

**INDIAN RIVER COUNTY, FLORIDA  
M E M O R A N D U M**

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**TO:** Jason E. Brown; County Administrator

**THROUGH:** Phillip J. Matson, AICP; Community Development Director

**FROM:** Ryan Sweeney; Chief, Current Development

**DATE:** September 11, 2020

**SUBJECT:** Jacob Allenbaugh's Appeal of a Decision by the Planning and Zoning Commission that Construction of a Residence on Property at 6390 77<sup>th</sup> Street with a Legal Nonconforming 500' Tall Communications Tower is not allowed under County Regulations [98030058-86943]

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It is requested that the data herein presented be given formal consideration by the Board of County Commissioners at its regular meeting of September 22, 2020.

**BACKGROUND**

Jacob Allenbaugh is a prospective buyer of property at 6390 77<sup>th</sup> Street owned by Vertical Bridge LANDCO, LLC (see location map, Attachment 1). The subject 17.8 acre property contains a 500 foot tall communications tower, also owned by Vertical Bridge. The property is zoned A-1, Agricultural District, up to 1 unit per 5 acres.

In 2018, Mr. Allenbaugh contacted County staff requesting information on the development potential of the property, particularly for a residence. Staff responded in a letter dated 10/30/2018 (and with follow-up emails on 1/10/2019 and 1/30/2019) advising him that a residence could not be built on the property due to County regulations relating to the tower, as explained hereinafter.

The tower on the property was approved for construction in 1990, in compliance with County land development regulations (LDRs) in effect at that time. In 1997, the County revised its LDRs to prohibit commercial communications towers 150 feet and taller in the A-1 zoning district. Because the structure was legal when constructed, but no longer meets County LDR requirements, the structure is now a "legal nonconformity" subject to the provisions of County Code Chapter 904.

County Code Subsection 904.05(3) (see Attachment 3) provides that:

*...[D]evelopment...of structures on property with site-related nonconformities...may be permitted provided that such additions...do not increase the degree of the existing site-related nonconformity.*

Since 1997, County Code Subsections 971.44(1)(d) and (g)1. (see Attachment 3) require that commercial communications towers 150 feet and taller satisfy the following criterion:

*...[T]he tower is to be located a distance more than equal to three hundred (300) percent of the tower height from the nearest residential dwelling (existing or under construction).*

A distance of 1,500 feet (300% of the 500 foot tower height) measured from the base of the subject tower covers the entire ±17.8 acre property. As such, staff's finding is that development of a residential dwelling on the same property (owned/controlled by the same owner of the nonconformity) would increase the degree of the existing site-related nonconformity (the tower), since the 500' tower would not be allowed within 1,500 feet of a residential dwelling if built under current LDRs.

Over the past year, Mr. Allenbaugh has researched the approval history and specifications of the subject communications tower. Among other things, Mr. Allenbaugh has learned that the tower, when built, was engineered to have a 200' design fall radius, a distance substantially less than the dwelling setback requirement of 300% of the tower height (1,500' in this case). Also, he was advised by staff that off-site residential dwellings, on parcels not under the ownership/control of the tower parcel owner, are allowed within the 1,500 setback.

### **Appeal of Staff's Decision**

Initially, Mr. Allenbaugh's appeal started as an appeal of staff's interpretation of County regulations, contending that a residential dwelling should be allowed on the subject tower property, albeit outside of the tower's 200' design fall radius, particularly since off-site dwellings on parcels not under the ownership/control of the tower parcel owner are allowed within 1,500' of the tower. Mr. Allenbaugh has also provided examples of Vertical Bridge towers at other locations (outside of Indian River County, in Florida and in other states) where development has been allowed to occur in close proximity to towers of similar design (see application, Attachment 4).

The procedure for processing "appeals from decisions of the community development director or his designee" is established under County Code Section 902.07 (see Attachment 5), which indicates that the Planning and Zoning Commission (PZC) hears and decides such appeals.

Consistent with that procedure, Mr. Allenbaugh requested a formal letter from staff (i.e., the community development director or his designee) reaffirming staff's position on the matter. That letter was provided to him on March 12, 2020 (see Attachment 6). Subsequently, on April 3, 2020, Mr. Allenbaugh submitted an appeal of staff's March 12 letter, appealing staff's reaffirmed interpretation of the development restrictions applying to the subject tower property.

### **Planning and Zoning Commission Decision**

On July 23, 2020, the PZC made a finding that staff's determination did not fail any of the three areas outlined in LDR Section 902.07(4), denied the appeal, and wholly affirm staff's determination by a vote of 5-2 (see Attachment 2). While affirming staff's determination, several members of the PZC, in acknowledgement of the unique set of facts regarding this situation, discussed the options for further appeal. At that point, staff confirmed that applicant could further appeal the PZC's decision to the Board of County Commissioners (BCC).

## **Appeal of the Planning and Zoning Commission's Decision**

As outlined in LDR Section 902.07(5), at any time within 21 days following action by the PZC, the appellant may seek further appeals from actions by the PZC to the BCC. On July 28, 2020, Mr. Allenbaugh submitted a formal request to appeal the PZC's decision to the BCC. The procedures outlined for the BCC's consideration of the requested appeal are the same as those outlined for the PZC (see Attachment 5).

At this time, the BCC is to consider the appeal under guidelines provided in Section 902.07. In doing so, the BCC may uphold, amend, or reverse wholly or partly the decision by the PZC. The decision of the BCC shall be final.

### **ANALYSIS**

In this case, the subject appeal is based on the appellant's assertion that the dwelling setback requirement of 971.44(1)(g), requiring dwelling setbacks a distance of 300% of the tower height (1,500 feet), was established in 1997, after the subject tower was built, and therefore should not apply when considering an increase in the nonconformity. Since the regulations as revised in 1997 no longer allow such towers in A-1 zoning districts, Mr. Allenbaugh contends it is moot and inappropriate to apply the revised setback tied to the now-prohibited use in the district. Rather, the setbacks required at the time the tower was built in 1990 should apply (i.e., 110% of the tower height or other approved design fall radius, 200' in this case) when considering an increase in the nonconformity. Mr. Allenbaugh also contends that it is inequitable that dwellings on parcels other than the subject property can be (and have been) built within 1,500 feet of the tower, but a dwelling is not allowed to be built on the property itself within the 1,500 feet.

Notwithstanding Mr. Allenbaugh's assertions, staff's position is that building a dwelling on the subject property would conflict with County Code Subsection 904.05(3), which does not allow structures on property with a site-related nonconformity that would increase the degree of the existing site-related nonconformity. Although the dwelling setback distance of 300% of the tower height was established after the subject tower was built, construction of a residence on the property would clearly increase the degree of nonconformity under the County's current tower-dwelling setback requirements.

### **BCC Review Guidelines for Appeals**

Section 902.07 provides guidelines for the BCC's review of an appeal of a PZC decision (see Attachment 5). Under Section 902.07(5), the BCC is to review the PZC decision and make findings in the following three areas. In accordance with 902.07(4), the BCC may make additional findings of fact.

- 1. Did the reviewing official fail to follow the appropriate review procedures? If so, what procedural error was made?**

***Staff's Response:*** Staff and the reviewing official followed the appropriate review procedures in establishing its position that construction of a dwelling on the subject tower property is not allowed under County regulations. In making its decision, staff reviewed aerial photos, County records, County regulations, and information provided by the appellant. Staff then reviewed all available information and rendered a determination in a timely manner. In addition, the

appellant has not raised an objection to any procedural item. Therefore, staff and the reviewing official did not fail to follow appropriate review procedures.

2. **Did the reviewing official fail to properly interpret or apply the applicable zoning district regulations? If so, what error was made?**

*Staff's Response:* Staff and the reviewing official did properly apply the applicable zoning district regulations. In this case, the nonconformity requirements of County Code Chapter 904 apply relating to the communications tower on-site, including the tower-dwelling setback requirements of LDR Section 971.44(1).

3. **Did the reviewing official fail to properly evaluate the application or request with respect to the comprehensive plan and land development regulations of Indian River County? If so, what error was made?**

*Staff's Response:* Staff and the reviewing official did properly evaluate the issue with respect to the comprehensive plan and the land development regulations. As previously referenced herein, LDR Subsections 904.05(3), 971.44(1)(d) and 971.44(1)(g)1. apply and support staff's conclusion that a dwelling on the subject property would increase the site-related nonconformity and is therefore not allowed. Moreover, Policy 10.1 of the Future Land Use Element (FLUE) of the County Comprehensive Plan (see Attachment 6) reads as follows:

Policy 10.1: Indian River County land development regulations shall allow legally established non-conforming uses to continue until ceased. When a non-conforming use has ceased, it can be replaced only with a conforming use. **All new development, even development associated with non-conforming structures, must meet current regulations.** [Bold font emphasis added]

Policy 10.1 provides that all new development, including development associated with non-conforming structures, must meet current regulations. Building a dwelling on the subject property with the tower nonconformity would not meet the current on-site dwelling-tower setback requirement, and therefore would not be consistent with FLUE Policy 10.1.

## **SUMMARY**

Staff and the PZC has considered Mr. Allenbaugh's inquiry as to the regulatory allowance of building a residential dwelling on the subject tower property, and after thorough review of County records, regulations, and other information, has concluded that construction of a dwelling on the subject property is not allowed under County nonconformity regulations. Mr. Allenbaugh has raised issues as to the equity of not allowing a dwelling on-site within 1,500 feet of the tower when off-site dwellings are allowed within the 1,500 foot setback. Also, he has raised the point that the 1,500 foot setback does not reflect the design fall radius of the tower, and therefore goes beyond a setback required for safety reasons. Notwithstanding Mr. Allenbaugh's points, it is staff and the PZC's position that to allow a dwelling on the property would be contrary to County requirements and is not allowed under current County regulations.

## **RECOMMENDATION**

Based on the analysis performed, staff recommends that the Board of County Commissioners:

1. Make a finding that staff and the PZC's determination did not fail any of the three areas outlined in LDR Section 902.07(4), and
2. Deny the appeal and wholly affirm staff and the PZC's determination.

## **ATTACHMENTS**

1. Location Map
2. Excerpt from July 23, 2020 PZC Minutes
3. County Code Sections 904.05 and 971.44(1)
4. Appeal Request with Attachments
5. County Code Section 902.07 (Appeal Procedures)
6. March 12, 2020 Staff Letter with Attachments
7. County Comprehensive Plan Future Land Use Objective 10