

<b>IN RE: PETITION FOR SPECIAL</b>	*	BEFORE THE
<b>EXCEPTION</b>		
W side of New Cut Road, 2,300' E of	*	OFFICE OF
c/line of Harford Road		
11 <sup>th</sup> Election District	*	ADMINISTRATIVE HEARINGS
3 <sup>rd</sup> Councilmanic District		
<b>(6850 Sunshine Avenue)</b>	*	FOR
James Ralph Medley, <i>Legal Owner</i>	*	BALTIMORE COUNTY
New Cingular Wireless, PCS, LLC		
<i>Lessee</i>	*	<b>Case No. 2012-0320-X</b>
Petitioners		

\* \* \* \* \*

**ORDER AND OPINION**

This matter comes before the Office of Administrative Hearings as a Petition for Special Exception filed for property located at 6850 Sunshine Avenue. The Petition was filed by the legal owner of the subject property, James Ralph Medley and the lessee, New Cingular Wireless, PCS, LLC d/b/a AT&T Mobility (the “Petitioners”). The Special Exception Petition seeks approval to permit a telecommunications structure on a portion of the property which includes a 95' monopole and a 4' lightning rod; the structure and an equipment shelter will be located in a 50' x 50' fenced compound. The total Special Exception area will be 2,500 square feet or, if the access road is included, 14,339 square feet. The subject property and requested relief are more fully described on the site plan which was marked and accepted into evidence as Petitioners’ Exhibit 2.

Appearing at the hearing on behalf of the Petitioners were Timothy Smolinski, Amarjeet Singh, Robert Posilkin, David Richardson, and Paul Whitley. Gregory Rapisarda, Esquire with Saul Ewing, LLP, attended and represented the Petitioners. Two members of the community attending the hearing (Mike Pierce and Joy Keller) and raised certain concerns regarding the tower that will be discussed later in this opinion.

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. A ZAC comment was received from the Department of Planning, dated July 17, 2012, which indicated no opposition to the Petitioners' request. That Department did, however, note that the property (which is zoned RC 2) is in agricultural preservation and also located in a rural legacy area. As such, the owners of the property sought and obtained a release of one acre of land from the preservation easement, which includes space for the proposed wireless communications facility, all utilities, and access to and from the facility. *See* Petitioners' Exhibit 5.

In addition, a ZAC comment was received from the Bureau of Development Plans Review (DPR), dated June 27, 2012, which indicated that a landscape plan may be required. *See* Petitioners' Exhibit 8. Petitioners' counsel acknowledged that such a plan may be required, and that issue will be addressed at the building permit phase of the project.

Finally, ZAC comment was received from the Department of Environmental Protection and Sustainability (DEPS), dated July 13, 2012, which indicated that Groundwater Management must review any proposed building permits for the site since the area is served by private well and septic.

According to a story in [The Baltimore Sun](#), there were 504 cell tower locations in Baltimore County as of fall 2009. *See* [The Baltimore Sun](#), January 14, 2010. And given society's insatiable appetite for wireless devices, this number will no doubt increase. No one likes cell towers, but they are simply a fact of our modern life.

In this case, AT&T proposes to construct a 95' tower in the Kingsville area, to fill a coverage gap in that rural area. The property in question is zoned RC 2, and under that

classification such a tower is permitted as a special exception use. In support of its petition for special exception, the Petitioners presented the testimony (via proffer) of three witnesses.

The first witness was Timothy Smolinski, a site acquisition specialist for AT&T. Mr. Smolinski described the 95' tower, and indicated it was a typical monopole design, and included space for three other wireless carriers to co-locate their facilities. Mr. Smolinski stated that 95' was the minimum height needed to fill the service gap, and he noted that the topography and tree cover of this property would greatly reduce the visibility of the tower. In conclusion, Mr. Smolinski opined that the subject site was the best and only location for the tower, and that the proposed location would cause no more detrimental impact than if the tower was located elsewhere in the RC 2 zone.

Amarjeet Singh, a radio frequency engineer for AT&T, was the next witness. Mr. Singh testified that his job is to evaluate the coverage gap, and he explained that he prepared the "RF propagation maps" (Exhibit 3) which depict the extent of the coverage gap in this vicinity. Mr. Singh testified that all equipment will meet federal and state standards, and that 95' was the minimum height required to fill the service gap. Joy Keller (a resident of the Kingsville area) questioned why a 75' tower would not suffice, and she made reference to the RF Propagation Maps (Exhibit 11) that contained depictions of the coverage areas in either scenario; i.e., a 75' or 95' tower. While Mr. Singh conceded the green "coverage areas" on the maps looked, at first blush, to be similar, he pointed out that the 95' tower would, for example, provide coverage for a state highway (Maryland Route 147) known as Harford Road in this vicinity, while the 75' tower would not.

The final witness was David Richardson, a licensed architect with the firm of BC Architects Engineers. Mr. Richardson stated that he prepared the site plan, and was acquainted

with this property, which is 97 acres in the aggregate. He opined that the tower would not be detrimental to the public health, safety and welfare, and he also indicated that AT&T's proposal satisfied the special exception requirements set forth at Baltimore County Zoning Regulations (B.C.Z.R.) § 502.1. Mr. Richardson also explained that this would be an unmanned, remotely-monitored facility, and that it would have on-site inspections by AT&T staff every 1 to 3 months.

As is frequently done in these cases, AT&T performed a 99' balloon test, to determine whether the tower would be visible from various vantage points in the vicinity (Exhibit 9). Ten such photographs were taken, and in only three such locations would the tower be visible. Perhaps most importantly, as noted by the Department of Planning, the tower would not be visible from any designated scenic routes, including Harford Road.

At the conclusion of Petitioners' case, Ms. Keller addressed certain concerns of the Greater Kingsville Civic Association, and she submitted a letter signed by its president, Charles Wolpoff. (Protestant's Exhibit 2). The community's two primary concerns are with the height of the tower (a point discussed earlier) and the lack of appropriate measures to minimize the tower's visual impact. The community proposes a stealth tower disguised as a windmill, and a photograph was submitted of such a structure (Protestant's Exhibit 1). The community points to the report of the County's Tower Review Committee (Petitioners' Exhibit 7) which, though it recommended approval of the tower, indicated that AT&T pledged to "work out any visual impact issues ... with the community." This issue winds up being the crux of this case, and it will be discussed in greater detail in the following portion of this Opinion.

## LEGAL ISSUES

Wireless towers are permitted in RC zones by special exception, per B.C.Z.R. § 426.5. Here, it is undisputed Petitioners comply with the setback requirements of the regulations, and they need no other form of zoning relief for the project.

Under Maryland law, a special exception use is presumptively in the interest of the general welfare, absent evidence that the adverse effects of such use (inherent in all special exception uses) would be greater at the location proposed than elsewhere in the zone. *People's Counsel v. Loyola College*, 406 Md. 54 (2008). In this case, no evidence was presented to rebut this presumption, and Petitioners are therefore entitled to special exception relief.

Section 426 of the B.C.Z.R. imposes several other requirements for such towers permitted by special exception, as set forth in B.C.Z.R. § 426.9. The Petitioners' presented testimony that they attempted to locate the tower on existing structures (Petitioners' Exhibit 4) in the vicinity, and Mr. Singh opined that the tower is warranted, and is no higher than needed to accommodate the future co-location of three other providers. As such, B.C.Z.R. § 426.9.A is satisfied.

Section 426.9.C.1 and 2 sets forth additional conditions (i.e., that the tower cannot be sited on an available commercial site, and that the lot in an RC zone must be a minimum of five acres) that were addressed and satisfied by Petitioners' witnesses, as discussed earlier. Section 426.9.C.3 provides that the tower shall be "disguised as a structure or natural formation ... unless the Commissioner finds that the requirement is not reasonable or advisable for the protection of properties surrounding the tower." In this case, both the Department of Planning and Petitioners' witnesses opined that the tower was at or about the height of existing tree cover in the area, and would not be visible from the scenic routes or rural legacy areas in the vicinity. The only evidence to the contrary was contained within Mr. Wolpoff's letter (Protestant's Exhibit 2), but no

adjoining neighbors or nearby residents testified that the tower needed to be disguised “for the protection of properties surrounding the tower.” See B.C.Z.R. § 426.9.C.3. In fact, the Department of Planning advised the tower “will really only be visible from the property on which it will stand.” Petitioners’ Exhibit 8.

Based on the evidence in the record (on which I must base my decision), I do not believe that Petitioners should be required to disguise the tower. While “few people would argue that telecommunications towers are aesthetically pleasing,” the zoning commissioner’s “aesthetic judgment must be grounded in the specifics of the case.” *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 5 (1<sup>st</sup> Cir. 2001).

I am not unmindful of the fact that AT&T represented to the Tower Review Committee that it would “work out any visual impact issues” that arose. Of course, the Tower Review Committee indicated it “had no concerns with the proposed design of AT&T’s tower,” and its comments are only “advisory” in nature. B.C.Z.R. § 426.4.E.4. In the end, I simply do not believe there is sufficient evidence in the record to justify a condition that the tower be disguised as a windmill, especially given that to do so would result in a 400% cost increase, according to AT&T.

Pursuant to the advertisement, posting of the property, and public hearing on this petition, and after considering the testimony and evidence offered, I find that Petitioners’ Special Exception request should be granted.

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County, this **13<sup>th</sup>** day of August, 2012, that Petitioners’ request for Special Exception to permit a telecommunications structure on a portion of the property, including a 95’ monopole and a 4’ lightning rod, an equipment shelter located in a 50’ x 50’ fenced compound, comprising a total

Special Exception area of 2,500 square feet or, if the access road is included, 14,339 square feet,  
be and is hereby GRANTED.

The relief granted herein shall be subject to and conditioned upon the following:

1. Petitioners may apply for their building permit and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, Petitioners would be required to return, and be responsible for returning, said property to its original condition.
2. Petitioners shall comply with the ZAC comments provided by Development Plans Review, Department of Environmental Protection and Sustainability, and the Department of Planning; all of which are attached and made a part hereof.

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

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Signed  
JOHN E. BEVERUNGEN  
Administrative Law Judge  
for Baltimore County

JEB/dlw