BOARD OF APPEALS CASE NO. 4953	*	BEFORE THE
APPLICANT: Sprint PCS	*	ZONING HEARING EXAMINER
REQUEST: Special Exception to construct a communications tower in AG District; 2544 Conowingo Road, Darlington	*	OF HARFORD COUNTY
	*	Hearing Advertised
	*	Aegis: 8/11/99 & 8/18/99
HEARING DATE: September 22, 1999		Record: 8/13/99 & 8/20/99
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ZONING HEARING EXAMINER'S DECISION

The Applicant is Sprint PCS. The Applicant is requesting a Special Exception to Section 267-53(I)(4) of the Harford County Code, to construct a communications tower in an Agricultural District.

The subject parcel is located at 2544 Conowingo Road in the Third Election District. The parcel is identified as Parcel No. 82, in Grid 4-C, on Tax Map 20. The parcel contains 45 acres, more or less, all of which is zoned Agricultural. The parcel is owned by Paul Wollaston, who resides at 307 Woodlawn Road, Baltimore.

The first witness to testify was Mr. Norman Ray who was admitted as an expert in the field of land use planning, zoning and communication towers. Mr. Ray indicated that he had been involved with between 800-1,000 cellular communication tower sites from New York to the Carolinas. He said he evaluates sites and works with engineers, attorneys, RF engineers and coordinates site identification and development.

Mr. Ray testified that the Special Exception criteria in the Harford County Zoning Code requires that each tower be set back the height of the tower plus 10 feet. Mr. Ray said that the tower will meet or exceed all setback requirements set forth in the Code. Mr. Ray went on to explain that Sprint has been granted a license for 57 major markets throughout the United States and is required by Federal law to provide seamless coverage within the license area. The site identification process involves identification of a hole in coverage and then an analysis of road networks, topography, and prospective properties within the area which might be appropriate locations for a tower. Then the site must meet the criteria of the local zoning ordinance.

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Mr. Ray testified there is very little impact on traffic generated by the site since each site is visited once a month and there is no water, sewer or other utilities to the tower with the exception of electric and telephone. He testified that the tower proposed for this site is a lattice tower which is galvanized with a zinc coating. He said the tower is designed wind loads of 90 miles per hour with ½ inch of ice on the entire tower and wind loads of 130 miles per hour at the top of the tower. Mr. Ray indicated that the towers are designed with a break point so that what if a failure occurs, the tower would collapse on itself, thereby limiting any potential damage to adjoining properties.

The tower design was admitted into evidence as Petitioner's Exhibit No. 9, and Mr. Ray indicated that the tower is designed to co-location by users. He said co-location helps to eliminate the need for other towers in the vicinity and that the equipment on the ground consists of 3 to 5 cabinets, the largest of which is the same width and depth as a refrigerator, but a foot and one-half shorter. He went on to testify that each site is enclosed in a fence and that break-in and theft detection are remotely monitored. Mr. Ray said he is aware of no incidents of interference with television or radio reception and that the site will not emit odor, dust, gas, smoke, fumes, vibration, glare or noise, and that each tower will be lighted because FAA regulations require lighting for towers over 199 feet.

Mr. Ray testified that as an expert planner, he felt that the application was consistent with generally accepted engineering and planning principles and practices and very similar to other sites located throughout the County. Mr. Ray located the site through exhibits and identified the property location by site map and discussed the specific location of the tower on the property. Mr. Ray said that the tower will not have an adverse impact on structures in the vicinity such as churches, schools, theaters, hospitals or other places of public use. He said that the tower was consistent with the Harford County Zoning Code and Master Plan and that there were no sensitive natural features in the immediate vicinity of the site.

With respect to a generator being located on the site, Mr. Ray indicated that the site is served by a propane powered generator which will operate when electrical power is out. Mr. Ray also said that a monopole is not capable of handling as many carriers and is of solid mass through which light and air do not pass. With respect to property values, Mr. Ray indicated that, in some circumstances, people prefer owning property adjacent to a tower site because they know nothing else can be built on the property improved by a tower and he said he did not feel the tower would enhance the value of the property but he also felt that the location of the tower would not decrease the property values.

Mr. Jules Cohen's resume was entered into evidence as Petitioner's Exhibit No. 11 and his engineering report was admitted into evidence as Petitioner's Exhibit No. 12. Mr. Cohen was admitted to testify as an expert in the field of radio wave, radio frequency, and radiation. Mr. Cohen testified that he was a consulting engineer and the principal in a substantial consulting firm which handled in excess of 10,000 projects involving applications before the Federal Communications Commission (FCC), measurements of field strength from various types of facilities and design and adjustment of antenna systems. He testified he has also been involved in the investigation of possible biological effects of exposure to radio frequency energy. Mr. Cohen said he has been engaged in his profession for over 50 years. Mr. Cohen testified that Congress recently enacted 47 U.S.C., Section 322(c)(7)(b) to the effect that:

> "No state or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effect of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission regulations concerning such emissions."

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Mr. Cohen said he served on the committee that developed the standards used as the basis of the above-reference federal legislation. Mr. Cohen testified that the proposed tower complied with the regulations concerning radio frequency emissions by a very wide margin. Mr. Cohen testified that he assumed a worse case scenario and assumed maximum load on the tower by other users in addition to Sprint. As a result of the study more particularly set forth in Exhibit No. 12, Mr. Cohen determined that the radio frequency emissions from the Sprint transmissions at a point 6 feet above ground anywhere within 3,000 feet of the tower would be approximately 0.0003 percent of the maximum permissible exposure allowed by the FCC. He further testified that the radio frequency exposure emanating from the tower would be 15 million times less than the level at which there may be an adverse biological effect. Mr. Cohen testified that Sprint would be required to certify on an ongoing basis that the facilities remained compliant with the FCC standard through any future modifications of the towers. Mr. Cohen also addressed the question raised regarding whether or not the towers would create interference with radios, televisions, or hearing aids. He testified that the frequency is exclusively set aside for telecommunications service and is far removed from the frequencies that are used for any of the broadcast services. Mr. Cohen concluded his testimony by saying that microwave ovens emit more radiation that the proposed tower would.

Mr. Anthony S. McClune, Manager, Division of Land Use Management, for the Department of Planning and Zoning, said his Department visited the site and, based on their investigation, has recommended approval of the requested Special Exception. Mr. McClune said that the site is in compliance with the Special Exception criteria and the "Limitations, Guides and Standards" set forth in the Zoning Code. Mr. McClune also testified that the location of the tower where proposed would have no greater impact than if located on other property in the same zoning district.

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Mr. McClune indicated that the Department initially had difficulty with the location of this tower because of its proximity to a historic structure known as "Gray Gables". Based on this concern, the Applicant moved the tower approximately 1,500 feet to the east and away from the west property line next to Gray Gables. The tower location is now adjacent to the property to the east which is zoned General Industrial. Mr. McClune said, based upon that relocation, the Department recommends approval of the application.

After the close of testimony, Mr. W. Paul Thompson, Jr., Chair of the Historical Preservation Committee, by letter dated October 8, 1999, advised that there were some historically significant properties in the lower Deer Creek Valley Historic District and that the next meeting of the Historic Preservation Commission was scheduled for October 25, 1999 to review the proposed tower for its impact.

CONCLUSION:

The Applicant is requesting a Special Exception to Section 267-53(I)(4) of the Harford County Code, which provides:

> "Towers, communications and broadcasting. These uses may be granted in the AG, B2 and B3 Districts, provided that the setback of the tower from all property lines shall be equal to the height of the tower plus ten (10) feet."

The issue to be decided by the Hearing Examiner is whether or not the Applicant has complied with the Special Exception criteria set forth in Section 267-53(I)(4). The criteria set forth in that Code Section is whether or not the tower will be set back from all property lines a distance equal to the height of the tower plus 10 feet. The Applicant testified and introduced a site plan and other exhibits demonstrating that the tower will be located the height of the tower plus 10 feet from all adjoining property lines.

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A special exception is a use which has been legislatively predetermined to be conditionally compatible with the uses permitted as of right in a particular zone. Creswell v. Baltimore Aviation Service, Inc., 250 Md. 712, 719 (1970). The most recent, comprehensive and definitive statement of the law of special exceptions is found in the case of Mossberg v. Montgomery Co., 107 Md. App. 1 (1995), hereinafter referred to as "Mossberg". Mossberg chronicles the history and development of special exception case law in Maryland and sets forth a definitive statement of the current law regulating special exceptions. The law of Mossberg is controlling in this case. The Court of Special Appeals in Mossberg stated:

> "Thus, it is not whether a special exception/conditional use is compatible with permitted uses that is relevant in this administrative proceeding. The legislative body, by designating the special exception, has deemed it to be generally compatible with other uses. In special exception cases, therefore, generally compatibility is not normally a proper issue for the agency to consider. That issue has already been addressed and legislatively resolved. Moreover, it is not whether a permitted use by way of special exception will have adverse effects (adverse effects are implied in the first instance by making such uses conditional uses or special exceptions rather than permitted uses), it is whether the adverse effect in a particular location would be greater than the adverse effects ordinarily associated with a particular use that is considered by the agency."

Mossberg stands for the proposition that once the Code requirements have been complied with, a special exception use is transformed into a principal permitted use and the special exception standard cannot be denied unless the opposition demonstrates that there are greater adverse impacts at this particular location than other locations in the district.

Abrams, "Guide to Maryland Zoning Decisions', quoting Mossberg, summarized the issue:

> "Once an Applicant presents sufficient evidence establishing that his proposed use meets the requirements of the ordinance, even though it has adverse impacts at that particular location, if the record is otherwise silent as to a greater impact at the present location than other locations similarly zoned, the special exception must be approved."
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> (Abrams, Guide to Maryland Zoning Decisions, at pp. 120 and 121.)

The Hearing Examiner received a Memorandum, dated October 8, 1999, from the Historic Preservation Commission, indicating that they were going to conduct a meeting on October 25, 1999, with respect to this proposal. Mr. McClune, from the Department of Planning and Zoning, indicated that the Department had initial reservations about the location of this tower; however, when the Applicant agreed to move the tower away from the Gray Gables house, the Department recommended approval of the request. It should be noted that the property was posted, notices were sent to adjoining property owners, and the required advertisement was conducted.

In any event, the testimony concluded on September 22, 1999, and the record closed except for the submission of a brief by the Applicant if they wished to do so. There is no provision in the Zoning Code or the Rules that would allow the Hearing Examiner or the Board of Appeals to consider any evidence not on the record, and the Applicant, by their attorney, in a letter dated October 11, 1999, strongly objected to reopening the case for additional testimony because adequate notice, as required, was given prior to the hearing.

It is the finding of the Hearing Examiner that the Applicant can meet the requirements set forth in the Code for the requested Special Exception and, further, that approval of the Special Exception will not adversely impact the "Limitations, Guides and Standards" set forth in Section 267-9(I).

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Therefore, it is the recommendation of the Hearing Examiner that the requested Special Exception to locate a communications tower be approved, subject to the following conditions:

1. That the Applicant shall submit a plan to be reviewed through the Development Advisory Committee.
2. That the Applicant shall obtain all necessary permits and inspections for the proposed tower.
3. That upon expiration or termination of the lease, the Applicant shall remove the tower and restore the property pursuant to the terms of Paragraph 7 of the PCS Site Agreement (Applicant's Exhibit No. 7).

Date NOVEMBER 10, 1999

L. A. Hinderhofer
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Zoning Hearing Examiner