

Appeal of Planning and Zoning Commission  
Conditions of Approval of CUPFY2023-0002,  
CUPFY2023-0003, and Planning Officials  
Decision DSRFY2023-0001 regarding a wireless  
facility located at 8247 W. State Street

# Appeal Procedure Rules

- Not de novo
- Burden of proof is on the appellant
- New material must be remanded to decision maker
- Grounds for **affirming the decision**, and denying the appeal, are summarized below:
  1. The findings, inferences, conclusions, or decisions **are not in violation of constitutional or statutory provisions**;
  2. The findings, inferences, conclusions, or decisions **are not in excess of statutory authority**;
  3. The findings, inferences, conclusions, or decisions **are not made upon unlawful procedure**;
  4. The findings, inferences, conclusions, or decisions **are supported by substantial evidence on the record**;
  5. The findings, inferences, conclusions, or decisions **are not arbitrary, capricious, or an abuse of discretion**.
- Grounds for **vacating, remanding, or reversing** (granting the appeal) the decision are summarized below:
  1. The true **intent of codes has not been correctly interpreted**;
  2. The **provisions of codes do not apply, or a better form should have been applied**;
  3. The **findings, inferences, conclusions, or decisions are not supported by weight of evidence**;
  4. There is **significant error in the application of the code provisions**;
  5. There is **significant violation of the notice provisions**;
  6. If there are **significant errors that were committed by the decision body or in the materials provided to the decision body**;
  7. There is **significant error in the application of approved policies that are important to sustaining the action taken**.

# APPEAL

1. The appeal is of all conditions of approval.

## GROUND

1. The conditions adversely affect the appellant by contravening rights under federal law because the requested changes are not substantial as identified by section 6409.
2. There is no health and safety basis for the conditions.

# RESPONSE

1. The appeal of DSRFY2023-0001 and CUPFY2023-0002 **may** not correctly be before the City Council.
2. The applicant is responsible for the pre-existing conditions, regardless of requested changes.
3. Removal of all conditions of approval including the requirement of a building permit, etc. exceeds the federal preemptions for Eligible Facilities Requests (EFR).
4. The failure to comply with conditions associated with the prior approval of construction or modification of the tower or base station, nullifies the request from being an EFR, and could nullify *legal* non-conforming status of the facility.
5. The conditions of approval provide a nexus to health and safety (however, this is a moot point as the conditions of approval are either clearly a health and safety issue (such as requiring a building permit) and/or are pre-existing conditions of approval (such as adhering to landscaping to conceal the facility).
6. The request does not meet the grounds for reversing, remanding, or vacating the decisions.

# THE APPEALS MAY NOT BE CORRECTLY BEFORE THE CITY COUNCIL

## **The Appeal of CUPFY2023-0002 and DSRFY2023-0001 Are Not Timely**

- The date of action is the date that the decision maker formalizes their decision. Action is not defined as the date that the applicant is provided with a signed copy.
- On December 9, 2023, the City Council deferred final decision-making authority to the Planning and Zoning Commission because the applications would not be able to be reviewed within 15 days of the Commission's Action on December 21, 2022.
- Staff reports and written draft decision documents including findings of fact, conclusions of law, and decision were provided on December 16, 2022. All staff reports and draft decision documents provide written notice of 15-day right to appeal.
- On December 19, 2022, staff met with and acted on DSRFY2023-0001.
- On December 21, 2022, the Planning and Zoning Commission took the action to approve the applications in accordance with the draft decision document in the affirmative.

**8-6A-7C.2.d.** When a design review consultation is required as part of an application that requires a public hearing, public testimony regarding design will be heard by the planning and zoning commission at the planning and zoning commission's scheduled hearing.

**8-6A-9 A.2.** Any action taken by the planning and zoning commission regarding conditional use permits, which would be final unless appealed, may be reviewed and heard by the city council, when an appeal is not made but the city council determines in a public meeting, within fifteen (15) days of commission action, that there may be significant adverse impact to the city as a result of the final decision by the commission, making the city affected or aggrieved by the final decision. Such council reviews are not de novo.

**3. An appeal shall be made on the form provided by the city and filed with the city *within fifteen (15) days after the action of the decision maker.***

### **Date of Action:**

DSRFY2023-0001 December 19, 2022 = 23 days

CUPFY2023-0002 December 21, 2022 = 21 days

CUPFY2023-0003 December 21, 2022 = 21 days

### **Date of Signature:**

DSRFY2023-0001 December 19, 2022 = 23 days

CUPFY2023-0002 December 21, 2022 = 21 days

CUPFY2023-0003 December 27, 2022 = 15 days

## THE APPEALS MAY NOT CORRECTLY BEFORE THE CITY COUNCIL

- Upon receipt of the appeals, the Planning Official suggested that the applicant should apply to amend their conditional use permits and design review.
- The appellant declined and appealed to the legal department to override the decision.

### **Not Following Due Process**

**8-6A-2 C.** Planning Official: The planning official is responsible for the application of the development code. The planning official shall administer and enforce this title and fulfill all the duties imposed by law including, but not limited to:

1. Interpret provisions in the enforcement and administration of this title

**Table 8-6A-1** Authorities and Processes identifies appealable decisions. Interpretations of code are not appealable.

# PRE-EXISTING CONDITIONS OF APPROVAL ARE REQUIRED

Congress enacted section 6409(a) in 2012 to streamline review and adopted rules to implement in 2014.

**FCC 6409 Rules pgs. 15-16 (1251-1252) #81-- existing wireless towers must have been reviewed under applicable zoning laws/ approvals to be eligible**

Previous approvals required landscaping, irrigation, and concealment.

- See analysis of staff report pages 14-15 and supplementary previous approvals pages 18-57- lack of adherence with previous conditions result in non-compliance with previous approvals

## **GCC 8-1A-4**

The regulations of this title shall apply and govern development and use of all properties: a) within the corporate limits of the city; and b) within the area of city impact, based on mutual agreement between the city and Ada County.

A. No person or public agency shall construct, alter, or move a structure; or change the use of a structure; or undertake any development unless:

1. The proposed use, structure, division of property, or modification to a division of property complies with this title, is not illegal, and provides safety as defined herein; and

2. Any required approval is first obtained as provided by chapter 6, "Administration," of this title, and any applicable conditions of approval are met.

## **GCC 8-1B-3 Nonconforming Uses**

1.A [legal] nonconforming use may continue provided that the use remains lawful and is not abandoned, expanded, or extended.

## **8-6A-13**

"It shall be unlawful for any person, firm or corporation, or property owner to authorize any person, firm or corporation, to occupy property regulated by this code, or cause same to be done, in conflict with or in violation of any of the provisions of this code."

**GCC Table 8-2B-1** Wireless Facility Requires a Conditional Use Permit

# RESPONSIBILITY

## **8-6B-2.C. 3**

Transferability: Conditional use permits shall not be transferable from one parcel of land to another. Unless otherwise stated in the conditions attached to a permit, **the permit shall be granted to the applicant and successors in interest to the premises for which it was approved.**



# Conditional Use Permit 03-17-CU

- Tower to be concealed with landscaping that is taller than 6'; 75% evergreens; interspersed with lower evergreens
- Landscaping to continually maintained and provide automatic, underground sprinkler system

**Ord 803 6-10-2003**

**GCC 3-10-7: Cellular Tower Locations**

**A. Purpose**

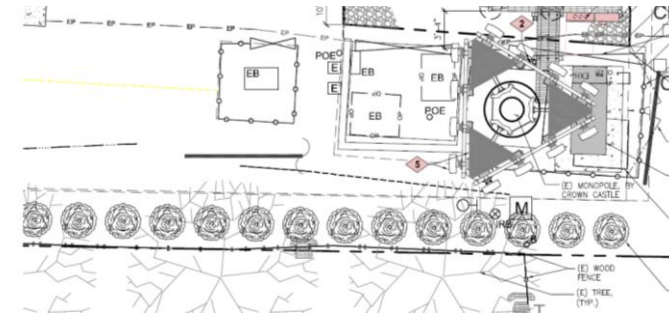
Cellular towers can create an aesthetic nuisance when constructed in, or within view of, residential neighborhoods. This section of the Garden City Code is a means to reduce the negative visual impact of cellular towers within Garden City.

# CUPFY2016-5

- Conditioned to comply with 03-17-CU and 05-05-CU
- 05-05-CU
  - shows landscaping to the 10' north, 20' south, and 5' west sides of the property- 4,102 square feet of landscaping
  - All landscaping shall be continuously maintained with a permanent underground sprinkler system

# DSRFY2016-0014 staff report attachments

- Install one class II or III for every 50' lineal frontage (street side)
- Landscaping shall be continually maintained and in good health
- conditions require 70% or more of living material to comply with 03-17-CU required 75% evergreens interspersed with evergreen shrubs
- A 10' perimeter landscaping area
- The approved building permit plans BLDFY2017-0073 show a row of arborvitae trees at south property line.



# THE FAILURE TO COMPLY WITH PRIOR APPROVAL NULLIFIES THE REQUEST FROM BEING AN EFR

**“The Commission provides that the modifications of an existing tower or base station that occur after the passage of the Spectrum Act will not change the baseline.”**

## **New FCC 6409**

(1) for towers outside of public rights-of-way, it increases the height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater; for those towers in the rights-of-way and for all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater;

(2) for towers outside of public rights-of-way, it protrudes from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for those towers in the rights-of-way and for all base stations, it protrudes from the edge of the structure more than six feet;

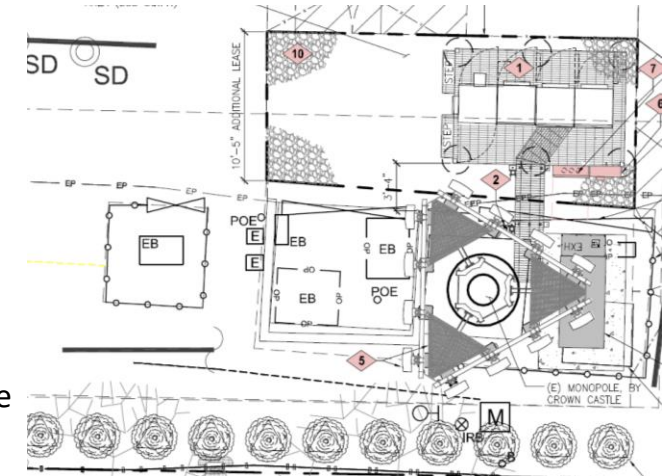
3) it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets;

(4) it entails any excavation or deployment outside the current site of the tower or base station;

(5) it would defeat the existing concealment elements of the tower or base station; or

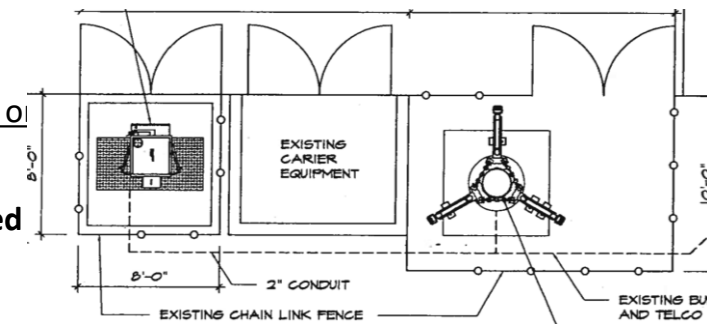
(6) **it does not comply with conditions associated with the prior approval of construction or modification of the tower** or base station **unless** the compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding “substantial change” thresholds identified above.

**“ A modification constitutes a substantial change if... or 2) does not comply with pre-existing conditions associated with the prior approval of construction or modification” Pg .19 (1255) FCC 6409 Rule**



**BLD2017-0073 plans**

See line 105 DR transcript  
noting additional lease area



**BLD2008-0055 plans**

# THE FAILURE TO COMPLY WITH PRIOR APPROVAL COULD NULLIFY LEGAL NON-CONFORMING STATUS

## GCC 8-6B-2.C. 6 Revocation

- a. The commission shall have the authority to review any conditional use permit based upon a written complaint; a change in any applicable city ordinances; or the conditions attached to the permit by the commission.
- b. If the commission finds that there is a probable cause for revoking a conditional use permit, the commission shall give notice of a hearing to the applicant and the public in the same manner as a notice of a hearing for an application for a conditional use permit. The commission shall hold a hearing on the question of revoking the permit and, if it finds that grounds for revocation exist, it may revoke the permit.
- c. The commission may revoke a conditional use permit for any of the following grounds:
  - (1) Violation of this code;
  - (2) Violation of the conditions of the permit after written notice of the violations and a ten (10) day period to correct said violations; or
  - (3) Causing or allowing a nuisance, as determined in title 4, chapter 3 of this code, in connection with the use for which the permit was granted.

FCC page 33 (1269)  
“Existing= A  
constructed tower  
or base station is  
existing for the  
purposes of this  
section if it has  
been reviewed and  
approved under the  
applicable zoning or  
siting process...”

# NEXUS TO HEALTH AND SAFETY

## New FCC 6409

**“the Commission finds that Congress did not intend to exempt covered modifications from compliance with generally applicable laws related to public health and safety”**

- 8-6B-2.C.4**
4. Conditions Of Approval: Upon the granting of a conditional use permit, **the commission may attach conditions** to said permit including, but not limited to, those:
- a. **Minimizing adverse impact on other development;**
  - b. Controlling the sequence and timing of development;
  - c. Controlling the duration of development;
  - d. **Assuring that development is maintained properly;**
  - e. Designating the exact location and nature of development;
  - f. **Requiring provision for on site or off site public facilities or services;**
  - g. Requiring more restrictive standards than those generally required in an applicable ordinance;
  - h. Requiring mitigation of effects of the proposed development upon service delivery by any political subdivision providing services within the planning jurisdiction.

**8-6B-2. D. Required Findings**

- In order to grant a conditional use permit, the commission shall make the following findings:
- 1. The **use is appropriate to the location**, the lot, and the neighborhood, and is **compatible with the uses permitted in the applicable zoning district;**
  - 2. The use will be supported by adequate public facilities or services to the surrounding area, or conditions can be established to mitigate adverse impacts;
  - 3. The use will not unreasonably diminish either the health, safety **or welfare of the community**; and
  - 4. The use is not in conflict with the comprehensive plan or other adopted plans, policies, or ordinances of the city.

**Idaho Code 67-6512 – LLUPA Special Use Permits, Conditions, and Procedures**

- (d) Upon the granting of a special use permit, conditions may be attached to a special use permit including, but not limited to, those:
- (1) Minimizing adverse impact on other development;**
  - (4) Assuring that development is maintained properly;**
  - (5) Designating the exact location and nature of development;
  - (6) Requiring the provision for on-site or off-site public facilities or services;
  - (7) Requiring more restrictive standards than those generally required in an ordinance;

Police power is the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants.

Idaho Constitution Article 12 Section 2 -enacts zoning as a police power provided ordinances are adopted via the public hearing process.

LLUPA 67-65 Requires zoning.

67-6502. PURPOSE. The purpose of this act shall be to promote the health, safety and general welfare of the people of the state of Idaho as follows

## Planning and Zoning Transcript-92

Kent Brown: Uh, since I ask that this be heard and I appreciate your presentation, um, let me ask a question and it may be on your last slide, Mr. Schneider. And I - I realized that you did not participate in this when the previous CUs were approved for this site in 2003 and 2005. And you have said that, uh, you, on behalf of the two applicants, uh, that you were agreeable with all the requirements. Most of those requirements, in fact, maybe all of them involving landscaping, uh, taking down a chain link fence that has, uh, barbed wire on it, and putting around privacy fencing were requirements in those previous CUs. So my question is and, apparently, uh, we don't have a choice about whether or not we're gonna - we're gonna approve this, uh, in accordance with federal law, but are we likely to see those conditions being performed, or will they be something that is not gonna happen again?

Gary Abrahams: And I apologize. Is that a question for me?

Kent Brown: Yes.

Gary Abrahams: Okay. Um, so this is, as I understand it, um, and - and it - I've discussed this with Crown. My understanding is that the conditions that are referenced are, uh, pertain to the original CUP approval going back I think you said 2003. That was my understanding was it was about 20 years ago. Um, so there are original conditions from the CUP and, um, my understanding is that, um, a jurisdiction cannot impose new conditions on an application. However, the original CUP contained certain conditions that were not complied with. And - and, again, my understanding of 6409 is those are two completely different things - is that the original conditions from the CUP which were not complied with compliance can be enforced, but they are not new conditions per se. And so, in talking to Hanna and in going through the conditions that have been outlined in both staff reports is all that's been reiterated is the original conditions from 20 years ago. None of those are new conditions today. And I've asked for further clarification from Crown. But my understanding to date is that, um, if it was an original condition that was not complied with that, it can be, uh, enforced at this time.

DR Transcript 131- Obviously, it can't be conditioned or can't put additional design requirements on it

DSR Transcript- 227 It's not a - it's not a new condition. It's an old condition that has yet to be met and maintained.

DR Transcript 109 - And is there any accommodations or thought given to, you know, a CMU wall between the generator and the adjoining neighbors 'cause it does look like that, you know, there's bedroom - bedroom windows 25 feet to the south it would be.

# CONCLUSIONS

1. The applicant is responsible for the pre-existing conditions, regardless of requested changes.
2. Removal of all conditions of approval including the requirement of a building permit, etc. exceeds the federal preemptions for Eligible Facilities Requests (EFR).
3. The failure to comply with conditions associated with the prior approval of construction or modification of the tower or base station, nullifies the request from being an EFR, and could nullify *legal* non-conforming status of the facility.
4. The conditions of approval provide a nexus to health and safety (however, this is a moot point as the conditions of approval are either clearly a health and safety issue (such as requiring a building permit) and/or are pre-existing conditions of approval (such as adhering to landscaping to conceal the facility).
5. The request does not meet the grounds for reversing, remanding, or vacating the decisions.
6. By not applying applicable regulations and procedures, Garden City's application of code would be arbitrary and capricious.



# DOES NOT MEET CRITERIA TO VACATE OR REVERSE DECISIONS

## Grounds for affirming the decision

1. The findings, inferences, conclusions, or decisions are not in violation of constitutional or statutory provisions;
2. The findings, inferences, conclusions, or decisions are not in excess of statutory authority;
3. The findings, inferences, conclusions, or decisions are not made upon unlawful procedure;
4. The findings, inferences, conclusions, or decisions are supported by substantial evidence on the record;
5. The findings, inferences, conclusions, or decisions are not arbitrary, capricious, or an abuse of discretion.

Thank you