



WASHOE COUNTY

Integrity Communication Service
www.washoecounty.us

CM/ACM	<u>DS</u>
Finance	<u>KE</u>
DA	<u>ME</u>
Risk Mgt	<u>N/A</u>
HR	<u>N/A</u>
Comptroller	<u>CH</u>

STAFF REPORT BOARD MEETING DATE: January 9, 2018

DATE: November 1, 2017

TO: Board of County Commissioners

FROM: Trevor Lloyd, Planning Manager, Planning and Building Division,
Community Services Department, 328-3617, tlloyd@washoecounty.us

THROUGH: Mojra Hauenstein, Arch., Planner, Division Director, Planning & Building
Community Services Department, 328-3619, mhauenstein@washoecounty.us

SUBJECT: Public hearing and discussion to affirm, modify or reverse the Board of Adjustment's denial of an appeal of staff's decision to deny a building permit for a retractable private communication antenna taller than 45-foot tall, and to allow the antenna to extend up to 72-foot tall without what staff and the Board of Adjustment determined is the Code required Administrative Permit. Generally, the applicant contends that the Code does not require an Administrative Permit as long as the antenna is no taller than 45 feet when retracted, and alternatively that an Administrative Permit requirement would violate State and Federal law that limits local government's ability to regulate amateur radio communications structures.

The site is located at 4765 Giles Way west of Lakeshore Drive and east of Scripps State Wildlife Management Area. Section 31, T17N, R20E, MDM, Washoe County, NV. The parcel (APNs: 050-530-30) is ±1.55-acres in size and is within the boundaries of the South Valleys Area Plan. The Master Plan Category is Suburban Residential, and the Regulatory Zone is Low Density Suburban (LDS - 1 dwelling unit per acre). The appellant and property owner is Richard Stone. (Commission District 2.)

SUMMARY

The appellant is seeking to overturn the Washoe County Board of Adjustment's ruling issued on October 5, 2017, in which Mr. Stone's appeal was denied and staff's decision to deny the building permit for a proposed retractable private communication antenna lacking the Code required Administrative Permit was affirmed.

The Washoe County Board of Commissioners (Board) may choose to affirm or reverse the Board of Adjustment's approval.

Washoe County Strategic Objective supported by this item: Stewardship of our community.

AGENDA ITEM # _____

PREVIOUS ACTION

On October 5, 2017, the Board of Adjustment held a public hearing and took public testimony on the proposed project. The Board of Adjustment voted to uphold the decision of the Planning and Building Division Director and deny the appeal of Mr. Richard Stone, thus prohibiting the issuance of a building permit for a private retractable antenna taller than 45 feet.

BACKGROUND

On May 2, 2017, Mr. Richard Stone submitted plans to the Washoe County Building and Safety Division (the Division merged into the current Planning and Building Division on July 1, 2017) for a retractable private communication antenna on a 1.55 acre residential property at 4765 Giles Way with a regulatory zone of Low Density Suburban (LDS). The plans were denied by the Planning and Development Division staff because the antenna/tower, when extended to its full height of 72-feet, exceeds the maximum allowable height of 45 feet for a private communication antenna. The code allows private antennas to exceed 45 feet in height with the approval of an administrative permit. Consequently, the Building Program cannot issue a building permit for the antenna as proposed with a height that will exceed 45 feet.

Washoe County Code (WCC) Section 110.3234.20 limits the height for private communication facilities. The height limitation for main structures in the LDS regulatory zone is 35 feet and a 10 foot height bonus is allowed for private antennas. Therefore, the allowable height for a private communication antenna on Mr. Stone's property is 45 feet. WCC Section 110.324.30 allows additional height with the granting of an administrative permit. Staff interprets this section of code to read that any time a private communication antenna exceeds 45 feet tall in the LDS regulatory zone, the owner or applicant is required to obtain approval of an administrative permit prior to the issuance of a building permit, regardless of whether the antenna is retractable or not.

Mr. Stone also contends that federal and state law requires the County to allow his tower in this case. In state law, NRS 278.02085 imposes limitations on the ability to regulate amateur radio communications towers. In essence, it says, the County cannot "preclude" amateur service communications, and that the County's regulations must comply with 47 C.F.R. 97.156 and a 1985 FCC interpretation (FCC 85-506, PRB-1). A pdf copy of the FCC ruling can be found at the following address: <http://www.arrl.org/files/file/prb-1.pdf>. The National Association for Amateur Radio webpage includes a summary which says that its interpretation of the FCC's memo is that local authorities may still "zone for height, safety, and aesthetics concerns." The association's webpage can be found at: <http://www.arrl.org/prb-1>.

As to regulations of an antenna structure that are based on health, safety or aesthetic considerations, they must "reasonably accommodate amateur service communications" and "constitute the minimum level of regulation practicable to carry out the legitimate purpose of the governing body." However, the FCC ruling in question specifically avoids imposing a black-and-white rule about antenna height, leaving that to the discretion of the local authorities. But the FCC did point out that height restrictions do

directly affect amateur communications and indicated that any height restrictions must be based on a legitimate government interest.

Section 110.324.20 Private Communication Antennas: General. Private communication antennas, including antenna support structures, are allowed as accessory uses in all regulatory zones pursuant to the provisions of this article.

(a) **Height.** The retractable height of a private communication antenna is limited to the height limitation of a main structure allowed in the regulatory zone in which the antenna is erected with a bonus of up to ten (10) feet.

Section 110.324.30 Private Communication Antennas: Additional Height. A private communication antenna support structure may exceed the height restrictions within this article if an administrative permit is obtained pursuant to Article 808, Administrative Permits, and in accordance with the provisions of this section.

The appellant, Richard Stone, has filed an appeal of the Planning and Building Division Director's decision to not issue the building permit. Mr. Stone contends that the code allows private communication antennas to be taller than 45 feet tall when the antenna retracts to a height below 45 feet tall. Mr. Stone also contends that the code has not been interpreted consistently and that other retractable towers have been permitted taller than 45 feet tall. It is Mr. Stone's position that an administrative permit should not be required because Washoe County has changed its interpretation of code and has allowed for retractable towers to extend beyond 45 feet tall when they retract below 45 feet in height. It is possible that Washoe County may have approved retractable antennas that extend beyond 45 feet tall without an administrative permit in the past; however, staff was unable to find any such recent permits. The complete appeal is attached as Attachment A to this staff report.

The Board should be made aware that the Planning and Building Division made several accommodations to help support Mr. Stone. These accommodations included the waiving of the Planning fees for the administrative permit and allowing Mr. Stone to proceed with foundation work for the proposed tower. The Planning and Building Division Director authorized Mr. Stone to pour the concrete footing for the proposed antenna under the submitted building permit. This allowance was granted as Mr. Stone was concerned the lengthy process to appeal the Director's decision to deny the building permit could jeopardize his ability to pour concrete later in the season. The allowance also stipulated that Mr. Stone provide the County with a Hold Harmless agreement for the footing. Building Program staff inspected the property prior to and after the Board of Adjustment meeting on October 5, 2017. Building staff discovered that Mr. Stone had not only constructed the footing, but also had erected the antenna. This erection is directly contrary to the allowance granted by the Director and was done without an issued building permit.

Pursuant to WCC Section 110.912.10(j)(iv), the Board of Adjustment hears any appeal of a decision of the Director of the Planning and Building Division made in the course of administration of any zoning regulation or any regulation relating to the location or soundness of structures if the decision cannot be appealed to an administrative hearing officer. The appellant exercised his right to appeal the decision of the Director to deny

his building permit based on the administration of a zoning regulation. As noted earlier, the Board of Adjustment heard the appeal on October 5, 2017 and denied Mr. Stone's appeal

The Board hears appeals of a Board of Adjustment's decision pursuant to WCC Section 110.912.20. The appellant provided a formal appeal to the Board on October 30, 2017. The appellant contends that the decision to prohibit the issuance of building permits should not have been made due to three permits issued in the past that are retractable antennas. The appellant states that all three permits were granted since the creation of WCC Section 110.324.20, and that they conform to NRS 278.02085.2 (b) and 47 CFR 97.15 (b). Due to this, the appellant believes this to be proof that there is a "minimum level of regulation practicable" that is less burdensome than requiring an Administrative Permit to WCC Chapter 110, Article 808, Administrative Permits.

- **Permit No. 15-0512 - Applied: 2/27/2015 – Issued: 3/19/2015**
 - *Installation of 2 private communication antennas at 25 feet high, retracted, for owners sole use.*
- **Permit No. 04-1828 – Applied: 5/12/2004 – Issued: 9/13/2004**
 - *Installation of a private communication tower at 24 feet 6 inches retracted, and 70 feet when in use.*
- **Permit No. 04-3872 – Applied 9/09/2004 – Issued: 10/27/2004**
 - *Installation of 3 new communication towers at 20 feet tall.*

FISCAL IMPACT

No fiscal impact.

RECOMMENDATION

It is recommended that the Board of County Commissioners affirm the Board of Adjustment's decision to deny the appeal of the Planning and Building Division Director's decision to deny Building Permit number WBLD17-101171"

POSSIBLE MOTIONS

Two possible motion are provided, depending on whether the Board chooses to affirm or reverse the Board of Adjustment's denial of the appeal of staff's decision to deny the issuance of a building permit for a private communication tower tall than 45 feet in height.

Affirm

Should the Board agree with the Board of Adjustment's action, a possible motion would be:

"Move to deny the appeal and affirm the decision of the Board of Adjustment to deny the appeal of the Planning and Building Division Director's decision to deny Building Permit number WBLD17-101171"

Reverse

Should the Board disagree with the Board of Adjustment's action and wish to reverse the denial of the appeal of staff's decision to deny Building Permit number WBLD17-101171, a possible motion would be:

“Move to reverse the decision of the Board of Adjustment and approve the appeal of the Planning and Building Division Director’s decision to deny Building Permit number WBLD17-101171. This reversal of the Board of Adjustment’s decision is based on the Board’s review of the written materials provided for this item, as well as the oral testimony at the public hearing.”

Attachments:

- A. Appeal application
- B. Board of Adjustment Staff Report dated September 19, 2017
- C. BOA Action Order for WBLD17-101171
- D. Letter from Fred Hopengarten, Atty at Law

xc: Appellant: Richard Stone, 4765 Giles Way, Washoe Valley, NV 89704