

IN THE MATTER OF : BEFORE THE
VERTICAL BRIDGE : HOWARD COUNTY
DEVELOPMENT II, LLC : BOARD OF APPEALS
Petitioner : HEARING EXAMINER
 : BA Case No. 17-014C

.....
DECISION AND ORDER

On October 23, 2017, 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 Vertical Bridge Development II, LLC (Petitioner) for approval of a Commercial Communications Tower, specifically a 150-foot tall monopole and fenced equipment compound, in an RR-DEO (Rural Residential: Density Exchange Option) zoning district, filed pursuant to Section 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.

The Petitioner was not represented by counsel. Harold Bernadsikowski and Steve Baier testified in support of the petition. Steve K. Shollenberger testified in opposition to the petition.

Petitioner introduced into evidence Exhibit 1, an existing AWS coverage map.

FINDINGS OF FACT

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

1. Property Identification. The 23.66-acre subject property is located on the east side of

MD 32 in the 3rd Election District about 840 feet northeast of Rosemary Lane. It is identified as Tax Map 0015, Grid 0022, Parcel 36 and is also known as 3075 Route 32 (the Property). The proposed conditional use site (the Site) is about 0.14 acres.

2. Property Description. The vacant Property is predominantly wooded. Its low point is about 440 feet at the front lot line along Route 32. From here, the elevation rises to 540 feet at a cleared open area at the rear of the parcel. The front section of the Property is wooded and separated from MD 32 by an unimproved public right-of-way (ROW).

3. Vicinal Properties. Across MD 32 to the northwest, the RC-DEO Parcel 35 is improved with a single-family detached dwelling with driveway access to MD 32. North of Parcel 35 is the Middle Patuxent River and associated floodplain and wetlands. To the north are the RR zoned Parcel 85, a small triangular vacant parcel, and Parcel 97, improved with a single-family detached dwelling with long driveway access to MD 32. To the east are three RR zoned residential parcels, including Parcel 76, improved with a single-family detached dwelling, barn, and a large detached garage and Parcel 267 (Lots 1 and 2), which are each improved with a single-family detached dwellings with driveway access to Rosemary Lane. To the south, the RR zoned Parcels 211, 210, and 174 are each improved with a single-family detached dwelling fronting Rosemary Lane. The closest dwelling to the conditional use site is on Parcel 174. According to the conditional use plan, the proposed Site is more than 300 feet from the closest Parcel 174 lot line.

4. Roads. MD 32 has two travel lanes and approximately 45 feet of paving within a wide variable-width ROW along the Property frontage. The posted speed limit is 50MPH. The estimated sight distance from the existing driveway entrance is approximately 1,090 feet to the

southwest and more than 1,300 feet to the northeast. However, precise sight distance measurements can only be determined by a detailed sight distance analysis. According to State Highway Administration data, traffic volume on MD 32, from Burntwoods Road to 1-70, was 24,481 annual average daily trips as of 2016.

5. Water and Sewer. The Property is not located within the Planned Service Area. The proposed use does not require water or septic facilities. The conditional use plan shows a sealed well within the fenced area.

6. General Plan. PlanHOWARD 2030 designates the Property as “Low Density Residential” on the Designated Place type Map. The Functional Road Classification Map identifies MD 32 as a Principal Arterial.

7. The Proposed Commercial Communications Tower Conditional Use. Petitioner proposes to construct a 150-foot tall commercial communications monopole tower and associated equipment on the Site. The tower would sit about 170 feet from the MD 32 ROW, 312 feet from the nearest residentially zoned lot (Parcel 174) and several hundred feet from the other adjoining residential lot lines. The structure and equipment will be located in a 50'x50' fenced enclosure. The fence as proposed would be six feet in height and mounted by barbed wire. Located outside the fence will be a Modular Electronic Sealed Architecture (MESA) power cabinet and transformer, protected by bollards. Two Leyland Cypress trees will be planted on the east side of the Site perimeter (the MD 32 side) and four Cypresses will be planted on the south side perimeter. The Site will be accessed from an existing driveway and the right-angle access area in front of the compound will be used for parking. A 16-foot wide farm access gate will be installed

close to the current property line along MD 32. A maintenance employee will visit the site once a month. The backup generator will be tested weekly for one-half hour during the day.

8. Agency Comments. DPZ through its staff report recommends approval of the proposed conditional use.

State Highways Administration (SHA) Comments. The SHA commented that the existing access is acceptable but that the future dualization of MD 32 may impact this access.

9. Harold Bernadsikowski testified about the red balloon visual impact study included with the petition. Photographs of the balloon test were taken from 13 different views (Petition Exhibit 8). Because the balloon was visible from two locations (View 9- 3282 Rosemary Lane and View 11- 3080 MD 32) the proposed monopole was photoshopped on these photographs. The View 9 photoshop image shows the monopole in the background behind the bare wooded area (no leaves on trees). The View 11 photoshop image shows the upper section of the monopole above the tree line.

10. Mr. Bernadsikowski further testified the backup generator would not exceed county noise standards.

11. Steve Baier testified in reference to the radio frequency (RF) coverage objectives of the proposed communications tower, which is to provide additional coverage in the MD 32 area, especially an increase in LTE, a faster network technology. Petitioner performed an RF study, which first examined existing coverage provided by area cell towers, as shown in Petition Exhibit 7. The radio frequency (RF) propagation maps included with the petition as Exhibit 6 (Petition Exhibit 6) depict the proposed coverage in this area at 120 feet and 150 feet. The level of service

would be less than desired if a 120' tower were erected.

12. On cross-examination of Mr. Baier and in his direct testimony, Steve Shollenberger argued Petitioner did not establish need for the communications tower because the petition does not include maps indicating an existing coverage gap. During rebuttal, Mr. Baier introduced into evidence Exhibit 1, an existing AWS coverage map for what the Hearing Examiner understood correlates to Petition Exhibit 7. AWS refers to "advanced wireless service," which is a specific band of radio frequencies for wireless phone and broadband services.

13. Stephanie Olsen cross-examined Mr. Bernadsikowski about screening, alternative tower heights, noise generated by the back-up generator and the impact of communications towers on property values. She believes additional screening along the MD 32 side of the compound is necessary.

CONCLUSIONS OF LAW

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

I. A Background Issue: RF Coverage Gaps and Objectives

Mr. Shollenberger argued Petitioner did not demonstrate a coverage gap warranting approval of the proposed commercial communications tower. However, the commercial communications tower conditional use category (§ 131.0.N.17) contains no criterion requiring the Hearing Authority to make a finding as to the need for a proposed tower, no legislatively enacted standard by which to evaluate need. Any reliance on evidence of need in the decision would be arbitrary and capricious for imposing an extra-legislative evidentiary burden on Petitioner. Rather, all the probative evidence about RF coverage in a commercial communications

tower conditional use petition and proceeding goes to the effect that the height of the proposed tower at the proposed location would or would not generate atypical adverse impacts and comport with specific conditional use category standards, as further addressed in Parts II and III of these Conclusions of Law.

II. 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 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 accessed from an existing driveway. The use will generate only a limited number of vehicle trips from a Major Arterial road. The Site 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 RR 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 RR 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 RR district. There is no evidence of any generator noise being greater at the proposed Site than at other commercial communication facilities in the RR 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 170 feet from the MD 32 lot line, some 312 feet from the closest residential lot line (Parcel 174) and several hundred feet from other adjoining residential lot lines. Although a portion of the tower will be visible, the distance is such that it will 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 balloon test visual study photographs and photoshopped images included in the petition indicate the tower would be visible from two locations, but no more than other towers in western Howard County. No walls are proposed.

The screening requirements of § 131.N.14.b(3) (evaluated below in Part III) are intended to soften the view of a commercial communications tower facility at ground or street level. In BA Cases 09-024C, 09-039C and 09-043C, the individual property's topographical features were the

primary means of screening the facility, together with distance, existing vegetation, fencing and a limited amount of new landscaping. Based on her site visit, the Hearing Examiner agrees with Ms. Olsen that additional landscaping along the MD 32 and southern conditional use site perimeters is warranted because the proposed Leyland Cypress trees lose bottom limbs. Therefore, as condition of approval, Petitioner shall install a Type "D" landscape perimeter buffer along the MD 32 and southern conditional use Site perimeters. This will also soften the view of the six-foot high chain link and barbed wire fence.

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 right-angle access to the Site from the driveway will also function as a parking area. The parking area will be rarely used, as the compound is unmanned, and the proposed area and will easily accommodate the occasional employee visit. The required Type "D" landscape perimeter will buffered the view of the compound from MD 32 and the southerly residential uses.

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 SHA commented on the acceptability of the existing access, noting the future dualization of MD 32 may affect this access. 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 identifies the closest environmentally sensitive area as the Middle Patuxent River floodplain across MD 32, more than 500 feet from the Conditional Use site. There is no evidence of the proposed land use having a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

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 designated historic structure is the MD 32 bridge over the Middle Patuxent River, located over 900 feet from the Conditional Use site. There is no evidence of the proposed land use adversely diminishing the character and significance of this structure than elsewhere.

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

Section 131.O.N.14 provides for the use in an RR 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.

The petition includes zoning and area maps indicating the absence of non-residential zoning districts in the area. There are no government structures in the area. DPZ staff reviewed aerial maps in the area and reported no existing structure taller than 50 feet. The petition also

includes a map and list of existing commercial communication towers within two miles of the proposed Site. This information indicates that these facilities cannot provide the coverage and capacity needed in the area of the proposed 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 a six-foot high chain link and barbed wire fence. Additionally, as a condition of approval Petitioner shall install a Type "D" landscape perimeter buffer along the MD 32 and southern conditional use Site perimeters.

(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.

Section 128.0.E.2.a(1) requires communications towers in residential districts to be set back a minimum distance equal to the tower height (including antennas) measured from ground level from public street rights-of-way and other residentially-zoned lots. The 150-foot high tower will be set back 170 feet from the MD 32 ROW, 312 feet from the nearest residentially zoned lot (Parcel 174) and several hundred feet from other adjoining residentially zoned lots.

(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 **1st day of November 2017**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of petition of Vertical Bridge Development II, LLC, for approval of a Commercial Communications Tower Conditional Use, specifically a 150-foot tall monopole and fenced equipment compound, in an RR-DEO (Rural Residential: Density Exchange Option) 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 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.
5. A Type "D" landscape buffer shall be installed along the MD 32 and southern conditional use Site compound perimeters and outside of the fence.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFaivre

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.