

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,
Central Council of the Tlingit & Haida Indian Tribes of Alaska d/b/a Tidal Network,
Appellant.

JOINT STATEMENT OF UNDISPUTED MATERIAL FACTS

goals for Sitka; (c) the proposed structure will have minimal impact on existing infrastructure; and (d) the variance does not adversely impact and indeed is supported by Sitka's Comprehensive Plan . *VAR 25-01 Staff Report for March 5, 2025 at 3-4.*

8. At the meeting on March 5, 2025 the Planning Commission listened to reports by Ms. Ainslie and the Appellant and took public comment. *Planning Commission Meeting Transcription Excerpt March 5, 2025.*

9. At the March 5, 2025 meeting Ms. Ainslie explained her report and recommendations (pp. 4-10). Ms. Ainslee summarized the site plan as including two lots, with the proposed monopole being placed uphill on Lot 2, and preserving vegetation on Lot 1 to act as buffer space (p. 6). Staff stated that the requested height variance was consistent with the Sitka Comprehensive Plan's provision for well-functioning infrastructure (pp. 8 – 9). At the time of this hearing, Ms. Ainslie stated that the use was allowed as an accessory use (pp. 9 - 10), and that variance approval would be consistent with cell sites approved in other commercial and residential areas. Staff recommended approval. (pp. 9-10). The Commission discussed whether the proposed use was a principal or accessory use (pp.10-12); and discussed the locations of other such towers in Sitka (pp. 12-15). Ms. Ainslie stated that the municipal attorney had not been consulted on the issue of whether the proposed use was a primary or accessory use. (p. 16). *Planning Commission Meeting Transcription Excerpt March 5, 2025.*

10. At the March 5, 2025 Planning Commission meeting, Mr. Chris Cropley spoke on behalf of Appellant, explained the benefits of this particular location for coverage and colocation services (pp 17); the costs of Appellant's efforts to find suitable tower locations in Sitka (p. 18); the federal regulations under which the project is required to operate (p. 19, 43-44,); and the minimal impact the proposed use would have (p. 20). The Commission asked Mr. Cropley about what additional coverage the proposed use would provide and he presented a coverage map that was not in the Commission's packet (p. 21-22,); the type of infrastructure and its capacities including, eventually, mobile services (p. 23-24, 51-59); which type of pole was preferable (p. 25-26). Mr. Cropley explained the scope of the Tidal Network project throughout Southeast Alaska (pp. 27-29); how the technology will function (pp. 29-27, 45-47). He answered questions about whether a shorter tower or commercially zoned location was feasible (p. 40-1). *Planning Commission Meeting Transcription Excerpt March 5, 2025.*

11. Mr. Trevor Newton also spoke on behalf of Appellant explaining the amount of Sitkans not served by current wireless communications services (pp. 38-40); and the location of the proposed tower on the lot (pp. 48-50). *Planning Commission Meeting Transcription Excerpt March 5, 2025.*

12. Ms. Jessie Rico spoke on behalf of Appellant as well, answering questions about potential health effects (p. 42). *Planning Commission Meeting Transcription Excerpt March 5, 2025.*

13. The Planning Commission heard public comment from Mr. Jon Martin opposing the variance due to the potential for reduction in real estate value, inadequate time for public consideration, insufficient review by the legal department, aesthetics, adequate local internet access, and disbelief regarding the relationship between Tidal Network and Starlink (pp. 60-65); Mr. Hal Spackman opposing the variance due to health concerns regarding Radio Frequency Radiation, the potential for land slippage or landslides at the site, and the potential for decreased real estate value (pp. 65-70); Mr. Austin Cranford opposing the variance due to concerns about public notice timing, health concerns, the potential for the proposed tower to limit development opportunities on land he owns nearby, and potential landslide risk (pp. 70-73).

Planning Commission Meeting Transcription Excerpt March 5, 2025.

14. The Planning Director also read the following public comment letters into the record: Mr. Taylor Viera opposing the variance due to concerns about the proposed tower being an accessory use, failure to preserve residential character, the Comprehensive Plan's goal of preventing incompatible land uses, (pp. 73-76); Mr. Mike Viera opposing the variance due to aesthetics, incompatible use, the potential to lower real estate values, lack of camouflage, (pp. 73-79); Mr. Clayton and Mrs. Larissa Nellis opposing the variance due to health and safety concerns, anxiety due to perceived negative effects, potential impacts on property value, aesthetics, and drainage and stability concerns (pp. 79-81). *Planning Commission Meeting Transcription Excerpt March 5, 2025.*

15. Following public comment, the Planning Commission entered into deliberations, discussing the notice timing and requirements, a desire to have the municipal attorney assess the principal versus accessory use question, and requesting additional information from the Appellant (pp. 83-86). The Commission continued the hearing to a later meeting in order to allow time for those issues to be addressed. (p. 86). *Planning Commission Meeting Transcription Excerpt March 5, 2025.*

16. The continued meeting for VAR 25-01 was set for April 2, 2025, and the Planning Director submitted a revised Staff Report and additional material from the Appellant as part of the packet for that meeting. *Minutes – Final Planning Commission Wednesday April 2, 2025.*

17. The revised staff report explained the municipal attorney's opinion that communications towers and antenna serving the public are a principal use under SGC 22.20.055. *VAR25-01 Staff Report for April 2, 2025* at 3. It also addressed the question of possible federal preemption, relying heavily on *T-Mobile USA, Inc v. City of Anacortes*, 572 F.3d 897 (9th Cir. 2009). *Id.* At 4. The staff report recommended approval under both the local and the federal standards. *Id.* At 4.

18. At the April 2 hearing, Ms. Ainslie provided an updated staff presentation, following consultation with the municipal attorney. Ms. Ainslee testified that following consultation with the Municipal Attorney a communications tower offering public-wide broadband was best handled as a "public utility" that qualified as a "principal" use in the R-1 zone. (pp.5-6). (*Transcript of April 2, 2025 Hearing* pp. 4-5).

Commissioner Robin Sherman agreed with this Staff analysis of a public utility facility as a principal use (p.83). Ms. Ainslie also shared the Attorney’s opinion that local governments are preempted by the FCC regarding potential environmental and health impacts (*Id.* at pp. 6-7). Staff continued to be of the opinion that the proposed variance met the “special circumstances” requirement for a variance because the height necessary for the tower to provide wireless services is outside of the control of the property owner (p.10). Ms. Ainslie also explained the test outlined in *T-Mobile* regarding a significant gap in coverage, the least intrusive means of filling it, and lack of viable alternatives (*Id.* at pp. 7-8, pp. 15-17); that the 9th Circuit has held that “coverage gap” is provider specific (*Id.* at pp. 8- 9); that the project is subject to federal environmental review and local building codes (*Id.* at p. 13 - 14); that the applicant spoke with 129 owners of potential sites and only two were willing to sell their properties and neither was zoned commercial or industrial (*Id.* at p. 14).

19. The Planning Commission asked questions of Ms. Ainslie, the City’s Planning Director, questioning whether the “special circumstances” requirement for the City code is describing attributes of the proposed use or attributes of the land itself (*Transcript of April 2, 2025 Hearing* p. 18-21) and expressing surprise at the extent of governing federal law (*Id.* at p. 21-23);

20. At the April 2, 2025 hearing, the Commission gave Tidal Network the opportunity to make a statement, and Mr. Cropley stated that they agreed with the staff report (*Transcript of April 2, 2025 Hearing* pp. 23-24).

21. The Planning Commission asked Mr. Cropley if a 35-foot tower would be adequate and he responded that it would leave a significant coverage gap but could not state exactly how much coverage a 35-foot pole would provide. (*Transcript of April 2, 2025 Hearing* pp. 24 - 26). Mr. Cropley stated that Tidal Network had not commissioned a study of a 35-foot pole specifically, but that their engineer had determined that the 120-foot height was feasible. (*Id.* at p. 26). Ms. Jessie Rico explained that she had run many simulations and that a 35-foot pole would not provide good performance (*Id.* at p. 28) and that it would serve “maybe 25%” as many households as the 120-foot design (*Id.* at pp. 28-29).

22. Regarding dropped calls, Mr. Cropley explained that because there is currently no service, 100% of calls cannot go through. (*Transcript of April 2, 2025 Hearing* p. 30).

23. The Commission asked about whether Tidal Network had considered alternative technologies as well as alternative sites (*Transcript of April 2, 2025 Hearing* pp. 30-31), and Mr. Cropley explained that the technology being proposed is the most efficient technology available, usually applied in high density settings like Seattle (*Id.* at pp. 31-32). Mr. Cropley also stated that Tidal Network has spent millions of dollars identifying the least intrusive option for coverage (*Id.* at p. 32-33).

24. The Planning Commission took public comment and heard from the following individuals: Mr. Taylor Viera opposing the variance under the SGC criteria (*Transcript of April 2, 2025 Hearing* pp. 34-

37); Ms. Carol Voisin opposing the variance under SGC criteria, (*Id.* at 37-40); Mr. Robert Krehbiel opposing the variance because the tower would be close to his lot, concerns about landslides, and a desire to see more considerations of lease-based options (*Id.* at 40-42); Ms. Kelley Sweeny opposing the variance and stating that she and Mr. Krehbiel would not have purchased their property had they known a cell tower would go in and stating concerns about landslide risk (*Id.* at 42-44); Mr. Hal Spackman opposing the variance because other means and technologies are available, stating health concerns, stating landslide concerns, and stating that financial reasons are not grounds for a variance (*Id.* at 45-47); Mr. Tom Ensign thanking the Planning Commission for their work and stating that many variables point toward a denial (*Id.* at 47-48); Mr. Paul Clements thanking the Commission to facilitating citizen-directed growth and stating concerns about the size of the tower, whether other code provisions apply, and stating that the view shed is not just the water but also the trees (*Id.* at 48-50); Mr. Mike Viera stating that local laws still apply even with FCC rules, requesting that the City adopt cell tower specific code, avoidance of spot zoning (*Id.* at 50-53); Mr. Austin Cranford disagreeing with the tower being a principal use, that this tower only provides coverage in three of the seven zones presented by Tidal Network, concerns about radio frequency interference with preexisting Wi-Fi and Starlink, the need to involve FAA, and landslide risk (*Id.* at 53 -56); Mr. Brandon Marx stating that the largest land owner in the industrial area was not contacted (*Id.* at 57); Mr. Michael Tisher stating that he owns land in the industrial area and was never contacted for sale or lease of property (*Id.* at 58); Ms. Mary Todd Anderson expressing health concerns and asking if the City and/or Tribe are being paid off (*Id.* at 58 -62); Ms. Anna Hanson stating that the use isn't appropriate for a residential area, expressing health concerns, property value concerns, and that there are too many unknowns (*Id.* at 62-63); Mr. Jon Martin stating that the "no feasible alternatives" criteria has not been met and stating that Tidal Network is operating for profit (*Id.* at 63-65).

25. The Commission then had written public comments read into the record including: Mr. Paul Clements asking the commission to apply R-1 zoning, and stating that the Comprehensive Plan prioritizes most appropriate use of land; and Ashley Eisenbeisz expressing health concerns, property value concerns, animal welfare, that housing would be a better use for the property, no critical need for broadband service in Sitka, and lack of available sites elsewhere not necessitating that this site be used. (*Transcript of April 2, 2025 Hearing* pp. 65-69).

26. The Planning Commission then invited Mr. Cropley to address the concerns brought up by public comment. Mr. Cropley stated that Tidal Network did not contact non-viable locations (*Transcript of April 2, 2025 Hearing* p. 69), explaining that some technicalities are missing because this is a height variance not a full building permit application (*Id.* at p. 69-70), that Tidal Network surveyed possible locations and sent letters to owners (*Id.* at p. 70-71), and that Mr. Cropley did reach out to some owners personally (*Id.* at p. 71).

27. The Planning Commission entered into deliberations discussing principal use status for public facilities (*Transcript of April 2, 2025 Hearing* p. 72-73, 83) Ms. Ainslee stated that the most appropriate designation of the tower is as a public utility facility, in which case it would be allowed by right in most zones, including the R-1 zone as a principal use. (pp.72-73). Commissioner Sherman agrees with this Staff analysis of a public utility facility as a principal use (p.83), whether the applicant had shown a significant gap in coverage (*Id.* at p. 74-76; 78-79), that they felt they were lacking data regarding the coverage gap and outreach for alternatives (*Id.* at p. 76-74); the scope of federal preemption (*Id.* at p. 79-82); the SGC variance requirements (p. 83-86).

28. The Planning Commission asked if they could make a motion to deny the variance, as opposed to voting “no” on a motion to approve the variance, which the Planning Director confirmed was possible. Commissioner Mudry then “moved to approve” the variance and all commissioners voted against the motion. (*Id.* at 87-88).

29. The Planning Commission then voted to delay entering findings into the record until the April 16, 2025 meeting in order to give staff time to consolidate the discussion and testimony into distinct findings. (*Transcript of April 2, 2025 Hearing* p. 87-90).

30. The packet for the April 16, 2025 meeting included proposed findings of fact, compiled by Planning Director Amy Ainslie. (*Minutes – Final Planning Commission, Wednesday April 16, 2025*). Those proposed findings for a variance under SGC were that 22.10.160(D)(1)(a-c) were not met but that SGC 22.10.160(D)(1)(d) was met. The proposed findings regarding federal law under 47 USC 322 were that the Planning Commission made no finding regarding whether there was a substantial gap in coverage, that the applicant did not meet its burden of showing least intrusive means, and that evidence of lack of viable alternatives was inadequate. The findings also found that the variance was barred by AS 29.40.040(b)(3) because Tidal Network’s need for a variance was due to pecuniary hardship or inconvenience.

31. At the April 16, 2025 Planning Commission meeting Planning Director Amy Ainslie presented the proposed findings of fact (*Transcript of April 16, 2025 Planning Commission Meeting* at 4-9).

32. The Planning Commission deliberated about how public testimony should impact their findings about whether there is a material detriment to the public welfare or injury to property under subsection (c) of the SGC variance code. (*Transcript of April 16, 2025 Planning Commission Meeting* at 10-22) and ultimately revised that finding to not making a finding on subsection (c).

33. The Planning Commission also did not make a finding regarding whether there is a substantial gap in coverage. (*Id.* at 23–25).

34. The Planning Commission issued its final factual findings in a letter to the Applicant dated. The final findings of record are (text underlined for emphasis):

1. The Commission did not find that there were “... *special circumstances to the intended use that do not apply generally to the other properties. Special circumstances may include the shape of the parcel, the topography of the lot, the size or dimensions of the parcels, the orientation or placement of existing structures, or other circumstances that are outside the control of the property owner*” because all properties in the R-1 zone are subject to a maximum height of thirty-five (35) feet for principal structures, a limitation that does apply generally to the other properties in the vicinity and in the zone, and there were no special circumstances in relation to the physical characteristics of the parcel or pre-existing development of or on the parcel that justified granting of the variance.
2. The Commission did not find that the variance was “... *necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties but are denied to this parcel; such uses may include the placement of garages or the expansion of structures that are commonly constructed on other parcels in the vicinity*” because no other properties in the vicinity or in the zone have a right to build a principal structure that exceeds the maximum allowable height of thirty-five (35) feet, and because telecommunications towers, particularly of the height proposed by the applicant, were not commonly constructed on other parcels in the vicinity.
3. The Commission did not by consensus find “*That the granting of such a variance will not be materially detrimental to the public welfare or injurious to the property, nearby parcels or public infrastructure*” because of differing evaluation and conclusions by Commissioners regarding evidence submitted through public testimony, particularly from owners of nearby parcels, regarding the negative aesthetic and viewshed impacts that would be realized by the granting of the variance, as well as the potential for negative impacts to property values of said parcels.
4. The Commission did find “*That the granting of such a variance will not adversely affect the comprehensive plan*” because the proposal supported Comprehensive Plan actions 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.”

Additional findings regarding telecommunications towers classified as public facilities and utilities under SGC 22.05.1190 and regulated under 47 U.S. Code § 332 (text underlined for emphasis):

- a. The Commission did not make a finding on whether the coverage gap as described by the applicant was considered significant.
- b. The Commission 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 for two primary reasons:
 1. The applicant did not provide the Commission with adequate analysis regarding the extent to which the coverage gap could be closed by use of a tower that did not exceed the maximum allowable height for principal structures in the zone (35 feet). Though the applicant stated that they would need more 35-foot-tall towers in the area to provide adequate coverage, they did not prove why this approach was infeasible. Additionally, the applicant did not adequately demonstrate that the proposed 120-foot height of the proposed tower was the shortest height necessary to sufficiently close the coverage gap.

2. The applicant 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. The applicant stated that their inability to place the tower on a property zoned for commercial and/or industrial uses was due to the unwillingness of property owners of such parcels to sell, rather than lease, land to the applicant; the applicants further stated that their particular financial constraints made leasing land infeasible. The Commission found that that this justification was contrary to Alaska Statute 29.40.040(b)(3), which states that a variance from a land use regulation adopted by a municipality may not be granted if the variance is sought solely to relieve pecuniary hardship or inconvenience.

Findings of Fact and Decision dated April 16, 2025.

Respectfully submitted by:

CCTHITA, d/b/a TIDAL NETWORK
Appellant

08/08/2025
Date

Douglas Bonner
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CITY AND BOROUGH OF SITKA
Appellee

08/08/2025
Date

Rachel Jones
By: Rachel Jones, Municipal Attorney