

IN THE MATTER OF	:	BEFORE THE
<b>T-MOBILE NORTHEAST, LLC</b>	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 10-030C

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**DECISION AND ORDER**

On February 28, 2011 and March 7, 2011, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of T-Mobile Northeast, LLC, for conditional use approval of a Commercial Communications Tower, specifically a 127-foot tall communications tower designed as a silo that is 16-18 feet in diameter, with up to six T-Mobile antennas centered at 120 feet, and equipment compounds for T-Mobile and future co-locators. The proposed tower and equipment compounds would be located in an RC-DEO (Rural Conservation-Density Exchange Option) Zoning District. The petition is filed pursuant to Section 131.N.14 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner (T-Mobile) certified to compliance with the advertising and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sean Hughes, Esquire, represented T-Mobile. Michael D. McGarity, Hillorie Morrison, Curtis Jews, and Oakleigh Thornton testified on behalf of T-Mobile. Jen Noyes, Jerry Jubb, J.

Michael Lane, and Walter E. Carson testified in opposition to the petition. Ted Mariani testified on his own behalf and as the Concerned Citizens of Western Howard County representative.

T-Mobile introduced into evidence the exhibits as follows.

1. Amended Conditional Use Plan dated 2.28.11,
2. Resume of Michael McGarity
3. Resume of Hillorie Morrison
4. Google Map of Property
5. Mock silo housing telecommunications tower, Frederick County
6. Mock silo housing telecommunications tower, Knoxville Md.
7. Mock silo housing telecommunications tower, Gaithersburg, Md.
8. Telecommunications tower, Clearview Estates, Howard County
9. Balloon tests, Photographs A-N
- 10A. Location Map BAN (Baltimore Area Network) 597
- 10B. Existing T-Mobile Sites Proximity Map
11. Jeppesen Report, February 1, 2011
12. Resume of Oakleigh J. Thorne
13. Resume of Curtis Jews
14. Current On Air Coverage Map
15. Coverage with 7BAN597E@120 feet
16. Second Amended Conditional Use Plan, dated March 3, 2011

The Opposition introduced into evidence the exhibits as follows.

1. Letter from Concerned Citizens of Western Howard County authorizing Ted Mariani to testify on its behalf
2. Letter from Concerned Citizens of Western Howard County authorizing Walter E. Carson to testify on its behalf
3. Resume of Ted Mariani
4. Photographic copy, topography of Glenwood Church area, showing elevation of property
5. Photographic copy, telecommunications monopole at Glenwood Church on Rte. 7
6. Photographic copy, mock telecommunications silo on Route 94, south of Florence Road (3268 Woodbine Road).
7. Surrounding telecommunications towers proximity map, area marked in blue, based on Petitioner's Exhibit
8. Photographic copy, Cherry Grove Farm silo less than 65 feet in height.
9. Aerial view of Brendel Farm Silo

10. Aerial view of Brendel Farm
11. Aerial view of Mullinix Farm
12. Aerial view of mock silo housing telecommunications tower, Knoxville Md
12. Wikipedia history of Edwin Warfield
13. Oakdale, County Historic Site Inventory, HO-2, nomination form
14. Photograph copies, Oakdale and its viewshed

### **Preliminary Matters**

At the outset of the February 28, 2011 hearing, T-Mobile introduced into evidence an amended conditional use plan dated February 28, 2011. The amended plan depicts the dedicated 50-foot ingress and egress easement to Lots 1, 2, 3, and 4 of the Byong Yoo Subdivision. Additionally, the property boundary along Daisy Road is changed to reflect the dedication of an area to Howard County. Pursuant to Hearing Examiner Rule 9.5, I determined the amendment was not substantive and could be admitted.

At the close of the February 28, 2011 hearing, the Hearing Examiner instructed T-Mobile to amend the Amended Conditional Use Plan to depict the actual land use area of the proposed telecommunications tower.<sup>1</sup> At the March 7, 2011 continuation hearing, T-Mobile introduced into evidence a second amended conditional use plan dated March 3, 2011. The second amended plan outlines a 2,515-square-foot land use area for the proposed telecommunications tower, according to General Note 18. Within this area are the mock silo, two equipment compound areas, the driveway and access area off the main driveway, and a small area around the silo. Pursuant to Hearing Examiner Rule 9.5, I determined the amendment was not

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<sup>1</sup> The petition, conditional use plans, and the Technical Staff Report noted inconsistent land use areas for the tower.

substantive and could be admitted. The Hearing Examiner's findings and conclusions are based on the March 3, 2011 plan.

#### FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. Property Identification. The 10.47-acre, irregularly shaped subject property is located in the 4<sup>th</sup> Election District on the west side of Daisy Road about 4,800 feet north of Jennings Chapel Road. It is referenced as Tax Map 20, Grid 6, Lot 4, and is also known as 3200 Daisy Road (the "Property"). The Property is zoned RC-DEO ("Rural Conservation-Density Exchange Option). The Property is Lot 4 of the Byong Yoo Subdivision, Record Plat 6886.

2. Property Description. The Property is accessed from Daisy Road via an 800± foot asphalt and gravel driveway. This driveway leads to a dwelling in the northeast portion of the Property. In this same area are several accessory buildings. To the dwelling's west is a large pond, which lies about 130 feet at its closest point from the rear Property line.

On the driveway's south is a large metal accessory building and four sheds near the front of the Property. Behind these sheds are several attached barns with a silo near the central front area. The Technical Staff Report (TSR) estimates the silo to be about 50 feet in height. Behind (to the rear) of these barns is a large concrete area.

In the Property's rear are a stream, a 100-year floodplain, and a drainage and utility easement. Most of this area is wooded and the wooded area extends along portions of the

north and south property lines. The Property drops in elevation in a westerly direction from the front to the rear.

3. Vicinal Properties. Adjacent properties are also zoned RC-DEO. Adjoining the Property driveway on the south side are three lots of the Byong Yoo Subdivision. The three-acre Lot 1 fronts Daisy Road and is improved with a single-family detached dwelling. To the rear of Lot 1, the three-acre Lot 2 is also improved with a single family detached dwelling accessed from the Property's driveway. Lot 3, a 55± acre lot encumbered by an agricultural preservation easement, adjoins the south, west, and a portion of the east side of the Property. It is improved by a dwelling sited about 260 feet south of the barns on the Property, and several accessory structures, including a barn sited about 150 feet from the barns on the Property. Parcel 122, situated in the Property's northeast corner is a one-acre unimproved property.

On the north, extending to Daisy Road, is the adjoining Parcel 128, Preservation Parcel A, an approximately 71-acre preservation parcel of the Warfields Grant subdivision. There is an agricultural building on this lot, to the east of Parcel 122. The residential lots of this subdivision lie to the north of this preservation parcel and front on Spring House Court and Fields End Court.

4. Roads. Daisy Road has two travel lanes and about 18 feet of paving within a variable width right-of way (ROW). The estimated sight distance from the existing driveway entrance at Daisy Road is more than 500 feet to the north and south. According to Department of Public Works data, the traffic volume on Daisy Road north of Jennings Chapel Road was 811 average daily trips as of February 1999.

5. Water and Sewer. The Property is served by private water and sewer, neither of which is required by the use.

6. General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as "Rural Conservation." The General Plan Transportation Map depicts Daisy Road as a Major Collector.

7. Zoning History. There is no record of any specific Board of Appeals, Zoning Board, or Department of Planning and Zoning case for the Property.

8. Agency Comments. The Department of Technology and Communications commented on the outside mounting of the antennas, querying why the antennas cannot be located on the silo's interior.

9. The Proposal.

General Information. T-Mobile is proposing to construct and operate an unmanned commercial telecommunications tower located in the central south sector of the Property. The area of the proposed conditional use site is 2,515-square feet (the "Site"), as depicted on the March 3, 2011 conditional use plan. A 10-foot gravel access driveway off the existing driveway would provide access to the site and be used for parking. The tower would operate continuously and automatically with no employees on site except for maintenance visits occurring once every other month.

The Tower. T-Mobile is proposing to construct a 127-foot tall mock communications silo (the silo). The silo would be constructed in front of an existing barn and about 18 feet south of an existing silo. Conditional use plan general note 7 describes its proposed location as follows.

Latitude: N 39°16'52.40" (NAD 83)  
Longitude: W 77°04'26.66" (NAD 83)  
Ground Elevation: 496± AMSL (NAVD 88)  
Proposed Silo Elevation 623'AMSL (NAVD 88)

T-Mobile's antennas would be centered at 120 feet. Co-locator antennas would be located below.

Equipment and Compounds. T-Mobile's ground equipment will be installed on a 10-foot by 20-foot concrete pad within a 25' by 20' compound area enclosed by a six-foot board-on-board fence. It would be located about 10 feet to the silo's south. An adjoining 20' by 20' area on the south side of this is reserved for future co-locators. The T-Mobile compound depicts six proposed T-Mobile antennas and three future antennas.

10. Mr. McGarity testified that the silo meets the tower setback requirement imposed by Zoning Regulations Section 128.E.2.a.(1).<sup>2</sup> The March 3, 2011 conditional use plan notes the silo is 310± feet from the southeasterly lot line, 148± feet from the south property lot line, 444± feet from the west property line, and 427± feet from the north property line. The use also complies with 30-foot use setback of the RC zoning district.

11. In response to the Hearing Examiner's concern about the loss of mature trees in front of the equipment area, Mr. McGarity replied that there might be some tree loss during construction. The Hearing Examiner advised T-Mobile that she might impose a condition requiring it to replace any trees lost should she grant the petition.

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<sup>2</sup> Section 128.E.2.a.(1) requires a telecommunications tower to be set back from public street rights-of-way and other residentially-zoned lots at a distance equal to the tower height (measured at ground level).

12. In response to questioning by Mr. Mariani during cross-examination about the elevation of the silo, Mr. McGarity testified that the antennas would be about 616 feet in elevation. The elevation at Daisy Road is between 570 and 580 feet. He did not know the height of area mature trees. The silo would be sited about 140 feet from the floodplain.

13. During Ms. Morrison's testimony, she contended the proposed mock silo was similar to others in the region and similar in appearance to working silos with antennas. Petitioner's Exhibit 5 depicts a Howard County silo antenna. Exhibit 6 depicts a 130-foot high working silo in Frederick County. She pointed out that the antennas on this silo are just below the crown in the manner of the proposed silo tower in this case. Exhibit 7 is a mock silo on a farm in Montgomery County. Ms. Morrison stated that T-Mobile worked with county preservation staff on the installation. Exhibit 8 is a traditional lattice tower in Clarksville, which she explained was not the type of tower proposed in this case.

14. On recall, the Hearing Examiner questioned Ms. Morrison about the proposed exterior location of the antennas, referencing the Department of Technology and Communications comments. She replied the antennas could be placed on the inside of the silo for about two and a half times the cost of exterior antennas. She did not think the silo would be so visible as to justify the cost.

15. T-Mobile performed a balloon test for a 145-foot monopole, as was originally proposed, according to the information in the pre-submission community meeting notes in the case file. The balloon was launched at 145 feet in late October 2010. Ms. Morrison drove around the surrounding roads and took photographs from various locations based on the



visibility of the balloon. These locations are depicted on Petitioner's Exhibit 9 Location Map. After T-Mobile revised the telecommunications tower to include a 127-foot high mock silo, based on comments at the pre-submission hearing, T-Mobile simulated its visibility using the same photographs. Petitioner's Exhibit 9A-N.

Address/View	Exhibit/Photograph	Exhibit/Simulation
3116 Springhouse Court (.21 Miles from silo)	A/visible	B/not visible
1601 Pheasant Ridge Court (.86 miles from silo)	C/visible	D/not visible
Ed Warfield Court and Daisy Road (.91 miles from silo)	E/visible	F/not visible
View from 3210 Daisy Road. (.08 miles from silo)	G/visible	H/visible
Intersection, Cliff & Daisy Roads (.24 miles from silo)	I/visible	J/visible
3697 Jennings Chapel Road (.65 miles from silo)	K/visible	I/not visible
3101 Springhouse Court (.21 miles from silo)	M/not visible	None <sup>3</sup>
3145 Lorenzo Court (.26 miles from silo)	N/not visible	None

According to these exhibits and Ms. Morrison's testimony, the upper section of the proposed mock silo would be visible from two locations.

16. On cross-examination by Mr. Mariani, Ms. Morrison acknowledged the antennas would be sited at about at an elevation of about 616 feet. When questioned, she did not know the height of the silos in T-Mobile's exhibits in relation to the size of the farms on which they are located, nor did she know of any silos taller than 100 feet in the area. On further cross-examination by Mr. Mariani, she stated that the photographs were taken during late October

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<sup>3</sup> No simulation was done where the balloon test photographs showed no visibility.

when leaves were still on the tree. Although the view would be different during winter months, the overall density of trees would provide screening, in her opinion.

17. The Hearing Examiner questioned Ms. Morrison about how she selected the sites for photographing the balloon test. She stopped whenever the balloon was visible on a public road. The balloon was not visible from some area houses due to topographic changes.

18. Ms. Morrison continued her testimony to discuss the method by which T-Mobile chose the Property as the proposed site of the tower. Surrounding on-air telecommunications facilities are denoted on Petitioner's Exhibit 10. In order to fill the gap in coverage within this area, T-Mobile first looked at a property in the Fields End Subdivision. At the pre-submission hearing, T-Mobile learned the site was an undevelopable county open space lot. T-Mobile also contacted a nursery on Jennings Chapel Road about the possible location of a tower on the property but the owner was not interested in leasing property to T-Mobile. There are no water tanks and the existing 50-foot existing silo on the Property, it would not meet T-Mobile's requirements. There are no government structures in the search area. During cross-examination, Ms. Morrison stated that t-Mobile did not negotiate to locate a tower on any B-2 (Business: General) zoned properties at the intersection of Daisy Road and Ed Warfield Road/Union Chapel Road because these properties would not meet the requisite setbacks and T-Mobile rejected the sites based on coverage considerations. Additionally, the commercial property located north at Daisy and Union Chapel Road is not within the one-half mile radius alternative site search requirement of the conditional use criteria. It lies about .91 miles distant. When asked again about why T-Mobile did not search further north, she replied that the RF

engineer establishes the search ring, and then T-Mobile looks at parcels that can be leased and are good for zoning, but they first must meet the RF coverage objective.

19. T-Mobile then determined a tower meeting coverage requirements could be located at the subject property and held a second pre-submittal community meeting where T-Mobile presented a proposal for a 165-foot monopole. In response to concerns by those attending the meeting, T-Mobile switched to a silo design, according to Ms Morrison. After the balloon test, which showed the visibility of a mock silo at 145 feet, the silo was reduced to 127 feet to minimize its visibility.

20. Ms. Morrison further opined with respect to adverse impacts that the compound would be minimally visible because it sits at a lower elevation. It was her opinion that noise would be confined to the property. There is room for a T-Mobile vehicle to park. An employee would visit about once a month in an SUV to take readings. Additionally, it would improve wireless communication in the county. The fence would be locked.

21. Referring to Petitioner's Exhibit 11, Ms. Morrison explained it is a study concluding the mock silo requires no marking or lighting in accordance with Federal Aviation or Federal Communications Commission regulations.

22. When questioned by Mr. Mariani about whether a Section 106 federal National Environmental Policy Act (NEPA) historic review had been conducted, Ms. Morrison replied that she did not know.<sup>4</sup> An initial 106 screening would indicate whether a full Section 106 review

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<sup>4</sup> An historic Section 106 NEPA review requires consideration of historic preservation in the multitude of Federal actions that take place nationwide, including any FCC licensing.

was mandated. Unlike some jurisdictions, Howard County does not require telecommunications petitioners to produce the Section 106 report as part of a petition.

23. Mr. Thornton testified to be an appraiser who has conducted studies on the impact of telecommunications towers on property values, including a study for Clearview Estates in Howard County. These studies indicate telecommunication towers have no impact on area property values. It was his further opinion that the proposed mock silo telecommunications tower would have no negative impact of area property values.

24. Curtis Jews testified to being a radio frequency (RF) engineer who has worked on more than 2,000 telecommunication tower sitings. Referring to Petitioner's Exhibit 14 and 15, he explained they depict, respectively, existing T-Mobile coverage and improved coverage with the proposed tower. With the proposed tower, in-building and in-vehicle coverage would be improved. The proposed site would produce a better coverage balance between in-building, in-vehicle, and on street-coverage. A site further north would not be as balanced. The three T-Mobile facilities depicted on Petitioner's Exhibit 14 are directed "inward." If the proposed tower were approved, it would relieve or add capacity to the area of need (off-loading). This location was chosen because it provides better coverage and dropped or blocked calls would decrease.

25. During cross-examination by Mr. Mariani about the small size of the coverage area, Mr. Jews agreed that it was small, and therefore less efficient because it had less coverage. When asked about the coverage possible through relocation to the commercial properties at Ed Warfield and Daisy Road, which sit at a higher elevation, he replied that there would be broader coverage, but not an optimal balance in coverage. On further cross, Mr. Jews testified that one

of the siting issues is what properties are made available for a tower.

### **Opposition Testimony**

26. Opponent Jennifer Noyes, who resides at 3116 Springhouse Court, testified that she would not buy a house near a cell tower. She lives about 334 yards from the proposed site. She could periodically see the balloon when it was up in areas not represented in the exhibits. She would not have purchased her home had the telecommunications tower existed at the time of purchase.

27. Opponent Terry Apperson-Jubb, who resides at 3112 Springhouse Court, testified to agreeing with her neighbor Ms. Noyes.

28. Opponent J. Michael Lane, who testified to residing 3210 Daisy Road, testified to being the closest neighbor to the proposed tower. He explained that there are many problems with the maintenance of the shared private driveway providing access to the site. After contributing to the driveway's maintenance, he learned it is being used "more than intended." The Fitzgeralds rent some of the structures as residential rentals and others to commercial uses. Dust kicks up from the vehicles on the driveway. He further testified that he purchased the property for the view, which would be impaired by the mock silo.

29. Mr. Carson, the President of Concerned Citizens of Howard County, testified that he would like the Hearing Examiner to deny the application until the county completes its telecommunications tower policy. The property is not an actual farm and it is located along a scenic road. He believed a tower should be located along a major arterial like Routes 32, 97 and 94. There are other sites that a tower might be better located with less significant impact,

by which he meant the pollution of visual space.

30. Mr. Mariani's testimony focused on the size of working and mock telecommunications silos in relationship to the size of farms and properties on which they are located and the silos' alleged siting below area tree lines. He contended these three characteristics are the standard by which a mock telecommunications silo should be evaluated. To support this argument, he introduced into evidence several photographs and testified about multiple working and mock silos in the region.<sup>5</sup>

A. The Glenwood Baptist Church (Route 97). Referring to Opponents' Exhibit 4 and 5, Mr. Mariani testified they depict the higher elevation and design of the monopole site at the Glenwood Baptist Church on Route 97. The church site sits at a higher elevation than the Route 97 roadbed and the properties on the west side of Route 97. The monopole is above the tree line, a row of evergreen that appears to be located on the church property.

B. Mock silo, Route 94 (3268 Woodbine Road). Referring to Opponents' Exhibit 6, Mr. Mariani testified it depicts the higher elevation of the mock silo on Route 94, south of Florence Road, and alleged the silo sits below the tree line. On cross-examination, T-Mobile argued through its attorney that the silo is not below the tree line.

C. Silo tower in Frederick County, 1129 Brentland Road. Referring to Petitioner's Exhibit 5 and the aerial view introduced as Opponents Exhibit 12, Mr. Mariani testified the silo

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<sup>5</sup> The Hearing Examiner notes a difficulty in associating addresses with the property depicted in Mr. Mariani's exhibits, as the properties were often identified by the name of the property owner or farmer.

was an existing working silo with a telecommunications tower fitted over it. He contended the silo was located on a large farm. This silo is bigger than any silo (working or mock, apparently) in Howard County and it is about the size of the silo proposed in the instant case.

31. In support of his argument that the proposed mock tower exceeds the typical height of area silos, Mr. Mariani drove around western Howard County and then searched the sites on Google. He introduced into evidence Opponents Exhibit 8, apparently a working silo on "Cherry Grove Farm," located on Jennings Chapel Road, and Opponents Exhibits 9 and 11, which depict a silo on an historic Union Chapel Road Farm (the 200+ acre Brendel Farm). He also introduced into evidence Opponents Exhibit 10, an aerial view of the Patrick Farm on Daisy Road, and Opponents Exhibit 11, an aerial view of the Mullinix Farm. The silos on the Patrick and Mullinix Farms are less than 75 feet in height.

32. It was Mr. Mariana's further testimony that in Howard County, high telecommunications towers are located on high grounds above the tree lines and near major highways, like the Riggs Meadow tower, the tower on the Lisbon shopping center off Route 94, the "Larryland" monopole at 1960 Old Annapolis Road (a 300+ acre working farm). On cross-examination, Mr. Mariani stated that Concerned Citizens of Western Howard County did not oppose the Larryland farm telecommunications tower conditional use.<sup>6</sup>

33. Testifying about what Mr. Mariani described as the adverse impact on his property,

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<sup>6</sup> In February 2010, the Hearing Examiner in Board of Appeals Case No. No. 09-043C approved a telecommunications tower, including a 140-tall monopole on this RC-DEO (Rural Residential-Density Exchange Option Overly) zoned property.

historic Oakdale, he asserted that a silo located about 500 feet away would interfere with his viewshed. During cross-examination, Mr. Mariani testified that his front porch sits at an elevation of about 570 feet and is some 500 feet from the 616-foot high mock silo (as marked on Opponents Exhibit 14). He also opined the trees seen on the viewshed shown on Opponents Exhibit 15 would not mask the view. He acknowledged he was not home during the balloon test.

34. Mr. Mariani admitted that the NEPA 106 process does not prohibit construction of a tower. The Maryland Historical Trust could seek mitigation, but it could not stop the tower. It would be a long, arduous and costly process for him to fight the case without the assurance that the tower could be stopped. In his view, the only way to preserve the setting is to deny the application.

35. The Hearing Examiner questioned Mr. Mariani about his claim that T-Mobile should have explored siting a tower on the B-2 zoned properties north of the proposed site. He explained that the corner properties include a vacant 4.5-acre site and a vacant 2.0-acre vacant site. In the northeast corner are multiple parcels, and the fourth corner is totally built out. The Hearing Examiner pointed out that a lattice tower could be built up to a height of 200 feet as a matter of right on these properties, and asked rhetorically if such a tower would have a lesser visual impact on the community. During questioning, Mr. Mariani commented that T-Mobile had contacted him about locating the tower on his property.



**CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, I conclude as follows:

**I. General Criteria for Conditional Uses (Section 131.B)**

**A. Consistency with the General Plan**

Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.**

General Plan Land Use Policies. The General Plan Policies Map designates the Property as Rural Conservation. Because the Rural Conservation zoning district permits commercial communications towers as a conditional use, the proposed use is not inconsistent with the goals and objectives of the General Plan. Further, when a local legislature has determined through its comprehensive plan that a certain use is appropriate in a zone by way of special exception (conditional uses in Howard County), the legislature has effectively declared that such uses, if they satisfy the specific requirements of the use, promote the health, safety and general welfare of the community. See *Anderson v. Sawyer*, 23 Md.App. 612, 624, 329 A.2d 716 (1974).

The Nature and Intensity of the Use. In this case, T-Mobile is proposing a low intensity, passive utility occupying a small portion of the Property. The utility would make infrequent use of the compound.

The size of the site in relation to the use. The compounds, mock silo, driveway and parking areas comprise a 2,515-square-foot conditional use area, which is only a small portion of the 10.47-acre Property (less than one percent). The silo meets the one-for-one foot tower setback requirement imposed by Zoning Regulations Section 128.E.2.a.(1) and exceeds the 30-foot use setback of the RC zoning district.

Mr. Mariani's argument about silos and property size is addressed in Part II.

36. The location of the site with respect to streets giving access to the site. The Site will be accessed from Daisy Road via an 800± -foot asphalt and gravel driveway. The estimated sight distance from the existing driveway entrance at Daisy Road is more than 500 feet to the north and south and the TSR reasons that sight distance is not an issue in this case owing to the nature of the proposed use (minimal traffic generation.). The driveway's location appears to have adequate sight distance for infrequent visits to the compound and it appears to be appropriately sized for the use, which will involve infrequent visits by T-Mobile employees, trucks and related equipment.

The appropriateness of the conditional use in combination with a permitted use on the site. The proposed tower will be combined with a permitted use, a residence. There is no evidence that the combination of uses is inappropriate.

With respect to Mr. Lane's testimony that the property is being used for various commercial enterprises, the Hearing Examiner notes the absence of evidence that these uses are not permitted. Moreover, as the Hearing Examiner explained during the proceeding, if these uses are unlawful, the appropriate venue to address the matter is the zoning and code enforcement complaint process. It is an improper exercise of the Hearing Examiner's function to transform zoning application proceedings into a violation and enforcement process. *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 337, 462 A.2d 546, 554, 1983 (internal citations omitted).

## **2. Adverse Impact**

Virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in such uses. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an RC zoning district. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects beyond those inherently associated with such a use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

Unlike Section 131.B.1, which concerns the harmony or compatibility of a proposed conditional use in relation to the General Plan, the adverse impact of a proposed conditional

use is evaluated at the neighborhood level through four "adverse impact" criteria set forth in Zoning Regulations Section 131.B.2: (a) the adverse impact generated by the use's physical conditions; (b) the adverse impact generated by any structures and landscaping; (c) the adverse impact of any parking areas and loading, and; (d) the adverse impact of the proposed access to the use. When evaluating a proposed conditional use under these criteria, the Hearing Examiner may deny the use only when one or more of the four adverse impacts generated by the use is atypical of or non-inherent to the operational characteristics of the conditional use category and the atypical adverse impact cannot be mitigated (often through conditions of approval.)

For the reasons stated below, I conclude T-Mobile has met its burden of production and persuasion to establish this proposed use will not have atypical adverse effects on vicinal properties beyond those ordinarily associated with a commercial communications tower concealed as a mock silo in an RC Zoning District.

**a. Physical Conditions. Whether the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.**

There is no evidence the use would generate inordinate noise or other physical impacts detectable from adjacent properties. Additionally, the mock silo requires no marking or lighting in accordance with Federal Aviation or Federal Communications Commission regulations. I therefore conclude that any such inherent physical conditions resulting from the proposed

conditional use will not be greater at the subject site than elsewhere in the zone or applicable other zones.

**b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.**

The proposed 127-foot mock silo would be sited about 148 feet from the south property line, 440 feet from the west property lines, 415 feet from the north property line and 310 feet from the Property's southeast corner. The silo meets the one-for-one foot tower setback requirement imposed by Zoning Regulations Section 128.E.2.a.(1) and exceeds the 30-foot use setback of the RC zoning district. The southern edge of the equipment compound would be located about 130 feet from the closest structure on an adjacent property, a barn (Lot 3) and more than 250 feet from the closest dwelling on an adjacent property (Lot 3). The proposed equipment compound is significantly beyond the 30-foot use setback requirement and will be buffered by a six-foot board on board fence. The Hearing Examiner is requiring the same type of fence for the co-locator compound. No walls are proposed.

An important issue in this case is the visual impact of the mock silo. Commercial telecommunications towers have certain adverse impacts inherent to the conditional use category. Because all towers need height to function, the view of the upper section of a commercial communication tower is an inherent adverse impact.

To gauge the adverse impact of the mock silo, T-Mobile performed a balloon test in late October 2010 for the then proposed 145-foot high monopole, raising a red balloon to 145 feet.

T-Mobile photographed the balloon from the eight locations depicted on Petitioner's Exhibit 9. As can be seen on Petitioner's Exhibits A, C, E, G, I, K, M and N, the balloon was visible from six locations. T-Mobile subsequently reduced the height of the tower to 127 feet and changed the structure from a monopole to a mock silo in response to the requests of neighbors attending the pre-submission community meeting. T-Mobile then simulated the visual impact of the silo using the same photographs. Petitioner's Exhibits 9B, D, F, H, J, and I. In these simulation images, the upper section of the mock silo is visible from two locations.

T-Mobile also presented evidence of other mock silos in the region, including photographs of a Howard County silo antenna (Petitioner's Exhibit 5) a 130-foot working silo with telecommunications antennas on a farm in Frederick County (Petitioner's Exhibit 6), and a mock silo on a farm in Montgomery County (Petitioner's Exhibit 7). These silos are plainly more visible in the landscape than the silo in this case.

The Opponents' opposition to the mock silo is based in part on the visibility of the upper section of the silo from the two locations, and possibly other locations. The Opponents presented no evidence of the silo's visibility from any other locations. Nor did they present evidence that the silo's visual impact was atypical for this type of telecommunications tower. Moreover, there is no statutory requirement that the upper section of a tower on a proposed site be made less visually intrusive. Nonetheless, T-Mobile took several measures to reduce the tower's visibility. It changed the tower design from a stealth monopole to a mock silo, at the request of neighbors, and reduced its height from 145 feet to 127 feet.

With respect to Mr. Mariani's testimony about the visual impact of the mock silo on the Oakdale viewshed, the Hearing Examiner concludes he presented no evidence contravening the visual impact evidence presented by T-Mobile. He was not at home or present on the property during the balloon test. Although he cross-examined Ms. Morrison about whether a Section 106 federal National Environmental Policy Act (NEPA) historic review had been conducted and testified to the historic significance of Oakdale, during his testimony he presented no evidence that Oakdale is listed on the National Register of Historic Places or is eligible for listing. In Maryland, the State Historic Preservation Officer advises and assists the FCC in carrying out its Section 106 responsibilities by reviewing a proposed tower that may affect sites listed or eligible for listing in the National Register of Historic Places. Moreover, when the 106 review process identifies projects that might adversely affect an historic place, federal law requires only that appropriate measures be taken to mitigate any adverse effects to the historic property. It is not cause for denying the tower.

Mr. Mariani also argued through testimony and evidence that the proposed telecommunication tower should be denied because it did not meet certain characteristics relating to the height of working and mock telecommunications silos, the size of farms and properties on which they are located, and the silos' alleged siting below area tree lines. Mr. Mariani effectively claimed that the proposed mock silo at its location would have atypical adverse impact, because the proposed site and mock silo do not comport with these characteristics.

The evidence of record does not convince the Hearing Examiner that the silos in evidence are all located below tree lines. More significantly, the characteristics Mr. Mariani wishes me to consider are not legislatively defined standards for evaluating the adverse impacts of a proposed telecommunications tower.

Tree density and coverage do factor into T-Mobile's evidence about the mock silo's visual impact. While T-Mobile's witnesses testified that area tree density would adequately mitigate the silo's visual impact, the Hearing Examiner takes notice of her own experience of the area during winter months, when the seasonal absence of foliage increases the visibility of the landscape, including the view of this area along Daisy Road.<sup>7</sup> As a mitigation measure, the Hearing Examiner is requiring all antennas to be placed inside the silo as a condition of approval. For the same reason, the Hearing Examiner is requiring T-Mobile to replace any trees lost during construction in the conditional use site, based on Mr. McGarity's concession that clustered trees in front of the compound area might be lost during construction.

T-Mobile's appraiser witness testified to studies indicating that Property values telecommunication towers have no impact on area property values. It was his further opinion that the proposed mock silo telecommunications tower would have no negative impact on area property values. Ms. Noyes testified that she would not have purchased her house had there been a telecommunications tower at the proposed site. Mr. Lane testified that he purchased his

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<sup>7</sup> Hearing Examiner Rule 10.1 allows the hearing examiner to use his or her experience, expertise, and knowledge of the property and area in making a decision.



property for the view. This general evidence is not sufficient to prove that property values would decrease or that the use of their property would be atypically impacted by the silo.

Based on the evidence of record, and considering the conditions of approval, the Hearing Examiner concludes the proposed mock silo and telecommunications tower will not discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

**c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.**

T-Mobile is proposing a turnaround area adjacent to the compound and at the end of the access driveway. The existing driveway appears to provide safe access, with adequate sight distance. There is no evidence of adverse impact from the location of the parking area and driveway, in accordance with Section 131.B.2.(c).

## **II. Specific Criteria for Communications Towers or Antennas (Commercial) (Section 131.N.14)**

Section 131.N.14.a provides for the use in an RC Zoning District subject to compliance with the criteria in Section 131.N.14.b.

**(1) An applicant for a new communication tower shall demonstrate that a diligent effort has been made to locate the proposed communication facilities on a government structure or, on an existing structure or within a non-residential zoning district, and that due to valid considerations, including physical constraints, and economic or technological feasibility, no appropriate location is available. The information submitted by the applicant shall include a map of the area to be served by the tower, its relationship to other antenna sites in the petitioner's network, and an evaluation of existing buildings taller than 50 feet, communication towers and water tanks within one-half mile of the proposed tower.**

A preliminary issue in the Hearing Examiner's evaluation of the record for compliance with this criterion is the area within which a petitioner demonstrates it made a diligent effort to locate the proposed communication tower. Those opposed to the tower at the Daisy Road location would have the Hearing Examiner deny the petition because T-Mobile did not demonstrate why none of the B-2 zoned properties to the north would not suffice as a site, which they argued would have less adverse impact on their rural community. Although beyond the one-half mile alternative sites search range, the Opponents claim T-Mobile was obliged to consider these non-residentially zoned properties because T-Mobile had looked at a potential site at the Fields Ends Subdivision to the north of the proposed site.

The Hearing Examiner disagrees. The somewhat inartfully written Section 131.N.14.b.(1) requires an applicant to demonstrate only why no alternative site was available within a one-half mile radius of the petition site. An alternative site may be a structure, including a government structure or an existing structure, an existing building taller than 50 feet, or an existing communication tower or water tank. An alternative site may also be a non-residential zoned property.

The county legislature has determined that a wireless tower applicant must make a reasonable effort in its conditional use siting application to locate on one of the legislatively determined, least intrusive alternative sites within a one-half mile. While there may be a alternative site available within the one-half mile search area, the petitioner may reject it if it does not meet coverage objectives, since the purpose of a tower is to fill a gap in coverage.

In this case, Ms. Morrison testified to there being no water tanks or other structures within a one-half mile radius and that the existing 50-foot existing silo on the Property could not accommodate a communications tower. T-Mobile also sought to locate a communications tower north of the proposed site, in the Field's End Subdivision, only to learn the site was an undevelopable county open space lot. They looked west. T-Mobile contacted Mr. Mariani and a nursery on Jennings Chapel Road about the possible location of a tower on the property, but neither was interested in leasing property to T-Mobile. T-Mobile subsequently identified the property currently proposed for the mock silo.

Assuming arguendo, without deciding, that T-Mobile should have considered the B-2 zoned properties further north on Daisy Road, where it intersects with Ed Warfield Road/Union Chapel Road, Ms. Morrison explained they would not meet T-Mobile's requirements and the zoning setbacks for the use. Those opposed to the mock silo presented no contravening evidence that these properties would meet T-Mobile's requirements and the zoning setbacks for the use. Nor did the Opponents desire for an alternative site consider the adverse visual impact of a commercial communication tower at the intersection of three county-designated scenic roads, where a tower up to 200 feet in height, including a traditional lattice tower, is permitted as a matter of right (without a public review process). Zoning Regulations Section 119.B.25.

Based on the evidence of record, the Hearing Examiner concludes T-Mobile has met its burden of production and persuasion under Section 131.N.14.B.(1).

**(2) New communication towers shall be designed to accommodate antennas for more than one user, unless the applicant demonstrates why such design is not feasible for economic, technical or physical reasons. Unless collocation has been demonstrated to be infeasible, the conditional use plan shall delineate an area near the base of the tower to be used for the placement of additional equipment buildings for other users.**

The proposed mock silo is designed to accommodate at least one other telecommunications carrier and related ground equipment. The antennas of future users shall also be located within the silo. The petition complies with Section 131.N.14.b.(2).

**(3) Ground level equipment and buildings and the tower base shall be screened from public streets and residentially-zoned properties.**

The topography and forested areas will screen these structures, in accordance with Section 131.N.14.b.(3).

**(4) Communication towers shall be grey or a similar color that minimizes visibility, unless a different color is required by the Federal Communications Commission or the Federal Aviation Administration.**

The petition states the mock silo would be grey or off-white in color, in accordance with Section 131.N.14.b.(4).

**(5) No signals or lights shall be permitted on a tower unless required by the Federal Communications Commission or the Federal Aviation Administration.**

No additional signals or lights are proposed, in accordance with Section 131.N.14.b.(4).

**ORDER**

Based upon the foregoing, it is this 24<sup>th</sup> day of March 2011, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:** that the petition of T-Mobile for a 16-18 foot diameter, 127-foot telecommunications tower designed as a mock silo, with up to six T-Mobile antennas centered at 120 feet, additional antennas below for co-locators, and equipment compounds for T-Mobile and future co-locators, in an RC-DEO (Rural Conservation-Density Exchange Option) Zoning District is **GRANTED;**

**Provided,** however that;

1. All antennas on the mock silo shall be located on the interior of the silo.
2. The co-locator equipment compound shall be enclosed by a six-foot board-on-board fence.
3. Any trees currently existing in front of the equipment area that are lost during constructions shall be replaced.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed: 3/24/11

**Notice:** A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.