

Administrative Law Judge  
San Juan County, Utah

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|----------------------------------|---|--------------------------------------|
| Request for Land Use Variance by | : | Decision of Administrative Law Judge |
| Verizon Wireless for a 150-foot  | : | Lyn Loyd Creswell                    |
| Telecommunications Tower at      | : | 22 November 2023                     |
| R22 East Radio Hill Road         | : |                                      |
| Blanding, Utah                   | : |                                      |

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Troy Benson, representing Verizon Wireless, applied for 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 Verizon Wireless project involves the construction and operation of a 150-foot telecommunication tower. The planned tower is 45 feet from an existing 68.3-foot-tall guyed tower, with adjacent 8’ x 10’ building. The tower is also within 150 feet of an existing power pole. The guyed tower and power pole are on the existing parcel where the proposed tower will be located.

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 was 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).

### *Proposed Telecommunications Tower*

The planned telecommunications tower will be developed, owned and operated by Verizon Wireless. The tower will be a 150-foot telecommunication facility.

The proposed tower at R22 Radio Hill Road is intended to fill a “gap” in wireless services in the vicinity. A coverage analysis was prepared by Technology Associates EC Inc, 136 South Main Street, Suite 400, Salt Lake City, Utah 84101.

- The proposed Verizon Wireless communications facility (near Radio Hill Road) is planned to close a 7-mile coverage gap on Highway 191 north of Blanding – between Recapture Reservoir and Devils Canyon Campground.
- The coverage area currently experiences low to no coverage.
- Due to elevation changes in the roadway, Verizon’s current tower in the town of Blanding cannot cover (“see”) the roadway in the area of the proposed tower.
- The 150-foot-tall tower is needed at Radio Hill Road to get the line of sight needed to close the seven-mile-long coverage gap.
- The proposed facility would consist of a 150-foot unmanned communication structure consisting of antennas mounted to a new lattice tower with outdoor equipment and generator. The tower structure will be mounted with a 17’ leg spread on a 26’ x 26’ underground concrete foundation. Power would be provided by Blanding City Power. The footprint of the structure and supporting equipment would be 1800 square feet or 0.041 acres. The site would be supported by a 12-foot-wide access and utility easement for the purpose of egress and ingress and installing underground utilities. The easement would be 0.045 acres.
- The supporting equipment will consist of two (2) equipment cabinets (7’- 6” tall), and a diesel generator (7’-3” tall) upon a 12’-8” x 14’ x 6” thick concrete slab with canopy.

Verizon Wireless has designed the proposed tower to limit a potential hazard associated with telecommunication hazards.

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

The proposed tower location at R22 East Radio Hill Road includes the following characteristics.

- The proposed tower is located in an agricultural zone and the area is mostly undeveloped.
- The tower will be located on property leased by Verizon Wireless from Jerry and Joey Holliday – who own Tax Parcel 36S22E132400 (81.28 acres) in San Juan County, Utah.
- Ground elevation of the parcel is 6354 feet A.M.S.L.
- Existing structures on the parcel owned by Jerry and Joey Holliday are a power pole, a 68.3-foot-tall guyed tower and an 8' x 10' building. The tower will be 488 feet from the east Holliday property line.
- Power poles are the only other structures within 150 feet of the tower.
- The nearest residence is approximately 1,000 feet north from the proposed site location.
- There is a horse track about 800 feet east of the project area (on parcel 36S22E134200).
- The land south of the site is owned by the United States Government.
- There is a residence on the property to the west (parcel 36S22147802) and it is approximately 1,080 feet from the future tower location.

- The proposed tower is approximately 140 feet from East Radio Hill Road, 2.25 miles northeast of Blanding City, and 15.55 miles southwest of Monticello City.

Verizon Wireless intends to construct the tower in compliance with the International Building Code, the National Electrical Code, and ANSI/TIA/EIA 222.

Verizon Wireless will comply with all local, state, and federal laws and regulations governing wireless communication facilities. 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. Verizon Wireless will not start construction of the proposed tower without a completed NEPA report indicating the facility will not result in significant environmental effect.

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 two to three years Verizon 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 need 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, Verizon will install two (2) 7'-6" tall equipment cabinets and a 7'-3" diesel generator, upon a 12'-8" x 14'-6" thick concrete slab, with a canopy covering the cabinets.

*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.

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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.

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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. The future tower project property (4326 East Sunny Acres Lane) was in the Agriculture District (A-10) of the 1978 Ordinance.

On 12 September 2011 San Juan County adopted an amended Zoning ordinance. The tower property was in the 2011 Zoning Code's Agricultural District<sup>1</sup> (re-designated A-1), 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 applied 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 in the

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<sup>1</sup> 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.<sup>2</sup>

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.” Here that distance would be 150 feet.

#### A-1 Agricultural District.

The proposed tower is in the A-1 Agricultural District. 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.

San Juan County Conditional Use Permit Decision. On 9 November 2023, the San Juan County Planning Commission considered and approved the Verizon tower at R22 East Radio Hill Road as a “conditional use” in the A-1 Agricultural District. Supporting its decision, the Planning Commission made the following findings.

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.
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.

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<sup>2</sup> A New York State appellate decision involved a 400-foot cellular telephone tower which the location government and the appellate court 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)

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.

On 9 November 2023 the Planning Commission approved a Conditional Use Permit 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 license *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.



- 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.
- 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 this requirement 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*<sup>3</sup>, 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,

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<sup>3</sup> *Wayland* involved an application for a variance from a zoning law’s height restriction to build a wireless communications facility.

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.”)

A recent 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.

- Verizon Wireless 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 Verizon Wireless tower at R22 East Radio Hill Road qualifies for a variance from the height and set back restrictions in the San Juan County land use code.

1. The literal application of the San Juan County height and set back requirements for “utility buildings” would cause an undue and unreasonable hardship on applicant Verizon Wireless 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 engineering company, using industry standard evaluation methodologies, has identified a wireless communication gap (seven miles) on Highway 191 north of Blanding, Utah (between the Recapture Reservoir and Devils Canyon Campground).

3. The Verizon Wireless proposed tower at R22 East Radio Hill Road was designed for and supports the objective of eliminating or reducing the identified gap in services.
4. The proposed height (150 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 Verizon Wireless tower at R22 East Radio Hill Road 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.
7. The proposed Verizon Wireless tower at R22 East Radio Hill Road 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 Verizon Wireless tower structure proposed and located at R22 East Radio Hill Road.
9. The undue hardship relates to and comes specifically from the peculiar technical requirements supporting the Verizon Wireless 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 A-1 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 Verizon Wireless 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 A-1 Agricultural 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. Verizon Wireless 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), and to reduce the potential for a tower collapse in event of a catastrophic event.
17. Assuming that Verizon Wireless complies the conditions of the 9 November 2023 Conditional Use Permit approved by the Planning Commission - the proposed tower will not be contrary to the public interest.

18. The construction and operation of the Verizon Wireless tower at R22 East Radio Hill Road 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 Verizon Wireless 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 Verizon Wireless tower at R22 East Radio Hill Road, the following mitigation measures are required as part of the approval of a variance.

- Verizon Wireless will comply with the “conditions” of the 9 November 2023 Conditional Use Permit adopted by the San Juan County Planning Commission.

*Decision*

Administrative Law Judge Lyn Loyd Creswell, acting as the San Juan County land use appeal authority, grants Verizon Wireless a variance to the “utility building” height and set back requirements of the 2011 San Juan County Zoning Code for a proposed telecommunication tower and associated equipment located at R22 East Radio Hill Road, 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 cursive script, reading "Lyn L. Creswell", is written over a horizontal line. The signature is fluid and extends slightly beyond the line on both sides.

Lyn Loyd Creswell  
San Juan County Administrative Law Judge

22 November 2023