Salt Lake City Land Use Appeals Hearing Officer
Appeals Decision
Brad Bush
PLNAPP2020-00889
(Appealing Administrative Determination)
April 23, 2021

This is an appeal by Brad Bush ("Appellant") of an administrative decision by the Salt Lake City Planning Director ("Planning Director") making a determination that the cell phone antenna expansion on the roof of Indian Hills Elementary School located at 2496 East St. Mary's Drive (the "Property") would be considered a "stealth antenna" under the Salt Lake City Code and therefore a permitted use.

Ruling

My decision is that the administrative decision made by the relating to the identification of the cell phone antenna expansion being considered a "stealth antenna" under Salt Lake City Code ("City Code") and permitted use is ***upheld*** because I find that the City's interpretation of what constitutes a "stealth antenna" and its application at the Property to be correct, with negligible evidence to the contrary.

History and Procedures

T-Mobile has had an existing roof mounted cellular antenna (the "Antenna") located on the Property roof since approximately 2005. In 2020, T-Mobile expanded the Antenna without the required building permit and conditional use approvals. Since "stealth antennas" do not require a conditional use, T-Mobile sought a building permit to transform the Antenna into a "stealth antenna," which T-Mobile subsequently received on October 30, 2020. On October 29, 2020, the Salt Lake Planning Division Director reported in a memo that the expanded Antenna was in fact considered a "stealth antenna" under City Code (the "City Memo"). The appeal was timely filed initially on September 18, 2020, and updated on November 6, 2020, and February 25, 2021, in the form of an appeal memo ("Appeal Memo"). In mid-January 2020, T-Mobile installed the stealth enclosure on the Antenna.

A public hearing on this matter was held before the Appeals Hearing Officer on Thursday, April 8, 2021 (the "Hearing"). The Appellant, Brad Bush, appeared and testified. Appearing on behalf of the City were Kelsey Lindquist, Senior Planner with the City, and Paul Nielsen, a Senior City Attorney. Members of the public also weighed in on this matter. An extended discussion, including the identification and review of some of the evidence in the record, was conducted at the Hearing.

Standard of Review

Utah law grants to municipalities the authority to designate the standard of review for appeals of land use authority decisions. Utah law provides that "the appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of a land use ordinance" (*Utah Code Annotated* §10-9a-707, (1) and (4)). Salt Lake City ordinance provides that the standard of review for an appeal shall be *de novo*, which means that "[t]he appeals hearing officer shall review the matter appealed anew, based upon applicable procedures and standards for approval, and shall give no deference to the decision below" (*Salt Lake City Code*, Section 21A.16.030 E.).

While the Appellant identified three main arguments challenging the decision in the City Memo which I address in this decision, the Appellant also identified three ancillary issues which I did not and cannot consider as they lie outside the scope of this Appeal and my authority as an Appeals Hearing Officer, yet merit mention.

Ancillary Issue A: First, the Appellant understandably points out ways that T-Mobile may have, or appeared to have, skirted the established processes to obtain its desired outcomes. Be that what it may, that is an enforcement issue and something that has no bearing on the merits of this appeal.

Ancillary Issue B: The Appellant also spends considerable space in its appeal memo making various health and safety claims with respect to the cellular antennas and equipment. While the information is certainly troubling if close to representing reality, such a review and analysis is not only outside my legal and planning expertise, but outside the scope of what I can address in an Appeal of a land use decision. As the Staff Report pointed out on page 2, Federal Law precludes a city from regulating telecommunication facilities for "environmental effects".

Ancillary Issue C: The Appellant goes to great lengths in the Appeal Memo to challenge the integrity of City planning staff claiming bias against the neighborhood. Just because the planning staff made a decision that is unpopular with a neighborhood does not mean they are biased against a neighborhood. The evidence was scanty and beyond the scope of this appeal which determines the correctness of the land use decision.

I now turn to the review of the Appellant's substantive claims in challenging the City Memo.

Issue 1: Permit Required for the Antenna Array

The Appellant begins by pointing out what he calls a "foundational flaw" in the City Memo claiming that it ignores the City Code definition of a Roof Mounted Antenna (See *Salt Lake City Code* 21A.40.090). Appellant's argument essentially states that because the existing antenna on the roof of the school at the time the City Memo was issued was a "Roof Mounted Antenna," then T-Mobile should be required to go through the conditional use process. The City agrees that the then-existing antenna on the roof of the school was a "Roof Mounted Antenna" and

should have required a conditional use permit. The Appellant stresses that the City should follow the plain language of the City Code. This argument misses the point. The purpose and context in which the City Memo was issued was in response to a request by T-Mobile for a "proposed" antenna to expand the already existing antenna generally in the same location. (See City Memo, page 1, paragraph 1). All agree that T-Mobile improperly and illegally installed the then-existing antenna. T-Mobile and the City were thereby remedying the illegality. The City Memo's conclusion is the remedy – turn the existing antenna into a "stealth antenna", pursuant to Section 21A.40.090 E2f. Ms. Lindquist from the City Staff confirmed at the Hearing that the Antenna became stealth once the changes were made to comply with the Code requirements for a "stealth antenna."

The Appellant spends a lot of space arguing the significance of a comma in reference to both "Section 21A.40.090, Table 21A.40.090.E of this title" in the Wireless telecommunication facilities row in the Table of Permitted and Conditional Uses for Special Purpose Districts (21A.33.070). The Appellant wants us to ignore the entirety of Section 21A.40.090, by stating that "the reference to this table [Table 21A.40.090E] clearly orients to the section where the table is located, rather than to the section broadly and on equal footing with the table." Such attempted logic appears non-sensical, but at a minimum it is a reasonable interpretation for the City to suggest that we should look at the table and the entirety of Section 21A.40.090, thus including subsection f which addresses "stealth antennas." It is entirely reasonable for the City to read such references separated by a comma.

The Appellant also criticizes the City Memo for "manufacturing a conflict" between the lack of reference in the table at 21A.40.090E, and the plain language of the "stealth antenna" section which unambiguously states that stealth antennas "shall be allowed in all zoning districts." On multiple occasions the Appellant strenuously objects to the City Memo for not following the plain language of the Code. Significantly, I believe this case turns on following the plain language of the City Code. The fact of the matter is that the Code clearly says that stealth antennas "shall be allowed in all zoning districts." I am not persuaded by the strained logic of the Appellant and fail to see how you could interpret it any other way than stealth antennas are allowed in all zoning districts. Thus, the "conflict" with no reference to a stealth antenna in the table of permitted and conditional uses is resolved by the plain language of the statute. The City, in both the City Memo, and in its arguments in the Appeals Hearing and in the Staff Report, goes even further by pointing out legislative history and clear intent that "stealth antennas" were meant to be permitted in all zoning districts. I do acknowledge that this dispute could have been avoided altogether if the City had included a section for "stealth antenna" in the table and placed a "P" throughout the entire column. Yet, even without such clarity, the plain language of the statute remains clear. To parrot the Appeals Memo, "State code is clear that: 'A land use authority shall apply the plain language of land use regulations.' (10-9a-306.1)" See Appeals Memo, page 37.

Issue 2 and 3: Compliance with Stealth Antenna Definition

Because the second and third arguments by Appellant are related, I address them concurrently in this section. The Appellant challenges the determination made in the City Memo that the

antenna complies with and meets the requirement of a "stealth antenna" by being "completely disguised as another object or otherwise concealed from view thereby concealing the intended use and appearance of the facility" (21A.40.090.E.2.f.1 and 21A.62.040).

The Appellant again misses the point of the City Memo, that it was considering the proposal to turn the admitted roof mounted antenna into a stealth antenna which is approved in all zoning districts, thus not requiring any type of public process. Again, the City never claimed that the roof mounted antenna was legal. This is the very purpose for the proposal from T-Mobile, to turn a non-permitted use into a permitted use by complying with the requirements of City Code.

It appears that the stealth antenna disguised as an elevator bulkhead does in fact meet the plain language definition of the statute. The stealth antenna is completely disguised as an elevator bulkhead. The Appellant claims that it does not meet the City definition because the entire facility is not disguised and that you can see wires and other supporting portions of the antenna facility. The Appellant makes the argument that "the structure must appear just as an elevator bulkhead with no visual cues the [sic] betray that the facility is not actually an elevator bulkhead." Appeals Memo page 40. However, this is not the plain language of the City Code and the Appellant is attempting to add in his own criteria. From all appearances, the stealth antenna is completely disguised as an elevator bulkhead and does not need to meet the industry standards for an actual elevator bulkhead in every respect. Furthermore, City Staff effectively points out that City Code addresses the electrical equipment issue that is also governed by City Code and that this stealth antenna properly complies. See Staff Report, page 8.

Additionally, the "stealth antenna" definition clearly states that the stealth antenna can be EITHER "completely disguised as another object" [in this case an elevator bulkhead] "***or*** otherwise concealed from view, thereby concealing the intended use and appearance of the facility" (emphasis mine). The stealth antenna at issue also conceals the intended use and appearance of the facility. Simply by looking at it, unless you already knew what it was, you cannot tell that it is an antenna facility. The meaning of the language of the City Code is clear and unambiguous and the City Memo correctly states as much.

Conclusion

Based upon the materials in the City's Staff Report, the materials provided by the Appellant, other materials provided by the City, combined with the testimony presented in the Hearing and received from the public, I find that the conclusion in the City Memo asserting that the Antenna meets the "stealth antenna" definition and requirements consistent with City Code and Utah law is correct.

Matthew T. Wirthlin,
Appeals Hearing Officer