

Tax Map / Block/Parcel  
73-20-533

Building Permit/Zoning  
Certificate No. 93-3526

Case 3988

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

APPELLANTS: West Shore Communications, Inc., et al  
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APPEAL: An appeal from a stop work notice and revocation of building  
permit 93-3526 for construction of a communications tower.

LOCATION: 7001 Hollenberry Road in Election District 5

BASIS: Article 17, Section 17.4, Carroll County Zoning Ordinance

HEARING HELD: December 29, 1994

DELIBERATIONS: January 10, 1995

### Introduction

This is a simple case. West Shore Communications, Inc. obtained a conditional use approval from this Board to construct a 200' communications tower. It obtained site plan approval from the Planning Commission. On a Friday afternoon, it obtained a building permit/zoning certificate authorizing it to construct the tower. On the following Saturday and Sunday it constructed, in part, the base for the tower. On the following Monday, the County Commissioners arrived at the site. They then adopted a zoning ordinance (Ordinance No. 122) which had been pending for some time. The ordinance amended the County's regulations for communication towers. Its effect was to revoke the previously authorized conditional use since the proposed tower did not have a use and occupancy permit.

The parties agree that Maryland law recognizes vested rights. The only question before the Board is:

Did West Shore obtain vested rights which preclude the application of the revised ordinance to it?

For the reasons stated in this decision, the Board finds that it did.

### Findings of Fact

In Case No. 3885, decided February 10, 1994, West Shore obtained a conditional use for the erection of a 200' tower on leased property on Hollenberry Road near Sykesville. No appeal was taken from that approval. It obtained site plan approval from the Planning Commission on August 16, 1994. That decision was appealed to the Board of Appeals which affirmed on October 26, 1994, with the written decision being issued on November 22, 1994. The Planning Commission revisited the matter at the request of the Town of Sykesville on October 18,

1994, but refused to change its decision. Meanwhile, an ordinance to amend the regulations for communication towers had been introduced and a hearing held by the County Commissioners on October 18, 1994. Following the approval of the site plan, West Shore obtained a building permit/zoning certificate on Friday, October 28, 1994. Shortly thereafter, on that same day, an appeal was filed of the Planning Commission's decision refusing to reconsider its approval.

After it secured the building permit, West Shore took action to get construction started right away. Its construction superintendent flew up from the Eastern Shore. Construction started on Saturday, October 29, 1994. According to West Shore, it had notified the County that it was commencing construction over the week-end. Work continued on Saturday and Sunday, October 29 and October 30, 1994, and on Monday morning, October 31, 1994. At that time, the work was interrupted by the arrival of the County Commissioners on site. They reviewed what was going on and took action to adopt Ordinance 122 immediately. The revised law established a mandatory set back (or "fall area") equal to the height of the tower; the prior law had left the matter of the set back up to the Planning Commission. An unusual feature of Ordinance 122 is that it provided, "to the extent authorized by law", that it applied to all towers for which a use and occupancy permit had not been issued. Since a use and occupancy permit had not been issued for the West Shore tower, Ordinance 122 applies unless West Shore has acquired vested rights.

By the time the ordinance was adopted, the site had been graded; an excavation for the tower base had been dug; and two layers of rebar steel had been installed. The first layer sat on bricks on the ground; the second layer was suspended from a wooden frame. The Board finds that the status of the project is fairly described in the field notes made by the County Building Inspector,

Jim G. Brown, contained in Protestants' Exhibit 2, which read as follows:

"3/ Status of job: A 26' x 26' excavation approx. 4' deep with two mats of #7 rebar on 12" centers wire tied has been installed. A system of wood girders made out of triple 2 x 12's span across the excavation to suspend the top rebar mat. The lower rebar mat is setting on top of support brick. At this time no concrete has been placed. See attached photo's. 10-31-94. Jim G. Brown".

The work is depicted in exhibits introduced through West Shore (Exhibits 13-27). Anchor bolts had been brought to the site but not yet placed. The testimony was that if the work had not been interrupted, it would have continued until completion, and the Board accepts this testimony. All the facts and circumstances point to a bona fide commencement of construction, and the Board so finds. The plans filed with and approved by the County were full plans for the construction of the tower, not just the foundation. See Protestants' Exhibit 2. At least 30 days prior to the commencement of the work West Shore had ordered the tower to be manufactured; according to the testimony of the West Shore representative, it had been partially manufactured at the time the work commenced, but no part of the tower was on the site. Arrangements had been made for an inspection of the work on Monday morning but that was cancelled because the work was not far enough along. The Board can envision circumstances where an owner will perform some work in an attempt to "get something in the ground" with no real intent to proceed to completion; the only intent is to achieve protection against a change in the applicable law. The Board finds that here West Shore made a bona fide commencement of construction with every intent to proceed to completion.

The work, particularly the wooden frame superimposed over the steel, was visible from the closest road, Hollenberry Road, approximately 95' from the tower site. All the exhibits depict the wooden timbers rising up above the ground, causing the construction site to be clearly visible

for a considerable distance. In the context in which the work was being performed, the work clearly indicated that a tower was being erected. The testimony was that the tower proposal was well known in the community. It was hotly resisted by some residents and by the Town of Sykesville. As a matter of fact, at the very time the erection was occurring on Monday morning, there was a group of protesters on Hollenberry Road protesting the erection of the tower. It seems to the Board that there could be no better proof that the erection of the tower was known in the neighborhood than that the erection was being protested by certain members of the public. In short, the fact that work was underway for the erection of the tower was known to the surrounding community because the construction was clearly visible. .

After the ordinance was adopted, a stop work order was issued by the County on that same day, October 31, 1994. Ralph Green, the Bureau Chief of the County Bureau of Permits and Inspections, wrote West Shore on November 2, 1994, confirming the issuance of the stop work order and stating that the reason for its issuance was the adoption of Ordinance 122 which invalidated the previously issued building permit. On December 8, 1994, Solveig L. Smith, who holds the office of Carroll County Zoning Administrator, issued a memorandum which confirmed a verbal decision made on October 31, 1994 to revoke the previously issued zoning certificate on the grounds that the project had not received a use and occupancy permit and therefore was subject to the requirements of Ordinance 122.

Neither the Green nor the Smith correspondence alluded in any way to the then pending appeals of the Planning Commission's decision as a reason to revoke the building permit/zoning certificate. The Board finds that the revocation was because of the passage of Ordinance 122

and not because of the appeal of the Planning Commission decision.

### Conclusion

The facts, which are mainly undisputed, determine the outcome of this case. West Shore had obtained a valid permit for construction and commenced construction to the point that the neighborhood was aware that the erection of a tower was under way. The Board has no doubt but that West Shore followed the admonition, "Seize the Day!". In the Board's view, however, that does not disqualify it from obtaining vested rights. No one has suggested that West Shore was anything but up front about its desire to obtain a permit and erect the tower. There is nothing wrong with acting expeditiously to commence construction knowing that it is always within the County's power to take away the previously granted approval. The County has suggested that West Shore did not have the requisite good faith because it knew of the pending ordinance but the Board rejects this view. The Board finds that the construction of the tower was known in the neighborhood and that this construction was undertaken in good faith.

The County and the Town of Sykesville raise a second issue. They argue that since the site plan approval by the Planning Commission had been appealed, therefore West Shore was not operating under a valid permit. The County's argument has two prongs. First, it says that at the time the work was performed, the Board's decision sustaining the action of the Planning Commission had not yet become final. While the Board had announced its oral decision on October 26, 1994, the Board's written decision was not issued until November 22, 1994, after the work had commenced. The Board agrees with the County that its decisions take effect only when the decision is formally issued. Therefore, the County says that the appeal was pending

when the work was commenced. The second prong is the second appeal filed of the Planning Commission's decision, Case No. 3981. This was filed on Friday afternoon, October 28, 1994, and had not even been heard at the time of the commencement of the work; it has not yet been heard.

The reason these appeals are significant is because of the County's reliance on Section 4.07 (f) of Article 66B of the Annotated Code of Maryland which reads in pertinent part as follows:

"An appeal stays all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals after notice of appeal shall have been filed with him that by reason of the facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such a case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application on notice to the officer from whom the appeal is taken and for due cause shown".

In the board's view, there are two reasons why this section is not applicable to the facts of this case. First, the language itself seems to contemplate that some type of enforcement action is stayed. In other words, the term "proceedings" seems to contemplate some active effort by some administrative officer to accomplish something, such as the issuance of a zoning violation notice to make a particular use cease. This fits in with the remaining language of the section which allows the officer to prevent the proceedings from being stayed if he determines that there is some threat. It is hard to see how this entire section applies to the approval of a site plan by the Planning Commission; for example, it is hard to see how the exercise of rights under an approved subdivision plan or site plan is a "proceeding", or how the stay of action under a site plan could constitute some threat to the public welfare. The Board notes that Section 4.07, as originally drafted and for many years thereafter, applied only to appeals from an enforcement officer, such as the Zoning Administrator, and not to appeals from the Planning Commission.

Maryland-National Capital Park and Planning Comm'n v. City of Rockville, 269 Md. 240

(1973); 64 Op. Atty. Gen. 349 (1979). In short, the Board is of the view that approval of a site plan is not a "proceeding" which is stayed by an appeal to the Board, at least based upon the facts of this matter.

The second reason why the Board views this section as not being applicable is that the work was being done pursuant to the authority of the building permit/zoning certificate and it was the site plan approval, and not this certificate, which was appealed. Undoubtedly the building permit/zoning certificate and the site plan have a relationship in that the site plan is a necessary condition for the issuance of the building permit/zoning certificate. But the fact remains that the authority to do the work is pursuant to the building permit/zoning certificate, not the site plan. The Board finds it highly relevant that when the County revoked the building permit and when it revoked the zoning certificate, by separate actions, the experienced officials responsible for those actions relied on the fact that the use was no longer permitted by Ordinance 122, and not on the fact that the site plan had been appealed. Administrative practice has a role in the interpretation of a law. Here the clear message from the administrative practice is that the authority to accomplish the work was not stayed by the site plan appeal. The word "proceedings" is an undefined term and must draw its meaning from the administrative practices and procedures of the County. An observer of the events here under review would conclude from the written revocation decisions that the appeal of the site plan did not stay the authority to commence construction. The Board must be guided by these decisions rather than by the County's belated position that the appeal had the effect of a stay.



In short, the reason why Section 4.07 does not apply is because there was no appeal of the building permit/zoning certificate. A supporting basis for this conclusion is the fact that neither administrative official took this position when the stop work order was issued and the permit was revoked.

For these reasons, the Board concludes that West Shore had obtained a valid permit; that the permit did not become invalid by the appeals of the site plan; that West Shore undertook in good faith to construct a communications tower on the property; and that the construction of the tower had reached the point that it was obvious to the neighborhood that the construction of a tower was underway. For these reasons the Board finds that West Shore has vested rights under Maryland law. Therefore, Ordinance 122 is not applicable to it and the revocations of the building permit and the zoning certificate are reversed. Nothing in this decision prevents the persons who filed the second appeal of the site plan from pursuing that appeal. The normal rule is that a person who undertakes work pending an appeal does so at his or her own risk, but the effect of any possible successful appeal is not before the Board at this time.

Feb. 8, 1995  
Date

Claude R. Rash  
Claude R. Rash, Chairman