

CITY OF BURTON
BUILDING BOARD OF APPEALS MINUTES
MARCH 31, 2004, 3:00 P.M., COUNCIL CHAMBERS
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Bob Carpenter, Chairman, called the Meeting to order at 3:15 P.M.

MEMBERS PRESENT: Robert Carpenter, William Hall Jr. and Ted Hu.

MEMBERS ABSENT: Wm. Berry and Robert Haneline.

MEMBERS PRESENT: T. Strasser, Deputy Planning Official and C. Ladd, Deputy City Clerk.

PURPOSE OF THE MEETING: Discussion and possible action concerning the following: Interpretation of a utility pole within a "right-of-way".

Moved by Hu, seconded by Hall to approve the minutes of the meeting held on Wednesday, March 31, 2004.
Motion carried 3-0.

PRESENTATION:

Mr. Haley said he understood that there are three issues from the last meeting that need to be addressed.

1. Liability for going on the tower.
2. Jurisdiction
3. Document from Consumer's Energy approving the co-location.

Mr. Haley noted that in the packet given to the members, is a letter from Wendy Allen from Consumer's Energy regarding a lease agreement where they have previously agreed to go on the tower. The number of co-locations was not provided, but it is over 100. We have provided a partial list of jurisdictions that our office has done wireless carrier collations on Edison or Consumer's Energy transmission facilities. Most municipalities prefer to use existing towers rather than new towers.

The issue before this Board is, does the language coupled with the perception of the ordinance allow for Sprint to co-locate on Consumer's Energy tower.

Mr. Carpenter said his concern is the property is not a right-of-way, but private property. How does that impact whether we could make a decision? We can't arbitrarily change the way the ordinance is written. Another issue or concern is anyone who has private property could make the same case that has been made here. We don't want to set a bad precedence for the City. The ordinance doesn't say anything about private property. Possibly the Attorney could address this issue. Also, is it part of the Building Board of Appeals function to modify an ordinance that we had no say in originally? We need to be as fair and open-minded as we can be concerning this issue.

Mr. Haley said it is the Board's function to interpret the language of that ordinance and define whether this is a right-of-way and whether this is a utility pole, consistent with the language of the ordinance. It is not to modify or change the ordinance, but to make an interpretation of the ordinance.

Mr. Carpenter asked Attorney Austin for his input.

Mr. Austin commented that he authored the ordinance, which was modeled after another municipal client. You, as the Board of Appeals, have the authority to do the following three things:

1. Interpret the Ordinance
2. Grant variances to any of the ordinances requirements
3. Reverse any decision made by the administrative employee of the City, under the terms of the ordinance, specifically, Section 9, Board of Appeals.

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Mr. Austin stated if the Board grants a variance or reverses the decision of an administrative official, you must have the affirmative vote of three members of the board, regardless of how many members are present at the meeting. It takes the affirmative vote of the majority of the Board to grant a variance or to reverse the decision of the Board. If you are making an interpretation of the ordinance, that only requires a majority of those present.

Mr. Austin said in reference to the questions before you, regarding whether a utility pole is a tower or a tower is a utility pole and whether a right-of-way is the same as fee simple ownership, you could approach this as either questions of interpretation or questions of variance. For instance, you could decide that a utility pole and a Consumer's power to was the same thing. As a matter of interpretation they are the same thing. That would only require the affirmative vote of two of you. You then discussion whether right-of-way equals fee simple ownership or whether in this particular, unique circumstance, not likely to reoccur in the future, a variance would be granted. We are not going to equate the term right-of-way to fee simple ownership, but we will grant a variance to Sprint so they may co-locate on this tower. This would be a permitted use under Section 4 of this ordinance. This is what you could do.

Mr. Carpenter said concerning liability, we have been assured that somebody working on one of these would come back on the City, because it was not the original intended use for that piece of property and then we as the Board approve this and the City gets sued.

Mr. Austin said he has no authority to speak for the City, but the City appreciates your looking out for the City's best interest. Thank you for that. We, from the City Attorney's office, are not concerned about creating any potential liability in this situation.

Mr. Hu asked what one could do with a privately owned property that one could not do on a right-of-way or vice-versa.

Mr. Austin said if the right-of-way interest is owned, it is usually for a specific interest, such as to build a road, run a wire or put in a sanitary sewer line or water line. It is for a limited purpose. If you own a simple title, you can do anything that is a lawful activity or build anything you want on the property.

Mr. Hu said legally, on the privately owned property, the petitioner could do anything that he could have done on the right-of-way piece of property.

Mr. Austin added, and more. Consumers Energy enjoys greater rights as the fees simple owner than if it were just a right-of-way interest. Further discussion was held concerning this issue.

Mr. Hu asked if this Board has the authority to grant the interpretation or variance or do we recommend that?

Mr. Austin said an application has been made and the property owners within 300 feet of this site have been notified. Because there has been notification to the adjoining property owners, you have the right to either grant an interpretation of the ordinance grant a variance to the terms of the ordinance. In fact you have an obligation to come to some conclusion today. Whatever that conclusion might be, you have to vote and ultimately, the City Council will decide the question whether or not the permit is granted. You have to decide whether it is an interpretation or variance on the application that has been submitted. After you have made your decisions, the City Council will pass upon the issuance of the permit.

AUDIENCE PARTICIPATION:

There was no one present in the audience other than the court stenographer.

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BOARD DISCUSSION:

Mr. Carpenter said the motion that is made should be rather specific.

Mr. Austin suggested that the two issues be taken up separately. The two terms that are in question are contained within the same sentence and the same sub-paragraph, being Section 4A-2.

Mr. Hu commented that his interpretation is that a utility structure would be either a utility pole or utility tower and it seems to him they are the same.

Mr. Austin commented that by granting a variance rather than an interpretation, you are limiting it to this specific to this situation.

BOARD ACTION:

Hu moved and Hall seconded the following motion:

1. Approve and authorize the following motion:

For purposes of this application, the Consumer's Power tower, located just North of Davison Road, does equate to the term utility pole. As a matter of interpretation, Consumer's Power tower in this case and utility Poles are one in the same.

Motion carried 3-0.

Mr. Hu said the second issue is whether the utility structure could be located in the right-of-way versus privately owned property. He said he is not trying to define the legal definition of a right-of-way versus ownership.

Mr. Carpenter said to keep in mind this is essentially a right-of-way within the utility company's property.

Hu moved and Hall seconded the following motion:

2. Approve and authorize the granting of a variance rather than specifically saying that the privately owned property is the same as the right-of-way piece of land, so that we don't set a precedence for future interpretations, and that all the criteria set forth within the ordinance for the granting of a variance are applicable, in this instance, specifically that this is a condition that is unique to this situation and not likely generally to reoccur, so as to cause a defacto revision of the ordinance.

Motion carried 3-0.

Mr. Austin said the minutes have to be approved prior to the City Council acting on this application. Because this Board doesn't meet on a regular basis, Mr. Austin suggested that a meeting be called in a couple of weeks and ask for public input and approve the minutes and close the meeting. This would be the best way to get the minutes approved.

Mr. Carpenter said the Board would meet to get the minutes approved.

Meeting Adjourned at 3:55 P.M.

Cheryl M. Ladd, CMC
Deputy City Clerk

CML