

APPROVED MINUTES of the Regular Meeting of the City Council of the City of Rye held in City Hall on April 22, 2017, at 9:00 A.M.

PRESENT:

JOSEPH A. SACK Mayor
KIRSTIN BUCCI
EMILY HURD
JULIE KILLIAN
RICHARD MECCA
DANIELLE TAGGER-EPSTEIN
Councilmembers

ABSENT:

TERRENCE McCARTNEY
Councilmember

This meeting of the City Council was preceded by a joint meeting of the City Council and the Rye City School Board.

Mayor Sack made a motion, seconded by Councilman Mecca at 10:15 A.M., to adjourn into executive session to discuss litigation matters.

The Council adjourned from executive session and rejoined the public meeting of the City Council at 10:30 A.M.

Corporation Counsel Wilson read the proposed resolution.

Mayor Sack made a motion, seconded by Councilwoman Hurd, to adopt the following resolution:

**RESOLUTION
DENYING
PROPOSED PLAN FOR PLACEMENT OF WIRELESS
FACILITIES**

WHEREAS, the City of Rye entered into a Right of Way Use Agreement with NextG Networks of New York, whose successor, Crown Castle East NG, Inc. (Crown Castle), has asked the City to approve a plan for placement of more than 60 DAS nodes within the City of Rye; and

WHEREAS, Crown Castle has applied to place wireless facilities in the rights of way pursuant to the RUA, and not Chapter 196 of the City Code; and

WHEREAS, there is a substantial question as to the continuing validity of the RUA; and

WHEREAS, the City has nonetheless considered the request under the RUA as if it were fully enforceable according to its terms; and

WHEREAS, the RUA only extends to public ways of the City of Rye as defined in the RUA, and does not authorize placement of facilities by Crown Castle in any other location; and

WHEREAS, the RUA by its terms permits the reasonable review of any request and permits a more detailed review of requests that do not satisfy certain standards, and

WHEREAS, the City has determined that the project is subject to a positive declaration under SEQRA; and

WHEREAS, the basis for those determinations are incorporated into this Resolution by reference; and

WHEREAS, Crown Castle appears to contend that the proposed project is exempt under SEQRA, or that a negative declaration would be appropriate, and further appears to contend that the City is obligated by federal law to determine whether to grant or deny the request under the RUA; and

WHEREAS, in light of these contentions, the City believes it advisable to make a clear statement as to the action it would take based on Crown Castle's proposal as if the proposed project were exempt from SEQRA:

NOW THEREFORE BE IT RESOLVED BY THE CITY OF RYE:

Section 1. This Resolution is made without prejudice to the right of the City to approve the project after completion of a SEQRA analysis, and reflects the view of the City as to the projects as proposed in Plans A, B and C, as summarized in Crown Castle's letter to the City dated February 24, 2017 (filed 2/27/2017), which the City understands are the only requests Crown Castle now asks that the City act upon.

Under Proposal A, there would be 73 installations, including two new poles; installation of facilities that do not comport with DoITT standards (DoITT standards are described below); and no placement of facilities on City Facilities.

Under Proposal B, there would be 64 DAS nodes, no new poles, installation of facilities that the company says would comply with DoITT standards, and no placement of facilities on City Facilities.

Under Plan C, there would be 64 DAS nodes, no new poles, installation of facilities that the company says would comply with DoITT standards on third party poles, and placement of facilities that do not comply with DoITT standards on City Facilities.

Under *all* of the proposals, Crown Castle would allow Verizon Wireless to place equipment in the rights of way without Verizon Wireless obtaining the consent of the City.

Under *all* of the proposals, some of the facilities would be placed on County rights of way or on private property, although under Plan C, the company contends that it has moved DAS nodes to the extent practicable to avoid using properties other than City Public Ways.

Section 2. Assuming that the City is required by federal law to make a determination as of this date based on the plans before it, after considering the record before it and arguments raised, including the expert reports received by the City, and the staff recommendation, the City concludes that the requests for placement under Plans A, B and C should be denied, based upon this Resolution and for reasons set forth more fully in the Attachment to this Resolution, which is incorporated by reference.

ROLL CALL

AYES: Mayor Sack, Councilmembers Bucci, Hurd, Killian, Mecca, Tagger-Epstein
NAYS: None
ABSENT: Councilman McCartney

ATTACHMENT A

Section 1.

There are three proposals for placement of DAS nodes in the City, referred to as Plans A, B and C, and described more fully in the “Resolution Denying Proposed Plan For Placement Of Wireless Facilities.” Crown Castle appears to seek approval for at least one of the Plans in its entirety; it has not identified any nodes that are particularly critical, and we have no basis for assuming that if some nodes were denied and others approved, the project could move forward.

Section 2. Chapter 196 of the City Code.

By its terms, Chapter 196 would apply to the facilities installed by Crown Castle. Crown Castle never applied for any facility under Chapter 196. While it submitted some of the information required by Chapter 196 in connection with its request that the City approve filings under the RUA, it among other things did not submit information sufficient to address two issues that it is specifically required to address under Chapter 196, namely, whether there are higher priority locations (or less intrusive locations) that would satisfy service requirements; and whether there is a “need for the wireless telecommunications facility to provide service.” Based on the information in the record, including the information presented by Ronald Graiff, the information presented by Verizon and the information presented by Crown Castle and by the public criticizing the Crown Castle analysis, we conclude that this deficiency alone would mean the placement could not be authorized under Chapter 196 for Plan A, Plan B or Plan C.

Section 3. The RUA.

While there is substantial question as to the validity of the RUA to the extent it purports to exempt Crown Castle from otherwise applicable law for 25 years, the remainder of this discussion assumes that the RUA is valid, and considers whether, as requested by Crown Castle, Plan A, B or C should be approved pursuant to the RUA. The following Sections of the RUA are particularly relevant to the discussion of the RUA that follows:

a. “1.12: Public Way. "Public Way" means the space in, upon, above, along, across, and over the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, sidewalks, bicycle lanes and places, including all public utility easements and public service easements as the same now or may hereafter exist, that are under the jurisdiction of the City. This term shall not include county, state, or federal rights of way or any property owned by any person or entity other than the City, except as provided by applicable Laws or pursuant to an agreement between the City and any such person or entity.”

b. “3. Scope of Use, Agreement - Any and all rights expressly granted to [Crown Castle] under this Use Agreement...shall be subject to the prior and continuing right of the City under applicable Laws to use any and all parts of the Public Way exclusively or concurrently with any other person or entity and shall be further subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record which may affect

the Public Way. Nothing in this Use Agreement shall be deemed to grant, convey, create, or vest in [Crown Castle] a real property interest in land, including any fee, leasehold interest, or easement. Any work performed pursuant to the rights granted under this Use Agreement shall be subject to the reasonable prior review and approval of the City except that it is agreed that no zoning or planning board permit, variance, conditional use permit or site plan permit, or the equivalent under the City's ordinances, codes or laws, shall be required for the installation of [Crown Castle's] equipment installed in the Public Way and/or on Municipal Facilities, unless such a process has been required for the placement of all communications facilities and equipment in the Public Way by all other telecommunications providers..."

c. "3.1 Attachment to Municipal Facilities. The City hereby authorizes and permits [Crown Castle] to ...install, operate, maintain, control, remove, reattach, reinstall, relocate, and replace Equipment in or on Municipal Facilities...A denial of an application for the attachment of Equipment to Municipal Facilities shall not be based upon the size, quantity, shape, color, weight, configuration, or other physical properties of [Crown Castle's] Equipment if the Equipment proposed for such application substantially conforms to one of the approved configurations and the Equipment specifications set forth in Exhibit A."

d. "3.2 Attachment to Third-Party Property. Subject to obtaining the permission of the owner(s) of the affected property, the City hereby authorizes and permits [Crown Castle] to enter upon the Public Way and...to attach, install, operate, maintain, remove, reattach, reinstall, relocate, and replace such number of Equipment in or on poles or other structures owned by public utility companies or other property owners located within the Public Way as may be permitted by the public utility company or property owner, as the case may be...A denial of an application for the attachment of Equipment to third-party-owned poles or structures in the Public Way shall not be based upon the size, quantity, shape, color, weight, configuration, or other physical properties of [Crown Castle's] Equipment if the Equipment proposed for such application substantially conforms to one of the approved configurations and the Equipment specifications set forth in Exhibit A...."

e. "3.3 Preference for Municipal Facilities. In any situation where [Crown Castle] has a choice of attaching its Equipment to either Municipal Facilities or third-party-owned property in the Public Way, [Crown Castle] agrees to attach to the Municipal Facilities...."

Section 4. RUA Analysis.

(a) Several of the facilities proposed to be installed are not located in public ways of the City; some are on private property (particularly, Loudon Woods), and some are on County rights of way. Those uses are not governed by the RUA, but are governed by *inter alia*, Chapter 196. Crown Castle never filed an application for those facilities. Those facilities cannot be approved under the RUA, and because no application was filed as required by Chapter 196, and the information presented would not justify a special use permit, the request for those facilities must be denied under Plans A, B and C. Crown Castle contends that it has separately received an authorization to place facilities in the rights of way by virtue of a permit authorizing construction in the rights of way, issued by the County and counter-signed by the City Engineer. The

argument is not relevant to the question of whether the nodes can be approved under the RUA. Moreover, in our view, a permit for construction is not a substitute for a land use approval where required; the construction permit and special use permit processes are distinct.

(b) The installations are proposed to serve Verizon Wireless. Verizon Wireless will own facilities that will be managed by Crown Castle and will be connected to the node equipment owned by Crown Castle. Verizon Wireless does not have consent from the City to place facilities in the rights of way. Crown Castle proposes to overcome this deficiency by effectively granting franchise rights it holds to Verizon Wireless. The City has notified Crown that this is a violation of the RUA, and Crown Castle is now in a cure period under the RUA. There is no basis for authorizing installation of the facilities under Plan A, Plan B or Plan C until and unless the deficiency is cured, as the rationale for construction of the facilities is based on the particular requirements of Verizon Wireless.

(c) (1) The RUA Exhibit A, referred to in the quoted RUA language above, incorporates the NYC DoITT standards for wireless placement. In 2011, those standards, among other things, provided that a wireless provider could install:

“An equipment housing with a volume no greater than 2.8 cubic feet (i.e., 4,840 cubic inches). Equipment housings that are of a volume no greater than 2.8 cubic feet, but that are not “sub-sized housings” under subsection (b) below are referred to in this Agreement as “standard housings”. Standard housings shall have a maximum width (i.e., a maximum horizontal dimension, perpendicular to the pole and parallel to the ground) of eighteen inches unless a substantial operational need for a larger width is demonstrated to the satisfaction of DoITT and the City’s Department of City Planning (“DCP”). Any determination of satisfaction by DoITT and DCP pursuant to the preceding sentence may be in the form of an approval of a specific Street Pole use proposal or may be made in more generic form covering all or a category of Street Poles or potential installations, as DoITT and DCP may determine.

An equipment housing with maximum dimensions of 13 inches by 9 inches by 4 inches (that is, no more than thirteen inches in its longest dimension, nine inches in its second longest dimension and four inches in its shortest dimension).”

(2) Under Plan A, and under Plan C with respect to the municipal facilities, the installations do not comply with DoITT specifications. Under the February 24, 2017 submission proposes installation of equipment boxes at 42 x 24 x 12, (approximately 7 cubic feet) with a RF warning sign (indicating that the installation is no longer RF safe) which, according to the drawings submitted, are at a level possibly as low as 5’7” and no higher than 8’6. In considering the request under Plan A, and under Plan C with respect to Municipal Facilities, the City first must consider whether the larger boxes “substantially conform” to the DoITT standards. We conclude that they do not. As the photographs in the record and the model installations suggest, the large facilities are significantly larger and more visible than the “standard” DoITT equipment (2.8 cubic feet v. 7 cubic feet) or the smaller DoITT equipment. The size differential is particularly significant for placements in rights of way bounded by single family residential

units. Having determined the difference is substantial, the City may consider size, quantity, shape, color, weight, configuration, or other physical properties of the proposed installations. While the City desires for facilities to be placed on Municipal Facilities per the RUA, after viewing the drawings and the differences between the facilities that meet the DoITT standards and those that do not; the proposals that do not comply with the RUA appear significantly different for reasons suggested above, and especially given the number proposed to be installed, and because there may be alternatives that could obviate the need for the facilities. In addition, the record suggests that there may be noise issues that are greater with the larger facilities than with the DoITT approved facilities.

(d) Even setting aside the issues identified in Sections 4(a)-(b), Plan B fails because it does not include any consideration of Municipal Facilities as required by the RUA.

(e) That leaves the question as to whether the City should approve the facilities under Plan C that are consistent with the DoITT standards (essentially, that is, the Plan B facilities minus the facilities where a municipal structure provides a substitute). For reasons already suggested, we think the answer is “No.” But in addition, we believe denial of Plans A, B and C is justified for the following reasons:

(1) Installation is subject to the City’s “reasonable prior review and approval” under Section 3, although there are several factors that the City may not consider in reviewing a request to install facilities, quoted in Sections 3.1 and 3.2. However, we note that Section 3 specifically contemplates that the agreement shall not be interpreted to allow Crown Castle to effectively monopolize available space in the rights of way – that is, it is intended to ensure that the rights of way remain available to all. We think as part of the City’s review it is therefore important to ask whether the facilities – regardless of how many may be requested or their physical configuration – are needed at the locations proposed to provide service. In this case, as discussed above and as the report of Mr. Graiff suggests, the company has not provided the information that would permit the City to determine how many, if any, of the facilities are needed. We note that Verizon Wireless contends that there is a significant gap in service, or significant capacity issues that justify placement of the DAS nodes. However, the data is at best equivocal in this regard. In addition to data problems identified by Mr. Graiff, the drive data prepared by Crown Castle appears to show that adequate signals are available in areas where Verizon Wireless claims capacity problems – but Verizon Wireless only claims capacity problems in a single frequency (700 MHz) and does not claim it has capacity problems at 2.1 GHz where the drive data appears to show signal is available at what Mr. Graiff explains are typical network standards for Verizon Wireless. The capacity data Verizon Wireless did provide appears to show an immediate capacity problem in one sector served by one antenna within the City (the geographic areas served by specific antenna sectors for which capacity problems are claimed are not identified). Several other locations have no capacity problems, or are only anticipated to have capacity problems years from now. Moreover, Verizon Wireless claims it has not activated spectrum that is available to it (1.9 GHz).

In what we believe is also an effort to show a need for the facilities proposed, Crown Castle submitted a table showing projected daily traffic data for select roads in Rye, apparently derived from New York State data available at <http://gis3.dot.ny.gov/html5viewer/?viewer=tdv>.

The information does not show that the DAS nodes are located on the road segments that are referenced by Crown Castle, or show that the traffic levels are significant. More importantly only 18 of the 64 nodes are on the roads that Crown Castle seems to suggest are highly trafficked, and the data Crown Castle and Verizon Wireless submitted does not show that the DAS nodes are positioned to serve those roads. Many of the nodes appear designed to serve very small areas (see, for example, Plan A, Node 2-062 and Node 2-011).

(2) As suggested by the City's SEQRA determination, there may be noise issues associated with the Plan C facilities that have not been addressed.

(3) There appears to be a substantial contractual dispute between Crown and the City. The City views the RUA, if valid, as contractually limiting the company to installing facilities that substantially conform to DoITT standards, absent an approval process that would permit the City to consider various physical factors prior to modification. Crown Castle, as we understand it (based in part on information submitted for hearing on April 19), contends that it may expand the facilities any way it desires after the initial installation, or alternatively that any right of review by the City has been preempted by 47 U.S.C. Section 1455. Legally, the latter conclusion is suspect. The FCC's Order interpreting that provision noted that it did not apply where "local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local-government property...We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt "non regulatory decisions of a state or locality acting in its proprietary capacity." If Crown's view of the preemptive scope of federal law were correct, it is hard to imagine that the contract itself could survive, since its basic purpose – limiting what may be installed – could no longer be served. Given this dispute, we think it unreasonable to approve the proposed installations under Plans A, B or C.

Section 5. Conclusion.

Based on the information before us, and to the extent we must make the determination now, we conclude based on the record and considering the arguments made, that Plans A, B and C cannot be approved as currently formulated under either the City Code or under the RUA. Each of the reasons for denial justifies denial whether considered individually, or collectively.