

**IN RE: PETITIONS FOR SPECIAL HEARING * BEFORE THE
AND VARIANCE**

S side of Ebenezer Road; 266 feet W of * DEPUTY ZONING
the c/l of Eastern Avenue * COMMISSIONER
15th Election District * FOR BALTIMORE COUNTY
6th Councilmanic District
(6923 Ebenezer Road)

JPH, LLC *
Legal Owner
Tower Development Corporation * **Case No. 2011-0079-SPHA**
Contract Lessee
*

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before this Deputy Zoning Commissioner for consideration of Petitions for Special Hearing and Variance filed by Phil Harris on behalf of the legal property owner, JPH, LLC, and R. Scott Cheek on behalf of the contract lessee, Tower Development Corporation, a subsidiary of Crown Castle USA, Inc. Petitioner is requesting Special Hearing relief in accordance with Section 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to approve a telecommunications facility in a B.R. zoning district with a setback of 203 feet to the nearest residential property line as in compliance with Section 426.6.A.1 of the B.C.Z.R., and to determine that Section 426.6.A.1 does not require a 200 foot setback to a railroad property that is zoned D.R.5.5 and has no residences and cannot have any residences on it. Petitioner is also requesting Variance relief from Section 426.6.A.1 of the B.C.Z.R. only in the event that special hearing relief is not granted and it is found that Section 426.6.A.1 requires a 200 foot setback from a telecommunications facility to a railroad property that has no home upon it and cannot, in fact, have any home on it, but is nonetheless zoned D.R.5.5. The subject property and requested relief are more fully described on the site plan that was marked and accepted into evidence as Petitioner’s Exhibit 1.

Appearing at the requisite public hearing in support of the requested relief were Hillorie Morrison with Network Building & Consulting, LLC, agent for Petitioner Tower Development Corporation and Gregory E. Rapisarda, Esquire, attorney for Petitioner. Also appearing in support of the requested relief was Michael McGarity with Daft McCune Walker, Inc. (“DMW”), the firm that prepared the site plan. There were no Protestants or other interested persons in attendance.

Testimony and evidence in the case was presented by way of a proffer from Petitioner’s attorney, Mr. Rapisarda, and included the expert testimony of Mr. McGarity and Mr. Morrison, whose resumes were marked and accepted into evidence as Petitioner’s Exhibits 3 and 4, respectively. As their resumes indicate, Mr. McGarity has a degree in civil engineering and has extensive experience with DMW in managing wireless telecommunications projects for numerous carriers. Ms. Morrison is a licensed attorney with a significant background in transportation and land planning, as well as site acquisition and development in the telecommunications industry. They were both accepted as experts in their respective fields.

The proffered testimony revealed that the subject property is rectangular, but somewhat irregular, shaped and consists of approximately 2.30 acres, more or less, zoned B.R. with a small portion zoned B.L. to the south. The property is located on the southwest side of Ebenezer Road, east of Strawberry Court, in the Chase/Middle River area of eastern Baltimore County, and is also situated parallel and just east of existing railroad tracks currently utilized by Amtrak. The property is currently improved with an existing large (100 feet by 80 feet) one-story warehouse building to the rear and a two-story building (30 feet by 40 feet) near the center of the property. The current use of the property is commercial/office/warehouse. Petitioner Tower Development Corporation is a subsidiary of Crown Castle USA, Inc., a company involved in the engineering, deployment, marketing, ownership, operation and leasing of shared wireless communication

sites. Tenants include every major wireless carrier, various state and federal government agencies, narrowband and broadband data service providers. The company's tower portfolio consists of over 22,000 towers in 92 of the top 100 U.S. markets.

At this juncture, Petitioner desires to lease a portion of the subject property for a proposed 60 foot by 60 foot telecommunications compound as delineated on the site plan. The plan calls for a 10 foot by 20 foot T-Mobile equipment pad and an 11.7 foot by 30 foot Verizon Wireless equipment shelter at the base of a proposed 170 foot tall monopole tower inside the fenced, graveled compound. A MESA cabinet, 10 foot backboard, and a transformer will be installed outside the compound. In addition, proposed Verizon Wireless antennas will be mounted to the tower at the centerline height of 166 feet and T-Mobile antennas will be mounted at a centerline height of 156 feet on the monopole.

The proposed tower as shown on the site plan is permitted as of right; however an issue has arisen with regard to the proximity of the tower to a residential zone line and interpretation of the B.C.Z.R. In particular, Section 426.6.A.1 of the B.C.Z.R. states that “[a] tower shall be set back at least 200 feet from any other owner's residential property line.” That requirement is met without question at the north, south, and east side property lines. These areas are zoned B.L., B.R., B.M., and B.L.-A.S. and have various business and commercial uses throughout. The only issue is with the land to the west of the subject property and the site of the proposed tower. As shown on the site plan, that area is zoned D.R.5.5 and has predominantly residential uses. Located in between and along the subject property and the residentially zoned property is the railroad property that is approximately 120 feet wide. As labeled on the site plan, the B.R. zoning on the subject property side and the D.R.5.5 zoning on the residentially zoned side meet down the center of the railroad property. As also labeled on the site plan, the proposed telecommunications tower is located 142 feet from where the zoning changes from B.R. to

D.R.5.5 at the center of the railroad property, and is 203 feet from the nearest residential property line located west of the tower, owned by Gary and Theresa Oakley at 6917 Ebenezer Road.

The issue, then, is what is the meaning within the Regulation of “at least 200 feet from any other owner's *residential property line*.” (emphasis added). One could argue that “residential property line” means a residentially “zoned” property line, such as the adjacent D.R.5.5 Zone in this case. On that basis, the tower is only 142 feet from the adjacent D.R.5.5 Zone and this explains why Petitioner has requested the variance relief from Section 426.6.A.1 of the B.C.Z.R. in the alternative. On the other hand, Petitioner’s experts and counsel assert that the meaning of “residential property line” means just what it says; that is, a property line that is not merely “zoned” residential, but that is actually “used” residential. Mr. Rapisarda argues that the plain meaning of the Regulation at issue is clear and that when the County Council enacted the Zoning Regulations, it specified when it meant a residential property line, as above, and when it meant a residential zone line. He pointed to Section 243.4 of the B.C.Z.R., which states that in the M.R. Zone, “[n]o building or other structure shall be closer than 125 feet at any point to the nearest boundary line of a *residential zone*.” (emphasis added). In that section the Council specified “residential zone” because that is precisely what it meant to convey. In the instant matter, by specifying “residential property line” in Section 426.6.A.1 of the B.C.Z.R., the Council was more concerned with the location of a telecommunications tower being at least 200 feet from a residentially used property line than a residential zone line, and stated that clearly in the Regulation. Thus, Mr. Rapisarda requests that I confirm such an interpretation and approve the proposed telecommunications tower in a B.R. Zone with a setback of 203 feet to the nearest residential property line as being in compliance with Section 426.6.A.1 of the B.C.Z.R.

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. Comments were received from the Department of Environmental

Protection and Resource Management dated October 12, 2010 which states that development of the property must comply with the Forest Conservation Regulations. Given that no forest exists on this commercially zoned site, 0.3 acre of afforestation must be addressed prior to issuance of any permit.

After due consideration of the testimony and evidence presented, I am persuaded to grant the special hearing relief requested. I agree with Petitioner's position that Section 426.6.A.1 of the B.C.Z.R. requiring that the proposed tower be at least 200 feet from any other owner's residential property line means, literally, a "residential property line" and does not mean in this instance a "residential zone line." In being proposed for a location 203 feet from another owner's residential property line, I find that Petitioner is in compliance with this Regulation, as delineated on the site plan. It is also noteworthy that in an Inter-Office Correspondence dated October 4, 2010, which was marked and accepted into evidence as Petitioner's Exhibit 5, the Tower Review Committee unanimously recommended approval of the proposed 170 foot tower and also found that the proposed location meets all of the requirements of Section 426 of the B.C.Z.R.

Pursuant to the advertisement, posting of the property and public hearing held, and after considering the testimony and evidence offered, I find that Petitioner's special hearing should be granted. Having found in Petitioner's favor on the special hearing, it is not necessary to consider the variance request and it shall be dismissed as moot.

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County this 24th day of November, 2010 that Petitioner's Special Hearing request in accordance with Section 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to approve a telecommunications facility in a B.R. zoning district with a setback of 203 feet to the nearest residential property line as in compliance with section 426.6.A.1 of the B.C.Z.R., and to

determine that Section 426.6.A.1 does not require a 200 foot setback to a railroad property that is zoned D.R.5.5 and has no residences and cannot have any residences on it, be and is hereby **GRANTED**; and

IT IS FURTHER ORDERED that Petitioner's Variance request from Section 426.6.A.1 of the B.C.Z.R., filed only in the event that special hearing relief is not granted and it is found that Section 426.6.A.1 requires a 200 foot setback from a telecommunications facility to a railroad property that has no home upon it and cannot, in fact, have any home on it, but is nonetheless zoned D.R.5.5, be and is hereby **DISMISSED AS MOOT**.

The relief granted herein is subject to the following conditions:

1. Petitioner is advised that it may apply for any required building permits and be granted same upon receipt of this Order; however, Petitioner is hereby made aware that proceeding at this time is at its own risk until the 30-day appeal period from the date of this Order has expired. If for whatever reason, this Order is reversed, Petitioner would be required to return, and be responsible for returning, said property to its original condition.
2. Development of this property must comply with the Forest Conservation Regulations (Sections 33-6-101 through 33-6-122 of the Baltimore County Code). Given that no forest exists on this commercially zoned site, 0.3 acre of afforestation must be addressed prior to issuance of any permit.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

SIGNED
THOMAS H. BOSTWICK
Deputy Zoning Commissioner
for Baltimore County

THB:pz