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# CUP0012-24 - Request for Reconsideration

1 message

**'Josh Leonard' via Mail-Planning** <planning@bonnercountyid.gov> Thu, Apr 24, 2025 at 12:09 PM
Reply-To: Josh Leonard <jleonard@clarkwardle.com>
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Cc: "alexander.feyen@bonnercountyid.gov" <alexander.feyen@bonnercountyid.gov>, Andy Hambright <Andy.Hambright@smartlinkgroup.com>, Kevin Foy <Kevin.Foy@verticalbridge.com>

Please see the attached Request for Reconsideration, submitted on behalf of applicant Vertical Bridge REIT LLC, d/b/a The Towers LLC, in application number CUP0012-24.

Please send us a link for payment of the reconsideration application fee by credit card.

Thank you,

- Josh

cc: Alex Feyen

Andy Hambright

Kevin Foy

CLARK WARDLE

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JOSHUA J. LEONARD
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April 24, 2025

*Sent via email to:* planning@bonnercountyid.gov

Board of Bonner County Commissioners
1500 Highway 2
Sandpoint, Idaho 83864

**Re: Request for Reconsideration - CUP0012-24**

Dear Commissioners Domke, Williams, and Korn:

Our firm represents applicant Vertical Bridge REIT LLC, d/b/a The Towers LLC (the "**Applicant**"), the applicant in File Number CUP0012-24. We write, pursuant to Bonner County Revised Code ("**BCRC**") § 12-264.A, to **request reconsideration** of the Board's April 14, 2025 denial of the Applicant's Conditional Use Permit ("**CUP**") application (the "**Application**") in Bonner County Application Number CUP0012-24.

The Board's denial of the Applicant's CUP Application (i) violated statutory provisions, (ii) exceeded the Board's statutory authority, (iii) was made upon unlawful procedure, (iv) was not supported by substantial evidence, and (v) was arbitrary, capricious, or an abuse of discretion. As required by BCRC § 12-263.A, specific deficiencies in the Board's decision include the following:

1. **The Board's Conclusion 1 is incorrect; the Board incorrectly considered the proposed Communication Tower to be a commercial or industrial use, when it is a public use; and the Board's April 14, 2025 written decision does not contain a "reasoned statement," as required by Idaho Code § 67-6535(2).**

Conclusion of Law 1 incorrectly states:

> **Conclusion 1:** The proposed conditional use permit **is** in conflict with the policies of the Bonner County Comprehensive Plan.

As demonstrated during the January 15, 2025 public hearing before the County's Hearing Examiner, and as further demonstrated during the Board of County Commissioners' April 10, 2025

public hearing, and as found by the Hearing Examiner in its January 21, 2025 written decision, and as stated in the Staff Report, the proposed Conditional Use Permit is in accord with the policies of Bonner County's Comprehensive Plan.

To obtain a CUP, BCRC § 12-223 requires a finding that "the proposal is not in conflict with the policies of the comprehensive plan, as found in the adopted Implementation Component…"

In the Board's findings of fact, at Finding 12, the Board found as follows:

> 12. The proposed communication tower is in conflict with the policies of the comprehensive plan, specifically the policies of Community Design component and the goal of the Land Use component.

This is neither correct nor sufficient to be deemed a "reasoned statement," as required under Idaho's Local Land Use Planning Act ("**LLUPA**"). LLUPA's "reasoned statement" requirement, and the failure of the Board's written decision to include a "reasoned statement," is discussed in greater detail later in this request for reconsideration. For now, though, it suffices to say that the Board, in its Conclusion 1 and its Finding 12, failed to identify *how* the "proposed communication tower is in conflict with the policies of the comprehensive plan." Although the Board's decision points to "the policies of Community Design component and the goal of the Land Use component," the Board failed to explain its finding and conclusion.

Looking first at "the policies of Community Design component:"

> **POLICIES:**
>
> 1. To promote and preserve the natural features and rural atmosphere of the community, the county should enact development standards that address development within scenic byways and design standards that account for waterfront setbacks, wildlife corridors, commercial and industrial landscaping, requirements for reduced lighting, cluster development, rural rather than urban setback standards and other design objectives aimed at preserving the rural, natural character of the community.
> 2. Allow unique and flexible design standards such that new development within older neighborhoods and historic settlements is compatible with those unique neighborhoods.
> 3. Allow particularized design standards to address waterfront and mountaintop developments which may differ from standard design objectives.

(Comprehensive Plan: Implementation: Goals, Policies and Objectives, page 15.) All three of these policies are inapplicable to the proposed Communication Tower. All three of these policies urge the County to adopt standards applicable to *all* development applications, rather than governing the Board's consideration of any single development application.

Additionally, the "goal of the Land Use component" cited by the Board in its decision reads:

> Bonner County intends to balance and integrate its land use policies and proposed land use map with the components of the comprehensive plan to enable the community to grow while retaining its rural character and protecting its unique natural resources.

(Comprehensive Plan: Implementation: Goals, Policies and Objectives Update, page 6.) There are two problems with the Board citing to this goal of the Land Use component: First, the finding required by Bonner County Revised Code reads, "the proposal is not in conflict with the ***policies*** of the comprehensive plan, as found in the adopted Implementation Component" (BCRC § 12-223, emphasis added), but the Board's Finding 12 points to "the ***goal*** of the Land Use component" (emphasis added). BCRC § 12-223 does not require the proposal to not be in conflict with the ***goals*** of the comprehensive plan—instead, BCRC § 12-223 requires that "the proposal is not in conflict with the ***policies*** of the comprehensive plan, as found in the adopted Implementation Component…" (emphasis added). Second, even if Bonner County's code required the proposal to not be in conflict with the goals of the comprehensive plan, the proposed use—a communication tower—complies with "the goal of the Land Use component," in that a communication tower "enable[s] the community to grow while retaining its rural character…"

The ***policies*** of the Implementation Component of the Land Use component read:

**POLICIES:**

1. Commercial and industrial uses, in areas identified in the Comprehensive plan suitable for such development, should be unconditionally permitted. Evaluation of suitability should be based on availability of urban services, adequate access to hard surfaced publicly maintained roads and other factors that may impact the surrounding community.

2. Commercial and industrial uses may be conditionally permitted in areas not identified for such uses in the Comprehensive Plan if a critical review of the proposed use determines that with appropriate conditions the use will not adversely impact the surrounding area.

Both policy number 1 and policy number 2 are inapplicable to the present application for a Communication Tower. Policy number 1 references unconditionally permitting "***[c]ommercial and industrial uses***, in areas identified in the Comprehensive plan [*sic*] suitable for such development…" (emphasis added). Policy number 2 references conditionally permitting "***[c]ommercial and industrial uses***…in areas not identified for such uses…" (emphasis added). As noted by staff in its presentation to the Board on April 10, 2025, though, and as provided in the use table (Table 3-5) located within BCRC § 12-335, **a Communication Tower is neither a commercial use nor an industrial use—<u>a Communication Tower is a *PUBLIC* use</u>**:

**12-335: PUBLIC USE TABLE:**

TABLE 3-5

PUBLIC USE TABLE

| Use | Zoning District | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | F | A/F | R | S | C | I | RSC | REC | AV |
| Airports (1), (2) (airstrip) | | C (3) | C (3) | | | C | | C | |
| Cemeteries (4) | | C (3) | C (3) | C | | | | | |
| Churches, grange halls, public or private community facilities | | C (3) | C (3) | C | P | P | C | C | C |
| Communication towers | C (3) | C (3) | C (3) | C | C | C | C | C | C |
| Docks and marinas, community, upland accommodations (5), (6), (7) | | | | | C | | | C | |
| Heliports (8) | | C | C | C | C | C | | C | C |

(Highlighting added.) Neither policy no. 1 nor policy no. 2 says anything about ***public uses***, and they are therefore inapplicable to the present application for a Communications Tower.

The Board erred in finding (*see* Finding of Fact 12) and concluding (*see* Conclusion of Law 1) that the proposed use and the requested CUP "is in conflict with the policies of the comprehensive plan, specifically the policies of Community Design component and the goal of the Land Use component" of the County's Comprehensive Plan. As demonstrated above, neither the Community Design component's policies nor the Land Use component's policies even apply to the proposed Communication Tower.

The requested CUP is not in conflict with the policies of the County's comprehensive plan, as required by BCRC § 12-223.

**2. <u>The Board's Conclusion 2 does not specify *which* provisions of Bonner County Revised Code the Application is not in accord with; the Board's Conclusion 2 does not reflect facts contained in the administrative record; the Board's Conclusion 2 fails to identify what "hazard" is created by the proposed use; the evidence in the administrative record improperly includes evidence and testimony from members of the decision-making body; and the Board's Conclusion 2 contains no weighing of the evidence in the administrative record.</u>**

Conclusion of Law 2 incorrectly states:

> **Conclusion 2:** This proposal was reviewed for compliance with the criteria and standards set forth at BCRC Title 12, Chapter 2, Subchapter 2.2 Conditional Use Permits; Chapter 4 Development Standards and Chapter 7 Environmental Standards. The proposal **is not** in accord with the Bonner County Revised Code.

(Highlighting added.) In its Conclusion of Law 2, the Board broadly cites to the following:

- BCRC Title 12, Chapter 2, Subchapter 2.2 Conditional Use Permits;
- BCRC Title 12, Chapter 4, Development Standards; and
- BCRC Title 12, Chapter 7, Environmental Standards.

However, there is nothing in the Board's written decision that identifies ***which*** specific provisions of these titles and chapters the proposal is not in accord with, and there is nothing in the decision that indicates how the proposal is not in accord with any specific provision of the Bonner County Revised Code.

As demonstrated during the January 15, 2025 public hearing before the County's Hearing Examiner, and as further demonstrated during the Board of County Commissioners' April 10, 2025 public hearing, and as found by the Hearing Examiner in its January 21, 2025 written decision, and as stated in the Staff Report, the proposed Conditional Use Permit <u>is</u> in accord with the Bonner County Revised Code.

BCRC Title 12, Chapter 2, Subchapter 2.2 contains required application contents and prescribes the standards for review of CUP applications.

Application Requirements (BCRC § 12-222):

| | |
|---|---|
| A. Name, address and phone number of applicant. | ☑ |
| B. Authorized signature of at least one owner of the property for which the conditional use permit is proposed. | ☑ |
| C. Legal description of property. | ☑ |
| D. Applicant's interest in title | ☑ |
| E. Description of existing use. | ☑ |
| F. Zoning district in which property is located. | ☑ |
| G. Description of proposed conditional use requested. | ☑ |
| H. A narrative statement that addresses:<br>1. The effects of elements such as noise, glare, odors, fumes and vibrations on adjoining property.<br>2. The compatibility of the proposal with the adjoining land uses.<br>3. The relationship of the proposed use to the comprehensive plan. | ☑ |
| I. A plan of the site, drawn to scale, showing location of all existing and proposed buildings, parking and loading areas, traffic access and circulation, undisturbed areas, open spaces, landscaping, refuse and service areas, utilities, signs and yards. | ☑ |
| J. Reserved. (Ord. 583, 12-5-2018) | ☑ |
| K. A "vicinity map", as defined in section 12-822 of this title, sufficient to show the impact of the proposal commensurate with the scale of the project. | ☑ |
| L. Other information that the Planning Director or Governing Body requires to determine if the proposed conditional use meets the intent and requirements of this title, such as information regarding utilities, traffic, service connections, natural resources, unique features of the land or off site features affecting the proposal. | ☑ |

The application was complete, and contained all of the above required elements.

The standards prescribed in BCRC Title 12, Chapter 2, Subchapter 2.2 for review of CUP applications, generally, are the following:

> To grant a conditional use permit, the Zoning Commission or Hearing Examiner must find that the proposal is **not in conflict with the policies of the comprehensive plan, as found in the adopted Implementation Component**, and that the proposed use will **neither create a hazard nor be dangerous to persons on or adjacent to the property**.

BCRC § 12-223. As discussed above, the Board erred when it incorrectly found and concluded that the proposal was in conflict with the policies of the comprehensive plan. The proposal complies with BCRC § 12-223, in that it "is not in conflict with the policies of the comprehensive

plan, as found in the adopted Implementation Component…" The proposal also complies with BCRC § 12-223, in that it "will neither create a hazard nor be dangerous to persons on or adjacent to the property." There is no evidence in the administrative record on which to base a finding or conclusion that the proposed use will somehow "create a hazard" or "be dangerous to persons on or adjacent to the property." In fact, based on the facts in the administrative record, the only effect the proposed communication tower will have is that it will affect a narrow portion of the Hilberts' view. As noted by the Applicant, though, throughout the administrative record, there is no general right to a view in the state of Idaho.[1]

BCRC Title 12, Chapter 4 contains development standards for projects. In its Staff Report for the Board's April 10, 2025 public hearing, County staff reviewed each of the applicable development standards contained in BCRC Title 12, Chapter 4. (*See* April 10, 2025 Staff Report, pp. 6-7.) County staff determined that the proposed use complied with each of the applicable development standards. There is no evidence in the administrative record on which to base a finding or conclusion that the proposed use somehow does not comply with each of the development standards contained in BCRC Title 12, Chapter 4.

BCRC Title 12, Chapter 4 also contains BCRC § 12-488, entitled "Communication Towers," which prescribes standards specifically for communication towers, like the one proposed by the applicants in this matter:

| | |
|---|---|
| A. Communication towers and attendant facilities shall be enclosed by a fence not less than six feet (6') in height. | ☑ |
| B. The base of any tower shall not be closer to any property line than a distance equal to the tower height. | ☑ |
| C. The Zoning Commission shall consider the public convenience and necessity of the communication tower and any adverse effect the facility would have upon properties in the vicinity and may require such reasonable restrictions and conditions of development as to uphold the purpose and intent of this title and the comprehensive plan. | ☑ |
| D. Communication towers shall be built to telecommunication industry association/electronic industry association (TIA/EIA) 222 revision F standards, or as amended, for steel antenna support structures. | ☑ |
| E. Communication towers shall be constructed to accommodate other future communication services where technically feasible ("collocation"). | ☑ |

[1] *Fenwick v. Idaho Dept. of Lands*, 144 Idaho 318 (2007), citing *Sprenger Grubb & Assocs., Inc. v. City of Hailey*, 127 Idaho 576 (1995): Neighboring property owner had no right to prevent changes in the use of adjoining property. *Newton v. MJK/BJK, LLC*, 167 Idaho 236 (2020): Plaintiffs' "view is not a protected property interest," and plaintiffs "failed to produce any Idaho authority that creates a property interest in their view."

| | |
|---|---|
| F. Communication towers shall meet all operational, construction and lighting standards of the federal aviation administration. | ☑ |
| G. Communication towers shall not penetrate any airspace surface on or adjacent to any public or private airfields as set forth at subchapter 5.2 of this title. | ☑ |
| H. Upon termination of use of a communication tower for a period of not less than one year, the landowner and/or tower operator/applicant shall remove the tower along with all supporting equipment, apparatus and foundation. | ☑ |
| I. Flammable material storage shall be in accordance with international fire code standards. | ☑ |
| J. Communication towers shall not be used for signage, symbols, flags, banners or other devices or objects attached to or painted or inscribed upon any communication facility for the purposes of displaying a message of any kind, except as required by a governmental agency. | ☑ |

The proposed project's compliance with BCRC § 12-488, Subsections A, B, D, E, F, G, H, I, and J is undisputed in the administrative record. Subsection C was the only standard on which the opponents of the proposed communication tower attempted to provide testimony, and the opponents' competing evidence did not qualify as 'substantial evidence' upon which denial of a CUP for a communication tower is permitted, under federal law.

As noted in the January 15, 2025 Staff Report:

> **Staff:** Communication towers are conditionally permitted in all zoning districts in Bonner County. The proposed wireless facility will improve public health and safety for customers living, working and traveling through the coverage area by improving reliable access to emergency services and 911. The applicant has provided further information in their "Compliance and Safety" narrative.
>
> Adverse effects by a stationary communication tower on other properties in the vicinity appear to be negligible. There is no evidence that staff could find that shows the communication tower would adversely affect other properties in the vicinity.

During the Board's April 10, 2025 appeal hearing, the only material evidence of the necessity of the proposed communication tower was presented by the applicant's independent radio frequency (RF) expert, Steven Kennedy of Biwabkos Consultants. Mr. Kennedy applied scientific methods

and used state-of-the-art tools and software to demonstrate the existence of a significant gap in Verizon's in-building personal wireless service coverage in the area of the proposed site.[2]

The record's only contrary evidence of wireless coverage was presented not by the Hilberts or their attorney, but by one of the Commissioners, who consulted Verizon's online coverage map during the public hearing and remarked that it showed "good" Verizon coverage. The Board then wholly discounted the disclaimers accompanying Verizon's online coverage map. A Commissioner also commented during the public hearing that she drives through that area regularly and has not experienced dropped calls. These types of "evidence," improperly placed in the record by a member of the decision-making body, cannot be considered.[3] And the commissioner's testimony, during the public hearing, that she regularly drives through that area and has not experienced dropped calls should have been disclosed by the commissioner prior to the start of the public hearing.[4]

Even if the Board could consider the improper testimony[5] from a member of the decision-making body about Verizon's online coverage map and about a commissioner's personal experience with Verizon's wireless coverage in the area, Verizon's online coverage map only showed ***outdoor coverage***[6] and the Commissioner's testimony about her personal Verizon experience only reflected

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[2] Courts have consistently relied on propagation maps and drive test results as evidence of a significant service coverage gap to show an effective prohibition. *T-Mobile W. Corp. v. City of Huntington Beach*, No. 10-cv-2835 CAS EX, 2012 WL 4867775, at *__ (C.D. Cal. Oct. 10, 2012).

[3] Citing a wireless provider's online maps depicting approximate outdoor coverage is not substantial evidence. *T-Mobile W. Corp. v. City of Huntington Beach*, No. 10-cv-2835 CAS EX, 2012 WL 4867775, at *__ (C.D. Cal. Oct. 10, 2012). "A quasi-judicial officer must confine his or her decision to the record produced at the public hearing." *Eacret v. Bonner County*, 139 Idaho 780, 786, 86 P.3d 494, 500 (2004).

[4] As previously held by the Idaho Supreme Court, "If [the] Commissioner [ ] had previously viewed the property for reasons unrelated to the pending matter (*i.e.* located in his neighborhood or on his daily commute to work) ***he should have disclosed the fact of the view prior to the hearing***, in order to allow the parties to object or move for a viewing by all of the commissioners." *Eacret v. Bonner County*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004) (quoting *Comer v. Cnty. of Twin Falls*, 130 Idaho 433, 942 P.2d 557 (1997), emphasis added).

[5] The online coverage map itself was not admitted into the administrative record. The only evidence of Verizon's online coverage map comes from the testimony of two of the commissioners.

[6] Verizon's online map includes a disclaimer that states, in pertinent part:

> This map… is a general prediction of where we expect to deliver outdoor service at the cell edge based on typical human walking speeds, without factoring in loading (i.e., the number of people simultaneously using the service in an area) or throughput. This map is not a guarantee of coverage, contains areas of no service, and may not reflect actual customer performance. Actual coverage may vary. [. . .] Your service may vary significantly within buildings.

This disclaimer was dismissed by the Board, with no explanation. The Board also apparently thought that Verizon's online coverage map disclaimer somehow also applied to the results of the drive test performed by independent (non-

***in-vehicle*** coverage. Neither the online coverage map nor the commissioner's testimony about her experience with Verizon while driving provided any evidence about Verizon's ***in-building*** coverage and signal strength or about Verizon's capacity. Verizon must be able to provide in-building coverage and signal strength, or a significant gap exists in Verizon's wireless service.[7] Although the existence of a "significant gap" is not required by Bonner County's code or by LLUPA, it is one of two elements comprising the older (pre-2018) test for proving that the Board's decision violated the federal Communications Act of 1996 by effectively prohibiting Verizon from providing its personal wireless communications services to subscribers in the area of the subject property.[8]

Likewise, there was not substantial evidence in the administrative record upon which the Board could have found any adverse effect on nearby properties. The only two adverse effects claimed by the Board in its written decision are found in Finding of Fact #14, which reads:

> 14. The proposed communication tower would diminish property values due to the change in the rural character of the area and potential harm from Radio Frequency Emissions.

Verizon) radio frequency expert Steven Kennedy of Biwabkos Consultants, LLC. The Board failed to explain its reasoning in believing that Verizon's online coverage map disclaimer also covered Mr. Kennedy's factually undisputed scientific result that there existed a significant gap in in-building personal wireless service coverage in the subject area.

[7] *Intermax Towers v. Ada County et al*, Case No. 1:23-cv-00127-AKB (U.S. Dist. Ct. for the District of Idaho, April 14, 2025), at *2 ("Wireless providers, like Verizon, seek to provide reliable and competitive wireless services. To accomplish this goal, they design and build their wireless networks to ensure customers receive continuous, uninterrupted outdoor, in-vehicle, and in-building coverage. A stronger radio frequency ("RF") signal is required for in-building service, as compared to in-vehicle or outdoor service. Consumers rely on their ability to use their wireless phones and connected devices in their homes. Thus, wireless carriers must be able to provide reliable in-building service to avoid a service coverage gap." Citations omitted.).

[8] The second element of the pre-2018 test is whether the proposed communication tower is the "least intrusive means" of resolving the wireless carrier's significant gap in coverage. *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715 (9th Cir. 2005), *abrogated on other grounds by T-Mobile S., LLC v. City of Roswell, Ga.*, 574 U.S. 293 (2015); *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987 (9th Cir. 2009). The newer test is much less deferential to local jurisdictions' decisions to deny permit applications for wireless communications infrastructure: Whether the denial materially inhibits the wireless carrier's ability to provide personal wireless communication services to its subscribers. *City of Portland v. United States*, 969 F.3d 1020, 1034-35 (9th Cir. 2020), *cert denied, City of Portland v. FCC*, 141 S. Ct. 2855 (2021) (acknowledging "the continuing validity of the material inhibition test"); *In re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., Etc.*, 33 FCC Rcd. 9088 (FCC rel. Sept. 27, 2018) (material inhibition occurs whenever a denial prevents a wireless provider from providing new services or improving existing services).

The only evidence of potential diminished property values was the opponents' citations to three flawed studies, none of which applied to the specific property at issue in this matter. The opponents' citations included one to a 2018 Alabama study, one to an Australian study, and one to a study that based its findings on fears of radio frequency emissions. None of these studies even referenced Idaho. In fact, the administrative record's only evidence of the effect of cell towers on property values *in Idaho* is the following quote from the Ada County (Idaho) chief deputy assessor:

> In regards to the impact on property values, I would take the same view I had a few years ago. While it becomes very emotional for owners when they're installed, the overall effect in the market is very minimal. In fact, we have not been able to find any measurable adjustment in the market.

September 17, 2018 email. The Board's written decision failed to weigh the great weight of contradictory evidence presented by the Applicant, as the Board is required to do.

**3. <u>The Board's Conclusion 3 fails to identify how the proposed use will create a hazard and how the proposed use will be dangerous to persons on or adjacent to the property; the Board's Conclusion 3 does not reflect facts contained in the administrative record; the Board's Finding 14 is not based on facts in the administrative record.</u>**

Conclusion of Law 3 incorrectly states:

> **Conclusion 3:** The proposed use **will** create a hazard or **will** be dangerous to persons on or adjacent to the property.

To obtain a Conditional Use Permit ("CUP"), Bonner County Revised Code § 12-223 requires a finding that "the proposed use will neither create a hazard nor be dangerous to persons on or adjacent to the property." There is no evidence in the administrative record on which to base a conclusion that the proposed use will "create a hazard" or will "be dangerous to persons on or adjacent to the property."

As demonstrated during the January 15, 2025 public hearing before the County's Hearing Examiner, and as further demonstrated during the Board of County Commissioners' April 10, 2025 public hearing, and as found by the Hearing Examiner in its January 21, 2025 written decision, and as stated in the Staff Report, the proposed use <u>will not</u> create a hazard and will not be dangerous to persons on or adjacent to the property.

Importantly, the Board's Conclusion 3 even failed to identify *how* the proposed use will create a hazard or will be dangerous to persons on or adjacent to the property. Later, in the Board's Finding

No. 14, the Board concludes, without any evidence in the administrative record to support its conclusion, that "[t]he proposed communication tower would diminish property values due to the… potential harm from Radio Frequency Emissions." The Applicant is unsure whether that is what the Board meant the proposed use "will create a hazard or will be dangerous to persons on or adjacent to the property," because the Board failed to identify what hazards or dangers are posed by the proposed use.

**4. <u>The Board's Finding of Fact 9 is incorrect.</u>**

Finding of Fact 9 states:

> 9. The facility will provide telecommunications service to residential properties within the vicinity 24 hours per day year-round.

However, the services provided by the proposed facility will not be limited to residential properties. For it to be correct, that sentence from Finding of Fact 9 should read:

> The facility will provide personal wireless telecommunications services to <u>wireless subscribers and users</u> within the vicinity 24 hours per day year-round.

**5. <u>The Board's Finding of Fact 12 violates Idaho Code § 67-6535(2), in that it fails to include a "reasoned statement."</u>**

Finding of Fact 12 states:

> 12. The proposed communication tower is in conflict with the policies of the comprehensive plan, specifically the policies of Community Design component and the goal of the Land Use component.

However, Finding of Fact 12 fails to comply with section 67-6535(2) of Idaho's Local Land Use Planning Act ("LLUPA"). Even reading Conclusion 1 together with Finding of Fact 12, the Board's written decision fails to comply with LLUPA. Specifically, Idaho Code section 67-6535(2) reads, in pertinent part:

> The approval or denial of any application required or authorized pursuant to this chapter shall be in writing and accompanied by a reasoned statement that explains the criteria and standards considered relevant, states the relevant contested facts relied upon, and ***explains the rationale for the decision*** based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record.

I.C. § 67-6535(2), emphasis added. Nothing in the Board's decision can be fairly called a reasoned statement, as the Board's decision only "explains the criteria and standards considered relevant" and "states the relevant contested facts relied upon"—it fails to "explain[] the rationale for the decision based on the applicable provisions of the comprehensive plan, relevant ordinance and statutory provisions, pertinent constitutional principles and factual information contained in the record." None of the competing evidence before the Board was examined or weighed in the Board's written decision.

"In order to satisfy I.C. § 67-6535, a local decision-maker must articulate in writing both (1) the facts found and conclusions reached and (2) the rationale underlying those findings and conclusions." *Jasso v. Camas County*, 151 Idaho 790, 794 (2011). Although the Board's written decision included (1), it failed to include (2).

The Idaho Supreme Court's case law guidance on Idaho Code § 67-6535 "demonstrate[s] that the reasoned statement must plainly state the resolution of factual disputes, identify the evidence supporting that factual determination, and explain the basis for legal conclusions, including identification of the pertinent laws and/or regulations upon which the legal conclusions rest." *Jasso*, 151 Idaho at 794. The Board's written decision failed to resolve factual disputes in the record, failed to identify the evidence supporting its factual determinations, and failed to explain the basis for legal conclusions, all in violation of Idaho Code § 67-6535.

**6. <u>The Board's Finding of Fact 13 is not supported by substantial evidence in the administrative record.</u>**

Finding of Fact 13 reads:

> 13. The documentation provided did not provide adequate prove that there is a lack of cell coverage in the proposed cell tower location, and that the area was not sufficiently reviewed for other potential sites. Additionally, the studies shown by the applicant are not applicable to rural areas.

This finding is incorrect and improper for several reasons.

First, as noted above, the only material evidence of the necessity of the proposed communication tower was presented by the applicant's radio frequency (RF) expert, Steven Kennedy of Biwabkos Consultants. There was no evidence or testimony in the administrative record upon which the Board could find a lack of proof of the need for the proposed communication tower.

Second, although this finding states that "[t]he documentation did not provide adequate prove [*sic*]… that the area was not sufficiently reviewed for other potential sites," there is no requirement

in Bonner County's code that a communication tower applicant demonstrate that the proposed site is the least intrusive means of filling the significant gap in Verizon's personal wireless services. By imposing this requirement on the Applicant, the Board conflated the requirements of its own code with the elements required under federal law to demonstrate an effective prohibition of wireless service. Although not required by Bonner County's code, the Applicant *did* review and rule out other potential alternative sites for the proposed facility, a fact that was uncontroverted in the administrative record but omitted from the Board's written decision.

Third, the last sentence of this finding appears to be a non-sequitur, in that it does not apply to wireless coverage or a least intrusive means analysis. A review of the administrative record reveals that this last sentence likely was intended to be included in Finding 14, not this Finding 13.

**7. <u>The Board failed to weigh (or even address) conflicting evidence in the administrative record showing that communication towers have no effect upon property values; and the Board's Finding of Fact 14, being conclusory, failed to provide the "reasoned statement" required by Idaho Code § 67-6535(2).</u>**

Finding of Fact 14 states:

> 14. The proposed communication tower would diminish property values due to the change in the rural character of the area and potential harm from Radio Frequency Emissions.

Finding of Fact 14 fails to cite any facts in the administrative record to support this finding, perhaps because there is no evidence in the administrative record that supports such a finding. The Hilberts' attorney tried to argue that cell towers negatively affect property values, but the only "facts" he supplied were citations to inapplicable studies. Citations alone cannot be considered "substantial evidence" to support denial of a cell tower application. According to the Idaho Supreme Court, the Hilberts were required to provide "direct evidence to support their allegation that their property value [would be] affected…" *Hungate v. Bonner County*, 166 Idaho 388, 395, 458 P.23d 966, 973 (2020). Mere citations to studies from Australia, from the South, and that consider fears of radio frequency emissions cannot be considered "direct evidence." Further, the Board's finding that property values would decrease "due to the change in the rural character of the area" is unsupported by any facts in the administrative record, and the Board, in this finding, failed to explain how the proposed communication tower would change the rural character of the area, which has remained unchanged despite the existence of power lines and other public uses and utilities in the area.

Finding 14 also violates the Idaho Supreme Court's requirement that findings of fact must be supported by a reasoned explanation of the grounds upon which they rely. *Jasso v. Camas County*,

151 Idaho 790, 795. Finding 14 is a bare conclusion, with no indication as to how the Board resolved the factual conflict in the administrative record to find that the Hilberts' property values would be affected by the proposed communication tower.

## 8. The Board's Finding of Fact 15

Finding of Fact 15 states:

> 15.The evidence provided by the applicant conflicts with the coverage map provided on the Verizon public website, the carrier who will be leasing the tower.

This finding is fatally flawed for several reasons:

First, each Board member is required to "confine his or her decision to the record produced at the public hearing." *Eacret v. Bonner County*, 139 Idaho 780, 786-87, 86 P.3d 494, 500-01 (2004). In this case, evidence of Verizon's online coverage map was not introduced or even mentioned by the parties until after Verizon's webpage was accessed by a commissioner during the public hearing. The commissioner raised Verizon's webpage as an issue, thereby improperly inserting her own research into the administrative record. That evidence then was relied upon by the Board in its vote to deny the applicant's C.U.P. application.

Second, citing a wireless provider's online maps depicting approximate outdoor coverage is not substantial evidence upon which a land use decision can be based. *T-Mobile W. Corp. v. City of Huntington Beach*, No. 10-cv-2835 CAS EX, 2012 WL 4867775, at *__ (C.D. Cal. Oct. 10, 2012).

Third, Verizon's online coverage map only reflected ***outdoor coverage***[9] and the Commissioner's testimony about her personal experience with Verizon in the area only reflected ***in-vehicle*** coverage in the area. Neither the online coverage map nor the commissioner's testimony about her experience with Verizon while driving provided any evidence about Verizon's ***in-building*** coverage and signal strength or about Verizon's capacity. Verizon is entitled to provide in-building coverage, and anything less than in-building coverage may form the basis for a finding that a significant gap exists in its wireless coverage.[10]

[9] *See* Footnote 6.

[10] *See* Footnote 7.

There was uncontroverted evidence in the administrative record that Verizon has a significant gap in its in-building wireless service in the area of the subject property, but these facts were not mentioned in the Board's written decision.

**9. <u>Finding of Fact 16 incorrectly implied that a "No Hazard Determination" from the FAA was required to be submitted with the Applicant's CUP application, but there is no such requirement in Bonner County's code.</u>**

Finding of Fact 16 states:

> 16.The applicant did not provide a "No Hazard Determination" by the FAA.

This finding improperly—and incorrectly—infers that a "No Hazard Determination" from the FAA is required to be submitted with a CUP application. However, no such requirement exists in Bonner County's code.[11] By requiring the Applicant to submit an FAA "No Hazard Determination," the Board imposed a requirement on the Applicant that is not authorized by Bonner County Code.

**10. <u>The Board's Finding of Fact 17 mistakenly found that the Applicant did not provide adequate information showing access to the parcel, despite the subject property being located adjacent to a public highway.</u>**

Finding of Fact 17 states:

> 17.The applicant did not provide adequate information showing access to the parcel.

This is incorrect and not based on facts in the administrative record. Specifically, the Applicant's PowerPoint presentation during the Board's April 10, 2025 public hearing included several slides depicting the Applicant's options for access to the subject property. These options were not mentioned in the Board's Finding of Fact 17.

Additionally, the subject property is located immediately adjacent to (and has significant frontage on) State Highway 41, which is sufficient to ensure the subject property is not landlocked.

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[11] Please *see* the table of application requirements required by BCRC § 12-222, at the top of page 6 of this letter. A "No Hazard Determination" from the FAA is not among them. Nor is a "No Hazard Determination from the FAA among the standards required for approval of a CUP for a communication tower—*see* the table of standards for communication towers, as required by BCRC § 12-488, near the bottom of page 7 of this letter.

## CONCLUSION

As set forth above, the Board's decision in this matter contains material errors and insufficiencies. Crucially, these errors and insufficiencies contributed to the Board's decision to deny the Applicant the CUP for which it applied. As articulated throughout the within letter, the Board's denial of the Applicant's CUP Application was (i) in violation of statutory provisions, (ii) in excess of the Board's statutory authority, (iii) made upon unlawful procedure, (iv) not supported by substantial evidence on the record as a whole, and (v) arbitrary, capricious, or an abuse of discretion. Under Bonner County's code, Idaho statute, and federal law, the Applicant is entitled to approval of its CUP Application.

As provided in LLUPA, "An appeal shall be from the final decision and not limited to issues raised in the request for reconsideration" (Idaho Code § 67-6535(3)). Accordingly, in the event the Applicant's request for reconsideration is not granted and/or the Application is not approved with reasonable conditions, the Applicant hereby reserves its right to file a petition for judicial review (and/or other causes of action and claims for relief, as authorized under Idaho Code and/or federal law) that include errors in the decision beyond those identified herein as specific deficiencies.

On the within basis, the Applicant respectfully asks the Board to reconsider its decision and approve the Applicant's CUP Application for a communication tower.

Very truly yours,

Joshua J. Leonard