



COMMUNITY DEVELOPMENT

HEARINGS OFFICER HEARING - LAND USE

6:00 PM, TUESDAY, DECEMBER 07, 2021

Barnes Sawyer Rooms - Deschutes Services Bldg - 1300 NW Wall St - Bend

(541) 388-6575 | www.deschutes.org

AGENDA

FILE NUMBER

247-21-000889-AD

PROPOSAL

The Deschutes County Hearings Officer will conduct a public hearing for a proposal by J5 Infrastructure Partners and AT&T to establish a 155-foot-tall monopole, associated antennas, fenced lease area and equipment cabinets within the right-of-way associated with Highway 20.

MEETING FORMAT

This meeting will be conducted electronically, by phone, in person, and using Zoom.

Members of the public may view the meeting in real time via the Public Meeting Portal at www.deschutes.org/meetings.

Members of the public may listen, view, and/or participate in this meeting using Zoom. Using Zoom is free of charge. To login to the electronic meeting online using your computer, copy this link:

<https://us02web.zoom.us/j/86944692484>

Using this option may require you to download the Zoom app to your device.

Members of the public can access the meeting via telephone, dial: 1-346-248-7799. When prompted, enter the following Webinar ID: 869 4469 2484.

DOCUMENT SUBMISSION

Any person may submit written comments on a proposed land use action. Documents may be submitted to our office in person, U.S. mail, or email.

In Person

We accept all printed documents.

U.S. Mail

Deschutes County Community Development
Planning Division, Anthony Raguine
P.O. Box 6005
Bend, OR 97708-6005

Email

Email submittals should be directed to anthony.raguine@deschutes.org and must comply with the following guidelines:

- Submission is 20 pages or less
- Documents can be printed in black and white only
- Documents can be printed on 8.5" x 11" paper

Any email submittal which exceeds the guidelines provided above must be submitted as a paper copy.

Limitations

- Deschutes County does not take responsibility for retrieving information from a website link or a personal cloud storage service. It is the submitter's responsibility to provide the specific information they wish to enter into the record. We will print the email which includes the link(s), however, we will not retrieve any information on behalf of the submitter.
- Deschutes County makes an effort to scan all submittals as soon as possible. Recognizing staff availability and workload, there is often a delay between the submittal of a document to the record, and when it is scanned and uploaded to Accela Citizen Access (ACA) and Deschutes County Property Information (DIAL). For this reason, the official record is the file that resides in the Community Development office. The electronic record in ACA and DIAL is not a substitute for the official record.
- To ensure your submission is entered into the correct land use record, please specify the land use file number(s).
- For the open record period after a public hearing, electronic submittals are valid if received by the County's server by the deadline established for the land use action.
- IF YOU WISH TO BE NOTIFIED OF ANY DECISION RELATED TO THIS APPLICATION, YOU MUST PROVIDE A MAILING ADDRESS.

1.



Deschutes County encourages persons with disabilities to participate in all programs and activities. This event/location is accessible to people with disabilities. If you need accommodations to make participation possible, please call (541) 617-4747.



COMMUNITY DEVELOPMENT

STAFF REPORT

FILE NUMBER: 247-21-000889-AD

OWNER: Oregon Department of Transportation ("ODOT")

APPLICANT: J5 Infrastructure Partners

LOCATION: The AT&T facility will be located within the ODOT right-of-way ("ROW") associated with Highway 20 and adjacent to the following properties:

1. 23425 Highway 20; tax lot 1001 on Assessor map 18-13-03; and
2. 61585 K Barr Road; tax lot 300 on Assessor map 18-13-10.

REQUEST: Administrative Determination to establish a wireless telecommunications facility ("Facility") consisting of a 150-foot-tall monopole topped with a 5-foot-tall lightning rod; associated antennas; a 50-foot by 50-foot lease area surrounded by a 6-foot-tall chain link fence; and an equipment cabinet and a backup generator within the lease area.

STAFF PLANNER: Anthony Raguine, Senior Planner
anthonyr@deschutes.org
(541) 617-4739

RECORD: Record items can be viewed and downloaded from:
www.buildingpermits.oregon.gov

HEARING: November 9, 2021
6:00 pm

STANDARDS AND APPLICABLE CRITERIA:

Oregon Revised Statutes ("ORS")
Chapter 215, County Planning; Zoning; Housing Codes
Title 18 of the Deschutes County Code ("DCC"), the County Zoning Ordinance
Chapter 18.16, Exclusive Farm Use ("EFU") Zone
Title 22 of the Deschutes County Code, the Development Procedures Ordinance

II. BASIC FINDINGS

SITE DESCRIPTION: The project location is a portion of the ROW associated with Highway 20. It is sparsely vegetated and generally level, rising slightly in elevation west of Highway 20. As noted above, the project site will consist of a 50-foot by 50-foot lease area.

SURROUNDING LAND USES AND ZONING: The subject property is surrounded by lands zoned EFU. Properties zoned Rural Residential (RR10) are located approximately 2,650 feet to the west. The predominant uses on surrounding lands is rural residential, hobby farming and commercial farming. There is also a significant amount of undeveloped land in the area owned by the Bureau of Land Management and Deschutes County.

LAND USE HISTORY: There are no prior County land use approvals for this portion of Highway 20 ROW.

REVIEW PERIOD: The Administrative Determination application was submitted on October 1, 2021. Staff deemed the application complete on October 29, 2021. Pursuant to ORS 215.247(5), the 150th day on which the County must take final action on the application by March 28, 2022.

Staff notes the proposed Facility is also subject to Title 47 of the Code of Federal Regulations ("CFR") Section ("§") 1.6003(c)(1)(iv), which presumes the reasonable amount of time necessary to review a wireless telecommunications facility is no more than 150 days. This federal shot clock begins from the date the application is submitted. For this reason, the federal shot clock requires the County to take final action on the application by February 28, 2022.

CFR §1.6003(d) allows the federal shot clock to be tolled if the jurisdiction with review authority informs the applicant in writing that the application is materially incomplete. In this case, staff deemed the application complete on October 29, 2021. For this reason, the subject application was not tolled for the purposes of calculating the federal shot clock.

PUBLIC AGENCY COMMENTS: The Planning Division mailed notice of the public hearing on application on October 8, 2021 to several public agencies. Staff received the following response.

Central Oregon Irrigation District, Kelly O'Rourke (October 29, 2021)

Please be advised that Central Oregon Irrigation District (COID) has reviewed the provided Notice of Public Hearing. The proposal is for an administrative determination to establish a wireless telecommunications facility ("facility) consisting of a 150-foot-tall monopole topped with a 5-foot-tall lightning rod; associated antennas; a 50-foot by 50-foot lease area surrounded by a 6-foot-tall chain link fence; and an equipment cabinet and a backup generator within the lease area. The AT&T facility is proposed to be located within the ODOT right-of-way associated with Highway 20 adjacent to the following properties: 23425 Highway 20; tax lot 1001 on Assessor map 18-13-30; and 61585 K Barr Road; tax lot 300 on Assessor map 18-13-10.

There are no COID water rights appurtenant to the proposed footprint. COID main canal, Central Oregon Canal, crosses through the ODOT right-of-way associated with Highway 20. The Central Oregon Canal has a 100-foot easement (50-feet from centerline) with a road easement of 20-feet on the north side.

Listed below are COID's conditions of approval based on the provided schematics. All development affecting irrigation facilities shall be in accordance with COID's Development Handbook and/or as otherwise approved by the District.

- Comply with Requirements of COID Developer Handbook including restriction on drilling / blasting and excavation within and adjacent to the existing canal embankment. There is no blasting within 100-feet of the canal.
- Irrigation infrastructure and right-of-way are required to be identified on all maps and plans.
- Any irrigation conveyance, District or private, which passes through the subject property shall not be encroached upon or crossed without written permission from this office.
- No structures or utilities of any kind, including fences, are permitted within COID property/easement/right of way. There shall be no guy anchors expanding over COID's canal or within COID's easement.
- Please contact COID for additional discussion on the proposed project near COID's facilities.

Our comments are based on the information provided, which we understand to be preliminary in nature at this time. Our comments are subject to change. Additional requirements may be made as site planning progresses or additional information becomes available. Please provide updated documents to COID for review as they become available. Policies, standards and requirements set forth in the COID Developer Handbook must be complied with.

Oregon Department of Aviation, Seth Thompson (October 19, 2021)

We do not object with conditions to the construction described in this proposal. This determination does not constitute ODA approval or disapproval of the physical development involved in the proposal. It is a determination with respect to the safe and efficient use of navigable airspace by aircraft and with respect to the safety of persons and property on the ground.

Marking and lighting are recommended for aviation safety. We recommend it be installed and maintained in accordance with FAA Advisory Circular 70/7460-1M.

Because the requested marking and lighting are not tied to any DCC approval criterion, staff does not include a condition of approval.

The following agencies did not respond or had no comments. Oregon Department of Transportation and Bend Municipal Airport.

PUBLIC COMMENTS: On October 8, 2021, the Planning Division mailed notice of the public hearing to all property owners within the 4,500 feet of the proposed tower location. At the time of this Staff Report, the land use sign affidavit had not yet been submitted indicating the land use sign was

posted near the Facility site. In response to the Notice of Public Hearing, one public comment was received. Below, staff summarizes the letter submitted to the record.

George & Diane Burns (October 29, 2021)

The Burns oppose the location of the tower for the following reasons:

- Visual impact;
- Loss in home value;
- No issues with cellular or internet service;
- No issues with emergency fire or police contact;
- Failure to address DCC 18.128.340(B)(2) & (5);
- Oregon Department of Aviation marking and lighting results in unsightly lights;
- Incompatible with the rural landscape;
- Does not comply with the EFU 30-foot height limit; and
- Risk of fire.

[STAFF COMMENT: The proposed Facility is not subject to the conditional use standards under DCC 18.128.]

III. FINDINGS & CONCLUSIONS

Preliminary Issues

Use Category

The applicant argues the proposed Facility can be allowed under two different use categories in the EFU Zone. The first use category, which is subject of this land use application, is utility facility necessary for public service under DCC 18.16.025(E). In the alternative, the applicant argues the proposed Facility is allowed as a modification of a public highway, including the placement of overhead utility facilities, under DCC 18.16.020(F).

Staff addresses each use category below and asks the Hearings Officer to determine which category the proposed facility should be reviewed against. Should the Hearings Officer determine the Facility falls within the modification of highway use category, staff notes land use approval is not required.

Brentmar v Jackson County

The project site is located within the EFU Zone and the Landscape Management (“LM”) Combining Zone. The applicant argues the County cannot apply the 30-foot height limit or setback standards of the EFU Zone, the LM Zone standards, or Site Plan Review under DCC 18.124 to the proposed facility due to *Brentmar v. Jackson County*, 321 Or. 481 (1995) (“Brentmar”). Under *Brentmar*, the applicant argues the County is precluded from applying any approval criteria other than the approval criteria which are required by statute. In this case, a utility necessary for public service and

modification of highways are listed under ORS 215.283(1)(c) and 215.283(1)(i), respectively.

ORS 215.283(1)(c), further cites to criteria under ORS 215.275.

- (c) Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in:
 - (A) ORS 215.275; or
 - (B) If the utility facility is an associated transmission line, as defined in ORS 215.274 and 469.300.

ORS 215.275 requires the developer of utility facility necessary for public service to meet the following standards.

- (1) A utility facility established under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) is necessary for public service if the facility must be sited in an exclusive farm use zone in order to provide the service.
- (2) To demonstrate that a utility facility is necessary, an applicant for approval under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:
 - (a) Technical and engineering feasibility;
 - (b) The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;
 - (c) Lack of available urban and nonresource lands;
 - (d) Availability of existing rights of way;
 - (e) Public health and safety; and
 - (f) Other requirements of state or federal agencies.
- (3) Costs associated with any of the factors listed in subsection (2) of this section may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities. The Land Conservation and Development Commission shall determine by rule how land costs may be considered when evaluating the siting of utility facilities that are not substantially similar.
- (4) The owner of a utility facility approved under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this section shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

- (5) The governing body of the county or its designee shall impose clear and objective conditions on an application for utility facility siting under ORS 215.213 (1)(c)(A) or 215.283 (1)(c)(A) to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farmlands.
- (6) The provisions of subsections (2) to (5) of this section do not apply to interstate natural gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission.

These standards are incorporated into the DCC under Section 18.16.038(A), as detailed below.

Under ORS 215.283(1)(i), there are no other statutory approval criteria which apply to modification of a highway.

In addition to citing *Brentmar*, the applicant cites to prior County Hearings Officer decisions in file numbers SP-05-54 and AD-06-13, and to the Supreme Court's holding in *Seeberger v. Yamhill County*, 56 Or LUBA 656 (2008), in support of their argument. Staff attaches both Hearings Officer's decisions to this staff report.

Because height limits, setbacks, the LM Zone standards, and the County's Site Plan review standards are not specifically addressed under the relevant statutes, the applicant argues they cannot be applied to the proposed Facility. Specific to the EFU height limit, the also applicant points to ORS 215.283(1)(c), which expressly allows a transmission tower of no more than 200 feet when necessary for public service. The applicant argues this statutory provisions supersedes the 30-foot EFU Zone height limit.

Staff notes in *Josephine County v. Gamier*, 163 Or App 333, at 338-339 (1999), the Oregon Court of Appeals stated:

We read [Brentmar] to mean that local governing bodies may not impose additional criteria on the class of uses described in ORS 215.213(1) and ORS 215.283(1) as prerequisites to permitting that class of uses in areas zoned for exclusive farm use. We do not read Brentmar to insulate uses described in ORS 215.213(1) and ORS 215.283(1) from all state and local government safety regulations. Simply because a school is located in an area zoned for exclusive farm use, for example, does not mean that the school building does not have to meet state and local fire, building and other public safety regulations that apply to all such buildings, regardless of their location.

In this case, the building code requirements about which defendant complains have not been imposed by a local governing body as a condition of locating in an exclusive farm use zone. Brentmar precludes that. What BCSB and the county have done is to insist that defendant comply with building code requirements of general application. Brentmar does not preclude that. ORS 215.213(1) and ORS 215.283(1), therefore, do not require that the county permit defendant to use the tree houses in conjunction with his "Treehouse Institute,"

regardless of whether the tree houses satisfy public safety regulations. The trial court did not err in entering the injunction without establishing whether defendant's tree houses were essential to the operation of a school within the meaning of ORS 215.213(1) and ORS 215.283(1).

To the extent this application would be subject to DCC 18.124 Site Plan review, but for Brentmar, do safety criteria such as DCC 18.124.060(C) apply?¹ Do other provisions of the DCC of "general application," such as the LM zone criteria which are applied regardless of EFU zoning, need to be met?

Staff asks the Hearings Officer to determine whether the above-referenced County standards can be applied.

Chapter 18.16, Exclusive Farm Use Zone

Section 18.16.020. Uses Permitted Outright.

The following uses and their accessory uses are permitted outright:

...

- F. Reconstruction or modification of public roads and highways, including the placement of utility facilities overhead and in the subsurface of public roads and highways along the public right of way, but not including the addition of travel lanes, where no removal or displacement of buildings would occur, or no new land parcels result.***

FINDING: The applicant argues the Facility can be permitted outright as a utility facility in and along the Highway 20 ROW. The applicant provides the following findings in support of their position.

Section 18.16.020(F) DCC and its correlate, ORS 215.283(1)(i), clearly permit the siting of the Facility within the Highway 20 right-of-way, under the Oregon Supreme Court's interpretation of ORS 215.283(1)(i), previously codified at -.283(i)(L), in *Friends of Parrett Mountain v. Northwest Natural Gas Co.*, 336 Or. 93 (2003). Under this decision, the utility facility placement under ORS 215.383(1)(i) does not need to be in conjunction with and related to road work, nor must it be within the road it-self (just within the right-of-way).

First, under long-standing Land Use Board of Appeals ("LUBA") and court cases, a cell tower is a "utility facility" under ORS 215.283 and related statutes. See *McCaw Communications, Inc. v. Marion County*, 96 Or. App. 552, 554 (1989).

As determined in prior County decisions, AT&T's proposal is also a "utility facility" as defined by DCC 18.04.030 when wireless telecommunication facilities are not listed as a separate use

¹ C. The site plan shall be designed to provide a safe environment, while offering appropriate opportunities for privacy and transition from public to private spaces.

in a zone (like EFU):

"Utility facility" means any major structures, excluding hydroelectric facilities, owned or operated by a public, private or cooperative electric, fuel, communications, sewage or water company for the generation, transmission, distribution or processing of its products or for the disposal of cooling water, waste or by-products, and including power transmission lines, major trunk pipelines, power substations, telecommunications facilities, water towers, sewage la-goons, sanitary landfills and similar facilities, but excluding local sewer, water, gas, telephone and power distribution lines, and similar minor facilities allowed in any zone. This definition shall not include wireless telecommunication facilities where such facilities are listed as a separate use in a zone.

In the *Friends of Parrett Mountain* case, the Supreme Court considered a challenge to the proposed route of a new Northwest Natural Gas line, of which 56 miles would pass through EFU zones and in those zones, 36 miles of the route would be buried within or adjacent to an existing road or highway.

Petitioners challenged the utility route under the "utilities necessary for public service" criteria (ORS 215.275/ORS 215.283(1)(c)) for portions of the line crossing EFU parcels generally and under ORS 215.283(1)(i) for portions of the line to be buried within a right-of-way. Specific to the right-of-way locations, petitioners argued that the statute required Northwest Natural Gas to place the pipeline directly under the hard surface of the road.

In response to petitioners' arguments, the Supreme Court considered various definitions of "public roads and highways" in the Oregon Revised Statutes and held:

For zoning purposes, the legislature can define roads and highways differently if it chooses, but it has not done so. In the absence of any other definition in the zoning statutes, the statutes noted above provide important contextual clues from which we discern the legislature's intent regarding the roads and highways at issue here. We conclude that, for purposes of ORS 215.283(1)(L) [now -.283(1)(i)], the phrase "public roads and highways" means the entire right-of-way within which those thoroughfares are constructed, not just the hard surface upon which traffic travels. As a result, Northwest Natural could comply with ORS 215.283(1)(L) by burying a pipeline alongside a hard road surface, so long as it remained within the thoroughfare's right-of-way. Farm Bureau petitioners' contrary construction of the statute therefore is not well taken, and the council did not err in so concluding.

Moreover, this utility use allows "the placement of utility facilities overhead and in the subsurface of public roads and highways," which is inclusive of a cell tower. As a term undefined in the relevant statutes, "overhead" may be defined with reference to:

- Another statute in the ORS chapter governing state and county right-of-way, ORS 758.215(4), according to which, "Overhead electric or communication facilities" means

- electric or communication facilities located above the surface of the ground.”
- The dictionary, for which the adverb form of “overhead” is defined as “above one’s head: aloft.” “Aloft” is defined as “1: at or to a great height” or “2: in the air.”

There is no relevant context limiting “utility facilities overhead” to only linear electrical wires and communication lines, and there is no question that a cell tower’s antennas are located above the surface of the ground, above one’s head, and at a great height.

Due to the proposed location of AT&T’s Facility – in the ODOT right-of-way – it is a utility facility proposed for an overhead location in a right-of-way and thus permitted outright under DCC 18.16.020(F) and ORS 215.283(1)(i).

Staff asks the Hearings Officer to determine if the proposed Facility should be reviewed under DCC 18.16.020(F).

Section 18.16.025. Uses Permitted Subject to the Special Provisions Under DCC Section 18.16.038 or DCC Section 18.16.042 and a Review Under DCC Chapter 18.124 where applicable.

- E. Utility facilities necessary for public service, including wetland waste treatment systems, but not including commercial facilities for the purpose of generating electrical power for public use by sale and transmission towers over 200 feet in height. A utility facility necessary for public service may be established as provided in:**
- 1. DCC 18.16.038(A); or**
 - 2. DCC 18.16.038(E) if the utility facility is an associated transmission line, as defined in ORS 469.300.**

FINDING: The applicant also addresses the Facility in light of the criteria for utility facilities necessary for public service. As noted in this criterion, the proposal:

- Must be a utility facility;
- Must be necessary for public service;
- Is not a commercial power generating facility for public use; and
- Is not a transmission tower over 200 feet in height.

As noted by the applicant above, the DCC provides a definition of utility facility. Attachment 2 of the application materials provides the following findings.

Again, under long-standing LUBA and court cases, a cell tower is a “utility facility” under ORS 215.283 and related statutes, and, again, under long-standing County decisions, a cell tower in an EFU zone is a “utility facility” under DCC Title 18. See discussion above.

With respect to the “necessary for public service” portion of the criterion, the applicant’s Attachment 1 addresses the Facility’s necessity. Specifically, the applicant states,

This Facility is intended to fill a significant gap in AT&T's 4G LTE coverage experienced by its customers in an area ranging approximately 7-11 miles east of Bend, southwest of the Alfalfa area in Deschutes County, primarily along a significant portion of Highway 20, as well as portions of Alfalfa Market Road, Walker Road, Bear Creek/McNaught Road, Ward Road, and Rickard Road.

In addition to AT&T LTE commercial facilities, this proposed Facility will also provide an important public safety benefit by including facilities to support the FirstNet Nationwide Safety Public Broadband Network ("FirstNet"). As a FirstNet site, this proposed Facility is part of a more significant initiative by AT&T to upgrade existing wireless sites and to build new sites to support FirstNet and deploy the new frequency band for first responders ("Band 14").

The proposal is not for a commercial power generating facility and does not include a tower over 200 feet tall.

For the above reasons, staff finds the Facility can be reviewed under this use category.

This criterion also requires compliance with the standards under DCC 18.16.038(A), addressed below. Lastly, the header for this criterion indicates Site Plan review under DCC 18.124 can apply. As noted above, the applicant argues the standards under DCC 18.124 do not apply pursuant to *Brentmar*. Staff asks the Hearings Officer to determine whether Site Plan review under DCC 18.124 applies.

Section 18.16.038. Special Conditions for Certain Uses Listed Under DCC 18.16.025.

- A. *A utility facility necessary for public use allowed under DCC 18.16.025 shall be one that must be sited in an agricultural zone in order for service to be provided. To demonstrate that a utility facility is necessary, an applicant must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:***

FINDING: The applicant provides the following findings regarding reasonable alternatives.

AT&T's Facility must be sited in an agricultural zone for its wireless communication service to be provided. AT&T has considered reasonable alternatives and the Facility must be sited in an EFU zone due to technical and engineering feasibility, that the facility is locationally dependent, that there is a lack of available urban and nonresource lands, and that existing rights-of-way are available.

Most of the land within the Targeted Service Area of the Facility, and all the land within the search ring, is zoned EFU, and the area non-EFU parcels (RR10 and MUA) appear mostly on the fringes of AT&T's Targeted Service Area. See Figure G of Attachment 3—AT&T RF Justification.

AT&T identified an early raw land candidate that would meet its service needs along Highway 20 to the east (see discussion of first alternative below), but AT&T was unable to secure this location due to the complexity with various government agencies involved in property use and leasing as well as restrictions on the property. Thus, while meeting RF requirements, this alternative was not reasonably available for development and lease. AT&T has since considered various other alternatives (see detailed discussion below).

Broadly, AT&T seeks to improve wireless service, including the FirstNet public safety network, along an important stretch of Highway 20, which extends through extensive areas of EFU-zoned properties. It is reasonable to expect that meeting this critically important service need will impact resource lands.

Consideration of Reasonable Alternatives:

As outlined in Attachment 1–Project Narrative, AT&T’s team considered various siting alternatives, and it did not identify any available and/or feasible alternative locations to locate the proposed new Facility.

- Collocation. There are no existing wireless towers, buildings, or other structures within or adjacent to AT&T’s search ring that would provide the height required to meet AT&T’s service objectives for the Targeted Service Area. In fact, there are no existing towers with collocation potential within several miles of the proposed Facility. The US Cellular tower over three (3) miles to the southwest is already occupied by one of AT&T’s wireless facilities. See Attachment 3 – AT&T RF Justification, Figure D. In fact, three of the nearest four existing towers, all to the west, are already occupied by AT&T. See Figure D of Attachment 3. The utility poles along Highway 20 and roads connecting to Highway 20, at approximately 39 feet tall above grade, are of an insufficient height to meet AT&T’s service objectives. As explained in AT&T’s RF Justification, 150 feet is the minimum height necessary for this proposed facility.
- Alternative Raw Land Locations. AT&T explored numerous other raw land locations for siting the proposed Facility. See Attachment 3 – AT&T RF Justification and summary below. However, AT&T’s construction and engineering team deemed all alternative sites to be infeasible for the following reasons.
 - ❖ Alternative raw land sites considered:
 - 1st Alternative: Beginning in 2018, AT&T first targeted a raw land location at 44.0227/ -121.1323. This location is an Oregon National Guard Challenge Pro-gram and Oregon Military Department facility on Bureau of Land Management (“BLM”) land. With the available tip height of 150ft, the location would be able to meet AT&T’s coverage objective by enhancing the coverage along Highway 20 to the east and covering substantial portions of the Targeted Service Area. However, in 2020, this candidate fell out of consideration due to the complexities of addressing the needs, and fulfilling the requirements of, all the federal and state entities involved. During the site selection process, AT&T’s team determined that the Upper Deschutes Resource Management Plan encompasses all BLM properties in the area (see 2nd Alternative,

below). The management plan's purpose is to preserve the lands for various recreation and conservation uses, and it does not allow for wireless towers.

- 2nd Alternative: AT&T then evaluated another property owned by BLM, at 44.056806, -121.156314. This alternative was over a mile outside the search ring and had very high development costs. It is also subject to the Upper Deschutes Resource Management Plan, and therefore a cell tower would not be allowed.
 - 3rd Alternative: In 2020, AT&T identified another raw land location at 44.041436, -121.180933. This alternative, which was outside of the search ring and strongly disfavored by AT&T's RF engineers (it is further to the west and closer to AT&T's existing wireless facilities), was not found feasible due to un-reasonably high rent demanded by the property owner. This alternative is zoned EFUTRB with a Conventional Housing Combing Zone.
 - 4th Alternative: Later in 2020, AT&T inquired with Central Oregon Irrigation District ("COID") regarding the potential location of a cell tower to the north of the Property off Ten Barr Ranch Road, in the EFUTRB zone. COID responded that it was not interested in pursuing the opportunity further at this time. Up-on a request for clarification, COID confirmed that the same decision applied to all its holdings in the area.
- ❖ Additional raw land alternatives on nonresource lands:
- RR10 Parcels. There are parcels zoned Rural Residential (RR10) to the west of the search ring located a half-mile and more from the Property. AT&T considered these parcels as follows.
 - COID Property. Part of COID's holdings in the broader area include some RR10 property in the eastern portion of this RR10 area. COID's RR10 parcel was previously the subject of a denial of a proposed Verizon cell tower. See County file number 247-16-00081-CU (the "Verizon Denial"). When AT&T contacted COID in 2020, COID responded that it was not interested in engaging on the property Verizon had previously proposed for a cell tower location.
 - Other RR10 property. Based on the Verizon Denial and AT&T's experience in attempting to site a facility on RR10 property in the Alfalfa area in 2012, which was also denied (the "ATC Denial"), as well as the lack of a well-screened site in the RR10 area that could mitigate the visual impact of AT&T's 150-foot tower or a lower tower (the denied Verizon proposal was 120 feet), AT&T concluded that further pursuit of a RR10-zoned site in this area to the west was futile. This area zoned RR10 is dominated by the Western Juniper, which usually does not exceed 30-40 feet in height. When combined with the generally flat topography, there is insufficient opportunity for natural

screening. This is especially problematic when the purpose of the RR10 zoning is to provide sites for rural housing where views are important.

- MUA property. Also outside of the search ring, there are parcels zoned Multiple Use Agricultural (MUA) to the east of the south end of the search ring. AT&T considered these parcels as follows. Similar to the RR10-zoned property discussed above, this area zoned MUA is predominantly flat and sparsely treed with juniper trees of approximately 30-40 feet in height, and it thus lacks natural features to screen a tower. This MUA area is also relatively small (one-half mile by one-half mile), with a substantial portion of the area subject to the Badlands Ranch Covenants, Conditions, and Restrictions, according to which views are protected and above-ground utilities and commercial uses are prohibited.

Based on the information provided by the applicant, collocation would not fulfill the service gap need. The applicant also identified a number of alternative sites on both resource and nonresource zoned lands. The applicant details a number of reasons which either preclude use of these lands for the proposed Facility, or make use of those lands difficult. With respect to nonresource lands which could be used for the Facility, the closest RR10-zoned lands are approximately 2,650 feet to the west. The closest properties zoned Multiple Use Agricultural (MUA10) are approximately 7,000 feet to the northwest and 8,200 feet to the southeast. Although technically within the Service Area, these nonresource lands are located at the outer edge of the Service Area and it is not clear if these lands could adequately fill the gap in service depicted in Figure B, above.

Of note, the application materials point to a pair of previously denied wireless telecommunications facilities on nonresource lands in the area. If staff understands the applicant's perspective, the previously denied wireless telecommunications facilities point to the difficulty of siting these facilities on nonresource lands in the area. Additionally, the applicant cites to the Covenants, Conditions and Restrictions for the Badlands Ranch Subdivision on the MUA10-zoned lands to the southeast which would preclude siting of the Facility in that Subdivision.

Staff asks the Hearings Officer to determine whether the applicant has considered reasonable alternatives.

In addition to considering reasonable alternatives, the applicant must demonstrate the Facility must be sited in the EFU Zone to due to one or more of the factors detailed below.

1. *Technical and engineering feasibility;*

FINDING: The applicant provides the following findings to address this factor.

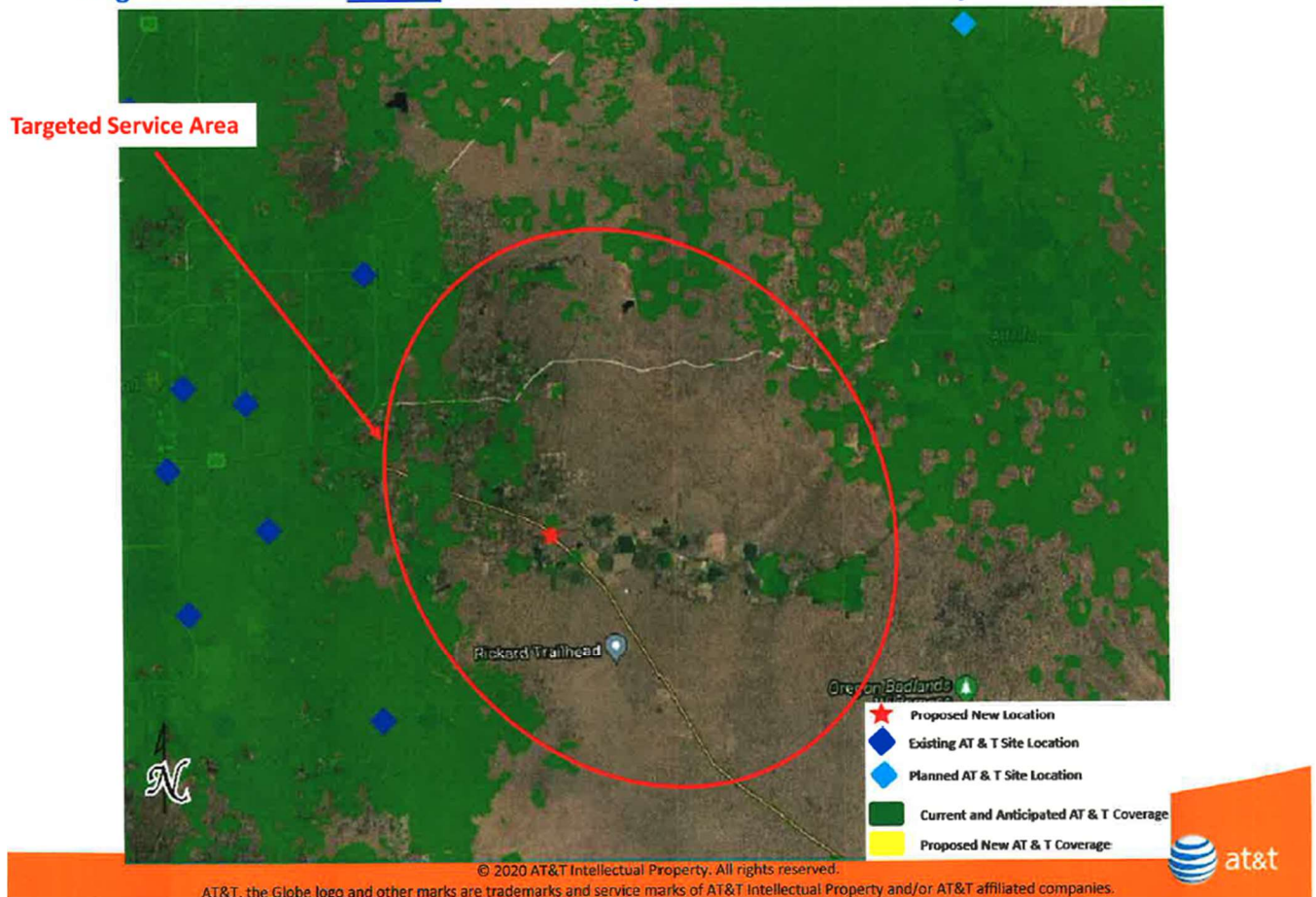
AT&T's RF Justification provides detailed technical analysis explaining the need for the Facility to serve what is predominantly EFU properties. See Attachment 3—AT&T RF Justification.

This proposal is needed to address a true significant gap in 4G LTE coverage. See section Attachment 1 – Project Narrative regarding significant gap/least intrusive means under federal law. This factor supports location of the Facility as proposed.

Staff notes Attachment 1, Section 3, excerpts portions of the full radio frequency (“RF”) analysis, which is attached as Attachment 3 to the application materials.

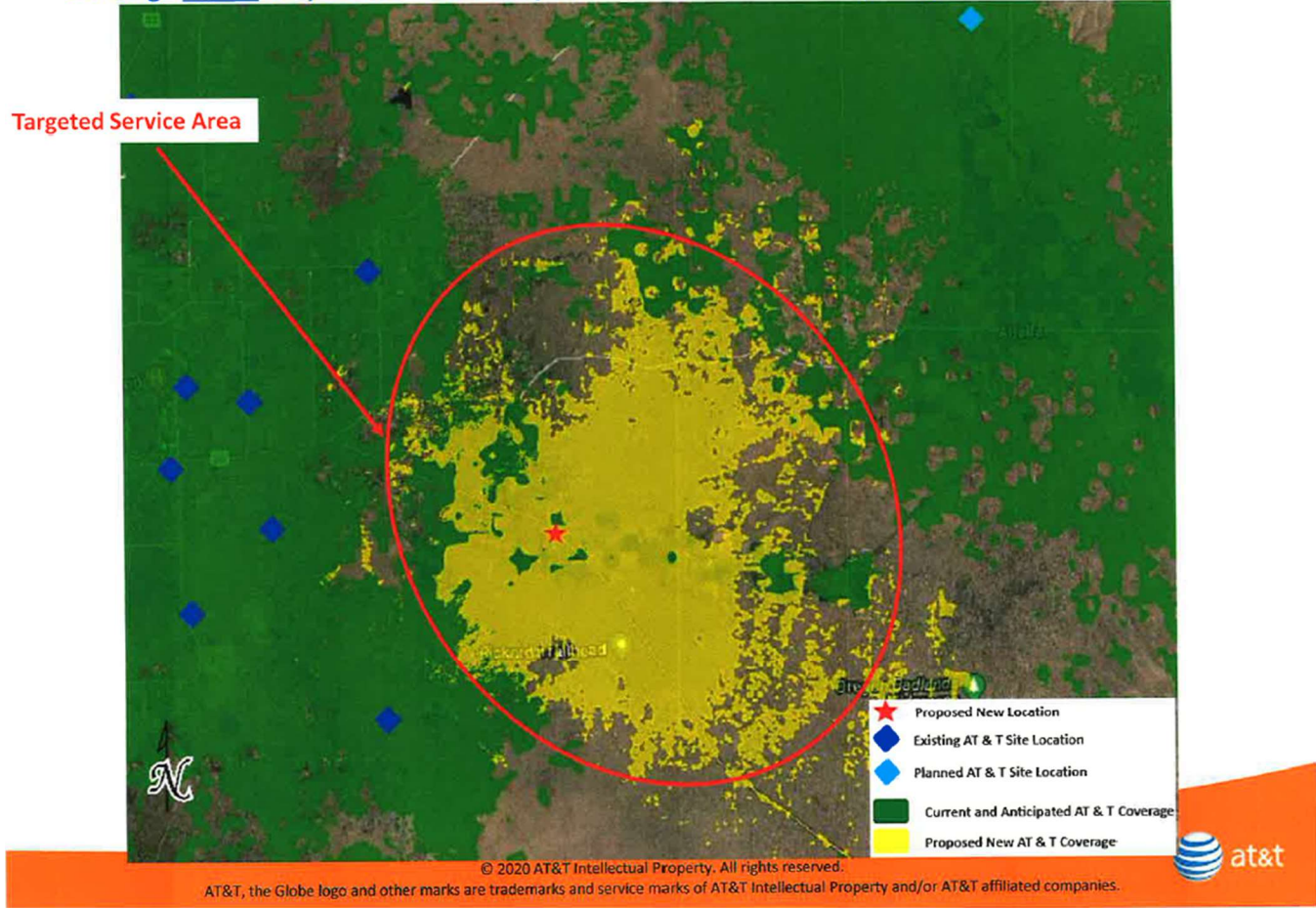
As illustrated in Figure B of the RF Justification report (“Report”) and depicted below, AT&T currently has a gap in service.

FIGURE B—Existing AT&T 4G LTE Coverage
Targeted Service Area BEFORE Addition of Proposed New Wireless Facility



According to the Report, even with the proposed Facility, there will be portions of the Service Area which will not be served. This is illustrated in Figure C of the Report and depicted below.

FIGURE C—Projected New AT&T 4G LTE Coverage
Coverage AFTER Proposed AT&T Facility On-Air—150ft Antenna Tip Height



Based on the RF maps, it appears the chosen location would fill most of the gap in service described by the applicant.

- 2. ***The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;***

FINDING: The applicant provides the following findings.

As found in prior County decisions, while a cell tower does not “cross” land in the same sense as a utility line, its RF signals do cross land where wireless service is provided in EFU-zoned areas. See County case file number AD-08-5. Relevant in this case is the Property’s location within the search ring, all of which is in the EFU zone, and the principal purpose of the Facility, to improve service along Hwy 20, all of which is in the EFU zone in this part of the County.

This factor supports location of the Facility as proposed.

As detailed above, the applicant details why siting the Facility on nonresource lands would be

precluded or, at a minimum, difficult.

3. Lack of available urban and nonresource lands;

FINDING: The applicant provides the following findings to address this factor.

Urban Lands

Urban lands are a significant distance from the Property and well outside of AT&T's Targeted Service Area (let alone its search ring).

Alternative EFU-zoned Sites

While AT&T did reasonably consider alternative EFU-zoned sites (before finding them unavailable), there is no requirement under ORS 215.275 to disqualify alternative sites among EFU parcels. See County case file number AD-08-5 and ORS 215.275.

Federally Owned Property

While AT&T did reasonably consider BLM-owned properties (before finding them unavailable), prior County decisions have concluded that due to the difficulties in obtaining approvals and permits for such properties and their significant resource value, they are not "reasonable" alternatives to EFU zoned land under ORS 215.275(A)(3) and do not require disqualification under the statute. See County case file number AD-08-5.

Nonresource Property

There are properties zoned RR10 and MUA outside AT&T's search ring but within its Targeted Service Area.

Regarding the RR10-zoned parcels to the west, these are not reasonably available as follows:

- The COID-owned RR10 parcel is unavailable because COID is not interested in engaging on the property Verizon had previously proposed for a cell tower location (the Verizon Denial).
- The remainder of the RR10-zoned property is not reasonably available due to incompatibility, lack of screening, and relevant conditional use criteria applicable to siting wireless towers in the RR10 zone. As shown in the Verizon Denial and the ATC Denial, the difficulty of meeting the lack of visual impact/intrusiveness standards of DCC 18.128.340 are such that RR10 parcels are not available when a 150ft tall tower, or a lower tower, cannot be adequately screened by existing trees and vegetation, the built environment, and/or topographical features.
 - ❖ The relevant approval criterion for an RR10/MUA location is in DCC 18.128.340(B)(2):

The applicant has considered other sites in its search area that would have less visual impact as viewed from nearby residences than the site proposed and has determined that any less intrusive sites are either unavailable or do not provide the communications coverage necessary. To meet this criterion, the applicant must demonstrate that it has made a good faith effort to co-

locate its antennas and microwave dishes on existing monopoles in the area to be served. The applicant can demonstrate this by submitting a statement from a qualified engineer that indicates whether the necessary service can or cannot be provided by co-location within the area to be served.

- ❖ In the Verizon Denial (2016), the applicant reduced the height of the proposed tower from 140 feet to 120 feet and changed the design from a lattice tower to a mono-pole/monopine, but this change was still not enough to obtain approval. There, the decision notes that the site has natural topography, the staff described the terrain as “moderately rolling,” and the parcel and area included juniper trees, shrubs and grasses. Neighbors argued that the surrounding trees were no more than 40 feet high, and the Hearings Officer found from materials submitted by Central Oregon Land-watch that variation in the terrain was not significant. [H]ere, the project had setbacks from parcel boundaries of as much as 190-2,300 feet. The Hearings Officer’s decision followed direction from the Board of County Commissioners (in an appeal from the ATC Denial) that “EFU land must be considered notwithstanding that it may be more difficult to locate a tower on resource land.” The Hearings Officer concluded that the applicant must “essentially...demonstrate that no better alternatives exist,” with reference to visual impacts on nearby residences. The Hearings Officer concluded that in that case the visual impact on neighboring residences was significant.
 - Here, there are RR10 parcels to the west of AT&T’s search ring, but as compared with a tower located within the RR10 area, AT&T’s proposed Facility is on an available site that can achieve AT&T’s service objective in a manner that is far less visually intrusive than a similar new tower on one of the RR10 parcels. The Facility will be a ½ mile or more from the closest RR10 parcel (owned by COID and not developed with a residence), in a direction (east) that does not impose on views of great significance, such as the Cascade Mountains (views of these mountains are to the west). AT&T’s proposal of a new tower on one of the RR10 parcels would be futile because location on EFU land is a far better alternative visually. In other words, the RR10-zoned lands are unavailable because negative visual impacts on surrounding nonresource lands cannot be avoided or reasonably mitigated.
- ❖ In the ATC Denial (2012), affirmed by the Board of County Commissioners in 2013, ATC proposed a tower to support AT&T antennas in the RR10 properties to the northeast of the Property and along and north of Alfalfa Market Road. The proposed tower there was only 100 feet tall. The Board of Commissioners concluded on appeal that the applicant was required to consider EFU parcels in its search ring. Then, in considering an EFU alternative, the Board concluded:
 - In fact, the Board believes that, in this location, a site on the EFU land would likely be the best placement for the tower because of fewer surrounding residential uses, the visual impacts for which would be impacted. The Alfalfa area, especially in the subject location, has wonderful views of the Cascade Mountains that would be impacted [by]

a 100 ft tall tower. The Board finds that, based on the oral and written record, the surrounding area has scenic views that include, as described in the Hearings Officer's decision: open desert plateau, the Cascade Mountains, Horse Ridge, Pine Mountain and the Paulina Mountains. The DCC provisions for wireless telecommunications clearly require protection of such views. Because parcels in EFU areas that surround the subject property are larger but fewer areas on those EFU lands are farmed such that siting a tower on EFU land will probably not significantly interfere with the farm uses and will have a lesser visual impact than if it is sited on the subject property so close to neighboring residential uses.

The Board of Commissioners also noted:

Additionally, the EFU lands would potentially have much fewer visual impacts than the proposed use on RR-10 zoned land, where many people live or intend to live, relative to the number and proximity of people living on EFU land. The subject property is in an area that is surrounded by EFU land which has larger parcels which are farther away from residents. Additionally, the surrounding EFU land does not appear to be fully farmed such that, it appears, without more evidence, that sites could be found that would not significantly impact farm uses.

And:

In addition, as stated above, the Applicant's analysis downplayed or ignored the presence of the CEC transmission line along Elk Lane, which could have been used by the Applicant to justify sites along that line as being already visually compromised and, thus, of lesser visual intrusion.

Below, the Hearings Officer had explained that a RR10 site may be unavailable under ORS 215.275(2)(c) as follows:

Neither the state statute nor DCC 18.16.038(A)(3) articulate the scope of the term "available." Webster's Third New International Dictionary defines "available" as: "3: such as may be availed: capable of use for the accomplishment of a purpose, immediately utilizable." It is possible to imagine many legitimate reasons why urban or rural residential lands might be unavailable for a proposed telecommunications facility. At minimum, "available" does not simply refer to lands which are available "for purchase or lease" because the statute omits those additional words. In view of the multiple references in DCC 18.128.340 directed at protecting scenic views and screening a proposed facility from the view of nearby residents, it is reasonable to construe ORS 215.275(2)(c) and DCC 18.16.038(A)(3) to be met when negative visual impacts on surrounding nonresource lands cannot be

avoided or reasonably mitigated.

Here, in the area to the west of the Property zoned RR10, relatively flat topography, relatively low prevailing tree height (junipers of 30-40 feet tall), and the history of denial of a 120ft tower that applicant offered to design as a monopine/stealth facility demonstrate that negative visual impacts cannot be avoided or reasonably mitigated.

AT&T's proposed location for the Facility is at least a half-mile from the RR10 parcels, places the tower within an established utility corridor with approximately 39-foot-tall utility poles, thereby constituting an incremental change to the landscape, and will be within a right-of-way area of no agricultural benefit (as described elsewhere, soils are not high value or irrigated, Property is committed long-term to nonagricultural transportation/utility use, etc.).

Regarding the MUA-zoned parcels to the east of the southern part of the search ring, these parcels are similarly characterized by relatively flat topography and low prevailing tree height (junipers of 30-40 feet tall) and are part of a small MUA area (one half-mile by one half-mile). Further, a majority of the parcels are bound by CC&Rs under which views are protected and above-ground utilities and commercial uses are prohibited.

Similarly, in County case number SP-05-54, a cell tower was approved in the EFU zone when "The applicant, however found the MUA-10 zoned properties unsuitable for two reasons: (1) the MUA-10 parcels are outside of the search area and (2) the MUA-10 zoned parcels are located in subdivisions and developed with dwellings and placing the tower facility 'amidst the homes, the existing trees would provide little screening because of the high angle of the tower from the horizon.'"

This factor supports location of the Facility as proposed.

4. Availability of existing rights of way;

FINDING: The applicant provides the following findings to address this factor.

While nonresource alternatives are not available, existing right-of-way, the usual location for utilities of all types, and as relevant under Factor 4, EFU property that has already been devoted to non-farm uses, is available for the location of this Facility. In addition to being a transportation corridor, Highway 20 is a utility corridor, with wood utility poles of heights of approximately 39 feet and other aboveground utilities along the highway. From many perspectives, when viewed at some distance when traveling on Highway 20, the Facility will appear no different from a utility pole that is some-what closer to the viewer. See, for example pages 1 and 4 of Attachment 9 – Photo Simulations.

This factor supports location of the Facility as proposed.

5. Public health and safety; and

FINDING: The applicant does not argue this factor applies to the analysis and, therefore, does not provide findings.

6. Other requirements of state and federal agencies.

FINDING: The applicant does not argue this factor applies to the analysis and, therefore, does not provide findings.

7. Costs associated with any of the factors listed in 1-6 above may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities that are not substantially similar.

FINDING: As noted above, the applicant argues a couple of the alternative sites are unsuitable due to high lease or development costs.

In conclusion, the applicant argues the Facility is necessary to be sited on EFU land due to technical and engineering feasibility; the Facility is locationally dependent; the lack of available urban and nonresource lands; and existing rights-of-way are available.

Staff asks the Hearings Officer to determine if the proposed Facility is necessary to be sited on EFU land.

8. The owner of a utility facility approved under this section shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this subsection shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

FINDING: The applicant provides the following findings to address this criterion.

When AT&T's use ends under its lease with ODOT, it will restore the agricultural land within its lease area and access easement to the same condition that existed upon the commencement of its lease. See Section 9 of Attachment 8- Redacted Lease with ODOT. The siting, maintenance, repair, and reconstruction of the Facility will not damage or disturb improvements to agricultural land, and AT&T's work will be confined to ODOT's right-of-way. See Attachment 10 - Construction Drawings for AT&T's proposed construction staging area and other details.

Should the Hearings Officer approve the application, staff recommends the following condition of approval to ensure compliance.

Site Restoration. The owner of a utility facility approved pursuant to DCC 18.16.038(A) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

- 9. *In addition to the provisions of 1-6 above, the establishment or extension of a sewer system as defined by OAR 660-011-0060(1)(f) in an exclusive farm use zone shall be subject to the provisions of OAR 660-011-0060.***

FINDING: The proposal does not include the extension of a sewer system. This criterion does not apply.

- 10. *The provisions above do not apply to interstate gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission.***

FINDING: The proposal does not include an interstate gas pipeline. This criterion does not apply.

- 11. *The County shall impose clear and objective conditions on an application for utility facility siting to mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use, in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on surrounding farmlands.***

FINDING: The applicant provides the following findings to address this criterion.

The proposed Facility will not force a significant change in, or significantly increase the cost of, accepted farm practices on surrounding farmlands. Rather, the Facility will improve communication services to support area farm practices, and it will provide future collocation opportunities for several other carriers, allowing those carriers to also serve this area of the County without a new raw land site affecting another EFU-zoned property or impacting views in rural residential zones.

The proposed Facility is limited to a 2500sqft lease compound and short gravel driveway/parking area within ODOT right-of-way. There are no active farm practices on the Property. The soils are classified 57B and 58C (Gosney stony loamy sand, 3 to 8 percent slopes and Gosney-Rock outcrop-Deskamp complex, 0 to 15 percent slopes), neither of which are prime/high value. The ODOT right-of-way is unlikely to ever be farmed.

Staff agrees the project site is comprised of 57B and 58C soils, which are not defined as high-value farmland under DCC 18.04.² Further, the site itself is not irrigated and, given its location along the Highway 20 right-of-way, is unlikely to be farmed. Lastly, no evidence has been entered into the record arguing the proposed Facility would result in a significant change in accepted farm practices or a significant increase in the cost of farm practices on surrounding farmlands. For these reasons, staff finds no mitigation measures or conditions are necessary to prevent impacts to lands devoted to farm use.

- 12. *Utility facilities necessary for public service may include on-site and off-site facilities for temporary workforce housing for workers constructing a utility facility. Such facilities must be removed or converted to an allowed use under OAR 660-033-0130(19) or other statute or rule when project construction is complete. Off-site facilities allowed under this provision are subject to OAR 660-033-0130(5). Temporary workforce housing facilities not included in the initial approval may be considered through a minor amendment request. A minor amendment request shall have no effect on the original approval.***

FINDING: The applicant does not propose off-site facilities for a temporary workforce. This criterion does not apply.

IV. ISSUE AREAS

As noted in this Staff Report, staff asks the Hearings Officer to focus his review on the following issue areas.

1. Should the proposed Facility be reviewed as:
 - A. A modification of a highway pursuant to ORS 215.283(1)(i) and DCC 18.16.020(F); or
 - B. A utility necessary for public service pursuant to ORS 215.283(1)(c) and ORS 215.275, and DCC 18.16.025(E) and 18.16.038(A)?
2. Does *Brentmar* preclude the application of non-ORS standards, including the EFU height limit and setback requirements; the LM Zone standards (implemented under Goal 5); and Site

² "High value farmland" means land in a tract composed predominantly of the following soils when they are irrigated: Agency loam (2A and 2B), Agency sandy loam (1A), Agency Madras complex (3B), Buckbert sandy loam (23A), Clinefalls sandy loam (26A), Clovkamp loamy sand (27A and 28A), Deschutes sandy loam (31A, 31B and 32A), Deschutes Houstake complex (33B), Deskamp loamy sand (36A and 36B), Deskamp sandy loam (37B), Era sandy loam (44B and 45A), Houstake sandy loam (65A, 66A and 67A), Iris silt loam (68A), Lafollette sandy loam (71A and 71B), Madras loam (87A and 87B), Madras sandy loam (86A and 86B), Plainview sandy loam (98A and 98B), Redmond sandy loam (104A), Tetherow sandy loam (150A and 150B) and Tumalo sandy loam (152A and 152B). In addition to the above described land, high-value farmland includes tracts growing specified perennials as demonstrated by the most recent aerial photography of the Agricultural Stabilization and Conservation Service of the United States Department of Agriculture taken prior to November 4, 1993. For purposes of this definition, "specified perennials" means perennials grown for market or research purposes including, but not limited to, nursery stock, berries, fruits, nuts, Christmas trees or vineyards but not including seed crops, hay, pasture or alfalfa.

Plan Review pursuant to DCC 18.124?

- 3. Has the applicant considered reasonable alternatives as required under DCC 18.16.038(A)?
- 4. Has the applicant demonstrated the necessity of siting the Facility in the EFU Zone considering the factors under DCC 18.16.038(A)?

V. RECOMMENDED CONDITIONS OF APPROVAL

Should the Hearings Officer approve the application, staff recommends the following conditions of approval.

AT ALL TIMES

- 1. Application Materials. Approval is based upon the application, site plan, specifications, and supporting documentation submitted by the applicant. Any substantial change in this approved use will require review through a new land use application.
- 2. Site Restoration. The owner of a utility facility approved pursuant to DCC 18.16.038(A) shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.

DESCHUTES COUNTY PLANNING DIVISION



Written by: Anthony Raguine, Senior Planner



Reviewed by: Peter Gutowsky, Planning Manager

Attachments:

- 1. Hearings Officer Decision SP-05-54;
- 2. Hearings Officer Decision AD-06-13;
- 3. Board of County Commissioner Decision CU-12-15, A-13-1;
- 4. Hearings Officer Decision 247-16-000081-CU, 536-MA; and
- 5. Location Map

DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBER: SP-05-54

HEARING DATE: Tuesday, November 29, 2005, at 6:00 P.M. in the Barnes and Sawyer rooms of the Deschutes Services Center located at 1300 NW Wall Street in Bend.

APPLICANT: Verizon Wireless
 c/o Alcoa Wireless Services
 Attn.: Kevin Martin
 25977 SW Canyon Creek Road
 Suite E
 Wilsonville, Oregon 97070

OWNER: Bend Metropolitan Park and Recreation District
 200 Pacific Park Lane
 Bend, Oregon 97701

SUBJECT: The applicant requests site plan review to establish a wireless communication facility consisting of a 100-foot steel monopole with flush-mounted antennas and an equipment shelter in the Exclusive Farm Use (EFU-TRB) zone and Airport Safety Combining zone.

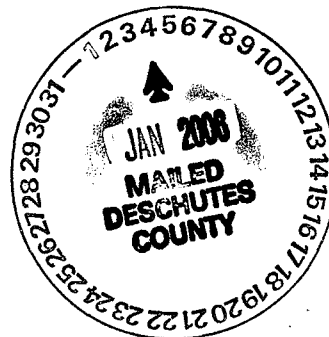
STAFF CONTACT: Catharine White, Associate Planner

I. APPLICABLE CRITERIA:

**Oregon Administrative Rules, OAR 660-033-0120 and 0130
Oregon Revised Statutes, ORS 215.275, .283**

Title 18, Deschutes County Zoning Ordinance

- A. Chapter 18.16, Exclusive Farm Use (EFU) Zone.
 Sections: 18.16.025, .038
- B. Airport Safety (AS) Combining zone



II. BASIC FINDINGS:

- A. **LOCATION:** The subject property is located is located at 21690 Neff Road, Bend, and identified on the County Assessor's tax map as tax lot #17-12-25-200.
- B. **LOT OF RECORD:** The property is a legal lot of record as it is Parcel 2 of Minor Partition, MP-78-223.
- C. **ZONING:** The property is zoned Exclusive Farm Use zone (EFU-TRB) and Airport Safety (AS) Combining zone.
- D. **PROPOSAL:** The applicant proposes to establish a wireless communication facility consisting of a 100-foot steel monopole with flush-mounted antennas and a 312-square foot equipment shelter within a 1,600 square-foot leased area within Bend Metropolitan Park and Recreation District's Big Sky Park. A lightning rod will extend above the top of the pole and space for the antennas of another carrier is available at the 90-foot level. The pre-fabricated equipment shelter will have a tan, exposed-aggregate finish. No "significant" trees will be removed. The facility will be unmanned and have access from Neff Road and will generate about one vehicle trip per month. The proposed monopole will be setback over 100 feet from all property lines.
- E. **SITE DESCRIPTION:** The subject property is an irregular-shaped approximate 96-acre property developed with an existing park that consists of soccer/ball fields, a BMX track, a caretaker's residence, and other park-related facilities as well as an old fire station that is no longer in use as it has been replaced with a new fire station on tax lot 203. Vegetation includes introduced landscaping in and around the developed park and juniper trees and other native ground cover along the perimeter and undeveloped areas. The proposed project site will be located in the southern portion of the property near the intersection of Hamby and Neff Roads. The proposed building site is undeveloped and covered with overgrown juniper trees, brush, and grasses.
- F. **SURROUNDING LAND USES:** Surrounding properties are public and privately owned in a mixture of uses, including rural residential, public service, school, and farm use. Zoning in the area is MUA-10 and EFU-TRB. Specifically, to the north is Eastmont Estates, a rural residential subdivision zoned MUA-10. East and southeast are several privately owned parcels zoned EFU: east is tax lot 17-12-25-501 that consists of 118.71-acres and zoned EFU (with a portion in the southeast corner that is zoned MUA-10 zone). Tax lot 501 is developed with a residence and County Assessor's data show the parcel is not irrigated or receiving farm tax deferral. South and southeast are two nearly 20-acre EFU-zoned parcels created via a nonfarm partition (partition plat 2003-2) that are not irrigated or receiving farm tax deferral with tax lot 400 developed with a home and tax lot 401 is vacant. South is Neff Road and south of Neff Road are two privately-owned parcels zoned EFU. Tax lot 17-12-36-600 was created via a nonfarm partition and is a nearly 20-acre parcel developed with a dwelling and tax lot 500 is an approximate 51-acre parcel receiving farm tax deferral, unirrigated, and vacant. West is an existing abandoned rural fire station and west of the fire station is Hamby Road. West of Hamby Road is the Quail Ridge subdivision, a rural residential subdivision zoned MUA-10. Northwest is Buckingham Elementary School and a new rural fire station.

The Urban Area Reserve is located about 1,370 feet west of the subject property and the Bend Urban Growth Boundary and City limits is located about 1,400 feet west at its closest point.

- G. **PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice to several public agencies and received comments from: Deschutes County Property Address Coordinator, Deschutes County Building and Safety Division and Deschutes County Transportation Planner. These comments are set forth at pages 4-5 of the Staff Report. The following agencies either had no comment or did not respond to the notice: Deschutes County Assessor, Deschutes County Road, Bend Fire Department, Central Oregon Irrigation District, Bend Parks and Recreation, Deschutes County Assessor, Deschutes County Environmental Health, County Transportation Planner, Oregon Department of Aviation, Bend Municipal Airport Manager, and the FAA.

The Deschutes County Rural Protection Fire District #2 submitted a letter, dated November 27, 2005, expressing concerns about possible interference by the cell tower with emergency radio communications provided by a 110' tower on adjacent property. Specifically, the letter noted that the station existing next door to the subject property is used by Bend Fire and Rescue, and is a back up center for 911 dispatch. The existing tower provides radio communications for Bend Fire and Rescue, the Deschutes County Sheriff's Office, Deschutes County Search and Rescue, and all of the south county fire agencies. It is vitally important that these services have clear communications to provide emergency services to the residents of the county. The letter requested that the applicant be required to provide an "intermodulation study to determine any potential incompatibility with all current systems in use at the existing tower."

While the Fire District's concerns are well founded, I do not find any applicable Deschutes County zoning code criteria upon which I can grant the Fire District's request for an intermodulation study. Moreover, I find that local governments are preempted by the federal law from regulating interference matters. In a memorandum opinion and order adopted by the Chief of the Wireless Communications Bureau of the Federal Communications Commission, WT-Docket # 02100, the FCC found that federal law preempted provisions of a county ordinance which required that, prior to receiving a county zoning approval, applicants for telecommunications facilities had to show that their facilities would not degrade or interfere with the county's public safety communications systems. The Deschutes County Rural Fire Protection District #2 was requesting that the applicant show such noninterference. Because the Federal Communications Commission has exclusive jurisdiction over this issue, I cannot grant the Fire District's Request.

The applicant's representative has noted that the chances for interference with the 911 system transmissions are very small. In an e-mail to staff dated November 23, 2005, the applicant's representative said that 911 systems typically use frequencies in the 800 MHz range. However, Verizon wireless can only use the 1950 MHz frequencies in the Bend area. Where cellular towers have interfered with 911 radios in the past, the cellular towers were using frequencies in the 800 range.

- H. **PUBLIC COMMENTS:** The Planning Division mailed notice of the public hearing to all property owners within 3,000 feet of the subject property. In addition the Public Hearing notice was published in the Bend Bulletin on November 6, 2005. The Planning Division received three letters in response to the public notice objecting to the proposal or expressing concerns, including visual impacts, precedence setting, and suggesting the applicant use existing sites for its communication facility.

In addition, the applicant submitted a completed Land Use Action Sign affidavit that states the applicant posted the sign on the property on November 29, 2005.

- I. **REVIEW PERIOD:** The Planning Division deemed this application complete and accepted it for review on November 2, 2005.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY CONCLUSIONS REGARDING APPLICABLE CRITERIA: The applicant proposes a wireless communications facility in the EFU zone consisting of a 100-foot tall monopole tower and associated equipment shelter. The present Deschutes County Zoning Code (DCC) applies the following criteria to this application: Chapter 18.16, Exclusive Farm Use (EFU Zone), Sections 18.16.025 (allows certain utility facilities and also requires site plan review per Chapter 18.124 for such utility facilities) and Sections 18.16.038 and 18.16.070; Chapter 18.16, Supplementary Provisions, Section 18.16.250 (requires that certain wireless facilities which meet the "tier 3" standards, which includes this proposed facility, are subject to conditional use criteria set forth at Chapter 18.128); Chapter 18.124, Site Plan Review, Section 18.124.060 (approval criteria); and Chapter 18.128, Conditional Use, Sections 18.120.015 and 18.120.340. Because of the subject property's location, Chapter 18.80, Airport Safety Combining Zone, also applies to the present application.

I find that under applicable state law, only DCC 18.16.038 and probably 18.80 apply to this application. ORS 215.283 lists the uses permitted in exclusive farm zones in non-marginal land counties. The uses listed in ORS 215.283(1) are uses "as of right" which may not be subjected to additional local criteria. *Brentmar v Jackson County*, 321 Or 481, 496, 900 P2d 1030 (1995). Specifically, ORS 215.283(1)(d) provides that "utility facilities necessary for public service...may be established in any area zoned for exclusive farm use..." Additionally, "a utility facility necessary for public service may be established as provided in ORS 215.275." ORS 215.275 sets forth the criteria for approving utility facilities necessary for public service in the EFU zone.

For the reasons stated below I find that the applicant satisfied the applicable criteria of 18.16.038 and 18.80. I further find that because the additional criteria listed above conflict with state law, they are not applicable to the present application.

Title 18, Deschutes County Zoning Ordinance

A. CHAPTER 18.16, EXCLUSIVE FARM USE (EFU) ZONE

Section 18.16.025. Uses permitted subject to the special provisions under DCC Section 18.16.038 and a review under DCC Chapter 18.124 for items C through M.

* * *

- I. **Utility facilities necessary for public service, including wetland waste treatment systems, but not including commercial facilities for the purpose of generating electrical power for public use by sale and transmission towers over 200 feet in height.**

FINDING: DCC 18.16.025(I) echoes verbatim the language at ORS 215.283(1)(d), which provides “the following uses maybe established in any area zoned for exclusive farm use.” In other words, state law provides that “utility facilities necessary for public service” maybe established in any EFU zone in the state.

Deschutes County Code, 18.04, defines “Utility facility” as:

“Utility facility” means any major structures, excluding hydroelectric facilities, owned or operated by a public, private or cooperative electric, fuel, communications, sewage or water company for the generation, transmission, distribution or processing of its products or for the disposal of cooling water, waste or by-products, and including power transmission lines, major trunk pipelines, power substations, telecommunications facilities, water towers, sewage lagoons, sanitary landfills and similar facilities, but excluding local sewer, water, gas, telephone and power distribution lines, and similar minor facilities allowed in any zone. This definition shall not include wireless telecommunication facilities where such facilities are listed as a separate use in a zone.

The EFU zone does not list a wireless telecommunication facility as a separate use in the zone. Therefore, the proposed facility is subject to the definition above. The applicant, Verizon Wireless, is a private communications company proposing to establish a telecommunication facility in the EFU zone. I find that because they operate together, the proposed “facility” consists of both the tower and the equipment shelter, and that together they satisfy the Deschutes County definition of utility facility.

However, I find that this application is not subject to Chapter 18.124, as implied by the title of this Section 18.16.025. ORS 215.283 prevents the county from imposing more criteria, including site plan review, than those set forth in ORS 215.275.

Section 18.16.038. Special Conditions for certain uses listed under DCC 18.16.025.

- A. **A utility facility necessary for public use allowed under DCC 18.16.025(C) shall be one that is necessary to be situated in an agricultural zone in order for service to be provided. To demonstrate that a utility facility is necessary, an applicant**

must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

1. **Technical and engineering feasibility;**
2. **The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands;**
3. **Lack of available urban and nonresource lands;**
4. **Availability of existing rights of way;**
5. **Public health and safety; and**
6. **Other requirements of state and federal agencies.**
7. **Costs associated with any of the factors listed in 1-6 above may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities that are not substantially similar.**

FINDING: These criteria echo verbatim ORS 215.275(1-3). These criteria boil down to two basic components: (1) the applicant must show that reasonable alternatives have been considered and (2) that the facility must be sited in the EFU zone due to one or more of the factors listed 1-6 above. The applicant is not factoring costs into the siting of the new antennas. For the following reasons I find that the applicant has satisfied these criteria.

Reasonable alternatives considered:

The Burden of Proof identifies an existing tower at the Bend Fire Department station located north of the project site on tax lot 203 "that may have been tall enough to provide the coverage needed by Verizon Wireless." Co-locating on the Fire Department's existing tower, however, was not possible, according to the applicant, because the "department is not able to lease space on the tower because of limitations imposed by the federal funding used to construct their facility."

An additional site was considered on the existing T-Mobile pole on the east side of Pilot Butte. However, this site was deemed infeasible due to potential interference and future system needs (see applicant's Exhibit G, an analysis performed by the applicant's engineer on the Pilot Butte site).

Factor (3) above--Lack of available urban and nonresource lands

The applicant selected factor 3 above to meet this criterion. The Burden of Proof lists several "selection criteria" in determining the subject location (reference page 5). These criteria include: limitations imposed by surrounding topography, the intended service area of the facilities, and the ability of sites to "see" adjacent sites from their proposed locations. Other selection factors included suitable access, availability of electrical service, and a willing property lessor.

From the selection criteria the applicant's engineers created a "search area" to identify the "best location" for a new site (see applicant's Exhibit D). The Burden of Proof states there are no urban lands in close proximity to the proposed site. As previously mentioned, the Bend UGB is located 1,400 feet west of the proposed facility site. The non-resource lands nearby are zoned MUA-10. The applicant, however found the MUA-

10 zoned properties unsuitable for two reasons: (1) the MUA-10 parcels are outside of the search area and (2) the MUA-10 zoned parcels are located in subdivisions and developed with dwellings and placing the tower facility "amidst the homes, the existing trees would provide little screening because of the high angle of the tower from the horizon." The search area for the Hamby Road area shown in Exhibit D shows a limited area for potential wireless sites to be located in the area. In addition, Exhibit F shows the network coverage without establishing the proposed tower, which shows "no usable signal" in this area to provide reliable service to Verizon's customers. Based on the search area results and Exhibit F that shows limited coverage without the proposed tower site, I find that the lack of *available* urban and nonresource lands in the coverage area, makes it necessary to locate the proposed wireless telecommunication facility at the site to provide wireless telephone service in the EFU zone.

- 8. The owner of a utility facility approved under this section shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this subsection shall prevent the owner of the utility facility from requiring a bond or other security from a contractor or otherwise imposing on a contractor the responsibility for restoration.**

FINDING: This criterion echoes verbatim ORS 215.275 (4). Deschutes County Code defines "agricultural land" as follows:

"Agricultural Land" means lands classified by the U. S. Soil Conservation Service (SCS) as predominately Class I-VI soils, and other lands in different soil classes which are suitable for farm use, taking into consideration soil fertility, suitability for grazing and cropping, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, and accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands shall be included as agricultural lands in any event.

I find that the proposed facility will not disturb any agricultural land. The soil within the leased area is 58C and unirrigated. 58C soil mapping unit is not a high value soil, and unirrigated, it has a soil capability class ranging from VI (Deskamp) to VII (rock outcrop). I accept as true staff's observations, made during a November 17, 2005, site visit, that the soils at the proposed development site are rocky at the surface and covered with dense and overgrown juniper, brush, and grasses. In addition, the site appears to never been farmed and is unlikely to be farmed due to its location between developed areas within Big Sky Park, the abandoned fire station, the new fire station, and Neff Road. The draft "Land Lease Agreement" submitted as Exhibit I contains a provision, number 11, that requires the applicant as the Lessee to restore the premises to its original conditions within 90 days upon termination of the lease.

In conclusion, I find that the applicant has provided evidence that demonstrates the proposed "utility facility" is necessary to be situated at the proposed location in the EFU zone, thereby satisfying DCC 18.16.038(1-8).

9. ***In addition to the provisions of 1-6 above, the establishment or extension of a sewer system as defined by OAR 660-011-0060(1)(f) in an exclusive farm use zone shall be subject to the provisions of OAR 660-011-0060.***
10. ***The provisions above do not apply to interstate gas pipelines and associated facilities authorized by and subject to regulation by the Federal Energy Regulatory Commission.***

FINDING: Subsections 9 and 10 do not apply as the applicant is not proposing a new or extension of existing sewer system or interstate gas pipe line. Because these criteria do not apply, I need not determine whether they are preempted by state law. I will note that the only criteria which the county may impose, beyond those set forth at ORS 215.275, are those which are designed to “mitigate and minimize the impacts of the proposed facility, if any, on surrounding lands devoted to farm use in order to prevent a significant change in accepted farm practices or a significant increase in the cost of farm practices on the surrounding farm lands.” ORS 215.275(5).

B. CHAPTER 18.80, AIRPORT SAFETY (AS) COMBINING ZONE

Section 18.80.020. Application of provisions.

The provisions of DCC 18.80.020 shall only apply to unincorporated areas located under airport imaginary surfaces and zones, including approach surfaces, transitional surfaces, horizontal surfaces, conical surfaces and runway protection zones.

Section 18.80.028, Height Limitations on Allowed Uses in Underlying Zone.

All uses permitted by the underlying zone shall comply with the height limitations in DCC 18.80.028. When height limitations of the underlying zone are more restrictive than those of this overlay zone, the underlying zone height limitations shall control. [ORS 836.619; OAR 660-013-0070]

- A. ***Except as provided in DCC 18.80.028(B) and (C), no structure or tree, plant or other object of natural growth shall penetrate an airport imaginary surface. [ORS 836.619; OAR 660-013-0070(1)]***
- B. ***For areas within airport imaginary surfaces but outside the approach and transition surfaces, where the terrain is at higher elevations than the airport runway surfaces such that existing structures and permitted development penetrate or would penetrate the airport imaginary surfaces, a local government may authorize structures up to 35 feet in height.***

FINDING: The Deschutes County Code applies this chapter to this application because the subject property is located within Bend Airport’s Safety Zone under the conical surface. Comments from the County Transportation Planner conclude that the “top of the proposed monopole is approximately 114’ lower than the Conical Surface, and this should result in no impact to the AS Zone.” Because the present application does not impact the AS zone, I do not need to determine for the purposes of this application whether the AS zone criteria apply to uses permitted by ORS 215.283 (1).

IV. DECISION:

APPROVED. For the reasons stated above, I find that the proposed use is allowed outright in the EFU zone pursuant to state law. I further find that DCC 18.16.030 (a) (1-8), because they implement state statute, are applicable to this application. The applicant has shown that the proposed use meets these criteria. I further find that the applicant satisfies the criteria of the airport safety combining zone, without deciding whether these criteria are applicable to this application. Finally, I find that state law prevents the county from imposing any other criteria on this proposed use.

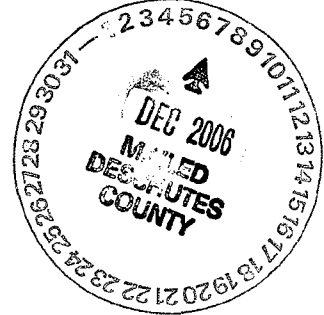
Dated this 3rd day of January, 2006.

Isa Taylor
Isa A. Taylor, OSB #04467
Deschutes County Hearings Officer

Mailed this 4th day of January, 2006.

**DECISION OF THE HEARINGS OFFICER FOR
DESCHUTES COUNTY, OREGON**

FILE NUMBER: AD-06-13
APPLICANT: GCC Bend, LLC
969 SW Colorado
Bend, OR 97702
PROPERTY OWNER: Central Oregon Irrigation District
2598 N. Highway 97
Redmond, OR 97756



HEARING DATE: Tuesday, October 17, 2006
6:00 P.M.
Barnes and Sawyer Rooms, Deschutes Services Building
1300 NW Wall Street
Bend, OR 97701

REQUEST: Land Use Permit to allow two radio transmission towers and associated equipment on a 62.55-acre parcel in the Exclusive Farm Use – Tumalo/Redmond/ Bend subzone (EFU-TRB). The property is also located within the Landscape Management (LM) and Airport Safety (AS) combining zones.

I. APPLICABLE CRITERIA:

Title 18 of the Deschutes County Code, County Zoning.

Chapter 18.04, Title, Purpose and Definitions
18.04.030, Definitions – Utility facility

Chapter 18.16, Exclusive Farm Use (EFU) Zones
18.16.025, Uses permitted subject to the special provisions under DCC Section 18.16.038 and a review under DCC Chapter 18.124 for items C through M
18.16.038, Special conditions for certain uses listed under DCC 18.16.025
18.16.060, Dimensional standards
18.16.070, Yards

Chapter 18.80, Airport Safety (AS) combining zone
18.80.020, Application of provisions
18.80.026, Notice of land use and permit applications within overlay zone area
18.80.028, Height limitations on allowed uses in underlying zone
18.80.030, Redmond Municipal Airport
18.80.050, Uses permitted outright

Oregon Revised Statutes

ORS 215.283, Uses permitted in exclusive farm use zones in nonmarginal lands counties

ORS 215.275 Siting standards for utility facilities in EFU zones

II. BASIC FINDINGS:

- A. **LOCATION:** The subject property has an assigned address of 65480 Deschutes Pleasant Ridge Road, Bend, and is identified on Deschutes County Assessor's map no. 16-12-24 as tax lot 200.
- B. **LOT OF RECORD:** The subject property is a legal lot of record as it is parcel 1 of partition plat no. 1996-39.
- C. **ZONING:** The subject property is zoned Exclusive Farm Use – Tumalo/Redmond/Bend subzone (EFU-TRB), and is also with the Landscape Management (LM) and Airport Safety (AS) combining zones.
- D. **PROPOSAL:** The applicant is proposing to establish two radio transmission towers, with side mounted antennas, and associated ground equipment on the property. Access to the property will be from Deschutes Pleasant Ridge Road. The tower site is located on that portion of the property located between the railroad tracks and Deschutes Pleasant Ridge Road, with the closest tower being located just under 500 feet east of the road.

The applicant has submitted a burden of proof statement and 35 exhibits in support of the application. The exhibits include color photographs of the site and the lands to the north, south, east and west. The applicant has also submitted a letter dated August 31, 2006 responding to the Redmond Airport's transmittal, which asserts that the proposed use requires filing with the Federal Aviation Administration for the two towers.

The subject property is to be leased from Central Oregon Irrigation District, with 42.62 of the 62.55 acres under lease. The proposed towers are intended to replace the existing radio transmission towers located within the Bend city limits adjacent to Butler Market Road. The proposed equipment shelter is to be no more than 25 x 30 feet and sited between the two towers, and is to be constructed of earth tone exterior colors. The tower site is to be surrounded by perimeter fencing, and is to have locked gates.

- E. **SITE DESCRIPTION:** The subject property includes 62.55 acres and has a level to somewhat sloping topography. The property is bisected by the Burlington Northern railroad tracks, and is currently undeveloped. The property has a vegetative cover of juniper trees and scrub brush, and there are a few dirt roads traversing the property. Deschutes Pleasant Ridge Road forms the western boundary of the property. Adjacent to the northwest corner of the property is the Highway 97/Deschutes Pleasant Ridge Road intersection.
- F. **SURROUNDING LAND USES:** The subject property is in an area that can be characterized as primarily dry, open space land. Immediately east and northeast of the property is land under the administration of the Bureau of Land Management (BLM) (16-12-24, 100; 16-12-13, 601). Directly north is land owned by the State of Oregon (16-12-13, 600). Directly south and west is land owned by Deschutes County (16-12-24, 300; 16-12-23, 100), and to the southwest is land operated by the Deschutes County Sheriff's Posse (16-12-24, 201), which includes an office/recreation building and a cinder parking area.

There is some rural residential land in the area, including the Whispering Pines subdivision located west of Highway 97. Additionally, there is some farm use in the area, located primarily north, south and west of the property. These rural residential and farm uses are all located at least one-quarter mile from the proposed tower locations. However, the proposed location of the towers and their heights will result in the towers being visible from those residences.

Zoning in the area is primarily Exclusive Farm Use (EFU-TRB), as well as Multiple Use Agricultural (MUA-10), and Rural Residential (RR-10). The area also includes the Landscape Management (LM) combining zone associated with Highway 97, and the Airport Safety (AS) combining zone associated with the Redmond Airport.

- G. **SOILS:** According to Natural Resources Conservation Service (NRCS) maps of the area, there are two soil units mapped on the subject property:

142B, Stukel-Rock outcrop-Deschutes complex, dry, 0 to 8% slopes: This soil type is composed of 35% Stukel soil and similar inclusions, 30% Rock outcrop, 20% Deschutes soil and similar inclusions, and 15% contrasting inclusions. The NRCS rates this soil complex as 6S/8S. This soil type comprises approximately 75% of the property. It is not designated high value soil.

138A, Stukel sandy loam, 0 to 3% slopes: This soil type is composed of 85% Stukel soil and similar inclusions, and 15% contrasting inclusions. The NRCS rates this soil type as 6S. This soil type comprises approximately 25% of the property. It is not designated high value soil.

- H. **PUBLIC AGENCY COMMENTS:** The Planning Division mailed notice to several public agencies. Those comments are included in the record and summarized in the October 9, 2006 staff report. Where relevant, those comments are included and addressed in the findings set out below.
- I. **PUBLIC COMMENTS:** The Planning Division mailed notice of the public hearing on this application to all property owners within 5,250 feet of the subject properties (7 times 750 feet). The additional notice area is required under DCC 22.24.030(A)(4), since the proposed towers are 195 feet in overall height. This section states:

“For structures proposed to exceed 30 feet in height that are located outside of an urban growth boundary, the area for describing persons entitled to notice under DCC 22.24.030(A)(1)(b) shall expand outward by a distance equal to the distance of the initial notice area boundary for every 30 foot height increment or portion thereof.”

The two towers, at 195 feet, are 6.5 times the height limit of 30 feet in the EFU zone, listed under DCC 18.16.060(E). The property is located outside of an urban growth boundary. Consequently, as outlined above, the notice area is seven (7) times the required 750 feet in the EFU zone, equaling a notice area surrounding the property of 5,250 feet. This notice was mailed out on September 20, 2006, which was 27 days prior to the hearing.

Written testimony was received from: Barbara J. Todd and Timothy N. Todd, who own property within the area. They request that the application be denied, or that conditions of approval be imposed to require that the transmission towers be

camouflaged as trees. At the hearing, Tami MacLeod, Karnopp Peterson LLP, and Dana Horner, COO/GM for the applicant, appeared on the applicant's behalf. Alan Erwert, Brenda Shepard and Daleyne Carpenter appeared in opposition to the application.

J. **REVIEW PERIOD:** This application was submitted on July 27, 2006. The 150-day review period deadline is no earlier than January 23, 2007. This decision is issued prior to the statutory deadline.

K. **POSTED NOTICE:** The applicant posted notice on the property in accordance with county standards.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

PRELIMINARY CONCLUSIONS REGARDING APPLICABLE CRITERIA:

The applicant proposes to establish two 195-foot radio transmission towers on property zoned EFU with a Landscape Management Combining Zone and Airport Safety Combining zone overlays. In a decision addressing a similar application, *Verizon Wireless*, SP 05-54 (1/4/2006), the Hearings Officer determined that the Oregon Supreme Court decision in *Brentmar v. Jackson County*, 321 Or 481, 900 P2d 1030(1995) limited the local government's authority to impose standards for uses allowed as of right in EFU zones. Consequently, the Hearings Officer concluded that only those county provisions that materially duplicate statutory and administrative regulations of utility facilities can be applied to an application for radio transmission towers that are smaller than 200 feet tall.

This Hearings Officer adopts that interpretation, finding that Oregon appellate law has specifically addressed this issue and concluded that only ORS 215.275 and LCDDC rules adopted to implement that statute may be used to regulate radio towers shorter than 200 feet. See *Dierking v. Clackamas County*, 170 Or App 683, 687, 13 P3d 1018 (2000) (“[t]owers less than 200 feet * * * are subject *only* to the necessity test [of ORS 215.275.] * * *”) (emphasis in original.) Accordingly, where the county's overlay zone standards may otherwise apply to a development application for the subject property, the proposed use (transmission towers) are not subject to those standards.

The application is reviewed in accordance with the standards set out below.

TITLE 18 OF THE DESCHUTES COUNTY CODE, COUNTY ZONING.

A. CHAPTER 18.16, EXCLUSIVE FARM USE ZONES.

1. Section 18.16.025, Uses permitted subject to the special provisions under DCC Section 18.16.038 and a review under DCC Chapter 18.124 for items C through M.

I. Utility facilities necessary for public service, including wetland waste treatment systems, * * *

FINDING: The applicant is proposing to establish two 195-foot tall radio transmission towers, with side mounted antennas, the associated ground equipment, and perimeter security fencing on the 62.55-acre parcel in the EFU zone. Utility facilities are defined under DCC 18.04.030 as follows:

“Utility facility” [includes] any major structures, * owned or operated by a public, private or cooperative *** communications, *** company for the *** transmission, distribution or processing of its products *** including *** telecommunications facilities, ***. This definition shall not include wireless telecommunications facilities where such facilities are listed as a separate use in a zone.”**

The applicant proposes to use two towers for radio communication. The proposed radio transmission towers are communications facilities owned and operated by a private company. The towers transmit radio signals for the applicant's use to the local community. The towers are shorter than 200 feet in height, meeting the 200 foot height limit set out at DCC 18.16.025(l). DCC 18.124 review standards do not apply, as they fall outside of the regulatory standards that can be applied to utility facilities. *Dierking v. Clackamas County*, 170 Or App at 687.

2. Section 18.16.038, Special Conditions for certain uses listed under DCC 18.16.025.

A. A utility facility necessary for public use allowed under DCC 18.16.025(C) shall be one that is necessary to be situated in an agricultural zone in order for service to be provided. To demonstrate that a utility facility is necessary, an applicant must show that reasonable alternatives have been considered and that the facility must be sited in an exclusive farm use zone due to one or more of the following factors:

- 1. Technical and engineering feasibility;**
- 2. The proposed facility is locationally dependent. A utility facility is locationally dependent if it must cross land in one or more areas zoned for exclusive farm use in order to achieve a reasonably direct route or to meet unique geographical needs that cannot be satisfied on other lands.**
- 3. Lack of available urban and non-resource lands;**
- 4. Availability of existing rights of way**
- 5. Public health and safety; and**
- 6. Other requirements of state and federal agencies;**
- 7. Costs associated with any of the factors listed in 1-6 above may be considered, but cost alone may not be the only consideration in determining that a utility facility is necessary for public service. Land costs shall not be included when considering alternative locations for substantially similar utility facilities that are not substantially similar.**
- 8. The owner of a utility facility approved under this section shall be responsible for restoring, as nearly as possible, to its former condition any agricultural land and associated improvements that are damaged or otherwise disturbed by the siting, maintenance, repair or reconstruction of the facility. Nothing in this subsection shall prevent the owner of the utility facility from requiring a bond or other security from a**

contractor or otherwise imposing on a contractor the responsibility for restoration.

FINDING: The applicant addressed these criteria. According to the applicant, other sites have been considered, but only this site satisfies locational demands to ensure a broad coverage area within its radio license boundaries. The applicant has included several exhibits which demonstrate what other areas and sites the applicant considered in determining which site to choose for the radio transmission towers. The maps included in the record indicate that much of the area east of Bend was considered for the towers. The Hearings Officer concludes that there is adequate evidence in the record to support a finding that the proposed site satisfies this standard because it is locationally dependent on a site that provides adequate coverage within the license range, and is available for such use.

The applicant proposes to occupy 42+ acres of this site to minimize interference with its transmissions. Non-resource lands within the county are generally of much smaller size and would be less suitable to accommodate the technical and engineering requirements of the tower. The Hearings Officer concludes that for this reason, the applicant has demonstrated that for engineering and technical feasibility reasons, the towers must be located on resource lands.

3. Section 18.16.060, Dimensional standards.

E. *Building height. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed under DCC 18.120.040.*

FINDING: This standard does not apply, for two reasons. First, DCC 18.16.025(l) specifically permits the siting of radio transmission towers of less than 200 feet. In addition, to the extent the county's siting standards restrict or prohibit the siting of utility facilities in EFU zones, those standards cannot be applied unless they implement statutory or state agency regulations.

4. Section 18.16.070, Yards.

FINDING: This section of the County Code requires minimum yards of 60 feet from a collector road (which Deschutes Pleasant Ridge Road is classified as), 25 feet from side property lines, and 25 feet from a rear property line. The applicant's site plan shows that the proposed towers are to be located more than 100 feet from any property line. To the extent these standards apply, the DCC 18.16.070 yard standards are satisfied.

B. CHAPTER 18.80, AIRPORT SAFETY (AS) COMBINING ZONE

1. Section 18.80.020, Application of provisions.

The provisions of DCC 18.80.020 shall only apply to unincorporated areas located under airport imaginary surfaces and zones, including approach surfaces, transitional surfaces, horizontal surfaces, conical surfaces and runway protection zones. While DCC 18.80 identifies dimensions for the entire imaginary surface and zone, parts of the surfaces and/or zones do not apply within the Redmond,

Bend or Sisters Urban Growth Boundaries. The Redmond Airport is owned and operated by the City of Redmond, and located wholly within the Redmond City Limits.

Imaginary surface dimensions vary for each airport covered by DCC 18.80.020. Based on the classification of each individual airport, only those portions (of the AS Zone) that overlay existing County zones are relevant.

Public use airports covered by DCC 18.80.020 include Redmond Municipal, Bend Municipal, Sunriver and Sisters Eagle Air. Although it is a public-use airport, due to its size and other factors, the County treats land uses surrounding the Sisters Eagle Air Airport based on the ORS 836.608 requirements for private-use airports. The Oregon Department of Aviation is still studying what land use requirements will ultimately apply to Sisters. However, contrary to the requirements of ORS 836.608, as will all public-use airports, federal law requires that the FAA Part 77 surfaces must be applied. The private-use airports covered by DCC 18.80.020 include Cline Falls Airpark and Juniper Airpark.

FINDING: The subject property appears to fall within the AS zone associated with the Redmond Airport. Staff believes that the portion of the AS zone for this site is the transitional surface for the airport. The proposed development would thus be subject to the AS zone standards. (AS zone standards implement statutory and administrative rule requirements for safe airline transport.)

2. Section 18.80.026, Notice of land use and permit applications within overlay zone areas.

Except as otherwise provided herein, written notice of applications for land use or limited land use decisions, including comprehensive plan or zoning amendments, in an area within this overlay zone, shall be provided to the airport sponsor and the Department of Aviation in the same manner as notice is provided to property owners entitled by law to written notice of land use or limited land use applications.

For the Redmond, Bend, Sunriver, and Sisters airports:

- A. *Notice shall be provided to the airport sponsor and the Department of Aviation when the property, or a portion thereof, that is subject to the land use or limited land use application is located within 10,000 feet of the sides or ends of the runway.***
- B. *Notice of land use and limited land use applications shall be provided within the following timelines.***
- 1. *Notice of land use and limited land use shall be provided prior to the public hearing at the same time that written notice of such applications is provided to property owners entitled to such notice.***

3. **Notice of the decision on a land use or limited land use application shall be provided to the airport sponsor and the Department of Aviation within the same timelines that such notice is provided to parties to a land use or limited land use proceeding.**

FINDING: A transmittal notice was sent to the Department of Aviation and the Redmond Airport. Only the Redmond Airport responded to the transmittal notice. Additionally, the Redmond Airport was sent notice of the public hearing on this application. Notice of the decision on this application will be provided to the Redmond Airport and the Department of Aviation.

3. Height limitations on allowed uses in underlying zones.

All uses permitted by the underlying zone shall comply with the height limitations in DCC 18.80.028. * * *

- A. **Except as provided in DCC 18.80.028(B) and (C), no structure or tree, plant or other object of natural growth shall penetrate an airport imaginary surface.**
- B. **For areas within the airport imaginary surfaces but outside the approach and transition surfaces, where the terrain is at higher elevations than the airport runway surfaces such that existing structures and permitted development penetrate or would penetrate the airport imaginary surfaces, a local government may authorize structures up to 35 feet in height.**
- C. **Other height exceptions or variances may be permitted when supported in writing by the airport sponsor, the Department of Aviation and the FAA. Applications for height variances shall follow the procedures for other variances and shall be subject to such conditions and terms as recommended by the Department of Aviation and the FAA (for Redmond, Bend and Sunriver).**

FINDING: Staff estimates that at 5 air miles from the Redmond Airport, the proposed 195-foot towers will not penetrate any imaginary surface associated with the airport. Steve Jorgensen, County Transportation Planner, estimated an elevation of 4,229 feet as the transitional surface for this site. According to the applicant's submittal, the ground elevation for the tower site is at approximately 3,220 feet. With the 195-foot tower height added to this ground elevation, the top of the towers elevation would thus be 3,415 feet. This elevation is 814 feet below the transitional surface for the airport. Based on this evidence, which is uncontroverted, the Hearings Officer concludes that this standard is satisfied.

4. Section 18.80.030, Redmond Municipal Airport.

The Redmond Municipal Airport is a Category 1, Commercial Service Airport. Its function is to accommodate scheduled major/national or regional commuter commercial air carrier service. The two approximately 7,040' long by 100'-150' wide, "other than utility" paved runways are located at an elevation of 3.077'. The proposed extension to runway 4-22 and the planned new parallel runway are

both identified on the FAA-adopted Airport Layout Plan. Therefore, these improvements are used in the layout of the Airport Safety Combining Zone. The same safety zone dimensional standards used for Runway 4-22 will also apply to the planned parallel runway.

- A. Primary Surface – For Redmond, the primary surfaces are 1000' wide by 7,440' long for Runway 10-28, 1,000' wide by 9,100' long for Runway 4-22, and 1,000' wide by 7,400' long for the proposed new parallel runway.**
- B. Runway Protection Zone (RPZ) - Two different RPZs apply to the Redmond Airport because it has a total of three potential runways with two possible approaches. Runway 4-22 and the planned parallel runway will both have precision approaches. Runway 10-28 has a non-precision approach on each end. The precision RPZ forms a 1,000' wide by 2,500' long by 1,750' trapezoid while the non-precision RPZ forms a 500' wide by 1,700' long by 1,010' wide trapezoid.**
- C. Approach Surface – The current ILS precision approach surface to runway 22, and the planned precision approaches to Runway 4 and the future parallel runway 4-22 are 1,000' wide by 50,000' long by 16,000' wide, with an upward approach slope ratio of 50:1 (one foot vertical for each 50 feet horizontal) for the first 10,000', then a slope ratio of 40:1 for the remaining 40,000'. The non-precision approach surface is 500' wide by 10,000' long by 3,500' wide, with an upward approach slope ratio of 34:1.**
- D. Horizontal Surface – The surface boundary is comprised of connected area drawn 10,000 feet outward and centered on the ends of the primary surface. The elevation of the horizontal surface for the Redmond Airport is 3,227 feet.**

FINDING: The subject property is approximately 5 air miles from the Redmond Airport. The applicant has submitted a copy (exhibit 12) of the modified permit request from the FAA. The applicant's evidence there is no impact on the Redmond Airport and FAA approval is not required for the construction of the 195-foot towers. To the extent this criterion applies, it is satisfied.

5. Section 18.80.050, Uses permitted outright.

Any uses permitted outright in the underlying zone with which the AS Zone is combined shall be allowed except as provided in DCC 18.80.044.

FINDING: The proposed radio transmission towers are allowed outright in the EFU zone and are thus allowed outright in the AS zone.

OTHER ISSUES RAISED DURING THESE PROCEEDINGS:

1. Visual Mitigation

Barbara J. and Timothy N. Todd requested that the applicant be required to camouflage the towers as trees in order to minimize the visual impact of the towers.

The applicant notes that the Todds appear to misunderstand the nature of the application in that the applicant is proposing AM radio towers, not wireless telecommunication monopoles. AM radio towers have different construction specifications, which are promulgated in federal regulations. The applicant's representatives stated that they have not found any decisions that have required *radio* towers to be disguised as trees, or even that they could be so disguised, given the construction requirements for such facilities. In addition, as photos in the record show, the vegetation in this area is comprised of low level shrubs and scrub grass. It is unlikely that if the towers are designed as two 195-foot trees they would be any less noticeable than the towers themselves.

The Hearings Officer concludes that even if she could impose conditions of approval to camouflage the tower, the Todd's proposed solution would not have the effect desired.

2. Health Impacts from Radio Emissions

Opponents testified that they were concerned about the health effects of radio transmissions on residents within the area. The applicant responded that studies have concluded that maximum permissible exposure levels are reached only within seven feet of the tower itself, and that area will be fenced to avoid trespass or damage to the tower. The Hearings Officer concludes (1) there are no county standards that require that health effects from telecommunications towers be considered in the land use proceedings to approve them and (2) there is substantial evidence in the record that the 42-acre leased site and the fencing and landscaping around the towers will minimize any potential health risk posed by human proximity to the towers and their transmissions.

3. Visual Impacts

Opponents testified that the proposed towers will have an adverse effect on views from their properties. One participant commented that she believed her property values would decline as a result of the towers. The Hearings Officer finds that case law prohibits the imposition of county regulations that would address those concerns. Simply put, the county does not have the authority to consider viewshed impacts when addressing the siting of a radio communications tower in an EFU zone.

IV. DECISION:

This application is **APPROVED**. For the foregoing reasons, the Hearings Officer concludes that the applicant has satisfied applicable standards or applicable standards can be satisfied with the imposition of conditions of approval, set out below:

1. Approval is based upon the submitted plan. Any substantial change to the approved plan will require a new application.

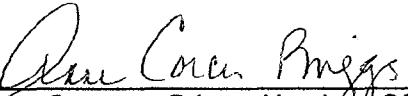
2. The proposed radio transmission towers shall be limited to 195 feet in overall height.
3. An access permit for any new access onto Deschutes Pleasant Ridge Road shall be obtained prior to issuance of the building permit for the towers.
4. The applicant is encouraged to design the proposed ground equipment with earth tone exterior colors to minimize the visual impact of those ground facilities.
5. The applicant shall obtain any necessary building permit(s) from the Deschutes County Building Safety Division prior to construction of the towers.

V. DURATION OF APPROVAL:

The applicant shall submit an application for a building permit for the towers, or if not required to obtain a building permit, have the towers constructed within two (2) years following the date this decision becomes final or obtain an extension of time pursuant to Section 22.36.010 of the County Code, or this approval shall be void.

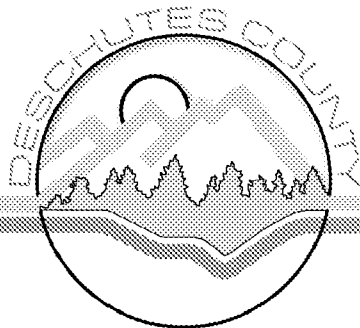
Dated this 5th day of December, 2006

Mailed this 17th day of December, 2006



Arine Corcoran Briggs, Hearings Officer

THIS DECISION IS FINAL UNLESS APPEALED WITHIN 12 DAYS OF MAILING.



Community Development Department

Planning Division Building Safety Division Environmental Health Division

117 NW Lafayette Avenue Bend Oregon 97701-1925
(541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

CERTIFICATE OF MAILING

FILE NUMBER: AD-06-13

DOCUMENT(S) MAILED: Hearings Officer's Decision

LOOKUP AREA: N/A

TAX LOT NUMBER(S): 16-12-24, 200

I certify that on the 7th day of December, 2006, the attached Hearings officer's decision, dated December 7th, 2006, was/were mailed by first class mail, postage prepaid, to the person(s) and address(es) set forth on the attached list.

DATED this 7th day of December, 2006.

COMMUNITY DEVELOPMENT DEPARTMENT

By: Bend Mailing Services

Applicant: GCC Bend, LLC 969 SW Colorado Bend, OR 97702	Alan Erwert Brenda Shepard 65313 73 rd Street Bend, OR 97701
Applicant's Representative: Tamara MacLeod Karnopp Petersen LLP 1201 NW Wall Street #300 Bend, OR 97701	Daleyne Carpenter 65540 73 rd Street Bend, OR 97701
Redmond Airport c/o Carrie Novick 2522 SE Airport Way Redmond, OR 97756	Barbara and Timothy Todd 3494 Ramada Way Single Springs, CA 95682
ODOT/Aeronatics c/o Tom Franklin 3040 25 th Street SE Salem, OR 97310-0100	Courtesy Copies to: County Road Department County Assessor County Planning Commission Watermaster
Central Oregon Irrigation District 1055 SW Lake Court Redmond, OR 97756	

REVIEWED
22
LEGAL COUNSEL



**DECISION OF THE BOARD OF COUNTY COMMISSIONERS
FOR DESCHUTES COUNTY**

FILE NUMBER: CU-12-15 (A-13-1)

APPLICANT: American Tower
c/o Rod Michaelis
1411 E. Pinecrest Road
Spokane, WA 99203

PROPERTY OWNER: Barbara Ellingboe
P.O. Box 8696
Bend, OR 97708

REQUEST: Approval of a conditional use permit for a Tier 3 wireless telecommunications facility on an approximately 5-acre lot in the Rural Residential Zone.

PROPERTY: 25070 Alfalfa Market Road, Bend; County Assessor's Map 17-14-29, tax lot 600

STAFF CONTACT: Paul Blikstad, Senior Planner

HEARING DATE: June 13, 2013

I. SUMMARY OF DECISION:

In this decision, the Board of County Commissioners ("Board") is asked to decide on an appeal of the County Hearings Officer's denial of a conditional use permit for a wireless telecommunications facility, consisting of a 100-foot monopole, with associated antennas, and ground equipment on an approximately 5-acre lot within the Rural Residential (RR-10) Zone. The proposed telecommunications facility is identified as a "Tier 3" facility under Deschutes County Code ("DCC") 18.116.250(C).

This case comes to the Board on the appeal by the applicant of the Hearings Officer's denial of the conditional use permit application (CU-12-15), the appeal was heard de novo.

DC 2013-473

In this decision, the Board upholds the County Hearings Officer's denial of the conditional use permit.

On the issues presented by this appeal, the Board decides as follows:

- The applicant should not have limited its search ring to only lands outside the EFU zone merely because approval of a tower on resource land may have been more difficult. The applicant specifically stated that they did not include EFU land in the search ring because the criteria for siting a wireless telecommunications facility of EFU land are more stringent than for non-resource lands. This should not have prevented the applicant from creating a reasonable search ring that could have included alternative sites on EFU land. A trapezoidal-shaped search ring that included only nearby RR-10 zoned land did not go far enough in analyzing sites that might be suitable and provide the necessary cellular coverage for any gaps in service for the applicant.
- Any reasonable person could see from the map of the search area that the search shape was specifically tailored for the subject lot and not as a reasonable search ring. This is especially true in light of the applicant's own engineer's declaration dated June 13, 2013 that says that any of the alternative sites analyzed would provide the desired coverage.
- In fact, the Board believes that, in this location, a site on the EFU land would likely be the best placement for the tower because of fewer surrounding residential uses, the visual impacts for which would be impacted. The Alfalfa area, especially in the subject location, has wonderful views of the Cascade Mountains that would be impacted a 100 ft tall tower. The Board finds that, based on the oral and written record, the surrounding area has scenic views that include, as described in the Hearings Officer's decision: open desert plateau, the Cascade Mountains, Horse Ridge, Pine Mountain and the Paulina Mountains. The DCC provisions for wireless telecommunications clearly require protection of such views. Because parcels in EFU areas that surround the subject property are larger but fewer areas on those EFU lands are farmed such that siting a tower on EFU land will probably not significantly interfere with the farm uses and will have a lesser visual impact than if it is sited on the subject property so close to neighboring residential uses.
- The applicant's statements regarding the possibility of the nearby Department of State Lands (DSL) property not being available or approvable for a telecommunications facility constitute merely speculation. The fact that it may have taken additional time to go through the DSL process is not sufficient to determine that such an approval would not happen within a reasonable time, merely because neighboring property owners might object to those sites as well is also merely speculation. The DSL staff person with whom the applicant's representative spoke did not say that it was a certainty that the tower could not be located anywhere on the DSL RR-10 property. That DSL staff person was not present at the Board hearing such that the Board could glean any additional information from the property owner's representative.

- The Board finds that the DSL sites may very well have fewer visual impacts than the proposed site. The testimony provided was that there is more vegetation and more rock ridgeline in various places to screen the tower. Additionally, if the tower is placed on the top of the ridge, it is likely the tower could be lowered by that same footage of elevation gain and be less visually intrusive.

The argument that requiring the applicant to go through the DSL process would not comply with the FCC requirement, that the approval or denial be within a reasonable time, is not a deterrent for finding that the DSL sites are better than the subject site (less visual impact) if the monopole must be placed in the RR-10 zone. The applicant could have submitted the DSL application at the same time as applying for the County land use approval of one or more of those sites. Additionally, that would be a process for a different site and not whether or not the subject site was approved or denied within a reasonable timeframe as required by FCC regulations.

- The applicant's submitted materials on July 5, 2013 clearly indicated that the alternative site B on the subject property has a lesser visual impact on nearby properties based on topographic and vegetative buffers than the original proposed site A. The applicant asked the Board to consider this site. While the Board agrees that Alternative B would be better than the subject site because it is closer to the ridgeline and, thus, would provide better visual screening than the subject site, the Board is not stating that Alternative B is the best site. In fact, the Board believes that the DSL sites may actually be better.
- Because the Board is not finding that Alternative B is the best site and because Alternative B was not included in the original application, Alternative B cannot be considered under this CUP application. Consideration of proposed alternative site B will require either the submission of a modification of CU-12-15, or a new conditional use permit application must be submitted.

II. APPLICABLE CRITERIA:

The Board adopts the Hearings Officer's findings in Section I of his decision and incorporates them herein as its own findings.

III. FINDINGS OF FACT:

The Board adopts as its findings of fact, the findings that were made by the Hearings Officer, in Sections II (A) through (I) except as modified below.

- F. PROPOSAL** The applicant proposed a tower at what it has termed Applicant's Preferred Alternative Site A, as shown in the application materials. This site was close to Alfalfa Market Road. During the proceedings, Applicant identified what it has termed as Applicant's Preferred Alternative Site B, located on the subject property some 530 feet to the north of Alternative A and argued that this site should be considered as a proposed site for its proposed tower. For the reasons set forth herein, the Board does not consider this proposed alternative.

The Board finds that the Applicant's proposed alternative location would constitute a "modification" of its application and that pursuant to DCC 22.20.055(B), such a proposal may be considered only if the applicant has submitted a modification application, paid a modification application fee and agreed to restart the 150-day time clock. By definition, a modification is a change that would modify the proposal as it relates to setbacks, orientation, or site layout in a manner that would require the findings of fact to be changed DCC 22.04.020. In this case, there is no question that such a change would require new findings of fact on among other things, the site's proximity to nearby houses and its location in relation to scenic views of those houses. Accordingly, the alternative site location constitutes a modification and the procedural requirements for placing that alternative before the County for decision was not adhered to.

The only proposal before the County for decision was the site close to Alfalfa Market Road identified in the Applicant's application materials and that will be the only site reviewed in this decision.

I. PROCEDURAL HISTORY: The procedural history submitted by the Hearings Officer is amended to add the following:

The Hearings Officer's decision was mailed out on March 1, 2013. The applicant appealed the Hearings Officer's decision on March 13, 2013, which was within the 12-day appeal period required by State Law and Deschutes County Code 22.32.015(B).

The applicant, by letter dated June 13, 2013, granted the County an extension to the 150-day time limit for an additional 116 days from April 6, 2013 to July 31, 2013. Additionally, at the June 13, 2013 hearing, the applicant granted the County an additional extension to August 27, 2013 for a final decision.

The Board of County Commissioners, under Order No. 2013-016, determined that they would hear the appeal, and that it would be heard de novo. The public hearing was held on Thursday, June 13, 2013. The oral portion of the hearing was closed on that same date. The written record was left open to June 28, 2013 for additional comments/evidence. Rebuttal for evidence during the June 28, 2013 open record period was allowed to July 5, 2013. And the applicant was allowed final argument until July 12, 2013. A letter from Bruce White dated July 12, 2013 was submitted objecting to the applicant submitting new evidence with its July 5th submittal, and requesting the due process right for the other parties to respond to that evidence; Bruce White was the only party to make such a request. On July 15, 2013 the Board issued a verbal order reopening the record to enter into the record Bruce White's July 12, 2013 letter. The record was left open to July 23, 2013 for the applicant to respond to Bruce White's letter. The Board issued Order No. 2013-033 on July 24, 2013, which ratified their verbal Order of July 15, 2013.

The Board held deliberations for a decision on the appeal of CU-12-15, on August 6, 2013. The Board voted to uphold the Hearings Officer's denial of CU-12-15. The Board

directed Staff to prepare a written decision taking into account the Board's statements at the deliberations for their decision.

IV. FINDINGS OF FACT AND CONCLUSION OF LAW **SPECIFIC LEGAL ISSUES**

Deschutes County Code 18.128.340 establishes the standards and criteria for a wireless telecommunications facility. The Hearings Officer's findings under DCC 18.128.340(A) and (B) are incorporated herein by reference, except as supplemented below.

B. Approval Criteria: An application for a wireless telecommunications facility will be approved upon findings that:

- 2. The applicant has considered other sites in its search area that would have less visual impact as viewed from nearby residences than the site proposed and has determined that any less intrusive sites are either unavailable or do not provide the communications coverage necessary. To meet this criterion, the applicant must demonstrate that it has made a good faith effort to co-locate its antennas on existing monopoles in the area to be served. The applicant can demonstrate this by submitting a statement from a qualified engineer that indicates whether the necessary service can or cannot be provided by co-location within the area to be served.***

The first ground for appeal asserted by the Applicant was that the Hearings Officer erred in finding that the applicant failed to demonstrate compliance with DCC 18.128.340(B)(2) requiring that the Applicant demonstrate that no available site had less of a visual impact than the subject site. The Board finds that an analysis of alternative sites requires a detailed, site-specific analysis that considers actual views of alternative sites from nearby residences. The Board finds that the Applicant failed to conduct the kind of analysis that would satisfy these requirements.

In evaluating that criterion, the Hearings Officer determined that the area has significant scenic areas, including the open desert plateau, the Cascade Mountains, Horse Ridge, Pine Mountain, and the Paulina Mountains. The Board concurs with this scenic assessment.

The Hearings Officer then denied the application based on Applicant's failure to meet this criterion because he found that Applicant had failed to conduct a meaningful search for alternatives that would minimize visual impacts. This included a failure to consider utilizing existing transmission lines along Elk Lane for co-location of the tower facility; a failure to respond to the opponents' suggestion that the tower might be located on the Division of State Lands (DSL) property; and a failure to review whether such alternatives would involve visual impacts of lesser magnitude than the subject site.

The Board agrees with the Hearings Officer's analysis on page 13 of his decision that the alternatives language of DCC 18.128.340(B)(2) is not limited to an analysis of opportunities for

co-location, but that it includes a general mandate that an applicant search for sites that “would have less visual impact as viewed from nearby residences than the site proposed.

The Board finds that the second sentence of this provision referencing co-location is intended to reference co-location as one means of satisfying the mandate of the first sentence but, in the absence of limiting language, does not represent the exclusive means of satisfying the general mandate that alternatives be considered.

The Board also finds that the review area of a half-mile from the subject site, as suggested by the opponents, satisfies the need to review the impacts of “nearby residences.” This review area was suggested by the opponents and the Applicant appears to have agreed to that distance within its submittals before the Board. The Board finds that such an area is tight enough to give protection to residences closest to the proposed tower but not so broad as to make the analysis too unfocused and diffuse.

The Board finds, however, that the applicant’s submittals include a statement from their Radio Frequency Engineer Karen Sullivan, that all five alternative sites, three of which are on the DSL property, shown on the map attached to her written statement, would provide the necessary coverage for the applicant. The statement reads as follows:

“In summary, all 5 of the proposed and alternate sites would provide acceptable coverage in the desired coverage area because all of the sites are relatively close to each other in the RR10 zone, and the elevation of the local terrain does not vary to a great degree. A 100’ tall tower on any of the proposed or alternate sites would provide adequate service in the desired coverage area. Approximately 27 square miles of reliable coverage is predicted to be added with the new site. Please see Exhibit 2 for a topographical map which shows the approximate locations for the alternate sites, and the elevations of the surrounding properties.”

Ms. Sullivan’s testimony undercuts the credibility of the Applicant’s earlier arguments that the size of the search ring was justified by meeting the applicant’s legitimate coverage needs.

Additionally, the Board finds that the applicant should have expanded the proposed search ring to include EFU lands in the surrounding area. Any reasonable person can review the diagram submitted by the applicant to see that the search area is not a ring in shape and was created expressly for the purposes of avoiding the EFU lands and justifying the subject site. Additionally, the EFU lands would potentially have much less visual impacts than the proposed use on RR-10 zoned land, where many people live or intend to live, relative to the number and proximity of people living on EFU land. The subject property is in an area that is surrounded by EFU land which has larger parcels which are farther away from residents. Additionally, the surrounding EFU land does not appear to be fully farmed such that, it appears, without more evidence, that sites could be found that would not significantly impact farm uses.

The credibility of the Applicant’s claims for the subject site is further undercut by the fact that, on appeal, the Applicant offered new testimony attempting to justify its chosen site as the superior alternative site regarding visual impacts and also suggesting that its Preferred

Alternative Site B on the subject property satisfied the approval criteria. The Applicant's formal statement in their July 12, 2013 submittal (page 2) is as follows:

"The least intrusive Site. Based on the Applicant's analysis and evaluation, the least intrusive site is on the Subject/Preferred property, at the (alternative) Preferred Site "B," which location is approximately 700' north of Alfalfa Market Road, on the Preferred Site."

Alternative Site B is not part of the application addressing the standards and criteria under DCC 18.128.340. is not before the Board for decision and therefore provides no basis for approving applicant's proposal. The Applicant should have submitted a modification of application under DCC 22.20.055 or must now submit an entirely new conditional use permit application.

In light of both of the above admission by the Applicant's engineer regarding all sites filling the service gap and by the Applicant regarding Alternative Site B, the Board need not make any further analysis or findings to justify denial of Applicant's proposal based upon this criterion. However, because the Applicant may resubmit an application for a tower in this area and out of an abundance of caution in the potential application of the Telecommunications Act of 1996 (TCA) to this decision, the Board will make additional findings related to the Applicant's failure to meet the requirements of this criterion.

The Applicant's analysis was largely based upon aerial photographs showing the numbers of houses surrounding each alternative proposed site then making assumptions about what the views of nearby houses were and how such "views" might be impacted. The only evidence submitted showing what the ground level views from nearby residences toward the alternative sites were photographs and narratives provided by the opponents.¹ That evidence showed the existence of vegetation and topographic features -- such as a ridge on the DSL property and other topographic nobs and a proliferation of mature Juniper trees -- that restricted scenic views of the houses surrounding some of the alternative sites (in comparison to the wide open view of the subject site from the nearby White and Armenta residences).²

The Applicant's approach seemed to be that all scenic views in the area were similar and that individual analysis of sight lines was therefore not required. Based upon the evidence supplied by the Applicant and the opponents, the Board finds that this is not the case. In addition, as stated above, the Applicant's analysis downplayed or ignored the presence of the CEC transmission line along Elk Lane, which could have been used by the Applicant to justify sites along that line as being already visually compromised and, thus, of lesser visual intrusion. The Board finds that due to the lack of ground-level data of the actual views of residences nearby the

¹ Applicant disputed this assertion by the opponents, but a review of the evidence shows that, other than some ground level photos of the subject site, the only other ground-level photographs were those provided by the applicant at the June 13, 2013 public hearing showing ground level pictures of the sites themselves, but no pictures showing any views *toward* those sites from nearby residences.

² The most unsubstantiated assertion was the Applicant's statement in its July 5 submittal that various houses near Alternative Site 1 and DSL Site 3 had views of the Cascades, when the only ground-level photographic evidence in the record showed that any views of the Cascades from houses around these sites was blocked by a ridge on the DSL property.

alternative sites the Applicant failed to make a prima facie case that the subject site would have less of a visual impact when viewed from nearby houses than the comparison alternative sites.

The Board finds that the evidence of the visual impacts on the White and Armenta residences in particular at the subject site showed that placement of the proposed wireless tower at that site in relative close proximity to those residences would have marred otherwise uninterrupted scenic views of the Cascade mountains or of Horse Ridge without the benefit of any the screening whatsoever. The Board finds that the site selected was one of the few sites in the area that was flat and that had no vegetative screening.

The Board finds that the Applicant's initial application considered a variety of alternative sites, including what it designated as Alternative Site 1 on a privately-owned parcel in Bend Cascade View Estates at the corner of Elk Lane and Todd Road. In analyzing Alternative Site 1, the Applicant ignored the 65-foot high CEC transmission lines in reviewing the scenic attributes of the alternative sites while arguing that that the presence of the 34-foot high telephone lines (which Applicant misrepresented as being 45 feet in height) along Alfalfa Market Road justified the subject site. Because of the higher transmission line at the Elk Lane/Todd Road corner, the Board finds that a tower at this Alternative 1 could possibly have less of a visual impact due to the presence of the CEC transmission line and the interruption of distant views and sight lines from nearby residences by trees and topography.

During the hearing process before the Hearings Officer, the opponents suggested other alternative sites that are located on the DSL lands near the CEC transmission lines and on the CEC transmission towers themselves. The applicant failed to respond to the alternatives suggested by the opponents and the Hearings Officer found that the applicant's failure to "seriously respond" to those suggested alternative sites warranted denial of the Applicant's proposal under this criterion. During the hearings process before the Board, the applicant did address alternatives sites on the DSL land and the CEC tower. However, for the reasons set forth below the Board finds the Applicant's alternatives analysis to still be lacking.

To the extent the TCA requires the Board's order to identify alternative sites having less of a visual impact than the present site, the Board finds that the three DSL sites shows on the Exhibit 2 map potentially have less impact on scenic views than the proposed site, based on the ridge that runs through the DSL property, and the amount of trees on and near the ridge that could help buffer the facility from views that might be impacted by a telecommunications facility in this area. In particular, the DSL Alternative 2 site (also referred to as SCF 3 and labeled on aerial photographs as Site 3) located near the CEC transmission line (at Pole # BA 133) would have less of a visual impact on the views from nearby residences than the subject site. This is because of the combination of the presence of the CEC transmission line that already mars any scenic views that might be present, the interruption of distant scenic views of the Cascade Mountains and other vistas by the presence of the north-south ridge on the DSL land, the proliferation of mature Juniper trees surrounding the site tending to screen the lower portions of a tower, the distance between the site and the nearest residence and the orientation of some of the nearest homes, with their primary view toward the south and not toward the alternative wireless site.

Finally, the argument that requiring the applicant to go through the DSL review process would not comply with the FCC requirement that the review be within a reasonable time is not a deterrent for finding that the DSL sites are potentially better than the subject site, if the facility must be placed in the RR-10 zone. The applicant could have submitted the DSL application concurrent with the County's conditional use application, for one or more of the DSL sites. Any statements regarding whether any of the DSL sites would not be approved is merely conjecture. The Board reviewed the DSL rules submitted by the opponents and found nothing in those rules that would indicate that an application would necessarily fail. Additionally, the evidence shows that the applicant already has sites on DSL lands. Furthermore, with regard to the limited 30-year special use period, the applicant contradicted itself by suggesting it would be seeking approval from the DSL for a 5-year period, with extensions up to 30 years. The applicant does not seem to have been in any particular hurry in this case to gain approval of the proposed tower. The evidence shows that Applicant held its required neighborhood meeting in March 2012 but did not submit its application until more than 6 months later, in October 2012 and has since granted several extensions to the 150-day deadlines. The applicant could have sought DSL review during that time.

5. *In all cases, the applicant shall site the facility in a manner to minimize its impact on scenic views and shall site the facility using trees, vegetation, and topography in order to screen it to the maximum extent practicable from view from protected roadways. Towers or monopoles shall not be sited in locations where there is no vegetative, structural or topographic screening available.*

The Board concurs with the Hearings Officer's findings regarding compliance with DCC 18.128.340(B)(5) and adopts as its findings the findings in the Hearings Officer's decision, as supplemented below.

Applicant makes three arguments related to compliance with this provision. It argues that supplied vegetation can be used to satisfy this standard. Second, in the event that natural screening is the only screening that can be utilized, it argues that because there is some screening location on the property, a topographical ridge located at the north end of the property and trees associated with that ridge, it has satisfied the criterion. Third, it argues that its Alternative Site B can be used to satisfy this standard.

With regard to the first argument, the Board finds that the language of DCC 18.128.340(B)(5) does not contemplate compliance using supplied vegetation. The use of the terms "vegetative, structural or topographic screening" as alternative forms of screening contemplate the use of existing conditions, such as an existing topographical condition or an existing structure. Vegetation is not differentiated in this list in any way that would suggest that the term "vegetation" as used could include supplied vegetation. The Board notes that the County Code expressly allows for supplied screening for Tier 2 wireless facilities. See, e.g. DCC 18.116.250(B)(1)(d). The Board knew how to expressly allow for supplied vegetation when it intended such vegetation to be used to satisfy visual impact concerns, but it did not do so here. Instead, because of the additional impacts posed by Tier 3 wireless facilities, it imposed a stricter

requirement of utilizing already existing screening. Therefore, any proposal that would rely in whole or in part upon mitigation by supplied screening to meet the vegetative screening requirement, as Applicant does here, does not comply with this criterion.

With regard to the second argument, that compliance requires only that there be *some* natural screening *somewhere* on the property, regardless of how effective it might be in screening the facility from nearby viewpoints, the Board rejects that argument. Such an interpretation does not comply with the requirement of the first sentence of DCC 18.128.340(B)(5) that the facility be sited in a manner to minimize its impact on scenic views. A proposal to site a wireless facility in a flat, open area devoid of screening vegetation in a scenic view shed, as indisputably is the case here with Applicant's Preferred Alternative A, does not satisfy this criterion.

Finally, Applicant again attempts to switch the location of its proposed tower to what it refers to as the Alternative B site, further to the north on the Ellingboe property and to argue that that site meets the code. As the Board has previously found, this site is not property before the County for a decision.

VII. DECISION:

Based on the findings of fact and conclusions of law set out above, the Board concludes that the applicant has not demonstrated that all applicable approval criteria have been met. The Board upholds the Hearings Officer's denial of the conditional use permit application.

DATED this 19th day of August, 2013.

MAILED this 26th day of August, 2013.

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON


ALAN UNGER, CHAIR


TAMMY BANEY, VICE CHAIR


ANTHONY DEBONE, COMMISSIONER

ATTEST:


Recording Secretary

THIS DECISION BECOMES FINAL UPON MAILING. PARTIES MAY APPEAL THIS DECISION TO THE LAND USE BOARD OF APPEALS WITHIN 21 DAYS OF THE DATE ON WHICH THIS DECISION IS FINAL.

DECISION OF THE DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: 247-16-000081-CU
247-16-000536-MA (Modification)

HEARING DATE: August 30, 2016, 6:00 p.m.

HEARING LOCATION: Barnes and Sawyer Hearing Rooms
Deschutes Service Center
1130 NW Wall Street
Bend, OR 97701

APPLICANT: Verizon Wireless c/o Land Services Northwest
Attn: Ed Fournier
Land Services Northwest
Post Office Box 302
Bend, Oregon 97709-0302

OWNER: Central Oregon Irrigation District
1055 SW Lake Court
Redmond, Oregon 97760

REQUEST: The applicant originally requested Conditional Use permit to establish a new wireless telecommunication facility consisting of a 140-foot tower. This was later modified to a 120-foot monopole or mono-pine tower with antennas and ground-mounted equipment shelter. The subject property is within the Rural Residential Zone.

STAFF CONTACT: Cynthia Smidt, Associate Planner

HEARING DATE: August 30, 2016

I. APPLICABLE CRITERIA:

Title 18, Deschutes County Zoning Ordinance

- Chapter 18.16. Exclusive Farm Use Zone
- Chapter 18.60. Rural Residential Zone
- Chapter 18.116. Supplementary Provisions
- Chapter 18.128. Conditional Uses

Title 22, Deschutes County Development Procedures Ordinance

II. BASIC FINDINGS:

A. LOCATION: The proposed wireless telecommunication facility will be located on property identified on Deschutes County Assessor’s map 18-13-09A as tax lot 100. Tax lot 100, is recognized as one legal lot of record together with neighboring tax lot 500 on map 18-13-10 and tax lot 1000 on map 18-13-03. The subject property is made up of three tax lots and is identified with the following addresses: 23325, 23345, and 23355 Highway 20, Bend.¹

B. LOT OF RECORD: The subject property, consisting of tax lot 100 on map 18-13-09A, tax lot 500 on map 18-13-10, and tax lot 1000 on map 18-13-03, is recognized together as one legal lot of record pursuant to County file no LR-05-63 and reconfigured through property line adjustments LL-05-98 and LL-06-120.

C. ZONING: The subject property is zoned Rural Residential (RR-10) and Exclusive Farm Use. The proposed wireless telecommunications facility is proposed on tax lot 100, which is zoned RR-10. Tax lots 500 and 1000 are within the Exclusive Farm Use Alfalfa (EFUAL) and Tumalo/Redmond/Bend (EFUTRB) subzones, respectively. Tax lot 100, where the facility is proposed, is designated rural residential exception area by the Deschutes County Comprehensive Plan. The remaining area is designated agricultural.

D. SITE DESCRIPTION: The subject property, encompassing three tax lots, is approximately 56.63 acres and irregularly shaped. The site consists of natural topography of moderately rolling terrain. The proposed wireless facility will be located on the approximate 13.5 acres of residentially zoned land in the southwestern region of the property. This region of the property is currently vacant and covered with a mix of juniper trees and native shrubs and grasses. A small irrigation canal traverses this region of the property in a north-south direction, connecting to the larger main Central Oregon Canal to the south, which is adjacent to the south-southeast boundary of the property. The proposed telecommunications facility will be located approximately 250 feet north of the main canal. The remaining approximate 43.13 acres of the property is farm-zoned with past evidence of irrigated lands together with a mix of juniper trees, and native shrubs and grasses. County Assessor records show a one-story residence established in 1940 on the property. Staff indicates it is unsure if the residence is still in use as a home. Highway 20 abuts the property along its northeastern boundary. Access to the site will be from Highway 20. According to the Flood Insurance Rate Map (FIRM) for Deschutes County and the National Wetlands Inventory, respectively, the subject property is not located in the 100-year flood plain and does not contain wetlands.

E. SURROUNDING LAND USES: The area surrounding the subject property consists of mostly developed and vacant rural residential and farm-zoned properties. Residential parcels are located to the west and south of the proposed building site. The majority of the residential parcels are eight (8) to 10 acres in size with some as small as five (5) acres. To the east and north are larger farm-zoned parcels. Parcels zoned for farm use range in size from 4.81 to 160 acres. Highway 20 abuts the northeastern boundary. Kennel Airstrip is located approximately 1,900 feet south of the proposed tower and is located on tax lot

¹ Tax lot 100 previously had the address of 61604 Gribbling Road, Bend, which was the address provided in the Notice of Application and Notice of Public Hearing related to the proposal. As identified in comments provided by the County Property Address Coordinator, the address changed to 23355 Highway 20 based on the access point to the property.

800 on map 18-13-10 and tax lot 900 on map 18-13-09A.² Juniper Airpark is located approximately 2.0 miles east of the proposed tower and is located on tax lots 302 and 303 on map 18-13-12.³ Zoning in the area is a mixture of Rural Residential and Exclusive Farm Use – Alfalfa subzone and Tumalo/Bend/Redmond subzone.

F. PROPOSAL: The applicant originally proposed a wireless telecommunications facility consisting of a 140-foot-tall steel lattice tower with antennas and a ground-mounted equipment shelter within a 60-foot-by-60-foot lease area on tax lot 100. The ground-mounted equipment area will be approximately 196 square feet (8 feet by 24.5 feet) and includes equipment cabinets, back-up generator, and other related equipment. The applicant indicates that the location is necessary to “improve the voice and data coverage/capacity, for its customers in east of Bend city limit, and as much of rural area along HWY 20.” According to the submitted site plan, the facility will be set back approximately 541.4 feet and 330 feet from the north and south boundaries, respectively. In addition, the facility will be set back approximately 192.2 feet from the west boundary and over 400 feet from the east boundaries. The proposal will require removal of vegetation (trees) for the area leased for development. The lease area will be accessed via Highway 20 to the east, using an existing roadway that runs parallel to, and north of the main Central Oregon Canal. Approximately one to two vehicle trips per month will be made to the site. The applicant has submitted a burden of proof statement, and other documents, and a plot plan in support of this application.

As discussed under paragraph K, below, on September 2, 2016 the applicant submitted a Modification of Application pursuant to DCC 22.20.055, changing the proposal to a 120’ monopole or mono-pine tower. No other changes were proposed.

G. PUBLIC AGENCY COMMENTS: The Planning Division mailed notice to several agencies and received the following comments:

1. Bend Fire Department: Comments were submitted by Jeff Bond, Deputy Fire Marshal, on March 21, 2016. Mr. Bond’s comments are below:

FIRE APPARATUS ACCESS ROADS:

- *Approved fire apparatus access roads shall be provided for every facility, building or portion of a building hereafter constructed or moved into or within the jurisdiction. **The fire apparatus access road shall comply with the requirements of this section and shall extend to within 150 feet of all portions of the facility and all portions of the exterior walls of the first story of the building as measured by an approved route around the exterior of the building or facility. 2014 OFC 503.1.1***
- ***Fire apparatus roads shall have an unobstructed width of not less than 20 feet, exclusive of shoulders, except for approved security gates in accordance with Section 503.6, and an unobstructed vertical clearance of not less than 13 feet 6 inches. Where a fire hydrant is located on a fire apparatus road, the minimum width shall be 26 feet, exclusive of shoulders.***

² The addresses assigned to tax lot 800 and 900 are 61425 K Barr Road and 23080 Timland Lane Trail, respectively.

³ The addresses assigned to tax lot 302 and 303 are 24135 Skywagon Drive and 61520 Cougar Trail, respectively.

Traffic calming along a fire apparatus road shall be approved by the fire code official. Approved signs or other approved notices or markings that include the words NO PARKING-FIRE LANE shall be provided for fire apparatus roads to prohibit parking on both sides of fire lanes 20 to 26 feet wide and on one side of fire lanes more than 26 feet to 32 feet wide. **2014 OFC 503.2.1, D103.1, 503.4.1, 503.3**

- **Fire apparatus access roads shall be designed and maintained to support the imposed loads of fire apparatus (60,000 pounds GVW) and shall be surfaced (asphalt, concrete or other approved driving surface) as to provide all weather driving capabilities.** Inside and outside turning radius shall be approved by the fire department. All dead-end turnarounds shall be of an approved design. Bridges and elevated surfaces shall be constructed in accordance with AASHTO HB-17. The maximum grade of fire apparatus access roads shall not exceed 10 percent. Fire apparatus access road gates with electric gate operators shall be listed in accordance with UL325. Gates intended for automatic operation shall be designed, constructed and installed to comply with the requirements of ASTM F 2200. A Knox® Key Switch shall be installed at all electronic gates. **2014 OFC D102.1, 503.2.4,**

OTHER FIRE SERVICE FEATURES:

- **New and existing buildings shall have approved address numbers, building numbers or approved building identification placed in a position that is plainly legible and visible from the street or road fronting the property.** These numbers shall be Arabic numbers or alphabetical letters. Numbers shall be a minimum 4 inches high with a minimum stroke width of 0.5 inch. Where access is by means of a private road and the building cannot be viewed from the public way, a monument, pole, or other sign or means shall be used to identify the structure. Address numbers shall be visible under low light conditions and evening hours. Provide illumination to address numbers to provide visibility under all conditions. Address signs are available through the Deschutes Rural Fire Protection District #2. An address sign application can be obtained from the City of Bend Fire Department website or by calling 541-388-6309 during normal business hours. **2014 OFC 505.1**
 - **A KNOX-BOX® key vault is required for all newly constructed commercial buildings, facilities or premises to allow for rapid entry for emergency crews.** A KNOX® Key Switch shall be provided for all electrically operated gates restricting entry on a fire apparatus access road. A KNOX® Padlock shall be provided for all manually operated gates restricting entry on a fire apparatus road and security gates restricting access to buildings. **2014 OFC Section 505**
2. Central Oregon Irrigation District (COID): Provided site plan does not show proposed power. Verizon has agreed to keep power outside canal and access road.
 3. Deschutes County Building Safety Division: Comments were submitted by Randy Scheid, Building Safety Director, on March 11, 2016. Mr. Scheid's comments are below:

The Deschutes County Building Safety Division code required Access, Egress, Setbacks, Fire & Life Safety, Fire Fighting Water Supplies, etc. will be specifically addressed during the plan review process for any proposed structures and occupancies. All Building Code required items will be addressed, when a specific structure, occupancy, and type of construction is proposed and submitted for plan review.

- 4. Deschutes County Property Address Coordinator: Because of the stated access point, an address change is recommended for this parcel to 23355 Hwy 20, pending notification to property owners.

Staff Comment: Based on this comment, the address of tax lot 100 has changed from 61604 Gribbling Road to 23355 Highway 20. However, this change did not occur prior to the mailing of the Notice of Application and Notice of Public Hearing and thus the reference to 61604 Gribbling Road may be included in various documents (e.g. public comments).

- 5. Deschutes County Transportation Planner: Comments were submitted by Peter Russell, Senior Transportation Planner, on March 16, 2016. Mr. Russell's comments are below:

I have reviewed the transmittal materials for 247-16-000081-CU to develop a 140-foot cell tower in the Rural Residential (RR-10) zone at 61604 Gribbling Road, aka 18-13-09A, Tax Lot 100.

Deschutes County Code (DCC) at 18.116.310(C)(3)(a) states no traffic analysis is required for any use that will generate less than 50 new weekday trips. The proposed land use will not meet the minimum threshold for additional traffic analysis.

The cell tower will not penetrate any imaginary surfaces for either the Bend Municipal Airport or Juniper Air Park, which is a private-use airport near Dodds Road and Cougar Trail.

Board Resolution 2013-020 sets a transportation system development charge (SDC) rate of \$3,852 per p.m. peak hour trip. As a cell tower does not consume road capacity as that term is commonly used and understood, no SDC applies.

- 6. Oregon Department of Aviation (ODA): Comments were submitted by Jeff Caines, Aviation Planner, on March 16, 2016. Mr. Caines's comments are below:

This letter is in response to Deschutes County's notice of application for a new wireless telecommunications facility; specifically located at 61604 Gribbling Road, Bend, OR; Tax Lot 100 on Deschutes County Assessor's Map 18-13-09A.

- *Prior to issuance of a building permit the applicant must file and receive a determination from the Oregon Department of Aviation as required by OAR 738-070-0060 on FAA Form 7460-1 Notice of Proposed Construction or Alteration to determine if the new development will pose a hazard to aviation safety. A subsequent submittal may be required by the FAA due to its location to the Bend Municipal Airport.*
- *The height of the new telecommunications tower should not penetrate FAA Part 77 Imaginary Surfaces, as determined by ODA and the FAA.*

- *Marking Lights, per FAA design, may be needed to identify the structure due its proximity to Kennel Airstrip and Juniper Airpark .*

7. The following agencies did not respond or had no comments: Avion Water Company, Deschutes County Assessor, Central Electric Cooperative, Deschutes County Road Department, and Pacific Power and Light.

H. PUBLIC COMMENTS: The Planning Division sent notice of this proposal to all property owners within 1,250 feet of the subject property. Numerous comments were received, prior to the hearing both in opposition and in support of the proposal, as summarized below.

Opponent Comments:

- Facility height and design
- Facility location on the property and surrounding area
- Visual impacts to surrounding area
- Visual impacts to protected roadway (e.g. Highway 20)
- Impacts to rural character
- Impacts to property values
- Impacts to humans, livestock, and wildlife
- Impacts to aviation operations of Juniper Airpark and Kennel Airstrip

Proponent Comments:

- Facility location on the property and surrounding area
- Lessen Visual impacts to surrounding area through different facility design
- Expand general service to surrounding area
- Expand and improve service for emergencies and law enforcement

Comments submitted prior to, during the hearing and during the comment period are incorporated in the record by reference and available for review.

I. NOTICE REQUIREMENT: The applicant complied with the posted notice requirements of Section 22.23.030(B) of Deschutes County Code (DCC) Title 22. The applicant submitted a Land Use Action Sign Affidavit, dated March 11, 2016, indicating the applicant posted notice of the land use action on March 11, 2016.

J. REVIEW PERIOD: The original application was submitted to the Planning Division on February 25, 2016. The Planning Division deemed the application complete and accepted it for review on March 25, 2016. On May 4, 2016, the applicant placed the application on hold and tolled the 150-day review limit until August 2, 2016. The clock restarted on August 2, 2016. As noted below, it was restarted on September 12, 2016.

K. Hearing, Record Extension and Modification of Application: The hearing was held on August 30, 2016. At the hearing, I indicated that I had no conflicts of interest, had had no ex parte contacts and had not conducted a site visit. After providing the required statements and outlining the hearing procedures, I asked for but received no objections to my participation and procedural or jurisdictional objections. At the request of various parties, I granted additional time to submit written comments as provided in my Order of September 1, 2016. On September 12, 2016, the applicant submitted a

Modification of Application pursuant to DCC 22.20.055, including a restart of the 150-day deadline for a final decision. On September 18, 2016, I issued an order authorizing the application, superseding the prior written comment periods and establishing periods in which to submit evidence and comments. Notice was provided as set forth in the Order. There were no objections to these Orders, nor were there any objections to the submittals. The case file for the modification is 247-16-000536-MA

II. FINDINGS and CONCLUSIONS:

.A. DCC CHAPTER 22.20, MODIFICATION OF APPLICATION:

1. Section 22.02.020 Definitions: "Modification of application" means the applicant's submittal of new information after an application has been deemed complete and prior to the close of the record on a pending application that would modify a development proposal by changing one or more of the following previously described components: proposed uses, operating characteristics, intensity, scale, site lay out (including but not limited to changes in setbacks, access points, building design, size or orientation, parking, traffic or pedestrian circulation plans), or landscaping in a manner that requires the application of new criteria to the proposal or that would require the findings of fact to be changed. It does not mean an applicant's submission of new evidence that merely clarifies or supports the pending application.

2. Section 22.20.055. Modification of Application. A. An applicant may modify an application at any time during the approval process up until the close of the record, subject to the provisions of DCC 22.20.052 and DCC 22.20.055.

B. The Planning Director or Hearings Body shall not consider any evidence submitted by or on behalf of an applicant that would constitute modification of an application (as that term is defined in DCC 22.04) unless the applicant submits an application for a modification, pays all required modification fees and agrees in writing to restart the 150-day time clock as of the date the modification is submitted. The 150-day time clock for an application, as modified, may be restarted as many times as there are modifications.

C. The Planning Director or Hearings Body may require that the application be re-noticed and additional hearings be held.

D. Up until the day a hearing is opened for receipt of oral testimony, the Planning Director shall have sole authority to determine whether an applicant's submittal constitutes a modification. After such time, the Hearings Body shall make such determinations. The Planning Director or Hearings Body's determination on whether a submittal constitutes a modification shall be appealable only to LUBA and shall be appealable only after a final decision is entered by the County on an application.

FINDINGS: The proposed modification directly relates, at a minimum, to the Code provisions relating to suitability of the site and impacts on nearby properties. It requires that the findings of fact be modified to address whether and to what degree the modification satisfies those Code provisions. I find that it meets the definition of a

modification. Further, the applicant submitted the modification within the required timeframe, paid the requisite fees and extended the 150-day time clock. I received numerous comments addressing the merits of the modification, but there was no objection to granting the request to modify the application. Accordingly, the application as modified is addressed below.

B. CHAPTER 18.16. EXCLUSIVE FARM USE ZONE

- 1. Section 18.16.030. Conditional Uses Permitted – High Value and Non-high Value Farmland.

The following uses may be allowed in the Exclusive Farm Use zones on either high value farmland or non-high value farmland subject to applicable provisions of the Comprehensive Plan, DCC 18.16.040 and 18.16.050, and other applicable sections of DCC Title 18.

...
K. Commercial utility facility, including a hydroelectric facility (in accordance with DCC 18.116.130 and 18.128.260, and OAR 660-033-0130), for the purpose of generating power for public use by sale, not_including wind power generation facilities.

FINDING: The subject property, comprised of three tax lots, is zoned RR-10 and EFU. A majority of the property, which includes tax lots 500 and 1000, are within the EFU Zone. However, the proposed wireless telecommunications facility will be sited on tax lot 100, which is zoned RR-10, rather than the EFU-Zoned portion. Therefore, this criterion does not apply.

B. CHAPTER 18.60. RURAL RESIDENTIAL ZONE

- 1. Section 18.16.030. Conditional Uses Permitted.

The following uses may be allowed subject to DCC 18.128:

...
V. Wireless telecommunications facilities, except those facilities meeting the requirements of DCC 18.116.250(A) or (B).⁴

FINDING: The applicant proposes to establish a wireless telecommunications facility originally consisting of a 140-foot lattice tower, now modified to a 120' monopole or mono-pine that will support antennas and microwave dishes and will include an equipment shelter in the RR-10 zone. The proposal does not qualify for either a Tier 1 or Tier 2 wireless communication facility allowed outright or subject to site plan review under DCC 18.116.250(A) or (B). Therefore, Conditional Use approval is

⁴ Deschutes County Code, Section 18.04, defines “Wireless telecommunications facility” to mean: “Wireless Telecommunications Facility” means an unstaffed facility for the transmission or reception of radio frequency (RF) signals usually consisting of an equipment shelter, cabinet or other enclosed structure containing electronic equipment, a support structure such as a self-supporting monopole or lattice tower, antennas, microwave dishes or other transmission and reception devices. This definition includes “personal wireless services facilities” as defined under the Telecommunications Act of 1996.

required satisfying the applicable criteria in Sections 18.128.015 and 18.128.340 of Title 18. No party argued otherwise.

2. Section 18.60.040. Yard and Setback Requirements.

In an RR-10 Zone, the following yard and setbacks shall be maintained.

A. The front setback shall be a minimum of 20 feet from a property line fronting on a local street right of way, 30 feet from a property line fronting on a collector right of way and 50 feet from an arterial right of way.

FINDING: Highway 20, a designated arterial right-of-way, is adjacent to the property along its northeastern boundary. The proposed wireless telecommunications facility will have a front setback of over 2,300 feet, meeting the 50-foot minimum standard above.

B. There shall be a minimum side yard of 10 feet for all uses, except on the street side of a corner lot the side yard shall be 20 feet.

FINDING: The subject property has an irregular shape, with as many as five (5) side lot lines. The closest side lot lines are to the north and south. According to the submitted application materials and site plan, the setbacks from these two side lot lines are approximately 541.4 feet and 330 feet, respectively. The proposed setbacks meet the minimum 20-foot standard above.

C. The minimum rear yard shall be 20 feet.

FINDING: As noted above, the subject property has an irregular shape. The front lot line is to the northeast and thus the rear lot line is the westernmost property boundary. According to the submitted site plan, the proposed facility will have a setback of approximately 192.2 feet, which meets the 20-foot minimum standard.

D. The setback from the north lot line shall meet the solar setback requirements in DCC 18.116.180.

FINDING: Solar Access is defined under DCC 18.04.030 as the “protection from shade for a specific area during specific hours and dates, but not including protection from shade cast by exempt vegetation.” Furthermore, shade is defined as “a shadow, except a shadow caused by a narrow object, including, but not limited to, a utility pole, an antenna, a wire or a flagpole.” In land use file CU-11-14, the Hearings Officer made the following findings,

“I would concur with staff that a simple unadorned monopole would be a “narrow object” as defined in the solar access requirements of DCC 18.116.180 and that the provision of Subsection D of 18.69.040 would not apply to such a monopole. However, that is not the proposal submitted by the applicant, who instead has specifically proposed a ‘monopine’ structure...Based on the foregoing, I find that the proposed ‘monpine’ is not a ‘narrow object’ within the meanings of ‘solar access’ and ‘shade’ as found in DCC 18.04.030. As such, the proposed monpine is simply not exempt from the solar access criteria of DCC 18.116.180.”

Staff found that a lattice tower is a self-supported tower with three or four sides as structural support using a method of steel latticework to provide the support. Although the latticework frame allows light to pass through the structure staff concluded that it is not a “narrow object” as discussed by the Hearings Officer in file CU-11-14 and thus, the proposed tower is not exempt from the solar standards.

As regards a monopole, I concur that it is a narrow object as discussed above. Conversely, a mono-pole is not a narrow object. Staff found that the originally proposed 140-foot tall tower would have required a solar setback of 372.7 feet (perpendicular measurement) from the north property boundary. There was no testimony to the contrary. Regardless of the configuration of the tower, it will have a setback of approximately 541.4 feet from the north property boundary. Neither staff nor any party argued that a 120’ mono-pole somehow would violate the setback when the tower would not. Accordingly, the proposal meets the solar setback requirements in DCC 18.116.180 regardless of which tower proposal is considered.

E. In addition to the setbacks set forth herein, any greater setbacks required by applicable building or structural codes adopted by the State of Oregon and/or the County under DCC 15.04 shall be met.

FINDING: Staff indicated that it is not aware of any greater setbacks required by applicable building or structural codes adopted by the State of Oregon or the County and there is nothing in the record to suggest otherwise.

3. Section 18.60.060. Dimensional Standards.

In an RR-10 Zone, the following dimensional standards shall apply:

A. Lot Coverage. The main building and accessory buildings located on any building site or lot shall not cover is excess of 30 percent of the total lot area.

FINDING: I concur with staff that proposed tower/pole is a building.⁵ It would be used for supporting cellular telephone antennas and any proposed microwave dish that are “chattels or property.” The ground equipment also is a building. The proposed ground equipment area is approximately 196 square feet. The applicant’s submitted elevation and site plan drawings show the footprint for the lattice tower would be approximately 324 square feet in size and the equipment shelter would be 196 square feet in size. The region of the subject property within the RR-10 Zone is approximately 13.5 acres in size. The total lot coverage of approximately 520 square feet would be under one (1) percent and well below the 30 percent standard above.

B. Building Height. No building or structure shall be erected or enlarged to exceed 30 feet in height, except as allowed under DCC 18.120.040.

FINDING: Prior decisions by the County Hearings Officers have determined that the height limit under DCC 18.128.340(A) (1) discussed below supersedes the 30-foot height limit above. See file nos. CU-08-86, CU-09-14, CU-09-53, and CU-11-14, incorporated into the record. I concur.

⁵ Deschutes County Code, Section 18.04, defines “Building” to mean:
“Building” means a structure built for the support, shelter or enclosure of persons, animals, chattels or property of any kind.

C. Minimum lot size shall be 10 acres, except planned and cluster developments shall be allowed an equivalent density of one unit per 7.5 acres. Planned and cluster developments within one mile of an acknowledged urban growth boundary shall be allowed a five-acre minimum lot size or equivalent density. For parcels separated by new arterial rights of way, an exemption shall be granted pursuant to DCC 18.120.020.

FINDING: The minimum lot size is not applicable to the proposal as no land division is proposed.

4. Section 18.60.070. Limitations on Conditional Uses.

The following limitations shall apply to uses allowed by DCC 18.60.030:

- A. The Planning Director or Hearings Body may require establishment and maintenance of fire breaks, the use of fire resistant materials in construction and landscaping, or may attach other similar conditions or limitations that will serve to reduce fire hazards or prevent the spread of fire to surrounding areas.**
- B. The Planning Director or Hearings Body may limit changes in the natural grade of land, or the alteration, removal or destruction of natural vegetation in order to prevent or minimize erosion or pollution.**

FINDING: I concur with staff that the proposed wireless telecommunications facility will not create any need for firebreaks, nor will it create a fire hazard. The materials used for the facility are fire resistant, thus preventing the spread of wildfire based on its construction. Given the relatively small disturbance area associated with the tower and equipment cabinets, and the area of level ground proposed for the development, staff believes no limitations to grading or removal of vegetation are necessary. Apparently, the October 2007 Malibu fire in California is attributed to a tower falling over. The closest fire hydrant is over one mile from the site. See e.g. Wards letter (August 30, 2016).

Given the number of towers located in not only Deschutes County but also elsewhere and the lack of concern expressed by the Bend Fire Department, I find there is not a sufficient basis to impose special setbacks or other fire protection steps beyond those required by Code and the Bend Fire Department comments. The Code standard does not dictate that there be no risk, only that it be managed. The residences in the area no doubt pose a more significant fire risk than the proposed facility. See also, CU-12-15 (Finding that tower does not violate this standard.).

C. CHAPTER 18.116, SUPPLEMENTARY PROVISIONS

1. Section 18.116.250. Wireless Telecommunications Facilities.

C. Tier 3 Facilities. Wireless telecommunications facilities (or their equivalent uses described in the EFU, Forest, and SM Zones) not qualifying as either a Tier 1 or 2 facility may be approved in all zones, subject to the applicable criteria set forth in DCC 18.128.330 and 18.128.340.

1. ***A request for a written determination from the County as to whether a proposed facility falls within Tiers 1 or 2 of DCC 18.116.250 shall be submitted to the County in writing and accompanied by a site plan and proposed schematics of the facility. If the County can issue a written determination without exercising discretion or by making a land use decision as defined under ORS 197.015(10), the County shall respond to the request in writing.***
2. ***A request for a written determination from the County as to whether a proposed facility falls within Tiers 1 or 2 of DCC 18.116.250 that involves exercising discretion or making a land use decision shall be submitted and acted upon as a request for a declaratory ruling under DCC 22.40.***

FINDING: The applicant proposes to establish a wireless telecommunications facility on land zoned Rural Residential. The proposed lattice tower and equipment shelter do not qualify as either a Tier 1 or Tier 2 facility. Thus, it is reviewed as a Tier 3 facility. No one argued otherwise. The criteria set forth in DCC 18.128.340 are applicable and addressed in this report.

D. CHAPTER 18.128. CONDITIONAL USES

1. Section 18.128.015. General Standards Governing Conditional Uses.

Except for those conditional uses permitting individual single-family dwellings, conditional uses shall comply with the following standards in addition to the standards of the zone in which the conditional use is located and any other applicable standards of the chapter:

A. The site under consideration shall be determined to be suitable for the proposed use based on the following factors:

1. ***Site, design and operating characteristics of the use;***

FINDING: The location of the proposed wireless telecommunications facility is in the southwestern region of the 56.63-acre property. The facility will be located in a RR-10 Zone. Staff thinks the subject property has no water rights or irrigated lands and there is no evidence to the contrary. County records show a residence established in 1940 in the northeastern region of the property. Staff is unsure if the residence is still in use as a home. Highway 20 abuts the property along its northeastern boundary. The Central Oregon Canal is adjacent to the south-southeastern boundary of the property.

The proposed telecommunications facility includes a monopole/mono-pole and ground equipment. The proposed building site will be approximately 250 feet north of the Central Oregon Canal. The site will also be set back approximately 192.2 feet from the western boundary and 541.4 feet from the north boundary. At its closest reach, the site is over 2,300 feet from Highway 20. This portion of the site does not have topography or vegetation that would interfere with or preclude siting the facility as proposed. Additionally, the site has adequate land area to accommodate the required 3,600 square foot lease area and the new 120-foot facility with antennas and ground equipment.

The operating characteristics include the initial construction activity, and after completion, periodic inspection of the site, with maintenance and possible repair, if it

becomes necessary. The facility will be unmanned except for one or two vehicle trips per month for maintenance purposes.

There was conflicting testimony as to whether staff characterization of the site as “rolling terrain” is accurate. It appears from the numerous photographs and materials from Central Oregon Land Watch that any variations in terrain are not significant. The site has a mix of juniper trees, native shrubs and grasses, and past evidence of irrigation in the northeast region.

Some, including Central Oregon Landwatch argued that the proposal does not meet this standard due to its alleged impacts on other properties. A review of prior hearings officer decisions makes it clear that this standard consistently has been interpreted as focusing on the suitability of the site for the proposed use. I concur. Other provisions of the Code clearly focus on the off-site impacts of the proposed use and those concerns are addressed under those provisions. Accordingly, I find that the proposal demonstrates that the site is suitable for the proposed wireless telecommunications facility based on the information in the record regarding the site and facility’s design and operating characteristics, subject of course to compliance with all other standards.

2. Adequacy of transportation access to the site; and

FINDING: The proposed facility will be using an existing vehicle access taken from Highway 20 to the east. The access road runs parallel to and north of the main Central Oregon Canal and first crosses tax lot 1001 (map 18-13-03), which is also owned by COID. The road is at least 20 feet wide and consists of compact gravel. The applicant submitted a copy of the lease agreement, which includes “non-exclusive rights for ingress and egress” along such road to the Verizon lease area. The road is adequate for passenger vehicles and can accommodate a low number of vehicle trips generated by the use.

3. The natural and physical features of the site, including, but not limited to, general topography, natural hazards and natural resource values.

FINDING: The natural and physical features of the site include the existing trees and other vegetation, open space, and the natural topography. There are no identified natural hazards, other than wildfire. Natural resource values of the site include native trees and vegetation, and the undisturbed terrain.

Submitted comments expressed concern regarding impacts the proposed facility may have on the mule deer, elk, coyotes, rabbits and other wildlife in the area. See. E.g. Vose letter (Sept. 18, 2016). Staff noted that the subject property is not within a big game habitat and, therefore, is not mapped within a Wildlife Area Combining Zone. Once constructed, the proposed facility will generate only one or two maintenance trips per month. I concur with staff that this level of activity likely is far less than that produced by surrounding residential uses and Highway 20. A cell tower inherently will have less impact on wildlife than rural residences and related human activity. Staff did not observe any other natural or physical features of the site that would preclude its siting on the property. For these reasons, I find that the proposal is suitable to the site considering its natural and physical features.

B. The proposed use shall be compatible with existing and projected uses on surrounding properties based on the factors listed in DCC 18.128.015(A).

FINDING: The applicant proposes a 120-foot monopole or mono-pole facility with associated ground equipment in the southwestern region of the property in the RR-10 Zone. The facility’s operating characteristics are limited to the reception and the transmission of communication calls. Maintenance personnel will make one to two vehicle trips to the site per month for equipment inspection and maintenance.

Residential and agricultural uses surround the subject property, with some vacant lands nearby. The two closest residential developments to the proposed facility location are approximately 650 feet and 630 feet to the north and west, respectively. Highway 20 lies approximately 2,300 feet to the east from the wireless telecommunication facility. Two private airstrips, Juniper Airpark and Kennel Airstrip, are within 2.0 miles and 1,900 feet, respectively, of the proposed development.⁶ The projected land uses based on the current zoning will likely be similar to those already established such as single-family dwellings, agricultural uses, and aviation related activity.

As discussed below, there was extensive testimony arguing that the proposal would have significant adverse impacts, including on scenic views, health, airport operations and property values. Comments submitted in support recognized the value of having expanded and improved personal service and improved contact with emergency personnel and law enforcement.

In County files CU-12-15, the Hearings Officer stated:

Prior hearings officer's decisions have construed this provision to require that the existing and projected “uses” on surrounding lands will be allowed to continue if the proposed telecommunications facility were approved – CU-11-14, CU-08-79. I agree with that analysis. This criterion is concerned with permitted and conditional uses allowed under the development code, not with surrounding property owners’ enjoyment of their land. I explained this distinction in CU-09-36 as follows:

I understand the neighbors’ concerns about the appearance of the tower in their neighborhood. However, the existence of the tower will not so much affect the use, but the enjoyment of their properties. This criterion is concerned mainly with making the proposed use compatible with other uses. There is no evidence in the record that the proposed monopole will impact the ability of current neighbors to use their properties for all the residential and associated uses that they now enjoy.

⁶ The proposed building site for the wireless facility is approximately 1.6 miles west of the end of Juniper Airpark approach surface and outside of the Airport Safety (AS) Combining Zone associated with the airpark. Regarding Kennel Airstrip, the Deschutes County Transportation System Plan acknowledges the private airport; however, the zoning ordinance does not include Kennel Airstrip as a designated airport for the purposes of the AS Zone.

This finding applies equally to the current application. The surrounding lands are primarily rural residential lands consisting of homes, outbuildings and perhaps some small hobby farm type uses. There is nothing inherent about the presence of a cell tower which would prevent those rural residential uses from continuing. Staff is correct that “the proposed facility would not inhibit the ability of property owners to build dwellings or any accessory structures”- and that conclusion is sufficient to show compliance with this criterion. The fact that the tower may be aesthetically displeasing to surrounding residents is outside the scope of consideration of this provision.

It is evident that the County consistently has applied this standard as addressing whether the nature of the proposed use or its would effectively, or at least substantially, inhibit or preclude existing development from being used or new development form occurring. As staff notes, the use would not create excessive traffic and would not generate any noise, dust, or vibration levels. Excerpts from Realtor Magazine were submitted supporting the conclusion that proximity to cell towers negatively impacts property values and narrows the range of buyers, i.e. that “94 percent of home buyers and renters surveyed...say they are less interested and would pay less for a property located near a cell tower or antenna.” The impact on prices could be “as much as 20 percent”. Julia Ohlson submittal (August 30, 2016). This does not rise to the level of substantially inhibiting or effectively precluding use of existing residences, including their sale, or development of new homes on residentially zoned land.

Several opponents argued that health risks posed by cell towers, primarily radiation, warrant denial. See e.g. Gretchen Valido comments referencing four studies or articles (March 21, 2016). My understanding is that the Telecommunications Act of 1996, as amended and as implemented by FCC regulations effectively preempts local decisions “premised directly or indirectly on the environmental effects of radio frequency (RF) emissions” as long as the provider complies with FCC emission rules. See e.g. <https://www.fcc.gov/general/tower-and-antenna-siting>. It appears that the courts consistently have upheld this preemption in regards to health impacts. See generally, Hearings Officer Decision, MA-09-5/AD-09-2, at 8-9, citing *Curl v City of Bend* 56 Or LUBA 746 (2008). The applicant submitted the required FCC license. (Ex. G to Application). There is no evidence in the record suggesting that this particular tower will exceed FCC emission standards and given that the FCC regulates it, I have no basis to assume otherwise.

Accordingly, this standard is met.

2. Section 18.128.040. Specific Use Standards.

A conditional use shall comply with the standards of the zone in which it is located and with the standards and conditions set forth in DCC 18.128.045 through DCC 18.128.370.

FINDING: The proposed wireless telecommunications facility is within the RR-10 Zone. The specific criteria for this zone have been reviewed above and the proposed use complies with specific criteria of the RR-10 Zone.

3. Section 18.128.340. Wireless Telecommunications Facilities.

An application for a conditional use permit for a wireless telecommunications facility or its equivalent in the EFU, Forest, or Surface Mining Zones shall comply with the applicable standards, setbacks and criteria of the base zone and any combining zone and the following requirements. Site plan review under DCC 18.124 including site plan review for a use that would otherwise require site plan review under DCC 18.84 shall not be required.

A. Application Requirements. An application for a wireless telecommunications facility shall comply with the following meeting, notice, and submittal requirements:

1. Neighborhood Meeting. Prior to submission of a land use application for a wireless telecommunications facility, the applicant shall provide notice of and hold a meeting with interested owners of property nearby to a potential facility location. To the greatest extent practicable, the neighborhood meeting shall be held in the general vicinity of the proposed wireless telecommunications facility. Notice shall be in writing and shall be mailed no less than 10 days prior to the date set for the meeting to owners of record of property within:

- a. One thousand three hundred twenty feet for a tower or monopole no greater than 100 feet in height, and**
- b. Two thousand feet for a tower or monopole at least 100 feet and no higher than 150 feet in height. Such notice shall not take the place of notice required by DCC Title 22.**

FINDING: The application includes a copy of the September 29, 2015 notice of the October 19, 2015 neighborhood meeting. The neighborhood meeting for the proposal was held on at 6:00 p.m. on October 19, 2015 in the Deschutes County Public Library (downtown Bend branch), 601 NW Wall Street, Bend. Notice of the meeting was mailed to all owners of record of property within 2,000 feet. Based upon a proposed tower height of 140 feet, the required noticing radius was 2,000 feet. The applicant has complied with this criterion.

As noted above, the height limit for structures in the RR-10 Zone is 30 feet. However, subsection (b) of this criterion allows a tower or monopole height of up to 150 feet. As discussed previously, this supersedes the height limit standard of the RR-10 Zone.

2. Pre-Application Conference. Applicant shall attend a scheduled pre-application conference prior to submission of a land use application. The applicant shall provide the proposed location of the required neighborhood meeting for review by Planning Division staff to ensure compliance with subsection A(1) above. An application for a wireless telecommunications facility permit will not be deemed complete until the applicant has had a pre-application conference with Planning Division staff.

FINDING: The applicant attended a pre-application conference with Paul Blikstad, Senior Planner, of the Deschutes County Community Development Department on March 30, 2015. This criterion has been met.

3. Submittal Requirements. An application for a conditional use permit for a wireless telecommunications facility shall include:

a. A copy of the blank lease form.

FINDING: The applicant submitted a signed Memorandum of Option and Land Lease Agreement, attached as Exhibit F to the submittal. On August 17, 2016, the applicant also submitted a blank lease form for the record. This criterion has been met.

b. A copy of the applicant's Federal Communications Commission license.

FINDING: The applicant provided the Federal Communications Commission (FCC) web page with the license information as Exhibit G. The FCC information indicates approval for wireless services, with a call sign/license number shown as KNLH656 – Verizon Wireless (VAW) LLC.

c. A map that shows the applicant's search ring for the proposed site and the properties within the search ring, including locations of existing telecommunications towers or monopoles.

FINDING: The application materials include search ring maps attached as Exhibit B and Exhibit C, in particular Exhibit 2 through 7 of Exhibit C. The search ring maps show six (6) existing tower locations in relation to the proposed site on the subject property. The applicant submitted a search ring although as discussed below the exact boundary is difficult to ascertain and the applicant has not submitted sufficient information about other properties within the search ring. This impacts whether the applicant has demonstrated that no alternative sites are available as discussed below.

d. A copy of the written notice of the required neighborhood meeting and a certificate of mailing showing that the notice was mailed to the list of property owners falling within the notice area designated under DCC 18.128.340(A)(1).

FINDING: As indicated previously, the applicant provided a copy of the September 29, 2015 notice of the October 19, 2015 neighborhood meeting. The application materials also include a list of the owners of record of property within the notice area. In the notice area, there were 21 different owners and 41 parcels. The applicant did provide an affidavit of mailing indicating that notice of the meeting was sent to these property owners.

e. A written summary of the neighborhood meeting detailing the substance of the meeting, the time, date and location of the meeting and a list of meeting attendees.

FINDING: As noted previously, the applicant provided a copy of the September 29, 2015 notice regarding the October 19, 2015 neighborhood meeting. The applicant

also provided a summary of the neighborhood meeting comments, which included the main topics of “design of the facility, need for the facility, and that there is not an existing tower that can be used” in the area. In addition, facility compatibility to the rural residential area was a concern at the meeting.

f. A site plan showing the location of the proposed facility and its components. The site plan shall also identify the location of existing and proposed landscaping, any equipment shelters, utility connections, and any fencing proposed to enclose the facility.

FINDING: The application includes a site plan that shows the lease area on site, including the ground equipment and tower, and the utility connections. The applicant states that it will not remove any significant trees. Exhibit H of the application materials includes photos of the area that shows existing vegetation.

g. A copy of the design specifications, including proposed colors, and/or elevation of an antenna array proposed with the facility.

FINDING: The original application includes drawings of the proposed lattice tower with antennas and the ground equipment area. The modification included a drawing of the proposed monopole/mono-pine tower. The proposed facility will be finished in a matte gray or tan color.

h. An elevation drawing of the facility and a photographic simulation of the facility showing how it would fit into the landscape.

FINDING: The application includes an elevation drawing of the proposed lattice tower (Exhibit H, View A, B, and C). The applicant has submitted a photographic simulation of the lattice tower showing how it would fit into the landscape, as depicted in Exhibit H. The photographic simulations are from three locations surrounding the proposed area as depicted on the aerial photo that is the first page Exhibit H (Exhibit H, Map). Similarly, the applicant submitted elevations, drawings and numerous photo simulations of the facility as proposed to be modified with a monopole or mono-pine.

i. A copy of a letter of determination from the Federal Aviation Administration or the Oregon Department of Aviation as to whether or not aviation lighting would be required for the proposed facility.

FINDING: The applicant has submitted documentation from the Oregon Department of Aviation, dated November 12, 2015. Oregon Department of Aviation states the following:

We do not object with conditions to the construction described in this proposal. This determination does not constitute ODA approval or disapproval of the physical development involved in the proposal. It is a determination with respect to the safe and efficient use of navigable airspace by aircraft and with respect to the safety of persons and property on the ground.

The November 12, 2015 letter does not specify that marking and lighting of the facility is recommended for aviation safety. Subsequent comments submitted by

ODA on March 16, 2016 indicate aviation lighting may be needed to identify the facility due to the proximity of Juniper Airpark and Kennel Airstrip. Staff recommends, as a condition of any approval, that the proposed wireless telecommunications facility comply with FAA design standards for aviation lighting.

The applicant did not address whether the reduction in height or change to a monopole/mono-pole might influence whether lighting would be required so I will assume that the possibility continues to exist. Nor is it clear why the applicant was unable to get a more definitive determination on this issue given that it relates to the impacts on surrounding properties, particularly the nighttime view shed. See discussion below.

B. Approval Criteria: An application for a wireless telecommunication facility will be approved upon findings that:

- 1. The facility will not be located on irrigated land, as defined by DCC 18.04.030.⁷**

FINDING: The proposed wireless telecommunication facility will not be located on irrigated land. Furthermore, the site does not have water rights. This criterion is satisfied.

- 2. The applicant has considered other sites in its search area that would have less visual impact as viewed from nearby residences than the site proposed and has determined that any less intrusive sites are either unavailable or do not provide the communications coverage necessary. To meet this criterion, the applicant must demonstrate that it has made a good faith effort to co-locate its antennas and microwave dishes on existing monopoles in the area to be served. The applicant can demonstrate this by submitting a statement from a qualified engineer that indicates whether the necessary service can or cannot be provided by co-location within the area to be served.**

FINDING: This is perhaps the primary area of substantive disagreement between the applicant and the opponents.

Staff noted that the County Hearing’s Officer stated the following in file CU-12-15:

Prior hearings officer's decisions have interpreted DCC 18.128.340(B)(2) to require both a search for co-location opportunities and a search for alternative sites that “would have less visual impact as viewed from nearby residences than the site proposed.” Former hearings officer Gerald Watson, in CU-11-14, concluded that this criterion requires an applicant to consider alternatives suggested by opponents based on the holdings in T-Mobile USA v. City of Anacortes, 572 F.3rd 987 (9th Cir. 2009) Van Nalts v. Benton County, 42 Or LUBA 497, 499 (2002). I agree with that analysis. For the reasons set forth below, the hearings officer agrees with the opponents.

⁷ Deschutes County Code, Section 18.04, defines “Irrigated” to mean: *“Irrigated.” As used in DCC 18.16, irrigated means watered by an artificial or controlled means, such as sprinklers, furrows, ditches or spreader dikes. An area or tract is “irrigated” if it is currently watered, or has established rights to use water for irrigation from a water or irrigation district or other provider....*

The Board of County Commissioners affirmed this decision on August 19, 2013. That decision provides some specific guidance for how to interpret and apply this section”

- EFU land must be considered notwithstanding that it may be more difficult to locate a tower on resource land.
- Cannot tailor the search ring to the desired site.
- There must be something more than “mere speculation” establishing that a site is not “available or approvable...within a reasonable time”.
- The analysis of alternative sites requires a “detailed, site-specific analysis that considers the actual views of alternative sites from nearby residences”.
- The alternatives analysis is not limited to co-location opportunities.

There is no doubt that this section imposes a difficult, though not insurmountable, burden on the applicant. The applicant essentially must demonstrate a negative, i.e. that no better alternatives exist. The determination of suitability is somewhat subjective, i.e. whether another site has fewer visual impacts on residences to be “less intrusive”.

Mr. Kearns, counsel for the Wards, argues in several submittals that the applicant also must demonstrate that there is a “significant gap” in service. See e.g. Sept. 22, 2016 submittal at 2. This assertion conflates the standards that an applicant must meet to demonstrate federal preemption of local siting standards, and those for siting on resource lands, with those applicable to proposed RR-10 sites. The applicant has not argued preemption, other than relating to environmental and health allegations. Service gaps are relevant in the sense, for example, that they relate to the search ring and what alternative sites must be examined but not as a separate review standard. In any event, the record clearly demonstrates that there are significant service problems in the area of the subject site. This includes expert testimony from the applicant and numerous comments from residents of the area. See e.g. Verizon 2-12-16 letter and exhibits, Scanner 3-12-2016 email, Verizon 8-22-16 letter and exhibits, Hubbard 8-24-16 email, Miriovshy 9-08-16 email, testimony of Carol Fulkerson at hearing. Several of these comments noted concerns about being able to summon public safety responders. While some letters suggested that Verizon service was adequate in the area, most opposition letters that addressed this issue suggested that persons switch to other carriers, rely on landlines or accept poor service as a cost of living in the area.

Counsel for the Wards also argues that the applicant is required to rule out alternative methods of providing service, including a “two-tower” solution. Again, for the most part, this conflates the siting standards applicable to EFU, SM and similar resource zones with those applicable to RR-10 sites. For example, in CU-09-60, cited by Mr. Kearns, the applicable standard required consideration of reasonable alternatives and a demonstration that the facility “technical and engineering feasibility” necessitate locating on resource lands. Similarly, the cases relied on by Mr. Kearns appear to all involve resource lands.

In contrast, nothing in DCC 18.128.340 expressly requires that alternative technologies or methods of providing service (other than co-location) be ruled out or that lands other than RR-10 must first be considered. The focus is on the impact of

the proposal at issue on nearby residences and whether less intrusive sites are available. Again, the option of placing two-towers may be relevant to, for example, whether a particular less intrusive site might provide adequate coverage but the analytical framework for resource lands cannot be bootstrapped into DCC 18.128.320.

Mr. Heinonen did testify that constructing a tower outside the search area would necessitate a second tower in the vicinity. I did not hear him testify that this was a viable option. In his September 30, letter he clarified that this option is not viable given the number of other facilities in the area. A shorter tower must deal with more "clutter" and terrain issues, resulting in gaps and other problems. Although his comments remain somewhat unclear, this conclusion is consistent with his testimony regarding conflicts, interference and electronic clutter and the need for a dominant facility to address those problems. There was no expert testimony or analysis on this issue from the opponents. They simply seized on his comment in the hearing as the sole technical support for their position. There is no evidence as to how high the second tower would need to be, its coverage area or other important considerations. Thus, even if the standard requires considering other technical options, such as two towers, the record provides no basis to overrule his expert conclusions.

Nearby residents argue strenuously that the proposal has significant and irreparable visual impacts on their residences. Most of the written comments and testimony in this regard, while important to consider, contained few specifics. Many of the comments stated that modifying the proposal to a monopole or mono-pole would make little or no difference. For example, several residents noted that a mono-pole would stick out far above the surrounding trees that generally are no more than 40' high, so clearly it would not blend in.

The Wards, however, submitted specific evidence in the form of numerous photos that purport to show rather dramatic visual impacts from their residence and property, the Lippke residence the Sherifan residence, the Bauge residence and other locations. These reflect the original tower structure.

The photos submitted by the applicant purport to show a much less significant impact. These include photos simulating the original tower and the later monopole proposal.

It is very difficult to reconcile this significant discrepancy. It appears that the Ward photos essentially photo-shopped a tower into their views. There was testimony, and the photos seem to show, that the Ward's successfully took into account the height by using the balloon placed by the applicant. Whether they accurately reflect the scale of the tower, however, is much less clear. The photos were not taken directly from the residences; rather they are from various angles some distance from the residences. The testimony was that the residence is approximately 600' from the tower site. A very crude scaling using the photos taken looking south-west suggests that the tower would be as much as 50' wide. The scaled elevation submitted by the applicant shows the monopole at its widest in the neighborhood of 5' wide and the top array (which would be most visible) 10' wide. Similarly, the proposed elevation submitted by the applicant for the tower something in the neighborhood of 10' at the base and comparable to the monopole at the top.

This discrepancy is evident when comparing the Ward's photos to the applicant's Photo No. 1 taken from approximately 610' feet. The scale of the tower in that photo is vastly less. A professional photographer took the applicant's photos. He states that they are "accurate to scale". Letters from Tim Bradley Imaging. Thus, even accounting for the angles and crude scaling, it appears that the Ward photos overstate the impact of the proposals at least as regards to scale.

In other regards, however, the applicant's photos also are problematic. As counsel for the Ward's notes, the standard relates to visual impact from the residences. None of the applicant's photos are taken from any of the impacted residences. I could find nothing in the record indicating that the applicant attempted to get permission from any of those residents. The applicant simply notes that it cannot go onto private property without permission so attempted to take comparable views from public property. This raises questions about whether they truly reflect the views from the residences due to differing angles, trees, terrain and other factors. Several opponents allege that the applicant took photos from low spots or otherwise minimize visual impacts. The applicant bears the burden on this issue. At a minimum, it should have sought permission to take photos from the residences, thus likely eliminating the discrepancy. If refused permission, the applicant may be able to address this standard adequately with other photos and more detail as to how it attempted to mimic views from the residences. Thus, on this record, I must discount the photos presented by the applicant and conclude that the impact on nearby residences is significant, albeit not as great as purported in the opponent's photos.

Failure to contact the owners, however, is not in and of itself, a basis for denial. It goes to the weight of the applicant's evidence. The standard is comparative, i.e. whether "less intrusive" sites that provide adequate coverage are available either for co-location or for stand-alone towers/poles.

It also is troubling that the applicant apparently made little effort to get a conclusive determination from the Oregon Department of Aviation regarding tower lighting. Whether a light is required clearly is a significant factor in assessing the visual impact of the proposal. For example, an alternative site that otherwise might be considered more visually intrusive may not be if it is outside the area requiring lighting. A light certainly would significantly increase impacts on the night sky view shed.

As regards co-location, I find that the applicant has met its "good-faith" burden. Mr. Kearns' March 12, 2016 letter listed 9 towers within 4 miles that he asserts would be suitable or colocation. (The applicant asserts that some sites do not in fact have towers.) Mr. Heinonen prepared the applicant's original submittals contending that co-location is not available. He has solid qualifications, but is not an engineer. The applicant subsequently submitted a letter from Thomas S Gordon a consulting engineer. His letter and testimony at the hearing is that he reviewed the August 22, RF Justification from Mr. Heinonen, visited the site and took other steps; reaching the conclusion that "no viable candidates for colocation, either towers or monopoles, exist within the area to be served." He also testified and provided his rationale for why none of the colocation sites would be suitable for a new facility. This meets the express terms of the applicable standard.

As regards alternative sites, the application originally asserted that the applicant “has considered other sites in the search area, and in consideration of the mixed EFU and RR-10 zoning, has determined that this site is less intrusive than other sites while providing the necessary communications coverage”. The applicant states that it ruled out areas with an LM overlay zone, have irrigation or are flat pastureland, etc. No specificity was provided and the discussion appears to indicate that there are sites within the search ring that would provide the needed coverage, but that the applicant considered them more intrusive or unavailable.

In his March 21, letter, Mr. Kearns proposed eight alternative sites. In his August 30, 2016 letter, he appears to have suggested one more (Bend Metro Parks TL 800). Three are zoned RR-10 and the remainder are EFU.

Unfortunately, the actual boundary of the search ring is unclear. The photos give a general idea, but do not clearly indicate what parcels are inside and I could find no clear boundary delineation or diameter in the record. This is important because I read the Code standard as providing expressly and unambiguously that the analysis is limited to whether “The applicant has considered other sites in **its** search area”. (Emphasis added.) The Board has concluded that an exception exists if the applicant has limited its search ring to exclude EFU lands, or if the search ring is “tailored” for the proposed site and is not a “reasonable search ring.” CU-12-15 (American Tower) The opponents argue that the applicant has artificially limited its search ring, contrasting the relatively large area of weak signal strength with its “comparatively ‘microscopic’ search ring.” Kearns 9-12-2016 letter at 5. They argue that the alternatives they propose are closer to the area of weak signal strength than the seven existing Verizon towers e.g. inside the “yellow blob” and, therefore, presumably are acceptable even though outside the search ring. They argue that Mr. Heinonen’s analysis, therefore is not credible and that he is not ‘suitably qualified’ to reach his conclusions.

I do not agree that the exception recognized by the Board is applicable in this case. Although the applicant cites EFU zoning as an impediment to whether particular sites are feasible, it did not exclude those sites from the search ring. Unlike American Tower, there is nothing in the record to demonstrate that the search ring was gerrymandered. Similarly, unlike American Tower, the applicant’s expert has not affirmatively conceded that the alternative sites would provide the desired coverage. Although not an engineer, Mr. Heinonen appears qualified to provide expert testimony regarding the appropriateness of the search ring and the technical issues associated with various sites.

In his September 30, 2016 memo, Mr. Heinonen explains need for a “single, local, dominant server”. Currently, the area is served by several facilities that due to their distance from the coverage area, clutter and obstructing terrain. Siting on or more towers outside the search ring would “inject yet another low-strength signal into the coverage area” which likely would “increase interference” and exacerbate existing problems. He also indicates that other sites have exhausted their capacity.

Thus, it is unrefuted, for example, that proximity to the area of service problems is not the sole, and may not be the most significant factor in evaluating sites. It is evident that the technical locational issues are complex and involve a delicate balance of many factors. The opponents presented no expert testimony to contradict

the applicant's expert analysis. Perhaps such testimony would give rise to another exception to the search ring presumption in the Code or support alternatives, such as two shorter towers. Absent such evidence, however, I find that the Code limits the focus of my analysis to those properties within the applicant's duly established search ring. On the other hand, Mr. Gortman, who is a registered engineer, stated that the proposal is designed to provide about 2 miles of coverage and that if it was moved 2 miles away there would be gaps or interference. It is clear that a 2-mile radius circle extends beyond the search ring but where and how far is unknown. Given the uncertainty about the size of the search ring, I will use the two-mile radius as a guide for the search ring. Cf. CU12-15 (2013) (Review area one-half mile from the subject site...is tight enough to give protection to the residences closest to the proposed tower but not so broad as to make the analysis too unfocused and diffuse.")

Daniel Kearns, attorney for Justin and Amy Ward, argues that the applicant did not make a good effort to site the facility somewhere else. In his March 21, letter, Mr. Kearns provided a list of eight alternative sites. The staff report indicates that staff is unclear about the location and co-location availability of these facilities. Staff recommended that the applicant and Hearings Officer address these other facilities.

Mr. Kearns' letter states that each of the alternative sites is within 2 miles of the proposed site, and within the area of coverage issues, but does not state that they are within the search ring. He later breaks this into 18 parcels (adding one – TL 800, Bend Parks and Recreation). (August 30, 2016)

The applicant provided testimony that the following are, in fact, outside the search ring: USA (National Guard), BLM (two parcels); COID I. The applicant states that the Western PCS site 1.44 miles away has no tower but is outside the search ring.

The applicant does not state that the 875-acre COID site (TL 100) at .9 miles away is outside the search ring but does rather cursorily conclude that it is so far east as to create coverage gaps. The applicant also provides further discussion of why the two BLM parcels do not provide adequate coverage. Letter from Mr. Heinonen. (September 12, 2016)

As regards the rest of the parcels within 2 miles, I could find only haphazard or conclusory analysis from the applicant. For example, in his September 12, letter Mr. Fournier references the multiple Park and Rec sites, stating only that the District would consider a tower only on the EFU parcels and not the RR-10 parcels. The applicant's power point states only that these are in the "same general location" as the COID parcel so would have the "same issues".

As regards several parcels, the applicant simply states that they are unavailable or the owner is not interested, with no information regarding the nature or extent of any contacts or offers. The Board of Commissioners has instructed that to meet its burden regarding whether a site is available, the applicant must do more than state that the owner is not interested, as the applicant herein did regarding the two unidentified parcels directly west of the site. See e.g. Fournier letter (September 12, 2016).

Further, the applicant provided no or minimal analyses of properties clearly within the search ring. For example, The applicant states that “Of the two potential candidates in the search ring considered by Verizon Wireless, one was located on EFU-zoned lands just east of the site ultimately selected...but would not have been a less intrusive alternative because of the lack of screening and the visual impacts.” October 12, letter from Charles Maduell, citing to Exhibit E, the September 12, 2016 letter from Ed Fournier. Mr. Maduell simply states in conclusory fashion that as regards EFU land, “none were available or found to be a less intrusive alternative....After winnowing out the alternative sites that were not allowed by Code, were on pasture or cleared lands with no screening, and with less separation to homes and views potential alternatives in the search ring were presented for consideration by Verizon Wireless.”

The applicant did submit an aerial photo depicting lands within the search area that are “irrigated/no screening”. The former presumably are not available under DCC 18.128.340 B. But the photo does not differentiate between those rejected for irrigation and those that the applicant considered not to have adequate screening. This does not satisfy the applicant’s burden of proof as interpreted and applied by the Board of County Commissioners. The Board has instructed that, “an analysis of alternative sites requires a detailed, site-specific analysis that considers actual views of alternative sites from nearby residences”. CU-12-15 (2013) at 5. The applicant provided no such evidence regarding sites within the search ring. It is not a stretch to conclude that the Code also means that the applicant bears the burden of demonstrating exactly which parcels are irrigated (disqualified) and a description of why the others lack screening or are otherwise more intrusive. These latter standards are for the review authority to evaluate and determine in relation to the proposed site, not for the applicant simply to reject in conclusory fashion.

Similarly, the applicant submitted an aerial depicting numerous homes scattered throughout the search ring. This is relevant to whether any less intrusive sites are available but does not provide sufficient evidence for me to make that determination.

The fact that the opponents may not have suggested alternatives that clearly are within the search ring does not relieve the applicant from providing some evidence as to why the parcels are unavailable, more intrusive or will not provide coverage. I do not want to overstate this requirement but there needs to be something more than assertions, e.g. correspondence or a summary of contacts with owners, photos or descriptions, conclusions by experts. With such information, the opponents would be charged with providing some counter evidence. But the applicant’s analysis of alternative sites is simply too sparse and haphazard for me to conclude that the subject site is the least intrusive available and technically feasible location.

In summary, I find that the applicant did not meet its burden regarding:

- whether each of the alternative sites is outside the search ring;
- whether those in the search ring are in fact unavailable (as to owner unwillingness or Code prohibitions such as being irrigated), and
- for any remaining properties, whether placing the facility on other properties within the search ring would be more or less intrusive than the proposed site.

This standard is not met.

3. The facility is sited using trees, vegetation, and topography to the maximum extent practicable to screen the facility from view of nearby residences.

FINDING: The overall height and design of the facility is the focus of many neighboring complaints. Staff describes the terrain as “rolling” although others take issue with that, describing it and the surrounding area as flat for miles. See E.g. COLW Letter August 30, 2016. Regardless, the proposed facility is located in an area surrounded by mature and relatively dense juniper trees on the subject property and adjacent properties. The record indicates that mature junipers top out at no more than roughly 40’. So it is evident that the top 80’ or so of the tower/pole will extend above the screening. On the other hand, as discussed above, the distance from residences is significant, and therefore the angle to the facility provides some screening.

Staff indicates that numerous prior decisions have interpreted this provision to address siting on the subject property, i.e. the tower/pole must be located on the site using screening to the maximum extent practicable. (CU-08-86, CU-09-14, CU-09-53, CU-11-14, and CU-12-15). I concur. Other standards focus on whether the site is appropriate; I read this standard as governing the precise location on the site. To conclude otherwise would mean telecommunication facilities designated as conditional uses could be located only in pine forests or areas of extreme terrain. Vast areas of the County would be off limits.

As noted above, the applicant has taken advantage of available screening on the subject property and surrounding properties. There is no evidence that other areas of the subject property could provide substantially greater screening. I agree with staff that this standard is met.

4. A tower or monopole located in an LM Zone is no taller than 30 feet. Towers or monopoles shall not be sited in locations where there is no vegetative, structural or topographic screening available.

FINDING: The proposed telecommunications facility is not located in a LM Zone. Therefore, the first criterion is not applicable. As indicated in the previous finding, the proposed tower is sited in a location where vegetative, topographic, and structural screening is available. The second criterion is satisfied.

5. In all cases, the applicant shall site the facility in a manner to minimize its impact on scenic views and shall site the facility using trees, vegetation, and topography in order to screen it to the maximum extent practicable from view from protected roadways. Towers or monopoles shall not be sited in locations where there is no vegetative, structural or topographic screening available.

FINDING: This standard is similar to B.3, above except that it focuses on view impacts beyond those of nearby residences. It appears to have three parts:

- Site facility to minimize impact on scenic views

- Site the facility to screen it from view from protected roadways to the extent practicable
- Cannot site facilities where there is no screening.

Staff and the applicant state that the “known scenic views are westerly in the direction of the Cascade Mountain Range.” Staff indicates that Highway 20 is a protected roadway as it is associated with a Landscape Management (LM) Combining Zone, although the proposed tower/pole is not within the LM zone.

Some opponents argued that their scenic views essentially are 360d. Some noted that the tower would be visible to persons driving from the east on Hwy 20.

I find that this section must be read consistently with the very similar language in B.3. That is, the first two sentences do not bar a particular site that otherwise meets the locational standards. Rather, they require the applicant to place the facility on the site to minimize impacts on views “to the maximum extent practicable”. As with B.3, reading it as the opponents suggest would mean that vast areas of the County would be off-limits to towers, especially if 360d views must be protected. Neither B.3 nor this standard includes the alternative site analysis found in B.2. Nor do these sections prohibit telecommunications facilities, as does the LM zone.

I find, consistent with my earlier finding, that the applicant has located the tower/pole on the site to minimize visual impacts. It avoids impacts on mountain views to the extent practicable. Given that the area is flat, the tower mostly will be screened from travelers on HWY 20 at least until they are quite close. See applicant’s photo simulations. The applicant has reduced the height of the facility to 120’, which the expert testimony indicates is the minimum that will still provide appropriate coverage in the area to be served. The applicant also has offered either a monopole or a mono-pine. I do not need to reach a conclusion as to which option is better given that I am denying the application. There was some testimony that a monopole would be preferable, others said it would not make a difference. A tower is more “see through” and less monolithic than a pole, but a pole is narrower. Making at least the lower portion of a pole blend in with faux limbs may help. It would be helpful to receive testimony on this issue if this decision is appealed or if the applicant re-files.

The second part of this criterion prohibits the siting of a tower or monopole in areas with no vegetative, structural, or topographic screening. As noted above, the proposed facility will be somewhat screened by existing mature juniper trees. No in this context means none, “not any”. Staff finds the second part of this criterion is met and I concur.

6. Any tower or monopole is finished with natural wood colors or colors selected from amongst colors approved by Ordinance 97-017.

FINDING: The applicant indicates the proposed wireless telecommunications facility will be finished in a matte grey or tan color, both of which are amongst colors approved by Ordinance 97-017.

7. Any required aviation lighting is shielded to the maximum extent allowed by FAA and/or ODOT-Aeronautics regulations.

FINDING: As noted in a previous finding, ODA indicated in their March 16, 2016 letter that aviation lighting might be needed to identify the facility based on the proximity of two private airstrips. The applicant did not address whether lowering the tower to 120 feet may influence whether lighting is required.

Although I am denying the application, if this decision is reversed on appeal I recommend that staff's proposed condition be reworded along the lines of the following to encourage the applicant to make an effort to work with the appropriate agencies to avoid having to install lighting: The applicant shall make a good faith effort to seek an ODA or FAA determination that lighting is not required for the facility. The applicant shall install lighting on the facility only if required by the ODA or FAA, and shall shield such lighting to the extent permitted by FAA and/or ODA regulations.

8. The form of lease for the site does not prevent the possibility of co-location of additional wireless telecommunication facilities at the site.

FINDING: The applicant submitted a copy of the form of the lease, which indicates the applicant has the unreserved and unqualified right to sublet the telecommunications tower, building, and ground space to subtenants. Staff has reviewed the lease and found no other language that prevents the possibility of co-locating an additional wireless carrier at this site. I concur and there is no evidence to the contrary.

9. Any tower or monopole shall be designed in a manner that it can carry the antennas of at least one additional wireless carrier. This criterion may be satisfied by submitting the statement of a licensed structural engineer licensed in Oregon that the monopole or tower has been designed with sufficient strength to carry such an additional antenna array and by elevation drawings of the proposed tower or monopole that identifies an area designed to provide the required spacing between antenna arrays of different carriers.

FINDING: The application indicates the proposed 140-foot tower is designed to carry at least two additional arrays of cellular antennas. The height of the co-location sites will be below the top level antennas. Based on the submitted documentation, the proposed tower has been designed with sufficient strength to carry the antenna platform of another wireless carrier.

The applicant did not address this standard as regard the monopole/mono-pine. The elevation submitted states, "Tower loading includes future capacity to support additional carriers and equipment" but does not appear to identify an area designed to provide the required spacing between antenna arrays of different carriers. Perhaps I am missing something, but the applicant bears the burden of demonstrating compliance and I cannot find that it has done so. This standard is not met as regards the monopole/monopine modification.

10. Any approval of a wireless telecommunication facility shall include a condition that if the facility is left unused or is abandoned by all wireless providers located on the facility for more than one year the facility shall be removed by the landowner.

FINDING: The submitted lease agreement indicates the property will be restored upon termination of the lease and/or operations of the wireless telecommunications facility and therefore, showing the applicant has met or can meet this criterion. To ensure compliance, staff recommends this be made a condition of any approval to address this criterion.

IV. CONCLUSION:

Based on the foregoing findings and conclusions, the application as originally submitted and as modified is DENIED for failure to comply demonstrate that any less intrusive sites are either unavailable or do not provide the communications coverage necessary as required by DCC 18.128.340 B.2.

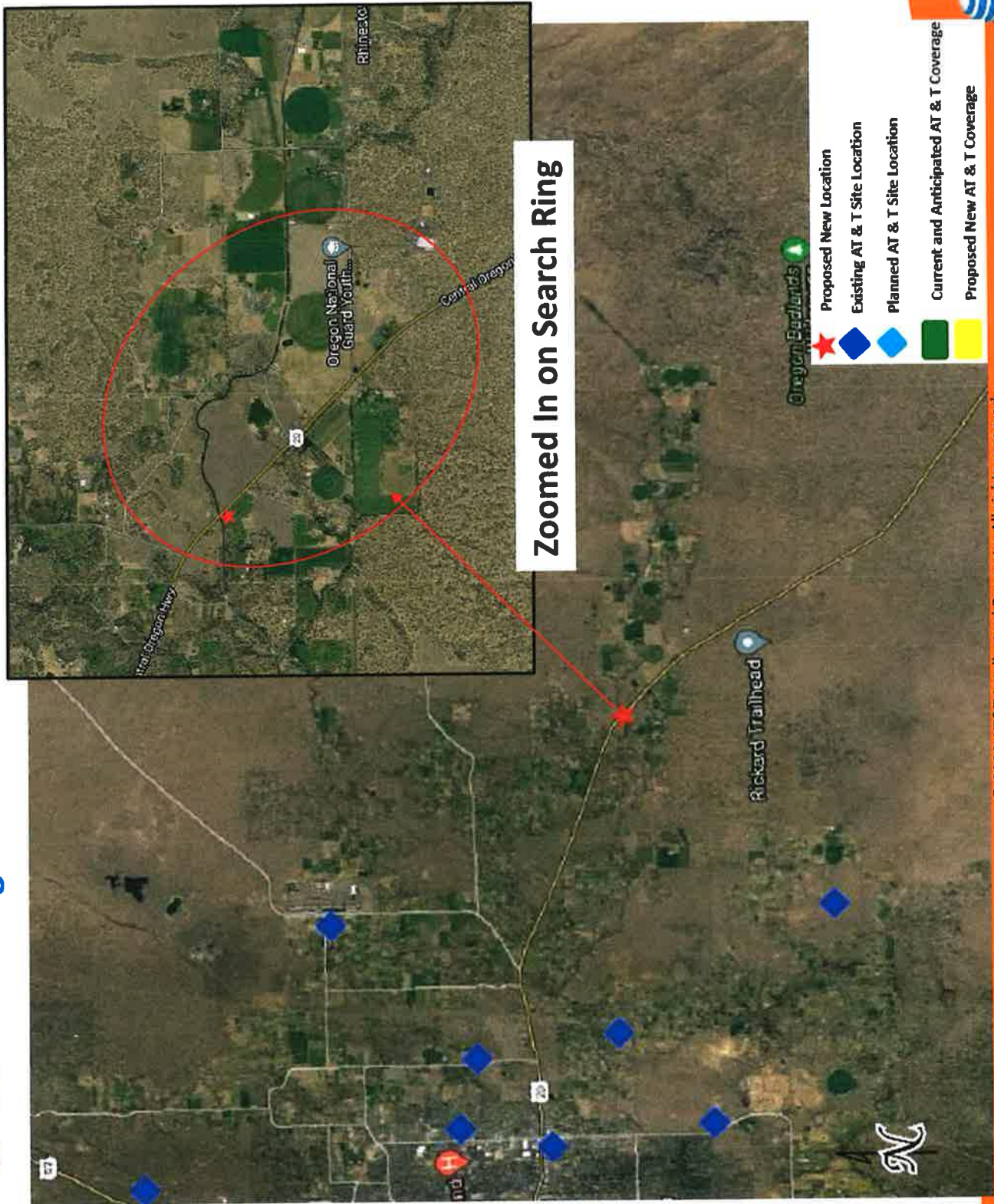
The application as modified to propose a monopole/mono-pole is DENIED on the additional basis of failure to demonstrate that it has the capacity to accommodate other carriers as required by DCC 128.128.340 B. 9.

Dan R. Olsen, Hearings Officer

Dated this 2nd day of December, 2016

Mailed this 2nd day of December, 2016

FIGURE A—Search Ring



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