

APPLICANTS:
Mary & George Kern, et al and
T-Mobile Northeast LLC

BEFORE THE
ZONING HEARING EXAMINER
FOR HARFORD COUNTY
BOARD OF APPEALS

REQUEST: Special Exception to locate a
communications tower in the Agricultural
District

HEARING DATE: May 14, 2008

Case No. 5621

ZONING HEARING EXAMINER'S DECISION

APPLICANTS: Mary & George Kern

CO-APPLICANT: T-Mobile Northeast LLC

LOCATION: 2500 Winters Run Road, Joppa
Tax Map: 61 / Grid: 3C / Parcel: 101
First (1st) Election District

ZONING: AG / Agricultural District

REQUEST: Special exception, pursuant to Sections 267-53.4C and 267-53.6 of the Harford County Code, to allow a communications tower in the AG/ Agricultural District.

TESTIMONY AND EVIDENCE OF RECORD:

The subject parcel is 157.13 acres in size, located at 2500 Winters Run Road, Joppa, in close proximity to Winters Run. The property is zoned AG/Agricultural and is in agricultural use. The parcel is improved by three residential structures and one barn.

First for the Applicant testified Liz West, acting as an agent for T-Mobile Northeast LLC ("T-Mobile"). Ms. West identified herself as a senior planner, employed as a consultant by T-Mobile. Ms. West had previously been employed by Anne Arundel County Department of Planning and Zoning for 10 years as a land planner, and has a land planning background.

Ms. West assists T-Mobile in locating appropriate sites for cell towers. She works with radio frequency engineers in developing coverage for "gap" areas. She helped prepare the application under consideration.

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Ms. West is familiar with the subject property. She identified it as being approximately 157 acres in size and improved by three residential structures and a barn. Some livestock is also maintained on the property, which has historically been used as a farm. The parcel itself is surrounded by smaller parcels, all of which are residentially used. The parcel is separated from Winters Run by Winters Run Road which lies to its east. Directly to the east of Winters Run Road and Winters Run is a relatively high ridge line which shields the property from the view of the residences in the residential developments to the east, or the MD Route 24 side of the ridge line. To the south of the parcel are agriculturally zoned large lots, most of which are used for residential purposes. To the west and north of the property are also located agriculturally zoned but residentially used parcels.

Ms. West explained that the Applicant performed a series of balloon tests, whereby efforts were made to determine the expected view of the tower from various locations around the site. Ms. West indicated that it had been determined, as a result of the balloon tests, that the proposed tower would not be visible from the east of the parcel, except for one location in the subdivision to the east. She believes that the tower will also be adequately screened from other directions by existing forest cover. She also notes that the residential density to the northwest and south is low, and is not nearly as intense as it is in the residential density to the east.

Ms. West believes that at least four (4) carriers will co-locate on the proposed communications tower. At ground level, T-Mobile uses cabinets for its equipment. Generally, these cabinets are 2 – 3 feet in diameter, 3 feet in height, and are placed directly at the base of the pole. A board-on-board fence will surround the equipment at the base of the pole.

According to Ms. West and the site plan submitted by the Applicant, the monopole will be located about 285 feet from the southerly parcel line, about 471 feet from the easterly parcel line (which is basically the middle of Winters Run stream), 2,251 feet from the westerly line, and almost 3,000 feet from the northerly point of the subject property. She believes that the site is well screened and, given the rolling terrain of the site and existing forest growth, visibility of the tower should be quite restricted.

Ms. West identified a coverage gap in the area, located south of Singer Road, west of MD Route 24, and north of Interstate 95. The propose monopole will provide coverage within this gap, and will connect to two other sites. The gap which now exists includes the rather heavily developed area of Constant Friendship.

Ms. West explained that the Applicant generally looks for well screened, somewhat isolated locations in meeting coverage needs. The subject site meets these qualifications. No other site is available, based on Ms. West's survey of the area, which is as forested as the proposed site; or as large as the proposed site; and having the terrain features of the subject site. The witness believes that no other residential structure in the area will have a view of the monopole site except for the house of the Applicants, Mary and George Kern.

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Ms. West observed a balloon test conducted by the Applicant in preparation for the hearing. The balloon test was an attempt to create a visualization of the proposed monopole tower from various locations around the site. From the residential development to the east, on the MD Route 24 side of the ridge, there is only one location along a street from which the top of the monopole will be visible. The monopole will not be visible from other locations in the residential subdivision. The monopole will be somewhat visible to users of certain portions of Winters Run Road. She does not believe the monopole will be visible to residences to the south.

Efforts have been made by the Applicant to find suitable sites for co-location. However, no existing, suitable sites have been located. Generally, an area having a diameter of 2 miles was examined in order to determine co-location possibilities. However, the area south of Interstate 95 is not appropriate to fill the gap in the existing coverage and, therefore, locations south of I-95 were not examined.

Potential sites identified were either too close to existing sites and, therefore, did not provide adequate gap infill, or did not meet other requirements of T-Mobile.

Ms. West believes that all materials required by the Development Regulations have been provided by T-Mobile, and all location standards have been met. She also believes that the “Limitations, Guides and Standards” of the Development Regulations have been complied with.

The monopole, which will be 197 feet high, will not be lighted. Even with a lightning rod, the pole will be less than 200 feet.

Next for the Applicant testified Amrish Garg, a radio frequency design professional employed by T-Mobile. Mr. Garg helped design the wireless network in the area of the proposed site; is familiar with the site, radio frequency issues in the area, and with the location of the proposed monopole tower.

According to studies conducted by T-Mobile, sufficient coverage in the area of the proposed site is lacking. Primarily, the coverage deficiency is for communications within buildings and vehicles. The gap is centered southwest of the intersection of MD Route 24 and Singer Road, to north of I-95 and to the south, and Clayton Road to the west. This area includes a large part of the densely populated area of Constant Friendship.

Mr. Garg identified propagation maps (Exhibit No. 5), which show the existing cell coverage in the area and the expected cell coverage once the site is improved with the 197 foot monopole tower. In determining the proper location of a site to fill a gap in coverage, topography, elevation of the proposed site, and natural features are all considered. All of this is then used to help determine, in a graphic way, the expected coverage of a proposed cell tower. This coverage is shown on the propagation maps introduced into evidence.

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In discussing the maps, Mr. Garg explained that those areas in “yellow” indicate a lack of necessary signal strength. Primarily, this is a problem for those indoors. Lack of signal strength results in dropped calls. In-home use of cell phones is the fastest growing area of cell phone coverage. Generally, coverage in the area identified by Mr. Garg is not reliable. This area extends from the intersection of Singer Road and MD Route 24, southwest to Winters Run, and from Winters Run to Clayton Road. The Constant Friendship Community enjoys, almost exclusively, outside coverage only. Coverage of calls from vehicles and homes is not possible, and will not be possible without the added cell tower at the proposed location.

Mr. Garg explained that for coverage problems on the east side of MD Route 24, a proposed antenna will be co-located on an existing pole. That antenna will handle the coverage gap between Emmorton Road and Singer Road, to the west and near MD Route 24.

The subject site is ideal as the location which T-Mobile needs to fill is the southwest side of the intersection of MD Route 24 and Singer Road.

T-Mobile’s propagation map (Exhibit No. 5-A), shows that anticipated coverage from the new site will made a radical difference to users in the area. In-building coverage will be adequate throughout almost all of Constant Friendship. The area to the Singer Road and MD Route 24 intersection will be covered by either the proposed location or a new site to be developed on the east side of MD Route 24. Mr. Garg is aware of no existing structure within the gap area which can be utilized to provide coverage. Furthermore, coverage is lost if the height of the tower is reduced. Residential areas and areas affected will have a diminished ability to connect. A tower 197 feet in height is the lowest the tower can be to meet the Applicant’s coverage requirements.

In support of his opinion Mr. Garg described a propagation map (identified as Exhibit No. 5-C), which shows the gap to be filled by a tower 180 feet in height. The map shows that the gap is not adequately covered by a tower of that height. If the tower is less than 197 feet, in Mr. Garg’s opinion, another tower will be required in the area. Mr. Garg also explained that the tower will operate within all Federal Communications Commission standards.

Next for the Harford County Department of Planning and Zoning testified Anthony McClune, Deputy Director. Mr. McClune indicated the subject site is shown as agricultural under the Master Land Use Plan. The Applicant can meet all required conditions. Mr. McClune believes that the 197 foot monopole cell tower will have no greater impact at the subject site than it will at any other site within the area. The tower will be located about 100 feet from the nearest residential structure. Substantial vegetation exists on the site and on the adjoining lots.

While Mr. McClune agrees that some individuals in the area will be able to see the tower from certain locations, existing screening is substantial and adequate.

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The County’s radio frequency engineer, according to Mr. McClune and documentation contained in the file, has found the application to be complete and justified. However, Mr. McClune remarked that existing zoning violations exist on the site – primarily related to the property owners’ failure to remove junk vehicles. A suggested condition of approval is that the property owners correct all existing zoning violations before a permit is issued for the monopole cell tower.

Mr. McClune and the Department see no adverse impact if the proposed is granted.

Under cross-examination by one of the neighbors, Mr. McClune stated that the tower will be located approximately 300 feet from the Winters Run flood plain.

In opposition testified Michael Ainsworth, an adjoining property owner residing at 2614 Winters Run Road and 2609 Winters Run Road, south of and adjacent to the subject parcel. Mr. Ainsworth expressed his opposition to the tower based on a number of reasons: 1) the tower will be dangerous to air traffic in the area as, at 197 feet, it will not be lit; 2) he is concerned about flooding and has personally experienced flooding in the area and believes that the monopole may be impacted by flooding; 3) the pole will be visible from his property and he will be able to see the monopole 100% of the time.

Next testified Donna Ainsworth. Mrs. Ainsworth expressed concern about the safety of children in the area who play and who are subject of being hurt by the cell tower and its equipment.

No other testimony or evidence was given in opposition.

APPLICABLE LAW:

The Applicant is requesting a special exception to Section 267-53.4C of the Harford County Code which states:

“C. Communications tower shall be allowed by special exception up to 199-feet, in the R, RR, R1, R2, VR, VB, B1, B2, and AG District.”

The Applicant also requests a special exception to Section 267-53.6 of the Harford County Code which states:

“An Applicant proposing a new communications tower in the R, RR, R1, R2, VR, VB, B1, B2, or AG Districts shall demonstrate that the request complies with the following conditions:

- A. *The placement of the communications tower at the proposed location will not have a material negative impact on the value, use or enjoyment of any adjoining parcel.*

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- B. *The Applicant has made a diligent attempt to locate the Applicant’s antenna on an existing tower or nonresidential building or structure.*
- C. *The Applicant shall provide the following additional information in support of its application:*
 - (1) *Photographs of existing site conditions;*
 - (2) *Photographs demonstrating that a balloon test has been conducted, or other evidence depicting the visual impact of the proposed tower within a one mile radius of the tower; and*
 - (3) *A map describing the topography of the site and the area within a one mile radius of the proposed tower.”*

Section 267-51 of the Harford County Code defines Purpose as:

“Special exceptions may be permitted when determined to be compatible with the uses permitted as of right in the appropriate district by this Part 1. Special exceptions are subject to the regulations of this Article and other applicable provisions of Part 1.”

Section 267-52 of the Harford County Code defines General regulations as:

- “A. Special exceptions require the approval of the Board in accordance with Section 267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.*
- B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.*
- C. Extension of any use or activity permitted as a special exception shall require further Board approval.*
- D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.*

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- E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.”*

Section 267-9I of the Harford County Code, Limitations, Guides and Standards, is also applicable to this request and its pertinent provisions will be discussed in detail below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Applicants propose the construction of a 197 foot tall monopole communications tower. As with most recent requests for similar uses, the tower is proposed to fill a “gap” in existing cell phone coverage. A suggestion was made by the Applicant that cell phone use is an important facet of modern life and, perhaps, even an essential element. It is difficult to disagree with that assertion.

The subject parcel is 157 acre tract, agriculturally zoned, historically having been used for agricultural purposes. The area lies in an area of relatively rolling terrain, within the watershed of Winters Run and adjoining Winters Run. The area also hosts mixed residential intensities, with high-density residential developments lying to the east of the property, close to MD Route 24, including Constant Friendship. However, surrounding the property to the northwest and east are large agriculturally zoned and residentially used lots. The dividing line between these two densities is Winters Run.

The testimony of the Applicant, for the most part, is that the monopole tower will not be visible from surrounding properties. The proposed cell tower, however, will be visible from certain spots within the residential subdivision just to the east of Winters Run, and from various parts of Winters Run Road.

An adjoining property owner to the south testified that he will also be able to see the monopole. Nevertheless, the Applicant suggests that the visibility of the monopole will be fairly limited, given the terrain and existing vegetative coverage. Based upon the testimony and the photos in the file, that suggestion is accepted herein.

The monopole tower will be located many hundreds of feet from all property lines and it meets all general and specific requirements. Despite the opposition of an adjoining neighbor to the south, it cannot be found that the proposed use will exhibit any particular or onerous impact. For that reason, the special exception will be approved, as discussed below.

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Initially, the Applicants must conform to the specific requirements of Section 267-53.4C of the Harford County Development Regulations, as follows:

“C. Communications tower shall be allowed by special exception up to 199-feet, in the R, RR, R1, R2, VR, VB, B1, B2, and AG District.”

The property is zoned Agricultural and the tower is less than 199 feet.

The Applicants must further address the requirements of Section 267-53.6, as follows:

“An Applicant proposing a new communications tower in the R, RR, R1, R2, VR, VB, B1, B2, or AG Districts shall demonstrate that the request complies with the following conditions:

A. The placement of the communications tower at the proposed location will not have a material negative impact on the value, use or enjoyment of any adjoining parcel.

As addressed above, no negative impact on values or enjoyment of any adjoining parcel is found. There was, indeed, no testimony at all concerning impact on property values, other than that of the adjoining neighbor, Mr. Ainsworth, who expressed his opposition in very general terms. Mrs. Ainsworth expressed her concerns on potential impacts on the safety of her children if the tower were constructed. Given that Mr. and Mrs. Ainsworth’s property line is no less than 285 feet from the proposed tower site, it is difficult to envision any impact on their safety which the tower would represent nor, as the tower is located well out of the floodplain, how floodplain issues would effect the tower. Furthermore, while the testimony of Mr. Ainsworth is noted and appreciated, the visual aspect of the tower as proposed is certainly no different than many other, if not all, other monopoles erected in Harford County. The proposed tower exhibits no distinguishing feature which somehow creates a more adverse or undesirable aspect than is normally associated with such a tower. It can simply not be denied for this reason.

It is further observed that the tower will not be lit and the equipment structures at the base of the tower should not be visible from Mr. and Mrs. Ainsworth’s residence, given the existing forest cover and intervening distance. Further support for this finding is the opinion of the Department of Planning and Zoning which indicates that the visual impact from the proposal will be minimal.

B. The Applicant has made a diligent attempt to locate the Applicant’s antenna on an existing tower or nonresidential building or structure.

The Applicant presented evidence of its unsuccessful efforts to locate on other structures. No appropriate structures were identified.

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- C. *The Applicant shall provide the following additional information in support of its application:*
- (1) *Photographs of existing site conditions;*
 - (2) *Photographs demonstrating that a balloon test has been conducted, or other evidence depicting the visual impact of the proposed tower within a one mile radius of the tower; and*
 - (3) *A map describing the topography of the site and the area within a one mile radius of the proposed tower.”*

All such required information has been provided.

Section 267-53.5A states as follows:

- “A. *All communications towers shall be structurally designed to accommodate for co-location, which shall mean the ability of structure to allow for the placement of antennas for 3 or more carriers. This provision may be waived by the approving body if it is determined that a co-location design will have an adverse impact on the surrounding area.”*

As many as four (4) telecommunication providers will utilize the tower.

- B. *No aviation-related lighting shall be placed upon any communications tower unless specifically required by the Federal Aviation Administration or other governmental entity.*

Lighting is not required and will not be installed on the tower.

- C. *Monopoles shall be the preferred communications tower structure type within the county.*

The proposed tower will be a monopole.

- D. *To the extent practicable, communication towers shall have suitable landscaping in order to screen the site from adjoining properties.*

Landscaping is not required.

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- E. The only signage permitted on any communications tower shall be a single sign no larger than 6 square feet, affixed to the equipment building or fence enclosure that identifies the tower owner, each locating provider and the telephone number for the person to contact in the event of an emergency.*

This condition shall be complied with.

Furthermore, Section 267-53.5G requires Harford County's radio frequency engineer to make certain determinations of radio frequency need, coverage, capacity issues, and lack of interference with other radio frequency users. Those findings have been made.

The more generalized requirements, however, of Harford County Code Section 267-9I, Limitations, Guides and Standards, remain to be reviewed. These factors are set forth and addressed as follows:

- (1) *The number of persons living or working in the immediate area.*

This area contains a mix of residential densities, with scattered agricultural uses. The large lot residential and agricultural users are primarily located to the west of Winters Run, which adjoins the subject property on its easterly side. The more intense residential development to the east is separated both physically and visually by a significant ridge line that runs on the eastside of Winters Run. The monopole will be visible from certain locations and during certain times of the year, although both the topography and existing forest cover will significantly limit visibility, perhaps at this location more than most within the County. There should be no unusual or adverse impact on the residents in the area, nor should the residential density of the area affect the tower in any fashion.

- (2) *Traffic conditions, including facilities for pedestrians, such as sidewalks and parking facilities, the access of vehicles to roads; peak periods of traffic, and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future.*

The proposed tower will have no impact on traffic. Access is through the existing parcel to Winters Run Road, a County maintained secondary road.

- (3) *The orderly growth of the neighborhood and community and the fiscal impact on the County.*

There should be no negative fiscal impact on the County. Cell phone availability is an important facet of modern life.

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- (4) *The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.*

No such impact should be generated by the use.

- (5) *Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal and the ability of the County or persons to supply such services.*

Harford County Sheriff's Department will provide police protection. Joppa Magnolia Volunteer Fire Company will provide fire protection.

- (6) *The degree to which the development is consistent with generally accepted engineering and planning principles and practices.*

The proposal is consistent with all generally accepted engineering and planning principles and practices.

- (7) *The structures in the vicinity, such as schools, houses or worship, theaters, hospitals, and similar places of public use.*

No such structures have been identified, and as a result, there should be no impact on any such structures.

- (8) *The purposes set forth in this Part 1, the Master Plan and related studies for land use, roads, parks, schools, sewers, water, population, recreation and the like.*

Commercial uses are allowable, under the Master Plan, in this agricultural district, which are intended to serve the agricultural industry or residences of the area. This use clearly benefits the residents of the area and is, accordingly, allowed by the Master Plan.

- (9) *The environmental impact, the effect on sensitive natural features and opportunities for recreation and open space.*

No sensitive environmental features or opportunities for recreation or open space will be impacted. There is no evidence that the floodplain in which Winters Run is located will have any affect on the location or operation of the tower or cause a potential safety concern in the future.

- (10) *The preservation of cultural and historic landmarks.*

No such landmarks have been identified.

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Having met all specific and general requirements, the use, nevertheless, pursuant to Schultz v. Pritts, 291 Md. 1, 432 A2d 1319 (1981), must be shown to have no greater impact at the location proposed than at another within the district. As addressed above and for reasons set forth above, it is easily found that the proposed use will have no greater impact here than at another location within the zone or, for that matter, virtually at any other location in Harford County. No other location has been shown that would be more fitting for such a 197 foot monopole tower; no other area has been shown which is somehow more appropriate. Other than the neighbors' generalized suggestions of potential impact, no specific facts or evidence to support such fears have been verbalized or submitted.

Accordingly, it is found that the requirements of Schultz v. Pritts have been met, and that the impact of this tower at the proposed location, if any, will be no greater than if allowed at some other location within the zone.

CONCLUSION:

Accordingly, for the above reasons, it must be recommended that the requested special exception be approved, subject to the following conditions:

1. The Applicants submit a site plan for review and approval by the Harford County Development Advisory Committee (DAC).
2. The Applicants obtain all necessary permits and inspections for the proposed facility.
3. The Applicant shall construct the facility as show on the Applicant's site plan, and comply with all applicable requirements of Article VIII A, Telecommunications Facilities, of the Harford County Development Regulations.
4. Existing zoning violations, which include the storage of untagged vehicles and junk on the subject property shall be abated prior to building permit application or approval.

Date: July 18, 2008

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on AUGUST 15 , 2008.