

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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(www.montgomerycountymd.gov/mc/council/board.html)

**Case No. A-6425  
APPEAL OF JAMES P. GOLDEN**

**OPINION OF THE BOARD**

(Hearing held December 18, 2013)  
(Effective Date of Opinion: January 31, 2014)

Case No. A-6241 is an administrative appeal filed by James P. Golden on behalf of lessee Cellco Partnership d/b/a Verizon Wireless (the "Appellant" or "Verizon"). The Appellant charges error on the part of Montgomery County's Department of Permitting Services ("DPS") in issuing its September 27, 2013, letter denying Building Permit No. 646284. Specifically, the Appellant asserts that this Building Permit, which would have allowed Verizon to collocate antennas for a telecommunications facility on an existing structure on privately owned land, should have been granted in accordance with Section 59-A-6.14(b) of the Montgomery County Zoning Ordinance. The structure to which the Appellant proposes to attach the antennas in question is owned by the Trinity United Methodist Church of Germantown, Maryland (the "Church"), and is located at 13700 Schaeffer Road in Germantown, in the R-200 zone.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on the appeal on December 18, 2013. M. Gregg Diamond, Esquire, represented the Appellant, and Associate County Attorney Terri Jones represented DPS.

Decision of the Board:           Administrative appeal **GRANTED**.

**FINDINGS OF FACT**

**The Board finds by a preponderance of the evidence that:**

1. The Property, known as 13700 Schaeffer Road, Germantown, Maryland 20874, and as Block U, Parcel A of the Kingsview Knolls subdivision, is zoned R-200. The Property is owned by the Trinity United Methodist Church of Germantown, Maryland.

2. On July 19, 2011, prior to the construction of the bell tower, Mr. Rick Novak, acting on behalf of Verizon Wireless, spoke with Mr. David K. Niblock, a Permitting Services Specialist with DPS, and subsequently inquired of him via email about the height limitations and setbacks for an attached steeple or free-standing bell tower at the subject Property. Mr. Novak also asked if Mr. Niblock would provide a letter or email "stating that upon construction of the steeple or bell tower, that the church would have the right to use the structure for wireless communications (antennas)." In an email of the same date, Mr. Niblock informed Mr. Novak that both a steeple and a bell tower are exempt from height restrictions, that the setbacks applicable to a bell tower are 40' front, 30' rear, and 12' side, and that "[i]f either of these structures are in existence, and are at least 50' in height, then telecommunications antennas could be attached to them by right." See Exhibit 7(a), page 32.

3. On July 24, 2012, DPS granted Building Permit No. 597442 to the Church to construct a "Free Standing 105' Bell Tower." That permit was finalized on January 28, 2013. See Exhibit 7(a), pages 5-8.

4. On August 21, 2013, Verizon and the Church filed an application for Building Permit No. 646284, to install antennas on the bell tower located on the subject Property and to construct an equipment shelter. See Exhibit 6, pages 48-49.

5. On September 27, 2013, Mr. Niblock issued a letter in response to this Permit application stating that pursuant to Section 59-C-1.31(b) of the Zoning Ordinance, a special exception was required for this use. The letter indicated that Building Permit No. 646284 was accordingly denied pending the grant of a special exception. See Exhibit 3.

6. On October 24, 2013, the Appellant filed this timely appeal of the September 27, 2013, denial letter. See Exhibit 1.

7. Mr. David Niblock, Permitting Services Specialist for DPS, testified that he has worked for the County for 25 years, and that he does the commercial and industrial zoning reviews. He stated that he is the DPS employee charged with reviewing the zoning of cell towers, and that he is a member of the Transmissions Facilities Coordinating Group ("Tower Committee"). Mr. Niblock later named the other members of the Tower Committee, explaining that all of the members are government employees except the WSSC representative, since the WSSC is quasi-governmental. He stated that Bob Hunnicut is the Tower Coordinator. He testified that the purpose of the Tower Committee is to keep a database of cell tower locations and to encourage collocations. He testified that the Tower Committee also reviews tower applications.

Mr. Niblock testified that he is familiar with the bell tower on the subject Property and the proposal to attach antennas to it, stating that he had reviewed both Building Permit No. 597442 and Building Permit No. 646284. He noted that the contact person listed on the first permit, Alex Beiro, works for SCE Engineering, and that the application for the second permit was filed by Robert Nealy, who also works for SCE Engineering. He stated that he had denied the application for the second Permit (Building Permit No. 646284). Mr. Niblock testified that the Tower Committee had reviewed the Appellant's application for these antennas and did not recommend approval of that application because it required a special exception. Mr. Niblock stated that although he attended the March 8, 2013, and May 1, 2013, Tower Committee meetings (at which the Appellant's application was considered), he abstained from voting because of the potential for controversy. He testified that the Tower Coordinator's recommendation referred to the tower to which the antennas were to be attached as a cell tower disguised as a bell tower.

Mr. Niblock testified that he is familiar with the Zoning Ordinance. He testified that in residential zones, cell towers are regulated by height (155' limit), but that the Board can allow additional height (up to 199'). He testified that Section 59-A-6.14 of the Zoning Ordinance is a Section which he implements for DPS, and that subsection (b) of that Section is the "collocation provision," listing existing structures to which antennas can be attached by right. He noted that this subsection does not list a bell tower or any church structure, and stated that the terms "bell tower" and "existing" are not defined in the Zoning Ordinance. He testified that he interprets "existing" to refer to a structure previously built or erected, and that by "previously," he means that a structure was erected before other applications were filed.

Mr. Niblock testified that in the R-200 zone, cell towers can be 155' tall, that they have to be set back one foot from the property line for every foot of height, and that they must be at least 300 feet from neighboring dwellings. He testified that this bell tower did not meet the setbacks required for a cell tower. He testified that prior to the construction of the bell tower, the Church already had a steeple. He testified that DPS does issue Building Permits for bell towers, that Division 59-B of the Zoning Ordinance lists similar types of structures, and that he would apply main building setbacks to such construction. Mr. Niblock testified that he never spoke with the Church, but that he had met with the engineering firm and with Mr. Diamond. He testified that although the Appellant applied for a Building Permit to allow the collocation of antennas on August 21, 2013, they had actually begun the approval process through the Tower Committee on November 14, 2012. See Exhibit 6, pages 30 and 48-49. He stated that while the bell tower was constructed in 2012, the Building Permit for that tower was not finalized until January 28, 2013, and noted that this Permit was therefore finalized after the Appellant had filed its collocation application with the Tower Committee. See Exhibit 7(a), page 2.

Mr. Niblock testified that he has reviewed other applications for collocation, but that he did not know of any where the structure on which the collocation was to occur was still under construction. He stated that he did not recall any other instances in which he had denied a permit for collocation on an existing tower. Mr. Niblock testified that he interpreted the intent of Section 59-A-6.14(b) of the Zoning Ordinance as being to take

advantage of existing structures to reduce the number of monopoles, lattice towers, etc. He then stated that he interprets "existing" to mean "previously constructed for another use." He testified that the approach taken by SCE Engineering does not meet the intent of Section 59-B-6.14. When asked if his interpretation of Section 59-A-6.14(b) allows for construction of a structure at the same time as an application for collocation, Mr. Niblock stated that the structure [on which the antennas are to be collocated] must be existing, and that the application must go through the Tower Committee first. He testified that when it became clear that this was an attempt to end run the Zoning Ordinance, which he testified was made evident through newspaper articles, calls from citizens, and even the Church's own website (which stated that the new "cell/bell tower" had broken ground), he determined to deny Building Permit No. 646284 for the collocation of antennas.

On cross examination, Mr. Niblock acknowledged that a posting on the Church's website cannot change the Zoning Ordinance. He testified that this is an application concerning private property in the R-200 zone. He agreed that this application did not involve a rooftop installation under Section 59-A-6.14(a), and that Section 59-A-6.14(b), which involves attaching antennas to non-rooftops, was the Section of the Zoning Ordinance that is at issue in this appeal.

With respect to the bell tower, Mr. Niblock testified that he had done the zoning review for the bell tower Building Permit, and that Mr. Simmons had done the final inspection; he testified that when a Building Permit is "finaled," that means that no further inspection is required, and that the owner can use the structure in an approved manner. Mr. Niblock agreed that the antennas that the Appellant sought to install on the bell tower comported with the parameters specified for antennas in the context of a telecommunications facility, as defined in the Zoning Ordinance. He acknowledged on cross-examination that when Verizon applied for Building Permit No. 646284 in August, 2013, it was seeking to attach antennas to an existing structure.

Mr. Niblock testified that even though Verizon had filed an application with the Tower Committee to allow the collocation in November, 2012, the Tower Committee did not meet to consider that application until March and May of 2013, and thus that when the Tower Committee considered Verizon's application, the bell tower "existed." He then testified that it had become clear in 2012 that the purpose for constructing the bell tower was to serve as a stealth cell tower. When asked what triggered the need for a special exception, given that he had already testified that the tower could be used from here to eternity [as a bell tower], Mr. Niblock testified that before construction at the subject Property was even complete, the Church was referring to the structure as a "cell/bell tower" and had acknowledged in published reports that this was installed to serve as a cell tower. He testified that this was an end run of the Zoning Ordinance.

When asked on cross examination if he had any concerns with the use or setbacks for the equipment shelter that was also proposed as part of Building Permit No. 646284, Mr. Niblock testified that he did not. When asked if he had written the email to Mr. Rick

Novak, in the record at Exhibit 7(a), page 32, Mr. Niblock stated that he had.<sup>1</sup> When this email was later characterized by a Board member as Mr. Niblock telling Mr. Novak that this could be done [i.e. that antennas could be attached to an existing bell tower], Mr. Niblock testified that that was correct, and that he would give the same advice today.

When asked whether, had the bell tower been built in 1970, he would have denied the application to attach antennas to the tower, Mr. Niblock testified that he would not have denied that application; when subsequently asked if it was therefore the amount of time that the bell tower had been in existence that was the cause for this Building Permit denial, Mr. Niblock testified that the public admission regarding the real reason for the construction of the bell tower was why he denied Building Permit No. 646284. He testified that in 2012, the Church's website and the media said that this was really a cell tower. He stated in response to Board questions that after hearing this, he did not speak to the Church, only to their agents. He testified that he went to the Church's website in 2012, and that he fielded questions about the construction from the neighbors. He testified that he took another look at the plans submitted in connection with this Building Permit, and stood by his decision that this was a bell tower. Mr. Niblock noted that when an applicant files a Building Permit application, DPS takes them at their word [with respect to what they are building], and that the Building Permit application for this bell tower was filed under false pretenses.

Mr. Niblock testified in response to a Board question that despite serving on the Tower Committee, he did not know about the November, 2012, collocation application until shortly before the March, 2013, meeting. The Board observed that in November, 2012, the Tower Coordinator appears to have concluded, in reviewing Verizon's collocation application, that the bell tower was in fact a cell tower disguised as a bell tower, and thus he did not recommend approval of the collocation application. See Exhibit 6, page 37-38. When the Board asked Mr. Niblock if this should have factored into DPS' determination to "final" Building Permit No. 597442, Mr. Niblock testified that the Tower Coordinator is not part of the Building Permit process, that the Building Permit for this structure allowed a bell tower, and that the plans DPS had reviewed did not say that the tower had three levels for telecommunications equipment in it, but rather showed a steel-wrapped structure with faux bells. He testified in response to a Board question that if the construction of the bell tower had not proceeded in accordance with the plans, DPS could have issued a stop work order. Mr. Niblock testified that he does review plans to see if they are potentially for a cell tower use, and that he has denied plans for flag poles with a thick base in the past because the proposed structure was not what it was purported to be. When asked by the Board if the fact that the preliminary drawings filed with the bell tower permit were prepared by a company called "Stealth," and that immediately under the company name is the tagline "First in Concealment" raised any questions, Mr. Niblock testified that he was not familiar with that company and that he did not check their website. He further stated that the company on the plans is not determinative. Mr. Niblock testified that he did question the lack of actual bells prior to approving the bell tower Permit, and was told that the bells would be electronic. He testified that as far as he knew, the proposed structure was going to be a bell tower.

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<sup>1</sup> This email is summarized in Finding of Fact #2.

On re-direct, Mr. Niblock testified with regard to the email exchange at Exhibit 7(a), page 32, that he was responding to Rick Novak, a real estate manager for SCE, who he understood to be working for Verizon. When asked if it was typical to have a 6-month delay between the filing of an application with the Tower Committee and a Tower Committee meeting, Mr. Niblock testified that it was, and stated that there could be as much as a two-year delay.

When asked by a Board member if the Tower Committee takes whether a structure is existing or not into account when reviewing a collocation application, Mr. Niblock testified that if the Tower Committee goes on a site visit and the structure is there, they take that into account; similarly, if the structure is not there, they take that into account. He testified, in response to questions from counsel for the Appellant, that the Tower Committee makes a recommendation, not a decision, and that in collocation by right cases, that recommendation is forwarded to DPS. He then explained that the Tower Committee recommendation is just one piece of evidence that DPS considers, and that DPS is not required to follow the Tower Committee recommendation.

### **CONCLUSIONS OF LAW**

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including Section 8-23.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. Section 8-23(a) of the County Code provides that "[a]ny person aggrieved by the issuance, denial, renewal, amendment, suspension, or revocation of a permit, or the issuance or revocation of a stop work order, under this Chapter may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, amended, suspended, or revoked or the stop work order is issued or revoked. A person may not appeal any other order of the Department, and may not appeal an amendment of a permit if the amendment does not make a material change to the original permit. A person must not contest the validity of the original permit in an appeal of an amendment or a stop work order."

4. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be

considered *de novo*. The burden in this case is therefore upon the County to show that Building Permit No. 646284 was properly denied.

5. Section 59-A-2.1 of the Zoning Ordinance defines "Antenna," "Telecommunications facility" and "Structure" as follows:

**Antenna:** Any structure or device used to collect or radiate electromagnetic waves, including both directional antennas, such as panels, microwave dishes and satellite dishes, and omni-directional antennas, such as whips.

**Telecommunications facility:** Any facility established for the purpose of providing wireless voice, data or image transmission within a designated service area. A telecommunications facility must not be staffed. A telecommunications facility consists of one or more antennas attached to a support structure and related equipment. Antennas are limited to the following types and dimensions: omni-directional (whip) antennas not exceeding 15 feet in height and 3 inches in diameter; directional or panel antennas not exceeding 8 feet in height and 2 feet in width; and satellite or microwave dish antennas not exceeding 8 feet in diameter. An antenna may be mounted to a structure, a building rooftop, or a freestanding monopole under Sections 59-A-6.12, 59-A-6.14, and 59-G-2.43. Equipment may be located in a building, an equipment cabinet, or an equipment room in an existing building. No lights or signs are permitted on an antenna or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.

**Structure:** An assembly of materials forming a construction for occupancy or use including, among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences, walls, signs, power line towers, pipelines, railroad tracks and poles.

6. Sections 59-A-2.2(d) and (e) of the Zoning Ordinance, "General rules of interpretation," provide that

(d) Uses designated by the letter "P" and uses of a similar character are permitted in the zones indicated, subject to all applicable regulations. Uses explicitly listed in one or more zones are permitted only in those zones. Where a use is not explicitly listed in any zone but is similar in character to more than one listed use, then the use must be deemed to be included in the more intensive of the designated uses in terms of traffic impact, noise, or other community impact.

(e) Uses designated by the letters "SE" may be authorized as special exceptions in the zones indicated, subject to the provisions of article 59-G.

7. Section 59-C-1.31(b) of the Zoning Ordinance provides that a telecommunications facility is allowed in the R-200 zone as both a permitted use, subject to Sections 59-A-6.12 and 59-A-6.14, and by special exception. Section 59-A-6.12 is not applicable to this case, since it applies to private telecommunications facilities attached to a publicly owned structure or on publicly owned land. Section 59-A-6.14 is applicable, and subsection (b) of that Section reads as follows:

Sec. 59-A-6.14. Antenna for a private telecommunication facility mounted on a rooftop or structure located on privately owned land.

\* \* \* \* \*

(b) In addition to a rooftop, an antenna may be attached as a matter of right to an existing structure on privately owned land, including but not limited to a radio, television, or telephone transmission tower, a monopole, a light pole, a water tank, or an overhead transmission line support structure. An equipment building located on such a structure is subject to the requirements of subsection (a)(4). A structure constructed for the support of: (1) an antenna that is part of an amateur radio station licensed by the Federal Communications Commission, or (2) an antenna to receive television imaging in the home, may not be used as a support structure for any other antenna.

8. Section 59-G-2.58 of the Zoning Ordinance, "Telecommunications facility," sets forth the specific criteria for a telecommunications special exception.

9. Board Rule 3.2.2 allows the Board, on its own motion, to seek summary disposition of a matter on the grounds that the application and other supporting documentation establish that there is no genuine issue of material fact to be resolved and that dismissal or other appropriate relief should be rendered as a matter of law.

10. The Board finds that while DPS presented evidence which might suggest that the "bell tower" constructed pursuant to Building Permit No. 597442 was in fact a "cell tower," Building Permit No. 597442 was not appealed, and the correctness of the issuance of that Permit is not at issue in this appeal. The Board further finds that DPS gave "final" approval to Building Permit No. 597442 on January 28, 2013, and that Mr. Niblock testified that this meant that the bell tower constructed pursuant to that Permit could be used for its intended purpose without further permission from DPS. The Board notes that there are photos showing the tower structure from as early as November, 2012, in the record, and that the Minutes of the March 8, 2013, Transmission Facilities Coordination Group Meeting indicate that the bell tower is currently being used, and state that the tower "is a working bell tower because the church plays bell music from it hourly and at the times of a call to worship." See Exhibit 6, pages 37-38 and 41. In light of the foregoing, the Board finds that DPS has not shown that there was any genuine issue of material fact as to whether this bell tower was "existing" on August 21, 2013, when Verizon and the Church filed the application for Building Permit 646284; the testimony and evidence of record demonstrate unequivocally that the tower did "exist" on that date.



Furthermore, the Board notes that in addition to acknowledging that the tower existed when the application for Building Permit No. 646284 was filed, Mr. Niblock testified that the subject Property is private property, located in the R-200 zone. The deed and the SDAT data in the record confirm that the Property is owned by the Trinity United Methodist Church. See Exhibit 7(a), pages 27-31. Thus the Board finds that there is no question that the subject Property, on which the tower is located, is privately-owned. In addition, the Board finds that Mr. Niblock testified that the antennas that Verizon was seeking to install on the tower comported with the specifications in the Zoning Ordinance, and that he did not have any concerns with the use or setbacks of the equipment shelter proposed as part of the Permit application. Taken together, the Board finds that there is no question that this Building Permit application seeks to do exactly what Section 59-A-6.14(b) allows to be done as a matter of right: namely, to attach antennas to an existing structure<sup>2</sup> on privately owned land. Having made that determination, the Board finds that irrespective of the intent behind the construction of this 105' bell tower, it was an existing structure on privately owned land at the time that the Appellant applied for Building Permit No. 646284, and thus pursuant to Section 59-A-6.14(b) of the Zoning Ordinance, the Appellant had a right to attach antennas to it. This comports with the advice given by Mr. Niblock to Mr. Novak, who Mr. Niblock acknowledged he understood to be working for Verizon, in his email of July 19, 2011 ("...If either of these structures [steeple or bell tower] are in existence, and are at least 50' in height, then telecommunications antennas could be attached to them by right."). See Exhibit 7(a), page 32. At the hearing, Mr. Niblock confirmed that this was still good advice. Finally, because the Board has concluded that the proposed telecommunications facility can be installed as a matter of right on this bell tower pursuant to Section 59-A-6.14(b) of the Zoning Ordinance, the Board finds that in accordance with Section 59-C-1.31(b), it does not require a special exception.

11. In sum, the Board finds, based on the evidence in the record and the testimony of Mr. Niblock, that there is no factual dispute regarding the physical existence of this bell tower at the time Building Permit No. 646284 was applied for, that there is no dispute regarding the fact that the bell tower is located on privately-owned land, and that per the testimony of Mr. Niblock, the proposed antennas and equipment shelter comply with the parameters specified in the Zoning Ordinance. The Board therefore finds that

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<sup>2</sup> As noted above, Section 59-A-2.1 defines "structure" as "[a]n assembly of materials forming a construction for occupancy or use including, among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences, walls signs, power line towers, pipelines, railroad tracks and poles." The Board notes that this is a very broad definition. Although no one questioned whether the bell tower was a structure, in the interests of closing all loops, the Board finds this bell tower is an assembly of materials, as shown in the photographs and preliminary drawings in the record. See Exhibit 6, pages 21 and 37. The Board further finds that these materials form a construction for use, as indicated in the Minutes of the March 8, 2013, Transmission Facilities Coordination Group Meeting, which indicate that the bell tower is currently being used to play bell music hourly and at the times of a call to worship. See Exhibit 6, page 41. In addition, the Board finds that this bell tower is similar in general appearance to many of the example structures listed in the definition (observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, power line towers, and railroad poles). As such, the Board concludes that this bell tower meets the definition of "structure."

Building Permit No. 646284 was improperly denied and should have been granted as a matter of law per Section 59-A-6.14(b) of the Zoning Ordinance. Accordingly the Board, on its own motion pursuant to Board Rule 3.2.2, has determined that this appeal should be granted.

12. The appeal in Case A-6425 is **GRANTED**.

On a motion by Member Stanley B. Boyd, seconded by Member Carolyn J. Shawaker, with Chair Catherine G. Titus and Vice Chair David K. Perdue in agreement, and Member John H. Pentecost necessarily absent, the Board voted 4 to 0 to grant the appeal and adopt the following Resolution:

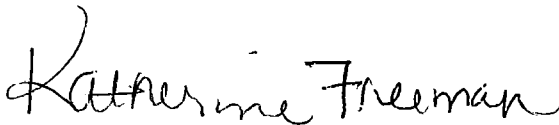
**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



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Catherine G. Titus  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 31<sup>st</sup> day of, 2014.



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Katherine Freeman  
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2-A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.