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

In the Matter of	)	
	)	
Appeal from Variance 25-01	)	OAH No. 25-2204-MUN
	)	Agency No. VAR 25-01

SITKA FOR SAFE TECH, *ET AL* PREHEARING BRIEF ON APPEAL

INTRODUCTION

Sitka for Safe Tech, Robert Krehbiel and Kelly Sweeney, Jon Martin, Hal and Carrie Spackman, Taylor and Mike Vieira and Carol Voisin (hereinafter, collectively, "SFST") respectfully request that the Office of Administrative Hearings (on referral and standing in place of the Assembly/Board of Adjustment of the City and Borough of Sitka, Alaska) deny the Appeal of the Planning Commission's ("Commission") rejection of VAR 25-01.[1] This was an application for a variance[2] allowing a 120-foot tower for fixed broadband wireless service in a R-1 residential district with a height restriction of 35 feet for all structures. The Commission reached the right result and its decision should not be reversed.

A. SFST and its members

SFST is a grassroots organization of Sitka residents concerned about placement of communications towers near homes, schools, historic districts, recreation areas, and sensitive environments. SFST members include the resident-abutters listed below, all of whom live on properties abutting the proposed tower, within the notice radius for the variance hearing, who testified at the March 5 and/or April 2 hearing, and/or provided written comments to the Commission. The resident-abutters expressed deep and well-founded concerns about the proposed tower, including the creation of landslide risks, impact on property values, and destruction of neighborhood character.

Robert Krehbiel and Kelly Sweeney, 315 Eliason Loop. *See Transcription Excerpt April 2, 2025* (pp. 40-44); *Minutes - Final Planning Commission Packet April 16, 2025* (pp. 3, 5, 73-74). Krehbiel and Sweeney live directly below the location of the proposed tower and worry about the increased risk of a landslide if the tower is built. "Imagine if you had a tower coming 145 feet behind your house…" *Transcription Excerpt April 2, 2025* at 40. Krehbiel, who is a registered civil engineer, noted the inevitability of adverse impacts from the additional weight of the tower "...that can only help slide it down the hill." *Id.* at 41.

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[1] SFST and its members reserve their rights regarding the ruling on "Intervention" but are thankful for the ALJ's allowance of the opportunity to submit a brief and aggregate time during public comment.

[2] SGC §22.05.1580 defines a "variance" as "the relaxation of the strict application of the terms of this 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." SGC §22.10.160.D then states the four affirmative findings that must be made before a variance can be granted.

Jon Martin, 108 Nancy Court. Martin "worked 30 years, three or four jobs at a time to build" his home and is concerned about the proposed tower's impact on the property he spent much of his life working on. *Transcription Excerpt March 5, 2025* (pp. 60-61); *Transcription Excerpt April 2, 2025* (pp. 63-64); *Minutes - Final Planning Commission Packet April 16, 2025* pp. 3, 5 71-72.

Hal and Carrie Spackman 313 Eliason Loop. Hal Spackman has built three houses in the area and noted the steepness of the area where the tower would be built. *Transcription Excerpt March 5, 2025* pp. 65-70. The tower could strike up to four houses, including his, "...if it fell over from any kind of a land slippage…" *Id.* at 69; *Transcription Excerpt April 2, 2025* pp. 45-47; *Minutes - Final Planning Commission Packet April 16, 2025* pp. 3-5.

Carol Voisin 309 Eliason Loop. *Transcription Excerpt April 2, 2025* (pp. 37-40); *Minutes - Final Planning Commission Packet April 16, 2025* pp.3, 5, 77-80. In her public comments to the Commission, Voisin noted the lack of structures on the Nancy Court parcel and "granting a variance for a 120-foot tower almost four times the height [restriction of 35 feet] does not promote housing quality. Think of having such a tower in your backyard." *Id*. at 78, 79.

Taylor and Mike Vieira*,* 312 Eliason Loop, Sitka. *See Transcription Excerpt March 5, 2025* (pp. 73-79); *Transcription Excerpt April 2, 2025* (pp. 34-37; 50-53; *Minutes - Final Planning Commission, Packet April 16, 2025* (pp. 3, 5, 69-70). Mike Vieira testified that what he loves about the area is most of the houses being "owner built" with people pouring "a lot of blood, sweat, and tears into the homes that they've built." *Transcription Excerpt April 2, 2025* at 52. People would not invest so heavily if they knew the zoning regulations could be "usurped" for a tower that would dominate all the other structures. *Id.* at 53.

B. Argument Summary.

The pertinent ordinance provisions provide that "structures" (which include communications towers) in residential areas are allowed accessory[3] uses, subject to certain conditions and site plan review, but the height is limited to 35 feet.[4] The R-1 district is "very restrictive" and taller structures will normally not "preserve the residential character of the R-1 district."[5] That is why structures require a variance. The Commission applied the evidence to the substance and policy of the ordinance and correctly concluded it could not make three out of the four required findings required by SGC §22.10.160.D as prerequisites to a variance approval. *Joint Statement of Undisputed Material Facts ("Joint Statement")* ⁋ 34 (pp. 6-7).

[3] The Staff and Municipal Attorney opine that this project is a "utility" matter and therefore there is no need to decide whether a communications tower qualifies as an "accessory use." MFST does not contest Applicant's status as a utility under state law but disagrees it is a "common carrier" under federal law. *C.f.*, *Transcription Excerpt April 2, 2025* at 5. There is no dispute, however, that a variance is required regardless of the use designation.

[4] SGC §22.16.015 and Table 22.16.015-1.

[5] SGC §22.16.040.A.1, 2.

These restrictions and local protections for nearby properties are all authorized (and sometimes prescribed) by state law. Applicant/Appellant, however, contends that federal law applies and operates to preempt or displace this local law to the extent it would "effectively prohibit" Applicant's ability to provide its fixed wireless broadband service. SFST contends that Appellant cannot claim the benefit of the federal overlay because it does not provide "Personal Wireless Service" and the tower and equipment will not be "Personal Wireless Service Facilities." The Commission misconceived Applicant's federal regulatory status, but the record nonetheless supports its inability to find a significant gap in personal wireless coverage and/or that this is the least intrusive alternative *Joint Statement* at 7-8. Finally, the federal regime allows "safe harbors" that permit denial even where it would lead to an effective prohibition, and the stated reasons in the Commission decision fit neatly within those safe harbors.

The appeal must be denied.

ARGUMENT

I. Standard of Review: OAH Should Defer to the Commission's Conclusions and Findings Unless They Are Legally Erroneous or Lack Sufficient Record Support; Appellate Jurisdiction is Limited to Valid Points Raised in the Written Appeal.

A planning commission's statutory responsibilities include "providing assistance to the borough (or city) to ensure that development proceeds in a 'systematic and organized' manner." *See Griswold v. City of Homer*, 186 P.3d 558, 562 (Alaska 2008) (quoting AS 29.40.020(b)(1)). This assistance takes several forms and includes review of variance applications and conditional use permits. Alaska courts give "considerable deference" to zoning board or planning commission interpretation of zoning laws and planning documents. *Native Village of Eklutna v. Board of Adjustment*, 995 P.2d 641, 643 (Alaska 2000) (citing *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2nd 168, 173 (Alaska 1993)); *see also Luper v. City of Wasilla,* 215 P.3d 342, 345 (Alaska 2009) (Zoning board decisions "are accorded a presumption of validity") (citing *Griswold v. City of Homer*, 55 P.3d 64, 67 (Alaska 2002)).

OAH is not serving as a reviewing court, and it is standing in the shoes of the Assembly. Even so, it is still acting as a *quasi*-judicial appellate body. SFST believes the standard of review should be like that applied in administrative appeals. The Commission's findings and conclusions deserve deference unless they are legally erroneous or lack substantial evidence support. OAH should, however, conduct an independent *de novo* legal analysis of statutes, regulations and municipal codes.

II. The Commission Correctly Refused to Make Three Out of the Four Required Findings Before a Variance Can be Granted, and Therefore Properly Denied the Requested Variance.

Before allowing a variance, the Commission was required to make the affirmative required findings for all four factors[6] in SGC 22.10.160.D.1.a-.d; an inability to make the required finding for any *one* factor precludes the variance. The Commission could not make the required affirmative findings for factors a., b. and c.[7] The Commission provided solid reasons for its inability to make three of the four mandatory affirmative findings. The record does not compel a conclusion on appeal that this outcome is legally erroneous.

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[6] *Accord Corkery v. Municipality of Anchorage*, 426 P.3d 1078, 1085-87 (Alaska 2015).

[7] The Commission did find the variance would not "adversely affect the comprehensive plan."

A. No special circumstances exist to merit a variance.

SGC 22.10.160.D.1.a requires a finding of "special circumstances" to the intended use that "*do not apply generally to the other properties*," such as "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."[8] The Commission properly found that the 35-foot height restriction from which Appellant sought a variance applies to all the properties in the district, and that "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." *Joint Statement* ⁋ 34.1 (p. 7). This is like *Corkery*, where the Court found that homeowners were properly denied a variance that would have allowed their home to occupy a footprint over the permitted lot coverage, because the need for the variance did not arise from features of the land that "*distinguish it from other land in the general area."*[9]

B. The variance is not necessary for the preservation and enjoyment of a substantial property right enjoyed by other property owners in the vicinity.

The variance is not necessary to preserve a substantial property right or use that other properties in the district enjoy, such as structures that are "commonly constructed on other parcels in the vicinity."[10] Applicant seeks to erect a 120-foot tower. This is not just an uncommon use, but an industrial use, and one that clashes with the neighborhood's residential character. Given the industrial and uncommon use Applicant seeks, no privileges are deprived to the Applicant's parcel that other properties in the district enjoy. Other landowners in the R-1 zone do not "enjoy" industrial use of a tower whose construction and operation will presumably generate revenue. What other landowners enjoy is the quiet enjoyment of homes, something that Applicant is trying to deny them. The Sitka General Code does not favor granting the variance in this instance.

C. Granting the variance will be materially detrimental to the public welfare and injurious to the property and nearby parcels.

SGC §22.10.160.D.1.c, requires a finding that granting the variance "will not be materially detrimental to the public welfare or injurious to the property, nearby parcels or public infrastructure." The Commission properly refused to make the finding based on the evidence. Residents' evidence of the negative impact on the aesthetics, viewsheds, property values, and safety demonstrated that the project would be "materially detrimental to the public welfare" and "injurious to the property and nearby parcels." *Joint Statement* ⁋ 34.3 (p. 7).

First, there is more than ample evidence that the proposed tower will injure the property upon which the proposed tower would be built. Groundbreaking and construction activities will require tree clearing, soil disturbance, damage vegetation, destroy habitats such as nests and burrows, and increase runoff (drainage). *Minutes - Final Planning Commission Packet April 16, 2025* pp. 61, 72; *Transcription Excerpt April 2, 2025* pp. 41-42. Applicant has not yet completed

[8] SGC 22.10.160.D.1.a (emphasis added).

[9] *Corkery*, 426 P.3d at 1087 (quoting *City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 635 (Alaska 1979) (emphasis added).

[10] *See* SGC 22.10.160.D.1.b.

an environmental assessment to evaluate the impact on federally listed endangered and threatened species. *Id.* p. 13; *Transcription Excerpt March 5, 2025* (pp. 68-69, 73).

Second, the project injures nearby parcels, by destroying the character of the neighborhood. The proposed tower will not blend in and harmonize with the existing structures in the district. It is ugly and will obstruct treasured views. Nearly all the structures in the area are single family homes built in traditional ranch, modern mountain or craftsman-style architectural styles. Wrap-around decks, picket fences, natural rock walls, and tapered square columns are common features of these homes. Most of the homes are painted in soft muted yellows, greens and baby blue, with a few sporting brighter reds or turquoise, giving the area a quaint, quiet and rustic feel. The tower simply does not fit into the character of this community.

Applicant's own photo simulations speak louder than words, depicting a dark brown man-made, metallic industrial structure with harsh rectangular lines that pop out as starkly distinct from the soft-grey brown bark of the tall green trees behind it. *Minutes- Final Planning Commission Wednesday, April 16, 2025* (pp. 31, 33). The tower looms over the shorter trees in the front. It may not disrupt the marine viewshed, but it ruins the entire natural beauty of the area. These photo simulations reflected an effort to diminish the visual, aesthetic impact but there's no hiding this out-of-place monopole. Moreover, none of these views depicted in the photo simulations account for the real-life visual impact from the street level or from second-story porches where the people who live there will have to see the tower outside their window, day in and day out, ruining a once pristine alpine mountainside view.

Applicant's photo simulations and characterization of the effect deceptively minimize the proposed tower's visual impact. One "view" is from a vantage point purportedly at the center of the residential area where the "tower is not observed to be visible." *Id.* at 38. The photo was taken at an angle downhill from the location of the proposed tower where the homes are in front of the tower, obscuring its visibility. *Id.* at 34. This view does not mitigate the ugly blight residents will have to live with every day from their windows, porches and yards, and is not reflective of what the tower will really look like from nearby homes.

The Planning Director admitted at the April 2 hearing that the "tower would create a visual impact for neighboring properties." *Transcription Excerpt April 2, 2025* (p. 11); *see also id.* at 30-31, 67. She then went on to reiterate Applicant's assertions about the lack of residences uphill of the proposed tower, camouflaging paint, and proposed monopole style to purportedly mitigate the unsightly impacts. *Id.* at 12. None of these factors, however, will mitigate the out-of-character, disharmonious placement of an industrial structure right on top of homes in a quaint alpine setting.

Third, the location and project design lead to serious safety risks from landslides, runoff, wind, and seismic events that could lead to structural failure. This threatens nearby properties and could lead to personal injury. Landslides are a well-known risk in Sitka. The two lots involved in this project (112 and 116 Nancy Court) are located on a steep slope. Landslides are more likely to occur and there will create increased runoff that adjoining properties will have to deal with. *Minutes- Final Planning Commission Wednesday, April 2, 2025* (pp. 68, 69-70.) There was also evidence of risks from structural failure from seismic events and high wind, and there is legitimate concern the foundation or tower would impact adjoining properties. The adjacent homes are within or very close to the "fall-zone" thereby endangering property and lives.

Transcription Excerpt April 2, 2025 (pp. 35-36); *Transcription Excerpt March 5, 2025* (p. 69; Sweeney/ Krehbiel letter, May 21, 2025, Agenda Packet at 78; Joint Statement ¶13, 25, 32.

"[A] variance may be granted which is in harmony with the general purpose and intent of this code so that the spirit of this code shall be observed, public safety and welfare secured, and substantial justice done." SGC §22.25.020. The last part about observing the "spirit of this code," securing "public safety and welfare" and enacting "substantial justice" bears noting. Restrictions in residential districts work to minimize adverse impacts from industrial activities, including structures, that are inconsistent with residential character. 9 A.L.R.2d 683. The R-1 district is very restrictive in that it is designated for single-family or duplex residences at moderate densities. SCG §22.16.040.A.1, .2. Other structures and uses needed to serve recreational and other public needs are allowed as conditional uses, subject to restrictions intended to preserve the residential character of the R-1 district.

Granting Applicant a variance to build its proposed tower would contravene the spirit of the code intended to protect residential areas, areas that are—and should remain—peaceful, quiet, safe and secure environments. The presence of Applicant's tower at Nancy Court would disrupt the peaceful, serene setting and, worse, threaten residents' security and safety. At both public hearings on Applicant's requests, residents voiced concerns about landslide risks, degraded property values, feelings that Applicant had not met its burden of proof on these issues, and questions about Applicant's efforts to find a better-suited parcel in an industrial or commercial district. Residents, not Applicant, will have to live with a considerably diminished quality of life, forced to see an ugly tower day in and day out, with the added anxiety of worrying during any event of high winds or heavy rainfall that the hill where the tower sits will give way and slide into their homes, or shear off with heavy wind to the same effect.

D. Alaska State Statutes and Case Law Supports the Denial of Applicant's Variance Request

Alaska statutory policy on variances is stringent. AS 29.40.040(b)(3) prohibits variances sought solely to relieve pecuniary hardship. Here it is clear that Applicant's basis for the variance here arises only from pecuniary rationalizations, and therefore, that the variance is prohibited under state law.

During the April 2 hearing on Applicant's request, Commissioner Riley discussed Applicant's grant constraints that allegedly require it to purchase rather than lease land and asked if this constraint qualified as financial hardship. *Transcription Excerpt April 2, 2025* (p. 77) The minutes do not reflect any answer to Commissioner Riley's question but the answer can be found in Applicant's March 28 letter to Planning Director Amy Anslie regarding its response to public comments at the Commission's March 5 hearing *Minutes- Final Planning Commission Wednesday, April 16, 2025* (p. 36); May 21, 2025 Agenda Packet at 41:

> Leasing land or tower space is incompatible with both grant compliance and the financial sustainability of the network. Further, the ability to control and monetize the infrastructure over time is central to Tidal Network's goal of achieving self-sufficiency while delivering affordable broadband to all citizens. Therefore, potential properties that *were suitable otherwise*, were not viable options for Tidal Network. (emphasis added).

The letter states plainly that other, more suitable and technologically feasible parcels for Applicant's project exist but these parcels allegedly limit the benefits of Applicant's federal

grant due to time limitations on expenses as opposed to capital investments. Applicant asserts that "financial sustainability" should take precedence over a state law restriction and the community's interest in prohibiting uses that disrupt the quiet, peaceful, safe, and secure character of a residential district where people spend much of their daily lives.

Applicant's "financial sustainability" comes at a cost to the residents' finances in the form of diminished property values. *See Joint Statement* ⁋⁋ 14, 34.3; *Minutes- Final Planning Commission Wednesday, April 16, 2025* (pp. 5, 10, 65, 66, 70, 71, 77, 82). The Commission decision noted the potential "negative impacts to property values. *Joint Statement* ⁋ 34.3. Thus, the Commission was correct in its April 16, 2025 finding that Applicant's statements regarding the "particular financial constraints made leasing land infeasible" contravened the AS 29.40.040(b)(3) prohibition of granting variances solely to relieve financial hardship. The legislature recognized that variances based on pecuniary interests improperly shift burdens from the applicant to neighboring parcels and owners. The variance here is prohibited by state law.

III. 47 U.S.C. §332(c)(7) and the FCC Rules at 47 C.F.R. Part 1, Subpart U Do Not Apply to This Application.

In Tidal Network's Appeal dated April 28, 2025, issues 1, 2, 4-6, and the general discussion that follows that list, are all related to claimed federal issues regarding a claimed coverage gap, least intrusive means, and feasible alternatives. Only issue 3 addressing visual impacts has any relation to the state and local criteria for variances. Applicant claims that federal law displaces any state or local law – including restrictions on or denials of variances – that would effectively prohibit its ability to provide fixed wireless broadband service. This is incorrect. The federal overlay does not apply to this case; state law and the local ordinance exclusively govern this matter. Moreover, even if the federal overlay does apply, Applicant failed its burden of proof on the federal issues.

Applicant asserted, and the staff and Commission assumed,[11] that Applicant is entitled to the preemptive benefits of 47 U.S.C. §332(c)(7) and the FCC's associated rules in 47 C.F.R. Part 1, Subpart U. This is not so. The Applicant does not qualify for coverage under this federal statute or the associated FCC Rules, because applicant is authorized to provide only non-common carrier fixed wireless broadband,[12] and Section 332(c)(7) does not apply to entities that only provide non-common carrier fixed wireless broadband.

This is a matter of law, where the ALJ exercises *de novo* independent judgment based on the record's facts. The Commission's apparent legal conclusion that Applicant is entitled to the federal protections is not binding and does not warrant any deference. The ALJ should find that the record does not support a legal conclusion that Applicant has proven entitlement to federal preemption. The ALJ should then sustain the Commission's findings that to the extent federal preemption does apply Applicant failed to carry its burden of proof on the federal issues.

[11] This was easy to miss by people that do not routinely deal with federal communications law. Applicant is at fault; Applicant as the federal licensee that should know better, yet made unsupported claims of entitlement to the federal overlay in §332(c)(7) based on a mischaracterization of the proper federal regulatory classification of its service and facilities.

[12] The FCC rules define "fixed service" as "A radiocommunication service between specified fixed points." 47 C.F.R. §§2.1, 24.5.

A. The Application materials show on their face that Applicant's only service is fixed wireless broadband, which is not covered by §332(c)(7).

The application for variance Appellant submitted says on its face that Applicant's service is "fixed wireless broadband."[13, 14] Applicant's fixed wireless broadband Internet access service is not "personal wireless service"[15] since it is not "commercial mobile service" "private mobile service" or an "interconnected service" as defined in 47 U.S.C. §332(d)[16] It is not "mobile service" or a "telecommunications service" as defined in 47 U.S.C. §153(33) [17] and (53).

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[13] *See* Planning and Community Department General Application, p. 1; *Minutes- Final Planning Commission Wednesday, April 16, 2025* (p. 59) ("This variance will allow T&H to provide infrastructure that immediately supports bringing fixed wireless broadband to Sitka.") The document then goes on to say the tower "provides infrastructure for *potential, future* cellular coverage for Sitka." *See also Statement of Facts* #10 (mobile services "eventually"). The significance of this statement is further addressed below.

[14] *See* 47 C.F.R. §§2.1 and 24.5 (terms and definitions):

> Fixed Service. A radiocommunication service between specified fixed points.
> Fixed Station. A station in the fixed service.

[15] *See*, 47 U.S.C. §332(c)(7)(C)(i)-(iii) Definitions (applicable only to paragraph (c)):

> (i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;
> (ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and
> (iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

[16] *See* 47 U.S.C. §332(d), Definitions (applicable to all of §332):

> For purposes of this section—
> (1) the term "commercial mobile service" means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;
> (2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B); and
> (3) the term "private mobile service" means any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

[17] 47 U.S.C. §153(33) defines "mobile service":

> The term "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90–314; ET Docket No. 92–100), or any successor

No evidence presented to the Commission indicated that customers will have the option of mobility with Applicant's service as described. No evidence presented to the Commission addressed or explained the subscriber equipment to be used with Applicant's service, so nothing indicates users can employ the service while "in motion." This, again, means Applicant did not prove it offers any mobile service. Applicant's proposed service is "broadband," but the evidence does not allow a finding it is mobile broadband and even that regulatory classification is still not within the definition of "personal wireless service."

The evidence is clear that Applicant is authorized to provide and will only provide "non common carrier" "information service."[18] *See FCC v. FCC (In re MCP),* 124 F.4th 993, 998, 1001-1009, 1009-13 (6th Cir. 2025), *reh'g en banc den*. March 11, 2025.[19, 20] The tower and antennas are not "personal wireless service facilities." Applicant's standalone fixed wireless broadband does not qualify for the treatment prescribed by §332(c)(7).

B. Applicant does not offer any service that *is* covered by §332(c)(7).

There are three ways Applicant could have brought itself within the coverage of §332(c)(7) and, thereby, 47 C.F.R. §§1.6001-1.6003. Applicant has not demonstrated it meets any of the statutory criteria for §332(c)(7) treatment and therefore cannot claim the benefits of the federal law that it asserts would preempt state and local law on variances and thereby require reversal of the Commission's denial.

1. Applicant is not FCC-authorized to provide personal wireless service.

The first way to qualify for coverage under the federal law would be for Applicant to obtain FCC approval to provide personal wireless service itself, using its current 2.5 GHz EBS spectrum or some other band. If an entity does provide personal wireless service, it can also offer "commingled" mobile wireless broadband (and even "fixed service") and remain covered by

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proceeding.

FCC rules define "mobile service" as "[a] radiocommunication service between mobile and land stations, or between mobile stations." A "mobile station" is "[a] station in the mobile service intended to be used while in motion or during halts at unspecified points." *See* 47 C.F.R. §2.1 (Terms and definitions).

[18] *See* 47 U.S.C. §153(24) (definition of "Information service.")

[19] "Using 'the traditional tools of statutory construction,' *id.*, we hold that Broadband Internet Service Providers offer only an 'information service' under 47 U.S.C. §153(24) … Nor does the Act permit the FCC to classify mobile broadband—a subset of broadband Internet services—as a 'commercial mobile service' under Title III of the Act (and then similarly impose net-neutrality restrictions on those services). *Id.* § 332(c)(1)(A)."

[20] The FCC has gone back and forth on whether Internet access is a telecommunications service several times, but the Sixth Circuit decision had now definitively resolved the question: fixed and mobile wireless broadband Internet access service is an information service, not a telecommunications service, and it is not personal wireless service.

§332(c)(7).[21] Applicant has not provided *any evidence* it has FCC authority to directly provide personal wireless service using its EBS spectrum.[22]

2. Applicant does not have definite collocation agreements with any provider of personal wireless service.

The second way to qualify for coverage under §332(c)(7) is to have definite and present arrangements for collocation of personal wireless service facilities by a third party provider like AT&T, Verizon, T-Mobile or a regional mobile provider.[23] An entity with definite contractual arrangements to provide collocation service to a carrier that does provide personal wireless service can claim the protection of the federal statute because the collocation provider will own and operate "personal wireless service facilities" as defined in §332(c)(7)(C)(ii) even though the entity itself does not directly provide the personal wireless service.[24] But Applicant has only said there will be room on the tower for collocation should a mobile provider ultimately ask for space, and there is clearly no current or definite agreement.[25] The proposed tower here does not at present meet the definition of "personal wireless service facilities" because there is no definite agreement to host antennas that will be used to provide personal wireless service.

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[21] *See*, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 9088, 9013, ¶36 & n.84 (2018) ("*Small Cell Order*") ("…these provisions apply to wireless telecommunications services as well as to commingled services and facilities.") (emphasis added); *see also* 47 C.F.R. §1.6002(b) definitions of "Antenna" and "Structure" – each requiring provision of personal wireless service but then also allowing "commingled" services.

[22] To secure FCC authority to directly provide personal wireless service Applicant had to ensure that its FCC license allows it to provide "Common Carrier - Interconnected" services using the relevant frequency band. Applicant mentions its FCC radio station authorization but did not provide a copy of it, perhaps because doing so would have revealed its ruse.

[23] *Small Cell Order*, 33 FCC Rcd at 9013, ¶36 & n.84. ("The fact that facilities are sometimes deployed by third parties not themselves providing covered services also does not place such deployment beyond the purview of Section 253(a) or Section 332(c)(7)(B)(i) insofar as the facilities are used by wireless service providers on a wholesale basis to provide covered services (among other things)").

[24] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies,* 29 FCC Rcd 12865, 12973, FCC 14-153, ¶¶271-272 (2014), *citing Crown Castle NG East Inc. v. Town of Greenburgh*, 2013 U.S. Dist. LEXIS 93699, 2013 WL 3357169 (S.D.N.Y. 2013), *aff'd*, 552 Fed. Appx. 47 (2d Cir. 2014); *Intermax Towers, LLC v. Ada Cnty*., 2024 U.S. Dist. LEXIS 7096, *15, 2024 WL 129033 (D. Id. 2024); *ExteNet Sys. v. City of Cambridge*, 481 F. Supp. 3d 41, 47-48 (D. Mass. 2020) ("ExteNet is a 'wholesale, facilities-based telecommunications services' provider that operates in Massachusetts. Wireless service providers, such as Verizon, AT&T, and Sprint, pay ExteNet to use its fiber optic cables and support equipment network to provide wireless coverage. Currently, ExteNet has a contract with AT&T to install five Small Wireless Facilities in Cambridge. Under the contract, ExteNet is responsible for obtaining the permits to install the Small Wireless Facilities, while AT&T is responsible for providing power and the necessary fiber and data." (Record citations omitted); *Liberty Towers, LLC v. Zoning Hearing Bd. of the Twp. Lower Makefield*, 748 F. Supp. 2d 437, 442 (E.D. Pa, 2010).

[25] The Site Plan Elevation View document submitted with the application on page C4 (*Minutes- Final Planning Commission Wednesday, April 16, 2025* at 28) shows only one antenna array for the 2.5 GHz antennas and then a place for three other "future antennas."

3. Applicant does not offer fixed point-to-point wireless transmission service on a common carrier basis.

Third, to qualify for §332(c)(7) treatment the applicant could offer and provide fixed point-to-point transmission service in the form of "common carrier wireless exchange access service" to one or more personal wireless service providers. As §332(c)(7)(C)(i) clearly states, however, the offering must be "common carrier," and Applicant never proved it has common carrier authority. Applicant has not demonstrated it has the necessary regulatory approvals and authorizations to bring itself within the scope of §332(c)(7)(C)(i), and no evidence was presented to the Planning Commission indicating there is a currently-effective agreement to provide common carrier wireless exchange access service to a third-party wireless carrier.

4. The proposed tower and facilities also do not meet the definitions for "Antenna" or "Structure" in the FCC rules.

Applicant's tower and associated antennas also do not meet the definitions in 47 C.F.R. Part 1, Subpart U for personal wireless services or facilities. For example, although there will be some kind of transmitting/receiving "antenna" there, it will not be an "antenna" for purposes of 47 C.F.R. §1.6002(b) because, again, there is no personal wireless service and no wholesale agreement for collocation or common carrier transport.[26] Further, the permit does seek permission to place a "tower" as that term is used in industry parlance, but it is not a "structure" under 47 C.F.R. §1.6002(m) because there is no personal wireless service, which means there is no qualifying "commingling."[27]

The Applicant's regulatory status and the lack of any current and formal wholesale agreements with any mobile provider means that this application does not qualify for §332(c)(7) treatment under any available criterion. Thus, the "effective prohibition" restriction in 47 U.S.C. §§253(a) and 332(c)(7)(B)(i)(II) does not apply. Similarly, the federal statutory "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. Likewise, although written decisions with stated findings are always a good idea and the Sitka Code requires them, the *federal* requirement in §332(c)(7)(B)(iii) does not apply. The express statutory prohibition against "regulating on the basis of environmental effects" in §332(c)(7)(B)(iv) does not apply. Finally, the federal cause of action and right to review in §332(c)(7)(B)(v) does not apply. In sum, Applicant can seek state court review under the ordinance and state law but there is no federal statutory cause of action or remedy in this context.

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[26] "Antenna," consistent with §1.1320(d), means an apparatus designed for the purpose of emitting radiofrequency (RF) radiation, to be operated or operating from a fixed location pursuant to Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under part 15 of this chapter. (emphasis added).

[27] "Structure" means a pole, tower, base station, or other building, whether or not it has an existing antenna facility, that is used or to be used for the provision of personal wireless service (whether on its own or comingled with other types of services). (emphasis added)

C. If the permit is granted the City and Borough will lose control over future modifications.

If this tower is permitted and constructed (albeit outside the coverage of §332(c)(7)), any later and qualifying "minor modifications" to any portion of it would be entitled to "eligible facilities" treatment under the Middle Class Tax Relief and Job Creation Act of 2012, §6409(a) ("Spectrum Act"), *codified at* 47 U.S.C. §1455(a), and the FCC rules at 47 C.F.R. §1.6100. Those authorities are not limited to personal wireless services or facilities. In contrast to §332(c)(7) and the related FCC rules, they *can* be used by an entity that provides only broadband Internet Access if the project meets the statutory and FCC rule criteria for "eligible facilities."[28]

This means that if this permit is granted, the tower could be unilaterally expanded through further height additions (so long each incremental increase is less than 10% of the original height) and – if there are at some point proper contractual arrangements – future collocations. Any required permits would be "shall issue" and not discretionary. The City and Borough will not have a second chance to decide the traditional zoning issues like consistency, aesthetics, and property values that are required for variances or amendments to previous variances.

The federal overlay that Appellant claims overrides any contrary state or local law simply does not apply. This application does not qualify for coverage under 47 U.S.C. §332(c)(7) or the associated FCC implementing rules binding local zoning authorities. But if the permit is granted other federal law will then take effect and the City and Borough will lose discretionary permitting control over future qualifying "minor modifications" to the tower.

IV. Even If The Federal Overlay Applies, Applicant Did Not Demonstrate That It Or Any Wholesale Customer That Provides Personal Wireless Service Has A "Significant Personal Wireless Service Coverage Gap."

The Commission "did not make a finding on whether the coverage gap as described by the applicant was considered significant." VAR 25-01 Findings for April 16, 2025 at 7. Applicant challenges this refusal in Appeal point 1. The Commission had good reason for refusing to find a gap, although it was mistaken about the kind of "significant gap" that the Ninth Circuit's test involves. Specifically, the "service" for which there must be a "significant gap" is *personal wireless service* and/or "commingled" mobile voice and broadband. When a wholesale company provides structure for other mobile providers in the form of collocation but does not itself offer any mobile wireless service, it must necessarily rely on its personal wireless service customer's service gap to show need.[29] Stated another way, the need analysis pertains only to the

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[28] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865, 12931, FCC 14-453, ¶154 (Oct. 2014).

[29] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies,* 29 FCC Rcd 12865, 12973, FCC 14-153, ¶¶271-272 (2014), *citing Crown Castle NG East Inc. v. Town of Greenburgh*, 2013 U.S. Dist. LEXIS 93699, 2013 WL 3357169 (S.D.N.Y. 2013), *aff'd*, 552 Fed. Appx. 47 (2d Cir. 2014) ("There is no dispute that Plaintiff proved that there was a service gap for its initial client, MetroPCS, and that Plaintiff's proposed DAS was needed to fill that service gap". 2013 U.S. Dist. LEXIS 93699, at *69 (emphasis added)); *Intermax Towers, LLC v. Ada Cnty*., 2024 U.S. Dist. LEXIS 7096, *5, *15, 2024 WL 129033 (D. Id. 2024)(wholesaler relied on Verizon Wireless service gap); *ExteNet Sys. v. City of Cambridge*, 481 F. Supp. 3d 41, 47-48 (D. Mass. 2020); *Liberty Towers, LLC v.*

services and facilities "covered" by §332(c)(7), and fixed wireless broadband service and facilities are not "covered" by that statute. This is clear from §332(c)(7)(B)(i)(I), which proscribes actions that "prohibit or have the effect of prohibiting the provision of *personal wireless services*." (emphasis added).[30]

Inadequate fixed wireless broadband coverage, standing alone, is not enough. The "coverage gap" must be for personal wireless service and the proposed facilities must be for the purpose of solving that gap. Applicant did not offer any evidence it offers personal wireless service. And it certainly did not prove it or any wholesale carrier customer suffers a gap in *personal wireless service* coverage.[31] Applicant representative Cropley acknowledged at the March 5, 2024 Commission meeting that Sitka already has "pretty good internet" and only 2% of households are unserved. *Transcription Excerpt March 5, 2025* (p. 38). The Applicant's tower is not necessary because broadband service is already available to the planned service area.[32]

The Commission therefore obtained the correct outcome when it refused to find that Applicant had demonstrated a significant gap in [personal wireless service] coverage.

A. Applicant Did Not Make the Kind of *Prima Facie* Case Required Under Ninth Circuit Precedent Before the Burden of Identifying Specific Alternatives Shifts To The Local Permitting Authority.

Applicant raises federal law based "least intrusive alternative" arguments in Appeal points 2, 4, 5 and 6. Applicant misstates, mischaracterizes and misapplies the Ninth Circuit "least intrusive alternative" test. First, the general rule is that the applicant always bears the burden of proof on all issues. Courts in the Ninth Circuit have held in the effective prohibition context, however, that *if the applicant makes a prima facie case* that the proposed location is the least intrusive alternative to solving a demonstrated significant gap in personal wireless service, the local authority must rebut that showing by identifying some potentially available and technologically feasible alternatives. The provider should then have an opportunity to dispute availability and feasibility. *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995-96, 998 (9th Cir. 2009). The City and Borough never bears the ultimate burden of proving feasibility or availability, which always remains with the Applicant. All it has to do – assuming a *prima facie* case has been made – is identify some "potentially available and technologically feasible alternatives."

Zoning Hearing Bd. of the Twp. Lower Makefield, 748 F. Supp. 2d 437, 442 (E.D. Pa, 2010) (wholesaler relied on service gaps of its customers Sprint and T-Mobile).

[30] *See*, *Source Towers II LLC v. City of Lakeland*, 2024 U.S. Dist. LEXIS 131272, *18-19 (M.D. Fl., Jul. 25, 2024) (Wholesale tower company relied on claimed gap by its customer Verizon but failed to demonstrate Verizon users "could not make a call" unless the tower was approved.)

[31] The Applicant claims to have no towers in Sitka so it may well suffer a "gap" for its non-covered terrestrial facilities-based fixed wireless broadband service. But that is not the focus of the significant gap test, which involves only gaps in personal wireless service.

[32] SFST is aware that the Ninth Circuit has held that the "significant gap prong is satisfied 'whenever a provider is prevented from filling a significant gap in *its own* service coverage.'" *MetroPCS,* 400 F.3d at 733. But it is clear from the First Circuit decision that persuaded the Ninth Circuit to change its stance that the focus is on filling a gap in *personal wireless service*, not fixed broadband service. *See Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 630-635 (1st Cir. 2002).

GTE Mobilnet of Cal. Ltd. P'ship v. City of Berkeley, Case No. 20-cv-05460-DMR, 2023 U.S. Dist. LEXIS 52004, *77-78 (N.D. Cal. 2023) tells us the rules for making a *prima facie* case:

> … a provider has made a *prima facie* showing that the proposed facility is the "least intrusive means" of filling a purported gap in coverage where it submits evidence that it considered alternatives and provides "adequate explanations" as to why they are not "feasible alternative[s] to meet [the provider's] coverage needs*." Los Angeles SMSA Ltd. P'ship v. City of Los Angeles, California*, et al., No. LA CV16-04954-JAK (SKx), 2020 U.S. Dist. LEXIS 269304, 2020 WL 13662046, at *22 (C.D. Cal. Sept. 1, 2020); *see also Anacortes*, 572 F.3d at 996-99 [(9th Cir. 2009)] (discussing provider's showing of a lack of available and feasible alternative sites).

To make a *prima facie* case the provider must adequately explain why other alternatives are not adequate. The Applicant here has tried to do that in by arguing it rejected all of them for financial[33] or other reasons. The test, however, is *technological feasibility* not cost, so its "explanations" are not "adequate." The known alternatives – limiting the height or collocating on another nearby tower – are clearly technologically feasible.[34]

The Planning Commission properly refused to find that Applicant had carried its burden of proving its proposal is the least intrusive alternative. VAR 25-01 Findings for April 16, 2025 at 7-8.

B. There Are Other Potentially Available And Technologically Feasible Alternative Sites That Would Allow Applicant To Provide Its Fixed Wireless Broadband Services.

Even if the Ninth Circuit's test does apply to Applicant's fixed wireless broadband, the record demonstrates there are other potentially available technologically feasible alternatives that would allow Applicant to provide its fixed wireless broadband services. So even if Applicant made a *prima facie* showing, it was adequately rebutted.

There is no dispute that available collocation space exists at an SBA tower very close to the proposed site. Tidal Networks rejected that option because it is "incompatible with Tidal Networks' (financial) model." *Minutes- Final Planning Commission Wednesday, April 16, 2025* at 37. This, again, has nothing to do with technological feasibility. Brandon Mars and Michael Tisher both own land in the nearby industrial area and testified that Tidal Networks never contacted about placing the project on their property. *Transcription Excerpt April 2, 2025* (pp. 57, 58).

Finally, as the Commission decision notes, "[t]hough the applicant stated that they would need more 35-foot-tall towers in the area to provide adequate coverage, they did not prove why

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[33] Applicant rejected collocation or leased land because it wants to own the underlying property or it deemed available space too costly in comparison to the cost of the proposed site. *Minutes- Final Planning Commission Wednesday, April 16, 2025* (p. 36). These are financial, not "technological feasibility" concerns.

[34] Again, the provider's preferred solution must be for the purpose of solving a demonstrated gap in *personal wireless service* coverage. The claimed gap and proposed solution here is to provide non-commingled fixed wireless broadband coverage, which is not covered by §332(c)(7). Applicant's complaint that a 35-foot tower will not support the entire desired fixed wireless broadband coverage area fails because it has nothing to do with a gap in *personal wireless service* coverage.

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." VAR 25-01 Findings for April 16, 2025 at 7. These factual conclusions are well founded in the evidence and should not be disturbed on appeal, since Applicant failed the least intrusive alternative test in multiple ways.

V. Even If §332(c)(7) Does Apply, Those Federal Directives and Limitations Do Not Completely Preempt And Disallow Application of Normal Zoning and Variance Considerations Contained in State Law and the Ordinance.

Regardless of whether §332(c)(7) applies, aesthetics, consistency with the surrounding community, and impact on surrounding property values are still legitimate concerns that local zoning authorities can consider. Adverse impacts in these areas justify denial. The effective prohibition restriction has exceptions and safe harbors; evidence-based determinations that the project is not consistent with the character of the neighborhood are not overridden by the effective prohibition restriction. Thus, even if there is a significant gap and the proposed site is the least intrusive alternative, the Commission still had enough evidence to deny the applications.

Section 332(c)(7)(A) sets the general rule for the federal overlay, where it applies. The basic rule is that local zoning authorities retain their traditional power over land use issues for wireless matters. Subparagraph (B) then establishes certain federal limits and requirements and provides a cause of action for any "person adversely affected by any final action or failure to act." The Ninth Circuit, other courts, and the FCC have directly held that when the limits in (B) apply, they do not always and automatically preempt the traditional local land use considerations preserved by (A). The federal law still allows practical "safe harbors" that allow for permit denials if the project would have adverse impacts on the surrounding community and nearby parcels.

47 U.S.C. §§253[35] and 332(c)(7)(B) do generally protect personal wireless providers from state or local regulation that prohibits (or effectively prohibits) the carriers' ability to provide personal wireless services. But the restriction is not absolute, nor does it override all other considerations and requirements. That is because the "effective prohibition" restriction in 47 U.S.C. §332(c)(7)(B)(i)(II) is <u>limited</u> by 47 U.S.C. §253(b) and (c), just as is the similar restriction in §253(a). They collectively require that a balance be struck.

The Supreme Court has long recognized that state and local governments have the authority to impose land use, zoning, and other aesthetic requirements. *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 300 (2015). Both §§253 and 332(c)(7)(B)(i)(II) preserve "state 'requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers'" even ***if*** they may materially inhibit the provider's ability to serve. These "safe

[35] Applicant has not invoked 47 U.S.C. §253 even though it too has an effective prohibition restriction. The likely reason is that that section even more clearly applies only to "telecommunications services" and Tidal Networks does not offer or provide any telecommunications service. It exclusively provides information service in the form of fixed wireless broadband. The precedent indicates, however, that the §253(b) "safe harbors" also apply to §332(c)(7).

harbors" "permit some legal requirements that might otherwise be preempted." *Small Cell Order*, 33 FCC Rcd at 9113-9114, 9130, ¶82.[36]

The *Small Cell Order* applied the "material inhibition" standard to local jurisdictions' "aesthetic"[37] requirements in ¶¶81-91, 33 FCC Rcd at 9130-9134. The FCC decreed that "aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance." At the same time, however, the Commission noted that "aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible." *Id.* ¶87, 33 FCC Rcd at 9132.

The Ninth Circuit reversed in part on this issue. It held that the FCC overstepped by requiring that aesthetic regulations for small cells be "no more burdensome" than those for other services; only "unreasonable discrimination" is prohibited. *Portland*, 969 F.3d at 1031. The court noted that "regulations focused on legitimate local objectives, such as ordinances requiring installations to conform to the character of the neighborhood" are not precluded by the "effective prohibition" restriction. "We do not see how all such regulations, designed like traditional zoning regulations to preserve characteristics of particular neighborhoods, materially inhibit, materially limit, or effectively prohibit the deployment of 5G technology." 969 F.3d at 1042. (emphasis added).

Local jurisdictions therefore retain the power to decide whether the location desired by the wireless provider is appropriate based on even subjective[38] aesthetic and locational considerations. The test is whether the local regulation is "reasonable." The wireless provider's interest does not predominate; balancing is required.

In sum, there are "safe harbors" from the "effective prohibition" limitation, and the limitation does not overwhelm all other traditional zoning considerations. Reasonable regulations focused on legitimate local objectives, such as ordinances requiring installations to "conform to

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[36] The FCC explained that the "safe harbors" embodied in 47 U.S.C. §253(b) "operate[] as a limitation on" the "effective prohibition" restriction in subsection (a) in *In the Matter of The Public Utility Commission of Texas, et al, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, 13 FCC Rcd 3460, 3480-3481, ¶¶42-44 (1997). The *Small Cell Order* held that the same safe harbor limitations also apply to and similarly limit the effect and scope of §332(c)(7)(B)(i)(II).

[37] Aesthetic requirements are not the same as regulations addressing "stealth" or "concealment" methods. A "concealment" element is "intended to make the facility look like something other than a wireless tower or base station." *In re Implementation of State & Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests*, 35 FCC Rcd 5977, 5994, ¶34 (2020). Aesthetic requirements, in contrast, are more broadly intended to minimize the visual impact of a facility and apply to "non-stealth" facilities like the ones in issue here. "[L]ocal governments often address visual effects and concerns in historic districts not through specific stealth conditions, but through careful placement" conditions. *Id.*, 35 FCC Rcd at 5994-5995, ¶36. The proposed brown paint on the tower in issue is not "stealth" or "concealment"; it is instead an "aesthetic" mitigation approach although it will be wholly ineffectual to the intended purpose.

[38] *See Portland*, 969 F.3d at 1042 (rejecting FCC requirement that aesthetic standards be "objective" because some subjective standards can still serve a public purpose).

the character of particular neighborhoods" and not negatively impact property values are not precluded by the "effective prohibition" restriction.

This means that Tidal Networks' interests do not automatically and without exception preponderate over all others. There is balancing to be done. Applicant had the burden of addressing the balance of interests and completely failed to even touch the subject; it simply asserts all other interests are irrelevant and only its desires and preferred locations matter. The statute itself and the Ninth Circuit *Portland* decision instruct otherwise. The "effective prohibition" does not preempt "regulations focused on legitimate local objectives, such as ordinances requiring installations to conform to the character of the neighborhood." Reasonable "regulations, designed like traditional zoning regulations to preserve characteristics of particular neighborhoods" do not "materially inhibit, materially limit, or effectively prohibit …" *Portland*, 969 F.3d at 1042.

The proposed site will create a permanent visual blight that detracts from treasured scenic views and disrupts the character of the surrounding area. Such considerations lie at the heart of land use and planning. They are, ultimately, why there are zoning and related use laws and their associated design mandates: to maintain aesthetics and ensure that unsightly infrastructure is not placed helter-skelter in inappropriate locations. Tidal Networks contends that the "effective prohibition" proscription is a magic talisman, indeed a sword, that grants it a free hand in placing towers and monopoles wherever it pleases. The statute does not go that far.

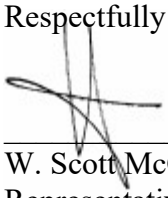
Congress preserved local zoning authorities' power to determine whether the proposed location is suitable for this use. Here, it is not. The tower does not belong right on top of residences. The project is inconsistent with the character of the community. It will reduce property values and destroy precious views. Local authorities can lawfully deny applications for wireless facilities that would have that effect. *See, e.g. Mun. Commc'ns III, LLC v. Columbus*, 2024 U.S. Dist. LEXIS 115947, *29-30 (M.D. Ga., Jul. 1, 2024) *citing Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1208-1209 (11th Cir. 2002); *Smith Communs., LLC v. Wash. County*, 785 F.3d 1253, 1259 (8th Cir. 2015).

Tidal Networks has not proven it has a significant gap in personal wireless service. Even if there is some gap, Applicant has not proven its proposal is the least intrusive alternative. The proposed site is not appropriate for the surrounding neighborhood. The effective prohibition restriction does not compel the City and Borough to put the wrong thing in a wrong place for wrong reasons. The Planning Commission's rejection of the application for a variance was correct, and it entered adequate findings explaining its evaluation of the evidence and its reasoning.

CONCLUSION

The appeal should be denied. The Commission's ultimate disposition of the variance request was well-grounded in the facts in the record. Its basic findings were correct, as were its conclusions. This tower does not belong at the proposed site. There are available alternatives that would not lead to the many negative effects detailed in the record and highlighted in this Opposition. Federal law does not require that the residents near this proposed project have their homes devalued, their scenic views destroyed or constantly live with the threat the tower will fall on them or their property.

Respectfully Submitted,



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August 14, 2025

Served on all party representatives