

APPLICANTS:
Sallee Rigler McElroy and
T-Mobile Northeast LLC

BEFORE THE
ZONING HEARING EXAMINER
FOR HARFORD COUNTY
BOARD OF APPEALS

REQUEST: Special Exception to locate a
communications tower within the required
rear yard setback in the CI District

HEARING DATE: September 16, 2009

Case No. 5694

ZONING HEARING EXAMINER'S DECISION

APPLICANT: Sallee Rigler McElroy

CO-APPLICANT: T-Mobile Northeast LLC

LOCATION: 2128 Pulaski Highway, Havre de Grace
Tax Map: 52 / Grid: 3D / Parcel: 209
Sixth (6th) Election District

ZONING: CI / Commercial Industrial District

REQUEST: Special exception, pursuant to Section 267-60B(1), Table 60-1 of the Harford County Code, to allow a communications tower to encroach the required 40 foot minimum rear yard setback (12 foot setback proposed), in the CI/ Commercial Industrial District.

TESTIMONY AND EVIDENCE OF RECORD:

The subject property is slightly greater than 1 acre in size, located on the southside of Pulaski Highway (U.S. Route 40), on the outskirts of Havre de Grace. The parcel is wide and shallow, having dimensions of approximately 622 feet along U.S. Route 40 and about 80 feet deep. The parcel is presently improved by an existing, non-conforming building and parking areas. Pulaski Highway adjoins the property to its north, and a 200 foot Amtrak right-of-way which carries Amtrak rail lines adjoins the property to its south.

The parcel is zoned Commercial Industrial. The Applicants intend to place a communications tower on the property. Communications towers are allowed as a principal permitted use on this Commercial Industrial zoned parcel. However, the Applicant is unable to meet the required 40 foot rear yard setback and, accordingly, a variance of about 28 feet is required and is requested by this application.

Case No. 5694 – Sallee Rigler McElroy and T-Mobile Northeast LLC

For the Applicant first testified (by proffer), Amy Bird, who identified herself as a consultant for T-Mobile Northeast LLC. Her job consists of resolving co-location issues and site identification. Ms. Bird is familiar with the site and coverage issues in the area of the site.

Ms. Bird identified an existing tree line located between the property and the Amtrak right-of-way. She indicated there is also an additional 80 feet between the rear property line of the subject parcel and the Amtrak railroad tracks themselves.

T-Mobile has identified the need for another tower in the area of the subject parcel. All Code requirements can and will be met. Furthermore, the Amtrak right-of-way is restricted to Amtrak use and Ms. Bird anticipates no other use, especially no other dwelling, ever being located on the Amtrak parcel. Ms. Bird envisions no adverse impact if the requested variance were granted. While the tower is not able to meet the 40 foot rear yard setback requirement, in fact, an additional 80 feet of unimproved property exists between the rear property line and the Amtrak line itself. Accordingly, Ms. Bird sees no adverse impact if the variance is granted.

Next for the Applicant testified Rajkanwar Brar, a radio frequency engineer employed by the Applicant. Mr. Brar testified (by proffer) that he had prepared a computer-generated search ring of the area which identified the coverage deficiencies experienced by T-Mobile in this particular area of Route 40. According to Mr. Brar's calculations, the proposed tower at the subject site will fill the existing coverage gap.

Next (again by proffer), testified Michael McGarity, who was identified as an expert in site development, with experience in over 1,000 communications tower projects. Mr. McGarity stated that not only is the subject parcel zoned Commercial Industrial, but the Amtrak parcel is zoned Commercial Industrial as well. Mr. McGarity indicated that, in his opinion, the subject parcel is a good site for the proposed communications tower. The Amtrak right-of-way acts as a natural buffer and the existing tree line also acts as a screen between the Amtrak parcel and the subject parcel. In all, the Amtrak parcel is 200 feet deep and is adjoined on its southerly side by residential properties. Furthermore, the parcel lies in the flood plain district and the structure that houses the communications equipment will as a result be elevated. Mr. McGarity testified that the property is unique because of the existing 200 foot buffer that exists south of the property which, in effect, adds to the setback between the proposed tower itself and the nearest residential properties. Except for the Amtrak train line, there is no possibility that the buffer will be disturbed within the foreseeable future.

Next for the Harford County Department of Planning and Zoning testified Shane Grimm. Mr. Grimm testified that the subject parcel is completely encumbered by a 100 year flood plain. The building on site is also non-conforming.

Case No. 5694 – Sallee Rigler McElroy and T-Mobile Northeast LLC

Mr.Grimm and the Department of Planning and Zoning’s Staff Report recommend approval, with the Staff Report stating, inter alia:

“The Department finds that the property is unique based on its configuration. The property is long and narrow. The site fronts on U.S. Route 40 and backs up to the Amtrak Railroad right-of-way. The tower will still be approximately 92 feet from the railroad tracks. The existing building is currently non-conforming to the required setbacks. The tower is a permitted use in the CI zoning district and will be required to meet all applicable requirements. Also, the site is within the 100 year flood plan and the proposed structures must be elevated to meet the floodplain regulations.”

The Department recommends approval, with conditions.

No evidence or testimony was given in opposition.

APPLICABLE LAW:

The Applicant is requesting a variance to Section 267-60B(1) of the Harford County Code, which states:

“Minimum lot area, area per dwelling or family unit, building setback from adjacent residential lot lines, lot width, front, side and rear yard and maximum building height, as displayed in Tables 60-1 through 60-3, shall apply, subject to other requirements of this Part I.”

Section 267-11 of the Harford County Code allows the granting of a variance to the requirements of the Code:

“Variances.

A. *Except as provided in Section 267-63.H (Chesapeake Bay Critical Area Overlay District, variances), variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:*

(1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.

Case No. 5694 – Sallee Rigler McElroy and T-Mobile Northeast LLC

(2) *The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*

B. *In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.*

C. *If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.”*

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The communications tower proposed by the Applicants is allowed as a matter of right on this Commercial Industrial zoned parcel. While the testimony was that the tower would meet all applicable communications tower requirements, a basic setback requirement prohibits the tower from being constructed because of the relative narrowness of the lot. The lot is, at most, 80 feet deep, and the tower would be located approximately 12 feet from the rear lot line. This is 28 feet shorter than what is required for the rear yard setback.

However, the property is unusually impacted by an extremely large, 200 foot wide Amtrak right-of-way to its rear. Because of that, the setback between the tower and the closest possible residential parcel would be in excess of 200 feet.

Furthermore, the parcel itself can be seen as somewhat unusual in that it fills a very specific coverage gap identified by T- Mobile. While not necessarily the only parcel that could fill such a coverage gap, it is clearly available and one which meets all applicable standards but for the rear yard setback.

Furthermore, there can be no finding of any adverse impact. The 200 foot buffer to the rear or south side of the subject property is only impacted by the actively used Amtrak railroad tracks. Surely, the impact of the railroad tracks on any adjoining neighbor to the south of the Amtrak buffer would be significantly greater than that of a communications tower that has been granted a 28 foot rear yard setback variance.

Case No. 5694 – Sallee Rigler McElroy and T-Mobile Northeast LLC

Accordingly, there is no evidence of any impact on the adjoining neighbors or on the neighborhood, as a whole.

CONCLUSION:

It is therefore recommended that the requested variance be granted, subject to the following conditions:

1. The Applicants shall submit a site plan to the County for review and approval through the Development Advisory Committee (DAC).
2. The development of the site shall meet all flood plain requirements.
3. The Applicants shall obtain all necessary permits and approvals for the proposed tower.

Date: October 21, 2009

ROBERT F. KAHOE, JR.
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on November 10, 2009.