BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON BEHALF OF THE CITY AND BOROUGH OF SITKA

In the Matter of the City and Borough of Sitka Assembly, sitting as the City and Borough of Sitka Board of Adjustment's decision to deny VAR 25-01,	)	
	)	OAH No. 25-2204-MUN
	)	Agency No. VAR 25-01
Central Council of the Tlingit & Haida Indian Tribes of Alaska d/b/a Tidal Network, Appellant.	)	

PRE-HEARING BRIEF OF APPELLANT, THE CENTRAL COUNCIL OF THE TLINGIT & HAIDA INDIAN TRIBES OF ALASKA D/B/A TIDAL NETWORK

On April 28, 2025, Appellant, Central Council of the Tlingit & Haida Indian Tribes of Alaska d/b/a Tidal Network ("T&H" or "Appellant") brought this appeal of the City of Sitka Planning Commission's denial of Appellant's requested variance to construct a personal wireless service facility at 116 Nancy Court to the City Assembly as a Board of Adjustment.

I. ISSUES PRESENTED IN THIS APPEAL

The issues presented in this appeal are:

1. Whether the Planning Commission's ("PC") denial of T&H's application for a variance to install a personal wireless facility was supported by substantial evidence in the record, as required by the Telecommunications Act of 1996, 47 U.S.C § 332(c)(7)(B)(iii)?
2. Whether the PC's denial of T&H's application to install a personal wireless facility had the effect of prohibiting wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II) where the record evidence demonstrated that the proposed facility was the least intrusive means of filling a significant gap in T&H's service coverage?

II. STATEMENT OF FACTS

T&H is a federally recognized regional Indian Tribe in Alaska. Tidal Network is a division of T&H and a "telecommunications infrastructure provider" (Joint Statement of Undisputed Material Facts)("JS") at 1, whose goal is to provide and facilitate the provision of wireless communications services to unserved and underserved communities in Southeast Alaska. T&H March 28, 2025 submission to City of Sitka ("3/28/25 Submission") at 1. As a wireless infrastructure provider, T&H's requested variance is to "provide infrastructure that immediately supports bringing fixed wireless broadband" to Sitka, as well as "cellular coverage" or "personal wireless services" in Sitka. T&H 2/11/25 Application for Variance at 1.

T&H's "first objective" is to "construct wireless infrastructure via the development of communications towers throughout Southeast Alaska, including its proposed communications tower at 116 Nancy Court." 3/28/25 Submission at 1. The proposed "personal wireless service facilities" will support public safety and government communication systems, and collocation for "other public and private telecommunications carriers" offering personal wireless services. *Id.*; JS at 2, para. 10 (supporting "mobile services"); March 5, 2025 Hearing Transcript[1] at 3 (Cropley: "other networks could lease space on the tower and may use fiber as well"); *See,* 4/2/25 Staff Report ("April 2 Staff Report"[2]), Attachment C Site Plan, Elevation View and Design, Pierson Wireless and Kimley Horn "Antenna and Tower Elevation Details", Sheet C4 (depicting future potential antenna arrays). The Communications Act governs federal, state, and

[1] References to the Hearing Transcript before the PC will be referenced hereafter by date and "Tr." References to the Joint Stipulation of Undisputed Material Facts will be referenced as "JS".
[2] "Staff," unless specified otherwise, refers to Ms. Amy Ainslee, Director, Planning and Community Development Department of the City and Borough of Sitka.

local government regulation of the siting of personal wireless facilities such as the one at issue in this case. 47 U.S.C. § 332(c)(7)(B).[3]

T&H's wireless services in Sitka will be utilizing 2.5 GHz spectrum that will support wireless broadband and 5G personal wireless services leased by T&H from the Sitka Tribe of Alaska (aka "STA"). 3/28/25 Submission at 2. *See,* April 2, 2025 Tr. at 24, 31 & 82; 3/19/25 letter re "Support for Tower Height Variance" from Yeidikook'aa Dionne Brady-Howard, Chairwoman, Sitka Tribe of Alaska (Attachment G to April 2 Staff Report).

T&H's application for a variance seeks to increase the maximum allowable height from 35 feet to 120 feet to construct a communications tower in the R-1 zone at undeveloped 112 and 116 Nancy Court. The purpose for this tower is to close a "significant gap" in wireless coverage in Zone 2 in Sitka, including parts of downtown, Sitka National Historical Park, and business and residential neighborhoods therein. 3/28/25 Submission at 2 & Exhibit 1 (RF coverage maps). 112 Nancy Court will remain as a buffer lot for the proposed communications tower. March 5, 2025 Planning Agenda, Final Minutes at 2, VAR 25-01. T&H demonstrated the significant coverage gap through coverage maps and radiofrequency ("RF") engineering analysis, with service deficiencies impacting essential sectors such as healthcare, education and economic development. 3/28/25 Submission at 2.

The only qualified expert testimony presented before the Planning Commission, which included Tidal Network's RF design engineer, established that a 35 foot tower would be of inadequate height and would leave a "significant coverage gap." 4/2/25 Tr. at 24-25. The undisputed testimony further established that a 35 foot tower would require multiple towers

[3] "Any person adversely affected by any final action or failure to act by…a local government or instrumentality thereof that is inconsistent with [Section 332(c)(7)(B)…may commence an action in any court of competent jurisdiction" to be heard and decided on an "expedited basis." 47 U.S.C. § 332(c)(7)(B)(v). *See, Global Tower LLC v. Hamilton Township*, 897 F.Supp.2d 237, 271 (M.D. Pa. 2012).

throughout Zone 2 –thereby logically impacting and visually impairing a substantially larger number of downhill residents and arguably higher value views of Sitka Sound at a lower elevation-- not just a single monopole tower uphill on a hillside. 3/5/25 Tr. at 40-41 (Cropley). Mr. Jessie Rico, Tidal Network's RF design engineer who prepared RF coverage maps, ran "many, many simulations." When asked "[d]o you have analysis of what a 35 foot tower would cover?", Mr. Rico responded: "At 35 feet we do not see good performance due to vegetation obstructions and various clutter elevations throughout the coverage area." 4/2/25 Tr. at 28. Furthermore, Mr. Rico stated that a single 35 foot wireless tower would serve "25 percent" of the area that a larger single monopole tower will cover, and "does not meet coverage objectives." *Id.* at 29. No contrary expert evidence was in the record. The PC's disregard of the unrebutted technical expertise of T&H's experts was inconsistent with the Ninth Circuit's least intrusive means standard. *See, e.g., T-Mobile Central LLC v. Unified Gov't of Wyandotte County,* 546 F.3d 1299, 1311 (10th Cir. 2008)(city denial unsupported when it fails to consider opposing evidence).

T&H conducted an extensive site search in Sitka, including contacting 129 property owners through letters and verbal communications, as well as several meetings with the City Planning Office, to identify the "least intrusive" wireless tower solution to fill its significant coverage gap in Zone 2. *Id.*; April 2, 2025 Tr. at 32-33 (T&H has spent "hundreds of thousands of dollars" identifying the "least intrusive way of doing it one tower up in the corner [of Zone 2] instead of any other solution." (Cropley)). The 116 Nancy Court site, a vacant property on high ground with no uphill residences, was the only feasible alternative among commercial and residential zoned locations to fill the significant gap in coverage. It was also considered a least intrusive option for a communications tower monopole covering Zone 2, due to its minimal visual impacts, since it is *uphill* of residences in the "far NE corner" of the neighborhood and

near the undeveloped tree line, and because it does not impair high value views of the Sitka Sound as downhill locations would. *See* 4/2/25 Staff Report at 5-6.

Staff agreed that T&H demonstrated a significant gap in coverage. *Id.* Staff also agreed that T&H's proposal is the least intrusive means of filling the identified service gap. *Id.* Specifically, Staff concluded that there were "no other feasible alternatives to close the significant coverage gap; *despite an extensive investigation of sites in Sitka and efforts to work with property owners on alternative locations (particularly in commercial and industrial zones), no other locations in the identified Zone 2 met their coverage, financial, or and* [sic] *development criteria*." *Id.* at 8. (Emphasis in original). Staff recommended that the PC approve of the height variance at 112 and 116 Nancy Court.

Staff, advised by the Municipal Attorney, determined that communications towers and related antennae serving the public by offering wireless services are best classified as "[p]ublic facilities and utilities" under SGC 22.05.1190, which are a "permitted use" by right in virtually all zones, including the residential R-1 zone. JS, para. 27; April 2, 2025 Tr. at 72-73 (Ainslee). Communications towers therefore qualify as a "principal" use in the R-1 zone under SGC 22.20.055; JS at paras. 17-18; April 2, 2025 Staff Report at 3, subject to the 35 foot height limitation in R-1 requiring a variance.

III. TLINGIT & HAIDA'S APPLICATION SATISFIED THE REQUIRED FINDINGS FOR A VARIANCE.

The undisputed factual record demonstrates T&H's satisfaction of the Sitka General Code requirements for a variance of the height limitations for its proposed communications facility,

and equally demonstrates that the PC denial of that variance was not based on substantial evidence as required by Section 332(c)(7)(B)(iii) of the Communications Act.[4]

SGC 22.10.160 (D)(1) sets forth four conditions for a variance:

a. "special circumstances" to the intended use (i.e. "to provide cellular and wireless coverage") must exist that are outside the control of the property owner;
b. The variance is necessary for the preservation of a substantial property right or use possessed by other properties but are denied to this parcel;
c. The granting of a variance will not be "materially detrimental "to the public welfare or injurious to the property, nearby parcels or public infrastructure";
d. The granting of a variance will not adversely affect the Sitka "Comprehensive Plan".

Staff concluded that all grounds for a variance were met under SGC 22.10.160(D)(1) and recommended the variance be granted. 4/2/25 Staff Report at 7-8. Even the PC agreed that the granting of a variance would not adversely affect the Comprehensive Plan, because the proposal supports ED 5.3 to "maintain well-functioning infrastructure upon which commerce and economic activity depend," and ED 5.4 "advocate for faster, more reliable cell and internet services." April 16, 2025 PC Findings at 1.d.

Staff found that "special circumstances" exist in satisfaction of condition a. because "*in this case the applicant's ability to provide cellular and wireless coverage is dependent upon the height of the proposed structure and is therefore [to] be considered a special circumstance that is unique to the proposed use*." April 2, 2025 Staff Report at 7. (Emphasis in original).

Staff also found that condition b. was met because the variance "will allow the applicant to more effectively meet broadband coverage goals for Sitka, *as the project is otherwise permitted by right.* The variance will allow for adequate broadband connectivity to all surrounding areas and "*is in line with existing variances applying to properties that host cellular towers elsewhere*

[4] The substantial evidence inquiry under 47 U.S.C. § 332(c)(7)(B)(iii) requires a determination whether the zoning decision is "supported by substantial evidence in the context of applicable *state and local law.*" *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 993 (9th Cir. 2009)(emphasis in original); citing *MetroPCS, Inc. v. City of San Francisco*, 400 F.3d 715, 723-24 (9th Cir. 2005).

within the municipality." *Id.* (Emphasis in original). Ms. Ainslee testified that approval of this variance "would be consistent with cell sites approved in other commercial and residential areas" of Sitka. JS, para. 9; March 5, 2025 Tr. at 9-10.

Staff also concluded that condition c. was satisfied because the granting of a variance will not be materially detrimental to the public welfare or injurious to property, nearby parcels or public infrastructure. RF emissions are beyond the authority of the City of Sitka to regulate under the Communications Act.[5] While Staff did find some "visual impact to the neighborhood," Staff nevertheless concluded that such impacts "*are minimized by the placement of the tower which is uphill of all existing residences and does not impede highly valued water views of Sitka Sound. The applicant has also included several mitigations that decrease visual/aesthetic impacts*." 4/2/25 Staff Report at 5. These include using a site on high ground in the "far NE corner" of the neighborhood, purchasing the neighboring lot in front as a buffer, painting the tower and antenna equipment brown to match the nearby treeline, and using a monopole instead of a self-supporting tower to reduce the visual footprint. *Id.* at 5-6. Staff further found that any negative impact to housing values relative to Sitka's "*unique housing market characteristics is unknown*." Staff Report at 8. Staff also found a minimal impact on existing infrastructure. *Id.*

IV. THE PLANNING COMMISSION'S LACK OF FINDINGS THAT THE GROUNDS FOR A VARIANCE INVOLVING MAJOR STRUCTURES WERE MET ARE NOT BASED ON SUBSTANTIAL EVIDENCE AS REQUIRED BY THE FEDERAL COMMUNICATIONS ACT.

The PC "did not find" that "special circumstances exist to the intended use" that do not apply "generally to the other properties" because it says that "all properties in the R-1 zone" are subject to a maximum height of 35 feet for "principal structures." Instead, the PC concluded that

[5] The Communications Act prohibits the City from denying T&H's application based on concerns regarding alleged environmental or health effects of RF emissions. 47 U.S.C. § 332(c)(7)(B)(iv).

there "were no special circumstances" in relation to the physical characteristics or "pre-existing development" of the parcel that justified granting of the variance. Findings Adopted by PC at 1. However, this conclusion ignored the Staff Report analysis and distorted the appropriate standard by completely disregarding the applicant's "intended use" of the property. As Staff recognized, supported by the unrebutted expert evidence of T&H's coverage maps, and testimony of Mr. Cropley and T&H's RF Engineer, Mr. Jessie Rico (4/2/25 Tr. at 24-29), T&H's ability to provide "cellular and wireless coverage" is "*dependent upon the height of the proposed structure*." 4/2/25 Staff Report at 4. That by definition is a "special circumstance." The PC simply reviewed the physical characteristics or "pre-existing development" of a vacant lot and failed to even consider the property owner's "intended use" which, as Staff recognized, establish "other circumstances that are outside the control of the property owner." *See,* SGC 22.10.160 D.1.a. Furthermore, Staff concluded that this variance approval "would be consistent with cell sites approved in other commercial and residential areas of Sitka" and with the Sitka Comprehensive Plan." JS, para. 9. The PC did not consider these material facts in its determination.

Second, the PC also "did not find" that the variance was necessary for the preservation and enjoyment of a substantial property right or use, simply because no other properties in the "vicinity or in the zone" have a right to build a structure exceeding 35 feet in height [without a variance] and because telecommunications towers of the height proposed by the applicant, were "not commonly constructed on other parcels in the vicinity." PC Findings at 1. Again, this simply recites the existing 35' height limitation in the zoning code absent a variance. But it ignores established City precedent for granting a height variance for wireless infrastructure. As Staff observed, the variance requested "is in line with existing variances applying to properties that host cellular towers elsewhere within the municipality." Staff Report at 7. There was record

evidence that other wireless tower infrastructure has been approved in the City of Sitka, including in residential areas. The PC simply ignored other wireless tower infrastructure approved in residential zoned areas in the City.

Finally, the PC "did not by consensus find" that the granting of the variance will "not be materially detrimental to the public welfare or injurious to the property, nearby parcels or public infrastructure." This denial of a ground for a variance relied on "owners of nearby parcels" and their statements about "negative aesthetic and viewshed impacts, as well as completely speculative "negative impacts to property values." These citizen letters are only generalized objections, in some cases based on unlawful or unfounded bases, such as concerns regarding RF emissions,[6] or claimed exogenous threats of "landslides", which are not unique to the subject property. In any event, the record confirms that compliance with FCC licensing requirements for any wireless tower, a federal environmental assessment, and compliance with local building codes for engineered building plans will all need to be satisfied by the applicant. 4/2/25 Staff Report at 5. For example, one letter states that Tidal Network must "factually demonstrate that cutting down dozens of trees [at the edge of a forest] will not negatively impact the wildlife in the area or make unstable the land surrounding the plot…." Voisin letter at 3 (April 1, 2025). Two letters refer to a "housing crisis" in Sitka and average assessed value of $723,550 within a 300' radius of the tower location, yet speculate that there will be a negative impact on property values. Viera Public Comment (March 31, 2025) at 2 and Eisenbeisz April 2, 2025 email (referring to "our continued housing crisis in Sitka"). But there is no empirical evidence to support these assertions. There is evidence in the form of photo simulations and designs provided by T&H as to what the monopole would look like, and there were speculative

[6] The Communications Act prohibits the City from denying T&H's application based on concerns regarding alleged environmental or health effects of RF emissions. 47 U.S.C. § 332(c)(7)(B)(iv).

comments and findings as to what would be the "effect," but these do not support the conclusion that simply "being seen" establishes that the facility is detrimental to the surrounding community. *See, Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 24 P.3d 1079, 1087 (Wash. Ct. App. 2001) (the standard of material detriment to public welfare is a "pretty significant standard" not merely satisfied by the fact that "you can see this thing from different places around the area"). As Staff concluded, "any negative impact to housing values relative to Sitka's "*unique housing market characteristics is unknown*." Staff Report at 8. Similarly, T&H indicated that there are mixed views on this, and some sources state "the impact [on property values] is minimal and/or offset by improved service and connectivity." *Id.* at 6.

Unsubstantiated concerns from the general public concerning home values, which professional Staff confirms are unknown, is not "substantial evidence." *California RSA No. 4*, 332 F. Supp. 2d 1291, 1308 (E.D. Cal. 2003) (speculative or generalized expression of concern for aesthetics are not substantial evidence); *Ogden Fire Company No. 1 v. Upper Chichester Township*, 504 F.3d 370, 389-90 (3d Cir. 2007) (generalized concerns about property values and aesthetics are not substantial evidence). *See also, Gulfstream Towers LLC v. Brevard County*, , 2024 WL 2459402 (M.D. Fla. 2024), No. 24-11648 (11th Cir. Aug. 13, 2025)(*per curiam aff'd*)(generalized aesthetic objections, standing alone, are not "substantial evidence" to deny an otherwise qualified monopole application). Moreover, the City is prohibited from relying upon allegations about RF emissions in its decision making. 47 U.S.C. § 332(c)(7)(b)(iv). There is no scientific support for the speculative assertion about "negative impacts to property values" in Sitka either, and the PC cited none. To the contrary, Sitka appears to be experiencing a "housing crisis" shortage with accompanying rapidly escalating home values, as the Viera Comment attests. So the concerns about property values would seem to support a greater concern about

affordability in a market with extremely tight supply rather than diminution of values simply because a camouflaged tower may be built nearby. No professional appraiser evidence was submitted in the record to support the speculation of a handful of nearby neighbors. Of course, the far more numerous downhill neighbors in Sitka in the silent majority who will not see the tower whatsoever will benefit from the improved wireless coverage from this improved infrastructure supported by the Sitka Comprehensive Plan.

V. THE PLANNING COMMISSION'S "ADDITIONAL FINDINGS" REGARDING TELECOMMUNICATIONS TOWERS CLASSIFIED AS PUBLIC FACILITIES UNDER SGC 22.05.1190 AND REGULATED UNDER 47 U.S.C. § 332 WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The PC recognized that the Communications Act governs local regulation of the siting of personal wireless service facilities like T&H's proposed monopole tower. PC April 16, 2025 Findings at 2. However, in an attempt to demonstrate that the PC's denial of a variance was based on "substantial evidence" and was not an effective prohibition of wireless services in violation of 47 U.S.C. § 332(c)(7), the PC issued the following "negative" findings[7]:

1. It "did not make a finding" on whether the coverage gap "was considered significant."
2. It "did not find that the applicant met their burden to prove that their proposal was the least intrusive means of closing the asserted significant coverage gap, and also did not find that the applicant lacked available and technologically feasible alternatives to close said coverage gap."

The PC gave "two primary reasons" for not finding a "significant coverage gap" and that T&H had proposed a "least intrusive means" solution. First, it asserted a lack of "adequate analysis" concerning whether the coverage gap could be closed by towers not exceeding 35 feet

[7] The PC, for unexplained reasons, chose not to make affirmative findings such as "there is no significant coverage gap," which would have been unsupported by the evidence, but instead disclaimed making certain findings.

in height (the maximum allowable height for principal structures in R-1). The PC also stated the applicant did "not adequately demonstrate that the proposed 120-foot…tower was the shortest height necessary to sufficiently close the coverage gap." Second, the PC found that the applicant "did not adequately substantiate that the tower could not be placed" in a commercial and/or industrial use zone "which the Commission found would be less intrusive than placement within the proposed residential neighborhood. The PC found that the applicant's desire to purchase rather than lease land for its tower was contrary to AS 29.40.040(b)(3) which states "[a] variance from a land use regulation adopted under this section may not be granted if the variance is sought solely to relieve pecuniary hardship or inconvenience."

A. The "Non-Finding" Of A Significant Gap in Coverage Was Unscientific and Improperly Ignored Unrebutted Record Expert Evidence.

The Commission's "non-finding" as to whether the applicant demonstrated a significant coverage gap improperly ignored unrebutted record expert evidence, including wireless coverage map evidence and the only expert RF engineering testimony from T&H's RF network design engineer, Mr. Jessie Rico. Staff in fact agreed that *"[t]he applicant has identified a significant coverage gap for Sitka, identified as Zone 2*…." 4/2/25 Staff Report at 5 (emphasis added). The Commission's failure to analyze and give due credit to unrebutted evidence contradicting its finding violates Section 332 (c)(7)(B) of the Communications Act. *T-Mobile Central, LLC v. Unified Gov't of Wyandotte County*, 546 F.3d 1299, 1311 (10th Cir. 2008); *Sprint Spectrum L.P. v. Bd. Of Zoning Appeals of Town of Brookhaven*, 244 F. Supp. 2d 108, 116 (E.D.N.Y. 2003) (finding that the rejection of a permit to construct a telecommunications tower was not supported by substantial evidence when the town failed to respond adequately to the contrary evidence provided by the telecommunications provider).

The PC would have the Board of Adjustment ignore the evidence presented by T&H's coverage maps and its RF evidence of a significant coverage gap and affirm its unsupported conclusions. The Commission's "non-finding" of a significant coverage gap, not based on any record evidence, is the type of speculation that courts have rejected in similar wireless infrastructure zoning contexts. *Wyandotte County*, 546 F.3d at 1310 ("technical determination is not supported by substantial evidence where it is made solely on the adjudicator's unsubstantiated belief"); *Cal. RSA No. 4 v. Madera County*, 332 F. Supp.2d 1291, 1303 (E.D. Cal. 2003); *AT&T Wireless Svcs. Of Cal. v. City of Carlsbad*, 308 F. Supp.2d 1148, 1156, 1159 (S.D. Cal. 2003) (court should not rely upon unfeasible or implausible interpretations of the evidence). The PC was not qualified to substitute its own speculative judgment as to technical RF coverage issues for unrebutted expert evidence from an RF engineer and RF coverage maps. As Staff agreed, the only credible evidence in the record was that there is a significant coverage gap in Zone 2 in Sitka, and T&H's proposed tower is the least intrusive means to close that gap.

B. The Evidence Confirmed That T&H's Proposal Was The Least Intrusive, And There Was No Substantial Evidence Supporting A Finding That Other Unspecified Theoretical Sites Were Potentially Less Intrusive.

The PC found that T&H did not "meet its burden" to show that its proposed tower site at 116 Nancy Court was "the least intrusive means" of filling its significant coverage gap, and that T&H did not have technological alternatives. But this finding betrays that the PC completely misunderstood and erroneously applied the Ninth Circuit's "least intrusive means" standard for wireless tower siting. Under that standard, T&H's *prima facie* burden was to submit a comprehensive application, after considering available alternatives, showing that its proposed tower location is the least intrusive means of filling a significant gap. *City of Anacortes*, 572 F.3d at 998. The City of Sitka was then required – to avoid violating Section 332(c)(7)(B)-- to

(A) either accept T&H's proposal (as Staff recommended), or (B) "to show the existence of some potentially available and technologically feasible alternative to the proposed location." *Id.* at 999. For example, without any analysis, or proposing any specific alternatives, the PC faults T&H for not showing why multiple towers of 35 feet in height, or a tower shorter than 120 feet could not be used. However, the PC cannot claim that other, multiple sites (of 35 feet or less in height) are less intrusive without meaningfully analyzing the feasibility and potential impact of those other allegedly alternative sites. For example, a three or four-site solution may not be feasible if it requires multiple sites to be constructed instead of one, which would substantially raise the visual impact of (and objections to) multiple towers for the entire community as well as the construction/operational costs to provide and deliver the wireless services.

The U.S. Court of Appeals for the Ninth Circuit has addressed the appropriate standards for review of a municipal denial under the "effective prohibition" limit of Section 332(c)(7)(B)(i)(II) and "substantial evidence" limit of Section 332(c)(7)(B)(iii). A city's denial of a wireless facility location must be overturned as having "the effect of prohibiting wireless service" where there is a "significant gap" in the wireless service provider's coverage and the provider's proposed location is the "least intrusive means" for filling the gap. *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 734-35 (9th Cir. 2005). In *MetroPCS*, the Ninth Circuit rejected just what the PC has attempted to do here in applying the "least intrusive means" test. The PC cannot deny T&H's proposed site merely because *hypothetical* alternatives may exist.[8] This would amount to requiring T&H to prove that its site is the "only alternative" or the "most acceptable option", standards which the Ninth Circuit explicitly rejected. As the Ninth

[8] The City did not propose any alternatives to T&H's proposed least intrusive means site.

Circuit explained in adopting the "least intrusive means" standard --adopted by the Second and Third Circuits-- and rejecting the "only viable alternative" standard, it allows "for a meaningful comparison of alternative sites before the siting application process is needlessly repeated. It also gives providers an incentive to choose the least intrusive site in their first siting applications, and it promises to ultimately identify the best solution for the community, not merely the last one remaining after a series of application denials.[9]" 400 F.3d at 734-35; *see also*, *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 989, 995 (9th Cir. 2009) (approving a 116-foot monopole with three antennas in a residential area after denial of siting application because the city failed to rebut showing that the denial amounted to an "effective prohibition of wireless services").

The PC's denial rested on a finding that T&H had failed to prove that its proposed "least intrusive means" of closing its significant coverage gap with a single monopole at its 116 Nancy Court site was the *only alternative* to the exclusion of other *theoretical, unspecified* alternative locations, such as several tower sites using multiple shorter towers, or a site or sites only in a commercial or industrial zone. PC 4/16/25 Findings at 2. However, the Ninth Circuit has expressly rejected the requirement that an applicant prove that its proposed "least intrusive means" site is the "only alternative," or to require that an applicant prove that no alternative sites other than its proposed site would solve the problem. *MetroPCS* , 400 F.3d at 734.

Here, T&H made its required *prima facie* showing of a lack of available and technologically feasible alternatives. *City of Anacortes*, 572 F.3d at 996. T&H investigated 129 properties in Sitka, only two of which met technical and feasibility requirements, and only one of which met its wireless coverage requirements in Zone 2. 4/2/25 Staff Report at 5. Thus, as Staff

[9]As the Ninth Circuit explained, the "only viable option" rule would either preclude the construction of any facility or require providers to "endure repeated denials by local authorities until only one feasible alternative remained. This seems a poor use of time and resources for both providers and local governments alike." 400 F.3d at 734.

found in its proposed approval order, T&H showed that there are "*no other feasible alternatives to close the significant coverage gap; despite an extensive investigation of sites in Sitka and efforts to work with property owners on alternative locations (particularly in commercial and industrial zones), no other locations in the identified Zone 2 met their coverage, financial, or and* [sic] *development criteria*." *Id.* at 8 (emphasis added).

The PC proposed no alternatives to T&H's proposed site, tacitly agreeing with the applicant and Staff that no other sites met technical and feasibility requirements to be a viable alternative, as required by law. By contrast, in *City of Anacortes,* the city attempted to find "at least four alternative single sites" that were potentially acceptable to provide the coverage required by T-Mobile, and at least two "two-site" alternatives that would satisfy RF coverage, and would be in "commercially or industrially zoned property…." Anacortes also hired a consultant to examine alternatives, something that the City of Sitka declined to do here. The PC also failed to even consider the impact on neighbors of a multiple-site alternative under the zoning variance criteria it has applied to T&H's proposed least intrusive means proposed site. In *City of Anacortes*, despite proposing a few specific site locations, the city "failed to show that there are any available alternatives" because one site was "too speculative" or proposed a "two-site combination" with no evidence that the second site was even available. 572 F.3d at 998.

The City of Sitka did much less to demonstrate that the denial was supported by substantial evidence than did the municipality in *City of Anacortes*. The City made no effort to rebut T&H's investigative work and its proposed least intrusive means site to fill its significant gap in coverage. It failed to propose any "potentially available and technologically feasible alternatives," nor to give T&H any opportunity to challenge the availability and feasibility of any specific alternatives that the City *might have proposed*. *Cf. id.* Without identifying any potential

alternatives, the PC also ignored and rejected its own Staff's considered recommendation that the T&H proposal is the "least intrusive means of filling the identified service gap" and recommending approval of the height variance. *See* 4/2/25 Staff Report at 6.

Accordingly, there was no substantial evidence to support the Planning Commission's denial of T&H's application for a height variance at the 116 Nancy Court location as the "least intrusive means" to fill a significant gap in its wireless coverage area.

C. The Planning Commission Misapplied A.S. 29.40.040(b)(3) in Finding That T&H Did Not Explore Leasing of Commercial and/or Industrial Zoned Sites.

The PC found that T&H did "not adequately substantiate that the tower could not be placed on a property zoned for commercial and/or industrial uses which the Commission found would be less intrusive than placement within the proposed residential neighborhood…" even though communications towers as a principal use by a public utility are allowed in all zones of Sitka. JS, ¶¶ 17-18; 4/2/25 Tr. at 4-6. The PC found that the applicant stated that commercial property owners were unwilling to sell their property and that its financial constraints "made leasing land infeasible." 4/16/25 PC Findings at 2. Nor was this technologically feasible either, requiring more tower placements as Mr. Cropley stated. 3/5/25 Tr. at 40-41; 4/2/25 Tr. at 24-29.

Again, the PC and the City failed to investigate and propose any specific commercially or industrially zoned locations to rebut T&H's showing of a lack of available and feasible sites. In *City of Anacortes*, the Ninth Circuit evaluated T-Mobile's proposed residential site for its 116 foot monopole as the "least intrusive means" by comparing it to the city's proposed alternatives identified by the city's consultant. 572 F.3d at 996. After conducting RF propagation analysis, the expert in that case concluded that a "two-site solution may not be feasible because it would require two sites be constructed instead of one, which *would raise both the impact of the WCF's [wireless communications facilities] on the community as well as the construction and*

operational costs that T-Mobile would have to bear." *Id.* at 997 (emphasis added). The expert further noted that "[e]ach site would have to have a sufficiently large coverage footprint to generate enough traffic to *pay back the wireless carrier's investment in the site as well as to defray the ongoing expenses to operate the site*." *Id.* at n.11. The Ninth Circuit concluded that in light of the "*environmental impact and additional costs…inherent in the two-site combination*, as well as the City's failure to present any evidence concerning the availability of…[a] tower", the "possible viability" of this combination did not overcome T-Mobile's showing that its site was the least intrusive means of closing its significant gap. *Id.* at 998 (emphasis added).

Here, the PC failed to identify a single available or viable multiple-site alternative that would justify forcing T&H to pursue alternative site(s) to its proposed wireless communications tower that T&H and Staff agreed was the least intrusive location. Instead, the PC improperly shifted the city's burden to propose available siting alternatives to T&H, after T&H had already met its *prima facie* showing of effective prohibition by submitting a comprehensive application and showing that its proposed wireless communications facility is the least intrusive means of filling a significant gap. *Id.* As discussed above, requiring T&H to disprove the availability of other alternatives, or that there are "no alternative sites" has been rejected for twenty years under the Ninth Circuit's well-settled "least intrusive means" standard. The Ninth Circuit "least intrusive" standard is meant to foster a timely "meaningful comparison of alternative sites before the siting application process is needlessly repeated." *MetroPCS*, 400 F.3d at 734-35.

Nor does AS § 29.40.040(b)(3) support the PC's denial of a variance. 4/16/25 PC Findings at 2. That statute provides that "[a] variance from a land use regulation adopted under this section may not be granted if…(3) the variance is sought *solely* to relieve pecuniary hardship or inconvenience." (Emphasis added). This requires that the variance of the height restriction

for the proposed wireless tower was solely "to relieve pecuniary hardship or inconvenience." But there was no record evidence that financial cost was the sole basis for the requested variance. Cost was only one of many considerations why T&H applied for a variance at this location. As the Staff Report summarized the reasons for recommending approval of the variance:

- The site is on high ground, in the far NE corner of the neighborhood
- The tower will be naturally shielded by existing terrain
- There are no places of residence uphill of the proposed tower location
- No current viewsheds of the waterfront impeded by the tower
- The applicant is also purchasing the vacant lot at 112 Nancy Court to ensure a natural, landscape buffer remains between current residences in the area.
- The tower and equipment will be painted brown to match the tree line

4/2/25 Staff Report at 5-6. So there were many non-pecuniary reasons for T&H to seek a variance for the 116 Nancy Court location as the "least intrusive means" of closing its significant gap in coverage. The elevation, lot location, natural buffer, and other environmental factors for the proposed site were among many demonstrable non-financial factors for the proposed site.

Moreover, under the Ninth Circuit's least intrusive means standard, cost is a completely acceptable consideration as part of a holistic evaluation of whether a particular proposed alternative is viable and feasible.[10] *City of Anacortes*, 572 F.3d at 997 & n.11 (city's consultant commenting that a two-site solution "may not be feasible" because of the greater impact that two sites will have on the community as well as "construction and operational costs."). The fact that overall cost might have been one of many considerations for the requested variance does not itself violate AS § 29.40.040(b)(3) pursuant to *Anacortes*.

VI. THE PLANNING COMMISSION'S DENIAL OF THE VARIANCE APPLICATION WAS AN EFFECTIVE PROHIBITION OF SERVICE VIOLATING 47 U.S.C. § 332(c)(7)(B) OF THE COMMUNICATIONS ACT.

[10] To the extent that AS § 29.40.040(b)(3) were to preclude any consideration of cost or "pecuniary hardship" as part of the variance application process in connection with wireless infrastructure siting, it would be preempted by federal law as an effective prohibition of wireless services under 47 U.S.C. § 332(c)(7)(B).

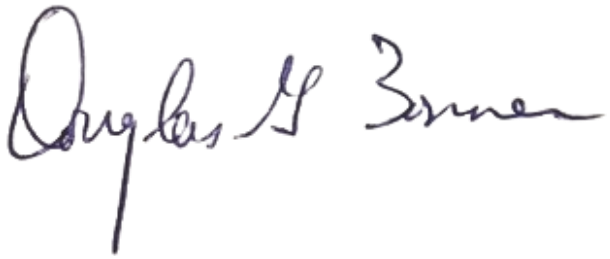
The PC's denial of T&H's application without showing the existence of some potentially available and technically feasible alternative constituted an effective prohibition of wireless service in violation of the Communications Act. *Id.* at 992, 994, 998-99. As discussed above, the record evidence discloses that no effort was made by the City to identify any available and technically feasible alternatives to close T&H's significant gap in coverage. In fact, City Planning Staff agreed that T&H's proposed site is the least intrusive means to close its significant gap in coverage, and that the requested height variance should be granted. 4/2/25 Staff Report at 6. Staff agreed that there were no available alternatives "despite an extensive investigation of sites in Sitka and efforts to work with property owners on alternative locations" with "no other locations in the identified Zone 2…[meeting] their coverage, financial or and development criteria." *Id.* at 8. PC unscientific speculation about multiple "35-foot-tall towers in the area" providing "adequate coverage" or hypothetical site(s) zoned for "commercial and/or industrial uses" did not meet the City's burden of identifying a "viable alternative." 572 F.3d at 998. Moreover, it was unlawful for the PC to require T&H to prove that its site was the "only alternative" or "the most acceptable option," standards which have been explicitly rejected by the Ninth Circuit. *Id.* at 995, 998; *MetroPCS*, 400 F.3d at 731, 734.

VII. CONCLUSION

For the foregoing reasons, the Planning Commission's denial of the height variance was unlawful as (1) not based on substantial evidence; and (2) an effective prohibition of personal wireless services in violation of 47 U.S.C. §§ 332(c)(7)(B)(iii) and 332(c)(7)(B)(i)(II). The PC's denial should be reversed by the Board of Adjustment based on the record and the law, and T&H's application for a height variance for its proposed monopole tower should be granted.

Date: August 14, 2025

Respectfully submitted,



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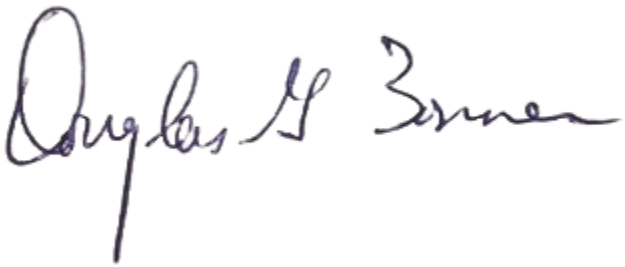
CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2025, I caused the foregoing to be electronically filed by electronic mail to doa.oah@alaska.gov, and served a copy of this filing by electronic mail to Ms. Rachel Jones, Ms. Mindy Torrance, of the City of Sitka, and on W. Scott McCollough, Esq.



Douglas G. Bonner