

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

EASTON HOMEOWNERS ASSOCIATION )  
AND BENJAMIN'S RUN HOMEOWNERS )  
ASSOCIATION, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 10-9403  
 )  
CITY OF TALLAHASSEE AND LANE )  
WRIGHT ON BEHALF OF AT&T, )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On February 28, 2011, a final hearing was held in this case in Tallahassee, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioners: Robert C. Downie, II, Esquire  
2660 Egret Lane  
Tallahassee, Florida 32308

For Respondent City of Tallahassee:

Hetal H. Desai, Esquire  
Linda R. Hudson, Esquire  
City of Tallahassee  
300 South Adams Street, Box A-5  
Tallahassee, Florida 32301

For Respondent Lane Wright on Behalf of AT&T:

Lauralee G. Westine, Esquire  
Law Offices of Lauralee G. Westine, P.A.  
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STATEMENT OF THE ISSUE

The issue in this case is whether the Tallahassee-Leon County Planning Commission should approve, with conditions specified by the Development Review Committee (DRC), a type B site plan submitted by Wright/AT&T for construction of a cell tower at the corner of Buck Lake Road and Pedrick Road.

PRELIMINARY STATEMENT

Petitioners and others who no longer are parties requested a quasi-judicial proceeding under Section 2-138 of the City of Tallahassee Land Development Code on the DRC's approval of Wright/AT&T's type B site plan.

The final hearing was held on February 28, 2011. The parties filed a Prehearing Stipulation on February 22, 2011. The Prehearing Stipulation eliminated several issues (some of which still are maintained by non-party members of the public), including issues relating to the "environmental effects of radio frequency emissions" (which are preempted by federal law), notice, and property values.

At the final hearing, the following members of public testified: Zoe Kulakowski; John Outland; William Dunne;

Laurie Svec; Dazhen Zhang; John Dew; John Viele; Cherie Pagan; Jose Mojitas; Delores Dunne; Laura Barrett; Thomas Ott; and Gregory Erickson. Joint Exhibits 1-24 were received in evidence. The City called the following witnesses:

Harold Gregory Harden, a Senior Planner in the City's Growth Management Department; Glenn Berman, the Land Use Administrator/Planner II in the City's Growth Management Department; and Susan Denny, a Senior Planner in the City's Planning Department. City Exhibits 1-3 were received in evidence. Wright/AT&T called the following witnesses:

Clifford Lamb, P.E., development project consultant; Lane Wright, real estate consultant; Charles Vicchini, an AT&T radio frequency (RF) design specialist for North Florida; Steve Belovary, an AT&T RF engineering specialist for the Tallahassee area; David Taulbee, a real estate appraiser; and Byron Block, an attorney, developer, and Trustee of the Tung Hill Trust, which owns the property subject to Wright/AT&T type B site plan. Petitioners called the following witnesses:

John Outland, who lives on Tung Hill Drive and is a member of the Tung Hill Homeowners Association; Vidya Mysore, president of the Easton Homeowners Association; and Laurie Bennett, vice-president of the Benjamin's Run Homeowners Association.

Petitioners' Exhibit 1 was received in evidence.

A Transcript of the final hearing was filed, and the parties filed proposed recommended orders, which have been carefully considered.

FINDINGS OF FACT

1. The applicant, Wright/AT&T, seeks approval of a type B site plan for construction of a 150-foot high telecommunications antenna support structure (cell tower) on 4,200 square feet of the commercially-zoned (C-1) Parcel 8 of the Benjamin's Run planned unit development (PUD) at the southwest corner of Buck Lake Road and Pedrick Road, along with a 230 square-foot building to house electrical equipment, a gated fence surrounding the tower and building, and an access driveway from Pedrick Road.

2. Buck Lake Elementary School is across Pedrick Road from Parcel 8. There are numerous residential land uses in the immediate vicinity, including the rest of Benjamin's Run, Easton, the Enclave, and Tung Hill.

3. Wright/AT&T demonstrated that there is a need for a cell tower to provide cell phone voice and data services to a coverage hole in the vicinity of Parcel 8 of Benjamin's Run and that there are no suitable alternative sites.

4. Petitioners did not rebut Wright/AT&T's demonstration of need and suitability. They questioned whether the search

area was broad enough, but the evidence proved that the applicant's search area was appropriate. They questioned whether there were any co-location opportunities that would be suitable, but the evidence proved that there are none.

5. The Benjamin's Run PUD is central to determining whether Wright/AT&T's type B site plan should be approved. The City approved the PUD in August 1998.

6. The approved PUD does not mention telecommunications support structures or cell towers explicitly. Under Section 3.1.2 of the Land Use Concept Plan in the PUD's Conceptual Development Narrative, it states that the proposed development's concept plan "[p]rovides outlet for goods and services at a restricted neighborhood scale, serving the immediate surroundings." Section 3.2.1 states that "Benjamin's Run is primarily a residential community with the intended conceptual objectives [to] [m]aintain compatibility with the existing neighborhoods[; p]rovide limited commercial and employment opportunities to the proposed development and surrounding neighborhood, at a restricted neighborhood scale[; and d]evelop to the infrastructure capabilities currently available . . . ." It also states: "The neighborhood commercial will generally be located at the intersection of Pedrick Road and Buck Lake Road, depicted as Parcel 8. . . . Office use is intended to serve as a bridge between the commercial and the residential component of

parcel 7."

7. Under section 3.2.2 of the PUD's Land Use Concept Plan, the residential densities are those allowable for the City's R-2 and R-3 Zoning Districts. Under section 3.2.3, office use is permitted as minor or major office parks, limited to those permitted in the City's C-1 Zoning District, and limited to a maximum of 25,000 square feet. Under section 3.2.4, minor to neighborhood commercial uses are permitted, limited to those permitted in the City's C-1 Zoning District, and limited to neighborhood commercial with a maximum of 25,000 square feet.

8. Section 3.3 of the PUD's conceptual development narrative provides that uses are limited to those permitted within the R-2, R-3, and C-1 zoning districts of the City Code, as amended November 1997. It also states that permitted uses "will be listed by Standard Industrial Code [SIC] number, where applicable, or specify a definition of other permitted uses not listed by SIC numbers." Section 7.2 of the PUD lists 64 SICs permitted in C-1, and none cover telecommunications support structures.<sup>1/</sup>

9. There also is no SIC for billboards. Section 4.6.2 of the PUD's general development standards, under signs, specifically prohibits them. There is no similar prohibition of cell towers.

10. Section 4.5.5 of the PUD's general development

standards, under non-residential building and site design, states: "All electrical and telecommunication utilities shall be located underground, except for antennas which may be located on rooftops so long as the roof design screens any rooftop equipment from view from public rights of way."

11. Section 10-425(c)(1) of the City's Land Development Code, known as the Telecommunications Siting Ordinance, which governs the siting of cell towers, was adopted in November 1996. The ordinance was amended in 1999; but, from its inception, it allowed cell towers in any zoning district so long as the tower met the requirements of section 10-425.

#### CONCLUSIONS OF LAW

12. The site plan review criteria are: (1) whether the applicable zoning standards and requirements have been met; (2) whether the applicable criteria of chapter 5 of the City of Tallahassee Code have been met; and (3) whether the requirement of other applicable regulations or ordinances which impose specific requirements on site plans and development have been met. § 9-153, Code. In this case, it is undisputed that the applicable criteria of chapter 5 of the Code have been met. The other two criteria involve consideration of section 10-425(c)(1) of the Code and the Benjamin's Run PUD.

13. Section 10-425(c)(1) of the Code provides that a communication antenna support structure may be located in any

zoning district so long as it meets the requirements of section 10-425. Section 10-425 includes co-location requirements, a setback from residential lots, a maximum height, fencing requirements, landscaping requirements, and a prohibition of illumination except as required by the Federal Aviation Administration. The only requirement of section 10-425 at issue in this proceeding is a demonstration by the applicant that a suitable alternative site does not exist. See § 10-425(t)(5), Code. Wright/AT&T made such a demonstration, which was not rebutted by Petitioners. Id.<sup>2/</sup>

14. By virtue of the previously-enacted section 10-425, a cell tower is allowed in any zoning district, including in the Benjamin's Run PUD, if it meets the requirements of section 10-425. Petitioners argue that, notwithstanding section 10-425, a cell tower would not be allowed in Benjamin's Run if it is clearly contrary to the PUD.

15. Section 3.3 of the PUD's conceptual development narrative states that permitted uses "will be listed by Standard Industrial Code [SIC] number, where applicable, or specify a definition of other permitted uses not listed by SIC numbers." No SIC for cell towers is listed, and cell towers are not specifically mentioned in the PUD. Petitioners contend that this omission means that cell towers are not allowed in the PUD. But the PUD does not explicitly prohibit cell towers, as it does



billboards, which also have no SIC. In addition, section 3.3 limits uses to those permitted within the R-2, R-3, and C-1 zoning districts of the City Code, as amended November 1997, which includes cell towers meeting the requirements of section 10-425 of the Code.

16. Section 4.5.5 of the PUD's general development standards, under non-residential building and site design, requires all electrical and telecommunication utilities except antennas to be located underground and limits antennas to rooftops if screened from view from public rights-of-way. Petitioners contend that this provision prohibits cell towers. If intended to prohibit cell towers notwithstanding section 10-425 of the Code and section 3.3 of the PUD's conceptual development narrative, this provision would have had to make such a prohibition explicit and clear. Since it did not, Petitioners' contention is rejected.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Planning Commission approve Wright/AT&T's type B site plan, with the DRC's conditions.

DONE AND ENTERED this 20th day of April, 2011, in  
Tallahassee, Leon County, Florida.



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J. LAWRENCE JOHNSTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of April, 2011.

ENDNOTES

<sup>1/</sup> SIC 7389, miscellaneous business and service not listed elsewhere, lists over 130 different businesses, and none are remotely similar to a cell phone tower.

<sup>2/</sup> Petitioners fault the City for not hiring independent consulting experts to evaluate Wright/AT&T's demonstration of no suitable alternative site. Even if this would be reasonable or prudent and not cost-prohibitive, it is not required by section 10-425, and Petitioners have cited no other legal requirement for an independent evaluation.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

Under section 2-138(k) of the City of Tallahassee Land Development Code, all parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the Tallahassee-Leon County Planning Commission, which will issue the final order in this case.