

**COUNTY OF HILLSBOROUGH
DECISION OF THE LAND USE HEARING OFFICER**

APPLICATION NUMBER: SU 10-0072 CW

DATE OF HEARING: December 14, 2009

APPLICANT: Collier Enterprises II, LLC ("Collier")

PETITION REQUEST: The request is to develop an unmanned flush mounted monopole Wireless Communication Support Structure ("WCSS"), with a height of 160 feet on a property owned by the Hillsborough County School Board ("HCSB"), Buchanan Middle School.

LOCATION: 1001 Bearss Ave. (Buchanan Middle School)

SIZE OF PROPERTY: 18.98 Acres±

EXISTING ZONING: ASC-1

FUTURE LAND USE: Public/Quasi Public (P/QP)

SERVICE AREA: Urban

COMMUNITY PLAN: N/A

PLANNING AND GROWTH MANAGEMENT STAFF REPORT FINDINGS

- The Wireless Communication Support Structure will be located at the rear of the property and will be designed as a flush mounted monopole.
- The applicant provided documentation explaining the limitation for locating the cell tower due to the site being a landfill. The tower could either be located toward the school gymnasium, but that would limit potential future school expansion, or it could be located towards the northern property line. According to the applicant, due to the School Board not wanting to compromise their ability to expand the existing facility, the northern property boundary proved to be the only other option.¹
- Per Section 6.11.29.D.7, the setbacks for the proposed tower exceeds the 1 foot of setback for every 4 feet in structure height, and therefore, the facility does not need to meet the buffer/screening requirement otherwise required on all non-school campus sites.
- The applicant has submitted documentation indicating the need for the facility and that there are no existing facilities on which to collocate. Documentation of letters of commitment as well as proof of notification to other potential users was also submitted.
- The applicant will comply with the requirements in Section 6.11.29 of the Land Development Code and, therefore, staff found the request approvable.

SUMMARY OF HEARING

THIS CAUSE came on for hearing before the Hillsborough County Land Use Hearing Officer on December 14, 2009. Mr. Brian Grady of the Hillsborough County Planning and Growth Management Department introduced the Petition.

Jim Porter of 41 East Jackson Street, Tampa indicated that he represents the applicant. Mr. Porter submitted documentation in the form of a presentation package. He then indicated that because the proposal is for a WCSS the Federal Telecommunications Act applies which limits the ability of the county to address the sighting of the cell tower. In addition, State Law, specifically Florida Statutes facilitating Emergency 911 further provides restrictions on the ability of the county to regulate the sighting of the cell tower. The Land Development Code does have specific provisions for cell towers located on a school campus. There are new published criteria in the Land Code for which the applicant does comply according to Mr. Porter. The applicant is asking for permission to erect a 160 foot wireless communication support structure. He provided pictures as examples of towers at other sites, depicting another 160-foot tower similar to the subject request. The proposal is for a slim line monopole. At the top, the dimensions are approximately 16 inches which is a much slimmer silhouette than otherwise associated with a cell tower. The antennas are flush-mounted, not the

¹ Testimony at the December 14, 2009 public hearing by the Collier's Geotechnical Engineer indicated that, while a landfill existed on the subject site, a geotechnical investigation had not been performed within the landfill area.

crow's nest effect seen on older structures. The applicant will comply with conditions for both slim line monopole and flush-mounted antennas. Next he provided locational information for the proposed structure. Initially, other areas of the Buchanan Middle School campus were considered; however several things led to the decision to put it at the proposed location. Part of the campus is a landfill and soils borings testing were performed. The landfill and soil condition made the proposed location the only viable location according to Mr. Porter.² The proposed location meets or exceeds all setbacks in the code. Certain criteria have to be met when constructing a cell tower on a school campus. The applicant meets or exceeds those. Mr. Porter then provided pictures of the surrounding development pattern. The zoning at the subject site is ASC-1. He also indicated that near the proposed tower is the agricultural lab for the school. On that portion of property within the school campus the lab has cows, a pig and chickens. The Planning and Growth Management Department staff found the request approvable. The Planning Commission found the request consistent with the Comprehensive Plan. Screening is addressed because of the location on the school site. There are criteria that the applicant meets or exceeds based on the additional criteria that were put in the code for school sites.

At this point the Zoning Hearing Master asked about the sighting, the structures relationship with the possible expansion of the school in the future and also about structural issues associated with the landfill. Mr. Porter stated that other areas were closer to the school but that would limit the school's ability to expand. There are no immediate plans to expand but putting it near the back of the existing school building would limit that. Mr. Porter then introduced the applicant's geotechnical engineering consultant.

Larry Moore of Tierra, Inc. stated that he would testify with respect to the landfill issue. Tierra did not study the landfill issue according to Mr. Moore. Using an exhibit he indicated the landfill area. He then indicated locations where borings were performed outside of the landfill area. One location was near the northwestern corner of the school site. According to Mr. Moore, a boring for a monopole cell tower is on the order of about 50 feet deep. They started to encounter organic soils during drilling. They continued drilling to 100 feet, still in organic soils. They returned to the office, called Collier Enterprises, and told them that the northwestern location was a poor site. At that point, there were two other alternative sites that were identified. They drilled both of those sites. One of the sites is the selected site; both of the sites are suitable for the tower construction and foundation. He indicated the unsuitable site on a map. The two other sites were indicated with soil boring symbols. Both of those sites are north of what was reported to be landfill materials. When asked by the Zoning Hearing Master if he had rendered any opinion if one could or could not found the monopole in the landfill area, he responded that the site locations were identified by others. As far as the landfill; they did not render an opinion to that whatsoever. He further indicated that with special considerations associated with the landfill materials it may be possible but they would have to do a study on that. Specific questions about the landfill were referred to the School District engineer, Greg Lafty.

² Further testimony by the applicant's geotechnical engineer indicated that no borings were performed within the landfill area. (See summary of testimony of Larry Moore of Tierra, Inc.)

Greg Lafty of Lakeland, Florida stated that he is familiar with the site as he had worked on the gymnasium expansion. He pointed out the location of the gym where work had been done in 2001. As part of that they reviewed the same report that Mr. Moore reviewed. The company that prepared that report had done some borings and test pits through the area, around the corner north of the track as well as some geophysical investigations. He and Mr. Moore had looked at the same report that shows where the landfill is inferred to be. The School District also never did a specific landfill investigation. They were also involved with work around the underground storage tanks in this area. Just recently they did a notice of contamination related to letting people know if there is anything identified on the school. As part of that they included data collected for the gym, underground storage tanks and depicted an area showing where the test pits had been done in 2001. When asked by the Zoning Hearing Master if anybody had rendered an opinion as to whether they could found the monopole on top of the landfill, Mr. Lafty responded that they had not been asked to look at that. When asked if there was a specific reason, other than the landfill, that they would not put the monopole central to the track and on the west side, he stated that he had not evaluated that location.

At that point, Mr. Porter concluded the initial applicant presentation.

Ms. Isabel Albert of the Planning and Growth Management Department stated that the request is to develop an unmanned flush mounted monopole wireless communication support structure with a height of 160 feet on property owned by the Hillsborough County School Board for Buchanan Middle School. The wireless communication support structure will be located at the rear of the property and designed as a flush mounted monopole. The applicant provided documentation explaining the limitation for locating the cell tower due to the site being a landfill.³ The tower could be located toward the gym, but that would limit potential future school expansion, or towards the northern property line. According to the applicant, due to the School Board not wanting to compromise the ability to expand the facility, the northern property boundary proved to be the only other option.⁴ Also per Section 6.11.29.D.7 of the Code, the setbacks for the tower exceed the one-foot setback for every four feet in height. Therefore the facility does not need to provide or meet buffer and screening requirements otherwise required on all non-school sites. The applicant also submitted all required documentation, according to Ms. Albert, and will comply with the requirements of 6.11.29 of the Land Development Code. With that, staff found the request approvable.

Ms. Heather Lamboy of the Planning Commission stated that the site is Public/Quasi Public and located the Urban Service Area. When staff initially looked at the application there were concerns regarding sighting. There is an objective in the Comprehensive Plan related to telecommunications

³ Note that the "documentation" provided was a statement in the application submittal document entitled, "Buchanan Middle School WCSS Location" wherein the applicant wrote, "If the proposed facility were located further south, it would encroach into the area affected by the landfill." In consideration of testimony by the applicant's geotechnical engineer and the applicant's project engineer, the affect of placing a monopole within the landfill was not evaluated.

⁴ The conclusion is based on ruling out a substantive portion of the entire site based on the presence of an existing landfill that was not evaluated for foundation capacity.

facilities in that they are to be located in a manner that is to be compatible as defined by the Comprehensive Plan⁵. The Policy 46.1 discusses that telecommunication facilities and towers should comply with LDC Code Regulations and its setbacks, buffering, screening and camouflaging as well. Upon staff's field visit to the site, they looked at where the potential tower would be located. There were some indications on the site plan that there was going to be buffering at the base of the cell tower adjacent to what could impact the residential structures. Because the application meets the Land Development Code requirements for setbacks, the Planning Commission staff found the application consistent with the Comprehensive Plan.

The Zoning Hearing Master then asked for audience members in support of the request. There were none.

The Zoning Hearing Master then asked for audience members in opposition to the request.

Ralf Brookes stated that he was an attorney representing Dudley and Ellen Vaughn, the closest neighbors to the cell tower. They adjoin and share the property boundary with the school site and are within the "dead fall" zone of the cell tower; meaning if the 160 foot cell tower were to fall it would fall through their master bedroom according to Attorney Brookes. Attorney Brookes contended that the case has violated procedural due process because the School District has not responded in full to the public records request that was made to them, including requests for the soil borings that were presented earlier in the hearing, the antenna leases or memorandum of site lease if any such leases or antennas actually exist and all documents on the proposed cell tower for Buchanan Middle School.⁶ He furthered that the request is inconsistent with the Comprehensive Plan under Statute 163.3215⁷ and they were presenting their objections at the hearing. The Development Order would be inconsistent with Objective 46 regarding telecommunications towers and in particular Policy 1.4 (*See footnote 5 below – the LDC definition is the same as the Comprehensive Plan Policy 1.4 definition*) which defines compatibility. At the subject location and height, the proposed cell tower does not maintain a safe dead fall zone and maintain compatibility with adjacent residential dwellings. This application is not in compliance with Land Development Code Section 6.11.29.E.1, 3, & 4 regarding demonstrating the need for the new tower which could not be met by an approved tower including that an existing tower cannot be reinforced to accommodate new antennas at a reasonable cost that would be less than building this new tower. Attorney Brookes provided documentation of unincorporated Hillsborough County single antenna sites as well as multiple sites within four miles of the subject location. Attorney Brookes further

⁵ The Hillsborough County Land Development Code defines Compatibility in Section 12.01.00 (Comp Plan Policy 1.4) as, "The characteristics of different uses or activities or design which allow them to be located near or adjacent to each other in harmony. Some elements affecting compatibility include the following: height, scale, mass and bulk of structures, pedestrian or vehicular traffic, circulation, access and parking impacts, landscaping, lighting, noise, odor and architecture. Compatibility does not mean "the same as". Rather, it refers to the sensitivity of development proposals in maintaining the character of existing development."

⁶ Standing before the Land Use Hearing Officer is accomplished through procedures, including but not limited to required public notice, established through the Hillsborough County Land Development Code.

⁷ Section 163.3215, F.S., creates a civil cause of action for an aggrieved or adversely affected party to challenge the consistency of a development order with an adopted local comprehensive plan.

indicated that the application violates requirements of law in that the applicant failed to show an educational purpose for a private cell phone tower located on school district property under Attorney General Opinion 2007-45.⁸ Attorney Brookes also expressed concern over the inadequacy of the screening at the base of the structure.

Sam Casella stated that he is a certified planner providing expert testimony on behalf of Dudley and Ellen Vaughn. His report includes his credentials as well as a report that details his methodologies, findings and conclusions.⁹ According to Mr. Casella, a cell tower placed at the subject location and at the proposed height will put residential property within the fall zone, which is a distance of 160 feet from the top, and would create multiple hazards, explained in his report. These include not just the physical hazard of damage or injury, but also property value damage. The placement would also limit the potential to expand houses on lots affected by the fall zone. The fall zone goes 85 feet into the lot at 15408 Wood Way Drive. If the property owner ever wanted to expand their house, they would run into the fact that it is in the fall zone. That could mean that expansion would be something that either might not be permitted or if it was permitted would be difficult to sell later on. He further indicated that Sarasota, FL is one community which does specifically by ordinance prohibit structures other than the structure of the cell tower itself to be within the fall zone. Secondly, the distance from the tower that is proposed of 75 feet to the residential property line is outside the "norms" of planning practice which he concludes to be 300 feet. His report details the methodology as to how he determined those norms and what those norms are. His report contained a survey of counties and cities around Florida and the nation including model codes. The tower would be visible from some residential properties as evidenced in his report. He had taken a recent photograph from the property line of 15408 Wood Way looking out towards the proposed tower location and indicated that the view is clear. He did further indicate that while there are some trees, at the point where he took the picture there is a clear view. Similarly, at the end of the block, there is a clear view to the tower. It is his opinion that at the scale of the tower, 160 feet at a distance of only 75 feet, it would be intrusive to the neighborhood. Finally, he found that there is evidence in the planning literature that cell phone towers do affect property values adversely. In the published research they indicate that the adverse effect on property values increases closer to the property. The published literature only goes as close as 100 meters according to Mr. Casella. The subject request is only about 28 meters. He concludes that there is reason to believe that not only would one have the adverse impact that is identified in the scholarly studies but one would also have additional adverse impacts since the subject request is much closer than data in those studies. In summary, he found the tower would be intrusive, it would have adverse impact in dollars on the neighborhood around Wood Way Drive and it is not compatible with surrounding uses and not consistent with Objective 46 of the Future Land Use element of the Comprehensive Plan.

Ellen Vaughn of 15408 Wood Way Drive provided a video taken from her home, pointing out what rooms would be within the fall zone of the tower. She also submitted photos that depicted the foliage that is mentioned by the Planning Commission. Petitions in opposition were also submitted.

⁸ Compliance with the referenced Attorney General opinion 2007-45 is not a Special Use criteria in LDC §6.11.29.

⁹ Mr. Casella provided a summary of his education and professional experience verifying his expertise as a certified Planner.

Many other audience members testified in opposition to the request. The principle points in opposition were as follows:

1. Visual Impact of Proposal
2. Health Effects
3. The request is inconsistent with the history of the subject site as a school
4. Negative Effects to Property Values
5. The environmental impact taking away the expectation of quiet enjoyment of property.
6. Impacts caused by ancillary buildings and access roadway
7. Applicant has not demonstrated "Need"
8. Lack of research in the landfill area
9. History of sinkholes in the area
10. The structure would be non-conforming

The Hearing Officer then asked if any staff had additional comments.

The Assistant county attorney, Mr. Clark then stated that one of the opponents had made reference to the term "nonconformity". What the opponent was articulating does not constitute "nonconforming" according to Mr. Clark. Pursuant to the Federal Telecommunications Act, state and local governments cannot regulate wireless radio frequency emissions. Federal Courts have held that environmental effects have been interpreted to include health concerns about the effects of radio frequency radiation. Accordingly, that particular line of consideration is outside the scope of what state and local governments can consider.

The applicant was then afforded the opportunity for rebuttal testimony.

In his rebuttal Mr. Porter stated that he concurred with the County Attorney's position on the ability to consider health concerns and he objected to any testimony to that regard. He also noted that the Principal of the school was present and had submitted a letter of support based on meetings they had with the school community, PTA and faculty. The tower needs to be 160 feet in part for code location. The code requires that they design the tower to hold more than one carrier; it is being designed to hold up to five, reducing the need for other towers in the area. The School Board public records request is outside the realm of public concern and is not appropriate. Mr. Porter further indicated that he was not representing the School Board at the hearing. Addressing "Need," he referred to Exhibit 10 in the material provided. The Statute E911 limits the ability of the county to consider that but it has been met under Exhibit 10. Referencing the Certified Planner that provided opposition testimony, Mr. Porter indicated that the request is a special use, not a rezoning. The applicant must meet certain requirements and they have to be consistent with the Comprehensive

Plan. Staff has said the applicant meet the requirements. The Planning Commission has found the applicant is consistent with the Comprehensive Plan. That is competent and substantial evidence according to Mr. Porter. The code provides specific criteria for the sighting of the subject structure. The applicant meets or exceeds every single one of those. Mr. Porter indicated that the Planner's report has a lot of "conclusionary" statements that are not backed up. He objected to the consideration of diminution of property values as no expert spoke to that issue. To the extent that it could be of concern Mr. Porter introduced a report dated June 9, 2009 dealing with the issue. Referring to "compatibility" the code provides screening, setback requirements and buffering requirements to ensure compatibility. The use is allowed. Mr. Porter described public activity occurring on the site; not residential. It is next to an agricultural lab, a use on the school property that has livestock currently. Referring to the landfill, Mr. Porter described the process of deciding where to site the structure as "a long one." The landfill played a part in where it should be. The property owner is not comfortable sighting the cell tower on a landfill.¹⁰ Mr. Porter then opined that the standard of review for the approval is not whether it can go somewhere else; instead does the applicant meet the criteria to where he proposes to put it? The applicant has demonstrated through the staff reports and the exhibits submitted that it does meet the criteria.

Michael Linet of Collier Enterprises testified that the design exceeds, in most instances, the Florida Building Code. That is now the standard for the entire state. The building code requirements for wind speed in Hillsborough County are 120 miles per hour and 110 miles per hour. Those are sustained wind speeds. The towers are designed to 130 miles per hour sustained wind speed with a three-second gust of 150 miles per hour; this exceeds the requirement of the Florida Building Code. Mr. Linet further illustrated the basis for the criteria determination. Regarding concerns for the fall zone, Mr. Linet indicated that the applicant recognizes the proximity of the tower to residential properties. They develop their towers with built-in stress points so they will fall within themselves or within the parent tract. The subject tower has not yet been designed but will be designed so it falls within a 60-foot diameter.

Mr. Porter then concluded the applicant's rebuttal indicating that should the Zoning Hearing Master recommend approval; the applicant would condition the subject special use to be a slim line, flush mount monopole. They would also construct the tower to have a 60 foot fall zone.

The hearing was then concluded.

EVIDENCE SUBMITTED

The following evidence was submitted at the hearing:

Jim Porter

Applicant's Presentation Packet

Jim Porter

Photographs of Cell Tower (2)

¹⁰ Reference footnotes 3 & 4 above. This statement needs consideration in light of previous testimony.

Larry Moore

Geotechnical Engineering Report

Ralf Brookes

Opposition's Presentation Packet (includes oversized map of cell tower locations in Hillsborough County)

Sam Casella

Resume & Written Report & Testimony

Ellen Vaughan

Opposition's Presentation Packet

Mary Avo

Opposition Comments, Memo to Don Howe & Photographs (8)

Tim Nelder

Opposition's Presentation Packet

Kim Britt

Opposition Comments

Sarah Harrison

Opposition Comments

Linda Ford

Opposition Comments

Karen Elenbaum

Opposition Comments

Jim Porter

Letter of Support from Scott Hilgenger, Principal of Buchanan Middle School

Jim Porter

Telecommunication Tower Impact Study Summary Report

Michael Linet

Wind-Borne Debris Region & Wind Speed Lines for Hillsborough County

PREFACE

All matters that precede the Summary of Hearing section of this Decision are hereby incorporated into and shall constitute a part of the ensuing Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

General Findings

1. The applicant has submitted a request for a Special Use Permit for a wireless communication facility in the form of a wireless communication support structure, 160 feet in height. Based on the provisions of the Hillsborough County Land Development Code (LDC) §6.11.29.D.3.b.3, WCSS and Schools, the request shall be reviewed as a Special Use by a Land Use Hearing Officer pursuant to the requirements of §10.02.00 LDC. The requirements for this Special Use Review are specified within §6.11.29 LDC and the Land Use Hearing Officer, pursuant to Section 10.02.03.E, must consider the following "as are relevant" in the decision:
 1. The history of the subject parcel.
 2. Applicable regulations and development standards promulgated.
 3. Applicable goals, objectives, and policies contained in the Comprehensive Plan.
 4. Reports and recommendations filed by reviewing agencies.
 5. Physical characteristics of the subject parcel and surrounding lands.
 6. Impact on the surrounding transportation network.
 7. Availability and capacity of public services.
 8. Nature of and impacts on surrounding land use.
 9. Environmental impact of the proposed development activity.
2. The subject property is zoned ASC-1 and has a Future Land Use of Public/Quasi Public within the Urban Service Area. The parent tract has historically been utilized as Buchanan Middle School.
3. The Planning and Growth Management Department of Hillsborough County has found the application approvable subject to recommended conditions.
4. The Planning Commission has found the proposed Special Use CONSISTENT with the Future of Hillsborough Comprehensive Plan, subject to the conditions proposed by the Planning and Growth Management Department.
5. The subject site contains a school facility from the central portion of the site to the site's southern boundary. From the central portion of the site, northward, the parcel is mostly

vacant, containing a track/sports field along the east and an agricultural lab to the northwest. A landfill area is purported to exist throughout the central site to the north.

6. The Special Use request poses minimal impact to the transportation network.
7. The Special Use request does not pose impacts to the capacity of public services.
8. Health effects are not a consideration of this decision. Title 47 of the Federal Telecommunications Act, Chapter 5, Subchapter III provides that, *"No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."*

Findings Regarding Applicable Portions of §6.11.29 Land Development Code

1. The proposed WCSS generally complies with §6.11.29.D.1 regarding allowance of a WCSS on a zoning lot containing other principal uses and method of measurement from the boundary of the zoning lot.
2. While the subject request does meet the minimum setback requirements of §6.11.29.D.2.a, the applicant has failed to analyze, in the submittal documents and testimony, the correct setback where adjacent to the rear yard of residential property as follows:
 - a. Refer to applicant's submittal exhibit entitled, "Code Compliance/Project Description Statement" and associated statements in testimony wherein the applicant suggests that the required residential setback is "one foot for every four feet of structure height – 40 feet." (hereinafter, "1/4 setback")
 - b. The LDC refers to the applicant's purported required 1/4 setback in two (2) locations: §6.11.29.D.3.b.3.i.c and §6.11.29.D.7.a. However, both of those references apply specific tests for specific determinations. The first determines whether the WCSS must be designed and built as a camouflaged WCSS. The second determines whether specific buffering and screening requirements (§6.11.29.D.6) apply. Neither concludes with the required setback.
 - c. §6.11.29.D.2.a provides that, because the WCSS is, ..."Adjacent to the rear yard...of residentially zoned property which is developed...for residential use, the minimum setback from the property line abutting said property shall be one foot for every three feet of structure height." (hereinafter, "1/3 setback")
 - d. The applicant's proposed setback from the rear yard of residentially zoned property is 75.9 feet which exceeds the minimum requirement of §6.11.29.D.2.a nonetheless.

Accordingly, while the applicant complies with §6.11.29.D.2.a, the analysis is arbitrary and fails to properly apply the law. The analysis was used to support

compatibility arguments including the nature and impacts on surrounding land use based on comparison to the purported code minimum required setback of 40 feet.

3. The applicant has demonstrated compliance with the Design Criteria of §6.11.29.D.3.a by utilizing the specific exemption from the requirement for a camouflaged WCSS on a school campus through meeting all of the criteria within §6.11.29.D.3.b.3.i.(a-d). Accordingly, the proposed structure is not camouflaged but designed as a flush mounted, monopole.
4. Since the proposed WCSS height is 160 feet, the applicant does not need to comply with the requirements for a Radio/Television Transmitting or Receiving Facility pursuant to §6.11.29.D.4.
5. The applicant will comply with the architectural finish requirements of accessory buildings set out by §6.11.29.D.5 through recommended conditions of approval.
6. The buffer and screening requirements of §6.11.29.D.6 do not apply to the subject application as the applicant has demonstrated compliance with §6.11.29.D.7.a (the test for minimum distances to certain zoning district boundaries that exempts compliance with §6.11.29.D.6).
7. The applicant will comply with the "adequate room for parking and maneuvering" requirement set out by §6.11.29.D.8 through the submitted site plan.
8. Staff has appropriately recommended a condition of approval requiring compliance with §6.11.29.D.9 regarding assurance that the applicant will not restrict or interfere with air safety and air operations.
9. The applicant has failed to document the "need" for the new WCSS pursuant to the requirements of §6.11.29.E inasmuch as the following factors being considered:
 - a. While Florida Statutes 365.172 provides that, ".....*the local government may not require information on or evaluate a wireless provider's business decisions about its service, customer demand for its service, or quality of its service to or from a particular area or site, unless the wireless provider voluntarily offers this information to the local government.*" And, "*In such local government regulations or review, a local government may not require information on or evaluate the wireless provider's designed service unless the information or materials are directly related to an identified land development or zoning issue*" And, "*Information or materials directly related to an identified land development or zoning issue may include, but are not limited to, evidence that no existing structure can reasonably be used for the antennae placement instead of the construction of a new tower....*"
 - b. The applicant submitted a "Certification of Necessity" as prepared by William Roberts, PE. On letterhead entitled, "EGI – Enhanced Graphics Imaging, Inc." wherein Mr. Roberts certifies that there is necessity for the

WCSS, "...due to the fact that there is no alternative vertical structure located within three quarters (3/4) of a mile of the Buchanan Middle School site." There was no other information submitted in support of the need for the WCSS or indicating the expertise of the certifying engineer.

- c. §6.11.29.E provides factors that can be considered in the determination of "need" (subparts 1-4). There was no evidence submitted in support of subparts 1-3 with regard to structural capacity of existing WCSS, radio frequency interference or sufficient space on existing or approved WCSS, respectively. Subpart 4 allows for documentation of "Other reasons that make it impractical..." to place equipment on existing and approved towers. That subpart provides for the allowance of documentation, at a minimum, consisting of a signed statement from "appropriate accredited experts, including but not limited to a radio frequency engineer and/or structural engineer..." and additionally, "Appropriate support material, for verification by staff, shall be included." The "Certification of Necessity" neither indicated the qualifications of the certifying engineer for the certification nor did it provide appropriate supporting material.
 - d. There was substantial and competent evidence provided through opposition testimony and submitted documentation indicating antennae sites less than or within very close proximity to the distance used as a basis for the "Certification of Necessity."
10. The applicant has demonstrated compliance with the "shared use" requirement of §6.11.29.F through the submission of an appropriate "Letter of Intent".
 11. The applicant has demonstrated compliance with the "notice" requirement related to collocation opportunities per §6.11.29.G through the submission of copies of notice letters.

Findings Regarding the Hillsborough County Comprehensive Plan

1. Future Land Use Element Policies 16.3 and 17.6 require new development to mitigate adverse impacts with visual impacts being specifically identified in Policy 17.6.
2. Future Land Use Element Objective 46 is intending to ensure that telecommunications facilities are located in a manner that is *compatible* (as defined in Policy 1.4 (see footnote 5 above)) with surrounding land uses and compliant with State and Federal Law.
3. Future Land Use Element Policy 46.1 sets forth that telecommunications facilities should comply with applicable Land Development Code regulations including but not limited to setbacks, buffering, screening and camouflaging.
4. Future Land Use Element Policy 46.2 requires Hillsborough County to comply with State and Federal laws relating to the location of telecommunications facilities.

5. The Land Development Code identifies certain WCSSs with specified camouflage types to be "presumed compatible (ref: §6.11.29.D.3.b.4)." The applicant has elected to utilize a flush mounted monopole WCSS meeting the criteria of §6.11.29.D.3.b.3.i and is therefore not subject to the presumptive criteria of subpart 4. The applicant must demonstrate compatibility for consistency with Future Land Use Element Objective 46.
6. The setback criteria of §6.11.29 do not indicate a presumption of compatibility and the applicant has introduced an arbitrary analysis of setbacks (see "Findings Regarding Applicable Portions of §6.11.29 Land Development Code", Finding 2, above).
7. Chapter 365.172(12)(b)1 regarding a local government's land development regulations provides that, "Nothing in this paragraph shall limit the local government from reviewing any applicable land development or zoning issue addressed in its adopted regulations that does not conflict with this section, including, but not limited to, aesthetics, landscaping, land use based location priorities, structural design, and setbacks."
8. Planning Commission staff identified that, "...staff had initial concerns regarding the visual intrusion of the tower in this location to the residences to the north of the site and noted that there were ample opportunities to locate the site in various places in the rear of the middle campus." After further review, they concluded that the proposed location is adequately buffered from the surrounding area; a finding that is refuted with substantial competent evidence submitted by the adjacent resident in the form of pictures and video.
9. Planning and Growth Management staff indicated that, "The applicant provided documentation explaining the limitation for locating the cell tower due to the site being a landfill." The applicant's documentation consisted of a statement identifying that, "If the proposed facility were located further south, it would encroach into the area affected by the landfill." Testimony by the applicant's experts indicates that the landfill area was not investigated for location of the WCSS (Ref: Footnotes 3 & 4 herein).

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the applicant has failed to meet the essential requirements of law in that it has not demonstrated compliance with the Hillsborough County Land Development Code minimum requirements for issuance of a WCSS Special Use Permit as follows:

1. The applicant has failed to document the "need" for the new WCSS pursuant to the requirements of §6.11.29.E.

The request is **INCONSISTENT** with the Future of Hillsborough Comprehensive Plan specifically:


2. The applicant has failed to mitigate its adverse visual impact to adjacent residences through appropriate investigation of land use based location priorities, including investigating the possible placement of the WCSS within the area identified as a landfill that could otherwise mitigate adverse visual

impacts and address compatibility concerns, thereby failing to comply with the Future Land Use Element Policies 16.3 and 17.6.

3. The subject request is not compatible at its proposed location in contradiction to Future Land Use Element Objective 46.

DECISION

Based on the foregoing, the applicant has failed to satisfy the requirements of the Land Development Code Section 6.11.29. The request is INCONSISTENT with the Future of Hillsborough Comprehensive Plan. Accordingly, the request for a Special Use Permit for the proposed WCSS is DENIED.



James A. Scarola 11/11/10
Land Use Hearing Officer Date

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