

**BEFORE THE CITY COMMISSION OF THE CITY OF
LAWRENCE, KANSAS**

In Re: APPLICATION FOR)
SPECIAL USE PERMIT OF)
PAMCORP, LLC, IN BEHALF OF) No. SUP-14-00312
VERIZON WIRELESS, LLC.)

)

INTRODUCTION

On November 17, 2014, the Lawrence-Douglas County Metropolitan Planning Commission recommended approval, with conditions, of Application for Special Use Permit, No. SUP-14-00312, filed by PAMCORP, LLC, in behalf of Verizon, LLC, to construct on that real property commonly known as 1725 Bullene Avenue, Lawrence, Douglas County, Kansas, a 120-foot monopole telecommunications tower. See City of Lawrence, Kan., Code § 20-1306(f) (July 1, 2013). On December 9, 2014, during its regular meeting, the City Commission convened a public hearing on Application for Special Use Permit, No. SUP-14-00312. During that hearing, the City Commission received evidence from City Staff, the applicant, and the general public. Based on the credible evidence adduced at that hearing, the City Commission voted unanimously to override the recommendation of the Planning Commission and to deny Application for Special Use Permit, No. SUP-14-00312. See City of Lawrence, Kan., Code § 20-1306(h) (July 1, 2013). This document, in accordance with 47 U.S.C. § 332(c)(7)(B)(iii) and City of Lawrence, Kan., § 20-529(10)(ii) (July 1, 2013), memorializes the City Commission's findings of fact and conclusions of law.

FINDINGS OF FACT

1. Steven L. Eudaly owns that real property commonly known as 1725 Bullene Avenue, Lawrence, Douglas County, Kansas ("the subject property").

2. The subject property is located on a small industrially zoned lot that is surrounded, generally, by residential lots and some light industry. To its north, the subject property is bounded immediately by a vacant lot and, beyond that, a number of residential homes. To the east and to the south, the subject property is bounded by light industry and other businesses. Directly west of the subject property is the Burroughs Creek Trail. To the southwest, across the Burroughs Creek Trail, exists "The Woods on 19th Street," a rather sizeable residential development. The remainder of the area would be described as residential.

3. The subject property is located in an IL (Limited Industrial) zoning district.

4. Although the subject property has been zoned industrial since the 1960s, the Burroughs Creek Corridor Plan, which is incorporated into *Horizon 2020*, the Comprehensive Plan for the City of Lawrence and Unincorporated Douglas County, as the area plan, provides that the subject property shall, in the future, be zoned commercial, surrounded by residential infill.

5. Under the City Code, telecommunications towers are, assuming certain standards and conditions are met, permitted in IL zoning districts only with the issuance of a Special Use Permit. See City of Lawrence, Kan., Code § 20-403 (July 1, 2013).

6. As owner of the subject property, Mr. Eudaly granted to PAMCORP, LLC, in behalf of Verizon Wireless, LLC (hereinafter, collectively, "the applicant"), the authority to seek from the City a special use permit to construct on the subject property a 120-foot monopole telecommunications tower.

7. In accordance with that authorization, on July 21, 2014, the applicant filed with the City Application for Special Use Permit, No. SUP-14-00312, seeking to construct on the subject property a 120-foot monopole telecommunications tower.

8. Although originally filed on July 21, 2014, Application for Special Use Permit, No. SUP-14-00312, was not actually completed and ready for processing until October, 2014.

9. On November 7, 2014, in accordance with City of Lawrence, Kan., § 20-529(7) (July 1, 2013), Burns & McDonnell, hired by the City to perform the third-party review of Application for Special Use Permit, No. SUP-14-00312, found that the applicant had met its burden of proof for a new telecommunications tower.

10. On November 17, 2014, the Lawrence-Douglas County Metropolitan Planning Commission conducted a public hearing on Application for Special Use Permit, No. SUP-14-00312. At that hearing, Planning Staff presented its report, wherein, having examined the application in light of City of Lawrence, Kan., Code § 20-1306 and 20-529 (July 1, 2013), Planning Staff recommended that the Planning Commission recommend to the City Commission that it approve Application for Special Use Permit, No. SUP-14-00312, with certain conditions.

11. At the conclusion of the November 17, 2014, public hearing, after hearing evidence from City Staff, the applicant, and the general public, the Planning Commission deliberated and voted unanimously to adopt the findings of City Staff and to recommend to the City Commission that it approve Application for Special Use Permit, No. SUP-14-00312, with certain conditions.

12. Within fourteen days of the conclusion of the Planning Commission meeting, under City of Lawrence, Kan., § 20-1306(g) (July 1, 2013), residents of the surrounding neighborhood filed with the City a valid protest petition.

13. At its December 9, 2014, regular meeting, in accordance with City of Lawrence, Kan., Code § 20-529(10) (July 1, 2013), the City Commission convened a public hearing on Application for Special Use Permit, No. SUP-14-00312. During the course of that hearing, the City Commission received evidence from City Staff, the applicant, and the general public.

14. Highly summarized, the following relevant evidence was presented during the public hearing:

(a) The proposed telecommunications tower meets the requirements of Lawrence, Kan., Code § 20-1306(i) and § 20-529 (July 1, 2013), for location on the subject property.

(b) The subject property is the best possible location from which the applicant can reach its target area.

(c) There is no suitable structure within the area upon which the applicant could collocate its equipment and still reach its target area.

(d) The applicant had not really explored locating the telecommunications tower on properties to the east and south of the subject property as they are located just outside the target area.

(e) If located on the subject property, the telecommunications tower would be an eyesore for those living in surrounding neighborhoods and for those using and enjoying the Burroughs Creek Trail.

(f) If located on the subject property, the telecommunications tower may cause a diminution in property values in the surrounding residential neighborhoods by as much as 20%.

(g) The telecommunications tower is incompatible with the Burroughs Creek Corridor Plan and, as such, the City's Comprehensive Plan.

(h) The telecommunications tower is incompatible with the growth occurring in the surrounding neighborhoods, which is residential in nature.

15. At the conclusion of the public hearing, the City Commission discussed the issues, deliberated on the evidence that it had received, and, taking all evidence into consideration, found the following substantial evidence to be credible:

(a) The proposed telecommunications tower is not compatible with the residential nature of the surrounding area.

(b) The proposed telecommunications tower is not compatible with the Burroughs Creek Corridor Plan and, as such, the City's Comprehensive Plan.

(c) The proposed telecommunications tower might likely cause a significant diminution in value of surrounding residential properties.

(d) The applicant had not fully explored locating the telecommunications tower on properties to the east and to the south, which would diminish negative impacts on the surrounding residential neighborhoods, and whether such location -- by itself or together with other locations -- would meet its needs.

16. Based on the totality of the substantial and credible evidence presented at the public hearing -- as outlined in the preceding paragraph -- the City Commission voted unanimously (5-0) to override the recommendation of the Planning Commission and to deny Application for Special Use Permit, No. SUP-14-00312.

CONCLUSIONS OF LAW

1. Although Congress has largely pre-empted local regulation of telecommunications towers, also known as personal wireless facilities, it provides expressly that "nothing in [the Telecommunications Act of 1996] shall limit or affect the authority of ... local government ... over decisions regarding the placement, construction, and modification" of telecommunications towers. 47 U.S.C. § 332(c)(7). See *U.S. Cellular Telephone of Greater Tulsa, L.L.C. v. City of Broken Arrow*, 340 F.2d 1122, 1132-33 (10th Cir. 2003).

2. The Kansas legislature has authorized the City to adopt zoning regulations that "provide for the issuance of special use ... permits." K.S.A. 12-755.

3. At City of Lawrence, Kan., Code § 20-1306 (July 1, 2013), which governs the issuance of special use permits within the City, the City has created "a discretionary approval process for uses ... [which is] intended to ensure that proposed [s]pecial [u]ses will not have a significant adverse impact on surrounding uses or on the community at large." City of Lawrence, Kan., Code § 20-1306(a) (July 1, 2013).

4. In reviewing and making decisions on a proposed special use, such as a telecommunications tower, the decisionmaking body shall consider, at least, the following:

- (1) whether the proposed use complies with all applicable provisions of this Development Code;
- (2) whether the proposed use is compatible with adjacent uses in terms of scale, site design, and operating characteristics, including hours of operation, traffic generation, lighting, noise, odor, dust, and other external impacts;
- (3) whether the proposed use will cause substantial diminution in value of other property in the neighborhood in which it is to be located;
- (4) whether public safety, transportation and utility facilities and services will be available to serve th subject property while maintaining efficient levels of service for existing development.
- (5) whether adequate assurances of continuing maintenance have been provided; []
- (6) whether the use will cause significant adverse impacts on the natural environment; and

- (7) whether it is appropriate to place a time limit on the period of time the proposed use is to be allowed by special use permit and, if so, what that time period should be.

City of Lawrence, Kan., Code § 20-1306(i) (July 1, 2013).

5. Pursuant to City of Lawrence, Kan., Code § 20-403 (July 1, 2013), a telecommunications tower is permitted, as a special use, in IL (Limited Industrial) zoning districts. *Id.* Telecommunications towers are also subject to standards established at City of Lawrence, Kan., Code § 20-529 (July 1, 2013). *See id.*

6. Among other things, City of Lawrence, Kan., Code § 20-529 (July 1, 2013), requires the City to consider, in determining whether a new telecommunications tower meets its standards, such things as height, proximity to residential structures and neighborhoods, nature of uses on adjacent or nearby properties, topography, availability of other structures for collocation, and the design of the telecommunications tower. *Id.*

7. Finally, those factors established by the Kansas Supreme Court for considering rezoning decisions, *see Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (1978), apply to the consideration of special use permits. *See K-S Center Co. v. City of Kansas City*, 238 Kan. 482, 495, 712 P.2d 1186 (1986). Those factors include such things as the character of the neighborhood, the uses of nearby properties, the suitability of the subject property for the proposed use, the length of time the property has remained vacant, the recommendation of City Staff, and whether the proposed use is consistent with the City's comprehensive plan.

8. Here, the standards for granting a special use permit, the standards governing location of a new telecommunications tower, and the *Golden* factors all require the City to consider, in making its decision, the compatibility of the proposed use with the surrounding neighborhood. The substantial evidence and credible evidence adduced at the public hearing -- notwithstanding City Staff's and the Planning Commission's conclusion to the contrary -- establish that the proposed telecommunications tower is incompatible with the surrounding residential neighborhoods and that the location of the telecommunications tower on the subject property will have a deleterious impact on those neighborhoods and the lives of those persons living in the neighborhoods, whether it be aesthetics, use of the Burroughs Creek Trail, or the possible diminution in property values. In this case, the City Commission concludes that the incompatibility of the proposed use with the surrounding properties is of paramount importance and that it overrides other factors and standards that may suggest that the subject property is appropriate for a telecommunications tower. Specifically, location of the proposed telecommunications tower on the subject property will disrupt the quiet peace and enjoyment of those living in surrounding residential neighborhoods. That is a fundamental right that this City Commission wishes, above all else, to protect. This factor alone leads the City Commission to conclude that it is in the best interests of the City to override the recommendation of the Planning Commission and to deny Application of Special Use Permit, No. SUP-14-00312.

9. Also bolstering that decision is the Burroughs Creek Corridor Plan, which has been adopted and incorporated into *Horizon 2020*, the City's comprehensive plan. The Burroughs Creek Corridor Plan provides that the subject property shall be zoned commercial -- rather than industrial -- and that surrounding properties largely be residential infill. Although telecommunications towers are permitted under the special use permit process in commercially zoned areas, based on the plan that surrounding properties be largely residential infill, the City Commission concludes that the proposed telecommunications tower on the subject property does not meet and is inimical to the Burroughs Creek Corridor Plan and *Horizon 2020*, the City's comprehensive plan.

10. Finally, the City Commission concludes that City standards require the applicant to consider and to exhaust all possibilities before constructing a new telecommunications tower on the subject property. However, the applicant admits that it did not consider better properties to the east and south -- properties that would have a less harmful and negative impact on surrounding neighborhoods -- and whether such property would meet its needs, only because said properties existed just outside its target area. As such, the City Commission is not convinced that the applicant, in failing to consider those locations and whether such locations -- either by themselves or in conjunction with other sites -- would meet its needs, has not met its burden of proof for the location of a new telecommunications tower on the subject property.

11. In sum, based on the substantial and credible evidence in the record, the City Commission concludes that the proposed telecommunications tower on the subject property is incompatible with the surrounding residential neighborhoods, that the proposed telecommunications tower is incompatible with the City's comprehensive plan, and that the applicant has not met its burden of proof that it has considered all options short of building a new telecommunications tower on the subject property. For each of those reasons, the City Commission hereby overrides the recommendation of the Planning Commission and denies Application for Special Use Permit, No. SUP-14-00132.

ADOPTED by the Governing Body of the City of Lawrence, Kansas, this 16th day of December, 2014.

MIKE AMYX
Mayor