

RESOLUTION NO. 2020-07-_____

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 SKYWAY TOWERS, LLC, TO CHANGE THE ZONING ON APPROXIMATELY 5.3 ACRES OF LAND FROM PD - PLANNED DEVELOPMENT DISTRICT FOR RS-84 SINGLE FAMILY RESIDENTIAL USES TO PD - PLANNED DEVELOPMENT DISTRICT USES WITH A BASE ZONING OF C-1 – NEIGHBORHOOD COMMERCIAL DISTRICT USES PLUS A TELECOMMUNICATIONS TOWER TO ALLOW A TELECOMMUNICATIONS TOWER AT THE SOUTHEAST CORNER OF VIRGINIA PARKWAY AND DOGWOOD TRAIL HAVING A STREET ADDRESS OF 2705 VIRGINIA PARKWAY, MCKINNEY, TEXAS; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, Skyway Towers, LLC (“Applicant”), requested a change of the zoning on a 5.3 acre tract of land from PD - Planned Development District for RS-84 Single Family Residential Uses to PD - Planned Development District Uses with a base zoning of C-1 – Neighborhood Commercial District uses plus a telecommunications tower to permit the construction and operation of a 95-foot tall (to the top of steel) concealment unipole telecommunications tower with a 4-foot lightning rod (collectively the “Cell Tower”) located at the southeast corner of Virginia Parkway and Dogwood Trail, on an approximate 5.3071 acre tract that is more commonly referred to as 2705 Virginia Parkway, Collin CAD Property ID # 2506196, (the “Property”) in the City of McKinney (“City”); and

WHEREAS, at the May 26, 2020, Planning and Zoning Commission (“Commission”) meeting of the City, the Applicant presented comments related to its application to change the zoning on the Property and the Commission conducted a public hearing relative to said rezoning application, File No. 19-0055Z; and

WHEREAS, after the presentation of substantial evidence and testimony during the public hearing on the requested application to rezone the Property, the Commission closed the public hearing and unanimously voted to recommend denial of the proposed zoning change to the City Council; and

WHEREAS, at the June 16, 2020, City Council meeting, the Applicant presented comments related to its application to change the zoning on the Property and the City Council conducted a public hearing relative to said rezoning application, File No. 19-0055Z2; and

WHEREAS, at the June 16, 2020, City Council meeting, the Applicant also addressed the Commission’s comments related to the requested change in the zoning on the Property; and

WHEREAS, after the presentation of substantial evidence and testimony during the public hearing on the requested application to rezone the Property, the City Council closed the public hearing and unanimously voted to deny the proposed change in zoning from the PD - Planned Development District, Ordinance No. 2001-08-089, zoning on the Property; 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 Property from PD - Planned Development District for RS-84 Single Family Residential Uses to PD - Planned Development District Uses with a base zoning of C-1 – Neighborhood Commercial District uses plus a telecommunications tower on the Property.

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:

- (1) shall not prohibit or have the effect of prohibiting the provision of service [47 U.S.C. § 332(c)(7)(B)(i)(II)];
- (2) may not unreasonably discriminate between providers of functionally equivalent services [47 U.S.C. § 332(c)(7)(B)(i)(I)];
- (3) must act within a reasonable time after a request is filed [47 U.S.C. § 332(c)(7)(B)(ii)];
- (4) 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
- (5) 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 application to change the PD - Planned Development District Ordinance No. 2001-08-089 zoning on the Property to allow commercial uses and the Cell Tower in question.

3. The Property on which the Cell Tower is proposed to be located is zoned "PD" - Planned Development District, generally for RS-84 Single Family Residence Uses. The Property is situated in an area that is predominantly residential in nature, and the Property is home to a church that also houses a pre-school. The area immediately south and adjacent to the Property is already developed as a single family residential neighborhood.

4. 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 T-Mobile and other wireless facility carriers. The Applicant stated that the purpose of this Cell Tower is to provide "optimum in-building residential and in-building commercial service" to eliminate buffering and dropped calls in the proposed service area.

5. Pursuant to the existing PD-Planned Development District Zoning on the Property, the maximum height for a structure is fifty feet (50') on the northern half of the Property and thirty-five feet (35') on the southern half of the Property. See PD - Planned Development District Ordinance No. 2001-08-089. The proposed Cell Tower is planned to be installed on the southern half of the Property. The proposed Cell Tower and lightning rod is intended to be a combined total of ninety-nine feet (99') in height, but the Cell Tower exceeds the maximum permitted height on the southern half of the Property by sixty-four feet (64').

6. Typically, commercial antenna support structures in non-residential zoning districts may increase the height of the tower beyond the maximum height of the governing zoning district through the Specific Use Permit ("SUP") process if the tower is located a distance from any property line that is at least equal to three times the height of the structure. Consequently, in a non-residential zoning district with a maximum height of thirty-five feet (35') like this Property, the ninety-five foot (95') tall Cell Tower would be required to be situated approximately two hundred eighty-five feet (285') from the nearest adjacent property line in order to obtain approval. In addition, commercial antenna support structures in non-residential zoning districts that are approved through the SUP process are required to be no closer to any residential district boundary line or residential dwelling than a distance equal to twice the height of the support structure, which equates to one hundred ninety-feet (190') in this instance, in order to obtain approval.

7. Because of the ninety-five-foot (95') height of the proposed Cell Tower, this Cell Tower application cannot be processed and approved through the usual SUP process.

Consequently, the Applicant requested the rezoning of the Property from a Planned Development District with a base zoning for residential uses to a Planned Development District with a base zoning for commercial uses.

8. As a part of this rezoning request the proposed ninety-five-foot (95') Cell Tower is proposed to be placed approximately seventy-five feet (75') from the nearest property line rather than the two hundred eighty-five feet (285') required by the SUP process, and a minimum of one hundred forty-five feet (145') away from the adjacent single family residential development rather than the one hundred ninety feet (190') required by the SUP process. If permitted under more typical circumstances, the Cell Tower would require at least an additional two hundred ten feet (210') of setback from the nearest boundary of the Property. But requiring the Cell Tower to conform to those minimum setbacks under the SUP process would cause the Cell Tower to impede upon an existing structure and parking area situated on the Property and therefore would not be feasible.

9. Furthermore, a Cell Tower exceeding the height limitations of the zoning in the area by sixty-four feet (64') will cause a visual height impact to the surrounding area. By way of illustration, or comparison, a ninety-five foot (95') tall cell tower is as tall as, or taller than, the average seven or eight-story building. If permitted, the proposed Cell Tower would be one of the tallest structures in the City.

10. The proposed ninety-five-foot (95') tall Cell Tower is located within approximately one hundred thirty feet (130') of an existing building, and is situated within the parking rows and public access drive aisles serving the occupancies on the Property. The existing development on the Property is within the fall zone of the proposed antenna and consequently, there are significant safety issues with the use of this location for a cell tower.

11. There are serious safety concerns about the proposed antenna and its fall zone. Correspondence provided by an engineer for the Applicant stated that the unipole will be designed "to withstand a 3-second gusted wind speed of 90 mph" and an "equivalent ultimate wind speed of 116 mph." The letter from the Applicant's engineer also stated that "in the event of a failure due to extreme wind . . . [the Cell Tower] would yield/buckle at the 71' elevation"; and that the "yielded section [(24' plus the 4' lightning rod)] would most likely remain connected and hang from the standing section. . . ."

12. During the public hearing, the Applicant stated that the area intended to be served by the proposed Cell Tower was already provided with cellular service; and that the reason the Applicant was seeking to place the Proposed Cell Tower on the Property is to provide "optimum in-building residential and in-building commercial service to eliminate buffering and dropped calls" (the "Optimum In-Building Service") in the proposed service area.

13. The Applicant explained that T-Mobile drew a ring around the proposed service area in which it wanted to obtain Optimum In-Building Service and then searched for a location where it could place a ninety-five-foot (95') tall cell tower to provide Optimum In-Building Service. The Applicant stated that there were not any other sites located within the ring drawn by T-Mobile that could satisfy the setback requirements or that the owners of those sites were not interested in allowing the Applicant to use such properties.

14. 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 ninety-five feet in height that might be used in tandem to achieve the desired Optimum In-Building Service. In fact, the Applicant appeared to indicate that the use of more than one site with a shorter cell tower on each site, to achieve Optimum In-Building Service, was not considered.

15. Three (3) nearby property owners opposed the Cell Tower, and were concerned with the Cell Tower's impact on their property values and the aesthetics of a ninety-five foot (95') tall unipole within close proximity of their properties.

16. 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.

17. 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.*

18. 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 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).

19. McKinney Code §§ 146-137(a), 146-137(d)(4), and 146-137(e) address the requirements for the placement of commercial antennas and antenna support structures in nonresidential zoning districts, in pertinent part, as follows:

- a. Sec. 146-137(a) provides as follows:

“(a)*Purpose.* The purpose of this section is to establish guidelines for the siting of communications antennas, satellite dishes and support structures/towers.”

- b. Sec. 146-137(d)(4) provides, in pertinent part, as follows:

“(4)*Non-residential zoning districts except the CHD, H, MTC, ML, and MH districts (Ag, NC, BN, C, O-1, O, BC, and PD).* Commercial antennas and antenna support structures are permitted by specific use permit, except as provided for in subsections (d)(4)e, (d)(4)f and (d)(4)g of this section, which may be allowed without a specific use permit. All commercial antennas in these districts shall comply with the following:

- a. Commercial antenna support structures must meet the setback requirements as follows:
 1. No antenna, antenna support structure, microwave reflector/antenna, or associated foundations or support wires or appurtenances shall be located within any required setback area for the front, side, or rear yards.
 2. No antenna support structure shall be closer to any residential district boundary line or residential dwelling than a distance equal to twice the height of the support structure.
 - (i) Setback/distance shall be measured as the shortest possible distance from the structure to the closest point of a residential district boundary line or residential dwelling.
 - (ii) The additional setback requirements shall not apply to antennas that meet the

requirements as provided for in subsections (d)(4)e, (d)(4)f and (d)(4)g of this section.

b. A commercial antenna support structures may be increased in height beyond the height limits of the zoning district if located at least a distance from any property line equal to three times the height of the support structure, notwithstanding that the maximum height permitted being 125 feet.”

c. Sec. 146-137(e) provides, in pertinent part, 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.”

20. The City Council has determined, as reflected in the agenda materials for the June 16, 2020, 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 Property as the area is already provided cell service by T-Mobile and other telecommunications providers.

B. The purpose of this Cell Tower is to provide optimum in-building residential and in-building commercial service to eliminate buffering and dropped calls.

C. The proposed Cell Tower is too tall for the area of the Property on which the Applicant seeks to place it.

D. The Property for which Applicant seeks the change in zoning is too small to accommodate a cell tower of the size proposed by the Applicant.

E. 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.

F. 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 with some predominantly neighborhood-scaled commercial uses).

G. The Cell Tower use requested on the Property by the Applicant is not normally associated with the use of property for residential uses or in residential neighborhoods. Moreover, there is no feasible way in which to address the setback requirements mandated by the extreme height of the proposed Cell Tower.

H. The Property is currently zoned for residential uses and is currently home to a church that also houses a pre-school. According to the City's RS-84 Single Family Residential district zoning requirements, the proposed Cell Tower is not reasonable, for the reasons articulated above. In addition, the proposed Cell Tower is also not reasonable in the base C-1 – Neighborhood Commercial district that also has a maximum height limitation of thirty-five feet (35'), for the reasons articulated above.

I. The proposed 95-foot tall Cell Tower is adjacent to and within approximately one hundred thirty feet (130') of an existing church structure that also hosts a daycare facility 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.

21. 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.

22. 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.

23. 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.

24. While the Applicant provided a propagation map relative to the location of the Cell Tower at the proposed site, no 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 T-Mobile and that the purpose of the proposed Cell Tower is "to provide optimum in-building residential and in-building commercial service to eliminate buffering and dropped calls."

25. 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.

26. 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.

27. 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 "optimum in-building residential and in-building commercial service" to eliminate buffering and dropped calls in the proposed service area.

28. 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 7th DAY OF JULY 2020.

CITY OF MCKINNEY, TEXAS

GEORGE C. FULLER
Mayor

ATTEST:

EMPRESS DRANE
City Secretary

APPROVED AS TO FORM:

MARK S. HOUSER
City Attorney