

NORTH CAROLINA) WINSTON-SALEM CITY COUNCIL
FORSYTH COUNTY)
) ZONING PETITION OF
) COMMUNICATIONS TOWER GROUP LLC
) FOR A SPECIAL USE PERMIT
) (W- 3347)

I, Thomas H. Johnson, Jr., attorney for the Applicant, am in support of the aforementioned special use permit request pursuant to the following reasons attached hereto, which are germane to the four findings set forth in Section B.6-1.5(F) of the UDO. (Please attach your statement relating to the four findings when submitting this document, and be sure to include your name at the top of each page of your statement.) (My statement is attached as Exhibit A and incorporated herein by reference.)

I believe I have standing in this matter because (check all that apply):

- I am the applicant.
[X] I am an agent of the applicant.

I live within 500 feet of any portion of the subject property for which the special use permit is requested. (Please note that your proximity to the subject property does not automatically confer standing. If necessary, be prepared at the hearing to articulate your status as an aggrieved party who will suffer special damages).

Other (If you require additional space, please attach a separate sheet, and be sure to include your name at the top of each additional page):

Blank lines for additional text or notes.

I understand that if I am not present at the public hearing scheduled for the consideration of the special use permit request by the City Council, this verified motion shall constitute hearsay, and Council may refrain from considering this motion.

This the 24th day of December, 2017.

Handwritten signature of Thomas H. Johnson, Jr.

Print Name: Thomas H. Johnson, Jr, Attorney for the Applicant

STATE OF NORTH CAROLINA - Wake COUNTY

I, Kim G. Ellis, a Notary Public of Wake County, NC, do hereby certify that Thomas H. Johnson, Jr. personally appeared before me this day and acknowledged the execution of the foregoing Verified Motion.

Witness my hand and notarial seal this the 7th day of December, 2017.



Handwritten signature of Kim G. Ellis, Notary Public

EXHIBIT A

Statement in Support of Verified Motion by Applicant Granting Special Use Permit W-3347

Thomas H. Johnson, Jr, attorney for Communications Tower Group LLC, the Applicant, submits the following in support of a Verified Motion to grant a Special Use Permit for a Transmission Tower to be located on the property of Twin City Bible Church, 1337 Ebert Street, Winston-Salem, NC:

1. A hearing was held before the Winston-Salem City Council in this matter on November 6, 2017. At that hearing, the Council held the record open and continued the matter until its December 18, 2017 meeting.
2. The findings that the Council must make to grant the Special Use Permit are as follows:
 - a. That the use will not material endanger the public health or safety if located where proposed and developed according to the application and plan as submitted and approved;
 - b. That the use meets all required conditions and specifications;
 - c. That the use will not substantially injure the value of adjoining or abutting property, or that the use is a public necessity; and
 - c. That the location and character of the use, if developed according to the application and plan submitted and approved, will be in harmony with the area in which it is to be located and in general conformity with *Legacy*.
3. At the November 6, 2017, hearing, Council Members asked whether another location was or could be considered. Pursuant to NCGS § 160A-400.52(c) (as recited by the Mayor prior to that hearing): “In reviewing an application, the city may not require information on or evaluate an applicant’s business decisions about its designed service, customer demand for its service, or quality of its service **to or from a particular area or site.**” (emphasis supplied). Therefore, state law does not allow the Council to question or base its decision on the Applicant’s business decision to locate the transmission tower at this particular location.
4. In deciding the four findings, the Council must follow state and federal law, including decisions from the appellate courts. The most relevant case to this matter is the case of *Blair Investments, LLC v. Roanoke Rapids City Council*, 231 N.C.App. 318, 752 S.E.2d 524 (2013) which involved the issuance of a special use permit by the Roanoke Rapids City Council for a cell tower (transmission tower) in Roanoke Rapids. The *Blair* case provides a precise summary of the law and excellent guidance for special use permit decisions regarding towers. The required findings in *Blair* are the same as are before this Council.
5. The Applicant must first establish a *prima facie* case that its request meets the required findings, and it is entitled to the special use permit. *Blair at 319-20*. “When an applicant for a conditional (special) use permit ‘produces competent, material, and substantial evidence of compliance with all ordinance requirements, the applicant has made a *prima facie* showing of

entitlement to a permit.” *Blair at 320-21*. “Substantial evidence is defined as that which a reasonable mind would regard as sufficiently supporting a specific result.” *Blair*. The court in *Blair* held that the findings in the planning department’s staff report constitute competent, material, and substantial evidence in support of the issuance of the special use permit. *Blair at 323*.

6. In the case before this Council, the planning staff’s report determined that the Applicant has met the requirements of all but the third finding which is sufficient under the *Blair* decision to meet the Applicant’s burden as to those findings. At the hearing in support of the third finding, the Applicant presented expert testimony from Michael Berkowitz, a North Carolina licensed appraiser, that the transmission tower as proposed will not substantially injure the value of adjoining or abutting property. (Note that statements from any opponents that do not own adjoining or abutting properties or are not from experts are not relevant. *See NCGS § 160A-393(d)(2) & (k)(3)a.*). To provide more specific information, I have attached an addendum to Mr. Berkowitz’s report that specifically examined the value of homes adjoining other towers in Winston-Salem. The towers examined by Mr. Berkowitz were NOT stealth towers such as the proposed unipole, were taller than the proposed tower and were lattice towers with a larger visual footprint. Even though the properties adjoined towers with a larger visual footprint, the towers still did not substantially injure the value of adjoining or abutting properties.

In addition, the Applicant commissioned an additional Impact Analysis by David A. Smith, MAI, SRA, a North Carolina licensed MAI appraiser. Mr. Smith specifically examined a residential development in Winston-Salem similar to the residential development around the proposed tower and that adjoins a non-stealth lattice tower that is taller than the proposed tower. Based upon his analysis, Mr. Smith found that the tower did not substantially injure the value of adjoining and abutting properties and specifically that the proposed tower “will not substantially injure the value of adjoining and abutting properties and will be in harmony with the area.” Mr. Smith’s report is attached to this motion.

7. Once the Applicant has provided competent, material and substantial evidence that the findings have been established then the special use permit must be issued absent competent, material and substantial evidence to the contrary. As stated in the *Blair* case: “In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use.” *Blair at 323*. Testimony from opponents at the hearing in the *Blair* case that the Court of Appeals found was insufficient to rebut this presumption almost mirror exactly the testimony of opponents of the proposed tower at the November 6, 2017 hearing including as follows:

“ . . . the tower would be visible from his house and that he did ‘not believe this would be good for his property value.’”

“ . . . she is not opposed to a cell tower but ‘does not want to look at one.’”

“ . . . he did ‘not see a need for the cell tower.’”

“ . . . stated this proposed tower will almost be in his backyard”

“ . . . she feels the tower might be a blight on a well-traveled area of the community.”
Blair at 324.

The Court in *Blair* found that these statements “. . . consisted entirely of speculative opinions, unsupported by any documentary or testimonial evidence, or of statements informing the council that the speaker had a question or a ‘concern’ about a particular issue.” *Blair at 325.* These statements, the Court held, were not sufficient to deny the special use permit. *Blair at 325.*

8. Confirming what was stated at the November 6, 2017, hearing, the *Blair* court stated “The inclusion of the particular use in the ordinance as one which is permitted under certain conditions is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district.” Again, the *Blair* court found that the statements from opponents quoted above were not sufficient to overcome this presumption. At the November 6 hearing, there was no substantial evidence to rebut the Applicant’s showing of entitlement to the special use permit, and it must be granted. The *Blair* case is attached along with the supporting cases of *Cumulus Broadcasting, LLC v. Hoke County Board of Commissioners*, 180 N.C.App. 424, 638, S.E.2d 12 (2006) (*upholding an application for a tower despite generalized complaints from neighbors*) and *Davidson County Broadcasting Company Inc. v. Iredell County*, 790 S.E.2d 663 (2016) (*which upheld the denial of a special use permit for a tower that was a 1,130 feet tall guy wired tower, that was lighted and industrial in appearance and was a much more imposing tower than the proposed tower.*)

9. In this matter, the required special use permit has specific standards contained in the provisions required for Transmission Towers located in the R-9S Districts in the Unified Development Ordinance (“UDO”). These provisions limit height, require a unipole or “slick stick” at this location, require additional setbacks from property lines and residences and require a more intense Type IV buffer yard around the tower base—all to make sure the transmission tower is compatible with residential uses. Some zoning ordinances limit special use permit review to general findings without specific standards. Since the direction in the UDO is so specific and this proposed transmission tower meets the specified requirements, it is even more difficult for opponents to overcome the presumption requiring approval of the special use permit. The concerns raised by the opponents are general concerns that would be applicable to any site in the R-9S District. However, Council, understanding the sensitivities of transmission towers in residential districts, provided specific requirements in the UDO for applicants to follow with the legislative direction that towers meeting these standards by definition should be allowed in residential districts. Therefore, since the proposed tower meets the specific requirements of the UDO, it creates an even stronger presumption requiring approval.