

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER**

**SPECIAL EXCEPTION
VARIANCE
4804**

DECISION

Application: Tower, Pole, Monopole or Antenna
Applicant: Crown Castle Inc./Abood Family LLC
Opposition: None
Hearing Dates: August 1, 2018 and August 8, 2018
Hearing Examiner: Maurene Epps McNeil
Disposition: Approval with Conditions

NATURE OF PROCEEDINGS

(1) Special Exception 4804 is a request for permission to bring an existing 115-foot-tall monopole into compliance and to extend the monopole to 125 feet. Variance 4804 is a request for a variance from the setback requirements in Section 27-416 of the Zoning Ordinance (requiring a setback from all property lines and dwelling units of a distance equal to the height of the monopole measured from its base). The subject property is a 0.746 acre (32,746 square feet) parcel, zoned R-R (Rural Residential), located approximately 950 feet northwest of the intersection of Crain Highway (US 301) and Old Indian Road

(2) The Technical Staff recommended approval with conditions. (Exhibit 20) The Planning Board chose not to have a hearing and therefore adopted Staff's recommendation as its own.

(3) No one appeared in opposition to the Application at the hearing held by this Examiner. (Exhibit 26)

FINDINGS OF FACT

Subject Property

(1) The subject property is a flag lot with 25 feet of frontage along Furgang Road. Furgang Road is the access to the site. In 2001 a 100-foot-high telecommunications tower/monopole was constructed upon issuance of Permit 15646-2001. At that time the property was approximately 42.24 acres in size.

(2) In 2004 Applicant Abood Family, LLC subdivided the site into 47 lots and 7 parcels. The monopole remained on Parcel G, and a note on the final plat of subdivision was to reference the fact that Parcel G may be converted to a lot when the cell tower is removed. (Exhibit 20, p. 55 and 70) Subsequent to this subdivision approval Commercial Grading Permit 12491-2004-CEW was approved, which allowed the addition of a 15-foot-high antenna mount extension to the existing tower/monopole. For some reason the actual tower was also illegally extended to 115 feet in height. (Exhibit 24)

(3) The property is not located within a Chesapeake Critical Area Overlay Zone. (Exhibit 20, p. 12)

(4) The site is subject to the requirements of the Woodland and Wildlife Habitat Conservation Ordinance since it is larger than 40,000 square feet and has more than 10,000 square feet of existing woodland. There is an approved Type 2 Tree Conservation Plan for the site -TCPII-089-00-02. (Exhibits 16(a)-(h)) The request is in conformance with that plan (and is shown thereon), since Applicant proposed no tree or woodland removal. (Exhibit 20, pp. 13 and 44)

(5) There are no regulated environmental features on site. (Exhibit 20, p. 13)

Surrounding Property/Neighborhood

(6) The site is primarily surrounded by detached residential uses in the R-R Zone. To the north are single-family homes and a church in the R-R Zone. To the south are single-family homes in the R-R and O-S Zones. To the east and west are single-family homes in the R-R Zone.

(7) The Neighborhood is primarily residential in character. Its boundaries are as follows:

- North - US 301/Crain Highway and Old Indian Head Road
- South - Old Indian Head Road
- East - CSX Railroad
- West - US 301/Crain Highway

Master Plan/Sectional Map Amendment

(8) The subject property is located within an area governed by the 2013 Subregion 6 Master Plan and Sectional Map Amendment. This Master Plan recommended a Residential-Low Transition Use for the site and the Community Planning Section of the Maryland-National Capital Park and Planning Commission ("MNCPPC") opined that the "impact of the increase in height on the existing surrounding low-density residential community would be negligible" and "will not substantially impair the integrity of the Subregion 6 Master Plan and SMA." (Exhibit 20, p. 14)

(9) MNCPPC Staff noted that the subject property lies within Environmental Strategy Area 2 of the Regulated Environmental Protection Area Map discussed in the 2014 General Plan ("Plan Prince George's 2035"), and found no conflict with the goals therein.

Applicant's Request

(10) Applicant purchased the subject property from Sprint in January 2007. As noted above, the height of the tower was increased from 100 feet to 115 feet without the requisite special exception approval. Applicant noted that "AT&T extended the monopole and installed their antennas between May 24, 2005 and February 12, 2007." (Exhibit 25, p. 1)

(11) Applicant submitted a Structural Modification Report prepared by an engineer and dated October 4, 2016. (Exhibit 10) Although the report was prepared to address the integrity of the nearly 100 foot tall monopole its results also note that a pole of 115.5 feet to 125 feet tall would be structurally sound. (Exhibit 31(e))

(12) Applicant submitted elevation view photos of the monopole itself and all adjacent views from the site. (Exhibits 11(a)-(e)) There is wood fencing around the related telecommunications equipment building and existing trees obscure it completely.

(13) The subject property is part of a larger area that was subdivided in 2004. (Exhibit 28, pp. 50-73) Subsequent to the subdivision the monopole remained on a flag lot (Parcel G) and does not currently meet the requisite set back of 125 feet from all property lines since it is set back 101' 9" from the eastern property line, 102' 6" from the northwestern property line, 104' 9" from the western property line, and 29' 7" from the southern property line. It is, however, nearly 175 from the closest dwelling unit.

(14) Applicant adopted Staff's view that the requested variances satisfy the criteria in Section 27-230, infra, since: the unique shape and size of the flag lot resulted from the final plat of subdivision; the monopole will not be able to accommodate a fourth antenna and Applicant will have to build another monopole in order to provide the needed cell service to the community if the variances are not granted; approval of the variances will not impair the General Plan or Master Plan since a monopole at that location was an established use prior to the adoption of either, there is no specific recommendation concerning the monopole; and, requiring another monopole to be constructed would contravene the County's policy of collocation.

Agency Comments

(15) The Technical Staff offered the following comment in support of its recommendation of approval:

The telecommunications tower and associated compound will not impair the integrity of any master plan, functional plan, or the General Plan. The applicant has provided that, while *Plan Prince George's 2035* does

not have specific references to telecommunications, the Public Facilities section aims to 'invest in public facilities to catalyze economic development and revitalization, stimulate employment growth, and strengthen neighborhoods.' (Policy 2) Additionally, Policy 7 seeks to 'ensure the provision of equitable, high-quality public services within municipalities.' The provision of reliable wireless coverage in the area through this facility supports both policies. Better wireless coverage benefits those working from home and conducting business in the area, while also ensuring that first responders have the network dependability needed to respond in emergency situations and locate those in need of help.

This application is in the Established Communities area which is most appropriate for context, sensitive infill and low – to medium-density development. *Plan Prince George's 2035* recommends maintaining and enhancing existing public services (police and fire/EMS), facilities (such as libraries and schools) ... to ensure that the need of existing residents are met. The 2013 Approved Subregion 6 Master Plan and Sectional Map Amendment ["SMA"] ... recommends residential low future land use for the subject property. Staff finds that this application for the extension of an existing telecommunications tower will not substantially impair the integrity of the Subregion 6 Master Plan and SMA. The impact of the proposed increase in height on the existing surrounding low-density residential community would be negligible.

The 2016-2017 Prince George's County Telecommunications Transmission Facilities Master Plan also shows that there are significantly fewer telecommunications facilities in this part of the County than in the western section. This telecommunications facility and application, therefore, do not impair the integrity of any plan, but rather, support the articulated goals of the County.

(Exhibit 20, p. 6)

(16) Accordingly, it recommended approval with the following conditions:

Based upon the above analysis and findings, staff recommends APPROVAL of Special Exception No. SE-4804 and Variance Application VSE-4804, subject to the following conditions.

1. Prior to certificate approval of the special exception site plan, the applicant shall revise the site plan to:
 - a. Provide the dimensions of the access road on the site and landscape plans.
 - b. Provide the details of the fence surrounding the equipment compound.
 - c. Provide notation on the landscape plan clearly

indicating the bufferyard dimensions, including the minimum building setbacks and the minimum landscape yards, around the entirety of the property associated with the telecommunications tower and equipment compound, in accordance with the requirements of the 1990 Prince George's County Landscape Manual.

(17) The Telecommunications Transmission Facility Coordinating Committee ("TTFCC") reviewed the Application administratively, per Applicants Counsel.

(18) The Department of Permitting, Inspections and Enforcement noted "no objection to Special Exception No. 4804 and variance application request". (Exhibit 20, p. 29)

APPLICABLE LAW

(1) The instant Application may be approved if it satisfies the requirements of Sections 27-317 and 27-416 of the Zoning Ordinance.

(2) Section 27-317 provides as follows:

- (a) A Special Exception may be approved if:
 - (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;
 - (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
 - (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
 - (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;
 - (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and
 - (6) The proposed site plan is in conformance with an approved Type 2Tree Conservation Plan; and
 - (7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130 (b)(5).
- (b) In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:
 - (1) where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or
 - (2) where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA.

(3) Section 27-416 provides as follows:

- (a) A tower, pole, or Monopole for the support of an antenna (electronic, radio, television, transmitting, or receiving) may be permitted, subject to the following:

(1) In the Commercial and Industrial Zones, and for land in a Residential Zone owned by a public entity, the structure shall generally be set back from all property lines and dwelling units a distance equal to the height of the structure (measured from its base). The District Council may reduce the setback to no less than one-half (1/2) the height of the structure based on certification from a registered engineer that the structure will meet the applicable design standards for wind loads of the Electronic Industries Association (EIA) for Prince George's County. In the Residential Zones, on privately owned land, the structure shall be set back from all property lines and dwelling units a distance equal to the height of the structure (measured from its base);

(2) On privately owned land, the structure shall not be used to support lights or signs other than those required for aircraft warning or other safety purposes;

(3) Any tower or Monopole which was originally used, but is no longer used, for telecommunications purposes for a continuous period of one (1) year shall be removed by the tower or Monopole owner at the owner's expense; and

(4) Any related telecommunication equipment building shall be screened by means of landscaping or berthing to one hundred percent (100%) opacity.

(4) In Schultz v. Pritts, 291 Md 1, 432 A2d 1319, 1325 (1981) the Court of Appeals provided the following standard to be applied in the review of a special exception application:

Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the [administrative body] that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material.... But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

Variance

(5) Applicant's request for variances must satisfy the criteria set forth in Section 27-230 (a) of the Zoning Ordinance. This Section provides as follows:

A variance may only be granted when the District Council, Zoning Hearing Examiner, Board of Appeals, or the Planning Board as applicable, finds that:

(1)

A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;

(2)

The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and

(3)

The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.

(6) "Practical difficulties" has been defined in Carney v. Baltimore, 201 Md.130,137 (1952), as follows:

The expression "practical difficulties or unnecessary hardship" means difficulties or hardships which are peculiar to the situation of the applicant for the permit and are not necessary to carry out the spirit of the ordinance and which are of such a degree of severity that their existence amounts to a substantial and unnecessary injustice to the applicant. Exceptions on the ground of practical difficulties or unnecessary hardships should not be made except where the burden of the general rule upon the individual property would not, because of its unique circumstances, serve the essential legislative policy, and so would constitute an entirely unnecessary and unwanted invasion of the basic right of private property.

(7) Finally, an area variance (such as the ones requested herein) need only satisfy the "practical difficulties" standard. (See, Richard Roeser Professional Builders, Inc. v. Anne Arundel County, 368 Md. 294, 793 A.2d 545 (2001))

CONCLUSIONS OF LAW

(1) If the conditions noted below are satisfied, this Examiner finds that the instant Application satisfies the following purposes of the Zoning Ordinance, and Section 27-317(a)(1), for the stated reasons:

1. *To protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County*

Provision of wireless telecommunications service will promote the health, comfort and convenience of County residents since there is increasing reliance on the use of cell phones and reliable, dependable service is appreciated.

3. *To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities.*

The instant Application includes an unmanned equipment compound. There will be minimal visits to the site, thus minimal impact on transportation and other facilities.

4. *To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business.*

The proposed use will not deter the orderly growth and development of the County but will provide a needed service (wireless communications) for residents and businesses in the area.

13. *To protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features.*

The instant Application will not generate any vibrations, noise, odor or other forms of pollution. Similarly, it will have minimal impact on forests since any disturbed area will be de minimis.

(2) There is a presumption that the proposed use is in conformance with the purposes of the R-R Zone set forth in Section 27-428 of the Zoning Ordinance if it satisfies Sections 27-102, 27-317 and 27-416. Anderson v. Sawyer, 23 Md. App. 612 (1974); Futoryan v. Mayor and City Council of Baltimore, 150 Md. App. 157, 819 A.2d 1074 (2003) Notwithstanding this presumption, this Examiner finds that the use will encourage the preservation of trees and open spaces and, therefore, meets Section 27-428 of the Zoning Ordinance.

(3) The proposed use does require variances from the setback criterion for monopoles. Once granted the use satisfies the requirements of Section 27-317(a)(2).

(4) The Master Plan recommended residential-low transition land use for the subject property and does not address Monopoles. The instant use is not inconsistent with this recommendation since it will not generate traffic and is inconspicuous on this wooded site. It will not substantially impair the intent of the Master Plan, and, therefore, satisfies Section 27-317(a)(3).

(5) The proposed use is buffered from surrounding residents, workers and uses by existing trees. Accordingly, it will not adversely affect the health, safety, or welfare of residents/workers in the area nor be detrimental to the use or development of adjacent properties or the general neighborhood. (Section 27-317(a)(4) and (5))

(6) The Application is in accordance with the approved Type 2 Tree Conservation Plan for the subject property. It, therefore, satisfies Section 27-317(a)(6).

(7) The Site Plan demonstrates the preservation of environmental features on site since the monopole is not located in the portion of the site with such features. (Section 27-317(a)(7))

(8) The subject property does not lie within a Chesapeake Bay Critical Area Overlay Zone. (Section 27-317(b))

(9) Section 27-416(a)(1) requires the monopole be set back at least 125 feet from all property lines and dwelling units. The proposed Monopole is set back more than 175 feet from any dwelling units. A variance is required for each of the site's boundaries.

(10) Applicant has requested the following variances from the requirement in Section 27-416 (a)(1) that the monopole be set back from all property lines and dwelling units a distance equal to the height of the structure measured from its base:

- A variance of 23' 3" from the eastern property line
- A variance of 22' 6" from the northwestern property line
- A variance of 20' 3" from the western property line, and
- A variance of 95' 5" from the southern property line

(11) I find sufficient justification for the approval of each variance. First, the approved plat of subdivision left the monopole on an unusually shaped flag lot, and the removal of the monopole would severely curtail the area's access to necessary cell service. (Section 27-230(a)(1))

(12) Given the small size and the shape of the lot there is nowhere that the monopole could be relocated that would avoid the need for a variance. If the monopole is reduced in height there will be no opportunity to add a fourth antenna and further the County's policy of collocation. Thus, a denial of the variances would result in the practical difficulty of removing the monopole or reducing its height -both of which would result in reduced cell service and negative impact on the community. (Section 27-230(a)(2))

(13) Finally, the variances will not substantially impair the intent of the General or Master Plan since the use is of low-impact, serves the needs of the residents, workers and emergency personnel in the area, and furthers the County's policy of supporting the collocation of antennas. (Section 27-230 (a)(3))

(14) The Monopole will not be used to support lights or signs and a note has been added to that effect. It, therefore, meets the requirements of Section 27-416(a)(2).

(15) Should the structure not be used for telecommunications purposes for a continuous period of one year, the Applicant has agreed to remove it and has added a note to that effect. Thus, Section 27-416(a)(3) will be satisfied.

(16) The equipment cabinets will be screened by an 8-foot high opaque fence, and existing woodlands and a fence. Accordingly, Section 27-416(a)(4) is met.

DISPOSITION

Special Exception and Variances 4804 is Approved, subject to the following conditions:

1. The following Note shall be added to the Special Exception Site Plan. (Exhibit 27(b)):

There shall be no further increase in height unless it is done in accordance with all applicable laws.

2. Prior to the issuance of permits, the applicant shall revise the site plan to:
 - a. Provide the dimensions of the access road on the site and landscape plans.
 - b. Provide the details of the fence surrounding the equipment compound.
 - c. Provide notation on the landscape plan clearly indicating the bufferyard dimensions, including the minimum building setbacks and the minimum landscape yards, around the entirety of the property associated with the telecommunications tower and equipment compound, in accordance with the requirements of the 1990 Prince George's County Landscape Manual.
3. Prior to the issuance of permits the revised Special Exception Site Plan shall be submitted to the office of the Zoning Hearing Examiner for approval and inclusion in the record.

[Note: The Special Exception Site Plan and attachments are Exhibits 27 (a) –(m)]