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

In the Matter of the City and Borough of Sitka Assembly, sitting as the City and Borough of Sitka Board of Adjustment's decision to deny VAR 25-01,	)	
Central Council of the Tlingit & Haida Indian Tribes of Alaska d/b/a TIDAL NETWORK	)	OAH No. 25-2204-MUN Agency No. VAR 25-01
Appellant.	)	

DECISION

I. Introduction

The Central Council of the Tlingit & Haida Indian Tribes of Alaska ("T&H"), doing business as Tidal Network, seeks a zoning variance that would allow it to construct a 120-foot monopole wireless communications tower within an area of Sitka that is zoned for residential use. The rules for this zoning district limit the maximum height of structures to 35 feet. If constructed, this tower would be used by Tidal Network to provide fixed wireless broadband service to portions of Sitka.

Tidal Network's variance request was denied by the City and Borough of Sitka Planning Commission (the "Planning Commission" or "Commission") on April 16, 2025. Tidal Network subsequently appealed this decision to the Borough Assembly, which presides over these appeals as a Board of Adjustment under SGC 22.10.060. For reasons not relevant here, the Assembly referred this matter to the Alaska Office of Administrative Hearings for a decision pursuant to Ordinance No. 2025-17.

For the reasons covered in detail below, the Planning Commission's denial of Tidal Network's variance request is AFFIRMED.

II. Facts

A. The opening of the 2.5 GHz Rural Tribal Priority Window.

In 2020, the Federal Communications Commission ("FCC") initiated a program where federally recognized Tribes and Alaska Native Villages could obtain licenses allowing them to access unassigned wireless spectrum over their Tribal lands in the 2.5 gigahertz ("GHz") band

for the purpose of providing broadband internet.[1] This program is commonly referenced as the "Rural Tribal Priority Window." The goal of this program is to provide a means by which Tribes and Alaska Native Villages can offer wireless broadband (either directly or through a third party provider) without having to participate in the auctions where the FCC sells portions of the wireless spectrum in a given geographic area to the highest bidder.[2] T&H has chosen to participate in this program under the business name of Tidal Network.[3]

Consistent with the FCC orders that created the Rural Tribal Priority Window, the goal of Tidal Network is to provide wireless broadband internet to unserved and underserved communities in Southeast Alaska.[4] This effort is supported by federal grants provided by the National Telecommunications and Information Administration (the "NTIA").[5]

B. The Planning Commission's denial of Tidal Network's variance request.

Tidal Network plans to build a series of wireless telecommunication towers at locations within Southeast Alaska that will provide wireless broadband coverage in areas where it has obtained licenses to provide this service.[6] As part of that effort, it wants to construct a 120-foot monopole tower on two lots located at 116 Nancy Court in Sitka (the "Nancy Court tower site") that would play a key role in achieving Tidal Network's goal of "bringing fixed wireless broadband to Sitka."[7] The Nancy Court tower site is located within a hillside subdivision that is approximately 300 feet in elevation above the areas where most of Sitka's residential and business neighborhoods are located.[8] Tidal Network has characterized the Nancy Court tower site as a "golden goose location" that would allow it to provide broadband coverage to a large area to the south and east of downtown Sitka,[9] including the small boat harbor and adjacent commercial and residential neighborhoods.[10]

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1 *See* https://www.fcc.gov/25-ghz-rural-tribal-window (accessed September 15, 2025).
2 *See* https://www.fcc.gov/economics-analytics/auctions-division (accessed September 15, 2025).
3 Joint Statement of Undisputed Material Facts ("Joint Statement") at 1.
4 Tidal Network submission to City of Sitka dated March 28, 2025 (the "3/28/25 Submission") at 1.
5 *See* https://broadbandusa.ntia.gov/funding-programs/tribal-broadband-connectivity (accessed September 14, 2025).
6 Transcript of March 5, 2025 Planning Commission Hearing (the "March 5 Transcript") at 27-28.
7 Tidal Network Variance Application at 1.
8 *See* Diagram of Line-of-Sight Paths included in Planning Commission packet for the April 2, 2025 meeting.
9 *Id.* at 17.
10 Exhibit 1 to 3/28/25 Submission.

A unique aspect of this tower is that it would have no connection with landline data networks; instead, it would serve as a conduit for data transmitted to and from satellites in low earth orbit operated by Starlink or similar providers.[11] While the Nancy Court tower would be large enough to support antennas owned by local cellular providers or emergency services agencies, no such collocation could occur without first constructing a fiber optic cable and related infrastructure required to connect the tower to a landline telephone network.[12] Nothing in the materials provided by Tidal Network indicates how difficult or costly it would be to upgrade the Nancy Court tower in this manner. Nor is there any information identifying a service gap in Sikta's current cellular network that could be remedied by antennas that were collocated on this tower.

The significant drawback to this proposed is its location within a residential neighborhood that has a zoning classification of R-1 under the Sitka General Code. The rules governing R-1 districts limit the height of principal structures (including accessory communication towers and antenna) to a maximum height 35 feet.[13] Recognizing this, on February 26, 2025, Tidal Network submitted a variance request to the City and Borough Planning Department (the "Planning Department") that would authorize construction of its proposed 120-foot tower.[14]

The Planning Commission began its consideration of this request during a hearing held on March 5, 2025. In advance of that hearing, the Sitka Planning Director prepared a staff report which recommended that the variance be granted.[15] The Commission was also provided with the site plans, plats, photographs, and visual mockups that had been submitted by Tidal Network.[16]

During the March 5 hearing, the Planning Director first explained the reasons why, in her view, Tidal Network had satisfied the requirements for variances imposed by SGC 22.10.160(D)(1).[17] Chris Cropley, the primary spokesperson for Tidal Network before the Commission, then offered testimony regarding the unsuccessful efforts made by Tidal Network to find an alternative site that would provide adequate coverage of the area to be served by the

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11 March 5 Transcript at 35.

12 *Id.* (testimony noting that a fiber optic line would have be installed before the tower could be used by a cell phone carrier or local emergency services).

13 SGC Table 22.20-1 and 22.20.055; Joint Statement at 1.

14 Joint Statement at 1.

15 *Id.*

16 *Id.* at 2.

17 *Id.*

proposed tower.[18] Mr. Cropley further advised the Commission that construction of the tower would be funded by a federal grant administered by the NTIA, and that this made it necessary for Tidal Network to own the land on which the tower was located as opposed to leasing it.[19] When asked if a tower that was only 35 feet in height would meet Tidal Network's needs, Mr. Cropley responded:

> I don't know. I'd have to reevaluate and -- and look at -- we -- if we had to do 35, we'll probably need a couple more. So what is -- and then we start moving pieces around, right. Like, maybe one over here and two over here and playing that game. We spent a lot of time moving puzzle pieces around, as you can imagine, trying to figure out the optimal location for -- for these towers.[20]

Public comments and letters were uniformly opposed to the variance based on concerns that construction of the tower would lower the value of nearby properties, would expose nearby residents to potentially dangerous radio emissions, destabilize landslide prone slopes in the area, and negatively impact aesthetics and land values in the area.[21]

When Planning Commission members began their deliberations, they quickly concluded that legal input was required from the Borough Attorney regarding the extent to which a communications tower located within an R-1 zoning district could be considered a principal or accessory use under the applicable zoning ordinances. The Commission also requested that Tidal Network provide additional information regarding some technical issues that had been raised by members of the public.[22] The hearing was continued to a later time so that these issues could be addressed.

The hearing resumed on April 2, 2025. In advance of the continued hearing, the Planning Department prepared a report that offered the following conclusions:

- While the proposed tower would have a visual impact on nearby properties, it would not impact "high value views of Sitka Sound and Mt. Edgecumbe, and was the same approximate height as nearby trees.[23]

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18 March 5 Transcript at 18.
19 *Id.* at 18-19.
20 *Id.* at 40-41.
21 *Id.* at 60-81.
22 *Id.* at 83-86.
23 April 2, 2025 Planning Department Report at 5.

- Tidal Network had identified a "significant coverage gap" in its wireless broadband coverage (referenced as Zone 2 in the documents and diagrams prepared by Tidal Network), which encompassed the parks of downtown Sitka, along with business and residential neighborhoods to the south and east of the downtown area.[24]
- Tidal Network's variance application was subject to 47 U.S.C. § 332, a federal statute that limits (among other things) the authority of local governments to deny applications to build wireless towers that are intended to resolve a "significant coverage gap."[25]
- Tidal Network had investigated 129 different sites in the Sitka area, and the Nancy Court location was the only one providing coverage in Zone 2 that met "coverage, financial and development criteria."[26]

Commission members were also provided with a letter written by T&H's president that responded to some of the questions and issues raised during the March 5 hearing. In this letter, T&H advised:

> Of the 129 initial sites, most sites were reviewed and eliminated based on financial, environmental, or coverage constraints. One of the biggest constraints was that very few landowners were not willing to subdivide or outright sell their land.
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> Tidal Network's business plan and federal grant requirements for sustainability mandate ownership of infrastructure and land. TBCP funds can be used for capital expenditures (CapEx). Recurring lease payments, which are categorized as operational expenses (OpEx) are not allowed longer than the life of the grant. 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.[27]

At the outset of the hearing, the Planning Director reported that the Borough Attorney had concluded that a communications tower offering wireless broadband to the public constituted

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[24] *Id.*

[25] *Id.* at 3-4. There is no indication in the record that the Planning Director's conclusion in the regard was supported by any type of formal or informal legal analysis.

[26] *Id.* at 5.

[27] Letter from Richard Peterson to Planning Director Amy Ainslie dated March 28, 2025, included in Commission packet for the April 2, 2025 hearing.

a "public utility" that was a permitted principal use within an R-1 zoning district.[28] This legal interpretation, which is not challenged here, means that Tidal Network could construct a tower up to 35 feet in height at the Nancy Court location without a variance or other type of zoning approval.

The next legal issue addressed by the Commission concerned the appropriate interpretation of SGC 22.10.160(D)(1), which provides (among other things) that a variance should only be granted when "there are special circumstances to the intended use that do not apply generally to the other properties." The Planning Director advised that Tidal Network had satisfied this requirement since the tower height required to close its coverage gap was "outside the control of the property owner" and thus constituted the type of "special circumstance" for which a variance could be granted.[29]

Chris Cropley again acted as the primary spokesperson for Tidal Network. When asked by a Commission member why a 120-foot tower was required, Mr. Cropley was again unable to advise whether Tidal Network had evaluated the suitability of smaller tower. All he could offer on this point was that engineers had determined that 120 feet was a "feasible height" for the proposed tower.[30] A radio frequency engineer retained by Tidal Network was also present at the meeting, and he advised that a 35-foot tower would not be sufficient due to "vegetation obstructions and various clutter elevations throughout the coverage area" and would only cover 25 percent of the area the proposed tower could serve.[31] Thus, no information was provided by Tidal Network regarding the suitability of a tower taller than 35 feet, but less than 120 feet.

The Commission then heard additional public comment from fifteen local residents who were unanimously opposed to the variance request based on concerns that largely mirrored those raised during the March 5 meeting.[32] Four additional written comments opposing the request were also read into the record.[33] Two of the individuals who offered comment asserted that Tidal Network had failed to contact owners of property zoned for industrial use that was situated within the coverage area for the proposed tower.[34]

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28 Transcript of April 2, 2025 Planning Commission Hearing (the "April 2 Transcript") at 5-6; SCG Table 22.16.015-4.
29 April 2 Transcript at 10.
30 *Id.* at 26.
31 *Id.* at 28-29.
32 Some individuals provided comment at both the March 5 and April 2 hearings.
33 *Id.* at 34-69.
34 *Id.* at 57-58.

Following these comments, Mr. Cropley offered a brief response on behalf of Tidal Network. He first advised that Tidal Network did not make any effort to communicate with property owners in areas judged to be non-viable for a tower site, so it was not surprising that some industrial property owners had not been contacted.[35] Responding to comments offered by some residents regarding landslide or drainage concerns, Mr. Cropley noted that such issues would be addressed through the building permit process, and that it would be unrealistic to expect Tidal Network to prepare a detailed tower design (and undertake related geotechnical work) prior to the variance being approved.[36]

When the Commission members began their deliberations, it was clear that the negative public comments weighed heavily on their decision.[37] An additional focus of concern was the absence of information showing that a 120-foot tower was necessary to close the coverage gap described by Tidal Network. As one Commission member noted:

> I've seen what coverage could look like and I understand what coverage would be provided if this tower were built. But how is the gap in coverage or the difference in coverage being that would result from a shorter tower being demonstrated?[38]

Another key area of concern for Commission members were the requirements of SGC 22.10.160(D)(1), which sets out four specific findings that must be made by the Commission prior to approving a variance. The first required finding – as noted above – is the existence of "special circumstances to the intended use that do not apply generally to the other properties."[39] The second required finding is that the requested variance is "necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties but are denied to this parcel."[40] As one Commission member noted:

> [M]y problem is the variance. And specifically, you know, I am reading the conditions required for a variance. And I already asked about [subsection (a)], which refers to special circumstances to the intended use that do not apply generally to other properties. And staff's answer was it really relates to the use. But I think [subsection (b)] is even more of an obstacle to me, because (b) says the variance is necessary for the preservation and enjoyment of a substantial property right or use possessed by other

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35 *Id.* at 69.
36 *Id.* at 70 (noting that "this is not a building permit, but a variance").
37 *Id.* at 74. (comment by Commissioner Riley that "I don't think I can vote yes for this with all of this public testimony").
38 *Id.* at 75 (comment by Commissioner Riley).
39 SGC 22.10.160(D)(1)(a).
40 SGC 22.10.160(D)(1)(b).

> properties but are denied to this parcel. And there is no parcel in a residential zone that has the right to build 120-foot tower.[41]

Following these discussions, the Commission by unanimous vote, denied Tidal Network's variance request.[42]

At a meeting held on April 16, 2025, the Commission adopted written findings which advised that Tidal Network's variance request was denied under SGC 22.10.160(D) for the following reasons:

> (1) Tidal Network failed to show that there were special circumstances regarding its intended use of the property that do not apply generally to other properties;
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> (2) There was no showing that a variance was necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties but denied to Tidal Network's parcel.
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> (3) Tidal Network had not shown that its proposed tower would not be materially detrimental to the public welfare or injurious to the property nearby parcels.[43]

The Commission additionally found that Tidal Network had failed to show that its proposed tower was the least intrusive means of closing the alleged coverage gap, or there were no other technologically feasible alternatives to close that gap.

Tidal Network timely appealed the Commission's decisions and findings to the Board of Adjustment. A public hearing on this appeal was held on August 21, 2025. Prior to the hearing, a group of area residents informally organized under the name of Sitka for Safe Tech ("SFST") retained the services of a telecommunications attorney who submitted a legal brief arguing that the provisions of 47 U.S.C. § 332 referenced by the Planning Director during the April 2 meeting do not apply here. Tidal Network was granted the opportunity to submit a responsive brief following the hearing.

III. Discussion

A. The competing concerns that are presented by the proposed construction of wireless telecommunication towers.

Proposals to build wireless telecommunication towers invariably raise thorny issues for local zoning authorities. Much like high voltage power lines, highways, and airports, almost

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41 *Id.* at 83-84 (comment by Commissioner Sherman).
42 *Id.* at 85.
43 Joint Statement at 7-8.

everyone uses the services made possible by these towers. Indeed, given the number of people and businesses who depend on the availability of reliable wireless networks, these towers are a necessity of modern life. Correspondingly, however, nobody wants a telecommunications tower constructed close to their home. If the decision to build these towers was effectively handed over to the owners of nearby properties, it seems a safe assumption that few would ever be built.

For this reason, Congress has enacted provisions within the Telecommunications Act, that limit the ability of state and local governments to deny applications for the construction of "personal wireless service facilities." These provisions, which have been codified at 47 U.S.C. § 332(c)(7)(B), provide as follows:

> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
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> > (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
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> > (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
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> (ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time . . . .
>
> (iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.
>
> (iv) No State or local government . . . may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

To the extent a local government denies an application to build a personal wireless service facility in violation of these provisions, the applicant may seek an injunction in federal court that overturns the denial.[44]

The first question that must be resolved here is whether these provisions of federal law are applicable to the variance request that was submitted by Tidal Network. Resolution of this

[44] 47 U.S.C. §332(c)(7)(B)(v).

question requires something of a deep dive into the definitions of key terms found within 47 U.S.C. § 332.

B. Does the Telecommunications Act apply to Tidal Network's planned wireless tower?

If constructed as proposed in this proceeding, the Nancy Court tower would have only one purpose – providing fixed wireless broadband internet service. Since the tower would be constructed without a fiber optic connection to a landline network, it would only be capable of transferring data between Tidal Network's local subscribers and communication satellites in low earth orbit. The tower could not be utilized by local cellular providers unless if it was first connected to the local telephone network. Tidal Network did not provide the Planning Commission with any information regarding the cost or feasibility of doing so. Nor is there anything in the record indicating whether there are coverage gaps in Sitka's existing cellular infrastructure that could be remedied through the collocation of cellular antennas on this tower. To the contrary, the only coverage gap that Tidal Network described in the information it provided to the Planning Commission related to its fixed wireless broadband service.

The brief submitted by SFST focuses on these considerations in arguing that the Nancy Court tower cannot qualify as a "personal wireless service facility" entitled to the benefits set out in 47 U.S.C. § 332(c)(7)(B).[45] This argument is based upon the statutory definition of the term "personal wireless service," which in the context of § 332(c) is defined as "*commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services*."[46] If the Nancy Court tower will not provide at least one of these three categories of service, then the provisions of § 332(c)(7)(B) become an irrelevancy here.

1. The proposed Nancy Court tower would not provide "commercial mobile services."

Since Tidal Network would only be transmitting radio signals for its fixed wireless broadband internet with the Nancy Court tower, it cannot be classified as a facility that would provide "commercial mobile services." This conclusion rests upon the statutory definition for that term found at 47 U.S.C. § 332(d)(1), which provides:

> [T]he 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

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45 SFST Brief at 8-11.

46 47 U.S.C. § 332(c)(7)(C)(i) (italics added).

> eligible users as to be effectively available to a substantial portion of the public. . . .[47]

In turn, 47 U.S.C. § 153(33) defines the phrase "mobile service" to mean "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." The phrase "interconnected service" as used in § 332(d)(1) means "service that is interconnected with the public switched network."[48] Here, Tidal Network has not shown that it has the equipment or licensing needed to provide a "mobile service" fitting the definition set out in 47 U.S.C. § 153(33).[49] Moreover, the proposed Nancy Court tower would not be interconnected with the public switched telephone network in Sitka.

Even if Tidal Network were to argue that the Nancy Court tower might conceivably offer some type of mobile broadband service in the future, this would not help its position here due to a recent case, *Ohio Telecom Ass'n v. FCC,* [50] where the Sixth Circuit Court of Appeals held that "mobile broadband does not qualify as 'commercial mobile service' under § 332(d)(1)."[51]

Thus, as proposed by Tidal Network, the tower it wants to build cannot be characterized as a facility that would provide "commercial mobile service."

2. The proposed Nancy Court tower would not offer "unlicensed wireless services" to Tidal Networks' subscribers.

The definitions set out in 47 U.S.C. § 332 also foreclose the possibility of the Nancy Court tower qualifying as a facility providing "unlicensed wireless services." This phrase is defined by § 332(c)(7)(C)(iii) to mean "the offering of telecommunications services using duly authorized devices which do not require individual licenses." Since Tidal Network's fixed wireless broadband service is operated under a license that allows it to utilize the 2.5 Ghz Rural Tribal Priority Window, it cannot claim to be offering unlicensed wireless service. Additionally, the "duly authorized devices" that are allowed to operate without a license under FCC

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47 47 U.S.C. §153(33) defines the phrase "mobile service" to mean "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves." The FCC has supplemented this definition through a regulation which provides a mobile service as a "radiocommunication service between mobile and land stations, or between mobile stations." *See* 47 C.F.R. §2.1

48 47 U.S.C. § 332(d)(2).

49 Whether a Tribe can utilize the 2.5 GHz Rural Tribal Priority Window to provide some type of mobile service is a point not addressed by either side in this matter.

50 *Ohio Telecom Ass'n v. FCC*, 124 F.4th 993 (6th Cir. 2025). This case was cited in SFST's brief as "*In re MCP No. 185*." Since the FCC has referenced this case as *Ohio Telecom Ass'n v. FCC* in subsequent orders, the agency's lead will be followed here.

51 *Id.* at 1013.

regulations are low power, short-range devices such as Wi-Fi transmitters that utilize the 57-64 GHz band.[52] It is thus clear that the tower Tidal Network wants to build will not be providing "unlicensed wireless services" as that term is defined by 47 U.S.C. § 332(c)(7)(C)(iii).

3. "Common carrier wireless exchange access services" would not be provided by the proposed Nancy Court tower.

Since the Nancy Court tower would be constructed without a connection to the existing telephone network in Sitka (or in FCC parlance, there would be no "exchange access"),[53] it cannot be characterized as a "common carrier exchange access service." Nor are broadband providers considered "common carriers" for purposes of § 332 since they do not offer a service that is interconnected with the traditional public switched 10-digit telephone system.[54] Accordingly, the tower that Tidal Network has proposed cannot be considered a facility that will provide "common carrier wireless exchange access service."

4. The legal authorities cited in Tidal Network's supplemental brief do not alter the conclusion that the proposed Nancy Court tower is not a "personal wireless service facility."

In its supplemental brief, Tidal Network cites a series of federal cases which stand for the proposition that wireless communication towers do not have to be constructed by a cellular service provider in order for it to quality as a "personal wireless service facility" that is entitled to the benefits and protections set out in 47 U.S.C. § 332(c)(7)(B).[55] Based on these cases, Tidal Network contends that the possibility of cellular antennas being mounted on its proposed tower at point in the future means it must be treated as a "personal wireless service facility" in the present.

The problem with the cases Tidal Network relies upon is that all of them are readily distinguishable. None of these cases involved a tower proposed for the specific purpose of providing fixed wireless broadband that had no connection with the public switched telephone network. Additionally, in all those cases the local zoning authority was presented with an

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[52] FCC Modifies Part 15 Rules to Spur the Deployment of Wireless Services, Unlicensed Spectrum Innovation in the 57-64 Ghz Band, 2013 WL 4040749 at *1 (Aug. 9, 2013).

[53] *See* 47 U.S.C. § 153(20) (defining "exchange access" as the "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services").

[54] *Ohio Telecom Ass'n v. FCC*, 124 F.4th at 1011-12.

[55] *See* T&H Supplemental Brief at 7 (noting that "parties who do not themselves provide personal wireless services, but deploy personal wireless service facilities, are protected by Section 332(c)(7)(B)(i)").

application that made it abundantly clear that the towers in question were being constructed for the intended purpose of filling coverage gaps in existing cellular networks.

To be clear, Tidal Network compellingly argues that (1) cellular towers constructed by third parties for the intended use of cellular providers can qualify as "personal wireless service facilities" as that term is defined at § 332(c)(7)(C); and (2) such third parties are not required to provide proof of current collocation contracts.[56] The problem that Tidal Network cannot overcome, however, is that it did not come to the Planning Commission with a proposed tower that was intended to fill a proven coverage gap in Sitka's cellular network. This is made abundantly clear from the hearing transcripts, and the fact that the only coverage maps provided to the Planning Commission related to the fixed wireless broadband network that Tidal Network plans to construct. Tidal Network offered nothing regarding alleged coverage gaps in Sitka's cellular network, much less explain how its proposed tower might resolve those gaps.

The obvious distinctions between the facts presented here, and the facts of the cases cited by Tidal Network, are highlighted by *Liberty Towers, LLC v. Zoning Hearing Bd. of Twp. Lower Makefield*, a case where a company with an established history of constructing and operating wireless facilities successfully challenged a municipality's denial of its application to construct a tower that was to be used by Sprint and T–Mobile to remedy a significant coverage gap.[57] In similar fashion, the facts in *Crown Castle NG W. LLC v. Town of Hillsborough* featured an independent developer of cellular infrastructure who had an agreement to construct facilities for Verizon based on solid technical evidence showing "critical service gaps" in the community's cellular network.[58]

This pattern of third-party developers coming to municipal zoning authorities with definitive plans to construct a wireless tower that would close a documented coverage gap in a community's cellular network is repeated in other cases referenced by Tidal Network, including *Industrial Tower and Wireless, LLC v. Esposito*,[59] *Gulfstream Towers LLC v. Brevard County*,[60] and *Industrial Tower and Wireless, LLC v. Roisman*.[61] The only case cited by Tidal Network

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56 *Id.* at 6-8, *citing* Declaratory Order, *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd 12865, 12973 (2014) (vacated in part on other grounds sub nom.); *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

57 48 F. Supp. 2d 437, 439 (E.D. Pa. 2010).

58 2018 WL 3777492, at *3 and *7 (N.D. Calif. 2018).

59 2018 WL 526334 at *1 (D. R.I. 2018).

60 2024 WL 2459402 at *2 (M.D. Fla. 2024).

61 2024 WL 4329935 at *2 -*4 (D. Vt. 2024).

where a developer lacked definitive technical information showing a gap in cellular coverage is *ExteNet Sys. v. City of Cambridge*, and there the developer could at least point to a contract it had negotiated with a major cellular provider who wanted to access the proposed facilities after they were built.[62]

Just as a pig's ear cannot be transformed into a silk purse, the fixed wireless broadband tower that Tidal Network has proposed here cannot be transformed into a "personal wireless service facility" for purposes of 47 U.S.C. § 332(c)(7)(B) simply by pointing to the speculative possibility that, at some unknowable point in the future, a local cellular provider might be willing to connect the Nancy Court tower to the telephone network in order to remedy a cellular coverage gap that may – or may not – actually exist at the present. The more prudent approach is to evaluate Tidal Network's proposed tower based on its actual function and purpose as presented to the Planning Commission. For the reasons covered above, that proposed tower cannot meet the statutory criteria for a "personal wireless service facility" as that term is defined by 47 U.S.C. § 332(c)(7)(C)(i). Accordingly, the limitations set out in 47 U.S.C. § 332(c)(7)(B) do not apply here.

C. Even if § 332(c)(7)(B) is applied here, Tidal Network would not be entitled to a variance for its proposed tower.

Even if it were assumed that Nancy Court tower was a "personal wireless service facility" that was covered by the provisions of 47 U.S.C. § 332(c)(7), the Planning Commission's decision would have to be denied under the holding of *T-Mobile USA, Inc. v. City of Anacortes*, a Ninth Circuit Court of Appeals decision that is controlling here.[63]

The facility at issue in that case was a 118-foot monopole tower that T-Mobile wanted to construct on property leased from a church in the community of Anacortes. The application that T-Mobile submitted to city zoning officials included an analysis of eighteen alternative sites, along with a technical analysis supporting its position that the proposed tower was the only feasible site available to it.[64]

In analyzing the case, the court first noted in enacting 47 U.S.C. § 332, Congress attempted to strike a balance between the authority of State and local governments over zoning

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[62] 481 F. Supp. 3d 41, 47-48 and 53-54 (D. Mass. 2020). Notably, the court upheld the municipality's denial of the developer's request due to this absence of evidence showing a gap in cellular coverage.

[63] 572 F.3d 987 (9th Cir. 2009).

[64] *Id.* at 989. This highlights the comparative lack of information that Tidal Network provided to the Planning Commission regarding the Nancy Court location.

and land use matters, and the need to encourage the rapid deployment of new telecommunication technologies. This balancing is reflected in § 332(c)(7)(A), which provides that "the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities" was preserved subject to the limitations set out in § 332(c)(7)(B). One of those limitations provides that local zoning regulations "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[65]

A local government violates this provision if it prevents a wireless provider from closing a "significant gap" in service coverage.[66] Such a claim generally "involves a two-pronged analysis requiring (1) the showing of a 'significant gap' in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations."[67] "A provider makes a prima facie showing of effective prohibition by submitting a comprehensive application, which includes consideration of alternatives, showing that the proposed [wireless facility] is the least intrusive means of filling a significant gap."[68] This requires the wireless provider to show that the manner in which it proposes to fill the service gap is the "least intrusive on the values that the [local government's] denial sought to serve."[69] The wireless provider has the burden of showing the lack of available and technologically feasible alternatives.[70]

In *City of Anacortes*, the court's analysis focused on the extent to which T-Mobile had proven that alternative tower sites suggested by zoning officials were either infeasible, or unavailable. The work that T-Mobile invested in this regard was impressive; among other things, it conclusively demonstrated that all the alternatives suggested by zoning officials were not viable options for reasons such as owner unwillingness to lease a tower site, or helicopter flight patterns.[71] The court concurred that no realistic alternative existed, and accordingly affirmed a lower court ruling that directed zoning officials to issue a permit allowing T-Mobile to proceed with construction of its proposed tower.[72]

When the documents and information that Tidal Network provided to the Planning Commission are evaluated against the standards set out in *City of Anacortes*, it becomes clear

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65 47 U.S.C. § 332(c)(7)(B)(i)(II).
66 *City of Anacortes,* 572 F.3d at 995.
67 *MetroPCS, Inc. v. City of San Francisco*, 400 F.3d 715, 731 (9th Cir. 2005).
68 *City of Anacortes,* 572 F.3d at 998.
69 *MetroPCS, Inc.,* 400 F.3d at 734.
70 *City of Anacortes*, 572 F.3d at 996.
71 *Id.* at 997.
72 *Id.* at 999.

that Tidal Network did not provide sufficient information for the Commission to undertake a reasoned analysis of its proposal. The most obvious issue in this regard is the absence of any technical analysis showing that a 120-foot tower was required to resolve the coverage gap in Tidal Network's wireless broadband coverage. While the record shows that Tidal Network offered an explanation as to why a 35-foot tower would be inadequate,[73] the only justification offered in support of the 120-foot tower was a comment by Tidal Network's representative that a radio frequency engineer had determined that 120 feet was a "feasible height."[74] This failed to explain why a tower higher than 35 feet but less than 120 feet would be insufficient to cover Tidal Network's coverage gap. Additionally, the absence of any maps showing the coverage offered by shorter towers prevented Commission members from evaluating the extent to which Tidal Network's verbal assurances were supported by reliable technical data.

Tidal Network also admitted that it rejected any alternative tower location that it was unable to purchase because "it's actually cheaper to buy and build these things" as opposed to leasing locations.[75] The fact Tidal Network rejected suitable alternative sites based solely on financial concerns was conceded in the March 28, 2025 letter that T&H's president sent to the Planning Director.[76] While the standards discussed in *City of Anacortes* suggest that a proposed alternative location can be deemed infeasible if the owner demands an unreasonable sum for a sale or lease of the property, there is nothing in Ninth Circuit's opinion supporting the proposition that a wireless developer's business plan or financial preferences are a legitimate basis for concluding that an otherwise suitable alternative location is unavailable.[77]

In summary, Tidal Network fell well short of establishing that the 120-foot tower it wants to build at the Nancy Court location was the least intrusive means of filling a significant coverage gap. The record offers no explanation as to why a tower less than 120 feet would be inadequate to address the Tidal Network's coverage gap. Nor does the record offer any details as to the location, cost, or technical feasibility of the alternative tower sites that Tidal Network rejected for purely financial reasons.

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73 April 2 Transcript at 28.
74 *Id.* at 26.
75 March 5 Transcript at 29.
76 *See* footnote 27, *supra.*
77 *City of Anacortes*, 572 F.3d at 996.

Thus, even if Tidal Network's proposed tower was considered a "personal wireless service facility" for purposes of 47 U.S.C. § 332(c)(7)(B), the outcome here would not be altered as a result.

D. The Planning Commission correctly interpreted and applied the ordinances governing the issuance of variances.

1. Two separate ordinances govern Tidal Network's variance request.

With the provisions of the federal Telecommunications Act removed from consideration here, the outcome of Tidal Network's appeal depends on the extent to which the Planning Commission properly interpreted and applied SGC 22.25.020 and 22.10.160(D)(1) in denying the variance requested by Tidal Network. The first of these ordinances provides as follows:

> The purpose of this section is to provide a means of altering the requirements of this code in specific instances *where the strict application of those requirements would deprive a property of privileges enjoyed by other properties with the identical regulatory zone because of special features or constraints unique to the property involved*. The city shall have the authority to grant a variance from the provisions of this code when, in the opinion of the planning commission, the conditions as set forth in SGC 22.10.160(D) have been found to exist. In such cases 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. (Emphasis added).

In turn, SGC 22.10.160(D)(1) imposes the following list of requirements that must be met before the Planning Commission can grant a variance request:

> Before any variance is granted, it shall be shown:
>
> a. *That there are special circumstances to the intended use that do not apply generally to the other properties*. Special circumstances may include the shape of the parcel, the topography of the lot, the size or dimensions of the parcels, the orientation or placement of existing structures, or other circumstances that are outside the control of the property owner;
>
> b. The variance is necessary for the preservation and enjoyment of a *substantial property right or use possessed by other properties but are denied to this parcel*; such uses may include the placement of garages or the expansion of structures that are commonly constructed on other parcels in the vicinity;
>
> c. That the granting of such a variance will not be materially detrimental to the public welfare or injurious to the property, nearby parcels or public infrastructure;
>
> d. That the granting of such a variance will not adversely affect the comprehensive plan. (Emphasis added.)

In its findings, the Planning Commission found that Tidal Network had failed to carry its burden with regard to subsection (a) because all structures in the R-1 zoning district are subject to the 35-foot height limit, and there were "no special circumstances in relation to the physical characteristics of the parcel or pre-existing development of or on the parcel that justified granting of the variance."[78] The Commission also determined that Tidal Network's variance request did not satisfy subsection (b) because other R-1 properties do not have a right to build a principal structure exceeding 35 feet in height, and "telecommunications towers, particularly of the height proposed by the applicant, were not commonly constructed on other parcels in the vicinity."

2. Deference will not be afforded to the Planning Commission's interpretation of the key ordinances here.

There is nothing in the Sitka General Code that requires the Assembly, when sitting as the Board of Adjustment, to defer to findings of fact or conclusions of law made by the Planning Commission. To the contrary, SGC 22.10.170(B)(1) grants the Assembly authority to exercise its independent judgment so long as its actions do not enlarge the area or scope of a proposed project, increase density or the size of a proposed building, or "[s]ignificantly increase adverse environmental impacts as determined by the responsible official." There is nothing in the Sitka General Code to suggest that an administrative law judge filling the Assembly's role in Board of Adjustment proceedings must offer a different level of deference to the Planning Commission.

3. The Planning Commission's interpretation of the relevant ordinances is consistent with their plain meaning and Alaska law.

Here, there are two competing approaches to the interpretation and application of these two ordinances. As covered in the factual summary above, the Planning Director believed that Tidal Network had demonstrated the existence of "special circumstances" under SGC 22.10.160(D)(1)(a) because the height of tower required to fill its wireless broadband coverage gap was outside Tidal Network's control.[79] While not directly stated in the Planning Director's reports to the Commission, it appears that she viewed the right to build a 120-foot tower in a residential zoning district as a use that was possessed by other properties but denied to the lots owned by Tidal Network for purposes of SGC 22.10.160(D)(1)(b).

In contrast, the Planning Commission concluded that the term "special circumstances" should be narrowly construed as referring to the "physical characteristics of the parcel or pre-

[78] Joint Statement at 7.
[79] *Id.* at 4.

existing development of or on the parcel."[80] The Commission also found that construction of a 120-foot communications tower was *not* a right of use enjoyed by other R-1 lots – or that such large towers were commonly constructed on other parcels in the vicinity.[81]

Here, Tidal Network contends that the Planning Director correctly interpreted these Code provisions.[82] However, careful analysis leads to the conclusion that the Planning Commission correctly interpreted and applied those provisions here.

Alaska law provides that municipal ordinances should be interpreted in the same manner as statutes enacted by the legislature.[83] The goal of statutory construction is to give effect to the intent of the lawmaking body, with due regard for the meaning the statutory language conveys to others.[84] A statute should be interpreted "according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose."[85] Statutory provisions should not be read in strict isolation. Rather, each part or section of a statute should be interpreted with every other part or section, so as to create a harmonious whole.[86] Unambiguous language in a statute is given its ordinary and common meaning; however, legislative history may be consulted as a guide in construing it.[87]

The starting point for applying these principles is SGC 22.25.020, which requires property owners seeking a variance to establish the existence of "special features or constraints unique to the property involved" that prevent it from being utilized in the same manner as similarly zoned properties. This imposes a requirement – consistent with the Commission's analysis – that landowners seeking a variance must show that their properties suffer from some type of unique physical feature or characteristic that prevents them being used in the same manner as other properties within the same zoning district. The fact SGC 22.25.020 makes no reference to an applicant's proposed use of its property reinforces this conclusion.

This focus on the characteristic of an applicant's property, and the extent to which it can be utilized in the same manner as similarly zoned properties, is carried over into SGC 22.10.160(D)(1). There, subsection (a) of the ordinance offers examples of unique features that

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80 *Id.* at 7.
81 *Id.*
82 T&H Prehearing Brief at 6-7.
83 *Marlow v. Municipality of Anchorage*, 889 P.2d 599, 602 (Alaska 1995).
84 *Murphy v. Fairbanks N. Star Borough*, 494 P.3d 556, 563 (Alaska 2021).
85 *Id.*
86 *Rivera v. Dep't of Admin., Div. of Motor Vehicles*, 564 P.3d 1040, 1046 (Alaska 2025).
87 *Umialik Ins. Co. v. Miftari*, 559 P.3d 169, 175 (Alaska 2024).

constitutes a "special circumstance." Notably, the list of examples – the shape of the parcel, the topography of the lot, the size or dimensions of the parcels, the orientation or placement of existing structures – all relate to the physical characteristics of the applicant's property. Under the interpretive rule called *ejusdem generis*, these specific examples of "special circumstances" limit the interpretation of that broader term to items having similar characteristics.[88]

In like manner, subsection (b) offers "the placement of garages or the expansion of structures that are commonly constructed on other parcels in the vicinity" as examples of situations where the Planning Commission can find that a "substantial property right or use possessed by other properties" is denied to the applicant's property. Again, this supports the conclusion that variances under the Sitka General Code are intended to level the regulatory playing field so that owners of properties with challenging physical characteristics can utilize them in the same manner as their neighbors. Nothing in the language of this subsection suggests that the Planning Commission can issue variances that allow property owners to utilize their properties in a manner that is distinctly different from the uses of neighboring parcels.

This narrow interpretation of subsection (b) finds additional support in the language of SGC 22.25.020, which provides that the purpose of a variance is to allow the owner of the subject parcel the same "privileges enjoyed by other properties with the identical regulatory zone." Or phrased more succinctly, under the Sitka General Code variances exist so that property owners can utilize physically unique properties in a manner similar to other properties in the same zoning district. Variances cannot be granted if they would permit specific parcels to be used in ways that are inconsistent with the zoning district in which they are located.[89]

The interpretive rule of *ejusdem generis* also comes into play here. Since subsection (b) offers specific examples of a "substantial property right or use possessed by other properties," those examples effectively limit the types of situations where a variance can be justified.[90]

The Planning Commission's interpretation of SGC 22.10.160(D)(1)(a) and (b) is additionally supported by the Alaska Supreme Court's opinion in *City & Borough of Juneau v.*

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88 *State v. Planned Parenthood of the Great Northwest*., 436 P.3d 984, 996 (Alaska 2019) ("[u]nder the interpretive canon *ejusdem generis*, when a general term follows specific terms, the general term will be interpreted in light of the characteristics of the specific terms, absent clear indication to the contrary"); *West v. Umialik Ins. Co*., 8 P.3d 1135, 1141 (Alaska 2000) ("[a] general term linked to specific terms with the word "including" may be interpreted under the *ejusdem generis* principle).

89 *See* AS 29.40.040(b)(2) (a variance from a land use regulation may not be granted if it would "permit a land use in a district in which that use is prohibited").

90 *Id.*

Thibodeau.[91] There, a store owner sought a zoning variance reducing the number of off-street parking spaces he was required to provide so that he could enlarge his store building into the parking area.[92] The variance was denied on the grounds that the store owner had failed to offer evidence indicating that his property suffered from "peculiarities" distinguishing it from similarly zoned properties. While the store owner agreed that there was nothing peculiar or unique about his property, he asserted that his need for an expanded store – and the potential benefits this would bring to the community – justified a reduction in the number of parking spaces he was required to provide.[93] In affirming the denial of the variance, the court noted:

> Peculiarities of the specific property sufficient to warrant a grant of a variance must arise from the *physical conditions of the land itself which distinguish it from other land in the general area*. The assertion that the ordinance merely deprives the landowner of a more profitable operation where the premises have substantially the same value for permitted uses as other property within the zoning classification argues, in effect, for the grant of a special privilege to the selected landowner. We do not believe that the variance provision in the instant ordinance is intended to achieve such an inequitable result.[94] (Emphasis added.)

Given the weight of this legal authority, the Planning Commission was clearly correct with it when it rejected the Planning Director's proposed interpretation of SGC 22.10.160(D)(1) and 22.25.020. Like the store owner in *Thibodeau*, Tidal Network seeks a variance not because of some inherent issue with the property it owns, but rather because it wants to use that property in a manner that is inconsistent with the restrictions applicable to parcels located within the R-1 zoning district. Accordingly, the Planning Commission's denial of Tidal Network's variance request must be affirmed.

IV. Issues Not Addressed in this Decision

Based on the ample grounds covered above for affirming the Planning Commission's decision, it is unnecessary to address the remaining issues. These include the Planning Commission's findings that (1) Tidal Network failed show that its requested variance satisfied

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91 595 P.2d 626 (Alaska 1979).
92 *Id.* at 628.
93 *Id.* at 635.
94 *Id.* at 635-36.

the requirement of SGC 22.10.160(D)(1)(c),[95] and (2) issuance of the requested variance was prohibited by AS 29.40.040(b)(3).[96]

V. Conclusion

The Planning Commission's denial of a variance that would have allowed Tidal Network to construct a 120-foot wireless communications tower at 116 Nancy Court in Sitka is AFFIRMED.

DATED: October 1, 2025.

Max Garner
Administrative Law Judge

RIGHT OF RECONSIDERATION

A party to the hearing in this matter may seek reconsideration of this decision by filing a written request for reconsideration with the Municipal Administrator within fourteen (14) calendar days of the date of distribution of this decision. A motion for reconsideration is governed by and shall comply with the requirements of SGC 22.10.190. The administrative law judge will fulfill the duties of the Assembly set out in that ordinance.

NOTICE OF APPEAL RIGHTS

An administrative appeal from a decision of the administrative law judge may be filed with the Alaska Superior Court within 30 days of the date the decision is issued, in accordance with SGC 22.10.240 and Alaska Rule of Appellate Procedure 602.

Certificate of Service: I certify that on October 1, 2025, this document was sent to: Douglas Bonner, Attorney (by email); Rachel Jones, Attorney (by email); W.Scott McCollough, Attorney (by email); Chris Cropley (by email).

By: Haley Canfield
Office of Administrative Hearings

[95] Under this subsection, the Planning Commission cannot approve a variance unless it finds "[t]hat the granting of such a variance will not be materially detrimental to the public welfare or injurious to the property, nearby parcels or public infrastructure."

[96] This statutory provision prohibits the granting of a variance "solely to relieve pecuniary hardship or inconvenience."