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September 17, 2014

Jonda Joseph, City Clerk
City of Fort Lauderdale
100 N. Andrews Avenue
Fort Lauderdale, FL 33301

Re: Notice of Appeal of Denial of Crown Castle Application for the Installation of DAS Antennas/**Application Number: 13-07/Node 62-1** ("Application")
**Denial Item Letter 5**

Dear Ms. Joseph:

Please be advised that our Firm represents Crown Castle NG East, LLC ("Crown"). We have been engaged to pursue an appeal of the denial of the captioned Application. In accordance with Ft. Lauderdale City Code ("Code") Section 25-100.2, (attached as **Exhibit A)** and any other applicable Code Sections, Crown hereby appeals the denial of the Application. A copy of the August 18, 2014 denial notification is attached hereto as **Exhibit B.**

Crown hereby respectfully requests a de novo hearing before the City Commission of the City of Fort Lauderdale ("City Commission") to determine if the denial was based upon a departure from the essential requirements of the law; or whether competent substantial evidence exists to support the denial. Crown requests that the denial be reversed and the requested permit be issued. We reserve the right to supplement these materials at the time of the hearing or before.

## Details of Appeal

**APPLICATION 13-07 (NODE 62-1):**
Applicant: Crown Castle NG East, LLC
Application location: 891 NW 12th Street
Approximate location: 891 NW 12 Street (**Exhinit C**)
Approximate street address: approximately 81' east of NW 9th Avenue
Zoning District: RS-8

Application Date: May 24, 2014
Denial Date: August 18, 2014

Description of Construction:
a. Replacement of FPL wood pole
b. Attachment of Crown Castle DAS
c. Installation of new above ground cabinet - 5'2" X 2'0" X 1 '6" = 104" Total

Denial Comments:
1. This Application is DENIED for failure to comply with Code Sec. 25-100.1 (c) (3) prohibiting placement in front yard locations in areas identified in Code Sec. 25-100.1 (c) (1). The Application is further DENIED for failure to comply with Code Sec. 25-100.1 (c) (13) requiring installation at outermost boundary of right-of-way in all areas.

2. The Application is further DENIED as beyond the subject matter jurisdiction of Code Sec. 25-100.1 the apparatus is not a *communications service facility.*

**Appeal Grounds:**

1) The City's Right of Way Ordinance ("ROWO"); to wit, City of Fort Lauderdale Code ("Code") Section 25-100 *et. seq.* as applied and likely on its face violates State Law; including Fla. Stat. Chapter 347 and Federal Law including the Federal Telecommunications Act of 1996.

2) The denial was a departure from the essential requirements of the law.

3) Competent substantial evidence does not exist to support the denial.

4) The procedure followed leading to the Permit Application denial constituted a denial of the Applicant's due process rights. The procedure also did not comply with the City Commission's directive to Staff to cooperate with the Applicant in siting installations in the right-of-way ("ROW").

5) ROWO subsection 25.100.1(c)(3), see Attached **Exhibit** D, applies to facilities which exceed 124 inches. Crown's proposed facility measures 104 inches. Therefore, this subection does not apply to Crown's Application and does not supply legal support for the denial.

Should it be determined that this subsection does apply, ROWO subsection (c)(3) prohibits placement in ***front*** yard locations. The facility proposed by this Application is in a ***side*** yard. As evidenced by the attached aerial (**Exhibit C** ), this subsection is inapplicable and does not provide legal support for the denial. (See, definitions attached as **Exhibit E**).

Regarding subsection 25-100.1 (c) (13), which addresses installation at the outer most boundary of the right-of-way in all areas (attached **Exhibit D)**, this facility location was selected as a result of discussions with the City to move from another location. The installation will be a co-location on an existing FPL pole. Under these circumstances, the Applicant submits that the subsection should be applied such that the location of the existing pole defines the outermost boundary. Such an interpretation encourages co-location.Should the City nevertheless prefer the existing pole be moved closer to the outermost boundary; if FPL will permit that, the pole can be moved. The Application should not have been denied on this ground. Rather, the City should have advised Crown as to the City's preference regarding the pole so that relocation could have been investigated.

6) Denial comment # 2 states that "...the apparatus is not a communications service facility." If that is the case, then the Application should not have been accepted and the City should have issued a ROW permit under the appropriate process consistent with Fla. Stat. Sec. 337.401.

However, as evidenced by the attached email correspondence (**Exhibit F** ) from then City Engineer, Dennis Girisgen, Crown was advised that the ROWO does apply to the proposed service facility. At no time subsequent to this acknowledgement was Crown advised by the City ROWO was not applicable to the Application. If the denial was based upon the application of an ordinance that does not apply, the denial is without legal support.

The ROWO; adopted in 2007, defines communications service (and therefore communications service facility ) by reference to, Florida Stat. § 202.11 (3). This appears to be an error because subsection three (3) of the 2006 and 2007 versions of that statute define "dealer." However, Florida Stat. § 202.11 (2) defines "Communications services" as "...the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added. This definition covers the services contemplated by the installation. The same would be true under Florida Stat. § 364.02 (14).

**The information provided in this letter of appeal is provided as a courtesy to the City. We are hopeful that the information will be helpful to the City in resolving the appeals. The sections of the City Code controlling this appeal however <u>do not</u> require the inclusion of any information in a letter of appeal other than a notifying the City that the applicant is appealing a denial. The applicant objects to its appeal; including argument before the City Commission, being limited to the matters raised in this letter. The applicant also reserves the right to amend or supplement its appeal including but not**

**limited to adding matters related any information supplied by the City in response to Crown's pending public records request.**

Please advise when the matter will be placed before the City Commission for consideration. Thank you.

Sincerely,

Hope Calhoun
For the Firm

Enclosures

HWC/cl
cc: Mr. Lee Feldman
Ms. Cynthia Everett, Esq.
Mr. Alex Scheffer
Melissa Anderson, Esq.
Wanda Melton
Perry Adair, Esq.

## RESPONSE TO APPEAL ON APPLICATION 13-07

Location: 891 N.W. 12th Street, approximately 81' East of N.W. 9th Avenue
Zoning: CF
Description of Work: a. Replace FPL wood utility pole
b. Attach Crown Castel antenna to replacement FPL wood utility pole - 24" x 16" = 40"
c. Install above-ground cabinet: 42" x 42" x 8" (92" total)

## CITY ARGUMENTS IN SUPPORT OF DENIAL

A. The Application is beyond the subject matter jurisdiction of Code Sec. 25-100.1 as the installation is not a *communications service facility* as defined by Code Sec. 25-100.1 (a).
B. The process by which the permit application was denied comports with due process.
C. The Application is not in violation of Code Sec. 25-100.1 (c) (3), *Prohibition against front yard location in certain areas*
D. The Application is in violation of Code Sec. 25-100.1 (c) (13), *Installation at outmost boundary of right-of-way in all areas.*

**A. The Application is beyond the subject matter jurisdiction of Code Sec. 25-100.1 as the installation is not a communications service facility as defined by Code Sec. 25-100.1(a).**

Florida Statute Sec. 202.11 (2014) defines *communications services* as:

> *Communications services* means the transmission, conveyance or routing of voice, data, audio, video, or any other information or signals, including video services, to a point, or between or among points, by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of the protocol used for such transmission or conveyance. The term includes such transmission, conveyance or routing in which computer processing applications are used to act on the form, doe or protocol of the content for purposes of transmission, conveyance or routing without regard to whether such service is referred to as voice-over-Internet-protocol services or is classified by the Federal Communications Commission as enhanced or value-added.

City Code Sec. 25-100.1 (a) defines *communications service facilities* as:

> *Communications service facilities* means any tangible thing affixed to the ground and located in any rights-of-way used to deliver communications services the combined height, width and depth dimensions of which are greater than ninety (90) inches, but does not include utility poles.

The proposed installation is an antenna system. There is nothing in the application to demonstrate anything more than an antenna system. The antenna system, in and of itself, does not deliver communications services. Only when coupled with a vendor involved in the "transmission, conveyance or routing of . . . any other information or signals" is the antenna system used to deliver "communications services." There is nothing in the record to demonstrate that the antenna system delivers *communications services*. Accordingly, this antenna system falls outside the regulatory framework and subject matter jurisdiction of Code Sec. 25-100.1.

Similarly, the argument that Florida Statute Sec. 364.02(14) covers the services contemplated by the installation lacks merit. Fla. Statute Sec. 364.02(14) defines a *Telecommunications facility* to include "real estate, easements, apparatus, property and routes used and operated to provide two-way telecommunications service to the public for hire within this State." Just as the Record fails to show that the antenna system **delivers** *communications services,* the Record is similarly devoid of anything demonstrating that the system is **used and operated** to provide two-way telecommunications service. Until such time as the system is "hooked up" with a company that actually provides the telecommunications service.

## ACCEPTANCE OF APPLICATION UNDER SEC. 25-100.1

The Applicant's response to City's position that the proposed installation does not constitute a communications service facility under Code Sec. 25-100.1(c) and Florida Statute Sec. 202.11(2014) and therefore the Application should not have been accepted by City Staff is without merit. In order to provide an Applicant with due process rights, an Application must be accepted and acted upon in accordance with the City Codes with a resulting "granted" or "denied" after having gone through the appropriate process. It is through the "denial" of the permit application, that an Applicant has due process rights to perfect it appellate remedies. By illustration, one could file an application for a zoning permit to construct a duplex in an RS-4.4 zoning district. City staff lacks the lawful authority to refuse to accept the permit application. The proper procedure under such circumstances would be to accept the permit application, review it in accordance with the City Code, and "deny" it, thereby opening the due process door for the Applicant to perfect and appeal from the "denial.

The Applicant raises the argument that the person formerly charged with responsibility of administering Code Sec. 25-100.1 had opined that the permit application should be reviewed in light of Code Sec. 25-100.1. Code Sec. 25-100.1 is the only section of the City's Code of Ordinances that could arguably be used to judge the sufficiency of the permit application. Staff's opinion that the permit application should be judged against the criteria found in Code Sec. 25-100.1 is not the equivalent of judging that the permit application meets each and every one of the applicable criteria in Code Sec. 25-100.1. In this instance City staff has found several portions of the applicable City Code that the permit application fails to meet.

## CODE SEC. 25-100.1 WAS DRAFTED WITH THE INTRODUCTION OF AT&T THE U-VERSE CABINET

Code Sec. 25-100.1 was drafted with the introduction of the AT&T U-verse cabinets and the City's fears of inundating the City's neighborhoods with "cabinet farms" in our public rights-of-way. Code Sec. 25-100.1 is a poor fit, at best, for the DAS system envisioned in the Applications before use now. In many respects fitting the DAS Applications into Code Sec. 25-100.1 is like trying to fit a round peg into a square hole.

It is for that reason that we are currently within a Moratorium period while staff investigates and drafts legislation more in tune with the DAS antennae and cabinets and small cell systems.

**B. The process by which the permit application was denied comports with due process.**

The Applicant argues that it has been denied due process as City staff failed to cooperate with the Applicant in siting installations in the right-of-way. City staff had met with members of the Applicant's team. City's staff, however, lacks the authority to "approve" of installation locations that violate the City's Codes. Accordingly, the "lack of due process" argument should be rejected.

Further, Applicant's appeal reveals a number of indications that reveal previous consultations with City staff: Applications 13-01; 13-04; 13-07; 13-11; and 13-12.

It has been suggested that Applicant has been denied due process as a result of City staff not advising them of where the installation could be located *prior to* the "denial." Such and argument has been rejected by the Fourth District Court of Appeal. *Las Olas Tower Company v. City of Fort Lauderdale,* 733 So2d 1034, 1040 (Fla. 4th DCA, 1999), 783 So.2d 1056 (rev. dismissed) (Fla. 2001); *Las Olas Tower Company v. City of Fort Lauderdale,* 742 So. 2d 308, 314-315 (Fla. 4th DCA, 1999) , 783 So.2d 1056 (rev. dismissed) (Fla. 2001).

**C. The Application is <u>NOT</u> in violation of Code Sec. 25-100.1(c)(3), *Prohibition against front yard location in certain areas.***

City Code § 25-100.1 (c) provides the regulations governing the placement of at-grade communications service facilities. Among other matters it provides for size limitations within certain areas of the City. The areas of the City where Sec. 25-100.1(c)(3) regulations are applicable are relevant to this Application. Those areas of the City at issue are outlined in Code § 25-100.1 (c) (1) and include:

i. City residential zoning districts
ii. RO, ROA and ROC
iii. Broward County residential zoning districts
iv. Rights of way that are contiguous to boundaries of the aforementioned zoning districts.

City Code § 25-100.1 (c) (3) provides as follows:

(3) *Prohibition against front yard location in certain areas.* No at-grade communications service facilities within the areas identified in § 25-100.1 (c) (1) above shall be constructed within a right-of-way abutting the front yard of a lot or parcel within such areas.

Upon further investigation the proposed location is in the public right-of-way for NW 12th Street and is within a CF zoning district. The CF zoning district is not within the zoning districts enumerated in Code Sec. 25-100.1(c)(3), *Prohibition against front yard location in certain areas.* Accordingly, it is conceded that the **denial** based on Code Sec. 25-100.1(c)(3) **is in error**.

**D. Code Sec. 25-100.1 (c) (13), *Installation at outmost boundary of right-of-way in all areas.***

Code Sec. 25-100.1(c)(13) provides:

*Installation at outermost boundary of right of way in all areas.* Where a superior site design results from construction of at-grade communications service facilities at or near the outermost boundary of the right-of-way, the farthest distance practicable from the centerline of the right-of-way and edge of pavement is to be encouraged. **. . .**

In this instance Site Plan page C-1 shows the proposed location of the equipment cabinet to not be at the outermost boundary of the right-of-way where it would yield a superior site design. The Code encourages the placement of the proposed cabinet to be the farthest distasnce practicable from the centerline of the right-of-way. This proposed location can be moved farther toward the outermost boundary of the right-of-way and therefore fails to comply with Code Sec. 25-100.1(c)(13).

## CONCLUSION

Accordingly, for the foregoing reasons, the Record demonstrates that the denial of the Application (i) does not show a departure from the essential requirements of the law, Code Sec. 25-1002. (a)(1)(a), and (ii) that competent substantial evidence supports the denial, Code Sec. 25-100.2(a)(1)(b), and accordingly, the denial of Application 13-07 should be upheld as a final decision of the City Commission without any further *de novo* review.

13.07.4**.**