



**CITY OF FORT COLLINS, COLORADO
ADMINISTRATIVE HEARING OFFICER
TYPE 1 ADMINISTRATIVE HEARING
FINDINGS, CONCLUSIONS, AND DECISION**

ADMINISTRATIVE HEARING DATE: October 9, 2003

PROJECT NAME: Wireless Telecommunication Equipment
T-Mobile, UPRR/PRPA Co-Locate, #27-03

APPLICANT: T-Mobile
c/o Chris Stryker
2323 Delgany Street
Denver, Colorado 80216

OWNERS: Union Pacific Railroad
201 W. Union
La Salle, CO 80645

Platte River Power Authority
2000 E. Horsetooth Road
Ft. Collins, CO 80525

HEARING OFFICER: Linda Michow, Esq.
Gorsuch Kirgis LLP
Tower 1, Suite 1000
1515 Arapahoe Street
Denver, Colorado 80202

PROJECT DESCRIPTION:

The applicant requests approval to co-locate wireless telecommunication equipment on an existing 100-foot Platte River Power Authority power pole. The wireless telecommunication equipment consists of an antennae array to be mounted on the existing power pole by a ten-foot pole extension, along with a ground-mounted equipment shelter. The equipment shelter will be enclosed within a six-foot cedar fenced area located south of the existing power pole.

The existing power pole is located adjacent to Harmony Road and is within the H-C, Harmony Corridor, zone district.

HEARING OFFICER DECISION: Approval.

ZONE DISTRICT: Harmony-Corridor (H-C).

NOTICE OF PUBLIC HEARING AND NEIGHBORHOOD MEETING: Evidence established at the hearing that the property was properly posted, legal notice mailed to adjacent owners, and notice published.

PUBLIC HEARING: The Hearing Officer, presiding pursuant to the Fort Collins Land Use Code (LUC), opened the hearing at approximately 2:00 p.m. on October 9, 2003 in Conference Room B of the City of Fort Collins Planning Department located at 281 North College Avenue, Fort Collins, Colorado.

RECORD OF HEARING: The Hearing Officer accepted during the hearing the following evidence: (1) Planning Department Staff Report; (2) site plan and supporting documents submitted by the applicant and the applicant's agents; (3) a sign-up sheet of persons attending the hearing; (4) public notice documentation; (5) a tape recording of testimony during the hearing; (6) the City of Fort Collins Land Use Code; and (7) the following exhibits:

- Exhibit A: T-Mobile site plan dated September 18, 2003;
- Exhibit B: Color photographs of approved wireless telecommunication equipment located along Drake Road (pole #1);
- Exhibit C: Color photographs of approved wireless telecommunication equipment located along Drake Road (pole #2);
- Exhibit D: Letter dated August 28, 2003 from Chris Stryker (T-Mobile) to Troy Jones, City Planner;
- Exhibit E: T-Mobile original site plan dated July 28, 2003;
- Exhibit F: Sprint PCS site plan dated January 10, 2003;
- Exhibit G: Color photograph of Sprint antennae array at Lake Sherwood;
- Exhibit H: Color photograph of Sprint ground-mounted equipment and cedar fencing;
- Exhibit I: Sketch by Troy Jones of proposed stealth technology on existing utility pole.

FACTS AND FINDINGS

1. **Application Meets Definition of Wireless Telecommunication Equipment:**
The application is a request to mount an antenna array, consisting of six antennae on three-foot long sectors, on an existing transmission pole.

The City Land Use Code ("LUC") defines wireless telecommunication equipment to mean "any equipment used to provide wireless telecommunication services, but which is not affixed to or contained within a wireless telecommunication

facility (monopole or tower), but is instead affixed to or mounted on an existing building or structure (or substantially similar replacement structure) that is used for some other purpose." See LUC, §5.1.2.

In contrast, a wireless telecommunication facility is defined as "any freestanding facility, building, pole, tower or structure used to provide only wireless telecommunication services, and which consists of, without limitation, antennae, equipment and storage and other accessory structures used to provide wireless telecommunication services." See LUC, §5.1.2.

By definition, a wireless telecommunication facility does not include wireless telecommunication equipment. City staff believes, as stated in the staff report, that the applicant's proposal to locate antennae on an existing utility pole meets the definition of wireless telecommunication equipment.

The hearing officer concurs with this opinion, since the antennae array is to be mounted on a utility pole rather than a stand-alone telecommunications structure. No evidence was introduced at the hearing to contradict this finding. This distinction is important in the analysis and consideration of T-Mobile's application as discussed below.

2. Compliance with Article 4 and the H-C District Standards:

As the staff reports indicates, the proposed site of the T-Mobile wireless telecommunication equipment is located in the H-C, Harmony Corridor, zone district. The hearing officer finds that within this zone district, wireless telecommunication equipment is permitted as an accessory use subject to Type 1 administrative review. See LUC, §4.21(B)(2)(e).

3. Compliance with Article 3 – General Development Standards:

Compliance with Section 3.8.13

T-Mobile's application must meet the supplemental regulations of Article 3 relating to wireless telecommunication. Section 3.8.13 of the LUC sets forth the location, co-location and standards that wireless telecommunication equipment and facilities must meet. These requirements, and the hearing officer's findings with respect to each, are discussed below.

Location. Section 3.8.13(A) provides that wireless telecommunication equipment may be attached to or mounted on any existing building or structure located in

any zone district of the city. The hearing officer finds that the proposal of T-Mobile meets this criteria and there was no evidence introduced at the hearing to contradict this finding.

Co-location. Subsection (B) of § 3.8.13 provides that "no wireless telecommunication facility or equipment owner or lessee or employee thereof shall act to exclude or attempt to exclude any other wireless telecommunication provider from using the same building, structure or location...Any application for the approval of a plan for the installation of wireless telecommunication facilities or equipment shall include documentation of the applicant's good faith efforts toward such cooperation."

As the site plan and testimony at the hearing have established, the applicant is proposing to "co-locate" its equipment on an existing utility transmission line. Although the co-location is not between wireless telecommunication providers, as contemplated by Subsection (B), the intent of this provision is to reduce the overall number of wireless telecommunication facilities and equipment and other structures that house them. To this end, the hearing officer finds that the applicant has met the intent of §3.8.13(B).

Standards – Color. The applicable standards for telecommunication facilities and equipment require, pursuant to §3.8.13(C)(3), that wireless telecommunication equipment "be of the same color as the building or structure to which or on which such equipment is mounted." Neither the staff report nor the applicant addressed the issue of color; however, the hearing officer finds, based on the site plan and photographs submitted, that the antenna array will be similar in color to the existing transmission pole. Therefore, this criteria has been met.

Standards - Berming, Fencing and Landscaping: The standards also address fencing, berming and landscaping (See LUC §3.8.13(C)(4), (5), (6)). Subsection (C)(5) requires that fencing material consist of wood, masonry, stucco or other acceptable materials and be opaque. Fencing also cannot exceed six feet in height. The uncontested evidence presented at the hearing establishes that the applicant's proposed cedar fencing of the ground-mounted equipment meets this requirement. As the staff report notes, the applicant also has met the landscaping requirements as the site plan includes provision for shrubs between the fenced enclosure and Harmony Road.

Standards - Color: Subsection (C)(8), requiring compatibility of colors, has been met as discussed above.

Standards - Lighting: Subsection (C)(9), concerning lighting, is not applicable as no security lighting is proposed, nor required.

Standards - Stealth Technology: Subsection (C)(15) addresses stealth technology and states:

To the extent reasonably feasible, the applicant shall employ "stealth technology" so as to convert the wireless telecommunication facility into wireless telecommunication equipment, as the best method by which to mitigate and/or camouflage visual impacts. Stealth technology consists of, but is not limited to, the use of grain bins, silos or elevators, church steeples, water towers, clock towers, bell towers, false penthouses or other similar "mimic" structures. Such "mimic" structures shall have a contextual relationship to the adjacent area.

Section 5.1.2 of the LUC defines "extent reasonably feasible" as:

under the circumstances, reasonable efforts have been undertaken to comply with the regulation, that the costs of compliance clearly outweigh the potential benefits to the public or would unreasonably burden the proposed project, and reasonable steps have been undertaken to minimize any potential harm or adverse impacts resulting from noncompliance with the regulation.

City staff takes the position that the application does not meet the stealth technology criteria because the proposed antennae array does not, to the extent reasonably feasible, employ stealth technology. Staff bases its position, in part, on the city's experience in two previous co-location requests to locate wireless telecommunication equipment on existing power poles adjacent to Drake Road (See staff report, page 2; Exhibits B & C). In the Drake Road cases, staff determined, after approval and installation of these antennae array, that the antennae on existing utility poles drew visual attention to these specific poles by motorists driving toward the poles. As noted in the staff report: "Staff concluded after the installation of the Drake Road co-locates that such a co-locate on a power pole in the future would be considered incompatible with the urban form when it is in the viewshed of traffic on a heavily traveled roadway." (See staff report, page. 2). The staff report further explains that "[p]artially as a result of staff's conclusions about the incompatibility [of] the two Drake Road co-locates, a new subsection on stealth technology was added to the Wireless Telecommunication section 3.8.13 of the Land Use Code in December of 2001."

As Troy Jones testified, the proposed T-Mobile equipment will be in direct line of sight of motorists traveling along Harmony Road. Mr. Jones further testified that the size, mass and scale of the antennae array will draw attention to it and make it incompatible with the surrounding area. Mr. Jones testified that the applicant could employ stealth technology by mounting on the pole a cylinder-type structure within which antennae could be installed (See Exhibit I). Alternatively, Mr. Jones suggested the applicant could co-locate on several transmission poles located to the south of the proposed site along the Union Pacific Railroad right-of-way as these locations are not within line of sight of traveling motorists along Harmony Road. Another alternative suggested by Mr. Jones would allow the applicant to install a freestanding telecommunication facility provided such pole looked like a utility pole.

The applicant contends that it has complied with the city's stealth technology standards in that it has reduced the number of antennae from nine to six and the size of each sector from twelve-feet to three-feet. The applicant pointed out at the hearing that this reduced antennae array is smaller than those installed on the poles adjacent to Drake Road. The applicant believes that by virtue of its co-location on an existing transmission pole, it has met the requirements of stealth technology. Chris Stryker, representing the applicant, testified at the hearing that Platte River Power Authority recommended the pole adjacent to Harmony Road as the most feasible in terms of its structural integrity for co-location. According to the applicant, the poles located to the south of the site, along the Union Pacific railroad right-of-way, may not support the antenna array proposed by the applicant. The applicant further testified that this site will best serve its needs for coverage.

At the hearing, the applicant also challenged the consistency of the City's application of its wireless telecommunication standards given that the City previously approved a Sprint tower that is adjacent to residential uses.

Having carefully considered the testimony and evidence presented at the hearing, along with the applicable provisions of the LUC, the hearing officer finds that the stealth technology requirement applies only in the context of a "wireless telecommunication facility" and not in the case of "wireless telecommunication equipment." Subsection (C)(15) specifically states that the "applicant shall employ stealth technology so as to convert the wireless telecommunication facility into wireless telecommunication equipment..." It does not require that wireless telecommunication equipment be converted to look like other structures. In this case, as the staff report notes, the request is not for a freestanding wireless telecommunication facility, but rather for wireless telecommunication

equipment to be mounted on an existing pole used for utility (and not telecommunication) services. The plain meaning of this provision, therefore, excludes wireless telecommunication equipment from its application.

Moreover, the intent of Subsection (C)(15) is to require freestanding poles and other structures used to provide only wireless telecommunication services to look like (mimic) wireless telecommunication equipment that is mounted on existing buildings or structures used for some purpose other than telecommunication services. In this case, the proposed wireless telecommunication equipment is already mounted on an existing utility pole. Therefore, it is the hearing officer's determination that the applicant has already complied with stealth technology by co-locating on an existing utility power pole.

The hearing officer is also aware of the requirements imposed by the Federal Telecommunications Act of 1996 (the "Act"). Section 704(B) of the Act sets forth significant limitations upon local government action concerning wireless telecommunication facilities. It specifically requires that any denial of a wireless facility be in writing and "supported by substantial evidence contained in a written record." Based on the evidence and testimony presented, as explained above, the hearing officer does not find there is substantial evidence in the record to support staff's recommendation of denial.

Finally, to the extent the City is concerned with preserving the viewshed along heavily traveled roadways, the City could have included language in §3.8.13 to address this issue, as it has accomplished with subsections addressing "foothills and hogbacks", "airports and flight paths", and "historic sites and structures". See LUC §3.8.13(C)(12), (13), & (14).

The hearing officer finds that the applicant has attempted to mitigate the visual impacts of the equipment by reducing the overall size of the antennae array as well as the number of antennae. The applicant testified that the six proposed antennae are the minimum necessary to provide the coverage needed to serve its customers. Although city staff suggested a cylinder-type structure to camouflage the antennae on the pole, the applicant testified that a cylinder structure could not be engineered so as to contain all six antennae.

In summary, because §3.8.13(C)(15), on its face, does not apply to wireless telecommunication equipment, the applicant is not required to employ stealth technology in seeking approval of this application request and, to some extent, has already mitigated the visual impacts of the antennae array by reducing the size of each antenna sector.

Compliance with Section 3.5.1 - Building and Project Compatibility

The staff report indicates that the application does not comply with §3.5.1 of the LUC because the physical characteristics of the proposed antennae array are not compatible with the character of the community when considered in the context of the viewshed of Harmony Road. According to the staff report, "the proposed antennae array is in direct line of sight of motorists driving both east and west on Harmony Road and would therefore draw attention to the pole." (See staff report, page 4). The staff report does not address any specific subsection of §3.5.1, but rather relies on the general "Purpose" section to find that the proposed wireless equipment is not compatible with the surrounding area.

The hearing officer finds that City staff's general reliance on §3.5.1 does not amount to "substantial evidence" in order to justify a denial of the application. Section 3.5.1(A) specifically states that the physical and operational characteristics of proposed buildings and uses "should be read in conjunction with the more specific building standards contained in this Division 3.5 and the zone district standards contained in Article 4." There has been no evidence presented to identify any specific building standards contained in Division 3.5 of the LUC to support staff's position that the proposed antennae array is not compatible with the surrounding area.

Moreover, to the extent the proposed wireless equipment is to be mounted on an existing utility pole, the hearing officer finds that the antennae array would be no more visually obtrusive than the arms of the existing utility poles which already line Harmony Road. See, for example, Exhibit B. For these reasons, the hearing officer finds that the application complies with the general compatibility provision of §3.5.1(A) of the LUC.

SUMMARY OF CONCLUSIONS

- A. The applicant's request to mount an antennae array on an existing utility pole and to install associated ground-mounted equipment meets the definition of "wireless telecommunication equipment."
- B. Wireless telecommunication equipment is permitted as an accessory use in the H-C, Harmony Corridor zone district subject to Type 1 administrative review.

- C. The applicant's request meets the applicable criteria set forth in Section 3.8.13 of the Land Use Code.
- D. Specifically, §3.8.13(C)(15) of the Land Use Code does not apply to this application because only wireless telecommunication facilities and not wireless telecommunication equipment are required to employ stealth technology.
- E. The applicant's request meets the general compatibility provision of §3.5.1(A) of the Land Use Code.

DECISION

The T-Mobile Wireless Telecommunication Equipment Application, #27-03, is approved by the Hearing Officer.

DATED THIS 21ST DAY OF OCTOBER, 2003.



Linda Michow, Hearing Officer

Type I Hearing for
Wireless Telecommunication Equip.
T-Mobile PRPA/VPRR

10/9/2003

Sign In sheet

<u>Name</u>	<u>Address</u>
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