

Tax Map/Block/Parcel
No. 73-20-533

Building Permit/Zoning
Certificate No. 93-3526

Case 3885

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

APPLICANT: West Shore Communications, Inc.
8373 Piney Orchard Parkway
Odenton, Maryland 21113

ATTORNEY: Clark R. Shaffer, Esquire
6 North Court Street
Westminster, Maryland 21157

**ATTORNEY FOR
THE OPPONENTS:** J. Brooks Leahy, Esquire
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REQUEST: A conditional use for a cellular mobile telephone communications tower, 200 feet in height, with antennas, and utility equipment buildings

LOCATION: 7001 Hollenberry Road in Election District 5

BASIS: Article 4, Section 4.11(c) and (d); Ordinance 1E (The Carroll County Zoning Ordinance)

HEARING HELD: January 27, 1994; Continued: February 7, 1994

DELIBERATIONS: February 10, 1994

On January 27, 1994, the Board of Zoning Appeals heard testimony and received evidence concerning a conditional use for establishment of a cellular mobile telephone communications tower, 200 feet in height, with antennas, and utility equipment buildings on the premises of 7001 Hollenberry Road. The public hearing was continued February 7, 1994.

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 the public hearing, the Board visited the site November 22, 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 properties 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, and in compliance with the state Open Meetings Act, the Board authorized the conditional

use February 10, following deliberations, subject to the establishment of landscape screening described below, as a condition of authorization.

Authorization of the conditional use for the property does not change its zoning designation of "C" Conservation district.

The application does not request a variance to the applicable provisions of the zoning ordinance, and no variance is necessary.

Provisions of the zoning ordinance that apply to the conditional use request and the Board of Zoning Appeals include the following:

Conditional uses are defined in Article 20 of the zoning ordinance 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.

Article 4, General Provisions; Section 4.1, Ordinance deemed minimum regulations; uniformity, reads:

The regulations set by this ordinance within each district shall be minimum regulations and shall apply uniformly to each class or kind of structure or land except as hereinafter provided.

From Article 4, Section 4.11, Utility Equipment and Towers, subsections (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 feet;

- (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) Other towers not enumerated above, together with structures accessory to the tower, shall be allowed as conditional uses in the Agricultural, 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

The pertinent findings determining the Board's decision include the following findings of fact, applicable law, and reasoning.

FINDINGS OF FACT

The proposed site of the cellular telephone communications tower is on a 5.5 acre lot located on the southeasterly side of Hollenberry Road about 1,200 feet north of Obrecht Road intersection. As depicted by the site plan filed with the application, and included in Applicant's Exhibit 1, improvements to the property include a dwelling, detached garage, shed, and two barns. The proposed tower site is located adjacent to the barns near the middle of the property, 120 feet from the northwesterly front property line, 110 from the northerly property line, 150 feet from the southerly property line, and some 370 feet from the easterly side property line.

The site and adjacent properties to the north, east, and south are zoned "C" Conservation District. (Zoning Map 73A.) The majority of the residential subdivision known as Beachmont Estates, located to the west, is zoned "R-40,000" Residence District. The "R-40,000" district lots are larger and were recorded within the county plat records more recently than the first lots of the subdivision located adjacent to and abutting Obrecht Road. These lots are zoned "R-20,000" Residence District. County facilities, Piney Run Reservoir and Park, are located to the north.

As portrayed by the Carroll County Master Plan, Applicant's Exhibit 4, the land use designation for the properties to the north, east, and south is conservation. The land use designation for the residential subdivision of Beachmont Estates is residential.

The planned relocation of a portion of Obrecht Road, beginning near Hollenberry Road and extending easterly to the intersection of Springfield Road and Maryland Route 32 is shown on the master plan for purposes of planning, but not construction.

The land to the south of Obrecht Road is within the corporate limits of the town of Sykesville. New residential development of approximately 500 homes is planned for the area. The neighborhood and general vicinity are described in detail in the real estate appraiser's study submitted in behalf of the applicant and identified as Applicant's Exhibit 1. Photographs identified as Applicant's Exhibit 3 depict views within the neighborhood. In addition, photographs identified as Protestants' Exhibit 5 also portray views of adjacent properties; however, the handdrawn representations of the tower added to three of the photographs are not drawn to scale and represent nothing more than how the protestant imagines the tower would appear from the location where the photograph was taken. Accordingly, the representative sketches of the tower are without merit, and the photographs are of value only for the features that they otherwise portray.

Applicant's Exhibit 2, a copy of an aerial photograph from the county files with added annotations, indicates the location of the proposed tower, Hollenberry

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.

Article 17, Board of Appeals; Section 17.2, General Powers, paragraph (b) specifies that one of the general powers of the Board is to hear and decide conditional uses listed within the zoning ordinance. Section 17.7, Limitations, Guides and Standards states:

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.

Lane, Beachmont Drive, Obrecht Road, Piney Run Reservoir, as well as the surrounding countryside. The scale of the photograph is presumedly one inch equals 400 feet.

Hollenberry Road is a single lane unimproved road not constructed to county standards. In addition to the proposed site, Hollenberry Road provides for vehicular access to several other dwellings. There is no evidence of further subdivision or residential development of properties served by Hollenberry Road, or construction of the road to county standards.

Visibility of the proposed site is at least partially screened from existing and planned residential development by stands of deciduous trees to the north, west and south, and to some extent by the rolling topography of the surrounding area. From some surrounding locations the tower will be less visible, or may not be visible. The tower will be visible from the dwelling located on the north side of Hollenberry Road opposite the site and from a second dwelling to the east on the south side of Hollenberry Road. The tower will not be clearly visible from distances in excess of several hundred feet except as it extends above the various stands of deciduous trees.

Although the dimensions of the proposed site to be enclosed by fencing are shown as 100 feet by 100 feet on the site plan, Applicant's Exhibit 11, the dimensions of the enclosure may be reduced to as small as 50 feet by 50 feet. Two equipment buildings will be erected inside the security fence, near the tower's base. The tower will be of triangular design, supported by three legs 25 feet apart at the base, gradually converging as the height of the tower increases to a truncated top at 200 feet. The communications system requires clear lines of sight between subscribers' telephone antennas and the antennas mounted on the tower. This requirement influences, if not determines, the height of the tower. The tower will be constructed to collapse upon itself in the event of an accident or structural failure.

An expert in real estate appraisal presented testimony and evidence on behalf of the request based on an investigation of the proposal, Applicant's Exhibit 1, and personal experience. The expert concluded that the tower, antennas and equipment buildings would not unduly affect the values of homes in the area, their marketability, or the interests of the public. The testimony and evidence was credible and conclusive.

Testimony, as well as a letter, Applicant's Exhibit 5, presented on behalf of the request, confirmed that establishment of the tower would benefit communications between hospitals and ambulances in this area of Carroll and Howard counties where communications are presently inconsistent and unreliable because of topography.

Neither the tower, antennas, nor equipment buildings will generate significant vehicular traffic to and from the site, and there is no probative evidence that the facility will cause any odors, dust, gas, fumes, vibrations, glare, or noise that would unduly affect residents of adjacent properties or the values of their properties.

Publication of the notice of public hearing for the conditional use request resulted in significant public interest, and numerous letters in opposition to the request were received prior to the public hearing. During the hearing, considerable testimony and evidence were introduced in opposition to the conditional use. Most, if not all, reasons described in the letters opposing the tower were also expressed during the public hearing. In addition, numerous exhibits including a petition, newspaper articles, technical reports, several contracts for sale of unimproved lots, additional letters, and photographs were submitted as protestants' exhibits.

The petition, Protestants' Exhibit 6, simply reflects persons opposed to, "...the erection of the tower...." While the Board realizes that the petition required a vigorous effort on the part of the petitioners, the petition reflects only the opinion of the petitioners. As the Board is responsible for finding facts pertinent to the request and the provisions to the zoning ordinance governing the request in order to render a proper decision, petitions merely reflecting opinions regardless of the number of signers, either pro or con, do not constitute probative evidence and cannot be relied on in deciding a request.

The newspaper articles discuss the technology of new telecommunications systems. However, the issue before the Board is for one of land use, and not how soon the system may become obsolete.

The technical reports examine issues related to electricity, which are matters for consideration by the Federal Communications Commission.

The contracts of sale for unimproved lots were submitted with testimony and photographs of an existing micro-wave relay tower (Protestants' Exhibits 10 and 11) seeking to establish that the tower adversely affected the marketability of the lots and their value. The testimony and evidence reflected opinions and unfounded conclusions that failed to substantiate the allegations.

The letters, Protestants' Exhibits 7, 8, 9, 14, 21, and 22 expressed a variety of reasons in opposing the tower. Some of the reasons are based on misconceptions of the provisions of the zoning ordinance; adverse affects to the public health; interests of the community, and marketability of dwellings in the area; depreciation of residential property values; and, displeasure with the notion of establishing the tower as proposed. However, the letters merely express the writer's opinions pertaining to the tower without probative evidence to substantiate their conclusions.

Establishment and operation of the cellular mobile telephone system is subject to the requirements and licensing provisions, including public health considerations, of the Federal Communications Commission. Concerns and responsibility pertaining to public health rest with that agency.

If necessary, identification of the tower for purposes of aerial navigation is regulated by the Federal Aviation Administration.

The applicant has investigated the possibility of locating antennas on existing towers as noted in Section 4.11(d)(2), and determined that existing

towers cannot be used to resolve problems of transmission and reception in the area. The applicant is agreeable to allowing antennas of other services to be erected on the tower.

The dwelling opposite the site and the adjoining dwelling to the east are affected to a greater extent than any other residences in the area. Due to the intervening distance and orientation of the second dwelling, the tower will have less impact on the residents of this dwelling and its value than upon the residents and value of the dwelling opposite the proposed site.

In order to minimize the impact of the tower upon the residents of the two adjoining dwellings and the values of their respective properties, landscape screening will be required as a condition of authorization to screen the fencing, equipment buildings, and base of the tower when viewed at eye level. The landscape screening will be required to be maintained until the facility is removed from the premises.

APPLICABLE LAW

Articles and Sections cited below are of Ordinance 1E.

In addition to the provisions of the zoning ordinance noted above, the Board is 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 designed 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.)

On Page 22, the court wrote:

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, Md.*, 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, Md.*, 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.)

In accordance with the provisions of Section 17.4.10, the Board extended the time for issuing this decision.

REASONING

If the decision in this case were governed by popularity, the conditional use would have been denied. However, the court decisions in *Steuart Petroleum Company v. Board of County Commissioners of Saint Mary's County, Md.* and *Entzian v. Prince George's County, Md.* preclude the Board from deciding cases merely on the basis of whether a conditional use is favored or opposed. The decisive issues are the standard governing conditional uses expressed in *Schultz v. Pritts*, and whether or not the applicant has met his burden of proof as discussed in *Turner v. Hammond*.

The testimony and evidence presented by the expert in real estate appraisal on behalf of the request (Applicant's Exhibits 1, 2 and 3) were objective and convincing. The testimony and evidence presented in opposition was neither probative nor convincing. The testimony presented by opponents regarding perceived effects of the tower upon the orderly growth of the community, and depreciation of property values and marketability of homes in the area were generally expressions of fear and displeasure.

The tower, antennas and equipment buildings are necessary for the mobile communications company, licensed by the Federal Communications Commission, to provide services to the public. In addition, the tower will be promote the health, safety and general welfare of the community by improving emergency medical communications between ambulances and hospitals. The facility will also benefit radio communications of the fire departments serving the area.

It is evident that the proposed site was selected as the best location for

the tower to resolve problems of transmission and reception in the area, and because it was thought that at this location, the tower would be better screened from most other properties in the area and have less impact on fewer residents and their homes than if the tower were to be located elsewhere in the area.

In considering the record of this case, the Board finds no probative evidence that establishment of the tower would be contrary to the provisions of Section 17.7, the purpose of the zoning ordinance, or the master plan for the county.

Furthermore, the Board is convinced that the applicant has met his burden of proof that establishment of the tower, antennas and equipment buildings as proposed and conditioned below is in accord with the provisions of the zoning ordinance, and the standard of *Schultz v. Pritts* governing conditional uses.

CONCLUSION

Based on the findings of fact, applicable law including the provisions of the zoning ordinance, and reasoning expressed herein, the conditional use is hereby authorized, subject to the following condition of authorization:

1. Landscaping, consisting of at least one row of Leyland Cypress trees, at least eight feet tall, shall be planted at intervals of not more than eight feet parallel with each exterior side of the security fence enclosing the tower site, except adjacent to the driveway providing vehicular access to the site. The trees shall be maintained for the time that the communications tower facility remains on the premises. Any trees that become diseased or die shall be replaced timely, during usual planting periods, subject to the direction of the zoning administrator. Additional landscaping, or landscape screening may be required as part of the site development plan approval requirements pursuant to Section 4.26 of the zoning ordinance, or those of the Carroll County Landscape Manual.

3-31-94

Date

Claude R. Rash
Claude R. Rash, Chairman