**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge William J. Martínez**

Civil Action No. 19-cv-3476-WJM-KMT

VERTICAL BRIDGE DEVELOPMENT, LLC,

Plaintiff,

v.

CITY OF COLORADO SPRINGS,

Defendant.

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**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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This matter is before the Court on Defendant City of Colorado Springs (the "City") and Plaintiff Vertical Bridge Development, LLC's ("Vertical Bridge") cross Motions for Summary Judgment ("Motions") (ECF Nos. 36 & 37). For the following reasons, the City's Motion is denied, and Vertical Bridge's Motion is granted.

## I. STANDARD OF REVIEW

Summary judgment is warranted under Federal Rule of Civil Procedure 56 "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986). A fact is "material" if, under the relevant substantive law, it is essential to proper disposition of the claim. *Wright v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001). An issue is "genuine" if the evidence is such that it might lead a reasonable trier of fact to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997).

In analyzing a motion for summary judgment, a court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In addition, the Court must resolve factual ambiguities against the moving party, thus favoring the right to a trial. *See Houston v. Nat'l Gen. Ins. Co.*, 817 F.2d 83, 85 (10th Cir. 1987).

## II. BACKGROUND[1]

This action arises out of Vertical Bridge's application to modify an unused 99-foot telecommunications tower (the "Tower) in Colorado Springs, Colorado. (ECF No. 1.) The Tower was built between 1968 and 1972, though the parties dispute the precise year due to unclear records. (ECF No. 37 at 5; ECF No. 44 at 3.) Although the parties appear not to dispute that the Tower is in fact 99 feet in height, the City does dispute that the Tower's 99-foot height was ever approved, because the approval record does not list its height. (ECF No. 44 at 3.)

Vertical Bridge, a development company, seeks to encase the structure in steel and enlarge its concrete base to house wireless transmission equipment.[2] Vertical Bridge submitted a development plan to the City reflecting these plans on February 28, 2019. On July 22, 2019, the City administratively approved the application. On July 29,

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[1] The following factual summary is based on the parties' Motions and documents submitted in support thereof. These facts are undisputed unless attributed to a party or source. All citations to docketed materials are to the page number in the CM/ECF header, which sometimes differs from a document's internal pagination. The Court does not cite the briefs for undisputed facts.

[2] The City notes that Vertical Bridge's application stated in several places that it would "remove and replace" the Tower. (ECF No. 36 at 4.) Vertical Bridge states that such characterization was erroneous and that it has clarified its plans repeatedly in subsequent communications with the City, which reveal that the plans do not involve removing or replacing the Tower. (ECF No. 45 at 5.)

2019, homeowners residing in the area surrounding the Tower appealed the City's administrative approval. On September 13, 2019, the City's Planning Commission overturned the administrative approval. Vertical Bridge then appealed the Planning Commission's decision to City Council. On November 12, 2019, City Council upheld the Planning Commission's decision.

Vertical Bridge initiated this action challenging the denial of its development plan. (ECF No. 1.) It brings a claim for declaratory judgment that the City violated the Spectrum Act of 2012, 47 U.S.C. § 1455 ("Spectrum Act") by denying its application and seeking injunctive relief ordering the City to approve the application. (*Id.*)

Both parties filed their Motions on December 4, 2020, seeking judgment on Vertical Bridge's sole claim. (ECF Nos. 36 & 37.) The Motions are fully briefed. (ECF Nos. 44, 45, 46 & 47.)

## III. ANALYSIS

### A. Declaratory Relief

As a preliminary matter, the Court addresses the propriety of the relief Vertical Bridge seeks in this action. Specifically, Vertical Bridge requests declaratory judgment that the City violated § 1455 by upholding the denial of its application. (ECF No. 1 ¶ 27.)

The Declaratory Judgment Act provides, in pertinent part, that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . . ." 28 U.S.C. § 2201(a). The Court "is not obliged to entertain every

justiciable declaratory claim brought before it." *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 982 (10th Cir. 1994). The Tenth Circuit has identified certain factors a court should consider when determining whether to exercise jurisdiction over a declaratory judgment claim:

> [1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race to *res judicata*"; [4] whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

*Id.* at 983.

The parties do not address the propriety of a declaratory judgment in this case. It cannot be reasonably disputed, however, that a declaration by the Court as to whether the City has or has not violated federal law would resolve the issue joined in this litigation. Too, such a declaration would clarify under what facts or conditions the Spectrum Act's approval mandate would apply to projects of the type at issue here. Finding, therefore, that granting declaratory relief here would not implicate issues of *res judicata* or encroach on state law, and that no obvious alternative remedy would be more effective, the Court finds that declaratory relief is properly sought in this action.

**B. Merits**

Under the Spectrum Act, a "[s]tate or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower . . . ." 47 U.S.C. § 1455. As such, if the Tower is "existing," the plans are an eligible

facilities request, and the change would not substantially modify the Tower, the City must approve the plans. *See id.*

Vertical Bridge contends that under § 1455, the City is required to approve the Tower's modification. (ECF No. 37 at 11–14.) Specifically, it argues that the Tower is an "existing structure," that its proposed plans are an eligible facilities request, and that the plans do not substantially change the Tower's dimensions. (*Id.*) The City argues, conversely, that the Tower is not existing, that Vertical Bridge's proposed plans are not an eligible facilities request, and that the changes would substantially modify the Tower. (ECF No. 36 at 5–7.) The City therefore contends that the Spectrum Act does not require it to approve Plaintiff's plans. (*Id.* at 7.)

i. *Existing Tower*

Per the Federal Communications Commission ("FCC"), an existing tower is one that a state or local regulatory body has authorized at some point in time. 2014 FCC Order, 29 FCC Rcd. at 12937. Thus, a tower is existing if it has been reviewed and approved under a local or state zoning process or was legally constructed and later became subject to local zoning laws. 47 C.F.R. § 1.6100(b)(5).

Vertical Bridge asserts that the Tower has existed for approximately 50 years and is therefore an existing tower within the meaning of the Spectrum Act.[3] (ECF No. 37 at 11–14.) The City contends, however, that the Tower is not "existing" and therefore the Spectrum Act does not mandate modifications thereto. (ECF No. 36 at 6.)

Vertical Bridge presents evidence that the City approved the Tower when it was initially constructed, namely, a copy of the approval of construction of a tower in the

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[3] Although records of the Tower's construction are unclear, the parties agree that the Tower was built sometime between 1968 and 1972. (ECF No. 37 at 5; ECF No. 44 at 3.)

location of the Tower dated 1972, approximately when the parties agree the Tower was constructed. (ECF No. 37-7.) The City argues that it never approved the Tower at the height it currently stands, pointing out that the approval document omits the height of the Tower. (ECF No. 44 at 9–10.) It further points to its 2006 approval of a since-abandoned modification to the Tower by a company called Alaska Native Broadband, which lists the Tower's height as 50 feet. (*Id.* at 10–11.) The City asserts, based on the 2006 approval, that it never contemplated or approved a 99-foot tower, and at most only approved a 50-foot tower.[4] (*Id.*)

While the City urges the inference that the Tower was illegally constructed based on the absence of its height in the records, it does not offer any competent evidence controverting Plaintiff's contention that the Tower's initial construction height was in fact as it is today – 99 feet. For example, the City does not provide any diagram, drawings, photographs, or other documentary evidence which would tend to show that the Tower was approved for an initial height of 50 feet, and was only subsequently increased the additional 49 feet in height. The Court finds that the only reasonable inference which can be drawn from the fact that the City approved the initial construction of the Tower, and that there is no evidence whatsoever in the record that over the course of nearly half a century the Tower has ever stood at any height other than 99 feet, is that the Tower was in fact approved and constructed at its present height of 99 feet. The incidental clerical omission of a specific reference to the Tower's height in the approval

[4] Vertical Bridge contends that the listing of the Tower's height as 50 feet was a clerical error, as Alaska Native Broadband's application contained descriptions and photographs of the Tower, thus leaving no possible doubt that the Tower at issue in this case is one and the same as the tower which was the subject of this third-party application. (ECF No. 45 at 22 n.4.)

documents is far too thin a reed upon which a reasonable factfinder can draw the opposite conclusion.

The Court therefore finds that the City has not demonstrated a *genuine* issue of material fact as to whether the Tower is an existing structure within the meaning of the Spectrum Act. *See Anderson*, 477 U.S. at 249 (stating that a factual dispute is genuine if evidence is so contradictory that a reasonable jury could find for either party); *see also Matsushita Elec. Indus. Co., Ltd.*, 475 U.S. at 587 ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no '*genuine* issue for trial.'" (emphasis added)). Vertical Bridge has established that the Tower is an existing structure, and the Court therefore proceeds to the next requirement of the Spectrum Act.

ii. *Eligible Facilities Request*

To mandate approval of a proposed modification to an existing tower, the modification must be an "eligible facilities request" ("EFR"). 47 U.S.C. § 1455. The Spectrum Act provides that an EFR "means any request for modification of an existing wireless tower or base station that involves . . . collocation of new transmission equipment." *Id.* (a)(2). Thus, Vertical Bridge's proposed hardening of the Tower must be "necessary to support a collocation, removal, or replacement of transmission equipment." *2014 Order*, 29 F.C.C. Rcd. at 12941, cmt. 180.

Vertical Bridge contends that—because the Tower is an existing structure at 99 feet—its proposed modifications to harden Tower's structure constitute an EFR authorized by the Spectrum Act. (ECF No. 37 at 14–16.) Specifically, Vertical Bridge's

project statement states—and its plans reflect—that it wishes to install transmission equipment in the Tower. (ECF No. 37-17.)

The City contends that the proposed alteration is not an EFR because Vertical Bridge has not proven that the modification is necessary to support the transmission equipment. (ECF No. 44 at 13.) It further argues that because Vertical Bridge has not yet obtained an antenna to insert in the Tower, the modification is not necessarily tied to collocation of transmission equipment. (*Id.* at 13–14.)

Vertical Bridge states that its expert, a land development consultant, would if called to do so testify that the modifications will allow the Tower to safely support new transmission equipment. (ECF No. 37-13 at 3.) As to the lack of a contract to collocate an antenna, Vertical Bridge also presents evidence in the form of deposition testimony by its corporate representative that the industry practice is to secure approval from the local government to harden a structure *before* finalizing a collocation agreement with a carrier. (ECF No. 37-22 at 55.)

The City, on the other hand, has failed to present any evidence that the Tower need not be modified in order to support new transmission equipment. Rather, it offers only its speculation that modification is unnecessary, and that Vertical Bridge might not ultimately collocate an antenna. (ECF No. 44 at 13–14.) The City also fails to cite any authority requiring a development company to finalize a contract for installation of transmission equipment *prior* to applying for approval to modify a tower. (*See generally id.*)

Moreover, the City has also failed to present any evidence that the modification is unnecessary to support the transmission equipment, or that the Spectrum Act requires

Vertical Bridge to obtain approval for placement of an antenna prior to applying to prepare the structure to support the equipment. The Court finds, therefore, that the City has also failed to establish a genuine issue of material fact as to this second requirement of the Act, and that Vertical Bridge has established that its plans are an EFR. The Court concludes, therefore, that the proposed Tower modification is an EFR within the meaning of the Spectrum Act.

iii. *Non-Substantial Modification*

Finally, to require approval under the Spectrum Act, a proposed modification must not be substantial. 47 U.S.C. § 1455. According to regulations promulgated under the Act, there are six modifications that can constitute a substantial change. The City relies on the sixth one, which allows a local authority to deny a request if "it does not comply with conditions associated with the prior approval [of the facility] unless the non-compliance is due to [a change that does not constitute a "substantial change" under the preceding standards]."[5] *Montgomery Cnty. v. F.C.C.*, 811 F.3d 121, 127 (4th Cir. 2015); *see also* 47 C.F.R. § 1.6100 (b)(7).

The City contends that the proposed alteration of the Tower is a substantial change because it does not comply with prior approval, namely, the 2006 approval of a 50-foot tower. (ECF No. 36 at 14–15.) Thus, for the same reasons the City asserts that the Tower is not "existing" due to lack of evidence that its current height was initially approved by it, the City argues that the alteration is a substantial modification because it

[5] The other five ways a modification may be substantial involve an: (1) increase in height of the tower by more than ten percent or by the height of one additional antenna array; (2) increase in width of the tower by more than twenty feet or by doubling the width of the tower where modification occurs, whichever is greater; (3) installation of excessive cabinets; (4) excavation outside of the site; and (5) defeat of the tower's existing concealment elements. *See* 47 C.F.R. § 1.6100 (b)(7).

would nearly double the Tower's approved height. (*Id.*) Vertical Bridge argues that the plans will not impact the Tower's height because it was approved and constructed at 99 feet, and there are no plans to increase the Tower's height beyond that. (ECF No. 37 at 17–19.)

As more fully discussed above, the City has failed to create a genuine issue of material fact as to whether the Tower was in fact approved at the height it has always stood for nearly five decades. As such, the Court finds that the proposed modifications would not conflict with any prior approval, nor would they impermissibly increase the Tower's current height.[6] As these proposed modifications do not conflict with the initial parameters of the City's approval of the Tower, or exceed the permissible height of the structure, they do not constitute a substantial modification within the meaning of the Spectrum Act. *See* 47 U.S.C. § 1455; *2014 Order*, 29 F.C.C. Rcd. at 12944–45.

Finding that Vertical Bridge has established that its plans satisfy each condition of the Spectrum Act's mandate of approval, its Motion is granted. The City's Motion is denied for the same reason. The Court will therefore enter declaratory judgment that the City's denial of Vertical Bridge's application violated the Spectrum Act.

Finally, as to Vertical Bridge's request for injunctive relief, the Court is mindful of the fact that principles of comity and federalism disfavor the federal judiciary's interference in matters of state and local government. *Cf. Gibson v. Berryhill*, 411 U.S. 564, 573 (1973) (stating that "established principles of equity, comity, and federalism" may "restrain a federal court from issuing [certain] injunctions" such as those enjoining state court proceedings). The Court is of the view that these federalism concerns are if

[6] Specifically, the FCC has stated that a modification is substantial if it increases height of the tower by more than 10%. 2014 FCC Order, 29 FCC Rcd. at 12944.

anything more pronounced when the state or local governmental entity is an elected body acting in a legislative capacity.

For these reasons, the Court declines to issue an injunction *ordering* the City to approve Vertical Bridge's plans with respect to the Tower. The Court presumes, however, that the City will now take action to bring itself in compliance with the terms of this Order now that it is on notice that failure to do so would be a violation of federal law.

## IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Defendant City's Motion (ECF No. 36) is DENIED;
2. Plaintiff Vertical Bridge's Motion (ECF No. 37) is GRANTED;
3. The Court hereby DECLARES that the City is in violation of 47 U.S.C. § 1455 by denying Vertical Bridge's application to modify the Tower, and that the City is mandated by the Spectrum Act to approve the application;
4. The Court shall enter judgment in favor of Plaintiff Vertical Bridge and against Defendant City and shall terminate this case; and
5. Vertical Bridge shall have its costs upon the filing of a bill of costs in accordance with the procedures under Federal Rule of Civil Procedure 54(d) and District of Colorado Local Civil Rule 54.1.

Dated this 30th day of September, 2021.

BY THE COURT:

William J. Martinez
United States District Judge