

JAMES S. MORRIS
ATTORNEY AND COUNSELOR AT LAW

Chairman Frank Severino and Commission Members
Planning & Land Development Regulation Commission
County of Volusia
123 W. Indiana Avenue
DeLand, FL 321720

February 8, 2011

Re: PLDRC February 11, 2014 Hearing
Agenda Items IV C, S-14-013 and E S-14-014

Dear Chairman Severino and Members of the Land Development Regulation Commission:

I represent the applicants in the above referenced special exception applications. Each applicant has an agreement to lease a site to my client, Mercury Towers, LLC. Each application seeks approval to allow a cell phone tower to be located to serve the Osteen area and cell phone users that are driving a car or motorcycle, riding a bicycle, hiking, hunting or fishing near the Maytown Road between the eastern bounds of Osteen and I-95. PRESENTLY, THERE IS A SIGNIFICANT CELL SERVICE VOID IN THIS AREA THAT AS A MATTER OF PUBLIC SAFETY AND CONVENIENCE SHOULD BE FILLED. Mercury Towers, LLC has agreements with both Verizon and AT&T to utilize the proposed towers to fill the service void.

Both towers are needed to meet the service needs outlined above. The applications are numbered S-14-013 (Sampson) and S-14-014 (JAS Properties Limited). S-14-013 (Sampson) is the eastern application on a 4.36 acre parcel of land. S-14-014 (JAS Properties Limited) is the western application near Maytown Road but located on a 419 acre parcel.

The planning staff has recommended approval of the western application (S-14-014)- JAS Properties Limited) with conditions. The applicant is agreeable to those conditions. The Planning staff analyzes but makes no recommendation on the eastern application (S-14-013- Sampson).

Given that there is agreement between the staff and the applicant on the western application (S-14-014- JAS Properties Limited), I will rely upon your consideration of the staff report and live testimony at the February 11, 2014 hearing to make the case for S-14-014 (JAS Properties Limited). The discussion below focuses on the eastern application (S-14-013- Sampson) and a statement to be considered as part of the basis of a PLDRC recommendation of approval for S-14-014.

THE SITE

The site is a 4.36 acre site surrounded by a 619.22 acre tax parcel of land owned by the Miami Corporation. See Exhibit 1. The site is owned by an individual who has elected not to sell out to the Miami Corporation. The Miami Corporation has clear cut the property surrounding the subject site. See Exhibit 2.

Presently, the site is deemed a legal, non-conforming site by County regulations. As a matter of law, the owner of the property is legally entitled to beneficial use of his property. The proposed cell tower shall be the principal use of the property. County staff has advised, and the applicant has acknowledged, that if the cell tower for his site is approved, he will not be allowed any other use for the property. The applicant has accepted this determination and plans no other use for the site.

THE FARMTON PLAN

The Farmton Plan is a land use plan promoted by the Miami Corporation and its related entities to one day allow conversion of the Farmton holdings from a tree farm and hunting area (its current use) to a new town accommodate a mixture of residential, industrial, retail office, institutional and other space. **THE TERMS OF THE FARMTON PLAN DO NOT APPLY TO AND IT IS SPECIFICALLY PROVIDED IN THE FARMTON PLAN THAT IT SHALL NOT GOVERN FUTURE LAND USE OF LAND NOT OWNED BY THE MIAMI CORPORATION.**

The Farmton Plan does not assign specific land uses to particular pieces of property governed by the plan. Instead, it allows for a mix of uses for specific sites. The Farmton land surrounding the subject property has an SDA Village designation that allows up to 90 acres of commercial space and the overall use of land in the SDA to be 40% office and commercial combined. The form, intensity and density of the future development of a particular site such as the surrounding tax parcel will be determined in the future. The Farmton Plan does not provide a time frame for development. The site may never be developed. For now, it is still timber farm and hunting area receiving an agricultural tax exemption with a taxable value of Four Hundred Thirty-Seven thousand Six Hundred Sixty-Five (\$437,665.00) Dollars or \$706.80 per acre for the whole parcel. Due to the tax exemption, taxes payable in 2014 for the surrounding Miami Corporation property based on property appraiser records are estimated to be Two Thousand Five Hundred Sixty-One and 13/100 (\$2,561.13) Dollars.

It is inaccurate to represent that the Miami Corporation parcel surrounding the site will be solely used for residential purposes. No one, not even Miami Corporation, knows how or when tax parcel 9322-01-01-0010 will be used for anything other than forestry or hunting or how much of it may one day be residential. Any attempt to create a fact finding that residences that do not now exist and may not ever be built near the subject site should not be considered by the Board as competent substantial evidence. Without evidence to support the conclusion of devaluation, the Board should not accept as an argument of fact by Miami Corporation that somehow a public utility structure like a cell tower devalues vacant clear cut forestry property. It is just as easy to argue that cell service adds value to a site that otherwise has no service at all but which is one

day planned to be a self sustaining village with homes, commercial space and office and institutional employment centers.

THE TRAIL

The Board has received a letter from River of Lakes Heritage Corridor, Inc. objecting to the cell tower proposed by S-14-013. The letter incorrectly states that Maytown Road is a designated scenic road; it is currently only proposed. The letter also states that the corporation is responsible for the managing of the River of Lakes Corridor Highway. A check of the corporate records shows that the corporate board appears to be a group of citizens with no specific authorization from the County or specific power to manage a public roadway. One of the board members, Mary Beth Harris, is the wife of Attorney Storch's listed law partner, Ty Harris. As a 501(c)(3) corporation, the entity has a limited opportunity to engage in political issues but it appears in this case they have been pressed into an issue with political content.

The group's objection focuses on a single aesthetics issue, view as perceived by the writer. It ignores the obvious benefit to the public health and safety afforded by the ability to call from a geographically remote area to reach law enforcement, medical or rescue personnel. On the day of the site visit to see the site, I encountered an automobile wreck that occurred virtually in front of the subject site. See Exhibit 3. There was no phone service available to my AT&T phone from the wreck location.

While someone may be inclined to follow their gut reaction that a cell tower is unattractive to a hiker, it is probably safe to say that a 600+ acres clear cut site is less attractive. Yet under the Farmton Plan, forestry as currently practiced is specifically allowed to continue. Existing power lines and poles are specifically protected by the Farmton Plan. While one group interested in the trail and whose members may occasionally use the trail object to the appearance of the tower, there are other user groups of the area and the roadway to consider and even other points of view hikers must consider. Specifically, the availability of cell service offers increased safety and convenience to all users of Maytown Road- automobile and motorcycle drivers, long distance bicycle riders or runners, Osteen area residents traveling to and from work and even the hiker who may be off trail using phone supported GPS to navigate out of the woods or a text to fellow hikers to come help someone.

The subject site is north of Maytown Road. The discussed alignment of the trail is that it will be south of Maytown Road. The aesthetic objection of the River of Lakes Heritage Corridor, Inc. should be given minimal weight as evidence since it is not supported by anything other than individual opinion and even that opinion is based on a trail that currently (a) does not exist; (b) is planned to go south of Maytown Road away from the subject site, (c) the trail may be laid out and designed to minimize the feared impact on a hiker's view of a cell tower located in a plan designated village with homes, commercial, office and institutional use and (d) the group's participation may be suspect.

ALTERNATE SITES

Mercury Towers, LLC worked with Miami Corporation for over two (2) years to agree upon a site utilizing Miami Corporation land. With Miami Corporation's consent, Mercury Towers, LLC even hired Miami Corporation's counsel, Glenn Storch, to represent his interest before the County. See Exhibit 4. Miami Corporation never agreed to a site even though it offered several sites only to pull them back when Mercury accepted. After a couple of years trying with Miami Corporation, Mercury Towers located the current site with a location able to fill the service void. It would be unfair now to allow Miami Corporation to defeat the current application at the expense of public safety and convenience when Miami Corporation had the opportunity to provide and control a site that would meet the public need but simply elected not to allow the need to be met.

TOWER SITING

Tower siting is not determined by land availability. Tower siting is determined by utility. In order to provide continuous service over a distance such as Maytown Road from I-95 to Osteen, towers must be located so that cell service is available for the entire distance. Considering each tower to provide an umbrella of coverage from point to point is a way to visualize how cell service is provided along a long corridor. The target is to allow one to stay under the umbrella of coverage from tower to tower as they pass from point to point. The S-14-013 application meets the standard for coverage and the standards for approval created by County ordinances.

APPLICATION OF CODE STANDARDS

The staff report addresses the goals of County law and the standards for review of the tower special exception. The majority of the staff analysis and findings are evidence that support a Planning Board recommendation of approval. Except where distinguished below, the applicant accepts the staff analysis and by reference incorporates it as evidence in favor of approval. The bold print is an abbreviated restatement of standards found in the staff report.

Communication Tower Requirements per 72-293(23)

1. **Height of proposed communication tower.**
Applicant accepts the staff finding.
2. **Proximity of Tower to residential structures.**
Applicant accepts the staff finding and emphasizes there are not residential structures anywhere proximate to the site. The assigned Farmton land use category, in addition to residential use allows commercial use such as retail storage, office complexes, institutional uses and public utilities. The provision of cell service to all of the allowable uses will support and promote their development and maintenance by the existence of reliable cell service.
3. **Nature of uses on adjacent and nearby properties.**
The immediate existing use is clear cut forestry areas that have no positive visual appeal and a two lane rural section connector roadway with traffic traveling

speeds, regardless of the posted speed limit, in excess of 65 mph. Pursuant to the Farnton Plan, the road will ultimately be a 200' wide multi-modal right of way. The planned general trail alignment is south of the two lane road; the site is north of the road.

4. **Surrounding topography.**

The area is relatively flat. The site is clear cut. See Exhibit 2. Replacement tree farm pines should be beginning to grow within the next few years.

5. **Surrounding tree coverage and foliage.**

See 4 above.

6. **Design of the communication tower, with particular reference to design characteristics that have the effect of reducing or eliminating visual obtrusiveness.**

Applicant agrees with the staff that the design minimizes impact.

7. **Proposed ingress and egress.**

Applicant agrees with the staff.

8. **Safety aspects relating to the proposed communication tower.**

Applicant agrees with the staff. Lighting will be provided as required by local and federal authority

9. **Availability of suitable existing communication towers and other structures. No new communication towers shall be permitted unless the applicant demonstrates to the reasonable satisfaction of the planning and land development regulation commission (PLDRC) or the county council as the case may be, that no existing communication tower or structure can accommodate the applicant's proposed tower. Evidence submitted to the county to demonstrate that no existing communication tower or structure can accommodate the applicant's proposed antenna shall be for any of the reasons provided as follows:**

Applicant agrees with the staff whose conclusions support a new tower.

Special Exception Review Criteria

a. **It is inconsistent with the purpose or intent of this article.**

Applicant agrees with the staff that it is not inconsistent.

b. **It is inconsistent with any element of the comprehensive plan.**

Applicant agrees with the staff in regard to consistency with general plan policy on towers and antenna.

In regard to policy 2.3.3.4 and the proposal to adopt Maytown Road as a scenic road, the applicant offers the following:

1. The scenic designation is a proposal not yet adopted or in effect. As a matter of law, it is not controlling or relevant.
2. It is not clear that the current alignment of the Maytown roadway will be the same as the years pass. The Farmton Plan provides for the possibility of realignment. The Farmton Plan requires the right of way shall be two hundred (200') feet wide. Two hundred feet (200') of right of way is enough room for a six lane highway. The tower site may be further away from a future road realignment due to relocation of the road.
3. It is impossible to locate the tower, which provides a public utility in the form of cellular phone service, underground and still have it function. Additionally, the "visual disturbance" will be no greater than a paved two lane road with fast moving traffic, other unpleasing to view, but necessary utility structures such as lift stations, traffic lights, speed limit signs and other traffic control devices and clear cutting timber as allowed by the Farmton Plan.

Visual disturbance is a subjective standard. One person's visual disturbance may be another person's beautiful view by the grace of god- those people would include stranded or wrecked motorists, injured hikers or bikers and individuals lost in the woods who need a visual way point or a GPS signal to find their way back home.

c. It will adversely affect the public interest.

The public interest is a balancing test. The balance is the need to protect the aesthetic sense of someone so sensitive to as ubiquitous a device as a monopole cell phone tower against the safety, need and convenience of the much larger numbers of the travelling public who need reliable communication for the reasons expressed above in b(3) above.

Also, since the trail is not yet designed or located, its design, alignment and screening from the road may be accomplished to minimize the presumed negative aesthetic of a communication tower.

d. It does not meet the expressed requirements of the applicable special exception.

Applicant agrees with the staff who concludes that it does meet the expressed requirements.

e. The applicant will not be able to meet all requirements imposed by federal, state or local governments, or by the county council.

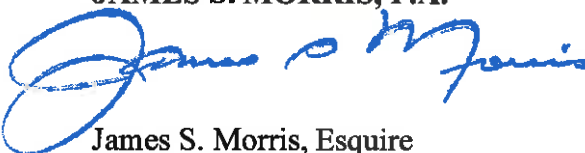
Applicant agrees with the staff who concludes that it will be able to meet all requirements.

- f. **Notwithstanding the provisions of article XIV of the land development code [appendix A] it will generate undue traffic congestion.**
Applicant agrees with the staff who conclude it will not generate undue traffic congestion.
- g. **It will create a hazard or a public nuisance, or be dangerous to individuals or to the public.**
Applicant disagrees with the staff on the conclusion of nuisance. The staff conclusion of nuisance relates to view.
- h. **It will materially alter the character of surrounding neighborhoods or adversely affect the value of surrounding land, structures or buildings.**
Applicant agrees with the staff who finds that it will not alter value.
- i. **It will adversely affect the natural environment, natural resources or scenic beauty, or cause excessive pollution.**
Applicant agrees with staff who find that it will not have an adverse effect.

Chairman and members, I appreciate your consideration of this letter and its attachments. I welcome conversation or questions. Please feel free to call me on my cell at 386-871-8841.

Sincerely yours,

JAMES S. MORRIS, P.A.



James S. Morris, Esquire

JSM/kw
Cc: client

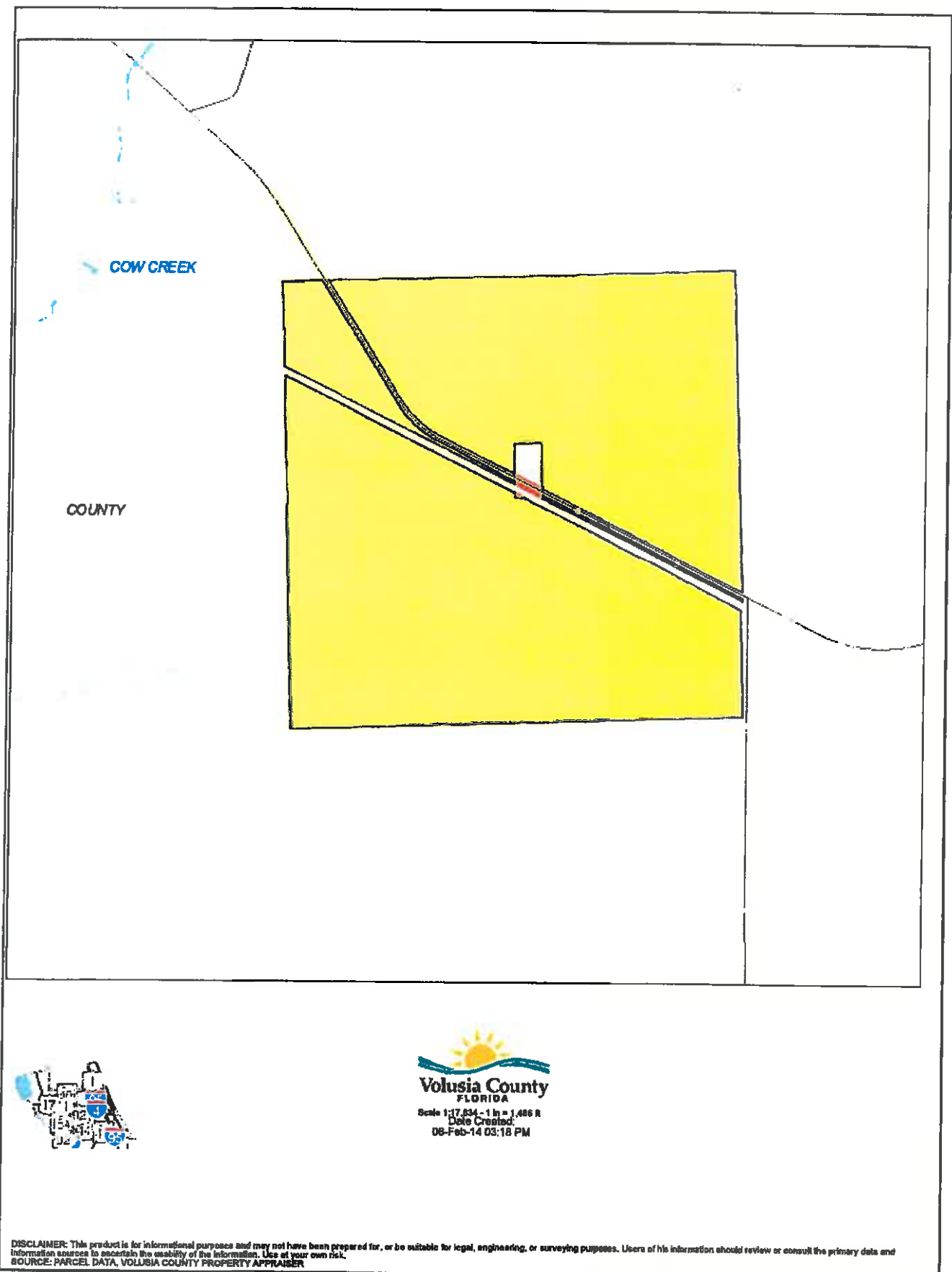


Exhibit 1



Exhibit 2



Exhibit 3

STORCH HARRIS, LLC
ATTORNEYS AT LAW

Daytona Beach • DeLand

GLENN D. STORCH, ESQUIRE
GLENN D. STORCH, P.A.
420 South Nova Road
Daytona Beach, Florida 32114
(386) 238-8383
(386) 238-0988 (fax)
glenn@storchlawfirm.com

TY HARRIS, ESQUIRE
TY HARRIS, P.A.
112 W. New York Ave., Ste. 211
DeLand, Florida 32720
(386) 624-6904
(386) 624-6906 (fax)
tyharris@pa@gmail.com

December 7, 2012

VIA EMAIL TO: toshaughnessy@comsoeast.com

Re: Special Exception/Communications Tower

Dear Tim:

The purpose of this letter is to outline our understanding of the fee agreement for which Storch & Harris, L.L.C. will represent you with regard to the above-referenced matter.

Attorneys' fees have been billed at an hourly rate of Three Hundred Sixty-Five Dollars (\$365.00) per hour, with the understanding that this rate may increase in the future in accordance with our then standard rate. Out-of-pocket expenses are not included in the hourly rates for attorneys' fees. Costs shall be billed exclusive of attorneys' fees and shall include, but not be limited to, filing fees, travel, postage, telephone calls, copies, court reporting, faxes and other expenses incurred by the law firm in pursuing your case. Additionally, from time to time it may be possible for Legal Assistants employed by the firm to work on your matter under the direct supervision of an attorney. The hourly rate for such work will be \$85.00 per hour.

A retainer in the amount of \$1000.00 is due. The retainer will be applied to any fees and costs billed and should be made payable to Glenn D. Storch, P.A..

Bills are due and payable immediately upon billing. An unpaid bill or any portion thereof that is unpaid thirty (30) days after billing shall accrue interest at the rate of eighteen percent (18%) per annum. The interest charged shall apply to charges for fees and costs. Billing and payment are not dependent on the outcome of the case.

In the event of litigation regarding fees or charges, venue shall be in Volusia County, Florida. Reasonable attorneys' fees and costs shall be assessed for the prevailing party against the losing party in any litigation arising as a result of the representation outlined by this letter.

The terms of this agreement may only be modified by an instrument of equal dignity. Either party may elect to cancel this agreement by giving written notice to the other party. The cancellation notice shall be effective upon receipt by the other party, but the terms and provisions of this agreement regarding fees and litigation shall survive cancellation.

If the terms of this letter are acceptable to you, please execute one copy and return it to my office. If you have any questions regarding the terms of this letter, please do not hesitate to contact me.

Yours very truly,

STORCH & HARRIS, L.L.C.



Glenn D. Storch

GDS:crs

ACCEPTED BY:

Date: 1/2/12



Tim O'Shaughnessy