

Administrative Law Judge
San Juan County, Utah

Request for Land Use Variance by	:	Decision of Administrative Law Judge
APC Towers IV, LLC for a 158-foot	:	Lyn Loyd Creswell
Telecommunications Tower at	:	30 July 2024
4110 South Highway 191	:	
Blanding, Utah	:	

On 25 January 2024 Russell Curry, representing APC Towers IV, LLC,¹ requested a variance to a 75-foot height restriction and a set-back requirement for “utility buildings” in the San Juan County land use code. The proposed APC Towers IV, LLC project involves the construction and operation of a 158-foot² telecommunication tower. The planned tower is 540 feet from a residential structure, 272 feet from a shed, and 363 feet from buildings used by a construction company.

The San Juan County Administrative Law Judge – as the County’s land use appeal authority – may grant a variance to the requirements of the land use code. San Juan County Code § 153.042 (B).

Administrative Law Judge (ALJ) Lyn Creswell requested the project applicant provide information relevant in determining whether a variance is appropriate for the proposed tower. The applicant has the burden of proving that all the conditions justifying a variance have been met. San Juan County Code § 153.042 (F).

¹ On 15 April 2024 APC Towers IV, LLC registered as a business with the Utah Division of Corporations and Commercial Code. The registered agent is identified as InCorp Services, Inc, 285 S. Tabernacle, Suite 201, St. George, Utah 84770.

² There will be a 155’ guyed tower with a 3’ lighting rod on top.

Proposed Telecommunications Tower

The planned telecommunications tower will be developed, owned and operated by APC Towers IV, LLC. The tower will be a 158-foot telecommunication facility.

The proposed tower at 4110 South Highway 191³ is intended to fill a “gap” in wireless services in the vicinity. A coverage analysis was prepared by RF Engineer Don Vigil with T-Mobile West, LLC. The “Significant Gap Statement” was prepared by Mr. Vigil on 22 May 2024.

- The 22 May 2024 Significant Gap Statement explained that T-Mobile has a significant gap in service and the need for the proposed site at 4110 South Highway 191 to provide in-building and in-vehicle coverage that support reliable T-Mobile voice and data services south of Blanding, Utah.
- As of 22 May 2024, T-Mobile had a significant gap in reliable 2G/3G/4G/5G in-building service along US. Highway 191 between Browns Canyon Road to the north and Ruin Springs Road to the south, a stretch of 5.9 miles, and extending 3 miles from east to west on both sides of the highway. The gap area was approximately 13.9 square miles.
- The result of the significant gap is that T-Mobile customers experience blocked calls, dropped calls, and slow data speed in the affected area.
- The proposed telecommunications tower is designed to eliminate the significant gap in wireless service with a single facility rather than multiple facilities.
- Mr. Vigil determined that the optimal location for a single facility was at or near the intersection of US Highway 191 and Utah Road 95, south of the Blanding Municipal Airport.
- Mr. Vigil determined that a tower design height of 150 feet antenna centerline (158 feet overall tower height) allows the proposed site to provide adequate in-building coverage in the gap area.

³ The property is located within Section 15, Township 37 South, Range 18 East, Salt Lake Base and Meridian, San Juan County State of Utah.

- The result would be robust in-vehicle and in-building wireless coverage uniformly throughout the area.

APC Towers IV, LLC has designed the proposed tower to limit a potential hazard associated with telecommunication facility hazards.

- To limit access to the tower for trespassers – who might climb and fall from the tower – APC Towers IV, LLC will install a security fence with locked gates around the tower site and remove any pegs or other devices which would allow an unauthorized person to climb the tower. The fence⁴ will be a 6-foot chain-link fence with barbed wire.

The proposed tower location at 4110 South Highway 191 includes the following characteristics.

- The proposed tower is located in an area which is sparsely developed.
- The tower will be located on property leased by APC Towers IV, LLC from Morgan and Vicky Kuykendall – who own Tax Parcel 37S22E155401 (10.03 acres) in San Juan County, Utah. The tower lease area is approximately 10,000 square feet.
- Ground elevation of the parcel is 5950 feet above mean sea level (A.M.S.L.).
- Existing structures on the parcel owned by Morgan and Vicky Kuykendall are a residential structure (with related accessory buildings) and an animal shed.
- There are no structures within 158 feet of the tower.
- The Kuykendall residence is approximately 540 feet from the proposed tower.

⁴ A compound of 50' by 50' will include the tower and equipment. The compound will be surrounded by a six feet chain-link fence.

- South of the Kuykendall property is a 16.62-acre parcel⁵ owned and operated by Sonderegger Yard & Gravel, Inc, a concrete, material, excavation, and site grading company. The structures on the Sonderegger property are approximately 363 feet from the proposed tower.
- Rocky Mountain Power will provide power to the tower.
- There is a residence on the property (parcel 37S22E155401) to the west of the tower and the residence is approximately 540 feet from the future tower location.

APC Towers IV, LLC intends to construct the tower in compliance with the International Building Code, the National Electrical Code, and ANSI/TIA/EIA 222.

⁵ Parcel Number 37S22E166003.

APC Towers IV, LLC will comply with all local, state, and federal laws and regulations governing wireless communication facilities. An airspace analysis⁶ was conducted and indicated that no additional consultation was necessary with the FAA or FCC for the proposed tower. In addition, all new wireless communication facilities are required to go through the National Environmental Policy Act (NEPA) screening, prior to construction, to determine whether the proposed action (construction) will have a significant environmental effect. The screening reviews impacts to wilderness areas, wildlife preserves, endangered species or designated critical habitats, historic places, Indian religious sites, floodplains, and wetlands. APC Towers IV, LLC will not start construction of the proposed tower without a completed NEPA report indicating the facility will not result in significant environmental effect.⁷

⁶ On 7 November 2023 Specialist Brian Oliver with the Federal Aviation Administration issued a decision (“preliminary findings”) for Aeronautical Study No. 2023-ANM-6556-OE relating to a proposed 158 feet telecommunications tower at Latitude 37-34-01.05N NAD 83 and Longitude 109-29-29.84W.

The proposed tower would be located 3,909 feet southwest of the Runway 35 approach to the Blanding Municipal Airport.

The decision found that if the proposed tower did not exceed 158 feet above ground level (5909 feet above mean sea level), the monopole tower would not create a substantial adverse effect on navigable airspace.

⁷ On 22 April 2024 Environmental Assessment Specialists, Inc, (EAS) Ventura, California submitted an “environmental screening” report of the proposed APC Tower IV, LLC proposed telecommunications tower. The 22 April 2024 screening report included the following information.

- There are no U.S. National Wilderness areas in the vicinity of the proposed site. There are no wildlife preserves in the vicinity of the proposed site.
- The project site contains no sensitive biological resources, including suitable habitat for any listed threatened or endangered plant and wildlife species.
- No wetlands or riparian areas occur on or within the immediate vicinity of the project site. The project will not result in any impacts to wetlands or other jurisdictional waters.
- Installation of the proposed facility will not result in any impacts to native vegetation communities or suitable habitat for any sensitive plant or wildlife species.
- Trees and shrubs located within the immediate vicinity of the proposed site provide suitable nesting habitat for several avian species, including the Northern Long-Eared Bat. EAS recommends that construction activity avoid the avian nesting season (1 February to 30 September). If construction activity must occur during the nesting season, a qualified biologist should perform a pre-construction clearance survey to determine the presence/absence of nesting activity near the project site. If no nesting activity is observed, no further action is required. If nesting activity is observed on or in the immediate vicinity of the proposed

site, construction activity can proceed after the nestlings have fledged. If the facility must be installed near the active nest, a biological monitor will be present during the construction activity.

- No previous archaeological sites or newly identified sites are present within the project footprint. The proposed facility will be over ¼ mile from any known eligible archaeological sites and thus will not physically impact the sites. The sites are in locations that have already been significantly impacted by road construction, maintenance, water and fiber lines, and utility poles. EAS advises APC Tower IV, LLC to have an “inadvertent discovery plan” for the site during construction. Should ground disturbing activities reveal any cultural materials, activity will cease, and the Utah State Historic Preservation Officer will be notified immediately. If human remains, suspected human remains, or any items suspected to be related to human burial are encountered during any aspect of the project, operations must cease within 200 feet of the find. The area around the discovery will be secured and the San Juan County Sheriff and the State Historic Preservation Officer will be contacted at once.

- Federally Recognized Tribal Groups were notified of the proposed project on 22 December 2023. Clearance was reported on 11 April 2024.

- The site is not located within a 100-year flood plain.

- No high intensity white lights will be used for tower illumination.

Once constructed, maintenance of the tower will include the following. Once a month wireless technician maintenance personnel will visit the site for routine maintenance. A standard work truck will be used for these visits. Roughly every three years APC Towers IV, LLC will upgrade their equipment and antennas on the tower. This work will likely require a manlift or crane. The maintenance and upgrades the site will produce little noise and will create little traffic or safety concerns.

The tower will only have the identification signage required by federal regulation. No commercial or other advertising will be on the tower or facilities.

The proposed tower will not encroach or block vehicular traffic. There is a path leading to the proposed site location and the path will continue around the facility. No portion of the path will be obstructed.

The proposed tower will have no accessory buildings. However, APC Tower IV, LLC will install two (2) equipment cabinets and a diesel generator on a 6" thick concrete slab.

San Juan County Plans, Land Use Code, Other San Juan County Ordinances

San Juan County General Plan. In 2018 San Juan County updated and adopted the *San Juan County General Plan*. Of interest here is an objective repeated in the *San Juan County General Plan* – to increase *broadband* infrastructure in San Juan County. Included in the chapter titled “Economic Development” (pages 21 – 30) of the *General Plan* is the following.

“The County’s economic strategy plan has been broken into five key areas of focus, with a vision and planned development of these areas over one, five, and ten years. The five key areas of focus are: *Broadband*, Transportation, Business Expansion and Retention, Diversification, Celebration of Culture and History.

One Year Vision

BROADBAND – In partnership with the Seven County Infrastructure Coalition, the county has identified *Broadband* as one of the primary infrastructure goals. Year one includes the development of a county-wide *Broadband* plan that includes connectivity in the communities fanning the Utah Education Network projects to have Broadband in all the public schools. Planning also includes establishing right of way agreements and initiating collaboration during roadwork discussions. Healthcare, a primary industry of the County, is one example of the necessity of *broadband* expansion with the development of telemedicine programs.

...

Five Year Vision

BROADBAND – A key infrastructure hurdle for business is the cost of *Broadband* in rural Utah. A key goal would be identifying a way to reduce cost of service and creating competitive prices compatible to the Wasatch Front.

...

Ten Year Vision

BROADBAND – *Broadband* will allow for expansion of remote and telecommuting opportunities. Creation of redundancy allowing for reliability in the system.”

San Juan County Zoning Code. On 5 June 1978 San Juan County adopted its first zoning ordinance.

On 12 September 2011 San Juan County adopted an amended Zoning ordinance. The APC Towers IV, LLC telecommunications project property is in the 2011 Zoning Code's Controlled District⁸ (which identified permitted, conditional, and prohibited uses within that district).

The 2011 Zoning Code states its "purpose" as follows. "This Ordinance is designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of San Juan County."

The 2011 Zoning Code included several sections (or provisions) which apply to all zoning districts in San Juan County. Among these general sections are yard space requirements, relationship of dwellings and lots, private garages with side yard requirements, prohibitions against selling or leasing "required space," restrictions on sale of lots below minimum size, exceptions to unobstructed side yards, area restrictions of accessory buildings, heights for main and accessory buildings, clear view of intersecting streets, and height restrictions for public, semi-public utility buildings.

Relevant here is the following general provision of the 2011 San Juan County Zoning Code. San Juan County Code § 153.135 (Height of Buildings) (A) "Public, semi-public utility buildings, when authorized in a zone may be erected to a height not exceeding 75 feet if the building is set back from each otherwise established building line at least one foot for each additional foot of building height above the normal height limit required for the zone in which the building is erected."

The 2011 Zoning Code does not define "utility buildings." In some local government zoning codes "utility buildings" are often defined as structures for the "storage" of materials. However, with a height standard of 75 feet (or seven stories) it was the likely intent of the San Juan County Commission to include any structure which served a "utility" function within the

⁸ The 2011 Zoning Code identified five "zoning districts": Multiple Use District (MU-1), Agricultural District (A-1), Rural Residential ((RR-1), Controlled District (CD), and Indian Reservation District (IR).

definition of “utility building.” It is difficult to image a “storage” building seven stories tall. Consequently, it is assumed that the height restrictions here applies to the proposed tower.⁹

The “Height of Buildings” provision includes a “set back” requirement. That requirement can reasonably be interpreted as requiring a set back at a distance equivalent to the height of the “utility building.”¹⁰ Here the “set back” distance would be 158 feet.

CD-c Community Commercial District.

The proposed tower is in the Community Commercial (CD-c) zoning district (or sub-zone) of San Juan County. The San Juan County land use ordinance authorizes the Planning Commission to review and approve a conditional use permit for any conditional use – identified either in the zoning district where the use is proposed or “elsewhere” in the County zoning code. “Radio and television transmitting stations or towers” are listed as conditional uses in the A-1 Agricultural District. Under the San Juan County land use ordinance, the Planning Commission may approve a conditional use permit for the proposed tower. If approved, the Planning Commission shall make findings supporting the recommendation for the Conditional Use Permit and adopt appropriate findings.

⁹ A New York State appellate decision involved a 400-foot cellular telephone tower which the location government and the appellate court found was properly included in the definition of “public utility building.” *Payne v. Taylor*, 178 A.D.2d 979, 578 N.Y.S.2d 327 (1991)

¹⁰ The Controlled District (CD) provisions of the 2011 Zoning Code also include a setback requirement for commercial and industrial buildings. No commercial or industrial building shall be erected within twenty-five (25) feet of a residential building or residential district boundary. §12-4 (3) of the 2011 Zoning Code. The proposed project does not require a variance for this requirement.

San Juan County Conditional Use Permit Decision. On 8 February 2024 the San Juan County Planning Commission considered and approved the APC Towers IV, LLC facility at 4110 South Highway 191, Blanding, Utah as a “conditional use”¹¹ in the CD-c Community Commercial District.¹² Supporting its decision, the Planning Commission made the following findings¹³.

1. The proposed tower will have a positive, beneficial impact on the economy, security, safety, and welfare of San Juan County residents and businesses. Specifically, the proposed project will support and enhance emergency services, schooling, health care services, and remote employment.
2. The proposed tower has unique characteristics which are appropriately addressed with conditions as part of a conditional use permit.

¹¹ On 13 December 2023 Russell Curry (with Romano & Associates), representing APC Towers IV, LLC at 8601 Six Forks Road, Suite 250, Raleigh, North Carolina, signed a San Juan County Conditional Use Application. The Application identified Morgan and Vicky Kuykendall as owners of the property.

The Application included the following project description: “New wireless telecommunications facility consisting of 155’ guyed tower with antennas and radio transmitting equipment as well as associated ground equipment shelters and emergency generator.”

On 19 January 2024 Morgan and Vicky Kuykendall executed a “Property Owner’s Affidavit” which accompanied the Conditional Use Application.

Previously, on 3 August 2023 Morgan Shane Kuykendall and Vicky L. Kuykendall (Grantors) executed an “Option for Lease Agreement” with APC Towers IV, LLC with a mailing address of 8601 Six Forks Road, Suite 250, Raleigh, North Carolina 27615. On 14 August 2023 Daniel C. Agresta III (president and CEO of APC Towers IV, LLC) signed the “Option for Lease Agreement” as Grantee. The “Option for Lease Agreement” identified four leases: a communication easement, an access easement, a utility easement, and a guy wire easement. Photographs and descriptions included with the “Option for Lease Agreement” identify the following: 100’ x 100’ lease area, new access gate installation, nearest power pole, and 16’ new access road and underground utility.

Design drawings state the leased access road will be 20’ wide with a 12’ gravel access road.

¹² During the Planning Commission discussion regarding the proposed tower, Planning Commission Nielson expressed concerns about the tower’s location near the Blanding airport. Russell Curry, representing APC Towers IV, LLC, stated the FAA had given a height restriction waiver for the tower. When a vote on a motion was called, Commissioner Neilson supported the project.

¹³ The findings are found in a nine-page document titled “Conditional Use Permit for Telecommunications Tower at 4110 South Highway 191” signed by Planning Commission Chair Schafer on 4 April 2024.

3. The proposed tower furthers a priority objective of the 2018 *San Juan County General Plan* to increase *Broadband* capacity to promote economic development and enhance public health and education.
4. The construction and operation of the tower will not be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity.
5. The construction and operation of the tower will comply with the intent, spirit, regulations and conditions specified in the County land use code for such use and the zoning district where the use is to be located, as well be harmonious with the neighboring uses in the zoning district. Additionally, the project will comply with all federal regulations which protect and conserve San Juan County resources.
6. The Federal Aviation Administration Southwest Regional Office conducted an aeronautical study which revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation.
7. The proposed height of the tower will require a variance from the height standards in the San Juan County land use code.

On 8 February 2024 the Planning Commission approved a Conditional Use Permit¹⁴ with the following conditions.

- a. Prior to construction, the applicant shall apply for and receive a San Juan County building permit.
- b. The applicant shall apply for, receive, and maintain a San Juan County business license¹⁵ *and* be subject to regular inspections associated with the business license – to include a review of compliance with the CUP conditions.
- c. The construction and operation of the tower shall comply with the International Fire Code and the San Juan County Fire Policy – and be subject to inspection by fire authorities.
- d. The tower shall be operated in compliance with federal regulations.
- e. The tower shall not be used for outdoor advertising, signage, or similar uses without first obtaining permission from San Juan County.
- f. This permit shall be null and void if the tower is abandoned as a telecommunication facility or the tower is not maintained for 90 days. After abandonment or non-maintenance, the tower shall be removed at owner’s expense.
- g. Any neighbor or adjacent property owner or person reasonably expected to be at or near the facility during construction, maintenance, or other activity which has the potential to harm an individual shall be informed of the activity and provided with safety information, as appropriate.

¹⁴ Planning & Zoning Department Conditional Use Permit #24014 was issued on 13 February 2024 to APC Towers IV, LLC for the “Kuykendall Telecommunication Tower” at 4110 South Highway 191 at Parcel Identification #37S22E155401.

¹⁵ On 8 May 2024 APC Towers IV, LLC of 57 East Washington St. Chagrin Falls, Ohio received a San Juan County Business License issued by County Clerk Lyman Duncan.

- h. The facility shall be kept clean and free from rubbish, flammable waste material or other noxious or nuisance substances.

San Juan County Variance Provisions

San Juan County land use code § 153.042 (Variances) authorizes the Appeal Authority to grant a variance of the requirements of the land use ordinance as applied to a parcel of property.

The Appeal Authority may grant a variance only if the following requirements are met.

1. The literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinance. In determining whether enforcement of the ordinance would cause an undue hardship the Appeal Authority must find a) that the undue hardship is located or associated with the property where the variance is sought and b) that the hardship comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood. Also, the Appeal Authority may not find an unreasonable hardship if the hardship is self-imposed or economic.
2. There are special circumstances attached to the property that do not generally apply to other properties in the same zone. In determining special circumstances, the Appeal Authority may find special circumstances only if the special circumstances a) relate to the hardship complained of and b) deprive the property of privileges granted to other properties in the same zone.
3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone.
4. The variance will not substantially affect the general plan and will not be contrary to the public interest.
5. The spirit of the land use ordinance is observed, and substantial justice done.

Relevant to the findings of “unreasonable hardship” and “special circumstances” in cases of wireless communication facilities are the requirements of the federal law. Where the hardship and special circumstances claimed by a land use applicant includes a gap in wireless services, the authority considering a variance must consider the federal Telecommunications Act (TCA). The TCA “imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification” of telecommunication facilities. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 – 16 (2005).

TCA 47 U.S.C. § 332 (c) (7) (B) (i) provides, among other things, 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 –
 - (I) Shall not unreasonably discriminate among providers of functionally equivalent services; and
 - (II) *Shall not prohibit or have the effect of prohibiting the provision of personal wireless services.*

Regarding the matter of “hardship” and “special circumstances” in variance decisions, the applicant of a proposed wireless cell tower may satisfy these requirements by showing a gap in service without necessarily demonstrating a hardship associated with the unique shape, topography, or other physical feature of the property. See *Nextel Communications of Mid-Atlantic v. Town of Wayland*¹⁶, 231 F. Supp. 2d 396 (D. Mass. 2002) (“Under the Telecommunications Act, the [local government] cannot deny the variance if in doing so it would have the effect of prohibiting wireless services. 47 U.S.C. § 332 (c) (7) (i) (II). In other words, the need for closing a significant gap in coverage, in order to avoid an effective prohibition of wireless service, constitutes another unique circumstance when a zoning ordinance is required.”)

¹⁶ *Wayland* involved an application for a variance from a zoning law’s height restriction to build a wireless communications facility.

A decision of the United States Court of Appeals for the Third District affirmed the federal Telecommunications Act affect on local government approvals of telecommunication towers. “Congress passed the TCA in 1996. ‘Its primary purpose was to reduce regulation and encourage the rapid deployment of new telecommunication technologies.’ *Reno v. ACLU*, 521 U.S. 844, 857 (1997). Congress preserved local zoning authority over the ‘placement, construction, and modification of personal wireless service facilities,’ like cell towers. 47 U.S.C. § 332 (c) (7) (A). But it specified that such regulation “shall not prohibit or have the effect of prohibiting the provision of personal wireless services.’ Id. § 332 (c) (7) (B) (i) (II).” *Cellico Partnership v. The White Deer Township Zoning Hearing Board*, Third Circuit Court of Appeals, decided 14 July 2023.

The Third District Court found that the following facts supported a conclusion that the denial of variance to Verizon Wireless triggered the preemptive authority of the TCA.

- The wireless company provided evidence that there was a “significant gap” in its wireless coverage in the White Deer Township and that the proposed monopole cell tower would fill that gap.

Findings

Administrative Law Judge Lyn Loyd Creswell makes the following findings relevant to a determination of whether the APC Towers IV, LLC telecommunications tower at 4110 South Highway 191 qualifies for a variance from the height and set back¹⁷ restrictions in the San Juan County land use code.

1. The literal application of the San Juan County height requirement for “utility buildings” would cause an undue and unreasonable hardship on applicant APC Towers IV, LLC by preventing the applicant from erecting the planned telecommunication tower designed to cover an identified gap in wireless services in San Juan County, Utah.
2. A qualified engineer, using industry standard evaluation methodologies, has identified a wireless communication gap (5.9 miles x 3 miles or 13.9 square miles) along Highway 191 in San Juan County.
3. The APC Towers IV, LLC-proposed tower at 4110 South Highway 191 was designed for and supports the objective of eliminating or reducing the identified gap in services.
4. The proposed height (158 feet) of the tower was certified by a professional communications engineer to achieve the necessary elimination or reduction of the identified gap by multiple wireless service providers.
5. The construction and operation of the APC Towers IV, LLC tower at 4110 South Highway 191 carries out the general purposes of the *San Juan County General Plan* and the San Juan County Zoning Code by benefitting economic development, health care, emergency response services, remote work, and education in San Juan County.
6. The proposed tower supports an important objective of the 2018 *San Juan County General Plan* by adding critical Broadband infrastructure in San Juan County.

¹⁷ Here the proposed tower does not require a set back variance. The closest structure is beyond 158 feet (the set back distance) from the tower.

7. The proposed APC Towers IV, LLC tower at 4110 South Highway 191 supports the following purposes stated in the 2011 San Juan County Zoning Ordinance: “[P]romoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of San Juan County.”
8. The undue hardship is specifically associated with the APC Towers IV, LLC tower structure proposed and located at 4110 South Highway 191.
9. The undue hardship relates to and comes specifically from the peculiar technical requirements supporting the APC Towers IV, LLC tower designed to provide gap coverage in an area with low or no coverage.
10. The special circumstances associated with the planned telecommunications tower apply to that structure as it is designed to transmit wireless communications signals and do not apply to other “utility buildings” in the CD-c District which are not designed and intended to support wireless communications.
11. In this case, both the undue/unreasonable hardship and the special circumstances relate to the peculiar technical requirements of the planned tower designed to provide gap coverage in an area with marginal or incomplete wireless communication services.
12. The wireless communication services created by the operation of the APC Towers IV, LLC tower will provide a much-needed service to residents and business owners in San Juan County.
13. The provided benefit is essential to the enjoyment of a substantial property right – to effectively communicate and receive government-provided emergency services, accessible health care, enhanced education opportunities, and economic security – possessed by other property owners in the CD-c Community Commercial District.

14. The operation of the planned telecommunications tower is fully consistent with and does not deviate from the San Juan County General Plan.
15. The risk of physical harm to the public or adjacent property caused by the construction, operation, and maintenance of the tower is minimal.
16. APC Towers IV, LLC has anticipated and designed the tower to limit access to unauthorized persons who might seek to climb the tower (who might fall from the tower).
17. Assuming that APC Towers IV, LLC complies the conditions of the 13 February 2024 Conditional Use Permit (#24014) approved by the Planning Commission - the proposed tower will not be contrary to the public interest.
18. The construction and operation of the APC Towers IV, LLC at 4110 South Highway 191 meets the spirit of the San Juan County land use ordinance and is substantially just.
19. Based on the established wireless gap analysis and other factors, a denial of the APC Towers IV, LLC tower variance application would violate the federal Telecommunications Act (as interpreted by federal courts) by prohibiting or having the effect of prohibiting the provision of personal wireless services to wireless service users in San Juan County, Utah.

Mitigation

To safeguard the public interest associated with the proposed APC Towers IV, LLC telecommunications tower at 4110 South Highway 191, the following mitigation measures are required as part of the approval of a variance.

- APC Towers IV, LLC will comply with the “conditions” of the 13 February 2024 Conditional Use Permit issued by San Juan County.

- APC Towers IV, LLC will provide San Juan County (through the County’s Chief Administrative Officer) a copy of a completed National Environmental Policy Act (NEPA) screening report¹⁸, indicating the tower and facility will not result in a significant environmental effect, prior to applying for a building permit.

- Prior to construction, APC Towers IV, LLC shall apply for and receive a San Juan County building permit. If requested by San Juan County, APC Towers IV, LLC will contract and pay for the services of an independent and qualified engineer to inspect and certify to San Juan County that the tower and associated equipment were constructed in compliance with the International Building Code, the National Electrical Code, and any other governing engineering or related codes or standards.

¹⁸ The 22 April 2024 Environmental Assessment Specialists, Inc environmental screening report was provided to ALJ Creswell as part of the review and consideration of the subject variance application. That report should be separately submitted to the San Juan County Chief Administrative Officer.

Decision

Administrative Law Judge Lyn Loyd Creswell, acting as the San Juan County land use appeal authority, grants APC Towers IV, LLC a variance to the “utility building” height requirement of the 2011 San Juan County Zoning Code for a proposed telecommunication tower and associated equipment located at 4110 South Highway 191, subject to the mitigation requirements contained herein.

Administrative Law Judge Lyn Loyd Creswell shall continue jurisdiction over the subject variance for twelve months after the date the tower begins operating. Continuing jurisdiction includes assuring compliance with the mitigation requirements or modifying the mitigation measures of this decision.

A handwritten signature in black ink that reads "Lyn L. Creswell". The signature is written in a cursive style and is positioned above a horizontal line that extends to the right, ending in a large, sweeping flourish.

Lyn Loyd Creswell
San Juan County Administrative Law Judge

30 July 2024