
MEMORANDUM

TO: JERRY A. BENTROTT, INTERIM CITY MANAGER

THRU: ROGER G. ORR, CITY ATTORNEY 

FROM: PAM E. BOOKER HAKIM, SENIOR ASSISTANT CITY ATTORNEY 

DATE: FEBRUARY 17, 2010

SUBJECT: T-MOBILE VARIANCE (P09-141)
NOTICE OF DENIAL ON VARIANCE APPLICATION

Attached please find a Notice of Denial for the T-Mobile variance request for the Fire District's site located at 777 SW Dalton Circle. At the request of Mary Solik, Esq., the City Attorney's Office is providing a written notice of the reasons for the denial pursuant to Florida Statutes, Chapter 166.033.

This item was heard before the Board of Zoning Appeals; therefore, this item should be brought before that Board for consideration and adoption of the attached notice.

Please place this item on the next available City Council agenda. Should you have any questions or need additional information, please contact me at x.6525.

PBH/dmf
Attach.

Notice of Denial On Variance Application

WHEREAS, on or about October 19, 2009, T-Mobile South, LLC, hereinafter “T-Mobile”, applied for a site plan approval, a special exception, and a variance to permit the installation of a 125’ wireless telecommunication facility at the Fire Station Site, located at 777 S. W. Dalton Circle, which currently has an existing 911 antenna; and

WHEREAS, the variance application request was heard by the Planning and Zoning Board on December 1, 2009, and the Planning and Zoning Board denied the request for the variance; and

WHEREAS, on or about December 15, 2009, T-Mobile appealed the decision of the Planning and Zoning Board to the City’s Board of Zoning Appeals, pursuant to §158.302 of the City’s Code of Ordinances; and

WHEREAS, on January 11, 2010, the City Council sitting as the Board of Zoning Appeals, heard the appeal of T-Mobile; and

WHEREAS, the Board of Zoning Appeals denied the request for a variance; and

WHEREAS, Florida Statutes, Chapter 166.033 requires a municipality to provide written notice to the applicant when the municipality denies a development permit, as defined in Florida Statutes §163.3164(8); and

WHEREAS, the denial of the variance request is a denial of a development permit, which requires written notice, pursuant to Florida Statute 166.033.

NOW, THEREFORE, the City of Port St. Lucie provides the following findings of fact and authority for the denial of the variance request.

1. The St. Lucie County Fire District currently owns a portion of Tract D, in Section 18, Township 37 South, Range 40 East, which is approximately one (1) acre in size.
2. On or about April 22, 1985, the Fire District requested a Special Exception Use (“SEU”) for the “erection of a 60 foot radio antenna adjacent to the building to provide radio contact with central dispatch, equipment out of the station and with the nearest emergency room facility.”

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3. On or about May 6, 1985, the Planning and Zoning Board recommended approval of the SEU.
4. On or about November 5, 2004, the Fire District requested administrative site plan approval for replacement of the emergency communications tower, due to damage sustained during the hurricanes.
5. On or about November 15, 2004, the Director of Planning and Zoning approved the site plan administratively to change the 60' antenna with a 120' antenna.
6. T-Mobile received authorization from the St. Lucie County Fire District on or about October 30, 2009, to represent the Fire District for the variance application.
7. Pursuant to City Code §158.006, Wireless Communications Towers are defined as:

“(1) A structure or ground-mounted tower which: (a) Is greater than 35 feet in height, as measured from base of the structure as provided in §158.213(L); (b) Does not exceed 300 feet in height (including antenna); and (c) Is principally intended to support communication (transmission or receiving) equipment for radio, TV, microwave, cellular, and similar communication purposes. (2) The term COMMUNICATION TOWER shall not include amateur radio operators' equipment licensed by the Federal Communication Commission (FCC). Communication towers are generally described as either monopole (free-standing), guyed (anchored with guy wires), or self-supporting (square, triangular, or pyramidal in plan view and constructed of steel lattice, tubular steel, reinforced concrete, or wood.”

8. Pursuant to City Code §158.213(E)(1), wireless communication towers may be located in (CS) Commercial Service, (LI) Light Industrial, (U) Utilities, (OSR) Open Space Recreation and (I) Institutional Land Use Areas.
9. Pursuant to City Code, §158.213, wireless communication antennas and towers located in institutional (I) areas must be on parcels greater than five (5) acres in size.
10. Essential Services are defined in City Code §158.006; as

“Public utility facilities either underground or overhead and related to the transmission or distribution systems of water, sanitary or storm sewerage (including treatment plants,) telephone, cable, gas, electricity, television cable, and public safety, including poles, wires, mains, hydrants, drains, sewer, lift

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stations, pipes, conduits, police or fire call boxes, warning sirens, traffic signals, and other similar equipment necessary for the furnishing of adequate service., are permitted in any zoning district as provided for in §158.209.”

11. Pursuant to City Code §158.295 (c), the Planning and Zoning Board should consider the following seven criteria when evaluating variances:
 - (1) That special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures, or buildings in the same zoning district;
 - (2) That the special conditions and circumstances do not result from any action of the applicant;
 - (3) That granting the variance requested will not confer on the applicant any special privilege that is denied by this chapter to other lands, buildings, or structures, in the same zoning district;
 - (4) That literal interpretation of the provisions of the chapter would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of the chapter and would work unnecessary and undue hardship on the applicant;
 - (5) That the variance granted is the minimum variance that will make possible the reasonable use of the land, building, or structure;
 - (6) That the granting of the variance will be in harmony with the general intent and purpose of the chapter and that the variance will not be injurious to the area involved or otherwise detrimental to the public welfare;
 - (7) That there will be full compliance with any additional conditions and safeguards which the Planning and Zoning Board or Zoning Administrator may prescribe, including but not limited to reasonable time limits within which the action for which variance is required shall be begun or completed, or both.

12. City Staff evaluated the aforementioned seven criteria in its staff report dated November 20, 2009, for the Planning and Zoning Board’s meeting of December 1, 2009.

13. City Staff recommended denial of the variance request based upon analysis and evaluation of the criteria enumerated in §158.295(c).

14. The Planning and Zoning Board denied the variance after the public hearing.

15. Pursuant to City Code §158.302, T-Mobile appealed to the City Council, sitting as the Board of Zoning Appeals.

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16. On January 11, 2010, the City Council heard the appeal and voted to deny the variance request.
17. Florida Statutes §163.3202 provides for local governments to regulate land use to ensure the compatibility of adjacent uses and provide for open space.
18. T-Mobile claimed an exemption from the requirement of needing a variance based upon Florida Statutes §365.172 (12)(a)(d)(5), which states:

“An existing tower, including a nonconforming tower, may be structurally modified in order to permit collocation or may be replaced through no more than administrative review and building permit review, and is not subject to public hearing review, if the overall height of the tower is not increased and, if a replacement, the replacement tower is a monopole tower or, if the existing tower is a camouflaged tower, the replacement tower is a like-camouflaged tower. This subparagraph shall not preclude a public hearing for any appeal of the decision on the application.”
19. The City disagreed with T-mobile’s assertion based upon the statutory definitions contained within Florida Statutes §365.172(3), which defines a “Tower” as “any structure designed primarily to support a wireless provider’s antennae.”
20. “Wireless provider” means “a person who provides wireless service and: 1. Is subject to the requirements of the order; or 2. Elects to provide wireless 911 service or E911 service in this state.”
21. “Wireless service” means “commercial mobile radio service” as provided under ss. 3(27) and 332(d) of the Federal Telecommunications Act of 1996, 47 U.S.C. ss. 151 et seq., and the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, August 10, 1993, 107 Stat. 312. The term includes service provided by any wireless real-time two-way wire communication device, including radio telephone communications used in cellular telephone service; personal communications service; or the functional or competitive equivalent of a radio-telephone communications line used in cellular telephone service, a personal communications service, or a network radio access line. The term does not include wireless providers that offer mainly dispatch service in a more localized, noncellular configuration; providers offering

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only data, one-way or stored-voice services on an interconnected basis; providers of air-to-ground services; or public coast stations.”

22. “Wireless Communications Facility” is defined as “any equipment or facility used to provide service and may include, but is not limited to, antennae, towers, equipment enclosures, cabling, antenna brackets, and other such equipment. Placing a wireless communications facility on an existing structure does not cause the existing structure to become a wireless communication facility.”
23. The definitions specifically exclude dispatch service that is offered in a more localized, non-cellular configuration as being “wireless service.”
24. The Fire District tower facilities are for dispatch services in a localized manner, and it does not allow for cellular telephone services.
25. The Federal Telecommunications Act of 1994, 47 U.S.C. SS 151 et seq. defines Wireless Telecommunications Services as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used”.
26. The Fire District tower is not an “existing tower” as defined in the statutes because the existing tower is not designed to primarily support a wireless provider. To the contrary, the tower is designed for dispatch services.
27. The Fire District does not provide wireless telecommunication to the public for a fee, therefore, they are not a “wireless provider” as defined under the Statute, which would allow the Fire District to avail themselves of the protections provided to wireless communications providers under Florida Statute §365.172(12)(a)(5).
28. The Board of Zoning Appeals considered the visual impacts of the tower on the surrounding residential neighborhood and photos submitted to the board by Gregory Atkinson on January 11, 2010, showing the difference in the existing 911 tower and other commercial telecommunication towers in the City.
29. The Fire Districts emergency communications tower currently existing at 777 S.W. Dalton Circle is substantially different from the proposed wireless communications tower T-Mobile seeks to erect on the one acre site.

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30. The variance requested by T-Mobile is for an 80% reduction of the City's five acre requirement for wireless telecommunication facilities.
31. The existing Fire Districts emergency communications tower is functioning to serve the purposes intended by the Fire District for dispatch services.
32. The Board of Zoning Appeals considered the proximity of the tower to the residential neighborhood which surrounds the Fire Station site and the negative impacts placement of a tower would have on the residential neighborhood.
33. The Board of Zoning Appeals considered the comments and concerns of the neighbors living adjacent to the proposed tower and the aesthetic impacts the proposed tower would place on the residential neighborhood.
34. The Board of Zoning Appeals considered the fact that there are alternative locations for the placement of the proposed tower which would create a less intrusive alternative to fill the alleged gap in coverage.
35. The Board of Zoning Appeals considered the fact that construction of the proposed tower would alter the essentially residential character of the neighborhood.
36. The Board of Zoning Appeals considered the opinion of its legal counsel that Florida Statute §365.172(12)(a)(d)(5), did not provide an exemption for T-Mobile to bypass the variance criteria provided in the City's Code of Ordinances.
37. Therefore, based upon the foregoing, testimony, facts, data, codes, statistics, reports, pictures and other information contained in the record, the Board of Zoning Appeals denies the requested variance.

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BOARD OF ZONING APPEALS

ATTEST:

Patricia P. Christensen, Mayor

Karen A. Phillips, City Clerk

APPROVED AS TO FORM
AND SUFFICIENCY:

Pam E. Booker Hakim
Senior Assistant City Attorney

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