

DECISION OF THE BOARD OF ADJUSTMENT
CITY OF DENISON

RE: **Appeal of Order of Removal—Coffin Street**

**Mobilitie Investments III, LLC
c/o Jackson Walker LLP
2323 Ross Ave., Suite 600
Dallas, TX 75201**

RE: Mobilitie Appeal Request from Denison Order of Removal of the 84' 6" "Tower" (sic mischaracterized as a "utility pole" by Mobilitie documents) from 300 block W. Coffin Street.

The City of Denison (City") and Mobilitie as the Appellant ("Appellant" or Mobilitie) were heard February 23, 2017 in a hearing on the he above-referenced request.

The Appellant's request was denied by the Denison Zoning Board of Adjustment ("Board") on February 23, 2017 by a vote of 5 in favor for denying the appeal and affirming the Order of Removal by Bobby Atteberry and 0 against with 0 abstaining. On this date, the Board found that the request did not meet the requirements and or the conditions of the City of Denison Zoning Ordinance and Code of Ordinances, as set forth in detail in Attachment 1. The Board adopted the findings in Attachment 1 by a vote of 5 in favor of adoption and 0 against with zero abstaining. Therefore, the Board upholds the City Order to Remove the "tower" (mischaracterized as a "utility pole" by Mobilitie) and deny the requested Appeal.

Any interested person wishing to appeal this decision is required to file a petition for Writ of Certiorari in a district court, county court or county court at law within ten (10) days of the date this decision is filed in the Board's office in accordance with section 211.011 of the Texas Local Government Code. This decision was filed in the Board's office on the date referenced below.

On motion by Board member Keese, seconded by Board member Hamel, for denying the appeal and affirming the Order of Removal by City approved by the following vote:

Ayes: Davis, Pilcher, Parks, Hamel, Keese

Nays: none

Abstentions: none


On motion by Board member Keese, seconded by Board member Pilcher, for adoption of the findings in Attachment 1 to this Order approved by the following vote:

Ayes: Davis, Pilcher, Parks, Hamel, Keese

Nays: none

Abstentions: none

ORDERED this 23rd day of February, 2017.



Michael Davis
Vice Chair of the Board of Adjustment

ATTEST to filing of decision in Board office on February 24, 2017:



Carrie Jones
Director of Strategic Services

Attachment 1

Board of Adjustment reasons upholding the City Order to Remove as to the required removal of the 84' 6" "tower" from the public rights-of-way in Denison (mischaracterized as a "utility pole" by Mobilitie) and denying the requested Appeal.

Upon hearing argument of the City of Denison and Mobilitie and the presentation of evidence, the Board of Adjustments finds:

1. The Parties and their Positions.

On January 17, 2017, the Right of Way Manager for the City of Denison issued a notice of violation with respect to an 84'6" tower at W. Coffin Street constructed by Mobilitie. The notice ordered Mobilitie to remove the tower because it was built without a proper permit as required by Section 21-158, and because it was built in violation of applicable City Code provisions that limit what may be constructed in the City with or without a permit. One provision specifically cited in the notice of violation included Sec. 21-150, which requires all construction to be performed in accordance with the City Thoroughfare Plan, but the notice also indicated the facility should be removed because it failed to comply with all local laws and regulations, and interfered with planned sidewalk improvements. Sec. 21-148 establishes a local requirement for compliance with local, state and federal requirements as a condition of construction in the rights of way.

Mobilitie is a provider of wireless facilities infrastructure to Federal Communications Commission (FCC) licensed Commercial Mobile Radio Service (CMRS, cellular) provider. Mobilitie is not a FCC licensed CMRS (cellular) provider. It contends that it was issued a permit by the City. The document it characterizes as a permit is a form prepared by Mobilitie. It is signed by Brad Park a Foreman for the City, who was ostensibly authorized to sign the Mobilitie forms by the Utility Manager, Jack Forbes. Mobilitie contends these permits are valid and fully authorized construction of an 84' 6" tower at on W. Coffin St. Specifically, Mobilitie says that "it was given approval and written permission to proceed with the installation of the poles which are the subject of the Notices. Moreover, the poles at issue were properly and appropriately installed pursuant to the Ordinances of the City and the laws of the State of Texas."

Conclusion of Law:

1. The City is the governmental entity managing the rights-of-way under state law, for the benefit of the public. Under Texas state law, wireless facilities providers have no right of access to place wireless facilities in the local public rights-of-way absent the City's non-discriminatory, discretionary consent. If the City grants consent, only then may permits for sites be applied for to use the rights-of-way in accordance with City Code of Ordinance.

2. While an entity granted the right to use the right-of-way may obtain a permit, the City Code specifically requires that permits be obtained from the Right-of-Way Manager. The Code further requires that no permit shall issue unless the Right-of-Way Manager “shall have been provided a written application, on a form furnished by the ROW manager...” Sec. 21-140.

3. This structure is a “tower”, not a “utility pole”. A “utility”, as defined in Section 224 of the Communications Act, 47 U.S.C. 224 (a) [(Federal Pole Attachment Act)], or in 47 C.F.R. sec. 1.4002 (a) is "... a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications...."

4. 47 CFR Appendix C to Part 1, Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process Part VII requires an entity that proposed to build a tower that is not exempt from the NHPA process to submit packets to the state SHPO prior to construction identifying the impact of the facility on historical areas. While there are certain exceptions to this requirement – where a facility is on a large tract of land distant from an historical area, or where what is proposed is in the right of way and consistent with surrounding structures, where a structure is not within the exemptions, the Section 106 procedures must be followed prior to construction.

Findings of Facts:

1. Mobilitie has city consent license agreements with several Texas cities, including San Antonio and Houston, and has requested city consent in McAllen, Texas, where they have submitted a proposed license agreement.
2. Mobilitie has not requested City consent to place wireless facilities in the rights-of-way.
3. The City has not granted consent to Mobilitie to place wireless facilities in the rights-of-way.
4. In June 2016, Mobilitie submitted its self-described Mobilitie form “application” to use the rights of-way, with deficient and preliminary plans, as detailed below; it did not submit an application on City forms, or in compliance with City Ordinances.
5. While Mobilitie commenced the Section 106 process with respect to another tower it proposed to build in Denison, it never followed the Section 106 process for the W. Coffin tower, and there is no evidence the tower was exempt from that process.
6. Mobilitie installed, without city consent to use the rights-of-way and without a City authorized rights-of-way use permit, an 84’ 6” tower on W. Coffin Street, a structure that was built to support an antenna on or about December 28, 2016.
7. Mobilitie submitted plans self-characterized as “PRELIMINARY NOT FOR CONSTRUCTION” “plan” documents dated June 20, 2016 to the City.

8. In Mobilitie's "PRELIMINARY NOT FOR CONSTRUCTION" plans dated June 20, 2016 Mobilitie repeatedly mischaracterizes the structure as a "utility pole". The plans refer, in numerous places to this structure and installation as a "utility pole" not as a "tower". However, the plans themselves clearly show it is a structure being built to support an antenna, and other wireless facilities, not wires for a "utility", as defined in federal law. As indicated above, this is not a "utility pole", this is a "tower" structure that has been installed/built, solely to support an antenna.

9. Mobilitie's "PRELIMINARY NOT FOR CONSTRUCTION" plans dated June 20, 2016 indicate on sheets 2.0, 4.0 and 5.0 that third party owned equipment may be installed in the rights-of-way, without consent to use the rights-of-way and without an authorized a city permit.

10. Mobilitie's "PRELIMINARY NOT FOR CONSTRUCTION" plans dated June 20, 2016 included the following defects which would have precluded the Right of Way manager from issuing a permit under the City Code:

1] The Firm Registration Number with the State of Texas should appear on the plans. This is a violation of the Engineering Practice Act and the City should not review and approve plans in violation of the Engineering Practice Act.

2] A note on Sheet 1.0 of all three plan sets states that the plans were generated without the use of a survey. This is typically not allowed.

3] None of the plans include any geotechnical information or design calculations regarding the foundation or wind speed, etc. There is no way to tell what was built without the design.

4] The Coffin Street 84'-5" pole plans do not show any information about the foundation.

5] The Coffin Street 84'-5" pole plans do not include any specific information about the pole material or size, it just says Wood 6" - 10".

11. While Brad Park, a foreman with the Utility Department, not the Right-of-Way Manager, initialed the cover sheet that was submitted with the drawings, Mr. Park and his supervisor are responsible for ensuring that projects do not conflict with utilities (through the utility locate process). They do not issue permits for use of the rights-of-way; by City Code permits for the right of way are issued by the Right-of-Way manager. The Right-of-Way manager sent the notice of violation referred to above.

11. On Feb. 7, 2017, still without city consent to use the rights-of-way, Mobilitie submitted an on-line application for a rights-of-way permit. The application included plans dated Oct. 11, 2016.

12. In Mobilitie's plans dated Oct. 11, 2016 Mobilitie repeatedly mischaracterizes the structure as a "utility pole". The plans refer, in numerous places to this structure and installation as a

“utility pole” not as a “tower”. However, the plans themselves clearly show it is a structure being built to support an antenna, and other wireless facilities, not wires for a “utility”, as defined in federal law. As indicated above, this is not a “utility pole”, this is a “tower” structure that has been installed/built, solely to support an antenna.

13. Mobilitie’s dated Oct. 11, 2016 plans as submitted indicate on sheets 2.0, 4.0 and 5.0 that third party owned equipment may be installed in the rights-of-way, without consent to use the rights of way and without an authorized a city permit.

14. Mobilitie’s plans dated Oct. 11, 2016 are deficient for the following reasons:

1] The Firm Registration Number with the State of Texas should appear on the plans. This is a violation of the Engineering Practice Act and the City should not review and approve plans in violation of the Engineering Practice Act.

2] A note on Sheet 1.0 of all three plan sets states that the plans were generated without the use of a survey. This is typically not allowed.

3] None of the plans include any geotechnical information or design calculations regarding the foundation or wind speed, etc. There is no way to tell what was built without the design.

4] The Coffin Street 84'-5" pole plans do not show any information about the foundation.

5] The Coffin Street 84'-5" pole plans do not include any specific information about the pole material or size, it just says Wood 6" - 10".

15. The validity of this new filing is not before the Board of Adjustment, and is relevant only insofar as it shows that deficiencies in the application have not been cured.

16. As far as can be determined from the information provided by Mobilitie to the City, the structure installed will not be used in any respect for wireline communications, but instead will receive signals from and send signals to mobile devices; and will utilize wireless technology as component of or an adjunct to and/or an expansion of a Commercial Mobile Radio Service (commonly known as cellular telephone service). As a result, the Appellant is not a utility under Section 224, and the structure that is being built therefore is not a utility pole within the meaning of Section 224. There is no showing that the Appellant believes it is bound by Section 224 or that it intends to lease capacity on its utility poles at rates regulated by the FCC. Rather the structure it is a "tower" installed, build primarily (and as far as can be determined, solely) to support wireless facilities, an antenna, and other facilities for a wireless network. (See FCC rule definition of a "tower", 47 C.F.R. sec. 1.4001 (b) (9)).

17. At the same time, in filings with the Texas Historical Commission, the company characterized almost identical facilities as towers. The failure to accurately describe and apply for the structure provides an independent ground for finding that Mobilitie’s application form and plans could not have authorized the structure actually built.

18. The Appellant does not contend nor has it presented any information or evidence that it must be able to place a tower in the rights-of-way at the location proposed in order to provide wireless services or any service. Nor does anyone who might use the tower make such a claim.
19. The Appellant does not contend nor has it presented any information or evidence that it must be able to place a tower in the rights-of-way at the location proposed in order to close a significant gap in cellular wireless services or any service. Nor does anyone who might use the tower make such a claim.
20. The Appellant does not contend nor has it presented any information or evidence that it must be able to place a tower in the rights-of-way at the location as the least intrusive location in order to provide wireless services or any service or to close a significant gap in cellular wireless services or any service. Nor does anyone who might use the tower make such a claim.
21. The Appellant does not contend nor has it presented any information or evidence that it must be able to place a tower in the rights-of-way at the location otherwise it will be prohibited from or an entity using the tower will be prohibited from or effectively prohibited providing a wireless service or any service or commercial mobile radio cellular wireless services or any service. Nor does anyone who might use the tower make such a claim
22. As stated on the Jan. 18, 2017 City “Notice of Code Violations & Order to Remove Utility Pole” [sic, should be “tower”]:

“Any work performed within the ROW must be conducted pursuant to a valid permit issued by the ROW manager, as specified in Denison City Code of Ordinances, Section 21-158. Standards for ROW permit issuance, including permit application fees, are detailed in Chapter 21 of the Denison City Code of Ordinances. The Code likewise specifies that the ROW manager may, at any time, order the immediate cessation of any work posing a threat to the public's well-being. In particular, Section 21-150 requires that permit issuance for work within an ROW conform to the City's Thoroughfare Plan. Further, the City has reserved the right to restrict the route of any improvement in the ROW, per Section 21-152. Finally, the ROW Management Code requires compliance with all local laws and regulations. Pursuant to Denison City Code Section 30.7, work requiring a permit within an historic district requires a certificate of appropriateness from the Historic Preservation Board.

Please be notified that this letter constitutes written notice of noncompliance as required under Section 21-160 governing ROW permitting. No permit applications were submitted or approved for the pole [sic, should be “tower”] Mobilite installed in Denison's historic district ROW at the 300 block of West Coffin Street.”

23. Prior to installation of the tower Mobilitie never applied for a permit with the Right-of-Way manager using the form for applying for a permit as required by the City Code.
24. Even if one assumes that a permit has been issued, in constructing the facility, Mobilitie failed to comply or take any steps to comply with the Thoroughfare Plan.
25. Mobilitie took no steps to comply with applicable federal requirements with which it is obligated to comply under both federal law and the applicable City Code provisions, most notably, Section 106, which governs steps that must be taken to ensure that a proposed tower does not adversely affect protected historical areas.(See Feb. 16, 2017, letter from Mr. Alexander Toprac, of the Texas State Historic Commission to Mr. Stephen J. Blazenko, GSS (Mobilitie Section 106 consultant) and made part of the record.)
26. This tower is not subject to the exclusion of a utility pole under 47 CFR § 1.1306 (c) (iii) (A). This tower is not subject to any Section 106 exemptions, and because this tower facility would be much more than 10% higher than utility poles in the area. The highest existing structures are two stories and about 35 feet in height, 10% of that is 3.5 feet. This tower is 84' 6", or more than 10% over the existing structures. (See Federal Historic District designation; nd, City Historic District Ordinance.)
27. The manner of access and use of the site by Mobilitie violates Section 1.04 of the City Charter.
28. This site is located within Tax Increment Reinvestment Zone No. 3 ("Reinvestment Zone") (See Ordinance creating Reinvestment Zone.)
29. The failure to follow Section 106 and to construct without completing required state and federal processes is a violation of the City Code provisions cited above.
30. The Appellant has not presented any information justifying its misleading submissions.

Conclusions

We conclude that the Order of Removal issued by the City's Public Works director should be upheld, and that it is appropriate to require removal of the structure for the following reasons, each of which would be an independent ground for denying the appeal.

- a. Mobilitie never requested nor received City consent to use the rights-of-way for installation of wireless facilities.
- b. Mobilitie never properly applied for or obtained the permit specifically required by the City Code. The Appellant failed to follow the steps required by the Code for the type of facility it actually sought to construct.
- c. Mobilitie never requested or submitted a license agreement for use of the rights-of-way for wireless facilities.

- d. Even had Mobilitie used the proper form application, the tower is proper for removal. Mobilitie's construction plans were deficient, as detailed above. The Appellant's form "application" was misleading; the Appellant was not in a position to apply for a utility pole; and a permit based on a request to build a utility pole could not justify the facility actually constructed.
- e. The construction of any facility pursuant to a permit is predicated on obtaining all authorizations required prior to construction, paying application fees as required by ordinance and the permit does not authorize, and a facility must be removed, if the predicates are not satisfied. In this case:
 - i. Mobilitie did not have the consent of the City to build towers in the rights-of-way. This was not, a request from a utility company for a non-discriminatory right to construct a utility poles. Rather; it was a request to build a wireless tower in the rights-of-way, and the City has not consented to the construction of wireless facilities, much less towers, in the rights-of-way by it or others. The mere grant of a permit, even if valid, is not the same as the grant of a license. A permit, for example, might authorize construction of a facility on private property, but could never be used to build a facility without the permission of the landowner. In this case, the permit was improperly used to justify construction of a tower prior to obtaining approvals required for access to the property where the tower was built.
 - ii. Mobilitie built before following procedures that are necessary predicates to valid construction under even a valid City permit, notably, the failure to follow the Section 106 procedures established by the FCC and submit sufficient engineering plans.
 - iii. Before constructing the facility, Mobilitie failed to comply with the City's Thoroughfare Plan, and the structure as built will interfere with improvements planned by the City.

Collectively and individually, these defects justify removal of the tower and upholding of the Order to Remove by the City's Public Works Director.