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BY EMAIL (planningdept@taoscounty.org)

Taos County Commission
105 Albright Street, Suite H
Taos, New Mexico 87571
Commissioner FR Bob Romero
Commissioner Miguel Romero, Jr.
Commissioner Darlene Vigil
Commissioner AnJennette Brush
Commissioner Ronald Mascareñas

Re: In the Matter of the Appeal of the Decision of the Taos County Planning Commission Meeting of July 31, 2025

CASE SUP-25-00003

Dear Honorable County Commissioners,

I have been retained to represent a group of residents and/or property owners in San Cristobal, Taos County, New Mexico who staunchly oppose Skyway Towers' application to construct and operate a 195-foot cellular tower and associated antennas and equipment on the property of Alfred, Susan, and Jacqueline Cordova at 1489 State Highway 522 in San Cristobal, New Mexico. My clients include the appellants. My clients have appealed the July 31, 2025 Decision of the Taos County Planning Commission approving a special use permit which allows the applicants to construct and operate the cell tower. My clients respectfully request that the Board of County Commissioners reverse the July 31, 2025 Decision of the Planning Commission and deny said special use permit.

My clients are not opposed to cell towers generally speaking. Rather, they are opposed to the *irresponsible* siting of an *unnecessary*, tall, intrusive, and unsightly cell tower that will mar the pristine open viewshed and the pastoral nature of this Taos County landscape for decades to come. They are opposed to a cell tower that plainly violates the County Land Use Regulations which have been enacted to protect the residents and this enchanted New Mexico land from being ravaged by soaring dystopian industrial infrastructure where no significant gap in wireless coverage exists and where the applicant has utterly failed to meet its burden of proof by a preponderance of the evidence that it meets all of the requirements of the County Land Use Regulations.

As a wireless telecommunications attorney who has been practicing law for over 42 years, I have been asked to make sure that you County Commissioners understand the very broad powers Congress expressly reserved in the federal Telecommunications Act of 1996 ("TCA") for local governments over the siting of wireless facilities. Unfortunately, telecom industry representatives often mislead local government officials and attorneys into believing, erroneously, that local government or local land use boards have virtually no control over the siting of wireless facilities within their jurisdiction. You have been wrongly told that "The federal government and the Federal Communications Commission (the "FCC") have taken away and preempted your zoning powers over the placement or siting of cell towers." You are chided "Your hands are tied" or "You have no power." These assertions, usually by wireless carriers, speculative cell tower developers, or their attorneys, are intended to confuse and disempower local decision-makers and to discourage them from denying or modifying ill-conceived cell tower or other wireless infrastructure projects. Your hands are not tied. You do have the power to protect your people and your land.

Section 4.11 of the County of Taos Land Use Regulations, Ordinance 2018-2, Governs Wireless Communications Facilities, and is a Proper Exercise of Local Government Zoning Control Fully Consistent with Federal Law and is Not Preempted by the Federal Telecommunications Act of 1996

I am here to provide you with support and reassurance that you can, and should, stop the Skyway Towers cell tower project from moving forward because this project does not comply with the County of Taos Land Use Regulations, Ordinance 2018-2, most notably numerous provisions of Section 4.11, governing Wireless Communications Facilities. I preface my comments by emphasizing that the Taos County Board of Commissioners must overturn the Taos County Planning Commission's decision at its meeting on July 31, 2025, granting the request of Skyway Towers, the applicant, and Alfred, Susan, and Jacqueline Cordova, the property owners, for a Special Use Permit (SUP25-00003) to construct and operate a 195-foot tall cellular tower on a 10.64 +- acre property located at 1489 State Highway 522 in San Cristobal, Taos County, New Mexico. With all due respect to the Planning Commission, its July 31, 2025 decision is, legally speaking, a "hot mess." As I will explain below, the Planning Commission decision approves a cell tower project that violates the County of Taos Land Use Regulations in multiple material respects.

Moreover, the decision is not based on substantial evidence in the record. In fact, the decision blatantly disregards the substantial incontrovertible record evidence which demonstrates why the project violates the Land Use Regulations. Accordingly and again, with all due respect, the Planning Commission decision is arbitrary, capricious, unsupported by evidence, irrational, and in violation of the County Ordinance. The County Board of Commissioners must invalidate the Planning Commission's July 31, 2025 decision, and deny Skyway Towers' and the property owners' request for the special use permit.

I was just retained by my clients in this matter early this week. Shortly thereafter, my clients retained Dr. Kent Chamberlin, a world-renowned wireless radiation scientist, Professor Emeritus and former Department Chair, Department of Electrical Engineering, University of

New Hampshire, to provide expert analysis of the application and supporting documentation for the proposed Skyway Towers 195-foot tall cell tower at 1489 State Highway 522 in San Cristobal. Dr. Chamberlin has reviewed the material in the record before the Planning Commission and has consulted further information available in the public domain. Dr. Chamberlin has prepared an expert report analyzing the same, and he has concluded, based on the available information, in his expert opinion, that there is no significant gap in coverage for the provision of outdoor and in vehicle wireless service in the proposed installation area. Hence, Dr. Chamberlin opines that the construction and operation of a new 195-foot tall cell tower at the proposed site is not justified. I respectfully refer the County Board of Commissioners to Dr. Chamberlin's expert report for your consideration and request that you accept this expert report into evidence because it is necessary for the proper disposition of this matter.

Before I delve into the many errors of law and fact that infest the Planning Commission decision, I will provide you with an overview of the County's wireless ordinance and explain how that ordinance fits into the wireless industry and the federal statutory framework for wireless communications facility deployment in the United States.

The wireless industry is insatiable in its quest to blanket the entire nation in an endless, willy-nilly sprawl of cell towers and small cell facilities, with the end goal to make wireless facilities the dominant provider of telephonic and broadband Internet connectivity to the American public. Wireless telephone calling has largely replaced landline calling throughout the nation, and the wireless carriers seek to use wireless infrastructure to push out cable TV providers, fiber optic providers, and satellite providers like DISH from the market, especially for high-speed broadband Internet connectivity. Why? Because this is an extremely profitable business for the wireless carriers. And to maximize their profits and eliminate their competitors, the wireless carriers need to densify their networks by putting up cell towers and small cell facilities everywhere and anywhere they can get away with it. The wireless industry is deaf to the concerns of the residents who live and work near the industry's desired wireless communication facility sites.

According to statistics published by the Wireless Infrastructure Association on May 7, 2025, at the end of 2024, 154,800 purpose-built macro cell towers were in operation in the United States. There were 248,050 macro cell sites, and 197,850 outdoor small cells in operation, with 802,500 indoor small cell and DAS nodes in use. Many thousands of new macro cell towers are under construction or in the works.

Skyway Towers seeks to benefit from this wireless "pot of gold" for its own profit-maximizing ends, rather than to fill a true "significant gaps in coverage," as the accompanying expert report of Dr. Kent Chamberlin demonstrates. Skyway Towers is a speculative, out-of-state, cell tower developer, funded by Basalt Infrastructure Partners, a U.K.-based set of private investment funds. Skyway Towers simply doesn’t care what disruption its proposed cell tower causes to *your* community – the degradation of views, the destruction of property values, the desecration of neighborhood character, and the public safety dangers its tower poses to nearby persons and property from icefall, falling debris, fire, and tower collapse.

As the highest elected officials in Taos County, your job is to safeguard the lives and properties of your fellow residents and to protect the future of your County from development that is inconsistent with the County's comprehensive Land Use Regulations, including its thoughtful wireless communications facilities provisions. Your responsibilities are to oversee development in the County and to ensure that the Land Use Regulations are being followed. Residents of the County are fortunate that the Board of County Commissioners had the wisdom and foresight to enact a comprehensive wireless telecommunications code within the County Land Use Regulations that encourages -- yet responsibly regulates -- the placement, design, and construction of wireless communications facilities within the County of Taos, fully consistent with the federal TCA and State and federal law.

Now, in the instant case, your responsibility is to correct a mistake -- an erroneous July 31, 2025 decision made by the Planning Commission, which approved the special permit even though the applicants failed to prove that they met the requirements for the permit set forth in the County Land Use Regulations and even though the Planning Commission's findings are not supported by competent record evidence.

On September 4, 2018, the Taos County Board of Commissioners wisely adopted a revised comprehensive land use ordinance, denominated as "the Taos County Land Use Regulations," to regulate development and land use within Taos County. This ordinance provides the statutory framework pursuant to which the County government exercises the traditional zoning powers of local government. One section of the Land Use Regulations, Section 4.11, is devoted to Wireless Communications Facilities. Most notably, as will be explained in greater detail below, Section 4.11 is fully consistent with federal law and is not preempted by the TCA.

Among the specific structures regulated by the Taos County Land Use Regulations are cell towers. Section 4.11 provides detailed legal standards applicable to wireless communications facilities, including cell towers, within the County.

Section 4.11.1A and 4.11.1B requires that all wireless communications facilities must first obtain a Special Use Permit Zoning permit or Major development Zoning permit from the County. In order to qualify, a facility must meet the applicable compatibility and performance standards set forth in Section 4.6 and Sections 4.7 and the application requirements set forth in Section 4.4 or Section 4.5, whichever is applicable. These are just the basic requirements. In addition, all wireless communications facilities must comply with many specific wireless-related requirements, including those relating to: (1) setbacks; (2) lighting and signage; (3) design and size limits for the telecommunications equipment building or cabinet; (4) abandonment and removal wireless communications facilities; (5) protection against signal interference; (6) compliance with the health and safety standards for electromagnetic field emissions as established by the Federal Communications Commission and any other federal, state or local agency; (7) compliance with the County's hierarchy of preferred tower locations; and (8) concealment requirements for wireless telecommunications facilities within 1,000 feet of traditional communities, historic districts listed in the State Register of Cultural Properties or the National Register of Historic Places, or any historic routes listed in the State or National Registers.

The County's wireless ordinance then sets forth a number of critical evidentiary hurdles that the applicant has the burden of proof in overcoming in order to qualify for the permit:

Importantly, Section 4.11.1C *et seq.* demands that the applicant jump a high evidentiary hurdle before it will be able to secure a permit for a new wireless facility from the County. **"[T]he applicant must prove that a bona fide need exists for the facility and that no reasonable combination of existing locations, techniques, or technologies will obviate the need. The applicant must further provide that it has made all reasonable efforts to procure antenna space on existing facilities...."** This is a tall order, and requires an applicant to: (1) conduct a rigorous, scientifically-based, *unbiased*, technological analysis of its network coverage in the area; (2) inventory all existing wireless communications facilities within a broad but technologically feasible radius of the proposed new site -- rather than the gerrymandered, short radius we usually see selected by the applicant to support the case for the very narrow search zone favored by the applicant; (3) explore the possibilities of co-locating on one of these existing facilities, including the option of extending the vertical height of an existing cell tower by up to 20 feet pursuant to the federal Spectrum Act, 47 U.S.C. §6409(a), which actually does preempt local governments from denying such a minor modification to an *existing* cell tower; and (4) investigate alternative technological solutions to closing a demonstrated significant coverage gap -- for instance, by selectively deploying small wireless antennas on existing utility poles along the public right of way and thereby achieving the needed wireless coverage.

Section 4.11.1C cannot be satisfied by an applicant simply submitting a couple of purported RF signal propagation maps prepared by its putative RF engineer who claims, without any vetting of his qualifications or his methodology and data, that such maps show the applicant "needs" a new cell tower and contends, without full substantiation, that co-location on an existing tower or use of a different technological solution, won't provide the needed cell phone coverage.

I can't emphasize strongly enough that the County Ordinance mandates that an applicant for a cell tower has the **burden of proof** of establishing by a preponderance of the evidence: (1) a bona fide need for the facility; (2) no reasonable combination of existing locations, techniques, or technologies will obviate the need; and (3) the applicant has made all reasonable efforts to procure antenna space on existing facilities. An applicant fails to qualify for the special use permit when it fails to produce real credible evidence for each of these foregoing elements. For example, an applicant must establish, through credible and substantiated scientific means that an actual significant gap in coverage exists in a geographic area such that cell phone users cannot make or receive phone calls to the network.

Importantly, a wireless carrier's or cell tower developer's business desire to increase its profits by densifying its coverage by adding more cell towers and/or more capacity does not constitute a bona fide need for the facility. This business strategy may enhance its profits, but has no bearing on its legal entitlement to build the new cell tower at this site under federal law. *See ExteNet, Inc. v. Village of Flower Hill*, 617 F.Supp.3d 125, 131 (E.D.N.Y. 2022)("Improved capacity and speed are desirable (and, no doubt, profitable) goals in the age of smartphones, but they are not protected by the [Telecommunications] Act [of 1996]"); *Sprint Spectrum LLP v.*

Willoth, 176 F.3d 630, 643 (2nd Cir. 1999)("We hold only that the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines.").

With these admonitions firmly in mind, it's worthwhile for the County Commissioners to focus on the specific elements the County Land Use Regulations mandate an application for a special use permit for a cell tower must prove by a preponderance of the evidence before the County is authorized by law to issue the permit. For the Commissioners' convenience, I re-state the provisions of Section 4.1.11C *et seq.* below in full.

> C. **Co-location.** In all applications for construction of a new facility, the applicant must prove that a bona fide need exists for the facility and that no reasonable combination of existing locations, techniques, or technologies will obviate the need. The applicant must further provide that it has made all reasonable efforts to procure antenna space on existing facilities and that the cost of the co-location exceeds the cost of a new facility by a least fifty percent, or that: 1. No existing tower, structure, or public utility structure is located within the radius that meets the applicant's engineering requirements; or 2. No existing tower, structure, or public utility structure is located within the radius that has sufficient structural strength or space available to support the applicant's proposed telecommunications facility and related equipment; or 3. The applicant's proposed telecommunications facility would cause significant, unavoidable electromagnetic interference with the antenna(s) on the existing towers, structures or public utility structure, or the antenna(s) on the existing towers, structures or public utility structures would cause interference with the applicant's proposed telecommunications facility; and 4. The owners of existing towers, structures, or public utility structures within the radius will not allow the applicant to place its telecommunications facility thereon, or such owners are requiring payments for the use of their tower that substantially exceed commercially reasonable rates; and 5. The applicant shall submit evidence to the county demonstrating that a genuine effort has been made to solicit additional users for the proposed new tower. Evidence of this shall include, at a minimum, copies of notices sent by registered mail, return receipt required, to all other providers of wireless communication services within Taos County and adjacent counties, advising of the intent to construct a new tower, identifying the location, inviting the joint use and sharing of costs, and requiring a written response within fifteen (15) working days; and 6. The applicant shall sign an instrument, approved by the county, agreeing to encourage and promote the joint use of telecommunications towers within the county and, to that extent, committing that there shall be no unreasonable act or omission that would have the effect of excluding, obstructing, or delaying joint use of any tower where fair and reasonable compensation is offered for such use.
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> C. [sic] **Criteria for Concealed Wireless Telecommunications Facilities.** Concealed wireless telecommunications facilities must be: 1. Architecturally integrated with existing buildings, structures, and landscaping, including height, color, style, clustering, placement, design, and shape. 2. Located to avoid a dominant silhouette of a wireless telecommunications facility on escarpments and mesas, and to preserve view corridors. 3.

Located on existing vertical infrastructure, such as utility poles or public utility structures, if possible. 4. Located in areas where the existing topography, vegetation, buildings, or other structures provide the greatest amount of screening.

D. **Landscaping and Screening.** The following regulations shall apply to landscaping and screening: 1. Freestanding wireless telecommunications facilities shall be surrounded by a six (6) -foot high fence or wall. 2. Any free-standing wireless telecommunications facility facing or abutting a property used for residential purposes shall include landscaping along the outside of the required fence or wall that is planted and maintained according to a landscape plan approved by the Planning Director or his/her designee. The Planning Director may waive this requirement if the freestanding wireless telecommunications facility is not readily visible from surrounding properties or rights of way. 3. All disturbed areas shall be re-vegetated and/or stabilized as necessary to control erosion and dust.

E. **Horizontal Separation of Free-Standing Wireless Telecommunications Facilities.** Free-standing wireless telecommunication facilities shall be separated by a distance of five (5) miles.

F. **Color and Camouflage** 1. All wireless telecommunication facilities, support structures, accessory buildings, poles, antennas and other external facilities shall be painted upon installation and thereafter repainted as necessary with a “flat" paint. Except where dictated by the FAA, paint color shall, at the discretion of the Planning Director, be designed to minimize visibility and blend with the surrounding environment. 2. Improvements which will be primarily viewed against soils, trees or grasslands shall be painted colors matching these landscapes, while elements that rise above the horizon shall be painted white. 3. Alternative and creative design that allow the structure to blend into its surrounding area, but which deviates from the above requirements may be permitted by the Planning Director, in his discretion and in writing.

G. **Access Roads.** All wireless telecommunications facilities shall have access roads.

H. **Emergency Backup Power.** Emergency backup power shall be required for timed power outages and testing/maintenance only.

I. **Application Requirements.** In addition to information already required by Sections 4.5 or 4.6 above, each applicant for a wireless telecommunications facility shall provide the Planning Department with the following:

1. Map(s) from the County Mapping Department that are specific to the application site, drawn to scale, showing land uses and zoning designations, including those within other jurisdictions.

2. Documentation regarding co-location as described in these regulations.

3. A set of plans which, in addition to other requirements in these regulations, includes:

a. A scaled site development plan clearly indicating the location, type, color and height of any proposed wireless telecommunications facility, on-site land uses, adjacent land uses, and zoning (including when adjacent to other jurisdictions), tower service area map, adjacent roadways, proposed means of access, setbacks from property lines, elevation drawings of any wireless telecommunications facilities, topography, and parking layout;

b. A notarized statement from the applicant that describes the facility's capacity and declares the number and type(s) of antenna(s) that it can accommodate, or an explanation of why the facility cannot be designed to accommodate other users;

c. A licensed engineer's stamp and registration number;

d. The distance between any proposed tower and other telecommunications facilities and identification of the owner(s) of the other facilities;

e. Verification that a copy of the above-proposed application material has been sent by certified mail, return receipt requested, to any other government jurisdiction within one (1) mile of the proposed site;

f. Any other information as requested by the county needed to evaluate the application; and

g. A letter of intent committing the wireless telecommunication facility owner and its successors to allow shared use of the facility, if an additional user agrees in writing to offer terms and conditions of shared use, including provisions for payment of prevailing commercial rates.

This Planning Commission Retains Broad, Traditional Zoning Powers Under The Federal TCA To Control The Placement, Construction, And/or Operation Of Cell Towers And Personal Wireless Communications Facilities Within The County's Boundaries

At the beginning of this letter, I told you about "the Big Lie" -- the one where the cell tower developers and the wireless carriers or their attorneys tell you the federal government or the FCC has taken away your power to regulate the siting of cell towers and other wireless communications infrastructure in your County. Well, I now expose why what you've been told is a "Big Lie."

The TCA is the federal law that regulates virtually all aspects of wireless telephony in the United States. Congress enacted the TCA in 1996, at the dawn of the age of wireless telephony, to foster the development of a national wireless network. Nonetheless, Congress was keenly aware of the needs of local governments to retain and exercise, for the most part, their ordinary zoning powers, so that they could continue to control orderly growth and development in their communities, consistent with their specific community needs, characters, and goals. Congress, therefore, enacted Subsection (7) of the TCA which, tellingly, is titled "*Preservation of local zoning authority*."

Pursuant to Section 332(c)(7)(A) of the TCA, local governments retain broad authority over "decisions regarding the placement, construction, and modification of personal wireless service facilities." The limitations of that authority imposed by Congress are delineated in Section 332(c)(7)(B), and are narrow: State and local governments (a) shall not unreasonably discriminate among providers of functionally equivalent services; and (b) shall not prohibit or have the effect of prohibiting the provision of personal wireless services. Moreover, the State or local government shall act on any request within a reasonable period of time; and any decision shall be in writing and supported by substantial evidence contained in a written record. And no State or local government may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions on human health to the extent that such facilities comply with the Commission's regulations concerning such emissions. Finally, any person adversely affected by any final action or failure to act by a State or local government may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction, and the court shall hear and decide such action on an expedited basis.

That's it. Don't discriminate unreasonably among carriers. Don't prohibit a carrier entirely from providing personal wireless services. Don't deny a request based on the human health effects of radio frequency emissions (so long as the projected RF transmissions will be within FCC guidelines).

A careful review of Section 4.11 of the County of Taos Land Use Regulations shows no provisions that run afoul of these proscriptions of Section 332(c)(7)(B) of the TCA. Thus, as long as Taos County follows these simple rules, it can decide where a wireless facility can be sited and how it should be constructed and operated. And because the members of the County Planning Commission and the County Commissioners have sworn duties to follow and enforce the duly enacted laws and ordinances of this County, they are required to follow and enforce the County of Taos Land Use Regulations, including Section 4.11, when considering applications for special use permits for cell towers. Most importantly, they must deny such applications when the applicants have failed to meet their burden of proof by introducing a preponderance of admissible evidence to support each required element set forth in Section 4.11.

Here's a caveat. When denying a special use permit for a cell tower or other wireless communications facility, the Taos County land use body issuing the denial must issue its decision **in writing** and that written decision must be supported by substantial evidence contained in the administrative record. The **written decision must cite to specific substantial record evidence to support its decision, and the written decision must be issued contemporaneously with any oral or written decision**. *See* 47 U.S.C. §332(C)(7)(B); *T-Mobile South, LLC v. Roswell, Georgia*, 574 U.S. 293, 302, 304 (2015)("[A] locality's reasons must be given in writing"..."at essentially the same time as it communicates its denial."). So long as the County follows these rules, a well-reasoned, evidentiary-supported decision denying a special use permit for a cell tower will be upheld by a federal court in the event the aggrieved applicant sues for alleged violations of the TCA.

But here's another critical point to know. Do not be intimidated by threats from a jilted applicant like Skyways Towers that it will sue the County in federal court if the County denies its cell tower application. Another Big Lie wireless carriers and cell tower developers frequently disseminate to local government officials and attorneys is that they will sue the local government in federal court if their permit applications are denied, and they will recover millions of dollars in damages and attorneys' fees that taxpayers will be forced to pay. Such extortionate threats, for some reason, often hit a nerve, and cause local governments to capitulate. But this unethical intimidation is actually completely baseless. Twenty years ago, the United States Supreme Court definitively ruled that *a wireless carrier can never sue for and recover from a State or local government monetary damages or attorneys' fees if the State or local government refuses to allow the carrier to build and operate a requested wireless communications facility, even if a court eventually decides the State or local government actually has violated the TCA.* As to the latter point, **the United States Supreme Court has expressly held, in *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), that neither monetary damages nor attorneys' fees are available to a prevailing plaintiff in an action brought under the TCA.** So even if Skyways Towers sues the County in federal court for denying the special use permit -- and the County somehow loses that lawsuit -- the County can never be liable for monetary damages or for Skyway Towers' attorneys' fees. The worst that could happen is that the County would be required to issue the special use permit for the project. **Any fears or implied threats that a wireless carrier will bankrupt the County through litigation if the County denies a permit for a wireless communications facility are completely unfounded.**

What Happens If The County Denies The Cell Tower Permit And Skyway Towers Sues The County In Federal Court

As I will discuss below, the Planning Commission's July 31, 2025 decision approving the special use permit for the cell tower lacks any rational basis and is contrary to the County Land Use Regulations and must be reversed. Assuming that the County Commissioners agree and issue a written decision supported by substantial facts in the record, Skyway Towers still may sue the County in federal court alleging that the permit denial violates the TCA. This is standard operating procedure for wireless carriers and cell tower developers. Skyway Towers would likely allege that (1) the County's written decision is not supported by substantial facts in the record; and (2) the denial constitutes "an effective prohibition" of personal wireless services for the wireless carriers who seek to place antennas on the proposed tower. The federal courts are all too familiar with these cases, and the federal case law governing them is well-developed. Taos County is venued in the Tenth Circuit of the United States Court of Appeals, and so, federal case law from the Tenth Circuit Court of Appeals sets the legal standard.

The first federal claim likely would be brought under 47 U.S.C.§332c(7)(B)(iii) and would allege that the County's written decision denying the special use permit was not "supported by substantial evidence contained in a written record." "[T]he 'substantial evidence' standard of section 332 is the traditional standard employed by the courts for review of agency action." *U.S. Cellular Corp. v. Bd. of Adjustment of City of Seminole, Okla.*, 180 F. App'x 791, 794 (10th Cir. 2006). "Substantial evidence is such evidence that a reasonable mind might accept as adequate to support the conclusion reached by the decisionmaker. Substantial evidence requires more than a scintilla but less than a preponderance. The possibility of drawing two competing conclusions

from the evidence does not prevent a finding of substantial evidence. While a reviewing court has no power to substitute its own conclusions for those of the fact-finder, if the record as a whole contains conflicting evidence, the fact-finder must adequately explain its reasons for rejecting or discrediting competent evidence." *T-Mobile Cent., LLC v. United Gov't of Wyandotte Cty., Kansas City, Kan.*, 546 F.3d 1299, 1307 (10th Cir. 2008). Substantial evidence review under Section 332(c)(7)(B)(iii) does not involve consideration of "the substantive federal standards imposed by the TCA." *Id.* Rather, the court must "look to the requirements set forth in the local zoning code to determine the substantive criteria to be applied in determining whether substantial evidence existed to support the [locality's' decision." *Id.* Thus, if a local government "invent[s] a criterion for which the applicable local ordinances [do] not provide," it "fail[s] to act on the basis of substantial evidence." *Id.* at 1308, 1310 (holding that the locality erred by relying on criteria with "no basis" in its code).

In this case, the Planning Commission failed to act on the basis of substantial evidence because the evidence either was insufficient to meet the requirements of the Land Use Regulations or the evidence directly contravened the Land Use Regulations. We are asking the Board of County Commissioners to review the record and the new evidence being added to the record, and we expect that the Board of County Commissioners will reach this determination. If it does so and supports the determination in writing, pointing out the substantial supporting evidence in the record, the federal court will have no difficulty in sustaining the decision on the first expected federal claim.

The second anticipated federal claim would be that the Board of County Commissioners' reversal of the special use permit has the effect of prohibiting Skyway Towers' provision of personal wireless services in the relevant area, which would constitute a violation of 47 U.S.C.§332(c)(7)(B)(i)(II). "[T]he TCA provides no guidance on what constitutes an effective prohibition, so courts ...have added judicial gloss." *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 48 (1st Cir. 2009). A "carrier has the burden to show an effective prohibition has occurred." *Id.*

The Tenth Circuit has adopted the legal standard for effective prohibition which is followed by most of the Circuits. In *AT&T Mobility Servs., LLC v. Vill. of Corrales*, 642 F. App'x 886, 889 (10th Cir. 2016), the Tenth Circuit held that a party may prevail on its claim of effective prohibition for the denial of a permit by showing that (1) a state or local government decision prevents the applicant from closing a significant gap in the availability of wireless services and (2) the manner in which the applicant proposes to fill the significant gap in service is the least intrusive means of doing so. In *Sposi v. Santa Clara City, Utah,* 2021 WL 5163209 (D. Utah 2021), resident property owners challenged the City's issuance of a conditional use permit ("CUP") to Verizon Wireless which allows it to build a 100-foot tall cell tower in an agriculturally-zoned area that had been designated as open space on the City's General Plan. The district court agreed with the residents, and voided the CUP. In its analysis, the Court explained the factors the Tenth Circuit considers in determining what "a significant gap" means with respect to the "effective prohibition" test. The Court stated: "Although 'there are no bright-line rules' when determining if a significant gap exists, potential factors to consider are 'the gap's physical size and location, the number of affected customers, dropped-call or failure rates, and whether the purported gap affects a plaintiff's ability to provide outdoor, in-vehicle, and in-

building coverage." *Id.* at *23. The Court added: "Also relevant is the population of the area and whether a gap 'straddles a significant commuter highway or a well-traveled road that could affect large numbers of travelers and the people who are trying to communicate with them. *Id.*, citing *Vill. of Corrales*, 642 F. App'x at 889, 891. Significantly, the Court cautioned "[H]oles in coverage or 'dead spots' that are limited in number or size do not constitute a *significant gap* in service. *Id.*, citing *Village of Corrales*, 642 F. App'x at 890.

The second prong of the legal test for "effective prohibition," assuming that the court first finds that a significant gap in coverage exists, is for the court to "determine if the proposed tower is the least intensive means of closing a significant gap in services." *Sposi*, 2021 WL 51563209 at *24. "When evaluating such claims we are in the realm of trade-offs between the carrier's desire to efficiently provide quality service to customers and local governments' primary authority to regulate land use." *Omnipoint Holdings*, 586 F.3d at 51. "On the one hand, 'a carrier cannot win an effective-prohibition claim merely because local authorities have rejected a carrier's preferred solution." *Sposi*, 2021 WL 51563209 at *24, quoting *Omnipoint Holdings*, 586 F.3d at 52. "On the other hand, 'there are limits on town boards' ability to insist that carriers keep searching regardless of prior efforts to find locations or costs and resources spent.'" *Sposi*, 2021 WL 51563209 at *24, quoting *Ominipoint Holdings*, 586 F.3d at 52.

Assuming the Board of County Commissioners issues a well-reasoned written decision, grounded in substantial evidence in the record, overturning the Planning Commission's July 31, 2025 decision which had erroneously and arbitrarily granted the application for the cell tower special use permit, the decision of the Board of County Commissioners will easily survive any challenge in the federal court under the TCA. The standards are not hard to meet based on the reasons I will summarize below as to why the Planning Commission's decision must go.

The Planning Commission's July 31, 2025 Decision Approving The Special Use Permit for the Cell Tower at 1489 State Highway 522 Is Arbitrary, Capricious, Irrational, and Contravenes The County Land Use Regulations And Must Be Reversed

With all due respect to the Planning Commission, the best that can be said about its July 31, 2025 Decision granting the special use permit to Skyways Towers and the Cordovas to build and operate the 195-foot tall cell tower is that it's short. Unfortunately, some of the findings are not supported by the preponderance of the evidence; certain critical findings are totally contravened by the decision itself. The bottom line is that the Decision is irrational, arbitrary, and capricious, and contravenes the Land Use Regulations. It cannot stand and must be reversed.

On September 4, 2025, the appellants, acting *pro se*, filed a remarkable notice of appeal in which they deconstruct the July 31, 2025 Planning Commission Decision, and point out, pursuant to Section 9.1.2D, the provisions of the Land Use Regulations which the Planning Commission improperly applied and the reasons supporting their claims that these challenged provisions were misapplied. I incorporate herein those challenges. Rather than reiterating what's already in the notice of appeal, I want to focus your attention on some egregious irrationalities that infect the Decision and comment more generally on what's missing which renders the Decision indefensible.

Finding 2 states that the Applicants meet the criteria of Section 4.6.1, subsection A. Use, based on Staff's analysis of the documentation submitted by the Applicants. The Planning Commission found that the proposed special use permit will provide a substantial public health, safety, and welfare benefit by providing cellular services for members of this community and for E911 Emergency Services in the event that there are medical or law enforcement emergencies. But that finding is not supported by a scintilla of record evidence stated in the Decision. The finding is totally conclusory. The Decision fails to specify the documentation submitted by the Applicants or the Staff analysis of same, nor explain why the Planning Commission determined that the Staff analysis and the documentation proved that the cell tower will provide a substantial public health, safety, and welfare benefit. There is no evidence in the record showing that 911 calls placed by cell phone users cannot connect to emergency service dispatch or disconnect. In fact, today, the FCC requires that any cell call placed to 911 be picked up immediately by any cell tower having connectivity, regardless of whether the caller is a subscriber. Moreover, AT&T, the wireless carrier with the most robust signal strength in San Cristobal, offers satellite-based SOS capabilities for many models of cell phones. If an emergency call is placed and no wireless signal is present, these satellite-capable phones will connect to the satellite constellation and provide emergency communication capability to the user.

Further, Section 4.6.1A, Use, requires the development to "be sensitive to and consistent with the existing traditional and historic uses in the neighborhood." The traditional and historic use in the San Cristobal neighborhood is rural, agricultural, and pastoral in a splendid semi-arid Western mountain setting. Allowing a raw steel industrial monopole cell tower to soar 195 feet into the sky, visible throughout San Cristobal and its historic environs, is the antithesis of being sensitive to and consistent with existing and historic uses in the neighborhood. The Planning Commission failed to consider this requirement. This section also requires the Planning Commission to analyze whether the development would have a substantial impact on the immediate neighborhood. The Planning Commission failed to address the substantial impact of the tower on the viewshed to adjacent and nearby property owners and residents, the impact of such a degraded viewshed on property values, and the detriment to tourism and visitors to the historic D.H. Lawrence Ranch, the Taos Goji Retreat, and the San Cristobal Mission Chapel.

Remarkably, the proposed tower site sits only a few hundred feet off of NM State Highway 522 which is part of the Enchanted Circle Scenic Byway, a famously scenic highway which the State of New Mexico heavily markets for tourism. The photo simulations of the proposed tower in situ submitted by the applicants in support of their special use permit illustrate very well how awful and destructive the tower will be to the viewshed, particularly as seen from the soon-to-be formerly enchanted and now cursed segment of State Highway 522.

With respect to Section 4.6.1, subsection B, Visual Compatibility, the Planning Commission issued Finding 3 which states that Staff determined that the applicants will need to disguise the proposed cell tower to look like a pine tree which blends in more with the neighborhood character than an undisguised cell tower. While it's arguable that a Frankenpine faux pine tree cell tower, which looks like an upturned toilet bowl brush standing on its handle, is much prettier than a bare industrial steel monstrosity of a cell tower, with four birthday cake layers of atrocious antenna arrays piled on top of each other, in its actual Decision, the Planning Commission required the applicants to build an unadorned, uncamouflaged, lattice structure steel

cell tower. The Planning Commission, in Decision 6, failed to explain why it rejected the Staff finding that a camouflaged monopine tower was needed to comply with the Land Use Regulations, and why the Planning Commission reverted to the steel Erector Set style cell tower.

In Finding 37, the Planning Commission found that the applicants have chosen to comply with the criteria of Section 4.11.1, subsection B(2), Tower Locations), by siting the proposed tower in the undeveloped highway corridors, residentially zoned areas, or residential communities category in the Land Use Regulations. That category happens to be the second of three categories in the hierarchical list of preferred tower locations established in the Land Use Regulations. The most preferred category for locating cell towers is within areas of existing commercial development. The Land Use Regulations require applicants to demonstrate, based on technical, practical, or financial considerations, the need to move down the list and locate in areas of lower preference. Finding 37 is fatally flawed because the Planning Commission failed to explain how, if at all, the applicant demonstrated that it needed to locate the proposed cell tower in the less preferred category for tower locations rather than in the most preferred areas of existing commercial development. Perhaps the applicants failed to prove the need, as mandated by the Land Use Regulations. In any event, the Planning Commission's finding 37 fails to satisfy the requirement of the ordinance.

Finding 38 is a travesty. Section 4.11.1, subsection C, sets forth the criteria for concealed wireless telecommunications facilities. The Land Use Regulations require that concealed cell towers actually be concealed. If not concealed, they should be located to be as inconspicuous as possible and to blend in with the surroundings. In particular, the facility is supposed to be located so as to avoid producing a dominant silhouette on escarpments and mesas and to preserve view corridors. Further, it should meld with the existing topography, vegetation, buildings, or other structures to provide the greatest amount of screening. In Finding 38, the Planning Commission falsely states that applicants meet these criteria "due to the fact that the proposed communications tower will be placed within the interior of the subject property and therefore will not be within the view of the general public." That's blatantly untrue. Skyway Towers has submitted a photo-simulation analysis prepared by TEP OPCO, LCC. The photo-simulations purportedly show scaled views of the simulated tower from specified viewpoints. TEP presents its photo-simulation report by first showing a photo of an existing view from a designated location and then following up with a photo-simulation of the tower inserted into the photo, supposedly at proper scale. Looking at the TEP photo-simulation for an unadorned 195-foot tall lattice-structure cell tower, location 1 appears to be somewhere along Highway 522. The giant tower appears directly in front of the car in full view of the driver. The tower completely dominates the viewshed, and soars high above a couple of low trees. Location 2 is taken from an undesignated road a considerable distance away from the proposed tower site. Even so, the photo-simulation shows the 195-foot cell tower jutting up high above the rolling hills that provide the backdrop for this photo. Location 3 seems to be another scenic spot on Highway 522. The photo-simulation shows the monstrous tower dominating the otherwise pristine open Western mountain view. The same is true for Location 4. The applicants have taken zero effort to conceal this odious tower which casts a sorry spell on the Enchanted Highway. Finding 38 perfectly illustrates the utter irrationality and arbitrariness of the Planning Commission's Decision.

In Finding 39, the Planning Commission recognized that Staff determined that in order to comply with Section 4.11.1, subsection D of the Land Use Regulations, the proposed cell tower will have to be disguised as a fake pine tree in order to blend in better with the neighborhood character. But as noted earlier, in Decision 6, the Planning Commission approved a non-camouflaged lattice-structure tower instead, thereby eviscerating Finding 39 without explanation. Again, this Decision is arbitrary and irrational and violates the ordinance.

Finding 40 is factually wrong. Section 4.11.1, subsection E requires that "Free-standing wireless telecommunications facilities shall be separated by a distance of five (5) miles." On September 16, 2025, the County of Taos Board of Commissioners approved a special use permit for a 95-foot tall cell tower in Arryo Hondo. This cell tower will be only about 3 1/2 miles from the proposed site of the cell tower in San Cristobal. The proposed cell tower at 1489 State Highway, San Cristobal thus will violate Section 4.11.1, subsection E, contrary to Finding 40.

In Finding 41, the Planning Commission recognized that Staff determined that in order to comply with Section 4.11.1, subsection F of the Land Use Regulations, the proposed cell tower will have to be disguised as a fake pine tree in order to comply with the color and camouflage requirements of the ordinance. But in Decision 6, the Planning Commission approved a non-camouflaged lattice-structure tower, contravening Finding 39 without explanation. Again, this Decision is arbitrary and irrational and violates the ordinance.

So just on the face of it, the July 31, 2025 Decision of the Planning Commission is flawed for many reasons and must be reversed. But the problems with the Decision go beyond what the Planning Commission actually did. The problems include what the Planning Commission didn't do.

The Planning Commission failed to address the co-location requirements of Section 4.11.1, subsection C. The Planning Commission never made the applicants prove that a bona fide need exists for the cell tower. The materials that the applicants provided to the Planning Commission to support a showing of need were laughably inadequate and unsubstantiated. The applicants made no effort to show that they explored, using combinations of existing locations, or other techniques or technologies to obviate the need for a new freestanding cell tower, despite the requirement in the ordinance that they do so. The applicants failed to provide documentation of existing cell towers or other wireless communications facilities in the vicinity of the proposed tower, as required expressly in Section 4.11.1, subsection I.

In reviewing the record, and considering the new evidence introduced for the upcoming hearing before this Board, the County of Taos Board of Commissioners must reverse the Planning Commission's July 31, 2025 Decision and deny the special use permit.

This Planning Commission Should Reject Skyway Towers' Proposed 195-Foot Cell Tower At 1489 State Highway 522 in San Cristobal, New Mexico

The County Land Use Regulations are valid and must be enforced. It is the duty of this Board of County Commissioners, upon reviewing the evidence, to insure that no special use permit for a cell tower be issued unless the applicant has proved by a preponderance of the evidence that it meets each and every requirement of the Land Use Regulations. The Planning

Commission July 31, 2025 Decision approving the requested special use permit, on its face, is arbitrary, irrational, and capricious. It makes a factual finding that a camouflaged monopine cell tower is required, and then in the decision, it orders that an uncamouflaged lattice cell tower be built. The Planning Commission fails to make required findings on critical issues. The Decision lacks evidentiary support on others. With all due respect to the Planning Commission, the Decision contravenes the Land Use Regulations, and is "dead on arrival" before this Board of County Commissioners.

San Cristobal is a very small community of just 117 occupied households. The overwhelming majority of the San Cristobal community opposes Skyway Towers' proposal. To ignore this overwhelming opposition and allow a cell tower which egregiously violates the County Land Use Regulations to be built and operate would betray the very community you serve. This 195-foot tall cell tower has no place in a pristine viewshed that helps define the County of Taos' character, local economy, and quality of life. Skyway Towers' cell tower proposal must be rejected, and the July 31, 2025 Decision by the County of Taos Planning Commission must be reversed.

Thank you for your consideration.

Respectfully submitted,

Robert J. Berg

/s/ Robert J. Berg