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,	)	
Central Council of the Tlingit & Haida Indian Tribes of Alaska d/b/a TIDAL NETWORK, Appellant.	)	OAH No. 25-2204-MUN Agency No. VAR 25-01

BRIEF IN SUPPORT OF DECISION

I. INTRODUCTION

The City and Borough of Sitka respectfully submits this brief in support of the Planning Commission's denial of a variance sought by the Central Council of the Tlingit & Haida Indian Tribes of Alaska d/b/a Tidal Network (henceforth "Tidal Network") to construct a 120-foot telecommunications tower in a residential zone with a 35-foot height limit. The applicant applied for, and the Planning Commission proceeded with, a variance to the height limitation. The application was not for, and the request was not processed, under the code provisions for conditional use permits. The Planning Commission's decision to proceed under the Sitka General Code ("SGC") provision for variances was supported by the record, and its decision to deny the height variance was both supported by substantial evidence and not contrary to federal law and therefore should be upheld.

II. STANDARD OF REVIEW, APPLICABLE LAW, AND PLANNING COMMISSION FINDINGS

A. Planning and Zoning Code Provisions

The City and Borough of Sitka's Planning Commission has authority under SGC 22.10.050(e) to "approve variances with appeals possible to the Assembly." The Assembly has authority under 22.10.060(a) to sit as the Board of Adjustment and "consider appeals of variance or conditional use permits". Due to an inability to establish a quorum to sit as the Board of

Adjustment in this matter, the Assembly passed CBS Ordinance 25-17 delegating Board of Adjustment authority to the Office of Administrative Hearings.

In exercising the Board of Adjustment's appellate authority, the OAH is bound by SGC 22.10.170.B.2 stating that "[a]n Assembly decision following a closed record appeal hearing shall include one of the following actions:

a. Grant the permit or appeal in whole or in part.

b. Deny the permit or appeal in whole or in part.

c. Remand for further proceedings."

Remand is controlled by 22.10.200 stating that **"**[i]n the event the Assembly determines that the public hearing record or record on appeal is insufficient or otherwise flawed, the assembly may remand the matter back to the hearing body. The Assembly shall specify the items or issues to be considered and the time frame for completing the additional work. The Assembly may hold a public hearing on a closed record appeal only for the limited purposes identified in the remand."

SGC 22.10.160.E explains that the standard of review on appeal is not *de novo*, rather, "[a]ppeals of any decisions regulated by this title shall only be granted when the designated appeal body determines that the subject permit approval or denial was in error. The appeal body shall base its decision on new evidence or proof of procedural error in the prior action. The appellant shall bear the burden of proving that the decision was in error." The CBS understands this part of its code to be in harmony with Alaska's "substantial evidence test" for closed-record review of Board and Commission determinations, such that the reviewing body should "revers[e]the decision only if [it] cannot conscientiously find that the evidence supporting [the agency's decision] is substantial. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." SGC 22.10.170.E *S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment,* 172 P.3d 774, 780 (Alaska 2007 (internal citations and quotations omitted).

Under SGC 22.05.1580, " '[v]ariance' means the relaxation of the strict application of the terms of this [the Planning and Zoning] title to a proposed development to be constructed in the future. This definition shall not be construed to permit any use in any district in which that use is prohibited by the district regulations." The variance process applies to an Applicant that is

wanting to build a structure that falls under a permitted *use* of the land, but in some way would fail to conform with restrictions that apply to all uses.

This is in contrast to conditional use, which under SGC 22.05.360, "means a provision which allows for flexibility within the zoning title by permitting certain specified uses in zoning districts where said uses could be considered appropriate, but only after additional conditions and safeguards are applied to insure their compatibility with permitted principal uses."

Public facilities and utilities under SGC 22.05.1190 "means land or structures owned by or operated for the benefit of the public use and necessity, including but not limited to public facilities defined in RCW 36.70A.030, as amended, and private utilities serving the public." That part of the Washington State code, defines Public Facilities as "Public facilities" include streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools." *RCW 36.70A.030(32)*. Notably, neither the SGC or the Washington state code to which it cites requires Public Utilities or Facilities to be publicly owned – private schools qualify just as well as public ones. And the SGC's Table 22.16.015-4. Public Facilities Uses shows "Utility facilities (transformers, pump stations, etc.)" to be designated "P – Permitted" in all zones. The Municipal Attorney advised staff and the Planning Commission that a communications tower offering service to the public at large would be permitted as a principal use in all zones, whether owned by a governmental or private entity.

However, other non-use restrictions on development in the R-1 zone, including the 35-foot height restriction at issue, still apply to the subject parcel, and can only be circumvented with a variance. Before granting a variance the Planning Commission under SGC 22.10.160.D.1, the Planning Commission must find:

> a. That there are 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;
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> b. The variance is 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;

c. 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;

d. That the granting of such a variance will not adversely affect the comprehensive plan.

Even if there is preemption, the "reasonable time to act" requirement in §332(c)(7)(B)(ii) and the FCC "shot clock" rules at 47 C.F.R. §1.6003 do not apply, as the parties have a tolling agreement for the sole purpose of resolving this appeal. Further, the Planning Commission was advised of the potential for Federal preemption barring "regulating on the basis of environmental effects" in §332(c)(7)(B)(iv) and did not include environmental concerns as the basis of any of its regulations. The Planning Commission was made aware of the Federal framework laid out in *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995-96, 998 (9th Cir. 2009) and considered whether the Applicant had (1) shown a substantial gap in coverage, (2) shown that the proposed tower is the least intrusive means for closing that gap, and (3) rebutted the evidence presented in public testimony regarding the availability of alternative sites with substantial evidence.

B. The Planning Commission's Findings

At its April 16, 2025 meeting and memorialized in its May 21, 2025 letter to the Applicant (effective April 16, 2025) the Planning Commission made the following findings *(Joint Facts at 34):*

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) *(Joint Facts at 34)*:

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."

III. THE PLANNING COMMISSION CORRECTLY PROCEEDED UNDER THE CODE PROVISIONS FOR A VARIANCE AND NOT FOR A CONDITIONAL USE PERMIT

At the initial hearing on March 5, 2025, the Planning Commission discussed whether the request for a 120-foot communications tower in the R-1 zoning district with a maximum height limitation of 35-feet was best handled under variance or conditional use standards. *Joint Facts at 9*. Specifically, the R-1 zoning code contains language treating some communications towers as accessory uses which might fall under the conditional use process. *Id.* The Planning Commission asked for clarification from the Municipal Attorney on this issue. *Id.*

Following that consultation, staff explained at the April 2, 2025, meeting that SGC 22.20.055 describing communications antennas and towers as permitted accessory uses within the R-1 and other districts was best understood to govern personal use antennas and towers accessory to a residence or other principal use. *Joint Facts at 18.* This would include uses such as mounting a personal amateur radio operator antenna to one's residential roof.

In the present case, because Tidal Network is offering a public communications service, the Municipal Attorney advised that the use is best characterized as a public utility under SGC 22.05.1190 which provides a non-exclusive list of public-facing infrastructure that can be installed as-of-right in the R-1 zone.[1] *Joint Facts at 17-18.* Staff and Commissioner Sherman stated agreement with the Municipal Attorney's opinion and second hearing proceeded on the

[1] Despite inexplicably referencing Washington State law, this provision remains the governing code for the current case.

assumption that the Applicant correctly applied for a variance and not a conditional use permit. *Joint Facts at 27.*

As a public utility, Tidal Network's proposed tower would have been available as-of-right, with no Planning Commission review whatsoever, had it been limited to the R-1 zone's 35-foot height maximum. It proceeded through the variance process, as requested by the applicant, solely due to the request for a height variance to accommodate a 120-foot tower. Because the use in question is permitted, and it is a non-use related height restriction applicable to all structures in the zone that is at issue, proceeding with the variance process and not the conditional use process was correct.

CBS respectfully requests that the Municipal Attorney's opinion and the Planning Commission action in proceeding with variance consideration of Applicant's request, instead of redirecting to the conditional use permitting process for accessory uses, be UPHELD.

IV. THE PLANNING COMMISION CORRECTLY DENIED THE VARIANCE UNDER SGC 22.10.160.D

After thorough discussion at both the March 5 and April 2 Meetings, the Sitka Planning Commission correctly found that the requested variance failed to meet three of the four mandatory criteria under SGC 22.10.160.D. Specifically finding that there were no special circumstances applicable to the property under SGC 22.10.160.D.1; the strict application of the zoning ordinance would not deprive the applicant of a substantial property right under SGC 22.10.160.D.2; and that granting the variance would be detrimental to public health, safety, or welfare under SGC 22.10.160.D.3.

These findings were adopted after three public hearings and were supported by testimony, staff reports, and public comment. They are entitled to deference under SGC 22.10.170.B.1.e, in harmony with Alaska's "substantial evidence" standard for review of factual findings by expert bodies as described in *S. Anchorage Concerned Coal., Inc. v. Municipality of Anchorage Bd. of Adjustment,* 172 P.3d 774, 780 (Alaska 2007).

A. The Planning Commission had Substantial Evidence that no Special Circumstances Justified the Variance SGC 22.10.160.D.1

The Applicant claimed that the site's limited development and access to existing utilities supported construction of a 120-foot tower. However, the Planning Commission found no

evidence of physical features unique to the site that would prevent compliance with the 35-foot height restriction for the R-1 zone. *Joint Facts at 19.* There is no dispute that the parcel is level, rectangular, and similar in size and shape to other residential lots in the area, and that the issues related to tower height have to do with signal propagation and not any interfering features of the lot itself.

It should be noted that the Planning Department Staff and the Planning Commission reached differing conclusions on this item. The Planning Staff determined that since a communications tower was available as-of-right, and Tidal Network stated that this tower height was necessary to make use of that right, that requisite tower height, influenced by surrounding topography, was a special circumstance outside of the Applicant's control, justifying a variance.

The Planning Commission applied this provision more narrowly, understand that "special circumstances" applied to the nature of the lot itself and not to the project being conducted on the lot, that attributes of the project itself are use issues for a conditional use permitting process and not a variance. Commissioner Sherman explained:

> "I also agree with the interpretation of staff that telecommunications tower is a permitted use in the district as a public utility. But it is subject to the height limit of 35 feet which makes it infeasible to actually take advantage of that permitted use for any practical or commercially feasible way. And ultimately, I – I kind of agree with Wendy [Alderson] that my problem is the variance. And specifically, you know, I am reading the conditions required for a variance. I already asked about A, which refers to special circumstances to the intended use that do not apply generally to other properties. And Staff's answer was that it really relates to use…" *(Transcript of April 2, 2025 Hearing at p. 83:6-1).*

Commissioner Sherman's earlier comments in the hearing had been that:

> "My question is about – because the maximum height of the tower is 35 feet, wouldn't that – wouldn't any property require a variance for a tall tower?" (Transcript of April 2, 2025 Hearing at p. 19:9-12). "So any 120-foot tower anywhere in town would require a height variance… (Id. At 19:17-19). So it really doesn't relate to a characteristic of the property. The variance is related to the use." *(Id. at 20:2-4*).

The Planning Commission affirmed this understanding of the distinction between conditional use permits as dealing with attributes unique to the proposed use, and variances as addressing unique features of the specific lot, when it found that there were not specific circumstances justifying the variance request in this case. Because it is uncontested that there is

nothing remarkable about this lot, there is necessarily substantial evidence of the lack-of-uniqueness underlying the Planning Commission's determination, and the Planning Commission is entitled to deference on its application of code to the evidence presented at hearing.

CBS therefore respectfully requests that Planning Commission's denial of Tidal Network's request for a variance due to a lack of special circumstances be UPHELD.

B. No Denial of Substantial Property Right under SGC 22.10.160.D.2

The Planning Commission determined that denial of the permit would not affect the rights of the applicant to build a principal-use communications tower on the subject property. It would merely be restricted to the 35-foot height limit like all other principal structures in the zone. The applicant retains full residential development rights under the current zoning designation and could pursue a telecommunications facility within the 35-foot limit.

Specifically, Commissioner Sherman also gave a detailed explanation of her thinking in this regard, stating:

> "…I think B is even more of an obstacle to me, because B says the variance is necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties but are denied to this parcel. And there is no residential zone that has the right to build a 120-foot tower.
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> Typically a zoning ordinance, it is not typical to do this kind of balancing when you talk about a variance, because what - what you have when you have a variance is something that is not allowed by the zoning code. So you're asking for a variance because there is something particular about the property that doesn't allow them to take advantage of the rights that similar property owners have. And in this case, all the property owners are in the same circumstances in that anybody would require a variance on any property to build a commercially feasible cell phone tower."
> *Transcript of April 2, 2025 hearing at 83:21-84:20*.

Here, again, staff interpretation and Planning Commission interpretation differed, with the Applicant agreeing with staff interpretation. In that view, because a communications tower is a principal use, the ability to build a functional communications tower is a substantial property right of all properties. Some parcels may be able to build a functional tower within the 35-foot height restriction, while others would be able to get a variance to the height needed to exercise that property right.

The Planning Commission saw the issue differently, in that every parcel has a right to build a communications tower of 35 feet in height. Whether or not that tower can provide the coverage that the applicant wants, is a vagary of the technology and how the particular tower integrates with other features of the project's overall technology. Whether and how the technology works out is an inherent feature of the project – that is, the use – and not an inherent feature of the property itself. No one has a right to a 120-foot tower, and such requests should come in as conditional use permit applications and not as variance requests.

Again, the Planning Commission interpretation is controlling, and because the underlying facts regarding the application of the height restriction I the zone are undisputed, the difference in Staff and commission outcomes is one of interpretation, not evidence. The Planning Commission's understanding of what constitutes a substantial property right is controlling and entitled to deference.

CBS therefore respectfully requests that Planning Commission's denial of Tidal Network's request for no denial of a substantial property right be UPHELD.

C. Detriment to Public Welfare under SGC 22.10.160.D.3

Nearly all public comment opposed the tower due to visual, aesthetic, and neighborhood character concerns. At the April 2 hearing, nearly all speakers opposed the variance. *Joint Facts at 13-14.* Commenters expressed concern about scenic degradation, proximity to homes, and negative effects on property values. *Id. at 13-14*. Photo simulations in the March 5, 2025, Packet show the 120-foot tower projecting far being plainly visible. And the Commission determined the proposal would be incompatible with the low-density residential character of the R-1 district, properly basing its decision on concerns that are not potentially preempted by federal law, as Commissioner Riley stated:

> "I don't think I can vote yes for this with all of this public testimony in the neighborhood. I mean, the neighborhood came together, you know, to oppose this. And it will affect their property values, with the aesthetics and everything." *Transcript of April 2, 2025 hearing at 74:2-8*.

The Commission properly excluded health and environmental concerns that are potentially subject to federal preemption with Commissioner Alderson explaining that "…the preemption, the federal preemption on environmental impacts, that is extremely clear. There is – the language in the federal law on that is extremely clear." *Transcript of April 2, 2025 Hearing at 81:22 – 82:4.*

Because the Planning Commission is entitled to deference on its determinations regarding local aesthetic and use-compatibility findings, CBS respectfully requests that Planning Commission's denial of Tidal Network's request for a variance on the ground that the variance would be detrimental to public welfare be UPHELD.

D. Convenience and Cost Are Not Grounds for Variance (AS 29.40.040(b)(3))

In addition to local code, Alaska law also prohibits granting a variance based solely on pecuniary hardship or convenience. See AS 29.40.040(b)(3). The applicant states that the reason for looking at lots for sale, and excluding alternatives that were only available for lease, was financial. Specifically, Mr. Cropley stated that:

> "Well, to lease these towers, and I can't say NDA, but they're thousands of dollars a month with a 4 percent rider every year for 20, 30 years. Well, it's actually cheaper to buy and build these things and now we have an asset that we can – we can put and hang GCI equipment on there. We can put fire, police, tsunami warning, but you know, it becomes what I consider the most valuable real estate in Southeast Alaska per square foot." *Transcript of March 5, 2025 Hearing at p 29:7-19.*

State law protects CBS from having to provide a variance solely for the financial benefit of the applicant. And here, Tidal Network has not shown that leased sites are lacking in technological viability, but rather specifically stated that land purchases are in its financial interests. While this approach may be commendable in terms of business planning, state law prohibits CBS from granting a variance that is "necessary" only due to the Applicant's financial constraints or desires.

CBS therefore respectfully requests that the court UPHOLD the Planning Commission's determination that granting the variance would be contrary to state law.

E. The Planning Commission is entitled to deference on its findings under the SGC 22.10.160.D.2 and AS 29.40.040(b)(3)

The Planning Commission properly applied both state and local law in rejecting Tidal Network's application for a height variance, and correctly concluded that the Applicant failed to meet its burdens of proof under SGC 22.10.230. The Planning Commission's denial of Tidal Network's request for a variance should, respectfully, be upheld by this court because its determinations that (1) no special circumstances justified the variance, (2) denial of the variance did not interfere with substantial property rights of the Applicant, (3) a variance would be detrimental to the public welfare, and (d) the variance could be denied as being pecuniary in

nature were supported by the record and are therefore entitled to deference. The variance denial should be upheld on all four grounds, or, in the alternative, any one or combination of more than one ground.

V. FEDERAL PREEMPTION IS NOT SUPPORTED BY THE RECORD

Tidal Network now asserts that 47 U.S.C. § 332(c)(7)(B) preempts Sitka's zoning authority. It should be noted that Tidal Network failed to raise federal preemption at the initial proceedings in front of the Planning Commission, and that the possibility of Federal Preemption was first raised as a possible concern with staff by the Municipal Attorney after Staff approached the attorney to discuss the principal vs. accessory use issue. *See Transcript of March 5, 2025 hearing* (lacking any comments on federal law by the Applicant); *see also Transcript of April 2, 2025 hearing at p. 6-10* (in which staff presents the municipal attorney's concerns about federal law, which had not been raised by the applicant). Having failed to even raise the issue, Tidal Network presented no testimony on federal preemption at the first Planning Commission meeting on this matter. *See Transcript of March 5, 2025 hearing* (lacking any comments on federal law by the Applicant).

The Federal law in question, 47 U.S.C. §332(c)(7) limits local governments from prohibiting personal wireless services and requires any local permitting denial to be supported by substantial evidence. The Planning Commission found substantial evidence for the variance denial under the SGC and Alaska law as described above. It additionally found that Tidal Network failed to meet its burden of proof under the *T-Mobile* standard to either trigger the federal standard in the first place, or to prevail under that standard on the merits.

A. Tidal Network failed to show that there would be a substantial gap in coverage between the 35-foot tower that is allowed as-of-right and the 120-foot tower it requested.

It is undisputed that Tidal Network does not currently have coverage in Sitka. However, the question regarding a significant coverage gap in this case is complicated by the fact that a 35-foot tower is available as-of-right, with no Planning Commission review, in the R-1 zone in which the subject lot is located. Because Tidal Network has the right to build a 35-foot tower without CBS planning and zoning review (the building code would of course still apply), the question is really whether there is a substantial coverage gap between what Tidal Network is

allowed to build as-of-right – a 35-foot tower – and what Tidal Network has applied for a variance to build – a 120-foot tower.

Tidal Network submitted coverage maps for the 120-foot tower design in advance of the continued hearing on April 2, 2050, but only made conclusory statements regarding the differences in coverage between a 35 foot as-of-right-tower and the request 120-foot tower. Tidal Network admitted on the record to not having submitted any evidence to support its conclusions, that a 35-foot tower would leave a substantial gap in coverage as demonstrated by the following exchange between representatives for Tidal Network and the Planning Commission at the April 2, 205 hearing (*Transcript of April 2, 2025 hearing at 24:11* - :

> COMMISSIONER SHERMAN: Question for the applicant. At our March meeting I believe that we had a question of – we had a discussion of why the variance is required and whether the applicant could install a tower that did not require a variance. And my memory of the answer was that the answer was yes, we would just need a lot more of them. So I just wanted to see if I was remembering that correctly and if the applicant had anything to add to that.
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> MR. CROPLEY: Thank you for the opportunity to clarify that. A 35-foot tower would not be tall enough and would create a significant coverage gap if we were not able to have this, you know, so that's 35 foot isn't gonna cut it.
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> FEMALE VOICE (*Commissioner Alderson or Riley*): May I? Good evening Mr. Cropley. I am hoping for a little bit more detail on your proposal here and especially in regard to this significant coverage gap. So can you tell me how many people in zone two [of the coverage maps provided by applicant] would be served with a 35-foot tower? How many households?
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> MR. CROPLEY: I don't know. We know that 35 foot would not provide coverage in zone two in order to cover the area required to be considered covered. So if you look at the coverage map, please, the – the side by side. That one – that's a good one, thank you. You can see we get significant coverage all the way out to the islands, all the way out almost to zone – to – to the geographic boundary there, I think zone five. And – and overlap with zone one, which is necessary for – nobdy likes dropped calls, to prevent any – any dropped connection between there.
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> FEMALE VOICE (*Commissioner Alderson or Riley*): So there has not been an analysis conducted over what that coverage map would look like with a 35-foot tower, is that what I'm hearing?

> MR. CROPLEY: I – I didn't commission one. I don't have one in front of me. I haven't done one. I haven't done one. That doesn't mean our guys didn't look at – at different heights, and this is the height that my RF engineer came up with as a feasible height.

Ms. Rico also address the coverage gap for Tidal Network, stating that on the basis of her running simulations, perhaps 20–25 percent of the household in that a 120-foot tower would serve could also be served by a 35-foot tower. *Transcript of April 2, 2025 hearing at 28:16 – 29:4*. But those simulations were not submitted into evidence. No evidence as to how Ms. Rico reached her estimates, and no supporting evidence from Tidal Network's engineering studies was submitted to the Planning Commission. And, most importantly, no analysis or argument was presented on whether serving only 20-25 percent of Tidal Network's optimal number of households would actually leave a substantial gap in coverage.

The standard for local governments is not that they must grant any variance that is necessary for the provider to optimize coverage. The obligation is only to ensure that permitting denials do not leave a substantial gap in coverage. If the 35-foot as-of-right tower would produce coverage that is less-than-ideal but not a "significant gap" than it is permissible for the Planning Commission to require Tidal Network to stay within the same height restrictions that everyone else is required to abide by. The record contains substantial evidence, including the Applicants own assertions, that it did not study and could not put into the record studies showing whether a 35 foot-as-of-right tower would leave a substantial gap in coverage. Lacking the necessary proof to make a finding in Tidal Network's favor, the Planning Commission did not make a finding that there was a substantial gap in coverage necessitating the 120-foot variance. As such Tidal Network has not carried its burden of showing that the federal overlay applies, and the Planning Commission's denial under local code and state law should stand.

CBS therefore respectfully requests that the Planning Commission's denial of Applicant's request for a variance under the SGC and/or Alaska state law be UPHELD, with no application of the alleged federal overlay. CBS's additionally ask that the court AFFIRM that Tidal Network did not carry its burden of showing a substantial gap in coverage in order to trigger the federal overlay.

B. Tidal Network failed to show that its 120-foot tower is the least intrusive means for closing the coverage gap and failed to present rebuttal evidence as to why lots in the industrial and commercial zones were inadequate.

In the alternative, even if the Planning Commission was incorrect to not apply the federal overlay, Tidal Network's presentation still failed to present substantial evidence that a 120-foot tower is necessary to close the gap between what a 35-foot tower can provide and "substantial coverage." It did not present evidence of what it would consider to be substantial coverage, whether a 50- or 100-foot tower, for example, could meet that standard, or why other technologies or sites cannot meet the needed level of coverage with fewer aesthetic and character impacts on the neighborhood.

Conversely, the neighbors and others in the public comments suggested that industrial and commercial lots exist that could provide adequate coverage to fill any gap left by a 35-foot tower, including two statements about or by industrial landowners who are not contacted by Tidal Network. *Joint Facts at 13 – 14; 24 -25*.

Tidal Network testified that it had contacted 129 owners of industrial and commercial lots and only two were willing to sell, with only the subject lot being located in zone 2 of Tidal Network's coverage map. *Transcript of April 2, 2025 Hearing at p. 14:2-15*. However, Tidal Network did not present supporting evidence showing which lot owners had been contacted and how it concluded that those lots were the only viable alternatives to the Nancy Court location. Tidal Network stated that other lot owners were unwilling to sell – but it did not produce evidence as to whether the other 127 lot owners merely did not respond to solicitations by Tidal Network, whether they affirmatively rejected offers by Tidal Network to sell, or whether they were merely unwilling to sell at a price that was palatable to Tidal Network. Lacking a presentation of that evidence, the Planning Commission only had Tidal's conclusory statements regarding the Nancy Court location being the least intrusive means and had no rebuttal evidence presented to it against the testimony that there are adequate commercial and industrial lots. Indeed, by Tidal Network's own description of its outreach efforts there are at least 128 other sites that it deemed potentially feasible, and the Planning Commission received no supporting documentation on how extensive the efforts to pursue those alternatives were and/or whether they remain technologically viable and the lack of alternatives is merely seller willingness and/or price point.

Again, lacking supporting evidence from Tidal Network, the Planning Commission determined that it could not make a finding that Tidal Network carried its burden of showing a 120-foot tower at the Nancy Court location being the least intrusive means, and could not determine that Tidal Network had rebutted the testimony of industrial or commercial locations being available.

CBS therefore respectfully request that, even if the court finds that the federal overlay should have been applied by the Planning Commission, it nevertheless UPHOLD the Planning Commission's denial of the variance under the Sitka General Code and state law because Tidal Network only made conclusory statements and not evidentiary showings regarding least intrusive means and rebuttal to alternatives sites being available.

VI. REMEDY

CBS would like the court to know that Tidal Network was advised by staff following its April 16, 2025 variance denial that it had the option of resubmitting its application with a more robust record in support of its statements regarding a substantial coverage gap and other issues regarding the federal overlay. The reapplication option has remained available to Tidal Network at all times and continues to be available unless this court upholds the variance denial with prejudice for reapplying.

VII. Conclusion

The CBS respectfully requests that this court UPHOLD:

(1) the Planning Commission's decision to proceed with the Appellant's request as a principal use under variance procedures,

(2) the Planning Commission's denial of a variance under SGC and state law, and

(3) the Planning Commission's decision not to apply the federal overlay because Tidal Network failed to carry its burden of proof to provide substantial evidence that it was entitled to the federal overlay in the first place and failed to carry its burden of proof on the merits in any event.

DATED this 14 day of August, 2025.

CITY AND BOROUGH OF SITKA
Appellee

Rachel Jones

Rachel Jones, Municipal Attorney
Alaska Bar No. 1404016

Certificate of Service

I certify that on August 14, 2025, this CBS's Brief In Support Of Decision was distributed via email to the following individuals: Douglas Bonner (dbonner@potomaclaw.com), Chris Cropley (ccropley@tlingitandhaida.gov), and W. Scott McCollough (wsmc@dotlaw.biz).

Mindy Lowrance

Mindy Lowrance, Legal Assistant