

IN THE MATTER OF : BEFORE THE
BALTIMORE GAS & ELECTRIC COMPANY : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
: HEARING EXAMINER
: BOA Case No. 18-034C

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DECISION AND ORDER

On April 29, 2019, 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 Baltimore Gas and Electric Company (Petitioner) to expand an approved Public Utility special exception (conditional use) through the addition of a 106-foot communications tower accessory use in an RR-DEO (Rural Residential: Density Exchange Option) zoning district, filed pursuant to § 130.0.B.5 of the Howard County Zoning Regulations (HCZR).

The Petitioner certified to compliance with the notice and posting requirements of the Howard County Code. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure. John Gontrum, Esq., represented the Petitioner. Timothy Madden and Christopher Collins testified in support of the petition. No one appeared to testify in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. The Conditional Use Plan
2. The technical staff report
3. Friendship Manor BGE smart grid head-end PowerPoint

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds the following facts:

1. Property Identification. The subject property is located on the north side of Frederick Road about 800 feet east of Route 32. It is identified as Tax Map 0015, Grid 11, Parcel 30, Lot Par 1 and known as 12600 Rt. 144 (Frederick Road) (the Property).

2. Property Description. The 2.71-acre, irregular shaped Property is currently improved with a Public Utility Service Center a Baltimore Gas & Electric (BGE) equipment building, transformer, driveway, fencing and a 55-foot communications tower and associated equipment. A gated vehicular point of entry is located near the southwest corner of the lot. The lowest elevation is about 500 in the northwest corner of the Property and rises to about 558 feet at the southeast corner along Frederick Road.

3. Vicinal Properties. The RR-DEO zoned properties to the north, south, and east are each improved with a single-family residence. The western B-1 zoned property is improved with an office building.

4. Roads. Frederick Road has two travel lanes within a 70-foot right-of-way and a 40MPH speed limit. Technical staff reports more than 500 feet sight distances. The State Highway traffic count on Frederick Road in 2017 was 3,830 average daily trips.

5. Water and Sewer. The proposed development is outside the Planned Service Area for water and sewer.

6. General Plan. The Property is designated "Low Density" on the PlanHoward 2030

Designated Place Types. The General Plan's Transportation Map shows Frederick Road as a Minor Arterial.

7. Zoning History. BA 93-25E. The Board of Appeals on September 7, 1991 approved BGE's petition for an outdoor public utility substation subject to the 3 substantive conditions. On September 7, 1999, the BOA granted a time extension to December 31, 1999.

1. The Petitioner shall comply with all applicable Federal, State and County laws, regulations and guidelines, including but not limited to those regarding limitations on noise levels.
2. The Petitioner shall comply with all testimony presented and remove the existing substation when the proposed substation is operational.
3. The Petitioner shall install landscaping in accordance with the Howard County Landscape Manual and plan the south side of the enclosure fence with landscaping which exceeds the Type D screening, so as to completely shield the facility from the view of the road and properties across the street; and shall provide a Type D landscaping edge to the north, south, & east. The west side shall be screened with a Type B landscaping edge.

8. The Conditional Use Expansion Proposal. Petitioner is proposing to expand the existing Public Utility by removing a 55-foot communication pole and erecting a 106-foot communication tower in the same general location. The existing pole will be removed when the tower is operational.

9. Tim Madden testified to the petition's compliance with the general and specific conditional use approval standards. The tower itself is 106 feet high; with the 8 vertically flushed mounted antennas, the communication equipment will be just under 116 feet.

10. Chris Collins testified to the parent company's system-wide upgrade of BGE's smart grid network interface to permit service improvements, including a decrease in the number and length of outages.

CONCLUSIONS OF LAW

I. General Criteria for Conditional Uses (§ 131.0.B)

Based upon the foregoing Findings of Fact, the Hearing Examiner concludes as follows:

1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.

There are no PlanHoward policies related directly to Public Utility uses. The 2013 Comprehensive Zoning Plan, including this conditional use category, implemented the General Plan.

2. 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 are such that the overall intensity and scale of the use(s) are appropriate for the site.

HCZR § 131.0.B.2 is an on-site evaluation of the proposed Conditional Use. The new 106-foot tower will not change the nature and intensity of use. Frederick Road, a Minor Arterial, continues to provide access. The Property's size is such that it can accommodate the increase in tower height, an indication that the size of the site can continue to accommodate the nature and intensity of use. The nature and intensity of use, as well as the scale of the use, and the location of streets providing access, are appropriate for the site.

3. The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the proposed use under this standard, the Hearing Authority shall consider whether or not:

Unlike §§ 131.0.B.1 and 2, which concern the proposed use's harmony or compatibility with the General Plan and the on-site characteristics of the proposed use, compatibility with the neighborhood is measured under § 131.0.B.3's six "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (4) access; (5) impact

on environmentally sensitive area, and; (6) impact on the character and significance of historic sites. These six adverse impact tests gauge the off-site effects of the proposed conditional use.

Inherent in the assessment of a proposed conditional use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an RR-DEO zoning district. The proper question is whether there are facts and circumstances showing the particular uses proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional] use irrespective of its location within the zones. *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).

For the reasons stated below, and as conditioned, the Petitioner has met its burden of presenting sufficient evidence to establish the 106-foot telecommunications pole accessory use will not have adverse effects on vicinal properties beyond those ordinarily associated with a Public Utility conditional use in the applicable zoning districts.

a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.

There is no evidence of record regarding atypical adverse effects on vicinal properties from dust, fumes, and odors, noise, or hazards.

b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

The 106-foot telecommunications tower would sit at least 188 feet from all property lines and about 300 feet from the nearest residence, in compliance with HCZR § 128.0.E, which requires a one-foot to one-foot setback for communication towers in residential districts. No new walls or fences are proposed. For these reasons, the Public Facility use expansion will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

No parking is required. The plan depicts two parking spaces for maintenance personnel. No loading or refuse area is proposed. Parking will be appropriately screened and buffered from surrounding areas by existing and proposed landscaping and fencing.

d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.

There is existing good sight distance. There is no shared driveway access.

e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

There is a stream to the northwest of the property and some 250 feet from the communication tower, but there is no evidence of any adverse impact on it from the structure.

f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

The closest historic site (which the TSR does not identify) lies some 2,000 feet to the southeast and there is no greater potential of the tower diminishing its character and significance.

II. Enlargement or Alterations & Specific Criteria for Public Utility Uses (HCZR §§ 131.0.J & 131.0.N.56)

Pursuant to HCZR § 131.0.J, the Hearing Authority may permit the enlargement or alteration of any existing use which is permitted by Conditional Use in the specified districts under the provisions of these Regulations, provided that in evaluating the enlargement or alteration, the Hearing Authority shall make all of the required findings applicable to the entire Conditional Use. Per HCZR § 131.0.N.56, a Conditional Use may be granted in the RR zoning district for the following public utility uses, subject to certain conditions:

a. Permitted Uses:

- (1) Utility substations.**
- (2) Above ground pipelines.**
- (3) Pumping stations and compression stations.**
- (4) Telecommunication equipment facilities.**

Petitioner is proposing to erect a 106-foot telecommunications equipment tower.

b. Special Conditions:

- (1) The proposed location, design and method of operation will not have a detrimental effect on the privacy and quiet of the neighborhood and the safety of its inhabitants.**

The operation has existed for many years at this location. The increased height of the telecommunications tower and de minimus location shift will not change substantially. For this reason, there will be no detrimental effect on the neighborhood.

(2) The design of proposed buildings and the landscaping treatment of the site will be in harmony with the area.

No buildings are proposed. Existing dense landscaping along Frederick Road will continue to screen the facility from adjacent residences and the right-of-way.

(3) The Hearing Authority may prescribe appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area, including requirements for soundproofing, for the construction of fences, barriers or other safety devices, for surfacing of access driveways, for shielding of lighting, and/or for landscaping or screening.

The evidence of record is devoid of any atypical adverse impacts. For this reason, the Hearing Examiner is not prescribing any conditions or safeguards.

(4) When approving a public utility use, in its discretion, the Hearing Authority may authorize future changes not requiring further Hearing Authority approval. Such changes shall be limited to the addition, relocation, or modification of foundations or equipment, or additions to existing buildings, within a fence line approved by the Hearing Authority.

For the reasons just discussed, the Hearing Examiner hereby authorizes future changes, which shall be limited to the addition, relocation, or modification of foundations or equipment, or additions to existing buildings, within the fence line previously approved in BA 93-25E.

(5) When approving a public utility use, the Hearing Authority may approve an accessory commercial communications tower to serve that use.

The requested enlargement of the approved Public Utility use is to accommodate a new 106-foot high accessory telecommunications tower serving the Public Utility use.

c. For a new public utility use, the use would be located on property which is not an ALPP purchased or dedicated easement property. An existing public utility is not required to comply with this criteria.

Because this petition concerns an existing public use, this standard does not apply.

ORDER

Based upon the foregoing, it is this **29th day of May 2019**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Baltimore Gas and Electric Company to expand an existing Public Utility conditional use through the addition of a 106-foot communications tower accessory use in an RR-DEO (Rural Residential: Density Exchange Option) zoning district is hereby **GRANTED**.

Provided, however, that:

1. The conditional use shall be conducted in conformance with and shall apply only to the proposed Public Utility use expansion described in the petition, as depicted on the Conditional Use Plan and shown on all exhibits.
2. The Hearing Examiner authorizes future changes, which shall be limited to the addition, relocation, or modification of foundations or equipment, or additions to existing buildings, within the fence line approved through this decision and order.
3. Petitioner shall continue to comply with the 3 conditions of approval imposed in BA 93-25, set forth in Finding of Fact No. 7 in this decision and order.
4. Petitioner shall obtain all required permits.
5. Petitioner shall comply with all federal, state, and local laws and regulations.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 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. In accordance with C.B. 51-2016, § 1 (HCC Sec. 22.902 - Computation of time), if the deadline to appeal is a Saturday, Sunday, or holiday, or if the County offices are not open, the deadline shall be extended to the end of the next open County office business day.