

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

HORIZON TOWER LIMITED
PARTNERSHIP-II, and HORIZON
TOWER, LLC,

Plaintiffs,

v.

ADA COUNTY, IDAHO, and BOARD OF
ADA COUNTY COMMISSIONERS,

Defendants

Case No.: 1:19-cv-00125-DCN

**CONSENT ORDER AND
JUDGMENT**

Upon joint motion by all parties to this action, and pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) (the “Communications Act” or “Act”), the parties’ Settlement Agreement filed with this Court, the documents and information submitted in this action, and based on applicable law, the Court finds and orders as follows:

This Court has jurisdiction over the parties, subject matter jurisdiction over this case pursuant to 47 U.S.C. § 332(c)(7)(B)(v) and 28 U.S.C. § 1331, and is authorized to issue declaratory relief pursuant to 28 U.S.C. § 2201-2202. The Court finds that venue is proper.

Plaintiffs Horizon Tower Limited Partnership-II and Horizon Tower, LLC (collectively “Horizon” or “Plaintiffs”) allege that Defendants Ada County (“County”) and the Board of Ada County Commissioners (“Board”) (collectively, the “Defendants”) unlawfully denied Plaintiffs’ application for a conditional use permit to construct a wireless telecommunications facility in Ada County, Idaho.

On June 20, 2018, Powder River Development Services, LLC (“Powder River”), as the contractor on behalf of Horizon, applied to the County for a conditional use permit (“CUP”) to allow the installation, operation, and maintenance of a personal wireless services facility at the Proposed Site (“Application”). The personal wireless service facility initially proposed by Horizon in its Application was an 85-foot tall monopole tower.

Based on feedback from neighbors, Horizon ultimately applied to install a 65-foot tall tower designed to resemble a pine tree to conceal the tower and make it “stealth” (the “Stealth Tower”). In addition, after meeting with some of the Opponents, Horizon moved the Proposed Facility to the back of the property to reduce the perceived visual impact. Thus, the Stealth Tower would be sited on a 50’x50’ gravel compound, surrounded by a solid vinyl fence, with vegetative screening in the form of 20 evergreen trees (with the Stealth Tower, as a whole, “Proposed Facility”).

On October 18, 2018, the Ada County Planning and Zoning Commission (the “Commission”) accepted written testimony and held a public hearing to evaluate the Application. At the October 18, 2018 public hearing, Horizon presented evidence and testimony, in addition to the Application and its supporting materials. On October 18, 2018, the Commission issued a “Findings of Fact, Conclusions of Law and Order” (“Commission Order”) approving Horizon’s Application, subject to standard conditions of approval.

On November 2, 2018, a group of property owners (collectively, the “Opponents”) filed an appeal (the “Appeal”) with the Board of the Commission Order approving the Application, pursuant to Section 8-7-2 of the County Code.

The Board accepted written public testimony and heard testimony on the Appeal on January 30, 2019.

On February 6, 2019, the Board issued a “Finding of Facts, Conclusions of Law and Order” (the “Denial”) by which the Board granted the Opponents’ appeal and reversed the Commission’s approval of Horizon’s application and, in so doing, denied Horizon’s Application. Pursuant to Idaho Code § 67-6535 and County Code § 8-7E-5.A, on February 20, 2019, Horizon exhausted its administrative remedies by filing a timely Motion for Reconsideration before the Board.

The Board denied Horizon’s Motion for Reconsideration on March 19, 2019 (the “Reconsideration Denial”), which constituted the County’s final action on the Application under Idaho and federal laws.

Horizon timely appealed under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B) (the “Communications Act” or “Act”), from the denial by the County of its Application by filing the Complaint in the above-captioned case (the “TCA Case”).

On May 16, 2019, Defendants filed an Answer to Plaintiffs’ Complaint.

The Act, 47 U.S.C. § 332(c)(7)(B)(i)(II), preempts the County from denying the Application where doing so will effectively prohibit the provision of personal wireless services. Applicable federal case law holds that a denial violates the Act’s effective prohibition provision when the Application proposes to close a significant service coverage gap by the least intrusive means. *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995 (9th Cir. 2009). Under *Anacortes*, the provider must make a *prima facie* showing of

effective prohibition by demonstrating that alternatives were considered and that the proposed wireless facility is the least intrusive means of filling the significant gap. 572

F.3d at 997-98.

Horizon has exceeded the least intrusive means to fill the gap in coverage. See RF report installed more antennas than required

On or about October 11, 2019, Horizon disclosed to the County an expert report drafted by Steven E. Kennedy, owner of Biwabkos Consultants, LLC (“Expert Report”). The Expert Report establishes that Plaintiffs have established that both Verizon Wireless and AT&T have a significant gap in their service in the vicinity of the Proposed Site. The Expert Report also establishes that Plaintiffs undertook a good faith and thorough investigation of potential alternative sites in and around the area of the Proposed Site. The Expert Report ruled out all existing towers in the vicinity as infeasible or unavailable for collocation. The Expert Report shows that Plaintiffs investigated several additional properties in the vicinity, but were unable to identify an available, technically feasible alternative to the Proposed Site. The Expert Report establishes that the Proposed Site is, therefore, the least intrusive location to remedy a significant gap in wireless service.

Counsel for the respective parties have engaged in discussions regarding settlement. The parties, after analyzing and weighing the issues involved in this case, and the inherent costs and risks associated with litigation, presented the Court with a resolution of the litigation that accomplishes the goals of the parties and which establishes a mechanism for the County and the Plaintiffs to meet their mutual objectives. Accordingly, Plaintiffs and the County have entered into and executed a Settlement Agreement to settle and resolve the claims by Plaintiffs in this matter.

The County is a body politic and corporate, pursuant to Idaho Code § 31-601, and its powers can only be exercised by the Board or its authorized agents and officers, pursuant to Idaho Code § 31-602.

The Board is authorized, pursuant to Idaho Code § 31-813, “[t]o direct and control the prosecution and defense of all suits to which the county is a party in interest... .”

No third parties have petitioned to intervene in this matter.

Pursuant to the Communications Act and consistent with the parties’ Settlement Agreement, the Court finds Plaintiffs’ claims well-taken and specifically finds that the Proposed Facility at the Proposed Site is the least intrusive means of remedying a significant gap in personal wireless service of Verizon Wireless and AT&T. The Court further finds that the appropriate resolution is the issuance of an order requiring the Defendants to grant Plaintiffs’ Application and to issue the conditional use permit to construct the Proposed Facility attached hereto as Exhibit A.

Therefore, IT IS ORDERED that within ten (10) business days of this Consent Order and Judgment Defendants shall issue to Plaintiffs final zoning approval by approving and issuing the CUP attached hereto as Exhibit A, thereby authorizing the installation, operation and maintenance of the Proposed Facility at the Proposed Site, subject to the conditions of approval attached thereto.

IT IS FURTHER ORDERED that following issuance of the Defendants’ approval for the Proposed Facility, the Defendants will cooperate to the extent required by law to provide any and all additional approvals for, or documents or information about, the

Proposed Facility as may be required for the Plaintiffs to obtain the requisite building permit and any other approvals from Defendants.

IT IS FURTHER ORDERED that as a result of the Defendants' actions in response to this Order, granting the Plaintiffs' Application, and upon receipt of any other necessary approvals, Plaintiffs shall be authorized to construct, operate, maintain, and use a personal wireless service facility located at the Proposed Site, as proposed in the Application and as conditioned by this Order, the Parties' Settlement Agreement, and subject to the conditions of approval of the CUP attached hereto as Exhibit A. No other relief except that provided according to the provisions of this Consent Order and Judgment and the Settlement Agreement entered into by the Parties is granted hereby. No costs and/or attorney's fees are to be sought by or awarded to any party.

IT IS FURTHER ORDERED that the Court shall retain jurisdiction of this action after the entry of this Consent Order and Judgment to the extent necessary to enforce compliance with it and the terms of the Settlement Agreement and to take any action necessary or appropriate for its interpretation, modification, or enforcement. Specifically, the Court's jurisdiction will continue until the proposed tower construction is complete. The Court's continuing jurisdiction does not extend to other zoning matters beyond the scope of the subject of the Application and Settlement Agreement.



DATED: November 7, 2019

A handwritten signature in black ink, appearing to read "David C. Nye".

David C. Nye
Chief U.S. District Court Judge

EXHIBIT A
to the
Consent Order and Judgment

BEFORE THE BOARD OF ADA COUNTY COMMISSIONERS

In re:
Application of Powder River Development
Services, LLC, on behalf of Horizon Tower
Project No. 201801311 CU

In re:
Application of Eberle Berlin Law Firm
(Stanley J. Tharp, agent)
Project No. 201801311 A

ORDER GRANTING CONDITIONAL USE PERMIT

On June 20, 2018, Powder River Development Services, LLC (“Powder River”), as the contractor on behalf of Horizon Tower Limited Partnership-II and Horizon Tower, LLC (collectively “Horizon”), applied to the County for a conditional use permit (“CUP”) to allow the installation, operation, and maintenance of a personal wireless services facility at 2557 N. Sky View Lane, Ada County, Idaho (the “Proposed Site”) (“Application”). The personal wireless service facility initially proposed by Horizon in its Application was an 85-foot tall monopole tower.

Based on feedback from neighbors, Horizon ultimately applied to install a 65-foot tall tower designed to resemble a pine tree to conceal the tower and make it “stealth” (the “Stealth Tower”). In addition, after meeting with some of the neighbors, Horizon moved the Proposed Facility to the back of the property to reduce the perceived visual impact. Thus, the Stealth Tower would be sited on a 50’x50’ gravel compound, surrounded by a solid vinyl fence, with vegetative screening in the form of 20 evergreen trees (with the Stealth Tower, as a whole, “Proposed Facility”).

On October 18, 2018, the Ada County Planning and Zoning Commission (the “Commission”) accepted written testimony and held a public hearing to evaluate the Application. At the October 18, 2018 public hearing, Horizon presented evidence and testimony, in addition to the Application and its supporting materials. On October 18, 2018, the Commission issued a “Findings of Fact, Conclusions of Law and Order” (“Commission Order”) approving Horizon’s Application, subject to standard conditions of approval.

On November 2, 2018, a group of property owners (collectively, the “Opponents”) filed an appeal (the “Appeal”) with the Board of the Commission Order approving the Application, pursuant to Section 8-7-2 of the County Code.

The Board accepted written public testimony and heard testimony on the Appeal on January 30, 2019.

On February 6, 2019, the Board issued a “Finding of Facts, Conclusions of Law and Order” (the “Denial”) by which the Board granted the Opponents’ appeal and reversed the Commission’s approval of Horizon’s application and, in so doing, denied Horizon’s Application. Pursuant to Idaho Code § 67-6535 and County Code § 8-7E-5.A, on February 20, 2019, Horizon exhausted its administrative remedies by filing a timely Motion for Reconsideration before the Board.

The Board denied Horizon's Motion for Reconsideration on March 19, 2019 (the "Reconsideration Denial"), which constituted the County's final action on the Application under Idaho and federal laws.

Horizon timely appealed the Denial and Reconsideration Denial to the federal district court for the District of Idaho under the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B) (the "Communications Act" or "Act") by filing a Complaint captioned *Horizon Tower Limited Partnership-II v. Ada County*, Case No.: 1:19-cv-00125-DCN (the "TCA Case"). On May 16, 2019, the County and Board filed an Answer to Horizon's Complaint.

On November 7, 2019, the United States District Court for the District of Idaho in the TCA Case entered an Order and Judgment in which it found that the County's Denial had the effect of prohibiting personal wireless services, which prohibition violated 47 U.S.C. § 332(c)(7)(B)(i)(II). In that Order and Judgment, the Court ordered the County and Board to issue to Horizon final zoning approval by approving and issuing this Conditional Use Permit, subject to the conditions which are attached hereto as Exhibit A, thereby authorizing the installation, operation and maintenance of the Proposed Facility at the Proposed Site.

ORDER

Based on the foregoing and pursuant to the Judgment and Order issued in the TCA Case, the Board grants Project # 201801311 CU, subject to the Conditions of Approval attached hereto as Exhibit A.

Dated this _____ day of _____, 2019

Board of Ada County Commissioners

By: _____
Kendra Kenyon, Commissioner

By: _____
Diana Lachiondo, Commissioner

By: _____
Rick Visser, Commissioner

ATTEST:

Phil McGrane, Ada County Clerk

EXHIBIT A

CONDITIONS OF APPROVAL

REQUIRED ACTIONS. THE FOLLOWING LIST DETAILS THE TASKS THAT MUST BE COMPLETED BEFORE THE APPROVAL OF PROJECT #201801311 CU WILL BE CONSIDERED FINAL. THE APPLICANT AND/OR OWNER HAVE UNTIL TWO YEARS OF THE WRITTEN DECISION TO COMPLETE THE REQUIRED ACTIONS AND TO OBTAIN A ZONING CERTIFICATE UNLESS A TIME EXTENSION IS GRANTED. SEE SECTION 8-7-6 OF THE ADA COUNTY CODE FOR INFORMATION ON TIME EXTENSIONS. IF A BUILDING PERMIT IS REQUIRED, THE ZONING CERTIFICATE SHALL BE ISSUED WITH THE BUILDING PERMIT. THIS APPROVAL SHALL BECOME VOID IF A VALID ZONING CERTIFICATE HAS NOT BEEN ISSUED BY THAT DATE. SITE IMPROVEMENTS ARE NOT ALLOWED UNTIL THE ZONING CERTIFICATE HAS BEEN ISSUED.

1. The applicant and/or owner shall obtain written approval of the development (site plan and/or use) from the agencies noted below. All site improvements are prohibited prior to approval of these agencies.
 - a) The Federal Aviation Administration (FAA) shall approve the facility.
 - b) The Chief of the Idaho Bureau of Aeronautics shall approve the facility.
 - c) The Farmers Union Ditch Company must approve all proposed modifications to the existing irrigation system.
 - d) The Drainage District No. 2 must approve all proposed modifications to the existing drainage system.
 - e) If applicable, the County Engineer must approve a surface drainage run-off plan. The plan shall contain all proposed site grading. Please contact the County Engineer at (208) 287-7900 for fee and application information. See Section 8-4A-11 of the Ada County Code for drainage plan standards.
2. The facility shall have approval from the Boise Airport Director prior to operation.
3. If required by the Ada County Building Code as set forth in Title 7, Chapter 2, of the Ada County Code, the applicant and/or owner shall obtain a building permit prior to commencing any development. Please contact the County Building Official at (208) 287-7900 for fee and application information. The design and construction of the development shall comply with the approved and stamped master site plan and the Ada County Code.
4. The footprint of the tower plus any equipment shelters cannot exceed 727 square feet.
5. A Professional Land Surveyor shall establish the boundary of the real property lease parcel and access and utility easements relative to the boundary of the parent parcel, monument corners of said lease parcel and access and utility easements, and file a Record of Survey with the Ada County Recorder's Office delineating said lease parcel relative to the boundary of the parent parcel. The Record of Survey shall be submitted to the Director for review prior to recordation.

6. Once construction is complete, the applicant shall request a zoning compliance inspection from the Development Services Department. Staff will check for compliance with the approved master site plan. The Director must approve any modification and/or expansion to the master site plan. See Section 8-4E-3 of the Ada County Code.
7. A Certificate of Occupancy will be issued when all of the above conditions have been met. In the event conditions cannot be met by the desired date of occupancy, the owner and/or applicant may request a surety agreement in lieu of completing the improvements. See Title 8, Chapter 4, Article K of the Ada County Code for the terms and regulations of surety agreements.

TERMS OF APPROVAL. THE FOLLOWING TERMS MUST BE COMPLIED WITH AT ALL TIMES OR YOUR APPROVAL MAY BE REVOKED.

8. A zoning certificate and/or a building permit may not be issued until 15 days after the Commission issued the written decision on the proposed development. In the event the decision of the Commission is appealed, the building permit may not be issued until the appeal is resolved in favor of the proposed development. See Section 8-7-7 of the Ada County Code for more information on appeals.
9. The Director must approve any modification and/or expansion to the master site plan. See Section 8-4E-3 of the Ada County Code.
10. The use must comply with the specific use standards for [Tower or Antenna Structure, Commercial] in Section 8-5-3 of the Ada County Code.
11. The property must be managed and maintained consistent with the standard regulations in Title 8, Chapter 4, Article A of the Ada County Code. Please note that this Article contains specific regulations regarding the accumulation of junk, atmospheric emissions, construction sites, hazardous material storage, outdoor public address systems, outdoor storage of chemicals and fertilizers, transmission line corridors, and utilities.
12. Any lighting on the site shall comply with the lighting regulations in Title 8, Chapter 4, Article H, of the Ada County Code.
13. The use must comply with the noise regulations in Ada County Code, Title 5, Chapter 13.
14. All drainage shall be retained onsite during and after construction.
15. The contractor shall restore disturbed areas to predevelopment condition.
16. Any outdoor storage on the site shall be a solid fence. Per subsection 8-4F-5A cyclone or chainlink fencing (with or without slats) shall not be deemed a screening material.
17. If there is a change in ownership or lessee interest, Ada County Development Services shall be notified of such change and any subsequent owners or lessee interests will abide by the conditions of approval.
18. The tower and associated facilities shall comply with FCC standards regarding radio frequency (RF) emissions.

19. The facility shall be maintained in compliance with all federal, state, and local regulations and construction standards.
20. The facility shall be removed within sixty (60) days after cessation of use.
21. The applicant shall plant 20 evergreen trees around the site subject to approval of staff.