

Tax Map / Block/Parcel  
73-20-533

Building Permit/Zoning  
Certificate No. 94-3668

Case 3981

**OFFICIAL DECISION  
BOARD OF ZONING APPEALS  
CARROLL COUNTY, MARYLAND**

**APPELLANTS:**

Town of Sykesville  
7547 Main Street  
Sykesville, Md. 21784  
and  
Ms. Kathleen Blanco-Losada  
6966 Hollenberry Road  
Sykesville, Md. 21784

**ATTORNEYS:**

Cynthia K. Hitt, Esq.  
Siskind, Grady, Rosen and Hoover, P.A.  
2 East Fayette St.  
Baltimore, Md. 21202

Christian Tesi, Esq.  
Law Offices of Jeff Griffith  
147 East Main Street  
Westminster, Md. 21157

**APPEAL:**

An appeal of the decision of the Planning Commission refusing to rescind its prior approval of a site development plan for a proposed communications tower on the premises at 7001 Hollenberry Road.

**APPELLEE:**

West Shore Communications, Incorporated  
% Mark Sapperstein  
8373 Piney Orchard Parkway  
Odenton, Md. 21133

**ATTORNEY:**

Clark R. Shaffer, Esq.  
6 North Court Street  
Westminster, Md. 21157

**BASIS:**

Article 17, Section 17.4, Ordinance 1E, Carroll County Zoning Ordinance

**HEARING HELD:**

July 26, 1995; deliberations and oral decision, August 11, 1995.

### Findings

The parties have stipulated that the Board may consider in its deliberations the contents of all the prior appeals on this subject, therefore, the Board deems it useful to set out the chronology of this matter:

March 31, 1994. Conditional use granted by Board of Zoning Appeals to erect 200 foot communications tower at premises at 7001 Hollenberry Road, on the outskirts of the Town of Sykesville. Case No. 3885. No appeal was taken from that decision.

August 16, 1994. Approval of site plan for tower by Carroll County Planning Commission. Under the zoning ordinance as it then read, the Planning Commission was empowered but not required to establish a "fall area" for the tower, consisting of land owned or controlled by the tower owner, which might equal the height of the tower. In this case, the Planning Commission chose not to establish the fall area.

September 15, 1994. Appeal filed by the Town of Sykesville to the Board of Zoning Appeals from the Planning Commission approval of the site plan. Kathleen Blanco- Losada also became Appellant. Case Nos. 3960 and 3962.

September 20, 1994. Further meeting of Planning Commission on the subject. Acted on objection by Town of Sykesville that it had not received copies of site plan per agreement between Town and County. Agreed to consider site plan again at its October meeting, at which time Town of Sykesville could make its presentation, and to consider whether to rescind prior approval at October meeting. Agreed to communicate with Board of Zoning Appeals and ask them not to hold hearing on appeal of site plan until after results of October meeting known.

October 18, 1994. Meeting of Planning Commission. The Town of Sykesville presented a number of witnesses and arguments as to why the tower should not be approved. These included: the lack of a fall area, possible safety reasons, and proximity to historic district of Sykesville. At the conclusion of the hearing, one of the Commission members, David Duree, made a motion to rescind the August approval given the tower site plan. That motion failed for lack of a second.

October 26, 1994. Hearing by Board of Zoning Appeals on appeals from August 16, 1994 approval of tower site plan. Oral decision announcing approval given, but final written decision not issued at that point. Case Nos. 3960 and 3962.

October 28, 1994. Building permit obtained for construction of tower.

October 28, 1994. Appeal filed to Board of Zoning Appeals of Planning Commission's decision of October 18, 1994 refusing to rescind its August 16, 1994 approval of the tower site plan. Case No. 3981. This is the case which is being decided by this opinion.

October 31, 1994. Ordinance 122 adopted by the County Commissioners. This amended the zoning ordinance dealing with communication towers. It provided that a fall area equal to the height of the tower was mandatory. In reliance on the adoption of this ordinance, the building permit for the tower issued on October 28, 1994 was revoked.

November 22, 1994. Decision of Board of Zoning Appeals denying appeals of August 16, 1994 Planning Commission approval of tower site plan. Case Nos. 3960 and 3962.

November 27, 1994. Appeal filed to Board of Zoning Appeals of October 31, 1994 revocation of building permit.

December 12, 1994. Appeal to Circuit Court from decision of Board of Zoning Appeals

denying appeals of Planning Commission decision, Case Nos. 3960 and 3962.

February 8, 1995. Decision of Board of Zoning Appeals reversing revocation of building permit and finding that tower owner had acquired vested rights to construction of tower under ordinance as it existed prior to October 31, 1994. This decision was subsequently appealed to the Circuit Court.

July 6, 1995. Decision of Circuit Court affirming decisions of the Board of Zoning Appeals in its decision denying appeal of Planning Commission approval of site plan in Case Nos. 3960 and 3962 and in its decision reversing revocation of building permit, Case No. 3988.

July 26, 1995. Hearing held by Board of Zoning Appeals on appeal of Planning Commission's refusal to rescind its August 16, 1994 approval of the site plan.

At the hearing on July 26, 1995, the parties presented several witnesses, whose testimony the Board has considered carefully, and an extensive memorandum, which has also been considered carefully by the Board. A motion to dismiss was filed on behalf of West Shore Communications, the Appellee, which the Board denied until the conclusion of the proceedings.

The present Town Manager of Sykesville testified on behalf of the Town. However, he was not in office at the time the events transpired and he was hampered by this fact. He did testify that the Town was not given the proper opportunity to review the site plan for the August 16, 1994 meeting as per the longstanding "Town-County" agreement between the Town of Sykesville and Carroll County, Maryland. Correspondence from the Commissioners of Carroll County was introduced indicating their opposition to the tower and the fact that they will not utilize it. Ms. Hitt, attorney for the Town, introduced the Planning

Commission file and pointed out several matters which had been raised before the Planning Commission--the proximity of the proposed site to a historic district and park; the lack of a sight line analysis; the discussion about an amended site plan; and the lack of a fall area.

Ms. Blanco-Losada also testified. She lives in close proximity to the site, and if the tower fell, it might damage trees on her property. She spoke of various alternatives to the tower location; and expressed safety concerns.

In the course of the proceedings it was established that no dwelling is within 200 feet of the tower except a dwelling on the property leased for the tower site.

It is necessary to sort through the prior proceedings and determine how the Board should act in the present case. This decision is based on the following premises. The Board previously found in Case 3988 that West Shore had acquired vested rights to proceed with the construction of the tower in accordance with the ordinance as it existed prior to October 31, 1994. The main point here is that the law prior to October 31, 1994 did not require the Planning Commission to establish a fall area. The Board rejects the suggestion by the Appellants that since the law has been changed, the owner is now subject to the new ordinance, particularly the fall area requirement. This ignores the fact that the owner acquired vested rights to proceed under the old ordinance. Second, the Board is not going to revisit the issue whether the August 16, 1994 decision of the Planning Commission was defective in any way: because the Town-County agreement was not observed, a member who had a conflict should have recused himself, the Planning Commission should have established a fall area, or for any other reason. The August 16 proceeding was appealed to the Board; the Board denied the appeal; and the Board's decision was then appealed to

the Circuit Court, which affirmed it. The only issue before the Board is the action taken on October 18, 1994 when the Planning Commission refused to rescind its approval.

With respect to the October 18 refusal to rescind, the Board finds that this action is the equivalent of a separate vote on the tower site plan. It is clear to the members of the Board that the Planning Commission did intend to respond to the complaint of Sykesville that it had not had the opportunity to present adequately its position at the August 16, 1994 meeting of the Planning Commission; and on September 20, 1994, the Planning Commission voted, effectively, to rehear the site plan application at its October 18 meeting. The Town was then given the opportunity to present its position and it took advantage of that opportunity, presenting several witnesses. In this context, the fact that a motion was made to rescind the approval, and the motion died for lack of a second, was the functional equivalent of an approval, for the second time, of the site plan.

As the Board sees it, its function now is to act upon the appeal of the October 18, 1994 approval. This may be done in two ways. First, the Board can review the action in an appellate capacity and determine whether a basis exists for the Planning Commission's approval. Acting in this manner, the Board finds that an adequate basis does exist for the Planning Commission's determination. There was nothing in the zoning ordinance which requires the Planning Commission to require a fall area. Aside from the house on the leased premises, no house will be endangered by the lack of a fall area. The record contains the assertion that the tower is designed to collapse on itself, rather than fall like a pencil, and the Appellants presented no proof before the Planning Commission of any real danger from a fall. The assertions about proximity to the historic district, etc. are not

compelling and primarily of a character which should have been raised in the conditional use proceedings. The zoning ordinance and maps are a part of the master plan, and the establishment of the conditional use means that it is generally consistent with the plan. Section 4.26 of the Zoning Ordinance requires conformity with all duly adopted elements of the Master Plan. No specific lack of conformity with any element of the Master Plan was demonstrated before the Planning Commission. While an assertion was made that the tower was inconsistent with the Town's historic district, which is located some distance from the tower, this was simply an assertion and did not have to be accepted by the Planning Commission. No specific lack of conformity was shown. Based upon the evidence before the Planning Commission, the Board finds that it had ample evidence for its determination to approve the site plan for the tower.

Appellants claim that the Planning Commission's decision to approve a tower without a fall area was inherently inconsistent with its decision to recommend adoption of an ordinance requiring a fall area in all cases. The Board finds no inconsistency. The Commission was obviously acting in two different capacities.

The Appellants also point out that the language of Article 66B and the Carroll County Zoning Ordinance might be read as requiring the Board to make separate findings and conclusions with respect to appeals from the Planning Commission, that is, to decide the matter de novo. Without accepting the correctness of this analysis, the Board accepts this charge for the purposes of this case only. In accordance with the findings and discussion stated above, the Board finds that there has been no suggestion of any real harm from the tower aside from the land use planning concerns, such as proximity to a park and a historic

district, which the Board finds were properly the subject of the conditional use proceeding and not of site plan approval. The Board repeats its earlier discussion that the suggestions regarding inconsistency with the Master Plan because of proximity to a park or a historic district were just that--suggestions. They were non-specific suggestions insofar as they relate to the elements of the Master Plan. One can envision how a tower might be inconsistent with a particular historic district or historic structure or a park, but that was not shown in this case. The Board does not accept the suggestions of inconsistency. Section 4.26 of the Zoning Ordinance addresses mainly the arrangement of the uses on a site. Apart from the fall area, no one has suggested any problem with the layout or arrangement of the uses on the site. With respect to the fall area, the Board finds that it will not affect any structure except that on the leased property; and that the suggestion that the structure will fall is highly speculative and not proven.

#### Conclusion

For these reasons, the Board affirms the decision of the Planning Commission taken at its October 18, 1994 meeting.

The Board also believes it should address the motion to dismiss filed by West Shore on the basis that the proceeding was foreclosed by the doctrine of res judicata. It is a fact that the Board heard testimony on this very same subject in its proceeding reviewing the August 16 approval of the site plan by the Planning Commission, Case Nos. 3960 and 3962, and that the Board's decision was appealed to the Circuit Court and there affirmed. Therefore, a compelling argument can be made that since the same subject matter was involved, and the same parties, the Circuit Court decision affirming Case Nos. 3960 and



3962, is res judicata and governs this proceeding. As an alternative ground, therefore, the Board grants West Shore's motion to dismiss on the grounds of res judicata. Far from being a technical legal matter, the members of the Board find that in fact this latest proceeding was in essence a rehearing of Case Nos. 3960 and 3962. The Board recognizes the strength of conviction of the Appellants in this case and the skill and persistence with which their case has been presented, but matters have to come to an end.

8-31-95  
Date

Claude R. Rash  
Claude R. Rash, Chairman