

Law Office of  
F. Samuel Byrer, PLLC

202 West Liberty Street  
P.O. Box 597  
Charles Town, WV 25414

Telephone: (304) 724-7228

Facsimile: (304) 724-7278

F. Samuel Byrer

Writer's email:  
fsamuelbyrer@frontiernet.net

August 16, 2023

*VIA EMAIL*

[ncochran@jepawv.org](mailto:ncochran@jepawv.org)

Nathan Cochran, Esq.

124 E. Washington Street

2<sup>nd</sup> Floor

Charles Town, WV 25414

Re: VB BTS, LLC v. Jefferson County, et al.; Federal District Court; 3:23-cv-171

SETTLEMENT COMMUNICATION  
NOT FOR USE IN COURT

Dear Nathan,

I write on behalf of my client, VB BTS, LLC (“Vertical Bridge”).

As you are aware, Vertical Bridge filed a lawsuit in the U.S. District Court for the Northern District of West Virginia against Jefferson County and the Planning Commission. A copy of that lawsuit is enclosed for your reference. The decision to file a lawsuit was not a decision Vertical Bridge made lightly, but it feels strongly that the denial of its application to construct a wireless communications (“cell”) tower was in error. As County Staff confirmed, approval of Vertical Bridge’s application should have been a ministerial act as it complied with local, state and federal law. Additionally, federal law—namely the Telecommunications Act, 47 U.S.C. 332—provides Vertical Bridge rights over and above those afforded to other zoning applicants as the federal government has seen fit to prioritize and expedite the rollout of digital infrastructure, like the cell tower Vertical Bridge seeks to construct. In short, Vertical Bridge has set forth strong claims in the lawsuit and it intends to protect and advance its rights in that proceeding.

Despite the strength of its claims, Vertical Bridge desires to be a good corporate partner to the County and would rather cooperate with the County than litigate. In that regard and as a compromise to resolve the lawsuit, Vertical Bridge proposes to construct a “mono-pine” design for the tower. A photo-simulation showing what this design would look like is enclosed. Please note that this sort of design is more expensive to construct and makes maintenance more difficult. Vertical Bridge, however, is happy to proceed with this design in order to address visual concerns noted at the public meeting and in order to resolve the lawsuit. As discussed, if the County is agreeable to this design as a means to resolve the pending lawsuit, we will need to

Nathan Cochran, Esq.

August 16, 2023

Page 2

further consider how to procedurally accomplish this. As such, any agreement is subject to a fully-executed agreement between the parties and dismissal of the lawsuit will be subject to a final, non-appealable approval of this mono-pine design (though we would be happy to stay the lawsuit pending such a final decision once an agreement is signed up). The parties would bear their own costs and attorneys' fees.

Further, we acknowledge that there were certain comments regarding the location where a helicopter has landed in the past for emergency purposes. Please note the following:

1. This is not a sanctioned "helipad" at all, but appears to have been a location of need/convenience for past emergency evacuations.
2. That location is on the opposite side of the street that bisects the property and is approximately 275' away from the proposed tower. Please see the enclosed diagram showing this.
3. It is Vertical Bridge's understanding that helicopters come in from the south over the lake, not from the woods to the north where the tower will be located.
4. Per the attached diagram, the proposed tower is nestled among the existing mature trees on the site. The tower will not be significantly taller than those trees so it should not pose a significant increase in existing aviation hazards.
5. All of this is to say that it appears to Vertical Bridge (who is not in the aviation industry and is not offering an opinion) that a helicopter could potentially still use the location at issue.
6. That said, this is not a sanctioned "helipad" and we are not commenting on the propriety or legality of a helicopter landing at this location at all.
7. Further, as discussed, we believe that denying the application based on the property's historic (albeit sporadic) use as an emergency helicopter landing site is to unlawfully burden this property with an easement to which the property owner has not agreed and for which he has not been compensated.

We look forward to hearing from you after you've had a chance to discuss this proposal with your client. If you have any questions in the meantime, please do not hesitate to let me know.

Sincerely,



F. Samuel Byrer

cc: Chris Blaesing, Esq.  
Ben Ford, Esq.

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF WEST VIRGINIA  
MARTINSBURG DIVISION**

ELECTRONICALLY  
FILED  
Jul 13 2023  
U.S. DISTRICT COURT  
Northern District of WV

VB BTS, LLC,

Plaintiff,

v.

JEFFERSON COUNTY, WEST  
VIRGINIA, & THE JEFFERSON  
COUNTY PLANNING COMMISSION.

Case No. **3:23-CV-171 (Groh)**

**ELECTRONICALLY FILED**

**COMPLAINT**

Plaintiff VB BTS, LLC (“Vertical Bridge” or “Plaintiff”), by and through undersigned counsel, and for its Complaint against Defendants Jefferson County, West Virginia (the “County”) and the Jefferson County Planning Commission (the “Planning Commission”), (collectively, the “County Defendants”), states and alleges as follows:

**NATURE OF THE MATTER**

1. This action seeks relief from the County Defendants’ improper and arbitrary denial of Vertical Bridge’s application to construct a wireless communications tower (colloquially called a “cell tower”; hereinafter, the “Proposed Tower”) on property located at 1329 Lakeside Drive, parcel ID number 06000600090000, Jefferson County, West Virginia 25425 (the “Property”).

2. Vertical Bridge complied with all of the federal, state, and local requirements applicable to cell towers. Despite such compliance, the County Defendants denied Vertical Bridge’s Application (the “Denial”).

3. The County Defendants’ Denial violates the Federal Telecommunications Act of 1996 (47 U.S.C. Ch. 5) (the “TCA”), as the Denial is not based on substantial evidence in the

record. Further, County Defendants' Denial violates the TCA as the Denial amounts to an effective prohibition of enhanced cellular service.

4. Vertical Bridge seeks declaratory, injunctive, and mandamus relief pursuant to 47 U.S.C. § 332 and 28 U.S.C. § 2201, and requests that the County Defendants be ordered to approve Vertical Bridge's Application or that the Application be deemed approved.

#### **PARTIES**

5. VB BTS, LLC is, and at all times relevant hereto has been, a Delaware limited liability company registered to conduct and conducting business in the State of West Virginia. Vertical Bridge's primary place of business is in Boca Raton, Florida.

6. The County is a political subdivision in the State of West Virginia.

7. The Planning Commission is the duly authorized planning commission for the County.

#### **JURISDICTION AND VENUE**

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and § 1367 because these claims arise under the laws of the United States, specifically 47 U.S.C. § 332(c)(7).

9. This case presents an actual controversy under Article III of the United States Constitution and 28 U.S.C. § 2201 because the County has violated Vertical Bridge's federal rights under the TCA.

10. Venue is proper in this Court because the County is located in this judicial district, and the property affected is located within this judicial district.

11. The TCA provides that "the Court shall hear and decide such action on an expedited basis." 47 U.S.C. § 332(c)(7).

**FACTS COMMON TO ALL COUNTS**

12. Vertical Bridge is in the wireless telecommunications industry and places, constructs, modifies, operates, and manages telecommunication infrastructure on behalf of its clients across the United States.

A. **PROPOSED TOWER**

13. After first looking for available collocation opportunities, a carrier and provider of wireless communications services and fixed internet services (the “Carrier”) engaged Vertical Bridge to locate, construct, and operate a telecommunications tower in Jefferson County, West Virginia in order to resolve a gap in coverage in the Shannondale area and improve its overall network.

14. Vertical Bridge conducted a thorough review of the area affected by the gap in cell and wireless service to determine which location would best achieve the Carrier’s objectives as well as best comply with the requirements of federal, state, and local law, including the Jefferson County Zoning and Land Development Ordinance Article 4B (the “County Code”).

15. After evaluating six potential sites, Vertical Bridge determined that property at 1329 Lakeside Drive, parcel ID number 06000600090000, Jefferson County, West Virginia 25425, was the ideal location for constructing the cell tower.

16. The Proposed Tower is a 100-foot monopole.

17. The Proposed Tower complies with the County Code. Such compliance is set forth fully in the Staff Report by the Jefferson County Planning Commission (the “Staff Report”), attached hereto as Exhibit A.

C. VERTICAL BRIDGE'S APPLICATION TO CONSTRUCT THE PROPOSED TOWER

18. Under Section 4B.7 of the County Code, wireless telecommunications towers are permitted uses in all Jefferson County zoning districts. The applicant must obtain a minor site plan.

19. Under, Section 4B.7 of the County Code, new tower applications in Jefferson County require a minor site plan approval, which is obtained in the following manner:

- A. The applicant submits a concept plan to the County.
- B. The concept plan undergoes review by the Jefferson County Planning and Zoning Staff ("Planning Staff") to ensure compliance with Section 4B.7 and the Comprehensive Plan.
- C. After a finding of compliance by the Planning Staff, the concept plan is reviewed at a public hearing before the Planning Commission.
- D. The Planning Commission reviews for compliance with Section 4B.7 and the Comprehensive Plan.
- E. Upon finding compliance with Section 4B.7 and the Comprehensive Plan, the Planning Commission approves a site plan.

20. If the application is compliant with Section 4B.7 and the Comprehensive Plan, the Planning Commission has no discretion to deny the application. The approval is ministerial.

21. Here, on April 26, 2023, Vertical Bridge submitted an application entitled the Shannondale Lake Telecommunication Tower Concept Plan (the "Application") to the Planning Commission.

22. In the Application, Vertical Bridge explained its reasons for the tower location and its efforts in evaluating five other nearby sites for the Proposed Tower.

23. The Application underwent review by the Planning Staff.

24. On May 5, 2023, Vertical Bridge's Application was deemed compliant by Planning Staff provided an FCC license was submitted. Vertical Bridge subsequently submitted the FCC license.

25. The Staff Report determined that the Application was "[c]omplete based on the information provided related to the required criteria outlined in the Subdivision Regulations and the Zoning Ordinance; and Consistent with the Comprehensive Plan." *See* Ex. A, Staff Report at 6.

26. The Staff Report also indicated that "[a]s provided for in Section 4B.7.B.2.J.7 of the Zoning Ordinance, the Planning Commission has the discretion to require that fencing be screened by a landscape buffer of at least 10 feet in width, planted along the entire exterior perimeter of the fence." *See id.*

27. On June 13, 2023, the Planning Commission held a public hearing, wherein members of the public appeared and voiced various objections to approval of the minor site plan.

28. Because the Application complied with the County Code, the Planning Commission had no discretion to deny the Application. The Planning Staff informed the Planning Commission of this fact at the July 13, 2023 public hearing.

29. Nonetheless, the Planning Commission denied Vertical Bridge's Application.

30. The Planning Commission approved meeting minutes from the June 13, 2023 meeting on July 11, 2023. Those meeting minutes are attached hereto as Exhibit B.

31. The meeting minutes do not provide a basis for denial of the Application. County Defendants have not provided any other written denial or writing that identifies the basis for denial of the Application.

**COUNT I – VIOLATION OF 47 U.S.C. § 332(c)(7)(B)(iii)**  
**(LACK OF SUBSTANTIAL EVIDENCE UNDER TCA)**

32. Vertical Bridge restates and incorporates by reference the preceding paragraphs as if fully set forth herein.

33. The TCA provides that “[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless services facilities shall be in writing and supported by substantial evidence contained in a written record.” 42 U.S.C. § 332(c)(7)(B)(iii).

34. Based on the record before the County Defendants, the Denial of the Application is not supported by substantial evidence and as such is a violation of the TCA.

35. First, the County Defendants failed to issue a written denial that provided the bases of their decision, in violation of the TCA. The Court must, therefore, assume there is no lawful basis for the Denial.

36. Second, the Denial is not based in local or state law. To the contrary, the record demonstrates that Vertical Bridge complied with all applicable laws and was entitled to the approval of its Application.

37. Third, whatever the bases for the Denial, they are not supported by substantial evidence found in the written record.

38. The County Defendants’ failure to comply with the requirements of the TCA and their refusal to approve the Application has caused and will continue to cause Vertical Bridge irreparable harm as Vertical Bridge and the Carrier cannot provide improved wireless service without the Proposed Tower.



WHEREFORE, Vertical Bridge respectfully requests that this Honorable Court:

- (i) Declare that the County Defendants' Denial of Vertical Bridge's Application is not supported by substantial evidence in the written record in violation of the TCA;
- (ii) Issue an Order prohibiting the County Defendants from denying the Application;
- (iii) Issue an Order requiring the County Defendants to complete the ministerial act of approving the Application;
- (iv) Issue a writ of mandamus directing the County Defendants to discharge their duties properly and to approve the Application;
- (v) Issue an Order requiring the County Defendants to certify to this Court a true, full, and complete copy of the record of the acts and procedures involved in the Denial of Vertical Bridge's Application so that this Court may review the data and records and adjudicate upon the legality of said proceedings under the TCA;
- (vi) Issue an Order reserving jurisdiction to this Court to resolve any issues between the parties as to further permit issues; and
- (vii) Provide for such other and further relief as the Court deems just and proper.

**COUNT II – VIOLATION OF 47 U.S.C. § 332(c)(7)(B)(i)(II)**  
**(EFFECTIVE PROHIBITION UNDER TCA)**

39. Vertical Bridge restates and incorporates by reference the preceding paragraphs as if fully set forth herein.

40. The TCA prohibits local regulation of the placement, construction, or modification of personal wireless service facilities that “prohibit[s] or ha[s] the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(II).

41. The Carrier has a substantial gap in coverage in the area around the Proposed Tower.

42. The Carrier cannot remedy its substantial gap and provide reliable coverage in the area without the construction of the Proposed Tower.

43. The Denial materially inhibits Vertical Bridge's and the Carrier's ability to provide enhanced coverage in the area.

44. The Denial therefore has effectively prohibited the provision of personal wireless services.

45. The County Defendants' failure to comply with the requirements of the TCA and their refusal to approve the Application has caused and will continue to cause Vertical Bridge irreparable harm as Vertical Bridge and the Carrier cannot provide improved wireless service without the Proposed Tower.

WHEREFORE, Vertical Bridge respectfully requests that this Honorable Court:

- (i) Declare that the County Defendants' Denial of Vertical Bridge's Application is an effective prohibition in violation of the TCA;
- (ii) Issue an Order prohibiting the County Defendants from denying the Application;
- (iii) Issue an Order requiring the County Defendants to complete the ministerial act of approving the Application;
- (iv) Issue a writ of mandamus directing the County Defendants to discharge its duties properly and to approve the Application;
- (v) Issue an Order requiring the County Defendants to certify to this Court a true, full, and complete copy of the record of the acts and procedures involved in the Denial of Vertical Bridge's Application so that this Court may review the data and records and adjudicate upon the legality of said proceedings under the TCA;
- (vi) Issue an Order reserving jurisdiction to this Court to resolve any issues between the parties as to further permit issues; and
- (vii) Provide for such other and further relief as the Court deems just and proper.

**COUNT III – DECLARATORY RELIEF**  
**(FEDERAL DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201-2202)**

46. Vertical Bridge restates and incorporates by reference the preceding paragraphs as if fully set forth herein.

47. Based on the record before the County Defendants, the Denial of Vertical Bridge's Application is not supported by substantial evidence, violating the TCA.

48. Further, the Denial of Vertical Bridge's Application amounts to effective prohibition, violating the TCA.

49. Based on the record before the County Defendants, the Denial of Vertical Bridge's Application is not supported by substantial evidence.

50. A real, immediate, actual, justifiable, and substantial continuing controversy exists between Vertical Bridge and the County Defendants as to whether the Denial of Vertical Bridge's Application violates the TCA.

51. There is a bona fide, actual, present, and practical need for a declaration of Vertical Bridge's right to an approval of its Application to construct the Proposed Tower.

52. Vertical Bridge's interest in the declaration of its rights are actual and adverse to those of the County Defendants.

53. All conditions precedent to the relief demanded herein have been performed.

WHEREFORE, Vertical Bridge requests that this Honorable Court:

- (viii) Issue an Order declaring that the Denial of Vertical Bridge's Application is not supported by substantial evidence in the written record, in violation of the TCA;
- (ix) Issue an Order declaring that the County Defendants effectively prohibited cell and wireless service, violating the TCA;
- (x) Issue an Order declaring Vertical Bridge's right to approval of its Application;
- (xi) Issue an Order reserving jurisdiction to this Court to resolve any issues between the parties as to further permit issues; and
- (xii) Provide for such other and further relief as the Court deems just and proper.

**COUNT IV – WRIT OF CERTIORARI/MANDAMUS**

54. Vertical Bridge restates and incorporates by reference the preceding paragraphs as if fully set forth herein.

55. The County Defendants' denial of the Application is subject to review by certiorari and/or mandamus.

56. Vertical Bridge is an aggrieved person because the County Defendants' refusal to approve the Application has caused and will continue to cause Vertical Bridge irreparable harm as Vertical Bridge and the Carrier cannot provide improved wireless service without the Proposed Tower.

57. The County Defendants' denial was illegal, null, and void because the County failed to follow its own procedure for the approval of wireless telecommunications towers with respect to the Application, failed to provide a written basis for denial, violated the TCA, lacked discretion to deny the Application, and, in turn, failed to perform the ministerial act of approving the site plan sought by the Application.

58. All conditions precedent to the relief demanded herein have been performed.

WHEREFORE, Vertical Bridge requests that this Honorable Court:

- (i) Issue an Order requiring the County Defendants to complete the ministerial act of approving the Application;
- (ii) Issue a writ of mandamus and/or mandamus directing the County Defendants to discharge their duties properly and to approve the Application;
- (iii) Issue an Order requiring the County Defendants to certify to this Court a true, full, and complete copy of the record of the acts and procedures involved in the Denial of Vertical Bridge's Application so that this Court may review the data and records and adjudicate upon the legality of said proceedings under the TCA;
- (iv) Issue an Order reserving jurisdiction to this Court to resolve any issues between the parties as to further permit issues; and
- (v) Provide for such other and further relief as the Court deems just and proper.

DATED this 13th day of July 2023.

Respectfully Submitted,

/s/ F. Samuel Byrer

F. Samuel Byrer (WV State Bar #571)

Law Office of F. Samuel Byrer, PLLC

P.O. Box 597

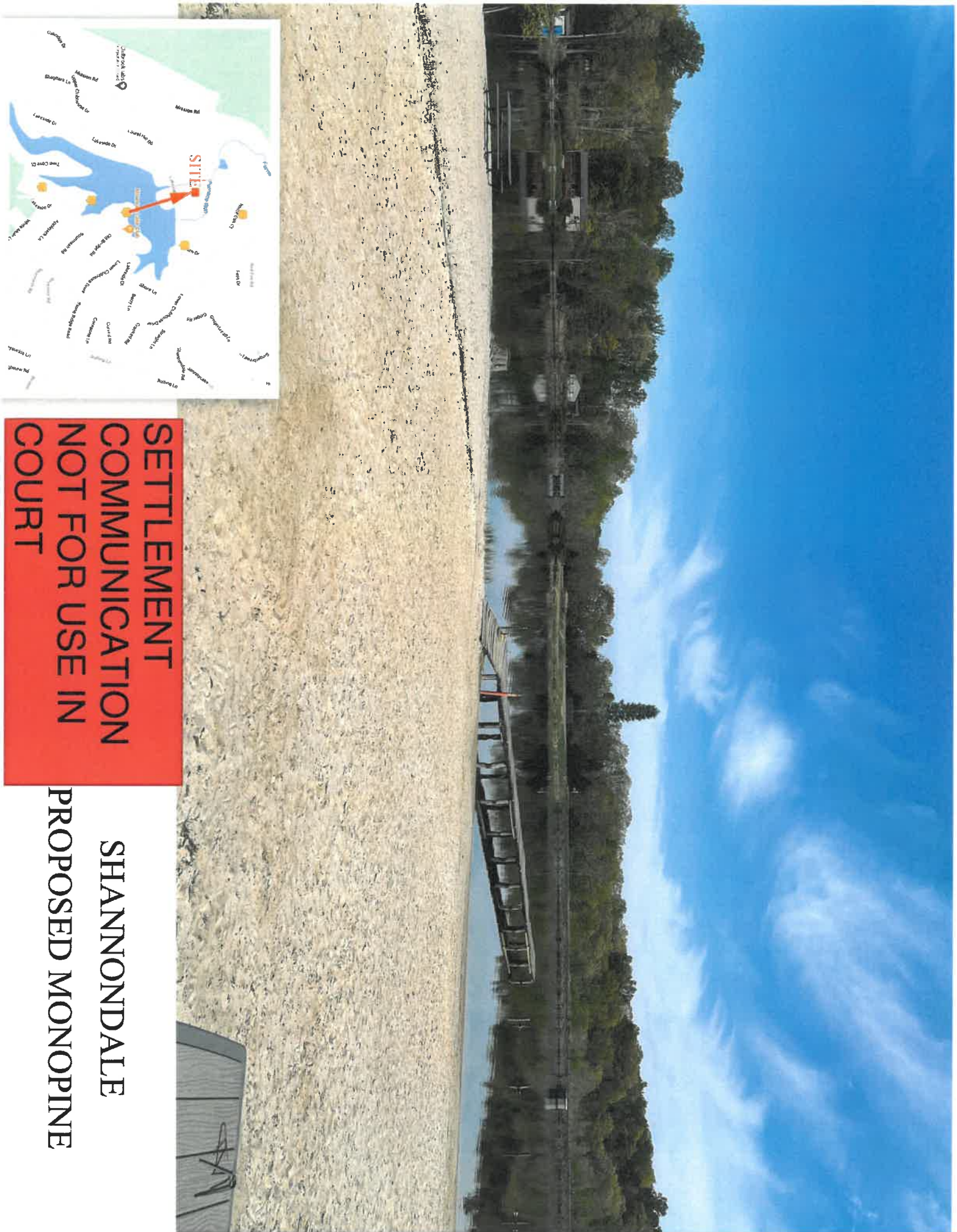
202 West Liberty Street

Charles Town, West Virginia 25414

Telephone (304) 724-7228

Facsimile (304) 724-7278

[fsamuelbyrer@frontiernet.net](mailto:fsamuelbyrer@frontiernet.net)



**SETTLEMENT  
COMMUNICATION  
NOT FOR USE IN  
COURT**

**SHANNONDALE  
PROPOSED MONOPINE**



1A FOR PROPOSED TOWER  
39.21261, -77.81534

275'

LOCATION WHERE THE HELICOPTER  
LANDS FROM TIME TO TIME

SETTLEMENT  
COMMUNICATION  
NOT FOR USE IN  
COURT

