

RESOLUTION NO. 2021-08-\_\_\_\_\_

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, MAKING WRITTEN AND EVIDENTIARY FINDINGS RELATIVE TO THE DENIAL OF A REQUEST FROM HEMPHILL, LLC, TO CHANGE THE ZONING ON APPROXIMATELY 10.7 ACRES OF LAND OCCUPIED BY FURR ELEMENTARY SCHOOL FROM PD - PLANNED DEVELOPMENT DISTRICT, ORDINANCE NO. 2001-02-024, FOR AN ELEMENTARY SCHOOL AND A PARK TO PD - PLANNED DEVELOPMENT DISTRICT WITH A BASE ZONING OF "GC"—GOVERNMENT COMPLEX DISTRICT AND TO ALLOW A TELECOMMUNICATIONS TOWER, AT THE SOUTHEAST CORNER OF BLUESTEM DRIVE AND HIDDEN HAVEN DRIVE HAVING A STREET ADDRESS OF 551 SOUTH BLUESTEM DRIVE, MCKINNEY, TEXAS; AND PROVIDING FOR AN EFFECTIVE DATE.**

**WHEREAS**, Hemphill, LLC ("Applicant"), submitted a rezoning application identified as File No. 21-0041Z (the "Rezoning Application") to the City requesting a change of the zoning on a 10.7 acre tract of land occupied by Furr Elementary School (the "Furr Elementary Property") from PD - Planned Development District, Ordinance No. 2001-02-024, for an elementary school and a park to PD - Planned Development District with a base zoning of "GC"— Government Complex District and to allow a telecommunications tower, with a stealth monopole design, to permit the construction and operation of an 80-foot tall (to the top of steel) stealth monopole telecommunications tower with a 5-foot lightning rod (collectively the "Cell Tower") with the use and development of the Furr Elementary Property conforming to the regulations contained in Sections 146-93 and 146-137 of the Code of Ordinances, City of McKinney, Texas, (the "McKinney Code") located at the southeast corner of Bluestem Drive and Hidden Haven Drive that is more commonly referred to as Furr Elementary School situated at 551 South Bluestem Drive, Collin CAD ID # 2780828, in the City of McKinney ("City"); and

**WHEREAS**, Applicant announced that it proposes to construct the eighty-foot (80') tall Cell Tower for the benefit of one confirmed tenant, Verizon Wireless, with one other telecommunications provider expressing "strong interest" in collocating on the proposed Cell Tower; and

**WHEREAS**, at the April 13, 2021, Planning and Zoning Commission ("Commission") meeting of the City, City Staff recommended that the Rezoning Application should be continued to allow the Applicant to post the required rezoning signs on the Furr Elementary Property as required by the McKinney Code; and

**WHEREAS**, the Commission opened the public hearing to allow members of the public who were in attendance to speak for or against the application to change the zoning on the Furr Elementary Property in accordance with the Rezoning Application; and

**WHEREAS**, after the presentation of evidence and testimony during the April 13, 2021, public hearing on the requested application to rezone the Furr Elementary Property, the Commission voted to continue the public hearing and table the item to the April 27, 2021, Planning and Zoning Commission meeting per Staff's recommendation, with a vote of 7-0-0; and

**WHEREAS**, at the April 27, 2021, Planning and Zoning Commission meeting of the City, the Applicant presented testimony and evidence related to its application to change the zoning on the Furr Elementary Property and the Commission conducted a public hearing relative to said Rezoning Application at which members of the public were also afforded and opportunity to speak for or against the Rezoning Application; and

**WHEREAS**, at the April 27, 2021, Planning and Zoning Commission meeting of the City, the Commission also asked questions to the Applicant and City Staff regarding the Rezoning Application; and

**WHEREAS**, after the public hearing on the requested Rezoning Application was closed and all deliberation ceased, the Commission voted to recommend approval of the proposed Rezoning Application to the City Council, with a vote of 7-0-0; and

**WHEREAS**, at the May 18, 2021, City Council meeting, the Applicant presented testimony related to its application to change the zoning on the Furr Elementary Property and the City Council conducted a public hearing relative to said Rezoning Application at which members of

the public were also afforded and opportunity to speak for or against the Rezoning Application and during which the City Council also asked questions regarding the Rezoning Application to City Staff and the Applicant; and

**WHEREAS**, after the presentation of evidence and testimony during the public hearing on the requested application to rezone the Furr Elementary Property, the City Council voted to close the public hearing and after discussion moved to table the item to the July 6, 2021, City Council meeting, with a vote of 7-0-0, to allow the Applicant an opportunity to investigate other potential locations that might provide the coverage being sought by this Rezoning Application, with a vote of 7-0-0; and

**WHEREAS**, at the July 6, 2021, City Council meeting, the Applicant re-urged its desire to have the City Council consider the Applicant's Rezoning Application for the Furr Elementary Property; and

**WHEREAS**, at the July 6, 2021, City Council meeting, the City Council re-opened the public hearing and accepted further evidence and testimony regarding the Rezoning Application from and asked additional questions of City Staff, the Applicant, and members of the public speaking for or against the Rezoning Application; and

**WHEREAS**, after the presentation of evidence and testimony during the public hearing on the requested application to rezone the Furr Elementary Property, the City Council closed the public hearing and voted to deny the proposed change in zoning from the PD - Planned Development District, Ordinance No. 2001-02-024, zoning on the Furr Elementary Property, with a vote of 4-3-0; and

**WHEREAS**, it is the intent of the City to fully comply with all applicable provisions of the Telecommunications Act of 1996 (specifically 47 U.S.C. § 332, *et seq.*) relative to the siting of the proposed Cell Tower; and

**WHEREAS**, federal law provides, in 47 U.S.C. § 332(c)(7)(B)(iii), that a local government that denies a request to place, construct or modify a cell tower must put the denial in writing, setting forth the basis for the denial, supported by substantial evidence; and

**WHEREAS**, the purpose of this Resolution is to provide the substantial evidence in writing for the reasons undergirding the City Council's denial of the application for a change in the zoning on the Furr Elementary Property from PD - Planned Development District, Ordinance No. 2001-02-024, for an elementary school and a park to PD - Planned Development District with a base zoning of "GC"—Government Complex District and to allow a Telecommunications Tower, with a stealth monopole design on the Furr Elementary Property with the use and development of the Furr Elementary Property conforming to the regulations contained in Sections 146-93 and 146-137 of the McKinney Code.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS, THAT:**

### **SECTION 1**

All of the above premises are hereby found to be true and correct legislative and factual findings of the City of McKinney and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

### **SECTION 2**

The City Council of the City of McKinney, Texas, hereby makes the following legal and factual findings:

1. Under the Telecommunications Act of 1996, while preserving local authority over the siting and construction of wireless communications facilities, there are five limitations on local authorities when dealing with cell towers and telecommunications carriers. A local government:

- (a) shall not prohibit or have the effect of prohibiting the provision of service [47 U.S.C. § 332(c)(7)(B)(i)(II)];
- (b) may not unreasonably discriminate between providers of functionally equivalent services [47 U.S.C. § 332(c)(7)(B)(i)(I)];

- (c) must act within a reasonable time after a request is filed [47 U.S.C. § 332(c)(7)(B)(ii)];
- (d) any decision by the local government must be in writing and supported by substantial evidence [47 U.S.C. § 332(c)(7)(B)(iii)]; and
- (e) any decision is subject to judicial review [47 U.S.C. § 332(c)(7)(B)(v)].

2. For purposes of the Telecommunications Act of 1996, the City considered the following substantial evidence in support of its denial of the Rezoning Application to change the zoning on the Furr Elementary Property from PD - Planned Development District, Ordinance No. 2001-02-024, for an elementary school and a park on the Furr Elementary Property to PD - Planned Development District with a base zoning of "GC"— Government Complex District and to allow the Cell Tower in question with the use and development of the Furr Elementary Property conforming to the regulations contained in Sections 146-93 and 146-137 of the McKinney Code.

3. The Furr Elementary Property on which the Cell Tower is proposed to be located is zoned "PD" - Planned Development District, Ordinance No. 2001-02-024, and such ordinance for an elementary school and a park. The Furr Elementary Property is situated in an area that is predominantly residential in nature, and the Furr Elementary Property is home to an elementary school. The areas immediately to the south, west, and north, and adjacent to the Furr Elementary Property are already developed as a single-family residential neighborhood. The area to the east of the Furr Elementary Property is designated as a lot for park land but is still owned by the Developer.

4. According to the documentation and testimony provided by the Applicant this Cell Tower is not a small cell application. The Applicant stated that the Cell Tower would be for 4G and 5G services which includes phone calls, data, and emails. The Applicant testified that Verizon Wireless only has one tower in the area that causes slow speeds with uploading and downloading information. The Applicant testified that Verizon Wireless is looking to improve both capacity and performance to the customers in the target area that would be covered by the proposed Cell Tower.

5. According to the documentation and testimony provided by the Applicant the area proposed to be served by the Cell Tower is already provided service by Verizon and other wireless facility carriers. The Applicant provided copies of propagation maps prepared by Verizon Wireless that show the existing cellular coverage in the area centered upon and around the Furr Elementary Property (the "Furr Propagation Maps").

6. The Applicant explained that the Furr Propagation Maps show there is no gap in coverage for in-vehicle and outdoor cell coverage for the area proposed to be served by the Cell Tower.

7. According to the documentation and testimony provided by the Applicant the purpose of this Cell Tower is to provide "ideal coverage indoors" to eliminate dropped calls inside homes in the proposed service area. The Applicant explained that the Furr Propagation Maps indicate the proposed service area does not have "ideal coverage indoors" as defined or determined by Verizon Wireless.

8. The Applicant explained when a "siting" company seeks to build a new cell tower in an area they start in the middle of the gap in coverage. The Applicant stated that the exception to that process occurs when there are issues with topography with hills or a large downtown area like Austin or Atlanta, Georgia. The Applicant testified that with the City's "relatively flat" land that the best place to place a cell tower to provide the "ideal coverage indoors" that is being sought through this Rezoning Application would be in the middle of the ideal indoor coverage gap. In this type of situation, the Applicant testified, that these towers and antennas address coverage needs anywhere from a half-mile to three-quarters of a mile in any given direction.

9. The Applicant stated that there were three (3) primary locations identified by the Applicant in the center of this proposed service area that was selected by Verizon Wireless are at least possibilities for where a proposed cell tower would work. The Applicant identified the three (3) locations as the fire station to the east, an amenity center to the southwest, and Furr Elementary School in the center. However, no propagation maps were provided by Verizon for potential cell service from any location other than the Furr Elementary Property.

10. The Applicant stated that the fire station was considered but the City of McKinney has a policy that prohibits leases on City-owned property that is used for public safety purposes. The Applicant also stated that the fire station site was not large enough at approximately three

hundred twenty feet (320') by four hundred feet (400') to allow for the required two-to-one (2:1) distance for setbacks from property lines given the proposed height of the cell tower. The cell tower would essentially have to be built in the middle of the property to make it work with the required setbacks. The Applicant did not provide any propagation maps regarding coverage available from the fire station site.

11. The Applicant explained that locating a cell tower on the amenity center land, which was identified as a possible cell tower location was not pursued due to the layout of the land. The amenity center land has floodplain and a pond located on it in addition to the amenity center. The Applicant did not provide any propagation maps regarding possible coverage available from the amenity center site.

12. The proposed Cell Tower is planned to be installed adjacent to the gymnasium of Furr Elementary School on the Furr Elementary Property in the middle of the ring displayed on the Furr Propagation Maps. The proposed Cell Tower is intended to be eighty-feet (80') tall with a five-foot (5') tall lightning rod attached to its top for a combined total height of eighty-five feet (85'). The Applicant testified that the Proposed Cell Tower is an "optimum location" that will give Verizon Wireless ninety percent (90%) of all of the coverage it wants to improve at this location.

13. The Applicant testified that there are two empty tracts of land immediately to the east of the Furr Elementary Tract. The Applicant stated that the area of land at the far east end is within the flood plain and is unusable. The Applicant went on to state that the area of land in the middle adjacent to the Furr Elementary Property is owned by a residential developer. The Applicant testified that it was a waste of time to talk to a residential developer about siting a cell tower within their property as the first project that goes in, and you will never get a positive outcome from those discussions before the property is developed although it might be accepted later by the residential developer as an amenity. So, the Applicant was left with the Furr Elementary Property.

14. When asked by a City Councilmember, the Applicant testified that the gap in coverage for "ideal coverage indoors" sought to be addressed by this Cell Tower also extends both to the area north of Virginia Parkway and to the area south of Westridge from the area that is shown on the Furr Propagation Maps centered on Furr Elementary Property as being the area proposed to be covered by the Cell Tower. The areas north of Virginia Parkway and south of Westridge will not be covered by this Cell Tower.

15. When asked whether there were any locations to the south of the Furr Elementary Property that were looked at a potential location, the Applicant responded that southern locations could be discussed. The Applicant also stated that if a tower was placed to the south of the ideal indoor coverage gap reflected on the Furr Propagation Maps it would necessitate a need to place another tower to the north of the ideal indoor coverage gap. The Applicant did not provide any additional information regarding southern locations, although a variant of the Furr Propagation Maps was provided that indicated, according to the Applicant, the placement of antenna equipment on a City-owned water tower to the south is not an optimal location and would only cover about thirty (30) to forty percent (40%) coverage of the area Verizon wants to improve and would require another tower to be installed to the north in the future.

16. No testimony or evidence was presented regarding how the placement of antennas on the water tower to the south and the installation of a cell tower at a different location to the north might address the overall gap in coverage for "ideal coverage indoors" within the area identified on the Furr Propagation Maps or those areas situated north of Virginia Parkway and south of Westridge that also lack "ideal coverage indoors" might be improved by locations other than the Furr Elementary Property.

17. When asked by the City Council what would happen if the owner of the Furr Elementary School site backed out of the lease agreement, the Applicant stated that they would have to start at the beginning to find another location.

18. When asked by the City Council whether any locations that were owned by homeowners' associations were investigated, the Applicant's propagation representative indicated he would have to defer to the Applicant's real estate team and that he was not aware of any investigations.

19. When asked by the City Council whether any discussions occurred with D.R. Horton regarding possible cell tower locations, the Applicant's propagation representative indicated he would have to defer to the Applicant's real estate team and that he was not aware of any discussions.

20. The Applicant did not verify the availability (or lack thereof) of any proposed alternative antenna sites for the placement of one or more cell towers less than eighty-feet (80') in height that might be used in tandem to achieve the desired "ideal coverage indoors." In fact, the Applicant appeared to indicate that the use of more than one site to achieve "ideal coverage indoors" throughout this gap in coverage area was not considered.

21. The Applicant also did not provide any testimony or evidence that the proposed stealth monopole to be erected on the Furr Elementary Property could accommodate the applicant's antennas (represented to be the antennas of Verizon Wireless) and comparable antennas for at least two (2) additional users as required by Section 146-137(e)(2) of the McKinney Code. The testimony was limited to a discussion regarding antennas for Verizon Wireless and AT&T only and accommodating only those two users rather than a total of three users as required by Section 146-137(e)(2) of the McKinney Code.

22. It is the purpose of the City's Zoning Ordinance, Chapter 146 of the Code of Ordinances, City of McKinney, Texas ("McKinney Code"), to among other things, secure safety from fire, panic, and other dangers; promote health and the general welfare; provide adequate light and air; prevent overcrowding of land; and, facilitate the adequate provision of public requirements, all in accordance with the comprehensive urban plan for the City. McKinney Code § 146-2.

23. The "PD" - Planned Development zoning district is designed to provide for the unified and coordinated development of parcels or tracts of land. *Id.* at § 146-94(a). Any design or development proposal that does not strictly conform to the requirements of the Zoning Ordinance may request approval of a "PD" - Planned Development District, to be approved in accordance with the provisions of this chapter. *Id.* at § 146-94(b). However, no proposed PD District ordinance may be approved without ensuring a level of exceptional quality or innovation for the associated design or development. *Id.* Exceptional quality or innovation could come in many forms including, but not limited to, enhanced landscaping, creative site, or some other innovative element(s). *Id.*

24. The approval of cell towers as a use on a particular parcel, lot, or tract of land within the City's corporate limits is subject to the siting requirements established by McKinney Code § 146-137. The intent of Section 146-137 of the McKinney Code is to:

- a. Encourage the location of towers in non-residential areas;
- b. Minimize the total number of towers throughout the community;
- c. Encourage the joint use (collocation) of new and existing towers;
- d. Protect the character and integrity of the historic districts; and
- e. Enhance the ability of the providers of telecommunications services to provide such services to the community quickly, effectively, and efficiently.

*Id.* at § 146-137(b).

25. McKinney Code § 146-137(e) addresses the requirements for the placement of new antennas and antenna support structures as follows:

"(e)New antennas and antenna support structures.

- (1) Collocation of antennas and antenna support structures shall be required. No new antennas and antenna support structures shall be permitted unless the applicant demonstrates to the reasonable satisfaction of the city that no existing antenna support structure can accommodate the applicant's proposed antenna. Evidence submitted to demonstrate that no existing tower or structure can accommodate the applicant's proposed antenna may consist of any of the following:
  - a. No existing towers or structures are located within the geographic area, which meet the applicant's engineering requirements;

- b. Existing towers or structures are not of sufficient height to meet the applicant's engineering requirements;
- c. Existing towers or structures do not have sufficient structural strength to support the applicant's proposed antenna and related equipment; or
- d. The applicant demonstrates that there are other limiting factors that render existing towers and structures unsuitable.

(2) Any proposed commercial wireless telecommunications service tower shall be designed structurally, electrically, and in all respects to accommodate both the applicant's antennas and comparable antennas for at least three additional users if the tower is over 100 feet in height or for at least two additional users if the tower is over 50 feet in height. Towers must be designed to allow for future rearrangements of antennas upon the tower and to accept antennas mounted at varying heights.”

26. The City Council has determined, as reflected in the agenda materials for the July 6, 2021, City Council meeting, as follows with regard to the proposed Cell Tower:

A. The proposed Cell Tower is not required to provide service to the area around and about the Furr Elementary Property as the area is already provided cell service by Verizon Wireless and other telecommunications providers.

B. The purpose of this Cell Tower is to provide “ideal coverage indoors” to eliminate slow speeds with uploading and downloading information.

C. Approval of the proposed Cell Tower in this residential area will not encourage the location of towers in non-residential areas or minimize the total number of towers throughout the City.

D. The proposed Cell Tower is adjacent to some developed property and the proposed Cell Tower is not harmonious and compatible with the surrounding existing uses or proposed uses (single-family residential neighborhoods).

E. The Cell Tower use requested on the Furr Elementary Property by the Applicant is not normally associated with the use of property for elementary school uses, residential uses, or in residential neighborhoods.

F. The Furr Elementary Property is currently zoned for an elementary school and a park and is currently home to an elementary school.

G. The proposed 80-foot (80') tall Cell Tower is adjacent to an existing elementary school structure, parent pick-up and parking area, all located within the fall zone of the proposed antenna. Therefore, for the reasons listed above, the impact on the surrounding area has not been mitigated.

H. The proposed Cell Tower cannot accommodate both the Applicant's antennas, represented to be antennas of Verizon Wireless, and comparable antennas for at least two additional users since the Cell Tower is over fifty-feet (50') in height.

I. The Applicant has not investigated all of the possible sites that are available to address the expressed desire to provide “ideal coverage indoors” to eliminate slow speeds with uploading and downloading information in the proposed service area.

J. There is substantial evidence of alternate sites that would equally serve the Applicant's desire to provide “ideal coverage indoors” to eliminate slow speeds with uploading and downloading information in the proposed service area.

K. The Furr Elementary Property is not the appropriate location for the Cell Tower.

L. Using the City's elevated water storage tank for an antennae location in conjunction with a cell tower location in an area north of the Furr Elementary Property may be a better approach to accomplish the same objective than unilaterally selecting one point in the middle of an area that does not have "ideal coverage indoors" for the placement of a cell tower notwithstanding the absence of hills and large buildings in the area. Working from the outside in rather than from the middle outward may also reduce the number of cell tower sites ultimately required to provide the "ideal coverage indoors" that the Applicant stresses in this case.

27. The Applicant did not demonstrate that existing or proposed cell towers within, adjacent to, or in the vicinity of the proposed service area cannot accommodate the proposed Cell Tower.

28. The Applicant did not produce any evidence or testimony of efforts to co-locate with other carriers on existing cell towers within, adjacent to, or in the vicinity of the service area.

29. The Applicant did not provide evidence of alternative locations within, adjacent to, or in the vicinity of the proposed service area on which to locate a Cell Tower.

30. While the Applicant provided the Furr Propagation Maps relative to the location of the Cell Tower on the Furr Elementary Property, no propagation maps centered on other alternative or co-location sites were presented to the City for consideration. In addition, the propagation maps indicated that the proposed service area is already fully served by Verizon Wireless and that the purpose of the proposed Cell Tower is to provide "ideal coverage indoors" to eliminate slow speeds with uploading and downloading information.

31. The Applicant did not present evidence that "further reasonable efforts are so likely to be fruitless that it is a waste of time even to try" to comply with City guidelines, zoning regulations and service-related concerns expressed by the City in denying this application.

32. It is the Applicant's burden, not the City's burden, to show and verify that alternative sites do, or do not, exist to accommodate the Applicant's service requests.

33. None of the evidence presented by the Applicant reflects a "significant gap" in actual service in the proposed service area and indeed, the Applicant provided no evidence of such gap, either in terms of physical size, geographic location, or number of users. The only "significant gap" expressed by the Applicant regarding the proposed service area was Applicant's desire to provide "ideal coverage indoors" to eliminate slow speeds with uploading and downloading information in the proposed service area.

34. In making these findings, the City Council relied upon the application and all related submittals to date by the Applicant, the evidence adduced at all public hearings before the Planning and Zoning Commission and City Council, as well as statements and related information from the Applicant, City Staff, and the public including correspondence and documentation presented by the Applicant, all of which is incorporated herein by reference.

**DULY PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF MCKINNEY, TEXAS ON THE 17<sup>th</sup> DAY OF AUGUST 2021.**

CITY OF MCKINNEY, TEXAS

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GEORGE C. FULLER  
Mayor

*[Signatures begin on following page.]*

ATTEST:

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EMPRESS DRANE  
City Secretary  
JOSHUA STEVENSON  
Deputy City Secretary

APPROVED AS TO FORM:

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MARK S. HOUSER  
City Attorney