

Tax Map/Block/Parcel
No. 77-18-72

Building Permit/Zoning
Certificate No. 95-2949

Case 4054

OFFICIAL DECISION
BOARD OF ZONING APPEALS
CARROLL COUNTY, MARYLAND

APPLICANT: Louis Mangione
1205 York Road
Lutherville, Maryland 21093

ATTORNEYS FOR APPLICANT: William B. Dulany, Esq. and Amber Dahlgreen Curtis, Esq.
127 East Main Street
P.O. Box 850
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ATTORNEY FOR PROTESTANT: David K. Bowersox, Esq.
24 North Court Street
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REQUEST: A conditional use for AM radio communication towers, approximately 350 feet in height

LOCATION: On premises known as the Mercer Farm, east of 340 Hoods Mill Road in Election District 14

BASES: Article 4, Section 4.11; Ordinance 1E (The Carroll County Zoning Ordinance)

HEARING HELD: September 28; Continued: October 23, November 9 and 16, 1995

Following introduction of this case September 28, the Board was requested to continue the hearing to a later date to provide time for persons opposing the request to obtain counsel. Although applicant's counsel objected, the Board continued the hearing to October 23, 1995. At that time, Mr. Bowersox, attorney with the firm of Hoffman, Comfort, Galloway and Offutt appeared as counsel for Mr. Jerry W. Thurber. Then and on November 9 and 16, the Board heard testimony and received evidence on behalf of, and in opposition to, the conditional use.

Articles and Sections cited below are of Ordinance 1E.

In accordance with the provisions of Sections 17.6.6 and 17.7, and the Board's long standing policy of visiting sites prior to public hearing, the Board visited the site September 25, 1995¹. 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.

¹Mr. Schumacher visited the site separately October 20, after being appointed to the Board.

At the conclusion of the public hearing November 16, 1995, in open deliberations in accordance with the state Open Meetings Act, Mr. Schumacher, citing his reasoning, motioned for denial of the conditional use. The motion failed for lack of a second. Mr. Raver then motioned for authorization of the request, subject to conditions of authorization expressed under CONCLUSION. Mr. Reichlin moved to second Mr. Raver's motion. Mr. Schumacher dissented. Mr. Reichlin announced that a written decision would be issued within thirty days.

On November 27, 1995, the County Commissioners of Carroll County adopted Ordinance Number 142, amending the zoning ordinance. The amendment to Article 20 defines a *communications tower complex*. The amendment to Article 4, Section 4.11, Utility Equipment and Towers, limits communications tower complexes to "I" districts ("I-R" Restricted Industrial District and "I-G" General Industrial District) as conditional uses, and establishes additional conditions and exceptions governing the use. The amendments became effective immediately upon adoption.

Due to the amendments and in order to comply with the state Open Meetings Act, the Board met publicly December 1, 1995, to acknowledge that Ordinance Number 142 affected the application in this case and superseded the Board's decision announced November 16, 1995.

During the December 1 meeting and on motion by Mr. Raver with second by Mr. Schumacher and concurrence of the Chairman, the Board ordered preparation of the decision in this case as heard and decided prior to adoption of Ordinance Number 142, and that enactment of Ordinance Number 142 rendered the application and November 16 decision moot.

The application, testimony and evidence comprising the record of this case are hereby included by reference in this decision.

The pertinent findings include the following facts:

FINDINGS OF FACT

The applicant's search for a new transmission site began about February 1994. As indicated by several witnesses, other areas of the county were considered as potential sites for erecting the towers (Protestant's Exhibit 1). Inquiries were mailed to land owners to determine if they were interested in selling land. Either the owners did not respond, or the sites were rejected due to one or more problems. Mr. and Mrs. Mercer responded to the inquiry and the site was determined to be suitable for the project by the applicant.

The applicant, Mr. Louis Mangione, has contracted to purchase Mr. and Mrs. Mercer's 390± acre farm located to the north and east of Hoods Mill Road. As depicted by the surveyor's plat submitted with the application and identified as part of Applicant's Exhibit 1, the southerly property line borders the CSX Transportation railroad, (identified on Protestant's Exhibit 1 as B & O RR), and is adjacent to the South Branch of the Patapsco River and Howard County.

Mr. and Mrs. Mercer's home is of historic significance and is not included in the sale. They plan to maintain their residence there.

Although some residential development has occurred in the past and more rapidly in recent years including fifteen residential lots subdivided from Mr. and Mrs. Mercer's farm, agriculture is the dominate land use in the immediate area. The aerial photograph taken in 1992, Protestant's Exhibit 3, portrays the agricultural versus residential land uses. Other exhibits, such as photographs and tax assessment maps, also depict land uses in the area. A large lot subdivision is located adjacent to the northwest corner of the farm on Old Washington Road; two smaller lot subdivisions are located on the south side of Obrecht Road, more than one-half of a mile north of the farm; and residential development has occurred to the east along Gaither Road between Howard County and Obrecht Road, more than 3,000 feet from the proposed location of the towers.

The Town of Sykesville (population 3,000 in 1995) is located slightly more than a mile to the east. The proposed site is within the community planning area of the Town. Notice of the public hearing was provided to the Town's Manager, Mr. Candland, who responded with comments by letter dated September 25, 1995.

The maximum number of lots for residential development allowed in the "A" Agricultural District by the zoning ordinance have been recorded in the plat records of Carroll County in accordance with the county's subdivision regulations. The applicant proposes to place the "A" Agricultural District land not utilized for the towers into a Maryland conservation trust easement that will restrict its use to agriculture, precluding future residential development. Approximately 113 acres of land zoned "C" Conservation District may be subdivided in accordance with applicable law.

The topography of the area is typical of a fairly large stream valley, with the elevation of the land rising substantially on both the north and south sides of the South Branch of the Patapsco River. On the farm, the elevation peaks along a ridge that extends easterly from near the shed and barn. To the north of the ridge, the land slopes downward again. Until 1984, the emphasis of the farm was dairying. Thereafter, various grains have been raised. Land suitable for dairying or cultivation has been cleared. Natural storm water drainage ways and woodland not suitable for cultivation have been retained. A pond is located on the southerly slope of the ridge within the area of the proposed towers.

As generally portrayed by Applicant's Exhibit 1, a rectangle 1,050 feet in width by 2,300 feet in length, having an area of 55.44 acres, is located east of Hoods Mill Road near the center of the farm. The locations of six towers, described as 350± feet in height are portrayed within the rectangle. Guy wires, anchored to the ground, will be installed at three levels on each tower for purposes of structural integrity. Examples of the proposed towers are depicted by photographs identified as Applicant's Exhibits 12A-D. A proposed building, 15 feet by 30 feet, is shown in the southwesterly corner of the rectangle. The dimensions of the rectangle provide sufficient space for one or more of towers to fall linearly, intact, without striking or damaging adjacent improvements. It may be necessary to shift the location of rectangle as shown on the plat in order to comply with location and site development plan requirements (Sections 4.11 and 4.26).

Vehicular access to the rectangle is depicted by a proposed driveway extending from Hoods Mill Road. After construction, vehicular traffic will involve routine weekly visits to the site.

The towers are electrified. For purposes of security, chain link fences, 8 feet in height, are proposed to be erected to enclose the rectangle, with separate fences erected 50 feet from, and surrounding, the base of each tower.

The towers must comply with Federal Aviation Administration requirements, including painting and installation of warning lights. The Board will require that red lights be used for both day and night. Section 4.11(c)(7) precludes the use of artificial or strobe lighting at night, except as required by the Federal Aviation Administration or other federal or state agency. However, shields could, and shall be required to be installed on the towers to obstruct view of the lights from the ground.

The purpose of the towers is provide platforms for AM radio transmission antennas for WCBM, 680 Khz, which is licensed by the Federal Communications Commission. The primary city of license is Baltimore. However, the station serves the Baltimore metropolitan area. With the demographic changes that have occurred since the station was established, including migration from the service area and residential development to the west, the population once within the service area has diminished substantially. The population growth to the west is not within the service area of the existing transmitting antennas, and in order to provide service, the transmitting antennas must be relocated. The area suitable for relocation of the antennas is limited because of licensed areas of service of other radio broadcasting stations and WCBM's own service area. The antennas must be directed toward the populated area to be served. Six towers, 350± feet in height, are required as antenna platforms.

There are no existing towers or structures within the area of transmission that can provide the required platforms for the antennas.

A number of homes located in Howard County are visible from the area where the towers will be located. Consequently, the towers will be visible from these and other properties within Howard County. In Carroll County, a number of homes adjacent to the farm are also visible from the site. Likewise, the towers will be visible from these and other properties. Due to their height, portions of the towers and especially the warning lights may be visible from all directions for miles, depending on intervening topography, trees, and structures that obstruct the view, as well as lighting and weather conditions affecting visibility.

A realtor and real estate appraiser testified on behalf of the applicant. Both witnesses testified that in their professional opinion, based on experience, towers did not adversely affect or depreciate residential property values, and that establishment of the towers at this location would not cause any more adverse effects at this location than any other location within the district. Aerial photographs depicting residential developments that have occurred adjacent to existing tower sites were introduced in substantiation of their conclusions (Applicant's Exhibits 3, 4, 5, 9 and 10). In several instances, some homes were existing and adjacent to the sites prior to erection of the towers.

A real estate appraiser, accepted as an expert witness, testified and presented evidence on behalf of the opposition. The evidence included copies of portions of the zoning and state tax assessment maps of the area, and the Comprehensive "Mini" Plan for the Freedom Area and Environs (Protestant's Exhibits 12, 13, and 14 respectively). The appraiser also referred to the

Carroll County Master Plan map, Protestant's Exhibit 2, regarding existing and planned residential development adjacent and east of the proposed site; the Maryland Residential Property Disclosure Statement, Protestant's Exhibit 17; the Uniform Residential Appraisal Report, Protestant's Exhibit 18; and, the U.S. Department of Housing and Urban Development, Baltimore Office, Valuation Condition Sheet, Protestant's Exhibit 19, that are used in the sale of residential properties. In considering the potentially damaging effects of the towers on the aesthetics of the site, the appraiser concluded that the property values and marketability of the homes of Mr. and Mrs. Mercer, Mr. Thurber, and Mr. and Mrs. Wheeler could be severely affected contrary to the opinions of the realtor and real estate appraiser who testified on behalf of the applicant.

With the exception of one owner and resident of a nearby property, all other owners and residents expressing their concerns in this case were opposed to authorization of the conditional use.

Mr. Thurber's counsel, and unrepresented protestants attacked the application, citing numerous reasons that the conditional use should be denied including:

- aesthetics, including the number and height of the towers and warning lights
- health and safety, involving high power radio frequency energy, ice falling from the structures, and that the towers would attract children in the neighborhood who might attempt to climb the security fences and towers
- radio interference with electrical appliances and equipment
- depreciation of residential property values
- environmental problems
- adversely affects to the quality of life of residents of the area
- detrimental affects to the historical character of the Town of Sykesville
- the application is frivolous, and the towers unnecessary and incompatible with the existing residential development and of no benefit except to the applicant

However, the majority of the Board finds:

- the concerns related to licensing and operation of the radio station rest with the Federal Communications Commission.
- the concerns regarding aesthetics, health and safety, environmental problems, and adverse affects to the quality of life of residents of the area are personal opinions, presented without substantiating evidence that effects at this location would be greater than else where in the district

- although portions of the towers may be visible from within the corporate limits of the Town of Sykesville, particularly the most recently annexed area, there is no probative evidence that the towers and warning lights will adversely affect the residents or historical district to any greater extent than the general public
- the concerns pertaining to depreciation of residential property values and marketability, particularly of Mr. and Mrs. Mercer's home, Mr. Thurber's home, and Mr. and Mrs. Wheeler's home, although expressed by an expert in real estate appraisal, are not substantiated by probative evidence
- there is no probative evidence that the application is frivolous or that the proposed towers are unnecessary
- whether the towers will benefit other than the applicant is not relevant
- the conditional use, in compliance with the provisions of the zoning ordinance, is legislatively deemed to be compatible with the other uses allowed in these districts unless there is probative evidence that the proposed conditional use fails to meet the standard established by the Court of Appeals in the case of *Schultz v. Pritts*, cited below

APPLICABLE LAW

As depicted by zoning maps 77B and 78A, the Mercer farm is zoned "A" Agricultural District and "C" Conservation District. The surveyor's sketch of the Mercer Property, Applicant's Exhibit 1, also portrays the respective zoning. The predominate zoning district of the 55 acres comprising the rectangle in which the six towers are planned is "A" Agricultural District. The remaining acreage within the rectangle is "C" Conservation District.

At the time the application was submitted, Article 4, General Provisions; Section 4.1, Ordinance Deemed Minimum Regulations; Uniformity, and Section 4.11(c), Utility Equipment and Towers read respectively and in relevant part:

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.

(c) Communications Towers

- (1) Communications towers are prohibited in all "R" districts, the "H" district and the "MPH" district.
- (2) Communications towers are permitted as a conditional use in the "A" district and in the "C" district subject to the conditions and exceptions noted hereafter, imposed elsewhere in this subsection, imposed elsewhere in Ordinance 1E, imposed elsewhere by law, and subject to the following:
 - a. A minimum setback of a distance equaling the height of the tower. The setback shall be

measured from the base of the tower to the boundary line of the property owned, leased, or controlled by easement by the applicant

- b. Subject to a minimum distance requirement of distance equaling the height of the tower plus 200 feet from all "R" districts, the "H" district and the "MPH" district or the nearest part of any existing dwelling, school, church or institution for human care, in any other district.
- c. Subject to a minimum setback from all overhead transmission lines of a distance equaling two times the height of the tower and all masts.
- d. Subject to site plan approval by the Planning Commission pursuant to Section 4.26.

[(3) is omitted]

- (4) Communications towers erected on existing structures other than communications towers shall be allowed in any district, provided the height of the tower does not exceed one-third of the height of the existing structure and the total height of the existing structure and tower does not exceed 200 feet.
- (5) No permit to construct a communications tower may be issued unless the applicant demonstrates to the...Board of Zoning Appeals, need for the tower and that the applicant has exhausted all alternatives to constructing a tower. Applicants are required to prove need by:
 - a. Demonstrating via statement or other evidence that, in terms of location and construction, there are no existing towers, buildings, structures, elevated tanks, etc., able to provide the antenna platform required;
 - b. Providing evidence, including coverage diagrams and technical reports, demonstrating that collocation on existing sites is not technically possible in order to serve the desired need. Collocation is not possible if:
 1. Planned equipment would exceed the structural capacity of existing and approved towers, considering existing and planned use of those towers, and existing and approved towers cannot be reinforced to accommodate planned or equivalent equipment at a reasonable cost;
 2. Planned equipment will cause RF

interference with other existing or planned equipment for that tower, and the interference cannot be prevented at a reasonable cost;

3. Existing or approved towers do not have space on which planned equipment can be placed so it can function effectively and at least in parity with other similar equipment in place or planned; or
4. Other reasons make it impracticable to place the equipment planned by the applicant on existing and approved towers.

c. Providing such other information as may be required.

If it is determined that the requirements of (1) or (2) above have been met, an application for a Zoning Certificate may be considered pursuant to the requirements of this Section.

- (6) An application for a Zoning Certificate for a communications tower must be accompanied by an affidavit from the applicant stating that space on the proposed tower will be made available to future users, when possible.
- (7) Except as required by the Federal Aviation Administration or other federal or state agencies, no tower may use artificial lighting or strobe lighting at night.
- (8) An applicant for a Zoning Certificate for a communications tower must execute an agreement with the County, in a form legally sufficient to the County, requiring the removal of the tower within six months after the tower ceases to function as a communications tower.
- (9) In reviewing any application or site plan under this Section, among other things, an agency shall consider the extent to which the proposed use seeks to:
 - a. Minimize adverse visual effects of towers through careful design, siting and vegetative screening;
 - b. Avoid potential damage to adjacent properties from tower failure and falling ice through engineering and careful siting of tower structures;
 - c. Lessen traffic impacts on surrounding residential areas;
 - d. Maximize the use of new communications transmission towers in order to reduce the number

of towers needed; and

- e. Demonstrate that comparable sites are not available in nonresidential or rural areas, where the use is proposed in a residential or conservation zone when otherwise protected from residential development.

- (10) The..., Board of Zoning Appeals and the Planning Commission can refer any application to appropriate agencies for comments.

Conditional uses are defined in Article 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.

Section 17.7 governs the Board in considering conditional uses and specifies:

Limitations, Guides and Standards

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.

As stated in the summaries and arguments presented by the applicant's attorneys and protestant's attorney, the Board is also governed by decisions of the courts. In the case of *Schultz v. Pritts*, 291, Md., 1, 20-21, (1981) the decision reads in relevant part:

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.)

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 the 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 from November 16, 1995, for issuing this decision.

REASONING

If decisions of this Board were to be determined by public opinion, the conditional use would have to be denied. Numerous opponents strongly object to the conditional use for diverse reasons, and contend that the proposed towers are not compatible with the existing residential development and must be denied.

However, the Board is governed by the zoning ordinance and decisions of the courts. The courts have ruled that decisions of the Board are not to be dictated by public opinion, either favorable or unfavorable, lacking corroborating probative evidence. The applicant must show that the conditional use conforms with the provisions of the zoning ordinance and the standards set by the courts.

In authorizing or denying conditional use applications the Board's task is to consider the record of the case and applicable provisions of the zoning ordinance, and determine whether or not the applicant has established that the proposed use conforms with the provisions of the zoning ordinance and standards set by the courts.

Although considerable concern was expressed in opposition to the request because of blanketing interference effects caused by the transmission of radio signals, the authority to regulate radio stations, including such complaints, rests with the Federal Communications Commission, not this Board.

In carefully considering the testimony and evidence submitted on behalf of the conditional use, the majority of the Board is convinced that the proposed plan for the establishment of the six towers complies with the provisions of Section 4.11 necessary to proceed with review of the site development plan by the Planning Commission.

Even though there is strong public sentiment in opposition to the conditional use, the majority of the Board finds that the applicant has shown that the towers will not unduly affect the residents of adjacent properties, the values of those properties, or public interests as described in more detail in Section 17.7.

Furthermore, the majority of the Board is convinced that the establishment of the towers, in compliance with applicable laws and the conditions of authorization imposed by the Board and stated below, complies with the standard established in *Schultz v. Pritts*, *supra*.

NOVEMBER 16, 1995 CONCLUSION

Based on the findings of fact, the then applicable law, and reasoning expressed above, the majority of the Board orally authorized the conditional use, subject to the following conditions of authorization:

1. The chain link security fences, 8 feet in height, shall be required to be erected, in accordance with testimony, at the perimeter of the 55.44 acre rectangle, with individual fences, 50 feet from, and surrounding the base of each tower.
2. The warning lights required to be erected on the towers for purposes of aerial navigation safety shall be restricted to red lights only, both day and night, unless directed otherwise by the Federal Aviation Administration.
3. Shields shall be erected appropriately below each level of lights on each tower to obstruct view of lights from the ground.
4. The applicant shall establish a system to respond within fifteen days to complaints of radio frequency interference caused by WCBM within a two mile interference free contour, and to resolve complaints within thirty days of receipt for a period of two years after commencing radio transmissions from this site.

DECEMBER 1, 1995 CONCLUSION

With the November 27, 1995, adoption and enactment of Ordinance Number 142 by the County Commissioners of Carroll County prior to the issuance of the written decision, the provisions of Article 4, Section 4.11 of the zoning ordinance no longer allow communications towers as conditional uses in the "A" Agricultural District and "C" Conservation District. Therefore, the application and decision, *supra*, in this case are moot.

12-27-95

Date

Karl V. Reichlin

Karl V. Reichlin, Chairman