

5. Board file and record for Appeal #2022-001:
 - a. Appeal Exhibits 1-31.
6. Board file and record for Appeal #2022-002:
 - a. Appeal Exhibits 1-35.
7. Planning and Zoning Staff Analysis, dated March 2, 2022.

B. PROCEDURAL HISTORY

1. The Commission opened a public hearing on September 16, 2021. The Commission tabled the hearing until the date of October 21, 2021.
2. The Commission resumed the public hearing on October 21, 2021. Horizon Tower, LLC (“Applicant”) and the public provided testimony regarding the CUP. The Commission approved the CUP with site-specific conditions.
3. The Commission approved and signed the Findings of Fact, Conclusions of Law, Conditions of Approval and Order for CUP #2021-006 on November 2, 2021.
4. The Planning and Zoning Department received the Notice of Appeal and filing fees from Eric Snyder on behalf of thirty-four (34) residents on November 16, 2021. Mr. Snyder’s appeal has been designated as Appeal #2022-01.
5. The Planning and Zoning Department received the Notice of Appeal and filing fees from Jennifer Ferguson on November 16, 2021. Ms. Ferguson’s appeal has been designated as Appeal #2022-02.
6. A public hearing for the appeals was scheduled by the Board for Thursday, March 3, 2022 at 9:30 a.m.
7. Notice of the Public Hearing was mailed/emailed to the appellants, Applicant, and applicable agencies.
8. Legal notice of the public hearing was advertised in the Idaho World on February 2, 2022 and February 9, 2022.
9. On March 3, 2022, the Board conducted the advertised public hearing to consider the appeal of CUP #2021-006 Horizon Tower, LLC.
10. Parties of Record: Planning and Zoning Administrator Alex Gross gave a staff analysis; Attorney Norman Semanko and Attorney Andrew Campanelli provided testimony in support of Appeal #2022-01; Jennifer Ferguson provided testimony in support of Appeal #2022-02; and Attorney Joshua Leonard and Radio Frequency Engineer Steve Kennedy provided testimony on behalf of Horizon Tower, LLC in opposition to the appeals.
11. Public Testimony: Members of the public provided testimony regarding the appeal of CUP #2021-006 Horizon Tower, LLC.
12. After hearing all testimony from the parties to the appeal, the Parties of Record, and the public, the Board closed the public hearing and tabled the deliberation to March 15, 2022 at 1:15 p.m.
13. On March 15, 2022, the Board deliberated Appeal #2022-01 and Appeal #2022-02 and affirmed and upheld the decision of the Commission to approve CUP #2021-006.

C. FACTS

1. The public had the opportunity to provide testimony at the October 21, 2021 public hearing and the March 3, 2022 public hearing. No member of the public was prevented from testifying.
2. The property subject to this appeal is located at 134 Mores Creek Rim Road, Boise, Idaho 83716 (RP04N04E28724B).

3. The property is owned by the Robbie Creek Volunteer Fire Department (“RCVFD”).
4. The property is a two acre parcel consisting of RCVFD’s Fire Station #2 and a water treatment facility.
5. RCVFD has agreed to lease 2,500 square feet of the property to the Applicant.
6. The Applicant is seeking a CUP to construct a 150-foot tall monopole telecommunications facility (“cell tower”) on the property it will lease from the RCVFD.
7. The properties surrounding the RCVFD property consists mainly of residential homes.
8. Applicant’s proposed cell tower location will be immediately adjacent to at least one residential home.
9. Several residents surrounding the RCVFD property purchased their properties because of the view the properties had of the surrounding mountains.
10. Several property owners testified that a cell tower located at the RCVFD property would negatively impact their scenic views.
11. Several property owners also testified that a cell tower located at the RCVFD property would negatively impact their residential property values.
12. Appellant Jennifer Ferguson submitted into the record a document stating that a “2014 survey by the National Institute for Science, Law, and Public Policy found that 94% of its respondents said cell towers and antennas in a neighborhood or on a building would impact how interested they would be in a property and how much they would pay for the it.”
13. The document further stated that “79% of those respondents said they would not under any circumstances buy or rent a property within a few blocks of [a cell tower], while 88% said they would never buy or rent a place that had a cell tower or group of antennas attached to it.”
14. The cell tower proposed by the Applicant will consist of a 150-foot tower, utility H-frame with new 4 gang meter bank, and carrier equipment.
15. The cell tower will include the RCVFD’s radio transmitters and antennae.
16. The cell tower will also include space for the antennae and equipment of four cellular carriers at 115-foot high, 125-foot high, 135-foot high, and 145-foot high.
17. Verizon Wireless will be the anchor tenant and will place its equipment on the cell tower.
18. The cell tower and all its elements will be contained within a 50-foot by 50-foot fenced compound.
19. The fence will be a 6-foot tall chain link fence rimmed with barbed wire.
20. Access to the cell tower will be accomplished using a 12-foot wide access and utility easement granted by the RCVFD.
21. The access easement is located to the north of Fire Station #2 and will be graveled.
22. The cell tower will be unmanned.
23. The Applicant estimates that upon completion of construction, the cell tower will require monthly visits to provide maintenance services.
24. During construction of the cell tower, the Applicant will use a temporary Cell On Wheels trailer (COW) on the property to provide wireless communications services until construction of the cell tower is complete.
25. The construction of the cell tower is designed for the purpose of providing wireless services to the Robie Creek population center and Highway 21.
26. The Robie Creek population center is in a license protect site.
27. The Federal Communications Commission (“FCC”) regulates that any transmitter that holds an FCC license must provide wireless coverage to the population centers within the license protect site.

28. Verizon Wireless holds the FCC license for wireless coverage for the Robie Creek population center.
29. The FCC license requires Verizon Wireless to provide wireless service to the population center of Robie Creek.
30. If Verizon Wireless does not provide wireless service to the population centers within the license protect site, the FCC will revoke the license.
31. In order to keep its FCC license, Verizon Wireless has hired Applicant to construct a cell tower that will provide wireless coverage to the Robie Creek population center.
32. The Applicant's goal for the cell tower is to: (1) provide wireless coverage along Highway 21 through Robbie Creek area; and (2) provide in-building wireless service to residents and businesses in the Robie Creek population center.
33. The Applicant provided testimony from Radio Frequency Engineer Steve Kennedy.
34. Mr. Kennedy provided drive test data from Root Metrics showing that wireless services were not available along Highway 21 and in the Robie Creek population center.
35. Mr. Kennedy testified that T-Mobile and AT&T drive tests also showed no wireless services along Highway 21 in the Robie Creek area.
36. Mr. Kennedy testified that data from Open Signal confirmed that there were no wireless services along Highway 21 in the Robie Creek area.
37. Mr. Kennedy also provided propagation models depicting coverage service in and around the Robie Creek population center.
38. Mr. Kennedy also testified that dropped call data in that area was not available because there was no wireless network in the area for a device to connect with in order to have a subsequent dropped call.
39. The Applicant testified that it spent about one year searching for an appropriate location to place the cell tower that would provide wireless services for Highway 21 and in-building wireless services for the residents and businesses within the population center of Robbie Creek.
40. The Applicant considered using at least eleven (11) alternate locations for the location of the cell tower.
41. The Applicant sent letters to property owners of each alternate location.
42. Many property owners either did not respond to the Applicant's letter or declined the opportunity to construct a cell tower on the locations.
43. Potential locations within the Wilderness Ranch Subdivision were eliminated from consideration because the subdivision's Covenants, Conditions, & Restriction prohibited commercial activity and the Home Owner's Association intended to enforce such provisions against the Applicant.
44. One alternative location considered was located 0.8 miles north of the RCVFD location.
45. Mr. Kennedy provided propagation maps showing that this alternative location did not provide in-building service for the Robie Creek population center. Therefore, Mr. Kennedy testified that a second tower would be required to achieve in-building service for Robie Creek.
46. The eleven (11) alternate locations were deemed by the Applicant to be non-viable for a cell tower.
47. The Applicant considered alternate locations to be non-viable if the locations:
 - a. Were not located within the carriers' search ring;
 - b. Did not include a 50-foot by 50-foot area that is reasonably flat on which the cell tower and its components could be constructed;
 - c. Did not have reasonable access;

- d. The owner of the alternate location was not willing to lease property to the applicant at reasonable terms; and/or
 - e. The location did not have utilities nearby.
48. The Applicant considered the RCVFD property to be the only location that met its viability requirements to build a cell tower that would provide wireless services for Highway 21 and in-building wireless services for the residents and businesses within the population center of Robbie Creek.
 49. Appellant Eric Snyder's appeal, memorandum, and exhibits in support of appeal did not provide any evidence of an alternative location for a cell tower.
 50. Appellant Jennifer Ferguson's appeal, memorandum, and exhibits in support of appeal did not provide any evidence of an alternative location for a cell tower.
 51. During the March 3, 2022 public hearing, Appellant Snyder did not provide any evidence of a specific alternate location for a cell tower.
 52. During the March 3, 2022 public hearing, Appellant Ferguson suggested that the cell tower should be located at property owned by Brian Andrus (also referred to in the public hearing as the "Maverick" site).
 53. The Andrus property is located at 13 Blacksmith Road, Boise, Idaho.
 54. Appellant Ferguson did not provide any evidence depicting the wireless service coverage that would be available at the Andrus property.
 55. During the March 3, 2022 public hearing, Mr. Andrus provided public testimony confirming that his property could be used to construct a cell tower. Mr. Andrus also testified that his property was previously considered for the construction of a cell tower by T-Mobile, but T-Mobile ultimately did not construct the tower. Mr. Andrus testified that his property contained a hillside that could be used for a cell tower. Mr. Andrus did not provide any evidence depicting the wireless service coverage that would be available at his property.
 56. Mr. Andrus also provided a written comment to the Board in support of the appeals. The written comments stated that Mr. Andrus would offer a portion of his property for a cell tower. The comments stated that the location met all the requirements Horizon Tower was looking for and would not "impede on ANY surrounding homes/structures/people's lives."
 57. The Applicant testified that it considered Mr. Andrus's property and determined that the property was not viable. The property is 100 feet lower in elevation and would require the Applicant to build a 250 foot tower rather than a 150 foot tower. Even with a 250 foot tower, Mr. Kennedy testified that the location would not provide wireless service to a northern portion of Highway 21, whereas the RCVFD location was capable of providing service further north on Highway 21. Therefore, Mr. Kennedy testified that a second tower would be necessary to match the service available from the RCVFD location. Further, a 250 foot tower would require the Applicant to place lights on the tower for aviation purposes, which would increase its visibility. Additionally, the Applicant would need to cut and fill portions of the hillside in order to create a flat spot to construct a cell tower.
 58. Appellant Ferguson argued that a cell tower located at the RCVFD location could impact bald eagle nesting sites. Appellant Ferguson provided documentation and evidence concerning the impact that a cell tower could have on bald eagle nests.
 59. The Applicant testified that FCC regulations and the National Environmental Policy Act ("NEPA") require it to complete a Biological Assessment or similar evaluation to determine the impact that a cell tower would have on certain species, including bald

eagles. If the assessment reveals that the cell tower could impact bald eagle nesting sites, the FCC will prohibit Horizon Tower from constructing the tower.

60. Appellant Snyder argued that the 150-foot cell tower would not have a meaningful or safe fall zone. If the structure failed and the tower collapsed, the neighboring home would be within the fall zone placing the home and its residences at significant risk.
61. The Applicant recommended that the Board include a site-specific condition to address the fall zone. Specifically, the Applicant recommended that the Board require it to relocate the cell tower so the cell tower is at least one hundred and fifty (150) feet from the nearest house. This would place the nearest house outside of the fall zone.

D. SITE-SPECIFIC CONDITIONS

The Commission approved the CUP with the following site-specific conditions:

1. This conditional use permit is non-transferable to another property and is only valid at 134 Mores Creek Rim Road, Boise, Idaho (RP04N04E28724B).
2. The days and hours of operation shall be set as: 24 hours a day, 7 days a week. However, generator testing may only occur between the hours of 10 a.m. and 5 p.m. and shall not occur on weekends or holidays unless in the event of an emergency.
3. Applicant shall provide appropriate screening along the fences surrounding the tower.
4. The tower shall be constructed out of non-reflective material and painted to blend into the surroundings.
5. Lighting shall be shielded to prevent glare, and only illuminated in accordance with regulations.
6. Applicant shall keep all structures and grounds in a clean and orderly condition.
7. Applicant shall apply for a sign permit, if a sign(s) is to be installed, with the applicable fees paid; and, any on-site signage shall comply with the Boise County Unified Land Use Ordinance #2016-01, as Amended by Resolution #2018-57 dated September 25, 2018, Chapter 3.6. No signs are permitted within any public right-of-way.
8. Applicant shall provide the Planning and Zoning Department with a copy of their current paid insurance policy suitable to this type of business, and maintain insurance each year.
9. Applicant shall obtain from the Planning and Zoning Department a Certificate of Completion of Conditions prior to the opening of the business.
10. Applicant shall obtain and maintain any and all licenses and permits from the necessary authorities to operate such a facility in addition to the Boise County CUP.
11. Applicant shall obtain all licenses and permits from all necessary authorities to operate the Cell On Wheels trailer (COW).

CONCLUSIONS OF LAW

Based on the facts contained in the record, including the facts identified above, the Board makes the following conclusions of law:

A. General Conclusions of Law.

1. The application contained sufficient information for the Commission and this Board to make all factual findings required by Boise County's Unified Land Use Development Ordinance ("ULO").

2. The application contained sufficient information to allow the public with a meaningful opportunity to comment on the CUP's impact on the community and surrounding properties.

B. ULO Conclusions of Law.

To approve a CUP, the Board must make the nine required findings identified in ULO ' 4.3.E. Accordingly, the Board makes the following findings and conclusions of law:

1. The Board finds that the proposed use meets the commercial use identified as "Towers or Antenna Structure (Commercial)" in Table 4.1.D.5 of the ULO.
2. The Board finds that the proposed use does not meet the goals and policies of the Boise County Comprehensive Plan. Chapter 1, "Private Property Rights," contains an objective to "recognize that property owners have responsibility in that ownership and should not negatively impact the value of property around them." The Board concludes that the evidence presented demonstrates that the cell tower would negatively impact the value of properties nearby. Nearby properties include several residential properties containing homes. The Applicant recognized that the presence of a cell tower could give a negative impression to potential real property buyers that would impact property values. The record also contained a 2014 survey by the National Institute for Science, Law, and Public Policy that found that 79% of respondents would not buy or rent a property within a few blocks of a cell tower. As a result, the Board finds that the Applicant's proposed cell tower would likely negatively impact the value of nearby residential properties, which would be inconsistent with the Boise County Comprehensive Plan.
3. The Board finds that the proposed use would not be operated and maintained to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that the proposed use would change the essential character of the same area. Photographs in the record and testimony provided at the public hearing demonstrate that the cell tower would not be harmonious in appearance with the surrounding residential uses.
4. The Board finds that the proposed use will not be hazardous or in conflict with existing neighboring uses. The Board finds that federal law prohibits the Board from regulating radio frequency emissions so long as the cell tower complies with FCC's regulations concerning such emissions. The Board finds that the proposed cell tower will comply with FCC's regulations relating to radio frequency emissions.

Additionally, the Board finds that the Applicant is required to complete a Biological Assessment or similar assessment in accordance with NEPA, and should the assessment reveal that bald eagle nesting sites could be impacted by the cell tower, the Applicant will be prohibited by the FCC from constructing a cell tower at the RCVFD location. Thus, the procedures and mechanisms provided by federal law will determine if the cell tower could impact bald eagle nesting sites and will regulate the construction of the cell tower in order to minimize or eliminate such impacts, or will simply prohibit the construction of a cell tower. Accordingly, so long as the Applicant complies with federal laws, which is also a condition of the CUP, the cell tower will not negatively impact nearby nesting sites.

Further, the Board finds that a cell tower located at the RCVFD location will not present a fall risk to neighboring uses so long as the cell tower is constructed at a location that places neighboring properties outside of the 150-foot fall zone. Accordingly, the Board imposes a site-specific condition requiring the Applicant to relocate the cell tower to a location on the RCVFD property that would be at least 150 feet away from the nearest residential home. With this site specific condition imposed, the cell tower will not be hazardous to neighboring properties should the cell tower collapse.

5. The Board finds that the proposed use will be served adequately by essential public facilities and services.
6. The Board finds that the proposed use will not create excessive additional costs on public facilities and services and will not be detrimental to the economic welfare of the community.
7. The Board finds that, with site-specific conditions imposed, the proposed use will not be detrimental to any persons, property, or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare, or odors.
8. The Board finds that the proposed use will have a vehicular approach that will not create an interference with traffic on surrounding public thoroughfares.
9. The Board finds that the proposed use will result in destruction of a natural, scenic, or historic feature. Specifically, the Board finds that the cell tower will result in the destruction of scenic views. The residential areas located around the proposed cell tower location enjoy scenic views of the surrounding mountains. Many homeowners moved to the Robie Creek area for the scenic views. The highway running through Robie Creek, Highway 21, is designated as the Ponderosa Pine Scenic Byway. Scenic views dominate the Robie Creek area and attract residents and visitors to the region. The Board finds that the erection of a cell tower at the RCVFD location will interfere with the scenic views.

Based on the finding and conclusions above, **the Board finds that the CUP application does not comply with the ULO.** The Board is unable to make all required findings identified in ULO ' 4.3.E. The Board would deny the CUP application so long as federal law does not prohibit the Board from doing so.

C. Federal Conclusions of Law.

Federal law allows the Board to determine the placement, construction, and modification of personal wireless service facilities, including cell towers. *See* 47 U.S.C. ' 332(c)(7)(a). However, the Board's authority to determine the placement of a cell tower is limited. The Board cannot "prohibit or have the effect of prohibiting the provision of personal wireless services." *Id.* at ' 332(c)(7)(b)(i)(II). The Ninth Circuit Court of Appeals has concluded that a governing board's denial of a cell tower application prohibits or has the effect of prohibiting the provision of personal wireless services if: (1) there is a significant gap in coverage; and (2) the proposed location is the least intrusive location. *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715 (9th Cir. 2005). Therefore, in order to deny the Applicant's CUP, the Board must first determine whether there is a

significant gap in coverage in the Robie Creek area, and whether the Applicant's proposed cell tower location is the least intrusive location.

1. Significant Gap in Coverage.

The Board finds that there is a significant gap in coverage in the area of the proposed cell tower. The evidence in the record shows that there is no wireless service along Highway 21 through Robie Creek and there is no in-building wireless service in the residences and commercial buildings in Robie Creek. The Applicant testified that drive test data from Root Metrics and propagation models showed the lack of personal wireless service in these areas. Further, T-Mobile and AT&T drive tests, and Open Signal data confirmed that there is no wireless services in these areas. Lastly, the Applicant testified that dropped call data was not available because there was no wireless network in the area for devices to connect to in order to have a subsequent dropped call.

Based on the foregoing, **the Board finds that there is a gap in personal wireless coverage in the area that the cell tower is proposed to serve.** Further, the gap is significant as the gap covers Highway 21, a major travel thoroughfare, and the gap includes several residential and commercial properties in the Robie Creek population center.

2. Least Intrusive Location.

a. Factual Background.

The Applicant provided a list of eleven (11) alternative locations that it considered for the cell tower. The Applicant testified that the eleven (11) alternative locations were not viable for a variety of reasons. These reasons included:

- The property owners did not respond to the Applicant's communications.
- The property owners refused to allow a cell tower on their property.
- The properties did not have a 50x50 foot flat area to erect a cell tower.
- The properties did not have access to the proposed cell tower location.
- The properties did not have nearby utilities.
- The properties were located in the Wilderness Ranch Subdivision, which prohibit commercial activity.
- The properties did not provide adequate coverage of the Robie Creek population center or Highway 21.

The Applicant provided propagation models showing that the RCVFD location would provide wireless coverage to Highway 21 through the Robie Creek area and would provide in-building wireless coverage to the Robie Creek population center. The Applicant also provided evidence that the owners of the RCVFD property were willing to lease the property to Applicant, the RCVFD property had a 50x50 foot flat area to construct a cell tower, the RCVFD location had proper access, and the RCVFD location was near existing utilities. The Applicant claimed that all other locations identified and analyzed by the Applicant failed to meet these viability standards. As a result, the Applicant alleged that the RCVFD location was the least intrusive location in order to fill the significant gap in coverage.

Opponents of the cell tower had the opportunity to submit evidence and testimony of alternate locations. Appellant Snyder's memorandum in support of his appeal did not contain any argument of a specific alternate location. Appellant Snyder also did not submit any written documents, exhibits, or evidence of an alternate location. Further, during the March 3, 2022 public hearing, Appellant

Snyder did not provide any testimony or argument of a specific alternate location. Indeed, Appellant Snyder's federal analysis relied exclusively on the argument that the record did not contain sufficient evidence to establish a significant gap in coverage and failed to make any argument concerning an alternate location.

Appellant Ferguson's memorandum in support of her appeal also did not contain any argument of a specific alternate location. Appellant Ferguson also did not submit any written documents, exhibits, or evidence of an alternate location. During the March 3, 2022 public hearing, Appellant Ferguson for the first time mentioned the Andrus property as an alternate location. However, Appellant Ferguson's statements only indicated that: (1) the Andrus property was previously approved for a cell tower by Maverick Properties; (2) Maverick Properties is an Idaho based company that pays taxes in Idaho; (3) Horizon Towers is a California based company that does not pay taxes in Idaho; and (4) Horizon Towers took business away from Maverick Properties. Appellant Ferguson's implication was that the Andrus property was a preferred location because it supported an Idaho business rather than an out-of-state business. Appellant Ferguson provided no further testimony or evidence regarding the Andrus property.

Public testimony in opposition of the cell tower generally recommended that the cell tower should be located at a different and better location. However, the majority of public testimony failed to identify a specific location that would be less intrusive than the RCVFD location. Instead, the majority of opponents relied on general and speculative statements asserting that the cell tower should be located at a better location.

Only one member of the public identified a specific location. Brian Andrus, owner of the Andrus property, provided public testimony at the March 3, 2022 public hearing. Notably, Mr. Andrus did not provide public testimony at the October 21, 2021 Planning & Zoning public hearing and did not provide a written public comment or submit any documentation to the Commission. Instead, Mr. Andrus only raised the option of his property serving as a potential alternate location when he submitted a public comment to the Board in support of the appeals and during the March 3, 2022 public hearing.

Mr. Andrus testified that his property was approved for a cell tower by Maverick Properties. He testified that his property had a 50x50 foot area where a cell tower could be located. Mr. Andrus did not provide any testimony, evidence, or data showing the wireless coverage that would be possible from his property or showing that the property would be a feasible location. He did not submit any propagation maps or any other evidence showing that a cell tower at his property would provide wireless coverage that would cover Highway 21 and provide in-building coverage for buildings and residences in the Robie Creek population center. He also did not submit any evidence regarding access to the property or whether utilities were located close to the property.

Mr. Andrus also testified that his property had a hillside that could potentially serve as a location for a cell tower. Mr. Andrus testified that the hillside could "probably" provide more coverage than the RCVFD location. However, Mr. Andrus once again did not provide any testimony, evidence, or data showing the wireless coverage that would be possible from the hillside or showing that the hillside would be a feasible location. He did not submit any propagation maps or any other evidence showing that a cell tower located on the hillside would provide wireless coverage that would cover Highway 21 and provide in-building coverage for the Robie Creek population center. Instead, Mr. Andrus simply speculated that the hillside on his property "probably" would provide more coverage, without producing any facts or evidence to support his assertion. He also did not submit any evidence indicating whether a flat 50x50 surface existed on the hillside to construct a cell tower. He also did not submit any evidence regarding how the Applicant could access the hillside, or whether

utilities could be provided near the hillside location. There simply is no real evidence indicating whether the hillside location on Mr. Andrus's property would be a feasible location at all.

The Applicant provided rebuttal testimony regarding the Andrus property. The Applicant's Radio Frequency Engineer, Mr. Kennedy testified that the Andrus property is located 100 feet lower than the RCVFD location. As a result, a cell tower on the Andrus property would need to be constructed at 250 feet in order to compare the level of coverage available between the two locations. Mr. Kennedy testified that a 250 foot cell tower located on the Andrus property would not be able to provide wireless service coverage to the northern portion of Highway 21 due to the topography of the area. Specifically, a mountain is located near the Andrus property that blocks the Andrus property from having a clear line of sight to the northern portion of Highway 21. As a result, a cell tower located on the Andrus property would be unable to provide wireless coverage to the northern portion of Highway 21 because the coverage would be blocked by the mountain. Mr. Kennedy testified that a second cell tower would need to be constructed in order to equal the service coverage available at the RCVFD location.

Further, Mr. Kennedy testified that a 250 foot cell tower would need to comply with the Federal Aviation Administration's ("FAA") requirements for lighting. Mr. Kennedy stated that a cell tower at the Andrus property would need a light, beacon, or strobe to comply with FAA standards.

The Applicant also testified that hillsides are generally not suitable for cell tower construction because cell towers require a 50x50 foot flat surface. In order to construct a cell tower on the hillside located on the Andrus property, the Applicant would need to cut and fill portions of the hillside to create a suitable building site. Additionally, hillside locations present access challenges, and often require easements through private property in order to obtain access to the hillside or to provide utilities to the hillside.

The Applicant also testified that its FCC license required it to provide wireless coverage along Highway 21 from Lucky Peak area to Idaho City. The Applicant testified that a cell tower located on the Andrus property would require a total of eleven cell towers along Highway 21 in order to provide wireless coverage from Lucky Peak to Idaho City. On the other hand, if the cell tower is located at the RCVFD location, it would only require six or seven cell towers to achieve the same coverage.

b. Legal Conclusion.

The Board finds that the Applicant produced evidence showing that there are no viable alternate locations. The Applicant analyzed at least 11 alternate locations and determined that each alternate location was not viable because: (1) the location did not provide wireless coverage to Highway 21 or in-building coverage to Robie Creek; (2) the location was not leasable; (3) the location was not accessible; (4) the location was not located near existing utilities; or (5) the location did not have a 50x50 foot flat surface to construct a cell tower.

The Board finds that the record contains no evidence to establish a less intrusive alternate location. There is no evidence in the record to establish that an alternate location exists that would provide wireless coverage along Highway 21 and in-building wireless coverage to the residents and commercial properties in the Robie Creek population center. The record does not contain any propagation maps or any other data showing that an alternate location could achieve substantially similar coverage to the RCVFD location.

Appellant Snyder did not provide any evidence or argument of an alternate location. Appellant Ferguson suggested the Andrus property as an alternate location because it supported an Idaho business. However, Appellant Ferguson did not submit any evidence or argument relating to whether

the Andrus property would provide wireless coverage to Highway 21 and in-building coverage to the Robie Creek population center.

Mr. Andrus provided testimony indicating that his property was available for construction of a cell tower. However, Mr. Andrus did not provide any evidence or data to establish that his property would provide wireless coverage to Highway 21 and in-building coverage to the Robie Creek population center. Instead, he only speculated that a hillside location on his property could “probably” provide better coverage. He provided no evidence, such as propagation maps or any other data, to support this speculative statement. Mr. Andrus’s speculative statement is insufficient for this Board to conclude that the hillside on his property would provide substantially similar coverage as the RCVFD location.

On the other hand, the Applicant testified that the Andrus property would not provide wireless coverage to the northern portion of Highway 21 to the same extent that the RCVFD location would provide such service. Due to the topography and mountain locations, the RCVFD location would be able to provide wireless coverage further north on Highway 21 in comparison to the Andrus property.

Further, the record contains no evidence that any alternate location would meet other feasibility requirements. There was no evidence presented relating to access, constructability, or available utilities for any identified alternate location.

As a result, the Board concludes that the Applicant established that the RCVFD location is the least intrusive location to fill the significant gap in coverage. The Board further concludes that the Appellants and opponents of the cell tower failed to provide any evidence to establish a less intrusive location. Accordingly, the Board finds that denial of the CUP application would have the effect of prohibiting the provision of wireless services. Therefore, the Board is constrained by federal law to approve the Applicant’s CUP for a cell tower located at the RCVFD.

D. Conclusion.

The Board finds that the Applicant’s proposed cell tower does not comply with the ULO. However, the Board finds that the proposed cell tower is located in an area with a significant gap in coverage and the proposed location is the least intrusive location to fill the gap in coverage. As a result, federal law requires the Board to approve the cell tower. In approving the cell tower, the Board includes all site-specific conditions approved by the Commission. In addition, the Board adds the following additional site-specific condition of approval:

12. Applicant shall relocate the cell tower so the cell tower is at least one hundred and fifty (150) feet from the nearest house.

ORDER

The Board affirms on other grounds the decision of the Planning and Zoning Commission, dated November 2, 2021, for the conditional use permit CUP #2021-006 Horizon Tower, LLC. The Board finds that the CUP does not comply with the ULO, but finds that denial of the CUP would violate federal law. Therefore, the Board upholds the Commission’s decision with the following site-specific condition of approval added to the existing site-specific conditions:

12. Applicant shall relocate the cell tower so the cell tower is at least one hundred and fifty (150) feet from the nearest house.

APPEAL OF BOARD OF COUNTY COMMISSIONER DECISION

Before any affected person can appeal to the District Court they must first seek reconsideration of the final decision by the Board within fourteen (14) calendar days of the date the final written decision or action is signed. ULO Section 2.10.C. Such written request for reconsideration by the Board must identify specific deficiencies in the final decision for which reconsideration is sought. Upon reconsideration, the Board's original final decision may be affirmed, reversed or modified after compliance with applicable procedural standards. A written decision by the Board shall be provided to the applicant or affected person within sixty (60) calendar days of receipt of the request for reconsideration or the request is deemed denied.

An affected person seeking review of a written decision of the Board may appeal within twenty-eight (28) calendar days after all remedies have been exhausted under local Ordinances in order to seek judicial review as provided in Idaho Code §67-6521(d) and §67-6535(2)(b), or as amended. ULO Section 2.10.C.

Findings of Fact, Conclusions and Order approved by the Board of County

Commissioners this 29th day of March 2022.

BOARD OF COUNTY COMMISSIONERS



Steven M. Twilegar, Chairman



Ryan F. Stirm, Commissioner

ABSENT

Robert T. Holmes, Commissioner



Mary T. Prisco

Mary T. Prisco, Clerk