

Tax Map/Block/Parcel
No. 29-23-111

Building Permit/Zoning
Certificate No. 93-1982

Case 3854

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

APPLICANT: Cellular One Washington/Baltimore
Suite 100
7855 Walker Drive
Greenbelt, Maryland 20770

REQUEST: A conditional use for a cellular mobile telephone communications tower 250 feet in height, with whip and panel type antennas, and a utility equipment building

LOCATION: 1418 Richardson Road in Election District 2

BASES: Article 4, Section 4.11(b), (c), and (d); Article 6, Section 6.7; Ordinance 1E (The Carroll County Zoning Ordinance)

HEARING HELD: July 28, 1993; continued July 29, 1993

On July 28, 1993, the Board of Zoning Appeals heard testimony and received evidence concerning a conditional use for a cellular mobile telephone communications tower 250 feet in height, with whip and panel type antennas, and a utility equipment building on the premises of 1418 Richardson Road in Election District 2. The public hearing was continued and concluded July 29, 1993.

In accordance with the provisions of Article 17, Sections 17.6.6 and 17.7 of the zoning ordinance, and the Board's longstanding policy of visiting sites prior to public hearing, the Board visited the site July 26, 1993. The purpose of the visit was for the Board to view the site and adjacent properties so that the Board would be reasonably familiar with the site and adjacent properties and to assist in the Board's appraisal of testimony and evidence, either pro or con, presented during the public hearing.

The application, testimony and evidence comprising the record of this case are hereby included by reference in this decision. Based on the record, the Board by majority vote approved the conditional use.

The pertinent findings determining the Board's decision include the following:

FINDINGS OF FACT

The proposed one acre off-conveyance lot, which is improved with a dwelling and several accessory buildings is located on the west side of Richardson Road, north of Taneytown Pike, (Md. Rt. 140). The residence will continue to be the principal use of the proposed lot. As depicted by the site location map used in this case, the lot is presently part of 40.17 acres owned by Robert E. Warner and

Audrey J. Warner, and is identified as parcel 111. Part of the 40 acres is located to the east of Richardson Road. The adjoining tracts to the south, 57.19 acres, and west, 78.38 acres, parcels 110 and 312 respectively, are also owned by the Warners. Apparently the principal use of the parcels is agriculture. Two residential lots are located on the north side of Richardson Road and are identified as lots 12 and 14. The lots are part of Allendale subdivision and parcel 285. Each of the lots are improved with a dwelling. Parcel 345, a 122.40 acre tract, is also north of Richardson Road, opposite part of the Warners' 40 acre parcel. From inspection of the Deed Plot on Applicant's Exhibit 7, the distance between the proposed lot and lots 12 and 14 will be over 730 feet and 660 feet respectively. The distance to parcel 33, northwest of the site, owned by Molly's Fancy, Inc. is in excess of 850 feet. However, the site location map does not portray any subdivision of that parcel.

Approximately 2,500 square feet located in the northerly rear corner of the proposed lot will be leased for construction of the tower and utility equipment building. The configuration of the tower is triangular with the top truncated. At the base of the tower, each side will be 20 feet, tapering to 10 feet at the top of the tower where the antennas will be mounted. The base of the tower will be constructed at an elevation of 629, plus or minus, feet, and the top of the tower will be 879, plus or minus, feet; or 250 feet above ground level. The technology of the system is dependent upon clear line of site transmissions between subscribers' telephone antennas and the antennas mounted on the tower. This directly influences the required height of the tower. A fall area for the tower of 250 feet radius is provided as indicated on Applicant's Exhibit 7. Identification of the tower, including illumination, is subject to the requirements of the Federal Aviation Administration.

As portrayed by the contour or topographic lines, and as observed by the Board during the visit to the site, the land slopes upward to the north and the intersection of Benson Road with Richardson Road. The view of the proposed site from this location, as well as the two residential lots on the north side of Richardson Road will be at least partially blocked by the intervening hillside. Although at least some of the tower will be visible from some distance from the site, due to the height, the property is not visible from north of the intersection of Benson Road. The site and tower will be visible from the south.

Due to technical problems, the existing tower east of Mayberry Road authorized by the Board in Case 3249 cannot be used to mount the applicant's antennas.

The communications transmissions will neither threaten public health, Applicant's Exhibit 4, nor interfere with television reception, Applicant's Exhibit 6.

Establishment of the tower and utility equipment building will not generate significant vehicular traffic to and from the premises.

Opponents of the request cited fears and opinions of adverse effects to public health, esthetics, depreciation of residential property values, and inconsistency with the provisions of the zoning ordinance.

Dr. Amin Jurf, a real estate appraiser, testifying on behalf of opponents, merely amplified the opinions of property owners pertaining to their perceptions that the tower would detrimentally affect the values of their properties.

However, no probative evidence substantiating any detrimental affects that would result from establishment of the proposed tower was introduced.

APPLICABLE LAW

Articles and Sections cited below are of Ordinance 1E.

The proposed one acre off-conveyance lot and adjacent properties are zoned "A" Agricultural District as depicted on zoning map 29B. The land use provisions for the district are expressed in Article 6. The preamble reads:

The purpose of this District is to provide for continued farming activities, conserve Agricultural land, and reaffirm Agricultural use, activities and operations as the preferred and dominant use of the land within the District, except in an area designated "MR" within the "MRO" Mineral Resource Overlay where mineral resource recovery is also a preferred use. While relatively small existing hamlets, villages and residential communities appear within, as do occasional dwellings, and other uses, the District is primarily composed of lands which, by virtue of their highly productive soils, rolling topography and natural beauty, are the very essence of the County's farming heritage and character. A substantial portion of the residential development in the County has previously taken place in the Agricultural District. This has the effect of taking agricultural land out of production and creating a demand for public facilities and services - roads, water and sewerage, schools, police and fire protection - in areas where provision for such additional services and facilities is not consistent with the purpose of the Agricultural District. The intent of this article is to recognize the need for and appropriateness of very limited residential development in the Agricultural District, but to prohibit residential development of a more extensive nature. It is the further purpose of this district to maintain and promote the open character of this land as well as to promote the continuance and viability of the farming and agri-business uses.

The Board recognizes: the preamble is not part of the statute, and the statute speaks for itself; the title of the zone, "A" Agricultural District, does not dictate the land uses permitted in the zone; and the zoning ordinance allows subdivision of agriculturally zoned land for residential development. Clark v. County Commissioners for Carroll County, 270 Md. 343, 349-350 (1973).

While agriculture and agricultural operations are the preferred land use within the district (Section 6.1), numerous other uses are listed in Section 6.2 as principal permitted uses, including single and two-family dwellings, protective care homes, group homes, and alternate living units. A variety of other land uses are also principal permitted uses such as churches; recreation areas and centers, including country clubs and swimming pools; riding academies and livery stables; public buildings and properties for recreational, cultural, administrative, or public services such as fire, ambulance or rescue services; and, veterinary clinics and animal hospitals.

Article 4, General Provisions; Section 4.11, Utility Equipment and Towers (Amended 11/13/86), paragraphs (c) and (d) read respectively:

Freestanding towers, including antenna towers, microwave relay towers, and installations for radio, television, and communications transmission or receiving, shall be allowed as follows and are exempt from lot area, lot width and yard requirements:

- (1) Towers which do not exceed a height of 100 feet shall be allowed in any district and shall be exempt from the provisions of Section 4.11(d);
- (2) Towers which are erected on existing structures shall be allowed in any district, provided the height of the tower does not exceed 1/3 of the height of the existing structure and the total height of the existing structure and tower does not exceed 200';
- (3) Single pole (flag pole) towers shall be allowed in any district;
- (4) Towers which do not exceed a height of 200 feet shall be allowed as conditional uses in all districts;
- (5) Others towers not enumerated above, together with structures accessory to the tower, shall be allowed as conditional uses in the Agricultural, Transitional, Business and Industrial districts; and,
- (6) A freestanding tower is one which is not connected to another tower by overhead lines. A single pole (flag pole) tower is a freestanding tower which is constructed of a single support or leg, as in a flag pole.

The following standards shall govern the approval of freestanding towers:

- (1) Site Plan Approval. An application shall be subject to site plan approval from the Planning Commission pursuant to Section 4.26.

(2) Multiple Use. It shall be the policy of the Board of Zoning Appeals to encourage the multiple use of towers. All applicants must first represent that they have considered utilizing existing towers prior to making application. Upon approval, all applicants shall consider making excess tower space available to other users.

(3) Fall Area. The Planning Commission is authorized to require an applicant to own or control by appropriate agreements sufficient land so that a reasonable fall area of the tower may be kept free of structures and uses unrelated to the tower. The fall area may be as much as 100% of the tower height based upon reasonable safety considerations.

(4) Public Health. The Board of Zoning Appeals (or the Planning Commission if Board approval is not required) is authorized to refer all applications to the County and State Health Departments and to disapprove an application on the grounds that it poses a danger to the public health.

Therefore, the provisions of Section 6.7, Lot Area, Lot Width and Yard Requirements governing conditional uses are not applicable.

Section 17.7, Limitations, Guides and Standards govern the Board in deciding conditional use requests. It reads:

Where in these regulations certain powers are conferred upon the Board or the approval of the Board is required before a conditional use may be issued, the Board shall study the specific property involved, as well as the neighborhood, and consider all testimony and data submitted. The application for a conditional use shall not be approved where the Board finds the proposed use would adversely affect the public health, safety, security, morals or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood. In deciding such matters, the Board shall give consideration, among other things, to the following:

- (a) The number of people residing or working in the immediate area concerned.
- (b) The orderly growth of a community.
- (c) Traffic conditions and facilities.
- (d) The effect of the proposed use upon the peaceful

enjoyment of people in their homes.

(e) The conservation of property values.

(f) The effect of odors, dust, gas, smoke, fumes, vibrations, glare and noise upon the use of surrounding property values.

(g) The most appropriate use of land and structures.

(h) The purpose of this ordinance as set forth herein.

(i) Type and kind of structures in the vicinity where public gatherings may be held, such as schools, churches, and the like.

Conditional Uses are defined in Section 20 as:

Uses which are specified for Board approval prior to authorization and which uses, after public hearing, may be approved conditionally or disapproved in accordance with Sections 17.2 and 17.7. The term "conditional use" shall constitute the same meaning as "special exception" specified as one of the general powers of the Board of Appeals in accordance with Article 66B of the Annotated Code of Maryland.

The Board is also governed by decisions of the courts. In the decision of Schultz v. Pritts, 291 Md. 1, 20-21, (1981) the court wrote:

Generally, when a use district is established, the zoning regulations prescribe that certain uses are permitted as of right (permitted use), while other uses are permitted only under certain conditions (conditional or special exception use). In determining which uses should be designated as permitted or conditional in a given use district, a legislative body considers the variety of possible uses available, examines the impact of the uses upon the various purposes of the zoning ordinance, determines which uses are compatible with each other and can share reciprocal benefits, and decides which uses will provide for coordinated, adjusted, and harmonious development of the district. (Footnote omitted.) (Citations omitted.)

Because the legislative body, in reaching its determination, is engaged in a balancing process, certain uses may be designated as permitted although they may not foster all of the purposes of the zoning regulations and, indeed, may have an adverse effect with respect to some of these purposes. Thus, when the

Legislative body determines that the beneficial purposes that certain uses serve outweigh their possible adverse effect, such uses are designated as permitted uses and may be developed even though a particular permitted use at the particular location proposed would have an adverse effect above and beyond that ordinarily associated with such uses. For example, churches and schools generally are designated as permitted uses. Such uses may be developed, although at the particular location proposed they may have an adverse effect on a factor such as traffic, because the moral and educational purposes served are deemed to outweigh this particular adverse effect.

When the legislative body determines that other uses are compatible with the permitted uses in a use district, but that the beneficial purposes such other uses serve do not outweigh their possible adverse effect, such uses are designated as conditional or special exception uses. (Citations omitted.)

Continued on page 22, the decision reads:

We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. (Citations omitted.)

In Turner v. Hammond, 270 Md. 41, 55 (1973), the decision states:

While the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material but if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for a special exception is arbitrary, capricious and illegal. (Citation omitted.)

In Steuart Petroleum Company. v. Board of County Commissioners of Saint Mary's County, 276 Md. 435, 445 (1975) the court wrote:

In the context of zoning law, a "plebiscite of the neighbors" or "of the neighborhood" refers to instances where the action of an administrative body which effects a change in zoning and deprives an individual of a property right is predicated on the pleasure of the owners of nearby property rather than on a comprehensive plan, which imposes mutual restrictions and confers mutual benefits on all,....(Citations omitted.)

In Entzian v. Prince George's County, Md., 32 Md. App., 256, 262, 263 (1976) the decision quotes from the opinion of the Circuit Court for Prince George's County quoting Rockville Fuel and Feed Company v. Board of Zoning Appeals of City of Gaithersburg, 257 Md. 183 and 193 (1970):

"'Zoning is not a plebiscite'" and therefore testimony in opposition restricted solely to lay witnesses, petitions of objection to the proposal by residents, and testimony amounting to unsupported dislike and fear of (a) project,"...amounted to no evidence at all."
(Citation omitted.)

REASONING

The applicant is licensed and regulated by the Federal Communications Commission to provide mobile telephone communications facilities in Carroll County for the public. The tower is required for erection of antennas. There is no existing tower or other suitable structure in the area that could be used to do so. The applicant is knowledgeable and consents to the provisions of the zoning ordinance pertaining to multiple use of towers for erection of antennas by others.

Although fears and objections were expressed by owners and residents of a residential subdivision located to the north of the site, as well as several other witnesses, no probative evidence was introduced establishing that the proposed tower fails to comply with the standard expressed in Schultz v. Pritts and require denial of the conditional use request. Without such probative evidence, denial of the conditional use request would be arbitrary, capricious and illegal. Furthermore, in considering the provisions of the zoning ordinance pertaining to conditional uses, Section 17.7, establishment of the cellular mobile telephone communications tower, antennas, and utility equipment building will have no real detrimental affect upon residents of adjacent properties, the values of those properties, or public interests. Therefore, the conditional use request is in accord with the purpose and intent of the provisions of the zoning ordinance.

CONCLUSION

Based on the findings of fact, applicable law and reasoning expressed herein, Mr. Raver motioned to approve the conditional use.

In the opinion of Mr. Rash, the applicant had not met his burden of proof and Mr. Rash motioned to deny the request. The motion failed for lack of a second.

Mr. Law concurred with Mr. Raver's motion to approve the conditional use and seconded the motion. Therefore, the conditional use is, by majority of the Board, hereby authorized.

8/20/93
Date


William Law, Chairman