

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: 13-12/Node 63-2** ("Application")  
**Denial Letter Item 8**

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 13-12 (NODE 63-2):**

Applicant: Crown Castle NG East, LLC

Application location: 421 NW 12th Street Approximate location: 421 NW 12<sup>th</sup> Street (**Exhibit C**)

Approximate street address: approximately 145' east of NW 5<sup>th</sup> Avenue - work on shoulder Zoning District: RD-15

Application Date: May 24, 2014

Denial Date: August 18, 2014

#### Description of Construction:

- a. Installation of new 40' concrete 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:<sup>1</sup>

3. This Application is DENIED for failure to comply with Code Sec. 25-100.1(c) (3) & (4) respecting prohibition against front yard location in certain areas and prohibition against corner yard locations in certain residential districts.
4. The Application is DENIED for failure to comply with Code Sec. 25-100.1 (c) (8) which prohibits placement within sight triangle.
5. 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.

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<sup>1</sup> The numbering in this section corresponds to the numbering in that section of denial letter addressing this Application. That section did not contain a comment #1 or comment #2.

### **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) provides in relevant part that: "no at-grade communications service facilities within the areas identified...above shall be constructed within a right-of-way abutting the front yard of a lot or parcel within such areas". (See **Exhibit D**). That subsection directs the Applicant to ROWO subsection 25-100.1(c)(1) regarding prohibition in front yard locations in residential districts. 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, subsection (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 section is applicable, this location was an alternate location to the one originally proposed by Crown. The further relocation of this facility will not provide coverage to the area where needed.
- 6) The installation is not proposed to be in a location within the prescribed sight triangle as depicted in **Exhibit F**. Accordingly, this denial comment does not provide legal support for the denial.

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**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 13-12**

Location: 421 N.W. 12<sup>th</sup> Street, approximately 183' East of centerline of N.W. 5<sup>th</sup> Avenue  
Zoning: RD-15  
Description of work: a. Work on shoulder  
b. Place new 40' concrete utility pole  
c. Place new ground mounted telecommunications cabinet: 62" x 24" x 18" (104" total)  
d. Attach new Crown Castle DAS antenna to new utility pole - 24" x 16" = 40" 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. Application violates Code Sec. 25-100.1(c)(1), *Size limitation in certain areas*.
- C. The Application violates Code Sec. 25-100.1(c)(2), *Height limitation in certain areas*.
- D. The process by which the permit application was denied comports with due process.
- E. The Application violates Code Sec. 25-100.1(c)(3), *Prohibition against front yard location in certain areas*.
- F. The Application violates Code Sec. 25-100.1(c)(4), *Limitations on locations in corner yards in certain areas*.
- G. The Application violates Code Sec. 25-100.1(c)(8), *Sight triangles 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, 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 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 RD-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).

**C. Application is in violation of Code Sec. 25-100.1(c)(3), *Height limitation in certain areas.***

It should be noted at the outside that Sec. 25-100(c)(3) 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 in an RD-15 zoning district, which is a City residential zoning district. The Site Plan shows the 24" x 16" 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.

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

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. 4<sup>th</sup> 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. 4<sup>th</sup> DCA, 1999), 783 So.2d 1056 (rev. dismissed) (Fla. 2001).



**E. 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.

The property at issue is located at 421 N.W. 12<sup>th</sup> Street. It is located in a City residential zoning district – RD-15. It is legally described as Lots 22 through 24, Block 124 PROGRESSO, PB 2/18. The driveway and front door face NW 12<sup>th</sup> Street and therefore the front yard faces N.W. 12<sup>th</sup> Street. The proposed location for this antenna system is within the public right of way for NW 12<sup>th</sup> Street and therefore is located in the front yard of the parcel in question in 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.”

**F. Code Sec. 25-100.1(c)(4), *Limitations on locations in corner yards in certain areas.***

Code Sec. 25-100.1 (c) (4) recites:

*Limitations on locations in corner yards in certain areas.* At-grade communications service facilities constructed within the right-of-way abutting the

corner yard of a corner lot property within the areas identified in section 25-100.1 (c) (1) above shall not be located any closer than ten (10) feet from the side property line of the lot or parcel abutting the corner lot.

After further review of the Plat of PROGRESSO, the 60' right of way width for NW 5<sup>th</sup> Avenue to the West, the depth of the lots at 135', it appears that the proposed location of the antenna system is located at 421 N.W. 12<sup>th</sup> Street and **does not constitute** a violation of Code Sec. 25-100.1(c)(4).

**G. Code Sec. 25-100.1 (c)(8), *Sight triangles in all areas*.**

Code Sec. 25-100.1(c)(8), *Sight triangles in all areas* recites:

No at-grade communications service facilities nor features incorporated therewith pursuant to section 25-100.1(c)(5) above shall be constructed or installed within a triangular shaped area of land, known as a sight triangle, as defined in ULDR Sec. 47-35, Definitions, and measured as follows:

- a. Ten (10) feet from the intersection point of the edge of a driveway and curb, or in the event there is no curb, the edge of the alley or street pavement;

. . .

Upon further examination of the underlying data, it appears that the edge of the driveway is more than ten (10) feet from the proposed location of the antenna and therefore **is not in violation** of Code Sec. 25-100.1(c)(8), *Sight triangles in all areas*.

**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 13-12 should be upheld as a final decision of the City Commission without any further *de novo* review.