE, BE IT ORDAINED by the Council of the City of Kent, Portage County, Ohio, at least three-fourths (3/4) of all members elected thereto concurring:

SECTION 1. That Kent City Council hereby authorizes the City Manager, or his designee, to accept the non-exclusive easement from the State of Ohio on behalf of the Kent State University for the expanded use of a permanent easement for the AT&T Cell Tower, and is more fully described in Exhibit "A", attached hereto and made a part thereof.

SECTION 2. That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council and that all deliberations of this Council, and of any of its committees that resulted in such formal action, were in meetings open to the public in compliance with all legal requirements of Section 121.22 of the Ohio Revised Code.

SECTION 3. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety, and welfare of the residents of this City, for which reason and other reasons manifest to this Council this Ordinance is hereby declared to be an emergency measure and shall take effect and be in force immediately after passage.

PASSED: May 15, 2019
Date

Fiala
Jerry T. Fiala
Mayor and President of Council

EFFECTIVE: May 15, 2019
Date

ATTEST: Dawn Bishop
Dawn Bishop
Interim Clerk of Council

I, DAWN BISHOP, INTERIM CLERK OF COUNCIL FOR THE CITY OF KENT, COUNTY OF PORTAGE, AND STATE OF OHIO, AND IN WHOSE CUSTODY THE ORIGINAL FILES AND RECORDS OF SAID COUNCIL ARE REQUIRED TO BE KEPT BY THE LAWS OF THE STATE OF OHIO, HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND EXACT COPY OF ORDINANCE No. _____, ADOPTED BY THE COUNCIL OF THE CITY OF KENT ON _____, 20_____.

(SEAL)

DAWN BISHOP
INTERIM CLERK OF COUNCIL

STATE OF OHIO EASEMENT

This Agreement (hereinafter referred to as "Agreement"), dated as of _____, 2019, is made and entered into by and between the State of Ohio, acting by and through the Department of Administrative Services, General Services Division, Office of Real Estate and Planning, 4200 Surface Road, Columbus, Ohio 43228-1395, the Grantor (hereinafter referred to as "State"), for and on behalf of Kent State University (hereinafter referred to as "Agency"), and The City of Kent, an Ohio body politic, duly formed and existing under the laws of the State of Ohio (hereinafter referred to as "Grantee"), having its principal place of business located at 301 South Depeyster Street, Kent, Ohio 44240, pursuant to the provisions of Section 123.01(A)(5) of the Ohio Revised Code.

RECITALS

WHEREAS, State is the owner, in fee simple, of the land described in Exhibit "A" attached hereto and made a part hereof (hereinafter referred to as "Easement Area"). Further reference is made to DAS File No. 3180-A on file with the State; and

WHEREAS, Grantee desires to obtain from State a non-exclusive easement with right of ingress and egress which shall be subordinate to the easement granted in DAS File No. 3180 and any subsequent easement governing the underlying state-owned land, in order to permit the installation, construction, reconstruction, use, operation, maintenance, repair, replacement, removal, servicing and improvement of a certain radio telecommunications array with platform affixed atop a water tower owned by Grantee, which is referenced in State of Ohio Easement file No. 3180 and will be further referenced in a separate lease agreement between Grantee and New Cingular Wireless PCS, LLC, a Delaware limited liability company, (NCW) dated November 1, 2018 hereafter referred to as "Lease"; and

WHEREAS, Agency requested the State prepare this Agreement; and

NOW, THEREFORE, in consideration of the terms and conditions contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

I. USE OF PREMISES.

State does hereby grant a non-exclusive easement unto Grantee with right of ingress and egress to be used solely to install, construct, reconstruct, use, operate, maintain, repair, replace, remove, service and improve in, on, over, under, across, through and upon the Easement Area a radio telecommunications array with platform affixed atop a water tower owned by the Grantee as referenced in the aforementioned State of Ohio Easement File No. 3180 (hereinafter referred to as "Improvement"). Said Improvement shall be installed, operated, maintained and used by NCW pursuant to the Lease. On or before the Expiration Date (as defined below) or earlier if this Agreement is terminated pursuant to the provisions hereof, Grantee shall remove, or cause the removal of, all component parts of the Improvement and restore the ground to its original condition at its own cost and expense, unless the parties agree otherwise in writing.

II. TERM.

The term of this Agreement shall be for five (5) years, concurrent with the term of the Lease between the Grantee and NCW or its successors, commencing on November 1, 2018 (hereinafter referred to as "Commencement Date"), and expiring on October 31, 2023 (hereinafter referred to as "Expiration Date"), unless earlier terminated pursuant to a subsequent agreement between the parties or in accordance with the provisions of Paragraph X hereof. This agreement shall not exceed the term of State of Ohio Easement File No. 3180 or any subsequent easement to govern the underlying state-owned land.

The grantee shall be entitled to three (3) five (5) year renewals of this easement upon the same terms and conditions set forth herein except to term and number of renewals provided Grantee:

- A. Concurrently renews its lease agreement with NCW or its successor.
- B. Is in good standing with State.
- C. Has complied with all the terms and conditions of this easement.
- D. State of Ohio Easement File No. 3180 or subsequent easement is still in effect.

III. CONSIDERATION.

During the term of this Agreement, Grantee shall pay Thirty Seven Thousand Two Hundred Thirty Eight and 40/100 Dollars (\$37,238.40) or 20% of the gross Lease income received from the lease between the Grantee and NCW, whichever is greater, in equal monthly installments of Six Hundred Twenty and 64/100 Dollars in advance continuing during the term of the Lease, to Agency in consideration of State's granting an easement. Grantee shall tender the first payment due hereunder, payable to "Treasurer, State of Ohio", on or before the Commencement Date of this Agreement and thereafter on or before the 1st day of the month. Any payment due hereunder shall be paid by Grantee without notice or demand, and without set-off, counterclaim, reduction, abatement, deduction or defense whatsoever. Commencing November 1, 2023, and each extension term thereafter the consideration shall increase by ten percent (10%) over the consideration paid during the previous term. State shall be entitled to the same proportional share of any future increases in rent to Grantee by any party. The renewal payment schedule shall read as follows:

<u>Extension Term</u>	<u>Five Year Total</u>	<u>Annual Rent</u>	<u>Monthly Rent</u>
11/1/23 to 10/31/28	\$40,962.24	\$8,192.45	\$682.70
11/1/28 to 10/31/33	\$45,058.46	\$9,011.69	\$750.97
11/1/33 to 10/31/38	\$49,564.31	\$9,912.86	\$826.07

IV. CONSTRUCTION/MAINTENANCE.

- (A) Grantee agrees that the Improvement shall be installed, constructed, reconstructed, used, operated, maintained, repaired, replaced, removed, serviced and improved at all times in accordance with all local, state or federal laws, rules and regulations and applicable industry guidelines, including compliance with all applicable Equal Employment Opportunity laws. If no such laws, rules, regulations or industry guidelines are applicable to the Improvement, then responsible engineering practices shall be the control.

- (B) If the surface of the ground in the Easement Area is disturbed at any time, Grantee shall provide necessary fill, re-sod or re-seed any grassed areas, and make such repairs and replacements for a period of not less than one (1) year after the date of such disturbance as may be needed to restore the ground to its former condition or pay State for all damages caused thereto.
- (C) Grantee shall notify State immediately when any installation belonging to a party other than Grantee, or any unusual condition, is encountered in the Easement Area.
- (D) Grantee shall prior to the commencement of any work permitted hereunder obtain and thereafter maintain, at its sole cost and expense, all licenses, permits, etc. required by law with respect to said work or the Improvement.
- (E) State or Agency may locate, relocate, install, construct, reconstruct, maintain, operate, repair, remove, use and place property improvements in, on, over, under, across, through and upon the Easement Area, so long as State's or Agency's improvements do not unreasonably impair the strength of or unreasonably interfere with Grantee's ability to use the Easement Area and maintain its Improvement.
- (F) Grantee shall comply with the provisions of Chapter 4115 of the Ohio Revised Code, Prevailing Wage Requirements, as applicable.
- (G) Grantee shall maintain and repair its Improvement at its own cost and expense on a continuous and ongoing basis for the term of this Agreement. Any maintenance and repairs shall be performed in a good and workmanlike manner.
- (H) No improvements, other than the mounting of the radio telecommunications antenna array by NCW as set forth in the Lease, and the antennas permitted to be installed by Grantee and the State therein, may be performed on this easement without the written approval of the State as to the aesthetics, which approval shall be in the sole discretion of the State.

V. LIABILITY.

Grantee shall indemnify and hold State harmless, so far as permitted by Ohio law, from any claims, demands, causes, actions and damages arising out of any act, omission or neglect by Grantee or any of its successors, assigns, agents, servants, employees, contractors, subcontractors and invitees ensuing from or in connection with Grantee's occupation and use of the Easement Area and operation or maintenance of the Improvement. Nothing contained herein shall be deemed to be a waiver by State of any legal or factual defenses, which State may enjoy.

The provisions of this Paragraph V shall survive the expiration or termination of the term of this Agreement.

VI. INSURANCE.

At all times during the term of this Agreement, Grantee shall maintain commercial general liability (CGL) insurance with a limit of not less than \$1,000,000 for each occurrence. CGL insurance shall

cover liability arising from premises, operations, independent contractors, products/completed operations, personal and advertising injury, together with all costs of defense. The defense cost shall be outside of the policy limits. Grantee shall include the State and Agency as additional insureds. CGL insurance shall apply as primary over any other insurance afforded to Grantee. Grantee waives all rights against the State for damages to the extent there is coverage afforded by Grantee's insurance maintained pursuant to this Agreement. Grantee shall provide a certificate of insurance, which must be in a form that is reasonably satisfactory to State as to the contents of the policies and the quality of the insurance carriers. All insurers must have at least an A- (Excellent) rating by A.M. Best & Co.

Grantee shall, for each policy required by this Agreement provide State with thirty (30) days' prior written notice of cancellation, or non-renewal, except a ten (10) day notice for non-payment of premium. Any failure to comply with this reporting provision may constitute a default of this Agreement. State reserves the right to approve or reject levels of self-insured retention, captive insurance, or any other alternative risk-financing program. By requiring insurance herein, State does not represent that the coverage and limits will be adequate to protect Grantee and such coverage and limits do not represent or serve as a limitation on Grantee's liability under the indemnities granted to State under this Agreement.

VII. MECHANIC'S LIENS.

- (A) Nothing contained in this Agreement shall be construed as constituting State's consent, express or implied, to or for the performance of any labor or services or furnishing of any materials for the installation, construction, reconstruction, usage, operation, maintenance, repair, replacement or improvement of the Easement Area or any portion thereof or the Improvement or any portion thereof.
- (B) Grantee shall not allow any liens or encumbrances to be filed against the Easement Area, or any portion thereof, other than (i) liens created by or resulting from any act or status of State or failure by State to perform any obligation not required to be performed by Grantee hereunder, or (ii) liens created by or resulting from any act or status or failure to act by Grantee to which State shall have expressly consented in writing. If such a lien or encumbrance is placed of record against the Easement Area, or any portion thereof, Grantee shall, within thirty (30) days after receiving notice thereof, remove or discharge same or bond off such lien or encumbrance.

VIII. TAXES/ASSESSMENTS.

If as a result of this Agreement any taxes and/or assessments, whether general or special, ordinary or extraordinary, unforeseen or foreseen, of any kind or nature whatsoever, shall be assessed, levied, confirmed, imposed upon, or grow or become due and payable out of or in respect of, or become a lien on the Easement Area and/or the Improvement, Grantee shall be fully responsible for and shall pay same before any fine, penalty, interest or costs may be added thereto, or become due or be imposed by operation of law for the nonpayment thereof.

IX. ASSIGNMENT.

Grantee may not assign or transfer this Agreement, in whole or in part, without the prior written consent of the State, whose consent may be withheld for any reason. Should consent to any such assignment be approved, Grantee shall notify the Agency. Any approved assignment or transfer shall not relieve Grantee of its obligations and duties under the terms, covenants and conditions of this Agreement. Grantee shall cause any assignee or transferee to expressly assume, and by reason of such assignment or transfer shall be deemed as having assumed, all of the obligations and duties of Grantee hereunder.

X. TERMINATION.

This Agreement may be terminated by State upon ninety (90) days' notice given to Grantee if the Easement Area, or any portion thereof, is needed by State for any public or quasi-public use or purpose. On or before the date stated in such notice of termination, Grantee shall remove, or cause the removal of all component parts of the Improvement and restore the Easement Area to its original condition, at its own cost and expense, if State so requests. Grantee shall have no claim against State for the value of any unexpired portion of the original term of this Agreement or for the Improvement. Upon termination of this Agreement, State shall have the immediate right to re-enter and repossess all or any portion of the Easement Area.

This Agreement may be terminated at any time by Grantee by delivering written notice to State and Agency setting forth the date Grantee intends to terminate. Upon either the voluntary termination of this Agreement, or the end of the term hereof, Grantee shall remove all of the Improvement prior to termination, at its own cost and expense, if State so requests, and shall restore the Easement Area to its original condition, unless otherwise agreed to in writing by State and Agency. Grantee's obligations hereunder shall continue until such time as the Improvement is fully removed and the Easement Area fully restored as required herein, notwithstanding the stated date of termination in the notice provided by Grantee, or in the Agreement. Failure to remove the Improvement shall not be considered an extension of the term of the Agreement. No portion of any consideration paid pursuant to the terms of the Agreement will be refunded to Grantee.

XI. DEFAULT.

- (A) State may find Grantee in default of this Agreement when any one or more of the following events shall have occurred and shall not have been remedied as hereinafter provided: (i) Grantee's failure to make any payment required to be paid by Grantee when the same shall become due and payable or (ii) Grantee's failure to perform or observe any other covenant, term, or condition herein contained on Grantee's part to be performed or observed.
- (B) If the State finds Grantee to be in default under Paragraph XI(A), Grantee must cure such default within fifteen (15) days after the giving of notice to Grantee by State of such failure. If Grantee proceeds to promptly and continuously cure the same default with due diligence, then upon receipt by State of notice from Grantee stating the reason that such default cannot be cured within fifteen (15) days and stating that Grantee is proceeding with due diligence to cure such default, the State may extend such time within which such default may be cured for such period as may be necessary to complete the curing of same with due diligence.

- (C) If Grantee fails to cure such default, then State may give to Grantee, at State's option, a notice of election to terminate this Agreement upon the date specified in such notice, which date shall not be less than ten (10) days after the date of such notice, and upon the date specified in such notice the term of this Agreement shall expire and terminate as fully and completely and with the same effect as if such date were the Expiration Date, and all rights of Grantee shall thereupon expire and terminate, and Grantee shall remove or cause the removal of the Improvements and restore the Easement Area to its original condition at its own cost and expense, if State so requests.
- (D) Upon termination of this Agreement, State shall have the immediate right to re-enter and repossess all or any portion of the Easement Area.
- (E) Upon the termination of this Agreement by reason of the happening of any event of default specified in this Paragraph XI, or in any other manner or circumstances whatsoever pursuant to legal process, by reason of or based upon or arising out of the occurrence of any such event of default under this Agreement, Grantee shall pay to Agency all sums required to be paid by Grantee up to the time of such termination.

XII. RECORDATION.

At its expense and within thirty (30) days of its receipt, Grantee shall present for recording a fully executed Agreement in accordance with Chapter 5301 of the Ohio Revised Code in the office of the County where the Easement Area is located. Grantee shall do likewise with respect to any addendum to this Agreement which may be entered into hereafter by the parties. As proof of recording, Grantee shall promptly return a copy of the recorded Agreement to the State.

XIII. RIGHTS CUMULATIVE.

All rights and remedies of State enumerated in this Agreement shall be cumulative and, except as specifically contemplated otherwise by this Agreement, none shall exclude any other right or remedy allowed at law or in equity, and said rights or remedies may be exercised or enforced concurrently and all obligations, rights or remedies shall survive formal termination of this Agreement.

XIV. WAIVER.

The waiver by State of, or the failure of State to take action with respect to, any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition, or subsequent breach of the same, or any other term, covenant or condition herein contained. The subsequent acceptance of any payment hereunder by State shall not be deemed to be a waiver of any preceding breach by Grantee of any term, covenant or condition of this Agreement.

XV. NOTICES, DEMANDS OR INSTRUMENTS.

All notices, demands, requests, consents, approvals and other instruments required or permitted to be given pursuant to the terms of this Agreement shall be in writing and shall be deemed to have

been properly given when hand-delivered or sent by U.S. certified mail, return receipt requested, postage prepaid,

- (a) with respect to State, addressed to:
Ohio Department of Administrative Services
General Services Division
Office of Real Estate and Planning
4200 Surface Road
Columbus, Ohio 43228-1395
Attention: Administrator

- (b) with respect to Agency, addressed to:
Kent State University
Executive Offices, 2nd Floor Library
P.O. Box 5190
Kent, Ohio 44242-0001
Attention: Associate Vice President Real Estate

and,

- (c) with respect to Grantee, addressed to:
City of Kent
301 South Depeyster Street
Kent, Ohio 44240
Attention: City Manager

Each party shall have the right from time-to-time to specify as its address for purposes of this Agreement any other address in the United States of America upon giving not less than fifteen (15) days' notice thereof, similarly given, as provided for in this paragraph.

XVI. MODIFICATIONS.

This Agreement may not be changed, modified or discharged except by a writing signed by duly authorized representatives of both State and Grantee.

XVII. GOVERNING LAW.

This Agreement shall be governed by and interpreted under the laws of the State of Ohio. Any action or proceeding arising out of the terms of this Agreement shall be brought only in a court of competent jurisdiction located in Franklin County, Ohio.

XVIII. HEADINGS.

The headings to the various paragraphs and exhibits to this Agreement have been inserted for reference only and shall not to any extent have the effect of modifying, amending or changing the express terms and provisions of this Agreement.

XIX. CAMPAIGN CONTRIBUTIONS & ETHICS COMPLIANCE.

Grantee hereby certifies that neither Grantee nor any of Grantee's partners, officers, directors, shareholders, nor the spouse of any such person have made contributions in excess of the limitations specified in Section 3517.13 of the Ohio Revised Code.

Grantee, by signature on this document, certifies that it has reviewed and understands the Ohio ethics and conflict of interest laws, is currently in compliance and will continue to adhere to the requirements of such laws and will take no action inconsistent with those laws.

Intentionally Left Blank

The terms of the within State of Ohio Easement are accepted and agreed to by Kent State University.

By: _____
Mark M. Polatajko, Senior Vice President
Finance and Administration

Date: _____

IN WITNESS WHEREOF, the parties, by their duly authorized representatives, have executed and delivered this Agreement as of the date first set forth above.

GRANTOR
The STATE OF OHIO

By: _____
Director of Administrative Services or
Signatory Designee
Statutory Agent, RC 123.01(A)(5)

ACKNOWLEDGMENT

State of Ohio, Franklin County, ss:

On this _____ day of _____, 2019, before me personally appeared _____ who acknowledged that the foregoing document is being executed for and on behalf of the Department of Administrative Services, acting on behalf of the State of Ohio, that the same is his/her own and the Department of Administrative Services' free and voluntary act and deed and that he/she is duly authorized to enter into said document for and on behalf of the Department of Administrative Services.

Notary Public, State of Ohio
My Commission Expires: _____

GRANTEE
City of Kent
an Ohio Body Politic

By: _____
<authorized signatory>

Title: <signatory's title> _____

ACKNOWLEDGMENT

State of Ohio, Portage County, ss:

On this _____ day of _____, 2019, before me personally appeared _____, <signatory's title>, of the City of Kent, an Ohio body politic, who acknowledged that he/she executed the foregoing State of Ohio Easement for and on behalf of the City of Kent and that the same is his/her and the Grantee's free and voluntary act and deed, and that he/she is duly authorized to execute the same on behalf of the city.

Notary Public, State of Ohio
My Commission Expires _____

This State of Ohio Easement prepared by:
Ohio Department of Administrative Services
General Services Division
Office of Real Estate and Planning
4200 Surface Road
Columbus, Ohio 43228-1395
Phone No. (614) 387-6049

Exhibit "A"

LEGAL DESCRIPTION

Beginning at a point in the center line of Summit Street, which is South 47°38' East a distance of 310.50 feet from an iron pipe in the North line of said Lot #13, said iron pipe also being an angle point in said center line of said Summit Street;

Thence along a line which bears North 43°01' East, distance of 30.00 feet to a point at the Northwest corner of land conveyed by deed dated September 27, 1937 from Julia A. Sawyer to the State of Ohio and being recorded in Volume 362, Page 329, Portage County Record of Deeds, said tract referred to hereinafter as the "Sawyer Tract";

Thence along the Northwesterly line of said Sawyer Tract North 43°01' East a distance of 210.03 feet to a point;

Thence by a line which bears North 48°17' West a distance of 75.45 feet to a point;

Thence by a line which bears North 48°53' East a distance of 80.62 feet to a point;

Thence by a line which bears South 48°17' East a distance of 67.21 feet to a point at the Northeasterly projection of said Northwesterly line of said Sawyer Tract;

Thence along said Northeasterly projection of said Northwesterly line of the said Sawyer Tract South 43°01' West a distance of 80.01 feet to the place of beginning, and containing 0.131 of an acre of land.

Thence along said Northeasterly projection of said Northwesterly line of the said Sawyer Tract South 43°01' West a distance of 80.01 feet to the place of beginning, and containing 0.131 of an acre of land; and