BECKER & POLIAKOFF

Hope Calhoun, Esq.
Shareholder
Phone: (954) 364-6083 Fax: (954) 985-4176
hcalhoun@bplegal.com

1 East Broward Blvd., Suite 1800
Ft. Lauderdale, Florida 33301

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: 13-01/Node 60-1** ("Application")
Denial Letter Item 1

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 13-01 (NODE 60-1):
Applicant : Crown Castle NGEast, LLC
Application location: 1001 SE 20th Street
Approximate location: SE 20 St & SE 10 Ave (see **Exhibit C**)
Approximate street address: 1001 SE 20th Street
Zoning District: PEDD

Application Date : May 24, 2014

Denial Date: August 18, 2014

Description of Construction:
a. Installation of new 40' pole with Crown Castle distributed antenna system, ("DAS")
b. Installation of new above ground cabinet - 6'2" X 1 '3" X 2'0" = 124" Total

Denial Comments:
1. This Application is DENIED for failure to meet the criteria of Code Sec. 25-100.1 (c) (3) respecting the requirement for installation at the outermost boundary of the right-of-way.

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 Telecommuincations Act of 1996.

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 13-01

Location: 1001 S.E. 20th Street, approximately 1,270' West of SE 14th Avenue
Zoning PEDD
Description of Work: a. Work on shoulder and sidewalk closure
b. Install new 40' black metal utility pole
c. Place new ground mounted telecommunications cabinet: 42" x 42" x 8" (92" total)
d. Attach Crown Castle antenna to 40' black metal utility pole

CITY ARGUMENTS IN SUPPORT OF DENIAL

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).
B. Application fails to meet criteria of Code Sec. 25-100.1(c)(13), *Installation at outermost boundary of right-of-way*
C. The process by which the permit application was denied comports with due process.

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 Application fails to meet criteria of Code Sec. 25-100.1(c)(13), *Installation at outermost boundary of right-of-way.*

Site Plan Page C-1 shows S.E. 20th Street to be a 45-foot right of way, with an additional 25-foot right of way dedication North of the 45-foot right of way. See MARIANA ASPHALT PLAT, Plat Book 135, Page 47, Broward County Public Records. Relative to the 25 foot additional right of way, the cabinet is placed within approximately the innermost 4 feet of the additional 25 foot right of way and the utility pole is placed within approximately the innermost 5 feet of that additional 25 foot right of way.

City Code § 25-100.1 (c) (13), *Installation at outermost boundary of right-of-way in all areas* provides in pertinent part:

> (13) *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.

Page C-1 of the Site Plan shows that there is another approximately 19 – 20 feet to the outmost boundary of the right-of-way. Placement of the cabinet within the innermost 4 feet of the 25-foot additional right of way and placement of the new 40-foot utility pole within the innermost 5 feet of the additional right of way fails to meet the Code requirements of § 25-100.1 (c) (13) above.

The denial letter erroneously refers to Code Sec. 25-100.1(c)(3) instead of Code Sec. 25-100.1(c)(13). However the letter after reciting Code Sec. 25-100.1(c)(3), continues to modify that citation with text that reads: " . . . respecting the requirement for installation at the outermost boundary of the right-of-way." Clearly citing 25-100.1(c)(3) for the proposition that the installation is not at the outermost boundary of the right-of-way, is the product of a typographical error where (c)(3) deals with *prohibition against front yard locations in certain areas* and (c)(13) deals with *installation at outermost boundary of right-of-way in all areas.* Under the "tipsy coachman" doctrine, Courts will affirm the results of a lower tribunal where the right result is reached, but for the wrong reason. *Johnson v. Allstate Insurance Company,* 961

So.2d 113 (Fla. 2nd DCA, 2007). Here, since after the typographical error, the substance of the section was revealed, we have the right result reached for the right reason.

There is substantial competent evidence in the record to support the denial of application 13-01 as the application fails to meet the requirements of Code § 25-100.1 (c) (13), *Installation at outermost boundary of right-of-way in all areas.* There has been no demonstration of a departure from the essential requirements of the law.

C. 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).

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 13-01 should be upheld as a final decision of the City Commission without any further *de novo* review.

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