

**IN RE: PETITION FOR VARIANCE**

W side of York Road, 725 feet S of the  
c/l of Ridgely Road  
8<sup>th</sup> Election District  
3<sup>rd</sup> Councilmanic District  
(1726 York Road)

**Betty Lou Adolph**  
*Legal Owner*

**Capital Telecom Acquisition, LLC**  
*Contract Lessee*

\* BEFORE THE  
\* DEPUTY ZONING  
\* COMMISSIONER  
\* FOR BALTIMORE COUNTY

\* **CASE NO. 2011-0169-A**

\* \* \* \* \*

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter comes before this Deputy Zoning Commissioner for consideration of a Petition for Variance filed by Betty Lou Adolph, property owner, and Capital Telecom Acquisition, LLC (“Petitioner”), lessee, through their attorney, Sean P. Hughes, Esquire. The Petitioner requests a variance from Section 426.6.A.1 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to permit a proposed wireless telecommunications tower with a setback of 134 feet from another owner's residential property line in lieu of the required 200 feet setback provided in the B.C.Z.R. The tower is proposed to be located on a portion of the property zoned B.L., a zoning classification which permits towers by right. The relief requested is more fully described on a five page site plan submitted and received into evidence as Petitioner’s Exhibit 1.

Mr. Hughes appeared at the public hearing, and joining him were John McGrath, Thomas Waniewski and Safwat Issa. The biographies and curriculum vitae of these gentlemen were marked as exhibits and received into evidence as Petitioner’s Exhibits 2A through 2C, respectively. No citizens or other Protestants appeared at the hearing.

The public hearing proceeded by way of a proffer by Plaintiff’s counsel. Mr. McGrath is a Division Manager of Advantage Engineers, LLC which is located in Columbia MD. His firm

provides environmental and civil engineering services to the wireless communications industry in the mid-Atlantic region. Mr. McGrath has over 20 years experience in the engineering and construction industry, and has been involved in the location and siting of wireless telecommunication towers for the past 15 years. Mr. McGrath was prepared to testify that he had selected the proposed site for the tower in this case and that it was proposed to be 120 feet tall. Mr. McGrath, if called as a witness, would also testify that the property has a very unique shape, as reflected on the aerial bird's eye map marked and received into evidence as Petitioner's Exhibit 3. Mr. Grath was prepared to testify that strict compliance with the B.C.Z.R. would in this case prevent the Petitioner from erecting a cell tower, which is a permitted use in the B.L. zone. Finally, Mr. Grath was prepared to testify that the provision of wireless broadband communications has become crucial to the U.S. economy and has become ubiquitous throughout American society.

The Petitioner's next witness was Thomas Waniewski, who has worked in the wireless industry for nearly 13 years, specializing in site acquisition, program management and relations between landlords and vendors in this industry. Mr. Waniewski holds both an MBA and law degree from Temple University, as well as an undergraduate degree from the Wharton School at the University of Pennsylvania, as reflected on his biography received into evidence as Petitioner's Exhibit 2B. If called to testify, Mr. Waniewski would discuss and provide testimony related to Petitioner's Exhibit 4, which is a photo depicting concentric circles surrounding the proposed cell tower site. Mr. Waniewski would testify that a balloon was raised to the height of the proposed tower, and photographs were taken from various viewpoints. Petitioner's Exhibit 4 contains eight such photographs showing what the tower would look like from the various vantage points. The tower depicted in Petitioner's Exhibit 4 is grey in color, and Mr. Waniewski would testify that

towers are often painted various colors, but that in his opinion the galvanized grey coloring would provide for the most inconspicuous appearance, and that opinion is buttressed by the photographs in Exhibit 4 which indeed do depict the proposed tower would be fairly unobtrusive.

The third and final witness for Petitioner was Safwat Issa, who is employed by Clearwire, which is the firm that would be the first tenant on the proposed cell tower. If called to testify, Mr. Issa would discuss and explain Petitioner's Exhibits 8 through 10 which were marked and admitted into evidence. On Petitioner's Exhibit 8, there is reflected a large circle depicting several other Clearwire sites in the vicinity, and Mr. Issa would testify that the proposed location (reflected as MD-BAL 0042 on Exhibit 8) was strategically positioned in the center of an area where coverage was lacking and would therefore provide much needed capacity for Clearwire's coverage. Mr. Issa, if called to testify, would explain that Petitioner's Exhibit 9 reflects that there is essentially a donut shaped area where Clearwire's coverage was extremely weak. Mr. Issa was prepared to testify further that Petitioner's Exhibit 10 reflects Clearwire's coverage area assuming the proposed tower were to be constructed, and as reflected on that exhibit the coverage would be enhanced to a red zone, which Mr. Issa was prepared to explain was far superior to the yellow and green coverage areas reflected on Exhibits 9 and 10. As such, Mr. Issa would testify that there was a great need for the coverage which would be covered by the proposed tower, and that the proposed height of the monopole (approximately 120 feet) was the minimum necessary to achieve the coverage enhancements reflected on Petitioner's Exhibit 10. Finally, Mr. Issa would testify that the radio emissions from the proposed tower would be well below those levels set by the Federal government. Also admitted into evidence was Petitioner's Exhibit 6, which was a letter from the Federal Aviation Administration, reflecting that the proposed tower did not need to be lighted, and would not pose any threat or hazard to air navigation.

Admitted into evidence as Petitioner's Exhibit 5 was a letter from William R. Heiden III, a licensed Senior Project Engineer from the firm of Valmont Structures. Mr. Heiden stated that monopole cell towers, as proposed in the present case, are very strong structures, and that there are very few instances of catastrophic failure. In the event such a tower should fail, Mr. Heiden explained that the most common location would be in the middle region of the pole, causing the upper portion to remain connected and "bowing over" against the base of the pole. As such, Mr. Heiden opined that the pole proposed in this case has a theoretical break point giving it a 40 foot fall zone. Even so, as reflected on Petitioner's Exhibit 1, there are no residential structures within the 120 foot theoretical fall zone radius. Finally, Petitioner's Exhibit 7 is interoffice correspondence dated November 4, 2010, reflecting that Baltimore County's Tower Review Committee approved of the proposed tower in this case, and also determined that Petitioner's proposed tower would meet all requirements of Section 426 of the B.C.Z.R.

The Petitioner's witnesses, if called to testify, would also confirm that several other locations were considered for the tower, including the nearby Circuit City store and the Church of the Nativity, but were determined to be unsuitable for locating the monopole. In addition, these witnesses would also confirm that efforts were made to explore whether the Petitioner could locate on an existing cellular tower, but those efforts were also unavailing.

The Zoning Commissioner is permitted to grant variances pursuant to B.C.Z.R. Section 307, upon finding that special circumstances or conditions exist that are peculiar to the land or structure which is at issue, and requiring strict compliance with the Zoning Regulations would result in a practical difficulty for the Petitioner. Having heard the testimony and considered the Exhibits, I find that sufficient evidence and justification exists to grant the requested variance. I find that the requested variance relief is appropriate in this instance, given the property's unique

and irregular shape, which make it impossible for the Petitioner to comply with the setback requirements. I also find that strict compliance with the applicable Zoning Regulations would result in a practical difficulty for the Petitioner. The evidence established that the Petitioner identified a gap in its wireless coverage, and that erection of the tower in the proposed location would provide much needed and substantial increase in wireless broadband coverage throughout the vicinity. Denial of the requested variance would also prevent the Petitioner from using its property to conduct an activity that is permitted as of right in the B.L. zone, given that cell towers are permitted in the zone at a height of 200 feet yet Petitioner's proposed tower is only 120 feet, which is 40% smaller than the height permitted as of right in this zone.

Additionally, I find that the variance request can be granted in strict harmony with the spirit and intent of the Zoning Regulations, and in such a manner as to not cause injury to the public health, safety or general welfare. In the present case, the Petitioner's witnesses confirmed that the radio frequency emissions were well below the acceptable level set by the Federal government, and as noted earlier, no community protestants appeared at the public hearing. In addition, the facility will be located in a dense commercial zone and as reflected on Exhibit 4, the proposed tower would in no way be an eyesore or visual blight when viewed from the surrounding residential and commercial locations.

Therefore, I find that the variance can be granted in such a manner as to meet the requirements of Section 307 of the B.C.Z.R., as interpreted in *Cromwell v. Ward*, 102 Md.App. 691 (1995).

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County this 13<sup>th</sup> day of January, 2011, that Petitioner's Variance request from Section 426.6.A.1 of the Baltimore County Zoning Regulations to allow a wireless telecommunications tower to be

set back 134 feet from another owner's residential property line in lieu of the required 200 feet, be and is hereby **GRANTED**.

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. At the public hearing, Counsel for Petitioner mentioned the comment from the Office of Planning, which indicated that it would prefer that an actual flag be flown from the top of the proposed monopole. The undersigned was remiss in not exploring this issue further, but to ensure that the zoning relief granted in this Order does not run afoul of the aesthetic concerns raised by the Office of Planning, Petitioner will be required to install a flag at the top of the proposed monopole, unless a representative of the Office of Planning indicates that such is not necessary, in which case this condition will be considered satisfied.

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

\_\_\_\_SIGNED\_\_\_\_\_  
JOHN E. BEVERUNGEN  
Deputy Zoning Commissioner  
for Baltimore County

JEB:pz