

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: 13-06/Node 61-3** (“Application”) **Denial Letter Item 4**

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 13-06 (NODE 61-3):

Applicant: Crown Castle NG, Eat, LLC

Application location: 934 NW 16th Avenue

Approximate location: 934 NW 16 Avenue (**Exhibit C**)

Approximate street address: approximately 135' south of NW 9th Place (adjacent to Carter Park) - Work on shoulder and sidewalk

Zoning District: P

Application Date: May 24, 2014

Denial Date: August 18, 2014

Description of Construction:

- a. Installation of new 40' concrete utility pole with Crown Castle distributed antenna system, ("DAS")
 - b. 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) prohibition against front yard location in residential districts. It is further DENIED for failure to comply with Code Sec. 25-100.1 (c) (12) prohibiting placement on certain collector streets 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) This service facility is proposed to be constructed in the right-of-way directly adjacent to Carter Park. ROWO subsection 25-100.1(c) (3); (**See, Exhibit D**), directs the Applicant to ROWO subsection 25-100.1(c)(1) regarding prohibition of front yard locations in residential districts. Assuming, however, that this ROWO subsection does apply to this Application, the installation is not proposed to be located in a "front yard" as that term is defined in the Code. Code Section 47-35.1 entitled "Definitions," defines a front yard as a "yard extending across the full width of the development site perpendicular to the front property line between the side property lines." (See, **Exhibit E**) The Applicant's proposed site is not a development site between side property lines, in fact, it is adjacent to a street on one side.

Further, ROWO subsection 2500.1(c)(1), addresses facilities which exceed 124 inches. The facility proposed by the Applicant is 104 inches. Therefore this subsection is not applicable to this Application. However, assuming that this subsection is applicable, had Crown been provided the opportunity to discuss the location with the City, Crown would have been willing to move the facility onto the City's public property and discuss terms of same with the City.

This denial comment also references ROWO subsection 25.100.1(c)(12); (**See, Exhibit D**) which prohibits placement on certain collector streets. However, according to this subsection, communications services facilities are prohibited specifically in areas where the department plans to install a sidewalk. As evidenced from the attached **Exhibit C**, there is an existing sidewalk at the proposed location. Therefore, this comment does not provide legal support for the denial.

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.

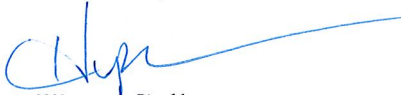
The ROWO; adopted in 2007, defines communications service (and therefore communications service facility) by reference to, Florida Stat. § 202.11 (3). This appears to be an error because subsection three (3) of the 2006 and 2007 versions of that statute define "dealer." However, Florida Stat. § 202.11 (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 do not 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.

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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 13-06

Location: 934 N.W. 16th Avenue, approximately 135' South of N.W. 9th Place
Zoning: P
Description of Work: a. Work on shoulder and sidewalk closure
b. Place new 40' concrete utility pole
c. Install new above-ground cabinet: 42" x 42" x 8" (92" total)
d. Attach new Crown Castle DAS antenna to new utility pole - 24" x 16" = 40"

**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. Application violates Code Sec. 25-100.1(c)(1), *Size limitation in certain areas*.
- D. The Application violates Code Sec. 25-100.1(c)(2), *Height limitation in certain areas*
- E. The Application violates Code Sec. 25-100.1 (c) (3), *Prohibition against front yard location in certain areas*.
- E. The Application violates Code Sec. 25-100.1 (c) (12), *Prohibition of placement on certain collector streets in all areas*.

A. 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, do 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 its 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 an argument has been rejected by the Fourth District Court of Appeal. *Las Olas Tower Company v. City of Fort Lauderdale*, 733 So.2d 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 in violation of Code Sec. 25-100.1(c)(1), *Size limitation in certain areas.*

It should be noted at the outside that Sec. 25-100(c)(1) was not listed as a basis of denial in the City Engineer's August 18, 2014 letter of denial. Nonetheless, granting a permit for the application in the face of a violation of the Code would be error.

The Application shows a cabinet with dimensions of 5' 2" x 1' 6" x 2' 0" with a combined dimensional total of 104". The antenna, mounted at the top of a 40-foot wood utility pole has measurements of 24" x 16", with a total dimensions of 40". The combination of 104" and 40" equal 144".

Code Sec. 25-100.1(c)(1), *Size limitation in certain areas* recites:

Size limitation in certain areas. Except as may otherwise be provided in sec. 25-100.1(c), at at-grade communications service facility with combined height, width and depth dimensions exceeding one hundred twenty-four (124) inches, as measure at- and above-grade, shall not be constructed in areas within (a) any of the following zoning districts within the City: (i) City residential zoning districts, (ii) RO, ROA and ROC, or (iii) Broward County residential zoning districts or (b) rights-of-way that are contiguous to the boundaries of the aforementioned zoning districts.

This installation is targeted for an RC-15 zoning district, one of the City's residential zoning districts. Additionally, the Application shows combined height, width and depth dimensions of 144". The combination of the residential zoning district and the combined height, width and depth of the facilities exceeding 124", the Application is in violation of Code Sec. 25-100.1(c)(1).

D. Application is in violation of Code Sec. 25-100.1(c)(2), *Height limitation in certain areas.*

It should be noted at the outside that Sec. 25-100(c)(2) was not listed as a basis of denial in the City Engineer's August 18, 2014 letter of denial. Nonetheless, granting a permit for the application in the face of a violation of the Code would be error.

Code Sec. 25-100.1 (c)(2) reads as follows:

25-100.1(c) (2) *Height limitations in certain areas.* Any portion of an at-grade communications service facility with a height of five (5) feet, eight (8) inches or greater, as measured at- and above-grade, shall be constructed below grade with the areas referenced in section 25-100.1(c)(1).

The areas referenced in Code Sec. 25-100.1(c)(1) include:

- (a) City residential zoning districts
- (b) RO, ROA and ROC
- (c) Broward County residential zoning districts
- (d) Rights-of-way that are contiguous to the boundaries of the aforementioned zoning districts.

Here the application is for installation of facilities within a City residential zoning district. The Site Plan shows the antenna to be placed on top of a 40' AT&T wood utility pole. Accordingly, the Application violates Code Sec. 25-100.1 (c)(2) as it contains a facility (antenna) that exceeds 5'8" as measured at- and above-grade.

E. The Application violates Code Sec. 25-100.1(c)(3), *Prohibition against front yard location in certain areas*

City Code Sec. 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. Those areas of the City where Code Sec. 25-100.1 (c) (3), *Prohibitions against front yard location in certain areas* 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.

Code Sec. 25-100.1 (a) defines abut as follows:

Abut when used in conjunction with a lot or parcel of land means a lot or parcel of land that shares all or part of a common lot line with another lot or parcel of land or right-of-way.

Although this installation is on property zoned P, it is on a right of way that is contiguous to a City residential zoning districts identified in Code Sec. 25-100.1 (c) and is within a parcel of land that *abuts* a right-of-way within a City residential zoning district. Accordingly, the denial of Application 13-06 should be upheld as a violation of Code Sec. 25-100.1 (c)(3)

The Applicant argues that the City has erred with respect to denials of Applications calling for installation in the front yard of certain residential districts designated under Code Sec. 25-100.1 (c)(1). Applicant advances the argument that the front yard prohibition only applies as to facilities that exceed “combined height, width and depth dimensions exceeding one hundred twenty-four (124) inches” as set forth in Code Sec. 25-100.1(c)(1):

Sec. 25-100.1(c)(1). *Size limitations in certain areas.* Except as may otherwise be provided in section 25-100.1(c), an at-grade communications service facility with combined height, width and depth dimensions exceeding one hundred twenty-four (124) inches, as measured at- and above-grade, shall be not constructed in areas within (a) any of the following zoning districts within the City: (i) City residential zoning districts, (ii) RO, ROA and ROC, or (iii) Broward County residential districts or (b) rights-of-way that are contiguous to the boundaries of the aforementioned zoning districts.

Code Sec. 25-100.1(c)(1), *Size limitations in certain areas* contains no reference to “front yards”

Further, the limitations as to “front yard” is contained in Code Sec. 25-100.1(c)(3), *Prohibition against front yard location in certain areas* is an absolute ban on location of the facilities within a right-of-way abutting the front yards of areas referenced in Code Sec. 25-100.1(c)(1), regardless of the combined dimensions of the apparatus.

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

As can be seen from the plain text of Sec. 25-100.1(c)(3), facilities are prohibited within the public right-of-way in front yards identified in Sec. 25-100(c)(1), regardless of whether such facilities are less than, equal to, or greater than 124" combined height, width and depth.

Applicant also raises the argument that the proposed installation is not located within the “front yard” as defined in ULDR Sec. 47-35.1, which defines “front yard” as follows:

Yard, front: a yard extending across the full width of the development site perpendicular to the front property line between the side property lines.

ULDR Sec. 47-35.1 defines a “development site” as follows:

Development site: a lot or parcel of land or combination of lots or parcels of land proposed for development. If a development site has more than one (1) parcel or lot with different owners, all property owners will be required to sign the application for development permit, and shall be required to execute and record in the public records a declaration on a form provided by the department, stating that the parcels have been developed as a single unit or purposes of meeting the ULDR. The declaration shall include a legal description of each parcel and shall state that no parcel may be developed separate from the other parcel unless each parcel standing alone meets the requirement of the ULDR.

The definition of “front yard” in the ULDR is not controlling as the entire focus of Sec. 25-100.1 is a set of regulations dealing with communications service facilities within the public rights-of-way. For that reason, the drafters of Sec. 25-100.1(3), *Prohibition against front yard location in certain area* chose to qualify the prohibition pertaining to the installation of such facilities “. . . within a right-of-way abutting the front yard of a lot or parcel within such areas.”

E. The Application violates Code Sec. 25-100.1(c)(12), *Prohibition of placement on certain collector streets in all areas*.

Code Sec. 25-100.1. (c) (12), *Prohibition of placement on certain collector streets in all areas* provides:

No at-grade communications service facility shall be constructed in the swale area on the side of a collector street where the department plans to install sidewalks.

Collector road means a route providing service which is of relatively moderate average traffic volume, moderately average trip length, and moderately average operating speed. Such a route also collects and distributes traffic between local roads or arterial roads and serves as a linkage between land access and mobility needs. Florida Statute Sec. 334.03 (2014)

This installation is projected to be in the swale area of N.W. 16th Place. N.W. 16th Place is on the Western periphery of Carter Park and services a fairly large residential community. As such it is a roadway of moderate average operating speed and collects and distributes traffic between local roads within this residential community and serves as a linkage to Sunrise Boulevard. N.W. 16th Place is a collector street or road under Florida Statute Sec. 334.03 (2014) and under the terms of Code Sec. 25-100.1 (c) (12) and is accordingly prohibited.

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. 25-100.2. (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 13-06 should be upheld as a final decision of the City Commission without any further *de novo* review.

13.06.4