

IN THE MATTER OF : BEFORE THE
MASTEC NETWORK SOLUTIONS : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
: HEARING EXAMINER
: BA Case No. 18-005C

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DECISION AND ORDER

On July 11 and August 15, 2018, 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 Mastec Network Solutions (Petitioner) for approval of a Commercial Communications Tower conditional use, specifically a 100-foot tall monopole and fenced equipment compound, in an R-SC (Residential: Single Cluster) zoning district, filed pursuant to §§ 130.0.B and 131.0.N.14 of the Howard County Zoning Regulations (HCZR).

The Petitioner certified to complying with the advertising and posting requirements of the Howard County Code. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Edward Donohue, Esquire, represented the Petitioner. Joshua Schakola, Paul Dugan, Mark Marzullo, David Dudich, and Karen Paide testified in support of the petition. No one testified in opposition to the petition.

Petitioner introduced into evidence these exhibits.

1. A-P. Site maps, propagation maps, balloon test photo simulations
2. 30-page presentation of revised landscape plan, revised fence detail, due diligence location sites

FINDINGS OF FACT

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

1. Property Identification. The 1.80-acre subject property is located on the southeast corner of the Cedar Lane intersection with Owen Brown Road. It is identified as Tax Map 0035, Grid 0018, Parcel 238 and is also known as 10689 Owen Brown Road (the Property). The proposed conditional use site is about 2,493sf (0.06 acres).

2. Property Description. The Property is improved with a religious facility located in the front section. To the west of the religious facility structure is a wooded forest conservation easement, within which is an intermittent stream and floodplain. The elevation rises from about 380 feet at the rear lot line to 400 feet at the front lot line.

3. Vicinal Properties. To the north, across Owen Brown Road, are NT (New Town) zoned properties improved with single-family detached dwellings. To the east are R-20 zoned properties improved with age-restricted adult housing. To the south is an unimproved, R-SC-zoned property. To the west is a POR-zoned property improved with a medical care facility.

4. Roads. Owen Brown Road, in front of the Property, has one eastbound travel lane and two westbound travel lanes and about 32 paving feet of paving within a variable-width right-of-way. The speed limit is 35 miles per hour. The estimated sight distance from the existing driveway entrance is about 310 feet to the west to the northbound right turn lane from Cedar Lane and over 500 feet to the east. According to State Highway Administration data, as of 2016, the traffic volume on Owen Brown Road from Cedar Lane to the cul-de-sac terminus was 5,305 AADT

(annual average daily trips).

5. Water and Sewer. The Property is served by public water and sewer.

6. General Plan. PlanHOWARD 2030 designates the Property as “Established Community” on the Designated Place Types Map. The Functional Road Classification Map identifies Owen Brown Road as a Major Collector.

~~7. The Proposed Commercial Communications Tower Conditional Use. Petitioner proposes to construct a 100-foot tall commercial communications monopole tower and associated equipment on the Site. A 21’x23’ equipment enclosed compound west of the existing church and parking lot will house the tower and equipment. According to the conditional use plan (CUP), the tower will be located 100’ from the Northerly Owen Brown Road lot line, 161’ from the eastern lot line, 143’ from the southern lot line and 162 feet from the westerly lot line. The proposed use will be accessed from the existing church access driveway off Owen Brown Road. Petitioner Exhibit 2.4-7 depicts the proposed revised 8-foot high wood, coffee-color stained fence compound with barbed wire. Petitioner Exhibit 2.4 shows a revised landscape plan with plantings on the easterly side of the compound.~~

8. Joshua Schakola testified about the proposed conditional use site (CUS) and the conditional use plan (CUP). The proposed CUS is shown on Petitioner Exhibit (PE) 1.1-15. The proposed tower meets or exceeds the one-foot to one-foot setback. The location and height of the proposed tower was determined by a coverage gap analysis, as shown on PE1.4-7. He testified in reference to PE1.8-15 about two balloon tests showing the proposed visibility of the tower from multiple locations in the neighborhood, where neighbors were invited.

9. Concerning the required HCZR § 131.0.N.14.1 due diligence location search, Mr. Schakola testified in reference to PE2 that within a one-mile radius there are no suitable government structures or existing structures within a non-residential zoning district to locate a communication towers facility, because the structure heights are too low for signal propagation or too close to an existing facility. The owners of three structures located on non-residentially zoned properties would not permit the facility to be constructed.

10. On cross-examination from Debbie MacArthur, Mr. Schakola testified the coverage gap does not measure the number of phone numbers that would be affected, but the area where the signal does not maintain voice or use.

11. Paul Dugan testified about the radio frequency need driving the proposed height and location of the tower in reference to PE1.6-7, which shows improved coverages and capacity at various signal levels, particularly for hand-held devices.

12. Mark Marzullo testified in relation to PE Exhibit 2.4-7, which shows the revised 8-foot high wood, coffee-color stained fence compound with barbed wire. Petitioner Exhibit 2.4 shows a revised landscape plan with plantings on the easterly side of the compound. The landscaping shows will provide additional screening.

13. David Dudich testified to residing next to the proposed location of the cell tower. He supports the proposed conditional use because it would not be very visible 9 months out of the year. He believes the tower will stop his wife's phone from dropping out, and he has been waiting for Verizon to improve the level of service. He wants a tower in the neighborhood and does not think the antenna as proposed is ugly; it's just part of the landscape.

14. Karen Paide testified to residing in one of the townhouses across the street. She recalls two balloon tests and to her surprise it would not be very visible. The service in the area is very bad.

CONCLUSIONS OF LAW

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

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

HCZR §§ 131.0.B.1-3 require the Hearing Authority to evaluate a proposed Conditional Use through the application of three standards, harmony with the General Plan, overall intensity and scale of use and adverse impacts.

A. Harmony and Intensity of Use (§§ 131.0.B.1 & .2)

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.

While no Howard County General Plan policy relates directly to Conditional Use petitions for communication towers, properly sited communication towers can be considered generally compatible with residential and commercial uses.

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.

The proposed use is a passive, low intensity utility use to be accessed from an existing driveway. The use will generate only a limited number of vehicle trips from a Major Collector road. The CUS would occupy only a very small portion of the Property. The Hearing Examiner concludes the proposed use is appropriate at the Site, given its location.

B. Adverse Impacts (§ 131.0.B.3)

Unlike § 131.0.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, or § 131.0.B.2, which concerns the on-site effects of the proposed use, compatibility of the proposed use with the neighborhood is measured under § 131.0.B.3's six off-site, "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (d) access; (e) environmentally sensitive areas; and (f) historic sites. 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 R-SC district. The proper question is whether there are facts and circumstances showing the particular use 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 applicable 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 under HCZR §131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a communications facility in the R-SC zoning district.

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.

In this petition, there is no evidence of adverse physical effects on vicinal properties beyond those ordinarily associated with a telecommunications tower and equipment compound in the R-SC district. There is no evidence of any generator noise being greater at the proposed Site than at other commercial communication facilities in the R-SC zoning district. The tower will not be lit. There is no evidence of atypical adverse noise, dust, fumes, vibrations, hazards, or other physical conditions.

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 tower would be sited about 100' from the northerly Owen Brown Road lot line, 161' from the eastern lot line, 143' from the southern lot line and 162' from the westerly lot line. The proposed eight-foot high coffee-colored compound fence, as shown in PE2.5 is similar to area deck fencing. Additional landscaping, as shown on PE2.4, is proposed on the easterly side of the compound for additional screening. Although a portion of the tower will be visible a few months a year, it would not be more visible than other facilities approved by the Hearing Authority. No walls are proposed. The screening requirements of § 131.N.14.b(3) (evaluated below) are intended to soften the view of a commercial communications tower facility at ground or street level.

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.

The HCZR do not impose specific parking requirements for the proposed use. The CUP submitted with the petition depicts two parking spaces in the adjacent existing parking lot for maintenance personnel. The only vehicles associated with the proposed use are routine maintenance vehicles for personnel who will visit the site approximately once a month. Loading or refuse areas are not proposed.

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 no indication that the existing driveway will not provide safe access with adequate sight distance. The driveway access is not shared with other residential properties.

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

The TSR does not identify any off-site environmentally sensitive areas.

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 TSR states the closest [unidentified] designated historic structure is located over one-half mile to the northwest of the Site. Based on this information, the proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

II. Specific Criteria for Commercial Communications Towers (§ 131.O.N.14)

Section 131.O.N.14 provides for the use in an R-SC zoning district subject to compliance with nine criteria.

(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 area and, an evaluation of all existing structures taller than 50 feet, within one mile of the proposed tower.

PE2.9 is a one-mile radius map showing the location of 20 government structures or existing structures located on non-residential zoning districts PE2.10-20 shows photographs of these locations and the reasons for eliminating the structures as possible location sites. These sites were ruled out because the structure height was too low for signal propagation or the structure was too close to an existing facility. PE2.20 shows the NT-zoned Hickory Ridge Village Center, whose owner would not allow a new tower facility. PE2.26 shows the POR-zoned Lorien Health Center, whose owner would not allow a new tower facility. PE2.27 shows the POR zoned Harmony Hall, whose owner would not allow a new tower facility.

(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 and cabinets for other users.

The petition states the facility is designed to permit multiple carriers.

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

The compound will be screened by an eight-foot high coffee-colored wood fence with barbed wire and additional landscaping.

(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 facility will comply with this section.

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

The petition states the facility will comply with this section.

(6) A communication tower that is no longer used shall be removed from the site within one year of the date that the use ceases.

The petition states the facility will comply with this section.

(7) The communication tower shall comply with the setbacks for such structures as specified in Section 128.0.E.

HCZR § 128.0.E.2.a(1) requires communications towers in residential districts to be set back a minimum distance (one-foot to one-foot) equal to the tower height (including antennas) measured from ground level from public street rights-of-way and other residentially-zoned lots. According to the CUP, the tower will be located 100' from the Northerly Owen Brown Road lot line, 161' from the eastern lot line, 143' from the southern lot line and 162' from the westerly lot line.

(8) On an ALPP purchased easement property, the use is not permitted except as a release of one acre for a public interest use per Section 15.516 of the Howard County Code.

This section is inapplicable, as no ALPP purchased easement property is involved.

(9) On an ALPP dedicated easement property, the use is permitted, provided that the use shall not interfere with farming operations or limit future farming production, shall operate within a specified area, which shall be no larger than necessary for the tower and the ground mounted equipment structures, and the parking shall be within this same area. The tower, the ground mounted equipment and parking shall count towards the cumulative use cap of 2% of the easement.

This section is inapplicable, as no ALPP purchased easement property is involved.

ORDER

Based upon the foregoing, it is this **3rd Day of October 2018**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Mastec Network Solutions for approval of a Commercial Communications Tower conditional use, specifically a 100-foot tall monopole and fenced equipment compound, in an R-SC (Residential: Single Cluster) zoning district, is **GRANTED**;

Provided however, that:

1. The Conditional Use shall be conducted in conformance with and shall apply only to the proposed facility described in the petition, the conditional use plan submitted with the petition and as revised in Petitioner Exhibit 2, for the proposed fence and landscaping, and not to any activities, uses or structures on the Property.
2. No additional lighting is permitted other than that required by the Federal Communications Commission or the Federal Aviation Administration.
3. The monopole tower shall be grey or a similar color.
4. If no longer used, the communication tower shall be removed from the site within one year of the date the use ceases.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFavre

Date Mailed: _____

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.