

IN THE MATTER OF : BEFORE THE
T-MOBILE NORTHEAST, LLC : HOWARD COUNTY
 : BOARD OF APPEALS
Petitioner :
 : Case No. BA 09-045C
.....

DECISION AND ORDER

The Howard County Board of Appeals (the "Board") met on July 29, 2010, September 28, 2010 and October 12, 2010, to hear and deliberate the amended petition of T-Mobile Northeast, LLC, for a conditional use for a Commercial Communications Tower and Commercial Antenna, specifically a 100-foot concealment monopole and fenced equipment compound in an RR-DEO (Rural Residential-Density Exchange Option) Zoning District, filed pursuant to Section 131.N.14 of the Howard County Zoning Regulations (the "Zoning Regulations").

Board members James Walsh, Henry Eagles, Albert Hayes, Maurice Simpkins and John Lederer participated in the hearings. Former Board Chairman Hayes presided over the hearings and deliberation of the case. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. The Board members indicated that they had viewed the property as required by the Zoning Regulations.

The hearing was conducted in accordance with Section 2.209 of the Board's Rules of Procedure. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the various technical staff reports, the Department of Planning and Zoning's Technical Staff Report dated February 18, 2010, the General Plan for Howard County, the General Plan of

Highways, and the conditional use petition were incorporated into the record by reference.

Sean P. Hughes, Esquire, represented the Petitioner. Michael McGarity, Hillorie Morrison, Daniel Tully, Oakleigh Thorne, Alfredo Palad, and Mearl Kemberling testified in support of the petition. Joan Becker, Esquire, represented Thomas Conover, Howard Rensin, James Brent, Steven Boeh, Robert Grove and Eric Grove in opposition to the petition. Thomas Conover, Sharon Keeny, James Brent, Steven Boeh, John Alden, and Robert Grove testified in opposition to the petition.

As a preliminary matter, on July 29, 2010, the Petitioner submitted a revised conditional use plan to the Board, shown as Petitioner's Exhibit #2 (a)(b)(c). In accordance with Board Rules of Procedure 2.202 (b&c), the Board considered whether or not the amendments made to the plan were substantive in nature. The Board found that the amendments were not substantive in nature and continued with the hearing.

The Board received a resolution from the Glenwood Estates Homeowners' Association authorizing the President of the Association, Edward Thomas Conover, to represent the Association and to appear on its behalf before the Board, in BA Case No. 09-045C, in opposition to the petition.

FINDINGS OF FACT

Based upon the testimony and evidence presented at the hearing, the Board makes the following Findings of Fact:

1. The subject property is located in the 4th Election District on the east side of Burntwoods Road about 3,500 feet east of MD 97. It is referenced on Tax Map 21, Grid 5, as Parcel 73, Lot 1, and the address is 14551 Burntwoods Road (the "Property").

2. The 5.41-acre Property is triangular in shape with a curved front property line along Burntwoods Road. The Property is zoned RR-DEO (Rural Residential-Density Exchange Option).

The Property is the site of a one-story religious facility known as Shepherd of the Glen Lutheran Church. The church sits in the center of the Property. To the religious facility's northeast is a paved parking lot and driveway entrance. A line of mature trees runs along the east property line. The topography of the site is relatively level.

3. Petitioner is proposing to construct and operate a new commercial telecommunications facility, including a 100-foot tall monopole concealing associated antennae, and a 1,350 sq. ft. equipment compound in the Property's southeastern area. In appearance, the whitish-grey monopole would look like a large flagpole without a flag. The monopole would lie about 155 feet from the rear of the church, 130 feet from the south property line and 107 feet from the east property line. The closest dwelling not located on the property would lie about $265 \pm$ feet from the site.

The facility would comprise a 30-foot by 45-foot gravel surface, fenced, compound housing multiple equipment cabinets and a 100-foot "slim design" monopole with antennae and cables concealed within the pole. A proposed 10-foot wide gravel drive will lead from the end of the church parking lot to the fenced compound. The Department of Fire and Rescue Services has commented that the access road must be 12 feet wide. A turnaround area will be established next to the fenced compound.

The facility would operate continuously and automatically. No employees will be on-site except for periodic maintenance visits a few times a month. The compound will be screened by a proposed six-foot gated board-on-board fence with evergreen trees around the compound area. Evergreen and deciduous trees will be planted along portions of the Burntwoods Road and south property lines to screen the compound further. A small light will be installed at the base of the

tower and turned on for night repair visits. No tower lights are proposed unless required by the Federal Aviation Administration. The monopole will house six antennae, with the potential for three future antennae, and the compound will accommodate at least one additional carrier. Page 1 of the Amended Conditional Use Plan depicts a 12-foot by 20-foot space for a future AT&T lease area within the compound.

4. To comply with the requirements of a commercial communications tower conditional use, the Petition states that there are few tall structures in the area that could serve as antenna support structures, given its rural and residential character, and that T-Mobile had unsuccessfully contacted Walnut Springs Nursery about constructing an antenna there. T-Mobile also unsuccessfully contacted the Howard County School Facilities Office about building a telecommunications light pole at Glenelg High School.

5. All adjacent properties are similarly zoned RR-DEO. Parcel 138/D to the south is a 3.28-acre unimproved parcel owned by Howard County. According to MDR Plat 19380, this parcel is a potential future right-of-way for the realignment of Burntwoods Road.

To the south of Parcel 138/D are Lots 1 and 2 of Parcel 179, the Glenwood Estates subdivision. These parcels are improved with single-family detached dwellings and various outbuildings. The house on Lot 2 is about 265 feet from the proposed monopole location.

The adjoining parcel to the east is Parcel 138, Preservation Parcel C, and is 2.48-acres in size. It is improved by a single-family dwelling lying about 320 from the proposed monopole location. To the south of Parcel C is a non-buildable preservation parcel, comprising a shared septic field.

Across Burntwoods Road to the northwest and west are several, 1±-acre residential lots, each of which is improved by a single-family detached dwelling.

6. Burntwoods Road has two travel lanes and about 32 feet of paving within a variable width right-of-way. The posted speed limit is 35 miles per hour. The Technical Staff Report (“TSR”) states that the estimated sight distance from the existing driveway entrance at Burntwoods Road is more than 250 feet to the northeast and more than 400 feet to the southwest. According to the Department of Public Works data, the traffic volume on Burntwoods Road east of MD 97 was 2,968 average daily trips as of January 2009.

7. The Property is served by private water and sewer, neither of which is required by the proposed use.

8. The Policies Map 2000-2020 of the 2000 General Plan designates the Property as “Rural Residential.” The General Plan Transportation Map depicts Burntwoods Road as a Major Collector.

9. In Board of Appeals Case No. 80-004E, the Board granted American Lutheran Church a special exception for a structure used primarily for religious activities on April 17, 1980.

10. Michael McGarity, a civil engineer, testified and stated that the proposed use would occupy a very small area on the Property. Specifically, the proposed use would utilize 1,350 square feet out of a total 235,659 square foot sized parcel. Mr. McGarity stated that the size of the proposed compound size is reasonable for the proposed use. Mr. McGarity testified that the compound will be surrounded by a six-foot tall board-on-board fence and surrounded by extensive vegetative screening. Mr. McGarity also noted that selected portions of area near the exterior property lines will be planted with evergreen trees to help mitigate views of the monopole and

compound. Lastly, Mr. McGarity stated that the proposed facility would generate one T-Mobile vehicle trip per month for maintenance purposes.

11. Hillorie Morrison, a consultant for the Petitioner, testified that the impact of adverse effects from the proposed use would not be greater at the subject site than it would be generally elsewhere in the zone. Ms. Morrison testified that there are no existing telecommunications towers within a .5-mile radius to accommodate T-Mobile's antennas. Ms. Morrison stated that T-Mobile looks at existing sites to enhance coverage because it tries to avoid building a site. In this case, the Petitioner looked unsuccessfully for an existing tower tall enough to meet coverage needs. Ms. Morrison stated that T-Mobile looked at the ham and radio antennas on Hobbs Road, but the structures were not strong enough and the property owner was not interested. Ms. Morrison testified that she had contacted Glenelg High School and had spoken to someone at the facilities office who informed her that they were not interested. Ms. Morrison testified that T-Mobile had contacted Walnut Springs Nursery with regard to building a tower at the property but the owner was not interested. Ms. Morrison also testified that the Gethsemane Church had been contacted and they were not interested. On cross-examination, Ms. Morrison admitted that she submitted no written request to the Board of Education and performed no follow-up telephone conversations with anyone. Lastly, Ms. Morrison stated that there were no water or transmission towers within 1/2 mile of the Site, and no existing buildings 50 feet or taller in the same range.

12. Daniel Tully testified that he estimates that Petitioner's proposed additional tree plantings will grow fast and reach 19 feet in height.

13. Oakleigh Thorne, a real estate appraiser, testified that he has conducted studies on the impact of telecommunications towers on property values, including a study for Clearview Estates in

Howard County. His studies indicated that telecommunication towers have no impact on area property values.

14. Alfredo Palad, a radio frequency engineer, testified to the high number of dropped calls in the area and T-Mobile's goal of reducing the number of dropped, nonessential and E911 calls for their customers. With the use of two maps, Mr. Palad stated that one map depicts current on-air coverage in the area, and a second map depicts the increased coverage with the proposed monopole.

15. Edward Thomas Conover, President of the Glenwood Estates Homeowners' Association, testified that it was the community's position that the subject property, due to its location, size and topography, was not a suitable site for the construction of the cell tower in this residentially zoned district.

16. Sharon Keeny, a real estate agent, testified that properties that were located in close proximity to cell towers sold at substantially lower prices and remained on the market for longer periods of time.

17. James Brent, a software engineer, testified that the Petitioner could achieve its goal of increased cell tower coverage by placing directional antennae on existing towers within the search range area.

18. Steven Boeh, a nearby resident, testified that the Petitioner's revised landscape plan with added landscaping will negatively impact sight distance at an already troubled intersection of Hobbs and Burntwoods Roads.

19. John Alden testified that the proposed plan is not in harmony with the land uses and policies indicated in the Howard County General Plan.

20. Robert Grove testified that the Petitioner did not make a legitimate effort to locate the proposed communication facility on an existing structure or at another site.

21. Mearl Kemberling, a site acquisition specialist, confirmed that that he talked with someone from Howard County Public Schools and that they stated that they were not interested in entertaining the project.

CONCLUSIONS OF LAW

Based upon the evidence presented to the Board in this case, and upon the Board's review of the evidence, the Board makes the following Conclusions of Law:

A. General Criteria for Conditional Uses (Section 131.B.)

1. Harmony with the General Plan: The Howard County General Plan designates the area in which the Property is located as a Rural Residential land use. The Petitioner proposes to construct a telecommunications facility on the Property. Because the Rural Residential 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. The proposed use would occupy a very small portion of the 5.41-acre Property. The proposed use is a relatively passive utility use that would have a very low level of intensity. The site will be accessed from a 10-foot gravel access drive off the existing driveway, which is accessed from Burntwoods Road and is designated as Major Collector. This facility would principally consist of a 100-foot tall monopole with antennas and associated telecommunications equipment within a fenced compound. The proposed telecommunications facility will operate continuously and automatically without on-site personnel and is therefore passive in nature with a low level of intensity. Accordingly, the nature and intensity of the operation, the size of the Property in relation to the use, and the location of the Property with respect to streets

giving access to the Property are such that the use will be in harmony with the land uses and policies indicated in the General Plan for the district, in accordance with Section 131.B.1.a.

The proposed conditional use will be combined with the religious facility use on the Property. The overall intensity and scale of uses will be appropriate as the proposed facility is passive in nature as noted above and the facility takes up a small percentage of the Property. As such, the Board concludes that the overall intensity and scale of uses is appropriate given the adequacy of the proposed buffers and setbacks, in accordance with Section 131.B.1.b.

2. Adverse Effect: The proposed telecommunications tower use will not generate inordinate physical conditions such as noise, dust, fumes, odors, lighting, or vibrations. The Petitioner does not propose any signals or lighting on the tower. Visits to the site by maintenance personnel would be infrequent, and any dust or noise associated with these visits would be minimal. Consequently, the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will not be greater at the Site than it would generally elsewhere in the RR-DEO zone, in accordance with Section 131.B.2.a.

The proposed tower is 100 feet high and the minimum required setback from roads and from adjacent properties for a 100-foot tall tower will be met. The proposed use will be buffered by fencing and proposed landscaping. Consequently, the location, nature, and height of structures, walls and fences, and the nature and extent of landscaping on the site are such that the use will not hinder or discourage the use or development of the adjacent land and structures more at the subject site than it would generally elsewhere in the zone, in compliance with Section 131.B.2.b. of the Zoning Regulations.

The facility would be unmanned and would generate approximately one additional vehicle trip for each provider per month. The gravel driveway and turnaround area will be of adequate size for parking and access for the particular use, and as such, the Board finds that the parking areas will be adequate and is properly located and suitably screened from adjacent properties, as required by Section 131.B.2.c.

The Petitioner did not meet its burden of production and persuasion of demonstrating that the ingress and egress drive will provide safe access with adequate sight distance, based on actual conditions, as required by Section 131.B.2.d. Notwithstanding the fact that the proposed use would generate a very lower number of vehicle trips the Petitioner is still obligated to demonstrate that the driveway's location has adequate sight distance for visits to the compound which will involve visits by T-Mobile employees, trucks and related equipment as well as future users of the facility. As such, based upon a lack of evidence presented on the issue, the Board is unable to make a determination that the ingress and egress drive will provide safe access with adequate sight distance, based on actual conditions.

B. Conditional Use Criteria for Communication Towers or Antennas (Section 131.N.14.)

1. The Petitioner provided maps and plots of the area to be served by the monopole and performed the required evaluation of existing buildings taller than 50 feet, and communication towers and water tanks within one-half mile of the proposed tower as required by Section 131.N.14.b.(1).

The Board finds, however, that as further required by Section 131.N.14.b.(1) of the Zoning Regulations, the Petitioner has not met its burden of production and persuasion of demonstrating that a diligent effort has been made to locate the proposed communication facility on a government

structure or on an existing structure or within a non-residential zoning district, and that due to valid considerations, no appropriate location is available. Hillorie Morrison, testifying on behalf of the Petitioner, testified to having made only telephone calls to the Howard County School Facilities Office about building a telecommunications light pole at the Glenelg High School, to Walnut Springs Nursery with regard to building a tower on that property, and to the Gethsemane Church. Although all persons she spoke with expressed disinterest in having the monopole erected on the particular property, Ms. Morrison had not identified anyone she had talked to as having authority to decide on acceptance of the monopole installation on the particular property. More importantly, Petitioner had not demonstrated to the Board that it had submitted written proposals with specifications to any person of authority to obtain acceptance of installation of the monopole on a particular property. A telephone call to an entity without more regarding locating a cell tower on a particular property is hardly sufficient to comport with the requirement of "diligent effort" specified in Section 131.N.14.b.(1) of the Zoning Regulations.

2. The tower and the site are designed to accommodate antennas and equipment for more than one user, in compliance with Section 131.N.14.b.(2).

3. The ground level equipment and tower will be screened from the public street and from the other residentially zoned properties by a fence and by proposed landscaping, in compliance with Section 131.N.14.b.(3).

4. The proposed tower will be whitish-grey in color, in compliance with Section 131.N.14.b.(4).

5. No signals or lights are to be placed on the tower, in compliance with Section 131.N.14.b.(5).

6. Should the Petitioner cease using the tower and not transfer it to another carrier, the Petitioner shall remove the tower from the site within one year of the date that the use ceases, in compliance with Section 131.N.14.b.(6).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is this 16th day of February, 2011, by the Howard County Board of Appeals, ORDERED:

That the Amended Petition of T-Mobile Northeast, LLC, for a 100-foot high monopole and a 1,350 square-foot equipment compound in an RR-DEO (Rural Residential-Density Exchange Option) Zoning District is **DENIED**.

ATTEST:

HOWARD COUNTY BOARD OF APPEALS

Ann Nicholson
Ann Nicholson, Secretary

James Walsh
James Walsh, Chairperson

Henry Eagles
Henry Eagles, Vice-Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
BARBARA M. COOK
COUNTY SOLICITOR

Dissent
Albert Hayes

Barry M. Sanders
Barry M. Sanders
Assistant County Solicitor

Maurice M. Simpkins
Maurice Simpkins

John Lederer
John Lederer