

Before the Planning Commission

Planning Department File No. 2019-02-006

**CONDITIONAL USE APPLICATION
FOR
Wireless Telecommunication Facility
And
Sage-Grouse Rule Permit
And
Variance from Setback Requirements**

Planning Commission Meeting Dates: March 28, April 25, May 23, & June 27, 2019

- 1. OWNER OF RECORD:** **Harry Stoddart**
5475 Iron Mountain Road
Jordan Valley, OR 97910
- 2. APPLICANT:** **Eco-Site, Inc.**
240 Leigh Farm Road
Durham, NC 27707
- 3. ACTION:** CUP approval of an unmanned wireless telecommunication facility consisting of a 500' guyed tower with anchor tenant's tower mounted antenna, radios, and cabling. Ground equipment will be enclosed in a shelter. Applicants request variance approval to setback requirements on the western property line which abuts BLM land. Applicants request a sage-grouse rule permit pursuant to OAR 660-023-0115.
- 4. PROPERTY IDENTIFICATION:** Tax Lot 200, T30, R38E, Sec. 2, Map 30S38E, Malheur County Reference Number 11754. Aka 5475 Iron Mountain Road, Jordan Valley, OR
- 5. PROPERTY LOCATION AND DIRECTIONS:** From Burns Junction, head north on the Steens Highway after approximately 2.5 miles, turn right (east) on Iron Mountain Road. The proposed site is on the right in approximately 3.25 miles.
- 6. ZONING:** Exclusive Range Use (C-A2).
- 7. PARCEL SIZE:** 355.87 acres.
- 8. PARCEL USE:** The parcel has an existing single-family dwelling and is exclusively used as rangeland.
- 9. SURROUNDING USE:** The surrounding area is exclusively used as rangeland.

10. **ACCESS:** Iron Mountain Road provides access to the proposed site.
11. **SANITATION REQUIREMENTS:** No sanitation is required.
12. **FIRE PROTECTION:** The proposed Wireless Telecommunication Facility is not within a fire district.
13. **NATURAL HAZARDS:** None known.
14. **WATER RIGHTS:** N/A.
15. **ZONING HISTORY:** In 2015 a zoning permit for a replacement dwelling was issued.

I. GENERAL CONDITIONAL USE CRITERIA

Malheur County Code (MCC) 6-6-7, OAR 660-033-0130 – GENERAL CRITERIA TO EVALUATE SUITABILITY: In considering the suitability of proposed conditional uses, the Planning Commission shall base its decision upon the following criteria:

- A. Comprehensive Plan goals and policies, as applicable.

Finding: The county comprehensive plan and county zoning regulations provide the conditional use process for a wireless telecommunication facility.

- B. Specific plan recommendations.

Finding: MCC 6-6-8-8 regulates the conditional use process for a wireless telecommunication facility.

- C. Existing development and viewpoints of property owners in the surrounding area.

Finding: Letter notice was sent to adjoining landowners and published in the Argus Observer on March 5, 2019. No comments were received.

- D. Availability of services and utilities.

Finding: There is no burden to any of the services and utilities anticipated.

- E. The effect of the proposed use on the stability of the community's social and economic characteristics.

Finding: The proposed tower will have no effect on the farming/ranching practices that would interfere with the stability of the community's social and economic characteristics.

- F. It does not interfere with traditional fish and wildlife use of habitats determined critical or sensitive in the Fish and Wildlife Habitat Protection Plan for Malheur County.

Finding: Applicant has contacted ODFW, specifically to assess the impact of the installation on the greater sage grouse. While the installation is in a designated low density area for sage grouse, the installation qualifies as a large-scale development. Additional communication between applicant and the ODFW will quantify the impact, resulting in a determination of the appropriate level of mitigation. Minimum soil erosion will result from the clearing of the project area.

G. General Criteria

1. Increasing setbacks of structures to reduce possibilities of overshadowing adjoining property, noise, odor or night lighting nuisances.

Finding: There are no anticipated adverse effects to air, water or land resource quality.

2. Landscaping improvements for the visual benefits of the subject site and for the improved appearance of the neighborhood and County.

Finding: The site location is 2.65 miles from Steens Highway and does not significantly detract from the character of the area.

3. Location and size of driveway access points and right-of-way widening and improvement for present and future traffic circulation and safety.

Finding: Driveway access will be in accordance with the Malheur County Road Department.

4. Visual screening of outdoor waste and storage areas.

Finding: No waste storage areas will be located onsite.

5. Control and focusing of outdoor lighting to avoid glare being directed beyond property limits.

Finding: Eco-Site will only install lighting as required by the FAA pursuant to the FCC Towair Determination.

6. Special criteria listed below, as applicable.

H. Allowance of Certain Uses: A use allowed under Section 6-3A-3 of this Title shall be approved only where it is found that the use will not:

1. Force a significant change in accepted farm or forest practices on surrounding

- lands devoted to farm or forest use; or
- 2. Significantly increase cost of accepted farm or forest practices on surrounding lands devoted to farm or forest use.

Finding: No agricultural efforts are currently evident in the area. Areas not enclosed by fencing will remain available for whichever use owner chooses.

II. SPECIFIC CONDITIONAL USE CRITERIA:

MCC 6-6-8-8 – Wireless Telecommunication Facilities

A. Siting Prioritization:

1. All wireless telecommunication facilities shall be sited in accordance with the following priorities, in order of preference:
 - a. Collocation by placement of antenna or other transmission and reception devices on an existing tower, building or other structure such as a utility pole or tower, water tank or similar facility.
 - b. Use of alternate technology whereby transmission and reception devices are placed on new or existing structures which are consistent in height with and sited similarly to types normally found in the surrounding are, such as telephone, electrical, or light poles.
 - c. Siting of a new tower in a visually subordinate manner. As used in this subsection “visually subordinate” means the relative visibility of a wireless telecommunication facility where that facility does not noticeably contrast with the surrounding landscape. Visually subordinate facilities may be partially visible, but not visually dominant in relation to their surroundings as viewed from residences, highways and other vantage points.
 - d. Siting of a new tower in a visually dominant location, but employing concealment technology. As used in this subsection a “concealment technology” means technology through which a wireless telecommunication facility is designed to resemble an object present in the natural environment or to resemble a building of a type typically and customarily found in the area.
 - e. Siting of a new tower in a visually dominant manner without employing concealment technology.

Finding: There are no suitable existing structures found in the search area to accommodate the technological needs. The proposed tower is 2.7 miles from the Steens Highway. The relatively narrow profile of the guyed tower and its distance from the travel corridor will effectively subdue its visual impact. Concealment technologies typically explored for wireless telecommunication facilities are not consistent with or effective for this type of installation.

B. Height, Setback and Access Requirements:

1. Wireless telecommunication facilities shall be limited to the height necessary to provide the service.

Finding: Attached technical documentation supports the need for a 500' tower in the area to support the needs.

2. Notwithstanding the setback requirements in the zone in which the facility is to be located, the following setbacks apply. Telecommunication towers shall be:
 - a. Set back from the property line at least the height of the tower plus ten percent (10%). A "tract" (contiguous property under the same ownership) shall be considered a single parcel for the purposes of setbacks.

Findings: To accommodate the property owner's wish to site the tower at a distance from the residential structures on the property, Eco-Site is requesting a setback variance to the western property line.

- b. Except as provided in subsection B2b(1) of this section, the plot leased by the licensed carrier for the wireless telecommunication facility shall be at least six hundred feet (600') from residences and schools not on the applicant's tract, or as far away from nearby residences and schools as it is sited from the closest dwelling on the applicant's tract.

Finding: The proposed lease area is 100' x 100'.

1. A facility may be sited closer to a school when the school district makes a request and demonstrates the facility is necessary for educational purposes.

C. Construction Standards:

1. The following construction standards shall apply to all new or replacement telecommunication facilities:
 - a. No lighting of wireless telecommunication facilities is allowed, except as required by the Federal Aviation Administration, Oregon Department of Aviation or as a condition of approval by the Malheur County Planning Commission.

Finding: Eco-Site will install lighting as required by the FAA pursuant to the FCC Tower Determination or other regulatory finding.

- b. Based on the existing conditions and vegetation at the proposed site, the wireless telecommunication facility shall be constructed or surfaced with materials to reduce visibility of the facility by the use of nonreflective materials that minimize glare and blend the structure into the surrounding environment.

Finding: Eco-Site will execute coloring requirements of the FAA or Oregon Department of Aviation (see (f) of this Title)

- c. Antenna(s) and associated equipment located on the same structure as the antenna shall be surfaced in a nonreflective material color to match the structure on which it is located.
- d. Warning and safety signs, up to three (3) square feet in area, are allowed. All other signs are prohibited.
- e. Equipment areas must be enclosed by a chainlink fence or equivalent with or without slats for screening.

Finding: The lease area will be surrounded by a 6ft chain link fence.

- f. Nothing in this subsection preempts the coloring requirements of the Federal Aviation Administration or the Oregon Department of Aviation.

III. VARIANCE CRITERIA

MCC 6-8-2: CIRCUMSTANCES FOR GRANTING VARIANCES: A variance may be granted only in the event that the circumstances in subsections A through D below have clearly been met.

- A. Exceptional or extraordinary circumstances apply to the property that do not generally apply to other properties in the same zone or vicinity, resulting from lot size or shape, topography or other circumstances over which the owners of property since enactment of this Title have had no control; or

Finding: The parcel is exceptional in the vicinity in that it is inhabited. Adjacent parcels are significantly larger tracts of open range land owned by the United States of America and the Bureau of Land Management. The land owner and Malheur County constituent, Mr. Harry Stoddard, has expressed interest in creating the maximum possible distance between his residence and the subject guyed tower. At the proposed location 216'11" from the western property line, the tower can be anchored within the confines of the property and leave approximately 884' between the tower and the inhabited structures.

- B. The variance is necessary for the preservation of a property right of the applicant substantially the same as owners of other property in the same zone or vicinity possess; and

Finding: As noted, the subject property is unique in its inhabited nature. The right of maximum quiet enjoyment of Mr. Stoddard's property is at issue and there is not a commensurate negation in enjoyment by 'others' as a result of the granting of the variance.

- C. The variance would not be materially detrimental to the purpose of this Title, or to property in the same zone or vicinity in which the property is located or otherwise conflict with the objectives on any County plan or policy; and

Finding: Granting of the variance would not be materially detrimental to adjacent property owners due to the uninhabited nature of those adjacent properties. Specifically, the property to the west of the subject property extends to the Steens Highway a distance of approximately 2.5 miles.

D. The variance requested is the minimum variance that would alleviate the hardship.

Finding: Alterations to the configuration would be harmful to both the lease and landowner without being helpful to ‘others’.

IV. SAGE-GROUSE RULE PERMIT CRITERIA (OAR 660-023-0115(11))

9. Program to achieve the goal of protecting significant sage grouse habitat in core area.
 - a) A county may consider a large-scale development in a core area upon applying disturbance thresholds and the mitigation hierarchy as follows:
 - A) A county may consider a large-scale development that does not cause the one-percent metering threshold described in section (16) or the three-percent disturbance threshold described in section (17) to be exceeded.
 - B) Avoidance. Before proceeding with large-scale development activity that impacts a core area, the proponent must demonstrate that reasonable alternatives have been considered and that the activity or other action cannot avoid impacts within core area habitat. If the proposed large-scale development can occur in another location that avoids both direct and indirect impacts within core area habitat, then the proposal must not be allowed unless it can satisfy the following criteria.
 - (i) It is not technically feasible to locate the proposed large-scale development outside of a core area based on accepted engineering practices, regulatory standards or some combination thereof. Costs associated with technical feasibility may be considered, but cost alone may not be the only consideration in determining that development must be located such that it will have direct or indirect impacts on significant sage-grouse areas; or
 - (ii) The proposed large-scale development is dependent on a unique geographic or other physical feature(s) that cannot be found on other lands; and
 - (iii) If either subparagraph (9)(a)(B)(i) or (9)(a)(B)(ii) is found to be satisfied the county must also find that the large-scale development will provide important economic opportunity, needed infrastructure, public safety benefits or public health benefits for local citizens or the entire region.

Finding: This large scale development is not located within a core area habitat, rather is located within a low density habitat. Although, OAR 660-023-0115(9)(a)(B)(iii) does not directly affect the development, it is important to note that the development will provide needed infrastructure, public safety benefits, AND public health

benefits for the local citizens AND the entire region.

- C) Minimization. If the proposed use cannot be sited by avoiding a core area altogether, including direct and indirect impacts, it shall be located to minimize the amount of such habitat directly or indirectly disturbed, and to minimize fragmentation of the core area(s) in question by locating the development adjacent to existing development and at the edge of the core area when possible. Uses should minimize impacts through micro-siting, limitations on the timing of construction or use, or both, and methods of construction. Minimizing impacts from large-scale development in core habitat shall also ensure direct and indirect impacts do not occur in known areas of high population richness within given core area, unless a project proponent demonstrates, by a preponderance of the evidence, that such an approach is not feasible. Costs associated with minimization may be considered, but cost alone may not be the only consideration in determining that location of development cannot further minimize direct or indirect impacts to core areas.
- D) Compensatory Mitigation. To the extent that a proposed large-scale development will have direct or indirect impacts on a core area after application of the avoidance and minimization standards and criteria, above, the permit must be conditioned to fully offset the direct and indirect impacts of the development to any core area, the required compensatory mitigation must comply with OAR chapter 635, division 140.
- b) A county may approve conflicting uses as identified at subsection (7)(b) above upon either:
 - A) Receiving confirmation from ODFW that the proposed conflicting use does not pose a threat to significant sage-grouse habitat or the way sage-grouse use that habitat; or
 - B) Conditioning the approval based on ODFW recommendations, including minimization techniques and compensatory mitigation, if necessary, to resolve threats to significant sage-grouse habitat.
- 10. Program to achieve the goal of protecting significant sage-grouse habitat in low density area.
 - a) A county may approve a large-scale development in low density area upon applying the mitigation hierarchy as follows:
 - A) Avoidance. Before proceeding with large-scale development activity that impacts a low density area, the proponent must demonstrate that reasonable alternatives have been considered and that the activity or other action cannot avoid impacts within a low density area. If the proposed large-scale development can occur in another location that avoids both direct and indirect impacts within a low density area, then the proposal must not be allowed unless it can satisfy the following criteria:
 - (i) It is not technically or financially feasible to locate the proposed large-scale development outside of a low density area based on accepted engineering practices, regulatory standards, proximity to necessary

infrastructure or some combination thereof; or

Finding: The vast majority of land in this area of Malheur County is owned by the Federal Government. It is the practice of the Federal Government to steer applicants to private property use prior to engaging an application for use of Federal land. In the course of identifying the Stoddart Property, a property unique in the area due to both its ownership characteristics and the fact that the property is developed and inhabited, the applicant has found the best property to keep the development away from the most productive sage-grouse habitat. Given the technical siting limitations for the coverage objectives (extent of Hwy 78 from the Harney County border to Burns Junction), the primary mitigation level of avoidance could not be achieved while satisfying the technical needs of Eco-Site's tenants.

- (ii) The proposed large-scale development is dependent on geographic or other physical features(s) found in low density habitat areas that are less common at other locations, or it is a linear use that must cross significant sage-grouse habitat in order to achieve a reasonably direct route.
- B) Minimization. If the proposed use cannot be sited by avoiding a low density area altogether, including direct and indirect impacts, it shall be located to minimize the amount of such habitat directly or indirectly disturbed, and to minimize fragmentation of the low density area(s) in question by locating the development adjacent to existing development and at the edge of the low density area when impossible. Uses should minimize impacts through micro-siting, limitations on the timing of construction or use, or both, and methods of construction.

Finding: 1. The proposed tower will be located on a property that is both developed and inhabited. Currently there is no land in the area that meets both of those requirements. 2. Although the tower meets the requirements to be sited on a core area habitat (see OAR 660-023-0115(9)(a)(B)(iii) above), the applicant has chosen a property located in low-density habitat. Therefore, siting the tower on a property that is currently developed and inhabited and siting the tower on a less significant habitat area will minimize the direct and indirect impacts on sage-grouse.

- C) Compensatory Mitigation. Required consistent with the provisions of paragraph (9)(a)(D) above.
- b) A county may approve a conflicting use as identified at subsection (7)(b) above when found to be consistent with the provisions of subsection (9)(b).

[...]

16. Metering. This rule is intended to ensure that the area of direct impact levels in any

PAC, including energy facilities exempted under subsection (2)(b), does not increase by an amount greater than 1.0 percent of the total area of the PAC in any ten-year period. The initial period shall commence upon the effective date of this rule and continue for ten consecutive years, where upon the process shall be successively repeated. The commission will consider revisions to this rule if the department's yearly reports required by section (15) indicate that the development trends in any PAC indicate that the 1.0 percent direct impact threshold is in jeopardy of being exceeded before the ten-year period has expired. Any proposal to amend this rule undertaken by the department shall be developed in coordination with all affected counties and other stakeholders.

Finding: The proposed site is located within the low-density habitat area of the Folly Farm/Saddle Butte PAC. As this is the first proposed large-scale development, the 1.0 percent impact cannot be jeopardized.

17. Disturbance Threshold. This rule is intended to ensure that direct impact level, including energy facilities exempted under subsection (2)(b), does not exceed three percent of the total area in any PAC. If this three-percent threshold is approached, then the department must report that situation to the commission along with a proposal to amend this rule to adapt the standards and criteria such that the threshold is not exceeded.

Finding: The proposed site is located within the low-density habitat area of the Folly Farm/Saddle Butte PAC. As this is the first proposed large-scale development, the 3.0 percent threshold cannot be jeopardized.

VII. CONDITIONS OF APPROVAL

1. All required road approaches shall be obtained from the Malheur County Road Department.
2. A ten foot (10') buffer must be maintained within the lease area and beyond the fence to decrease the chances of a wildfire.
3. After the county makes a determination of discontinued or nonuse, the property owner shall, within six (6) months, complete removal operations.
4. This approval is valid for two years from the date of this order. Substantial action must be taken within this time period or the approval will lapse.
5. A mitigation plan shall be developed by the applicant in consultation with and approved by ODFW prior to project construction.
6. The applicant shall provide permittee responsible mitigation or payment into ODFW's

In-Lieu-Fee program prior to project construction for residual project impacts as calculated by ODFW's Habitat Quantification Tool and as agreed to in the mitigation plan.

7. Minimization measures outlined in the mitigation plan shall be utilized and maintained for the life of the project, which includes construction, operation, decommissioning, and reclamation of the tower site.
8. In the event that a minimization measure becomes noncompliant with the standards and procedures outlined in the mitigation plan, the applicant shall provide additional mitigation for the estimated increase in project impact to sage-grouse as specified in the mitigation plan.

CONCLUSION

Based upon the foregoing findings of fact, the Malheur County Planning Commission makes the following conclusion and decision:

1. Substantial evidence exists in the record to support the conclusion that the application meets the general and specific criteria established in the Malheur County Code and Oregon Revised Statutes for a Wireless Telecommunication Facility in an exclusive range use.
2. Substantial evidence exists in the record to support the conclusion that the application meets the variance criteria established in the Malheur County Code.
3. Substantial evidence exists in the record to support the conclusion that the application meets the sage-grouse rule criteria as outlined in Oregon Administrative Rule 660-023-0115.

ORDER

1. The application for a conditional use permit is approved.
2. The application for a variance to the setbacks is approved.
3. The application for a sage-grouse rule permit is approved.

APPEALS

The appellate body for appeals from the final decision of the Planning Commission is the County Court. To file an appeal an appellant must file a completed notice of appeal on a form prescribed by the Planning Department, including the current appeal fee, with the Planning Department no later than 5:00 pm on the tenth day following the mailing of written notice of decision. Notice of appeals may not be received by fax or email. The notice must include a statement raising any issues relied upon for the appeal with sufficient specificity to afford the County Court an adequate opportunity to respond to and resolve each issue. All appeals from the Planning Commission's final decision shall be based on the record of the hearing made before the Commission. Therefore, no additional information or testimony not included in the record of the

hearing before the Planning Commission may be brought before the appellate body. The appellant must pay for the transcription of the hearing appealed from and submit the transcript to the Planning Department within ten days after the date of notice of appeal is filed or ten days after the hearing tape is mailed or given to the appellant, whichever is later.

Edmund J. Anthony

Planning Commission Vice-Chair
Ed Anthony

July 7 2019
Date