

**ZONING HEARING BOARD OF UPPER MERION TOWNSHIP
MONTGOMERY COUNTY, PENNSYLVANIA**

APPLICATION OF NEW CINGULAR WIRELESS PCS, LLC

NO. 2013-01

**PROPERTY: 541 FLINT HILL ROAD
KING OF PRUSSIA, PA 19406**

OPINION AND ORDER

This zoning application involves a commercial lessee's request for a special exception and a variance to permit a wireless telecommunications facility with a monopole/tower height of 126' on a property located in the LI Limited Industrial district.

On April 3, 2013, the Zoning Hearing Board ("ZHB") of Upper Merion Township ("Township") held a public hearing with regard to Application No. 2013-01 of New Cingular Wireless PCS, LLC ("Landowner"). The members of the ZHB present were William J. Clements, Esquire, Chairman; Lynne Gold-Bikin, Vice-Chair; Brad Murphy, Secretary; and, Mark DePillis, Esquire, Member. The ZHB was represented by Marc D. Jonas, Esquire, of the law firm of Eastburn and Gray, P.C., solicitor for the ZHB. Landowner was represented by Christopher H. Schubert, Esquire, of the law firm of Riley Riper Hollin & Colagreco.

Landowner sought a special exception and a height variance from sections 165-144.F and 165-145 of the Upper Merion Township Zoning Ordinance of 1942, as amended ("Ordinance") to permit a wireless telecommunications facility with a 126' high monopole/tower of 126' on a property located in the LI Limited Industrial District.

The ZHB admitted the following exhibits into the record:

ZHB exhibits

- A-1 ZHB application
- A-2 Zoning Officer's determination letter dated March 28, 2013
- A-3 Property owner's authorization letter dated January 24, 2013
- A-4 *Curriculum vitae* of Brock Riffel, Radio Frequency Design Expert
- A-5 FCC license for AT&T
- A-6 topographic map of surrounding area
- A-7 map showing existing coverage
- A-8 map showing proposed coverage
- A-9 EME Compliance Report
- A-10 Non-Interference Report
- A-11 FAA TowAIR Analysis
- A-12 Site plans prepared by Advantage Engineers dated September 20, 2012, last revised October 24, 2012

The zoning hearing was duly advertised, notice thereof was given in accordance with the requirements of the Ordinance, and the proceedings were stenographically recorded. After careful consideration, the ZHB makes the following findings of fact and conclusions of law:

A. FINDINGS OF FACT

BACKGROUND

1. Landowner is the lessee of the parcel of land located at 541 Flint Hill Road, King of Prussia, Pennsylvania ("Property"). [N.T. 17-18; Exhibit A-3]

2. The Property is a corner lot made up of two separate parcels, deemed merged by the Township Zoning Officer, comprising approximately 7 acres. [N.T. 22-24; Exhibits A-2, A-12]

3. Improvements on the Property include a building occupied by an automobile salvage operation and towing company. [N.T. 24; Exhibit A-2]

4. Landowner proposes the installation of a telecommunications facility for AT&T with 12 antennas and a radio equipment shelter. The current automobile salvage operation and towing company use will remain at the Property. [N.T. 14-15; Exhibit A-6]

5. A telecommunications facility is not permitted by right in the LI Limited Industrial district. However, Ordinance section 165-144.F permits a use of the same general character as the uses permitted in the LI Limited Industrial district when authorized as a special exception. Ordinance section 165-144.

6. Ordinance section 165-145 limits the height of structures in the LI district to 50', the height may be increased to a maximum of 65 feet, provided that for every foot of height in excess of 50 feet, there shall be added to each yard requirement one corresponding foot of width or depth.

7. Landowner's application requests a special exception and a variance to permit a telecommunications facility use with a monopole/tower height of 126' in the LI Limited Industrial district.

ZHB HEARING

8. Landowner offered the testimony of Brian Laslo, site acquisition consultant; Brock Riffel, radio frequency engineer; and Gary Lucas, P.E., project engineer, in support of the application.

9. The testimony was as follows:

- Landowner currently has an operating telecommunications facility in the area located on a PECO high tension pole; the facility has limitations, including restricted access making maintenance and upgrades difficult [N.T. 15-16];
- Landowner researched other sites for the telecommunications facility but these sites were rejected for various reasons, including lack of effective coverage, height limitations, and restrictions of property owners [N.T. 16-17];
- the Property is a suitable location for the telecommunications facility, and the Property's current use as an automobile salvage yard is compatible with the proposed telecommunications facility use [N.T. 17];
- upon cessation of the telecommunications facility use, Landowner will remove all structures and equipment from the Property associated with the telecommunications use within 90 days [N.T. 18, 24];
- the telecommunications facility will not contain any advertising or signage [N.T. 19];
- the monopole/tower will contain 4 antennas in each direction, for a total of 12 antennas [N.T. 21-22];
- there will be no lights on the monopole/tower [N.T. 22];
- the Property lease for the telecommunications facility is for 5 years, with 4 five year renewals [N.T. 23];

- the telecommunications equipment will be fenced, prohibiting public access to the site [N.T. 26-27];
- Landowner will name the Township as an additional insured on the comprehensive general liability insurance policy [N.T. 27-28];
- Landowner operates under a license issued by the FCC [N.T. 25; Exhibit A-5];
- the proposed telecommunications facility is necessary to provide 4G enhanced data transmission for Landowner's network [N.T. 33];
- if the proposed telecommunications facility is approved for the Property, the existing site located on the PECO high voltage pole will be decommissioned, and the radio equipment and antennas will be removed [N.T. 34];
- the height requirements of the monopole/tower are in part driven by the rolling topography occurring in the Township [N.T. 35; Exhibit A-6];
- the overall height of the proposed monopole/tower, including the lighting rod, is 126' [N.T. 38];
- the telecommunications equipment will be stored in a shelter 12' by 28' and enclosed by a fence [N.T. 39];
- the operation of the telecommunication facility will cause no harm to the public health, safety, or welfare [N.T. 40];
- the operation of the telecommunications facility will not interfere with other radio-based technology in the area [N.T. 49];

- the telecommunications facility is in compliance with the requirements of the FAA [N.T. 41];
- there will be no noise or odor emanating from the telecommunications facility [N.T. 42];
- other monopoles/towers in the area are greater in height than the proposed monopole/tower [N.T. 45];
- the proposed telecommunications facility complies with the LI district's area and bulk requirements [N.T. 47-48];
- a maintenance technician will visit the Property once every 6-8 weeks to inspect the telecommunications facility [N.T. 50];
- there will be no adverse impact on traffic [N.T. 50];
- the proposed use complies with all of the criteria for a special exception contained in the Ordinance [N.T. 52];
- Landowner agrees to provide future collocation of the monopole/tower for other telecommunication providers [N.T. 54]; and
- a monopole/tower height of 130' will allow for greater collocating opportunities for other telecommunication providers [N.T. 57].

10. One neighboring property owner raised concerns of generator noise and aesthetics. [N.T. 60-64]

B. DISCUSSION

1. Special Exception

Landowner proved compliance with the criteria necessary for the grant of a special exception to permit a telecommunications

facility use on the Property located in the LI Limited Industrial district.

Landowner sought a special exception to permit a telecommunications facility use in the LI Limited Industrial district. Ordinance section 165-144.F permits by special exception any use of the same general character as the uses permitted in the LI district. Ordinance section 165-144.A provides that any use permitted in the AG–Agricultural District is permitted in the LI district. The AG district permits radio and television transmitting stations and towers by special exception. Ordinance section 165-10.E(6). Thus, a telecommunications facility is permitted by special exception in the LI district.

A special exception is not an exception to a zoning ordinance, but rather a use, which is expressly permitted, absent a showing of a high degree of probability that the proposed use will adversely impact the community. *Rural Area Concerned Citizens, Inc. v. Fayette County Zoning Hearing Board*, 646 A.2d 717 (Pa.Cmwth. 1994), *appeal denied*, 658 A.2d 798 (Pa. 1995). Once the landowner meets its burden of proof that the proposed use satisfies the requirements of the zoning ordinance for the grant of a special exception, a presumption arises that the proposed use is consistent with the health, safety and general welfare of the community. *Greaton Properties, Inc. v. Lower Merion Township*, 796 A.2d 1038 (Pa.Cmwth. 2002).

Testimony presented by Landowner demonstrated compliance with the special exception requirements contained in section 165-251.B(1) of the Ordinance. Landowner demonstrated through the testimony of its site acquisition consultant that the Property is a suitable location for the telecommunications facility, and the Property's current use as an automobile salvage yard is compatible with the proposed telecommunications facility use. [N.T. 17]

Landowner demonstrated through its radio frequency engineer and civil engineer that the operation of the telecommunication facility will cause no harm to the public health, safety, or welfare, and that the operation of the telecommunications facility will not interfere with other radio-based technology in the area. [N.T. 40, 49] Landowner established that there will be no adverse impact on traffic caused by the proposed use. [N.T. 50] The telecommunications facility will emit no noise, odor, or light. [N.T. 22, 42]

The proposed telecommunications facility is of the same general character as the uses permitted in the LI district, including radio and television transmission stations and towers. Landowner demonstrated compliance with the special exception requirements. The proposed telecommunications facility is consistent with the health, safety, and welfare of the community. No evidence was presented to the contrary. Thus, Landowner proved its entitlement to the special exception.

2. Variance

Landowner proved compliance with the requirements for a variance, entitling Landowner to a height variance to permit a telecommunications facility with a monopole/tower height of 136' in the LI Limited Industrial district.

It is well settled in Pennsylvania that a zoning hearing board may grant a variance only where:

1. an unnecessary hardship will result if the variance is denied, due to the unique physical circumstances or conditions peculiar to the property;
2. because of the physical conditions, the property cannot be developed in conformity with the zoning ordinance and, therefore, a variance is necessary to enable the reasonable use of the property;

3. the unnecessary hardship was not created by the applicant;
4. the variance will not be detrimental to the public welfare;
and
5. the variance sought will represent the minimum variance that will afford relief.

53 P.S. § 10910.2(a); *Cope v. Zoning Hearing Bd. of South Whitehall Township*, 134 Pa.Cmwlth. 236, 578 A.2d 1002 (1990).

Landowner demonstrated through the testimony of its radio frequency engineer that the proposed height of the telecommunications facility monopole/tower is the minimum height necessary to perform its function of providing reliable cellular service due to the rolling topography of the Township. [N.T. 35; Exhibit A-6]

The Commonwealth Court in *In Re Appeal of Holtz*, 8 A.3d 374 (Pa.Cmwlth. 2010), held that to permit a cell tower use by special exception but limit the height of the cell tower so that it cannot be effective produces an absurd result. The Court stated:

Moreover, we must presume that the Borough Council does not intend a result that is absurd. Section 1922(1) of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1922(1). Under section 406.1 of the Zoning Ordinance, the permitted height for a structure in the relevant zoning district is fifteen feet. No communications tower, if limited to a height of fifteen feet, could possibly be effective. To allow communications towers by special exception, but then limit their height to fifteen feet unless the applicant can show hardship under section 908, produces an absurd result.

Id. at 378.

Landowner demonstrated through the testimony of its experts that the height requirements of the monopole/tower are in part driven by the rolling topography occurring in the Township [N.T. 35; Exhibit A-6] The proposed telecommunications facility is necessary to provide 4G enhanced data transmission for Landowner's network

[N.T. 33]. The telecommunications facility is in compliance with the requirements of the FAA [N.T. 41].

The telecommunications equipment will be fenced, prohibiting public access to the site [N.T. 26-27], and the operation of the telecommunication facility will cause no harm to the public health, safety, or welfare. [N.T. 40] A monopole/tower height of 136' will allow for greater collocating opportunities for other telecommunication providers [N.T. 57], and is the minimum height variance necessary that will afford relief.

C. CONCLUSIONS OF LAW

1. The ZHB has jurisdiction under sections 909.1(a)(4) and (5) of the Pennsylvania Municipalities Planning Code, 53 P.S. §10909.1(a)(4) and (5), and Ordinance sections 165-251.A(5) and (6).

2. Landowner has standing as the lessee of the Property.

3. The ZHB is obligated to ensure compliance with the technical requirements of the Ordinance.

4. A special exception is a conditionally permitted use, legislatively allowed where specific criteria in an ordinance are met.

5. Landowner provided substantial competent evidence satisfying all of the criteria for a special exception to permit a telecommunications facility use in the LI Limited Industrial district.

6. The ZHB may grant a variance provided that an applicant demonstrates, where applicable, that: (a) an unnecessary hardship will result if the variance is denied due to the unique physical circumstances or conditions peculiar to the property; (b) because of the physical conditions, the property cannot be developed in conformity with

the zoning ordinance, prohibiting the reasonable use of the property; and (c) the variance, if authorized, will represent the minimum variance that will afford relief. Ordinance §165-251.B(2).

7. Landowner provided substantial competent evidence satisfying the requirements for a variance to permit a monopole/tower height of 136'.

At the conclusion of its April 3, 2013 hearing, the ZHB entered the following order:

ORDER

AND NOW, this 3rd day of April, 2013, on the application of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility, the following relief is GRANTED:

1. A special exception from section 165-144.F to permit a wireless telecommunications facility; and
2. A variance from section 165-145 to permit a tower initially 126 feet high (including a 6 foot lightning rod) and constructed to permit a maximum height of 130 feet plus 6 feet for a lightning rod, for a total of 136 feet, to accommodate other wireless providers.
3. The conditions are as follows:
 - (1) The telecommunications facility will be removed within 90 days after cessation of use, and the applicant/landowner shall provide to the Township a bond to guarantee removal of the telecommunications facility; and
 - (2) The applicant/landowner shall permit other wireless providers to collocate on the telecommunications facility; and
 - (3) The applicant/landowner shall provide an insurance certificate to the Township naming the Township as an additional insured for the entire time period during

which the telecommunications facility is located on the property.

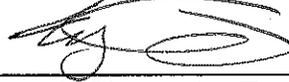
An opinion with findings of facts, conclusions of law, and reasons will follow.

This decision is subject to a 30-day appeal period beginning on the date of entry (mailing) of this notice of decision.

The applicant is directed to section 165-257 "Expiration of Special Exceptions or Variances" and applicable statutory provisions governing the expiration of special exceptions and variances.

Written notice of the ZHB's decision was mailed to Landowner on April 4, 2013.

**ZONING HEARING BOARD OF
UPPER MERION TOWNSHIP**



William J. Clements, Esquire
Chairman



Lynne Gold-Dikin, Esquire
Vice-Chair

Brad Murphy
Secretary



Mark DePillis, Esquire
Member

Date of Mailing: