

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
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IN THE MATTER OF
TELECOM CAPITAL GROUP and
RHODES BROTHERS LLC

Applicants

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Mark Marzullo

For the Application
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Attorney for the Applicants

* * * * *

John Durham

Opposing the Application

* * * * *

Mark Filipovic

Neither Supporting nor Opposing
the Application

* * * * *

Before: Lynn Robeson, Hearing Examiner

OZAH Case No. CU 23-07

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

On November 17, 2022, Telecom Capital Group and Rhodes Brothers LLC (Applicants or Telecom) filed an application for conditional use under Zoning Ordinance §59.3.5.2.C.2. to permit construction of an unmanned 145-foot-tall wireless Telecommunications Tower and 2,500 square foot electrical compound at 28025 Ridge Road, Damascus, Maryland 20872 (Tax Account No. 12-00939735). The property is zoned RC (Rural Cluster).

The Montgomery County Transmission Facility Coordinating Group (TFCG) concluded there was a need for the facility on October 6, 2022:

...on the condition that applications 2021081541 and 2021081545 were reviewed and recommended jointly to demonstrate the need for the tower to be built...The colocation application (2021081545) was the basis for justifying the need for the tower in this application (202108541). Without the colocation application, the need for the tower has not been demonstrated.” Exhibit 14.

Staff of the Montgomery County Planning Department (Planning Staff or Staff) issued its report on December 30, 2022. Exhibit 32. Staff recommended approval of the application subject to five conditions, one of which stated (*Id.*, p. 3):

Staff recommends the applicant use a fence such as vinyl or wood board screening fencing or provide landscaping around the proposed chain link fence to help screen the equipment in the compound. The applicant can also use a combination of fencing and landscaping.

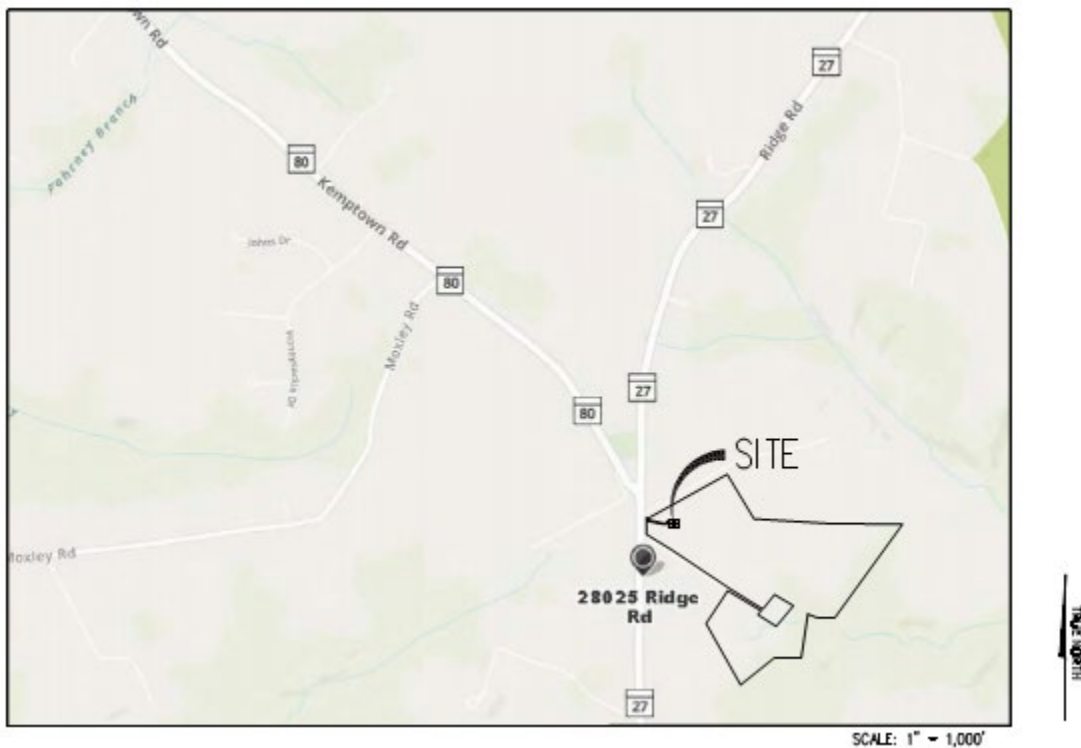
OZAH issued notice of the public hearing on December 6, 2022, for a hearing for January 12, 2023. Exhibit 36. The public hearing convened on January 12, 2023, as scheduled. The Applicant presented four witnesses in support of the application, including experts in radio frequency engineering and civil engineering. One individual, Mr. John Durham, appeared in opposition to the application, and one witness, Mr. Mark Filipovic, appeared to correct the mislabeling of an exhibit. T. 10-12, 60-62, 71-74.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application conforms to the general and specific standards for approval, with the conditions of approval listed in Part IV of this Report. Therefore, the Hearing Examiner hereby grants the application.

II. FACTUAL BACKGROUND

A. The Subject Property

The property is generally located south of the intersection of Ridge Road (Route 27) and Kemptown Road (Route 80), as shown on the vicinity map (Exhibit 38, below):



Staff advises that the property consists of +/- 45.45 acres, with topography that “steps up slightly from Ridge Road and then slopes down toward the back of the property around 600 feet from the front lot line.” Exhibit 32, p. 5. Staff describes the property as “predominantly open fields used for crop farming.” *Id.*, p. 6. A small pond and outbuildings are on the south side of

the property with a forested area along the southeast side. Two private drives adjoin the property to the south and north. Exhibit 39. An aerial photograph from the Staff Report (Exhibit 32, p. 6, below) outlines the subject property in yellow:



B. Surrounding Neighborhood

To determine the compatibility of the proposed use, it is necessary to delineate the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). The area is then “characterized” to determine whether the use proposed is compatible with the character of the surrounding neighborhood.

Staff defined the neighborhood as being within the boundaries shown in red on Figure 1 from the Staff Report (Exhibit 32, p. 5, on the next page).



Staff Defined Surrounding Area
Exhibit 32, p. 5

Staff determined the boundaries based primarily on the visual impact of the monopole (Exhibit 34):

Since the primary impact to the area will be visual, staff determined the neighborhood based on anticipated visibility of the proposed structure when approaching from the surrounding areas. When driving south on Rt. 80, the view of the proposed structure will likely be highest, when traversing the nearby crest of the hill, before descending down the hill and passing existing residential units and trees. When driving south on Rt. 27 (Ridge Road), again, the crest of the nearby hill will likely be the most visible point from that direction. When driving north on Rt. 27 (Ridge Road), between the existing residential area with trees and the Subject Property, this area will likely be point at which the proposed structure is most visible.

The Boundary selected is based on the points of the surrounding roadways described above, where the proposed structure will likely be most visible from those approaches.

The Hearing Examiner finds Staff's rationale reasonable given that the visual impact will be the most far-reaching impact of the use, as discussed below. For that reason, she accepts Staff's determination of the surrounding area.

Staff characterized the area as being (Exhibit 32, p. 4):

...comprised of low-density residential development, agricultural uses and a few commercial uses. The property directly to the north is zoned AR and is called Gladhill Brothers which is a John Deere Dealership approved under Special Exception S-1896 for Farm Machine Sales and Service. The properties to the northeast are zoned AR and are comprised of low-density residential and farm uses. The properties to the east and south are all zoned RC and consist of forested areas, agricultural fields and low-density residential uses. The property to the west is zoned NR and is a landscape contractor business named Broadleaf Grounds Works.

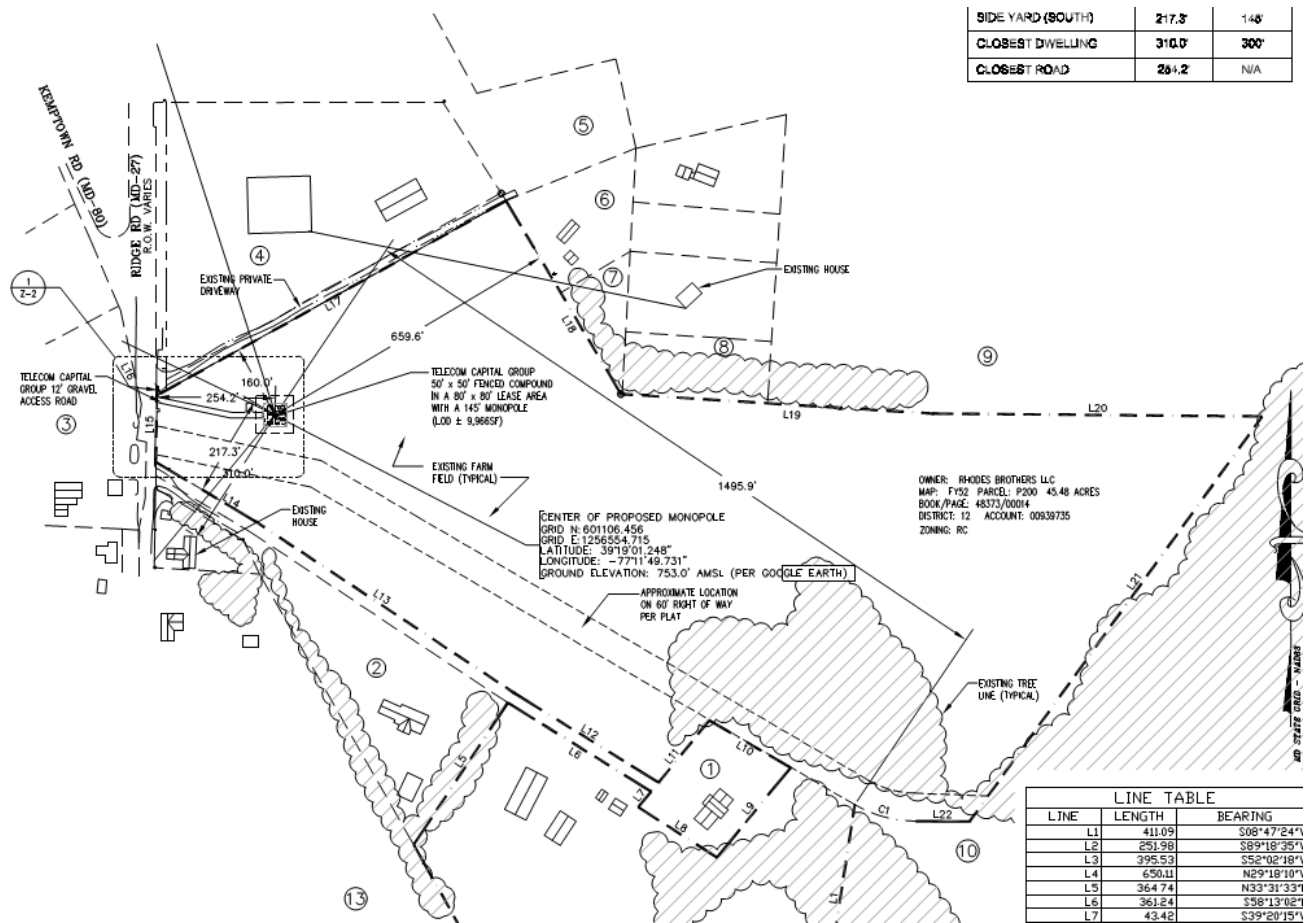
A property adjacent to Ridge Road to the north and west of the subject property is zoned NR (Neighborhood Retail). Staff reports that there are two other conditional uses/special exceptions in the surrounding area: (1) a special exception for sales, storage and service of farm machinery immediate adjacent to the north, and (2) an accessory dwelling unit. *Id.*, p. 5.

Based on Staff's description of the surrounding area, the Hearing Examiner characterizes the area as consisting of agricultural uses in the AR Zone to the west and south, low density residential uses in the RC Zone to the north and west, and some commercial uses, either permitted in the NR Zone or by special exception. The special exception abuts the northern side of the property.

C. Proposed Use

The Applicants seek approval to construct a 145-foot monopole within a 2,500-square foot compound that will contain the monopole as well as electrical equipment. Exhibits 38, 39, 41-48. The monopole compound is set back 254 feet from Ridge Road, 160 feet from the closest point on

the northwest property line, 217 feet from the closest point to the southwest property line, and 310 feet from the nearest dwelling (shown on Exhibit 39, below):

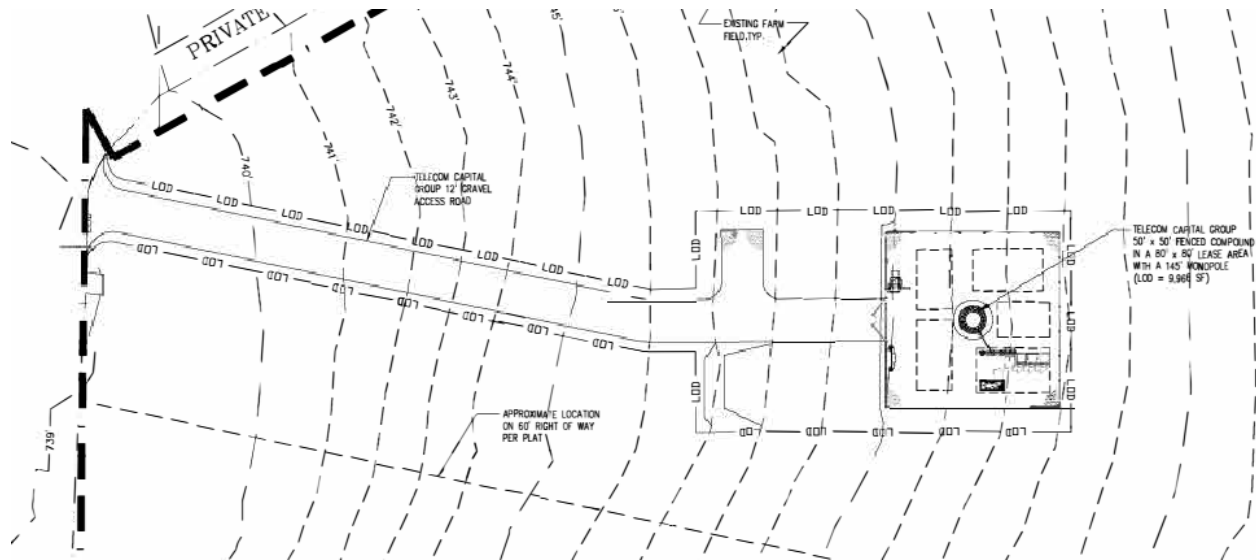


Access will be from Ridge Road via a 12-foot gravel driveway. The Applicants originally proposed a chain link fence to secure the electrical equipment and tower. At the recommendation of Staff, the Applicants agreed to substitute a wooden board-on-board fence and landscaping to make the structure more compatible with the low-density and rural character of the surrounding area. The additional landscaping and fence are described in Part II.B.2 of this Report.

1. Site Plan (Tower and Compound)

The conditional use area consists of the compound and drive leading to the compound. Exhibit 39 (above) shows the relationship of the conditional use area to the

entire property. The Applicants submitted a site plan of just the area subject to the conditional use (Exhibit 41, below):



**Conditional Use Area
Exhibit 41**

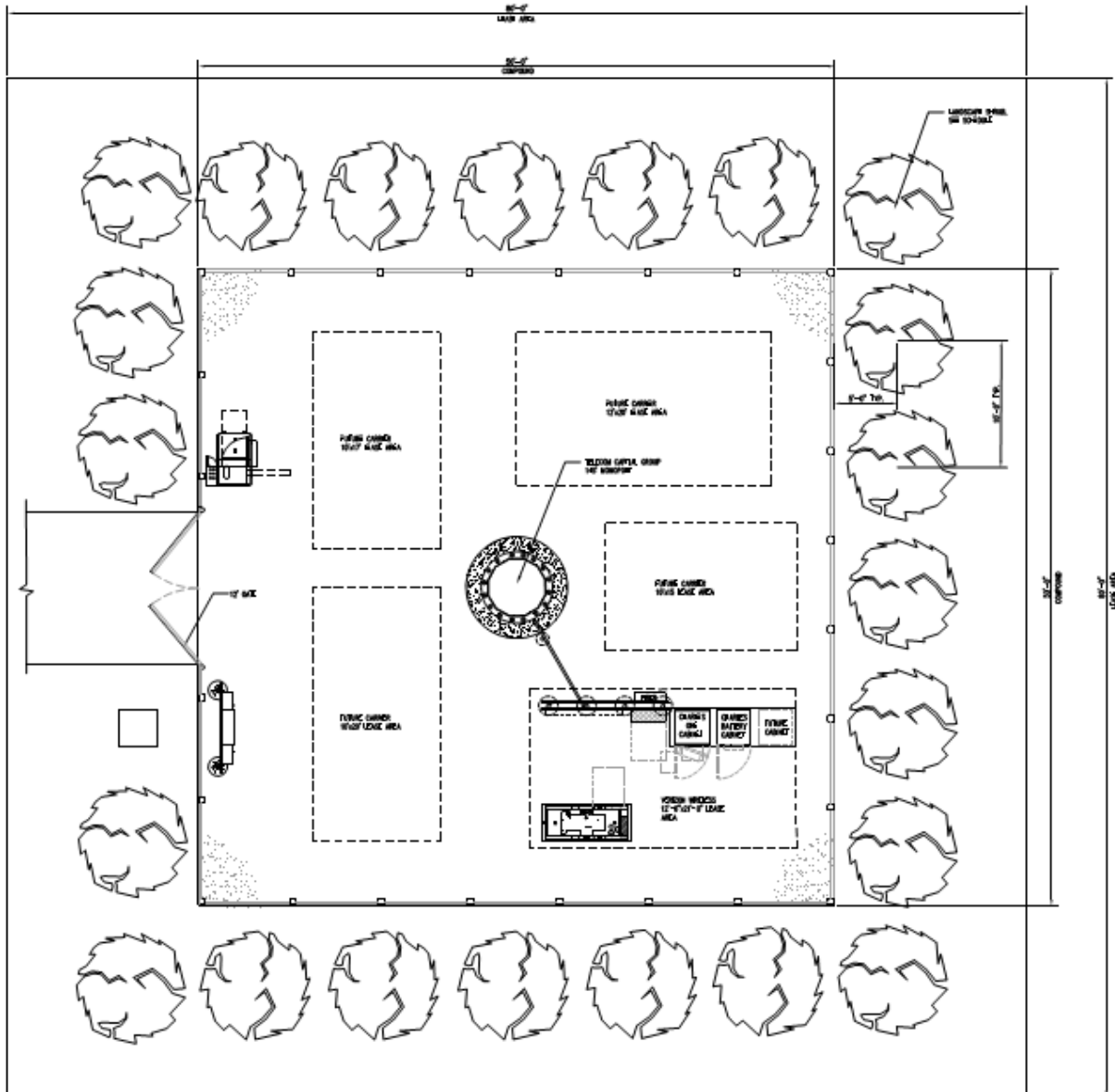
The compound provides space for up to five carriers, including the Applicants' facility. The Zoning Ordinance contains no parking requirements for a telecommunications tower and the Applicants do not seek authorization for parking. *Zoning Ordinance*, §59.6.2.4


2. Landscaping, Lighting and Signage

The Applicants do not propose any lights on the tower or the compound. Exhibit 32, p. 19. The only sign, which is mandated by the Zoning Ordinance, will be on the exterior of the compound and contain contact information in the event of emergency. *See, Zoning Ordinance*, §59.3.5.2.C.2.c.x.

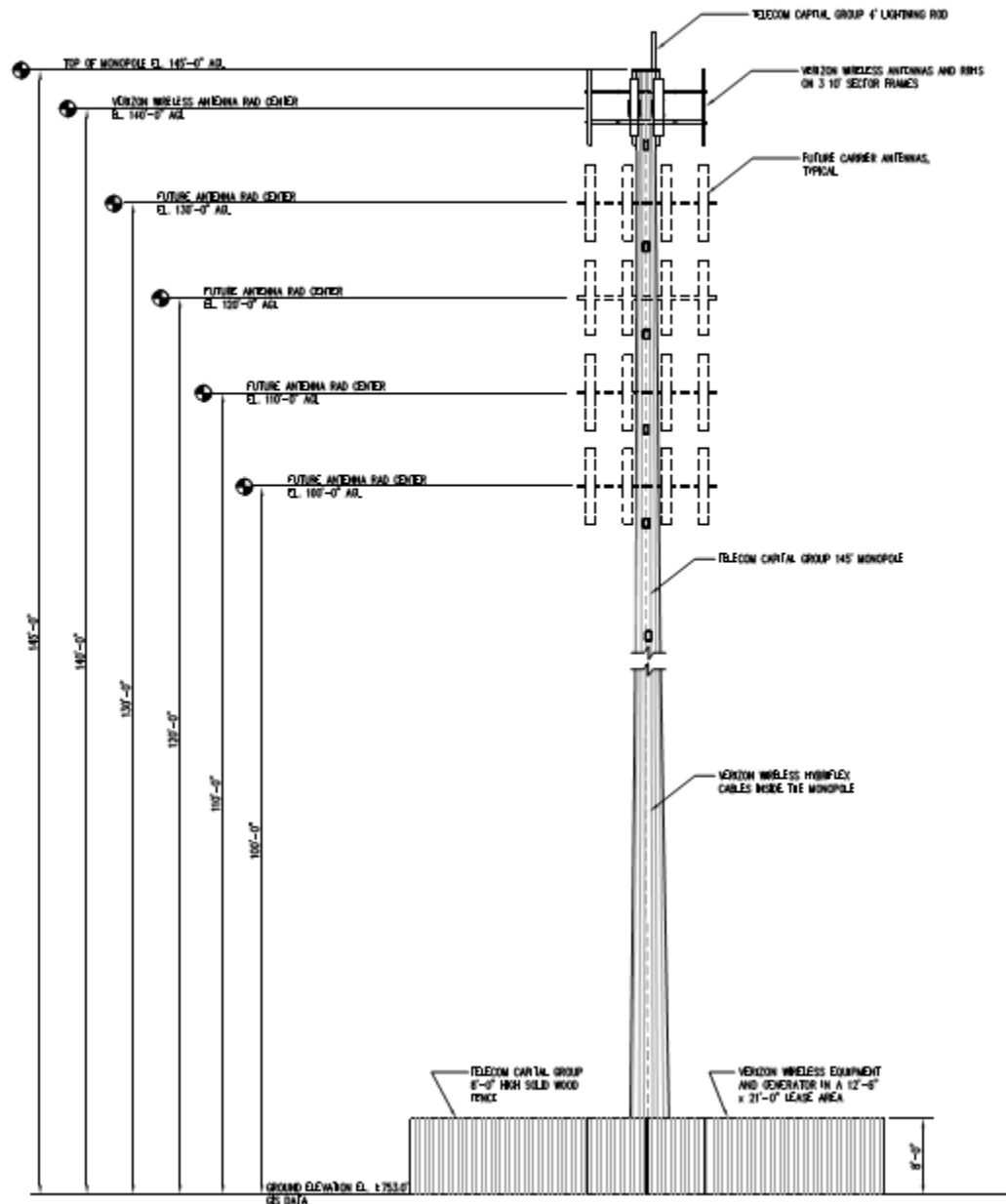
The compound will be secured by a wooden fence with evergreen shrubs on the exterior.

The revised landscape plan shows both the compound layout and the proposed fence and landscaping (Exhibit 48, below):



LANDSCAPE SCHEDULE								
SYMBOL	BOTANICAL NAME	COMMON NAME	TYPE	BUFFER YARD QTY.	SIZE	TYPE	SPACING CENTER TO CENTER	HEIGHT AT MATURITY
	PRUNUS LAUROCERASUS	SKIP LAUREL	SHRUB-EVERGREEN	22	3 GAL.	CONT.	10'	6'-10'

The tower will be 145-high with exterior antennas, as shown in an elevation submitted by the Applicants (Exhibit 43, below):



D. Community Response

The Hearing Examiner received a letter addressed to the TFCG opposing the application because it will utilize agricultural land and constitute an “eyesore” in the scenic Damascus area.

The individual suggests that the monopole be located on his property because it will not usurp agricultural land. Exhibit 32, Attachment B.

At the public hearing, Mr. John Durham testified that he lives on the opposite side of Ridge Road less than 400 meters from the proposed tower location. He has young children and has a traumatic brain injury. He suffers from symptoms, including migraines, sleep problems, dizziness, increased irritability, trouble remembering, fatigue and loss of focus, that are exacerbated when towers are less than 400 meters from a residence. Mr. Durham also expressed concern that the tower would reduce the value of his property and obstruct existing views from historic Claggettville. T. 60-62. He stated that the Damascus area is known for its agricultural character and views of rolling hills, and the proposed tower will obstruct those views.

Mr. Mark Filipovic appeared to point out that the label on the photo simulations submitted into the record (Exhibit 15) misspelled “Damascus”. T. 72-73. The Applicants submitted corrected copies of this exhibit. Exhibit 52.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. These standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested; in this case, a Telecommunications Tower allowed under Zoning Ordinance Section 59.3.5.2.C.2. These standards are listed below with the Hearing Examiner’s findings on each standard.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance:¹

¹ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that arguably apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended

Conclusion: Staff advises that there are no previous approvals for this property. Exhibit 32, p. 18.

This standard is not applicable.

b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6

Conclusion: This subsection requires the proposed development to meet the standards of the RC (Rural Cluster) Zone contained in Article 59-4, the specific use standards for a Telecommunications Tower contained in Article 59-3, and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on a review of those standards, the Hearing Examiner finds that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6 of the Zoning Ordinance.

c. substantially conforms with the recommendations of the applicable master plan

Conclusion: Development of the property is guided by the 2006 *Damascus Master Plan* (Master Plan or Plan). Staff advises that the Plan makes no specific reference to this property but does contain guidelines for conditional uses (Exhibit 32; *Plan*, pp. 40, 103):

Special Exception Guideline for Rural Vista Protection: To ensure careful consideration of the long rural vistas that are a unique aspect of this community, this Plan strongly encourages the protection of rural vistas that are intrinsic to the character of the Damascus vicinity. Damascus is a town set on a hill, and the long vistas outside the Town Center provide the most distinctive visual element for the

community. Land uses that impede those vistas should be discouraged. Because of the uniqueness of the rural areas surrounding Damascus, that are at the highest elevations in the County, this Plan recommends language in the Implementation Chapter to guide review of special exception uses proposed in the Rural Areas.

* * *

Guideline for Rural Vista Protection – The visual character of the Rural Areas surrounding Damascus are unique as they are the highest elevations in the County. When special exceptions are proposed in Transition and Rural Areas within the Damascus Master Plan area, their review should take into special consideration the preservation of these long vistas that are part of the unique character of the community. Any proposed land use that would impede those vistas should be discouraged unless it serves an important public purpose.

Staff determined that the application substantially conforms with the Master Plan (Exhibit 32, p. 20):

The Telecommunications Facility is setback 254' from Ridge Road to help minimize the visual impact on the Rural Vista as recommended in the Master Plan. Staff recommends the applicant use a fence such as a vinyl or wood board screening fencing or provide landscaping around the proposed chain link fence to help screen the equipment in the compound.

Later in its Report, when examining the height of the facility, Staff notes (Exhibit 32, p. 15):

The applicant is asking for additional height to allow the support structure [to be] over 135 feet. The monopole is proposed to be 145 feet in height in order to provide Verizon Wireless (VZW) the minimum height necessary to accomplish the signal improvement required to serve the target area. The Site is designed to serve Routes 27, 80, and the residences along Honeysuckle Drive, Holsey Road, Moxley Road and Gue Road...these areas are underserved or even unserved by the current cellular coverage in this area. This is especially important for citizens who may not have landlines and rely totally on cellular service for all their communication needs including needing to contact the Emergency Communications Center (911) when an emergency arises and therefore provides an important public service.

Mr. Mark Mazullo, whose company prepared the photo simulations of the proposed tower, testified that the Applicants cannot “hide” the tower due to its height. T. 54. He chose the location for Photo 1, (the view approximately from Mr. Durham’s driveway) because it is the first place one will see the pole from the opposite side of Ridge Road proceeding north. From this

perspective, the tower will not be significantly visible due to the location of an intervening house and trees on property immediately south of the subject property. Photo 2 approximates the view from a church across Ridge Road near its intersection with Route 80. T. 51. Photo 3 shows the view from further north on Ridge Road, including the intervening farm machinery sales and service use on the northern side of the subject property. T. 38. The aerial photograph below (Exhibit 52) shows the locations from which the photo simulations were taken; the photo simulations are on the following pages.





**Ex. 52, Photo 1 (view from
near Mr. Durham's driveway)**



**Ex. 52, Photo 2
View Near Intersection of
Route 80 and Ridge Road**



Ex. 52, Photo 3
View from north Ridge Road showing intervening
farm machinery sales and service use

Mr. Durham believes that the tower would obstruct the view of the Damascus countryside from historic Claggettville, which is just south of Route 80 after it branches toward the west.²

Conclusion: The photo simulations show that the monopole will be relatively screened from view from Mr. Durham's driveway by an existing house and tree (Photo 1, Exhibit 52). The facility is visible from the approximate location of a church on the west side of Ridge Road (Photo 2, Exhibit 52). The view from the north on Ridge Road looking south is somewhat mitigated by mature trees and buildings surrounding the farm machinery sales, service and storage business that abuts the property (Photo 3, Exhibit 52). The tower is visible from that location.

² During the hearing, Mr. Marzullo corrected Mr. Durham's assumption that stakes on the property closer to his house marked the location of the tower. T. 53. According to Mr. Marzullo, the stakes showed the location of test borings for stormwater management facilities. *Id.*

The Hearing Examiner finds credible Mr. Marzullo's testimony that a tower of this height could not be completely screened from view. She finds that the 254-foot setback from Ridge Road tempers views of the pole from that road and from western viewpoints. In addition, the location preserves the bulk of the parcel's agricultural use, which is consistent with the character of the surrounding area. While Mr. Durham testified that the tower would impact the view from Claggettville to the southeast, there is no evidence in the record to what extent the pole will be visible from Claggettville given the topography and higher ridge that runs along Ridge Road.³ The board-on-board fencing and landscaping of the compound screens the electrical elements from view in a manner consistent with the agricultural/rural character of the surrounding area.

Further, the Master Plan makes an exception from the policy to preserve rural vistas for uses that serve an important public purpose. The TFCG Committee recommended approval of the application (with a colocation) because it is needed to fill in coverage gaps in the area. Staff found that the use permits emergency communications in the area, an important public service. The Hearing Examiner finds that the tower conforms to the recommendations of the Master Plan given the setback from Ridge Road, the preservation of the agricultural use, the screening of the compound, and the important public service to provide emergency cellular communications in this area.

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan.

Staff found that the proposed tower met the above criterion (Exhibit 32, pp. 20-21):

The telecommunications tower will not in any way impair the preservation of farmland or open space and will serve those living, working and traveling through this agricultural and rural area. According to the USDA Soils map, the Property

³ The topography of the surrounding area is described in Part III.C of this Report. The Hearing Examiner notes that the TFCG asked the Applicants to study six existing telecommunication towers south and west of Route 80 and Ridge Road. Exhibit 6; T. 19-20. While the Hearing Examiner does not rely on this for her decision, these may already add a commercial aspect to the view from Claggettville.

has a soils designation of 9B, Linganore which is a Category III soil. Category III soil is not considered prime growing soils so therefore the tower is not taking away prime growing farmland. The tower has been pushed back 254 feet from the front lot line so as not to visually impact the neighborhood...

Other than its visual impact, Staff concluded that the monopole would have few other adverse impacts. It stated (Exhibit 32, p. 21):

The Conditional Use will not be detrimental to surrounding properties. The Site will be screened by existing trees, so it will have a limited visual impact, and will not cause any objectionable noise, fumes, or illumination or decrease the economic value of surrounding properties. The proposed use will have no adverse effect on road congestion or safety, as no on-site personnel are required. Once the telecommunications facility is construct, the only traffic to the facility would be for routine noise generated by this Site. The equipment is located on a secure foundation and the antennas and transmission lines are silent. There will be no offensive odors emitted by the equipment, transmission lines, or antennas. The site will not cause any vibrations.

To make the compound area more compatible with the rural agricultural, low-density residential character of the area, Staff recommended installing a board-on-board wooden fence and landscaping on the perimeter of the compound. The Applicants have complied with Staff's recommendations.

Conclusion: The Hearing Examiner has already discussed conformance to the Master Plan. For the reasons stated in there and here, the Hearing Examiner finds that the proposed use will be in harmony with the character of the neighborhood and will not alter the surrounding neighborhood in a manner inconsistent with the Plan. The tower cannot be fully screened from view, but the bulk of the property will remain in agricultural use, consistent with the agricultural and rural character of the area. While much higher than surrounding uses, the tower is set well back from Ridge Road to mitigate its impact on views and is screened from the nearest residence (Mr. Durham's property). Other than its visual impact, nothing in the record suggests that the use will have a notable negative impact on the area since it generates no traffic, does not require parking,

and will not generate noise or smells. As Staff points out, it will not reduce the amount of prime growing land in the area. The Hearing Examiner finds that this criterion for approval is met.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area

Conclusion: A review of the Zoning Map in this case (Exhibit 4) shows that the abutting property is zoned Rural Residential, Agricultural, and NR (Neighborhood Retail), none of which are Residential Detached Zones. *Zoning Ordinance*, §59.2.1.3. This standard does not apply to this application.

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Conclusion: Technical Staff did not indicate that the proposed use will require approval of a preliminary plan of subdivision. Therefore, the Hearing Examiner must determine whether the

proposed use will be served by adequate public services and facilities. By its nature, an unmanned and unoccupied telecommunication tower would have no significant impact on schools, police and fire protection, water, sanitary sewer, and public roads. Staff advises that the only utility needed will be power. Exhibit 32, p. 21. Staff determined that, because the facility is unmanned and requires only periodic maintenance trips, it will not generate enough trips to require a Traffic Study under the Planning Board's Local Area Transportation Review Guidelines. Mr. Marzullo testified that stakes for test pits for stormwater management have been placed on the site. Given this record, the Hearing Examiner finds that the proposed development will be served by adequate public services and facilities.

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or***
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Staff concluded that the one non-inherent impact of the use, the Master Plan recommendation to preserve rural vistas, did not warrant denial of the application (Exhibit 34):

To determine the impact of adverse effects on the neighborhood in which a proposed conditional use is located, analysts have focused on seven characteristics: size, scale, scope, light, noise, traffic, and environment. In this case, those effects typically and necessarily associated with a communications tower are considered inherent effects, and those not usually associated with the use or created by site characteristics are considered noninherent effects.

The physical and operational characteristics associated with a telecommunications tower are:

- antennas installed on or within a support structure with a significant height;
- visual impacts associated with the height of the support structure;

- an equipment compound at the base of the tower that may be enclosed within a fence;
- radio frequency emissions;
- vehicle trips for maintenance; and
- noise and emissions associated with back-up generators or other mechanical equipment.

The support structure—a monopole in this case—will be 145 feet high. It is virtually impossible to hide a 145-foot-tall pole that includes a set of antennas at the top. However, the applicant is installing the monopole 254' back from the property line as well as Staff is recommending the applicant install a privacy fence or landscaping or a combination of both around the equipment compound at the base of the monopole to help mitigate the visual impacts of the facility from Ridge Road. Per Federal Regulations, local government agencies are disallowed from considering the effects of radio frequency transmissions.

Non-Inherent Adverse Effects

The only non-inherent adverse effects Staff finds associated with the Application is the Master Plan guideline to preserve the rural vistas on the Property. This issue was discussed in the staff report, but Staff does not believe that the addition of the tower, antennas, and equipment compound (as conditioned with a privacy fence and/or landscaping) to the vistas will negatively impact the use, peaceful enjoyment, economic value, or development potential of properties in the neighborhood. The Conditional Use generates almost no traffic and does not have a parking requirement. There is no noise, odors, dust, or illumination associated with the Application.

Conclusion

Therefore, provided all requirements and conditions are satisfied, the proposed use will have no adverse impacts on the health, safety, or welfare of neighboring residents, visitors, or employees.

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.*

As specified in §59.7.3.1.E.1.g., quoted above, inherent adverse effects are not a sufficient basis for denial of a conditional use. Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a conditional use. The fact that a non-inherent effect exists does not mandate denial. It will result in denial only if the Hearing Examiner finds that the non-inherent adverse effect in combination with inherent effects, creates “undue harm to the neighborhood.”

The Hearing Examiner agrees with Staff’s analysis of the inherent and non-inherent characteristics of a telecommunications facility. The one non-inherent effect is the property’s location in an area where protection of rural vistas is encouraged. Because the primary impact is visual, and for the reasons stated above, the Hearing Examiner finds that the visual impact on the rural vista will not cause undue harm to the surrounding neighborhood.

Mr. Durham opposed the application out of concern that radio frequency transmissions less than 400 meters from his property would exacerbate his existing health condition. However, local officials are prohibited by federal law from considering the health effects of RF transmission if the facility complies with Federal Communications Commission (FCC) regulations. Federal law provides:

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 effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.

47 USC §332(c)(7)(B)(iv). The Applicants’ Statement of Justification (Exhibit 10) represents that Telecom Capital will be leasing the tower to Verizon Wireless, which has a license from the FCC to operate personal communications systems. There is no evidence in this record that the facility does *not* meet the federal standards for wireless emissions. Therefore, the Hearing Examiner may not consider or deny the application based on its potential health effects..

Based on this record, the Hearing Examiner concludes that the proposed use, as conditioned, will not cause undue harm to the neighborhood as a result of adverse effects in any of the categories listed in §59.7.3.1.E.1.g.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: This standard does not apply since the tower will be in a Rural Residential rather than a Residential Detached zone.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and for the reasons discussed above, the Hearing Examiner concludes that the conditional use should be approved, as conditioned in Part IV of this Report and Decision.

B. Development Standards of the Zone (Article 59.4)

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the Rural Cluster (RC) Zone. Development standards for the RC Zone are contained in §59.4.3.4.B. of the Zoning Ordinance. Planning Staff included a table with the applicable RC Zone development standards in the its Report (Exhibit 32, p. 19, on the following page).

Conclusion: The Zoning Ordinance does not require landscaping of the compound, although the Hearing Examiner may require landscaping to the extent needed to make the facility less visually obtrusive and more compatible with the surrounding area. *Zoning Ordinance*, §§59.3.5.2.C.2.c.iv, 59.7.3.1.E.1.b. The Applicants have agreed to install a board-on-board fence and landscaping around the electrical compound to enhance its compatibility with the area and the Hearing

iv. **Development Standards***Table 1: Conditional Use Development and Parking Standards (Rural Cluster- RC Zone)*

Development Standard	Permitted/ Required	Existing/Proposed
Section 59.4.3.4.B		
Minimum Lot Area	5 acres	45.47 acres
Minimum Lot Width at Front Building Line	300'	410'
Minimum Lot Width at Front Lot Line	300'	n/a ¹
Maximum Density	1 unit/5 acres	n/a
Maximum Lot Coverage	10%	<1%
Minimum Front Setback	50' (145' for tower)	254'
Minimum Side Setback	20' (145' for tower)	160' & 217'
Minimum Sum of Side Setbacks	n/a	n/a
Minimum Rear Setback	35'(145' for tower)	659'
Minimum Setback from Dwelling	300'	310'
Maximum Height	50' (135'-179' for tower)	145'
Vehicle Parking Requirement (Section 59.6.2.4.B)	n/a	n/a

¹ Section 50.3.3.A.10 exempts telecom towers from the subdivision and platting process, therefore this is not a requirement of this application.

Table from Staff Report (Ex. 32) showing compliance with required zoning standards

Examiner agrees this is appropriate given the area's rural and agricultural character. The Zoning Ordinance does not require parking spaces for unmanned telecommunication facilities. *Zoning Ordinance*, Sections 59.6.2.4. No lighting or signage is proposed except the sign mandated by the Zoning Ordinance.

Based on this evidence, and having none to the contrary, the Hearing Examiner finds that the application meets the development standards of the RC Zone.

C. Use Standards for a Telecommunications Tower (Section 59.3.5.2.C.)

The specific use standards for approval of a Telecommunications Tower Conditional Use are set out in Section 59.3.5.2.C. of the Zoning Ordinance. The applicable standards are:

C. Telecommunications Tower

1. Defined

a. Telecommunications Tower means any structure, other than a building, used to provide wireless voice, data, or image transmission within a designated service area. Telecommunications Tower includes one or more antennas attached to a support structure, and related equipment, but does not include amateur radio antenna (see Section 3.5.14.A and Section 3.5.14.B, Amateur Radio Facility), radio or TV tower (see Section 3.5.2.B, Media Broadcast Tower), or an antenna

on an existing structure (See Section 3.5.14.C, Antenna on Existing Structure).

b. Antenna Dimension means an antenna, and any enclosure containing the antenna, in which the total combined size of the antenna within any enclosure meets the following dimensions:

<i>Standard</i>	<i>Maximum Length on Any Side (in feet)</i>	<i>Maximum Volume (in cubic feet, excluding any equipment cabinet)</i>
<i>A</i>	<i>4 feet 2 inches</i>	<i>6 cubic feet</i>
<i>B</i>	<i>4 feet 2 inches</i>	<i>46 cubic feet</i>
<i>C</i>	<i>6 feet</i>	<i>30 cubic feet</i>
<i>D</i>	<i>9 feet</i>	<i>13 cubic feet</i>
<i>E</i>	<i>15 feet</i>	<i>1 cubic foot</i>

Conclusion: The proposed support structure will be constructed to provide wireless communications services within a designated area. Staff advises that the pole will have six antennas, each measuring 71.97 inches high, 11.8 inches wide, and 7.0 inches in diameter. Each antenna is 4.6 cubic feet (a total of 28.02 cubic feet), meeting the requirements of Standard C, above.) Exhibit 32, p. 12. Based on this evidence, the Hearing Examiner finds that the proposed support structure meets the definition of a telecommunications tower.

2. Use Standards

a. Where a Telecommunications Tower is allowed as a limited use in the Agricultural zone, Rural zone, Rural Cluster zone, Employment zones, and Industrial zones, and the tower is not a replacement tower that complies with 59.3.5.2C.2.b, it must satisfy the following standards:

i. Antennas are limited to the following:

(a) an antenna that satisfies one of the Antenna Dimensions standards in Section 59.3.5.2.C.1.b ;

(b) satellite or microwave dish antennas with a maximum diameter of 8 feet.

Conclusion: The Hearing Examiner finds that the Applicants' plan complies with this section since the proposed antennas meet the standards of Section 59.3.5.2.C.1.b, and no dish antennas are proposed.

ii. Signs or illumination on the antennas or support structure are prohibited unless required by the Federal Communications Commission, the Federal

Aviation Administration, or the County.

Conclusion: The application does not propose any signs or illumination on the antenna or support structure. Exhibit 32, p. 19. To ensure compliance, the Hearing Examiner imposes a condition of approval in Part IV of this Report prohibiting signage and lighting on the antennas and support structure, except for the sign mandated by the Zoning Ordinance.

iii. In the AR, R, and RC zones, the tower must be located within an overhead transmission line right-of-way and is a maximum height of 179 feet. The tower must be a minimum of 300 feet from any dwelling. A Telecommunications Tower conditional use application may be filed with the Hearing Examiner to deviate from this standard.⁴

Conclusion: This telecommunications tower will not be in a transmission line right-of-way. The Zoning Ordinance permits a deviation from this requirement if a conditional use for the tower is approved. By approving this conditional use, the proposed location outside a transmission line right-of-way is permitted and this standard has been met. The conditional use site plan demonstrates that the tower will be located 310 feet from the closest dwelling, exceeding the minimum setback.

c. Where a Telecommunications Tower is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 3.5.2.C.2.a, limited use standards, Section 7.3.1, Conditional Use, and the following standards:

i. Before the Hearing Examiner approves any conditional use for a Telecommunications Tower, the proposed facility must be reviewed by the Transmission Facility Coordinating Group. The applicant for a conditional use must file a recommendation from the Transmission Facility Coordinating Group with the Hearing Examiner at least 5 days before the date set for the public hearing. The recommendation must be no more than 90 days old when the conditional use application is accepted.

Conclusion: The Hearing Examiner finds that the requirements of this section have been met. The TFCG reviewed this application and recommended approval of the Applicants' proposal on

⁴ The remaining specific standards (Zoning Ordinance, §§59.3.5.2.C.2.a.iv and iv, and 59.3.5.2.C.2.b relate to telecommunications facilities in other zones or communications towers that are replacing a pre-existing pole. Since they do not apply, they are not repeated here.

October 6, 2022. Applicants filed the TFCG recommendation with its application, which was accepted on November 17, 2022. This is well in advance of five days before the public hearing. The TFCG issued its Notice of Action 42 days before the application was filed, well within the 90 day limit.

i. A Telecommunications Tower must be set back, as measured from the base of the support structure, as follows:

(a) A Telecommunications Tower is prohibited in any scenic setback indicated in a master plan.

Conclusion: Staff advises that the structure is not located in any scenic setback. Exhibit 32, p.

13. Having no evidence to the contrary, the Hearing Examiner finds that this criterion is met.

(b) In the Agricultural, Rural Residential, and Residential Detached zones, a distance of one foot for every foot of height or 300 feet from an existing dwelling, whichever provides the greater setback.

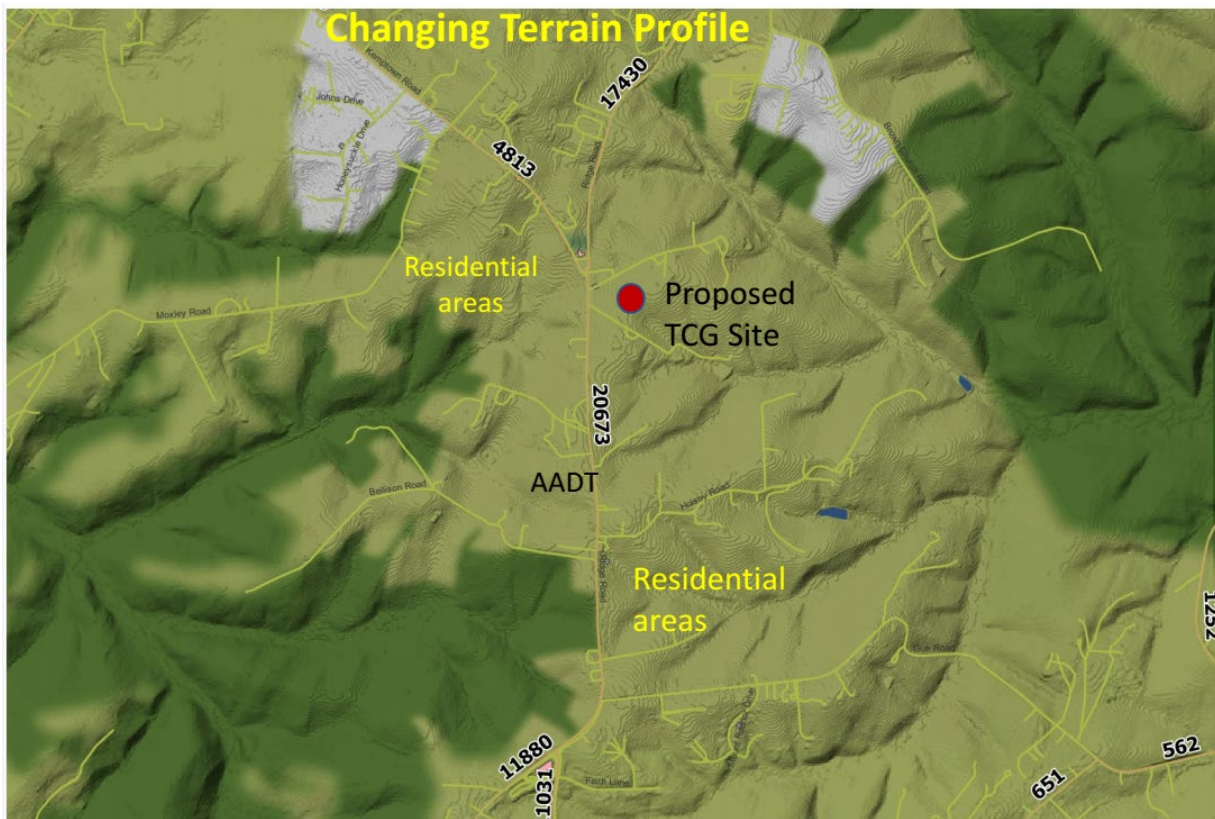
Conclusion: The Applicant's conditional use plan demonstrates that the tower will be set back 310 feet from the nearest dwelling. Exhibit 39. Mr. Marzullo testified that it was set back an additional 10 feet over the minimum to provide a buffer ensuring the setback is met. The application meets this standard.

iii. The maximum height of a support structure and antenna is 135 feet, unless it can be demonstrated that additional height up to 179 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection required by the building permit, the applicant must certify to DPS that the height and location of the support structure conforms with the height and location of the support structure on the building permit.

Conclusion: The Applicants seek authorization for a combined tower and antenna height of 145 feet, asserting that the height above 135 feet is needed to provide service, collocation, and public safety communications. Staff found (Exhibit 32, pp. 14-15) that the Applicant had demonstrated this need, given the propagation maps showing underserved and unserved areas at lower heights. Exhibit 6.

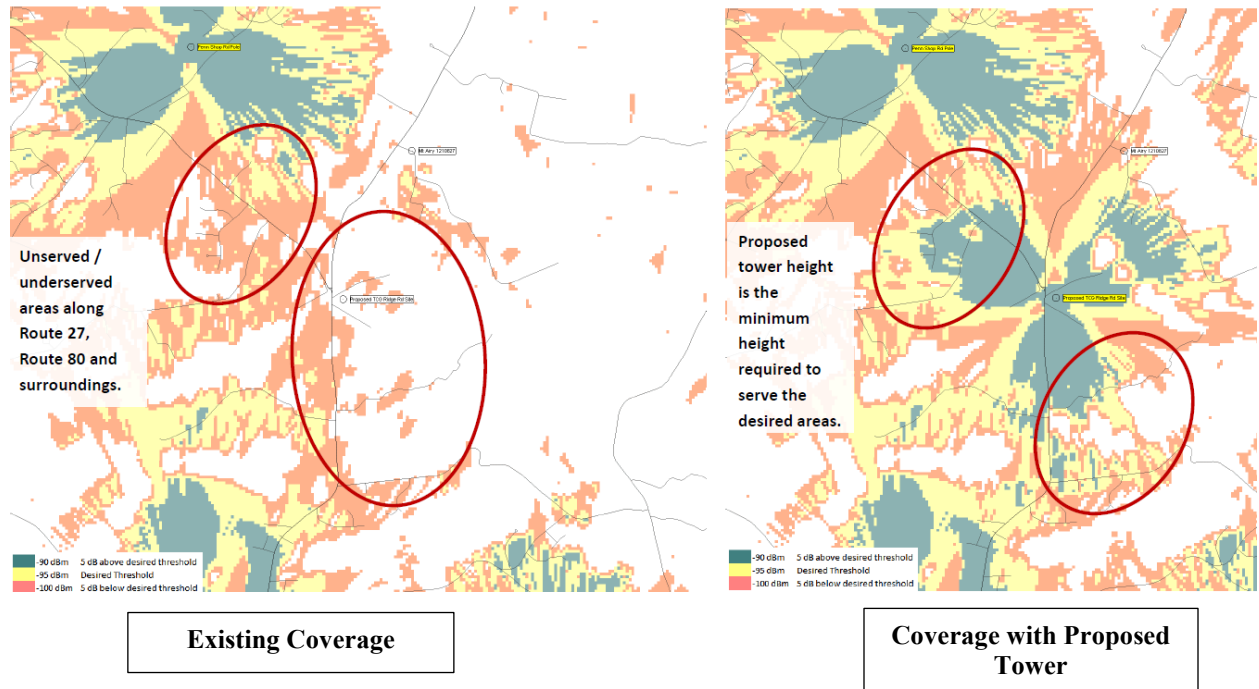
Mr. Narendra Mangra, the Applicant's expert in radio frequency engineering, explained why the additional height was necessary to cover target service area. His analysis looked at several factors, including the service required to provide coverage to Rt. 27 and nearby residences, the locations of existing facilities that might be used for colocation, and the terrain of the area. In his opinion, the hilly terrain in the service area prevented achieving coverage through existing towers.

T. 17-21. The terrain is depicted on the map below (Exhibit 6):

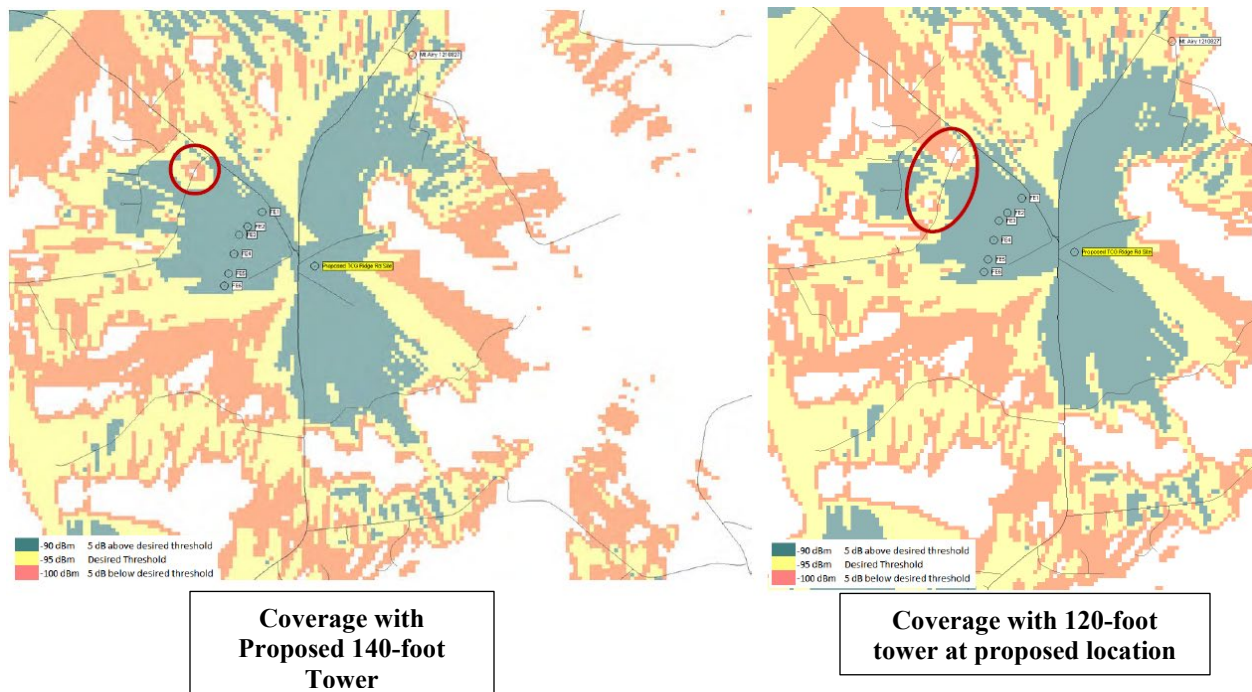


Mr. Mangra testified that propagation maps of existing coverage show both underserved and unserved areas (highlighted in red on Exhibit 6, on the next page). Existing coverage is shown to the left and coverage provided by the 140-foot pole at the proposed location is on the right.

Other propagation maps submitted by the Applicants compare coverage provided by a 120-foot tower and a 140-foot towers at the proposed location. The 140-foot tower covers an

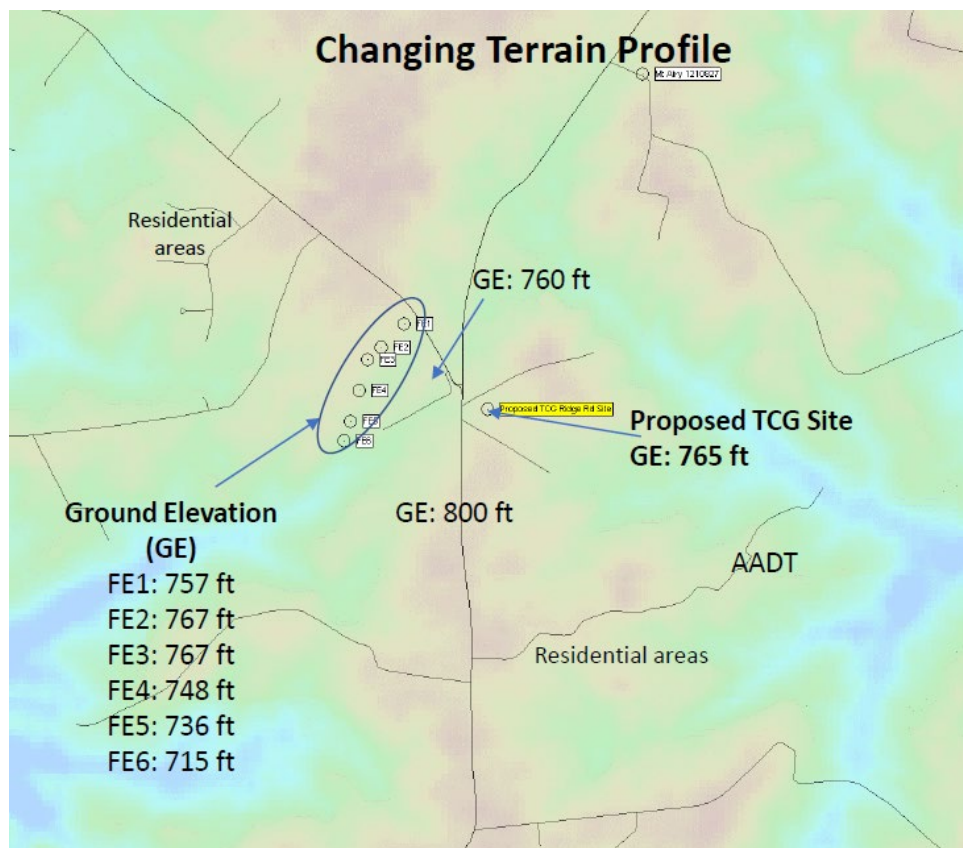


area to the north (highlighted in red on the left) not covered by the 120-foot tower, highlighted in red on the right (Exhibit 6, Slide 6):

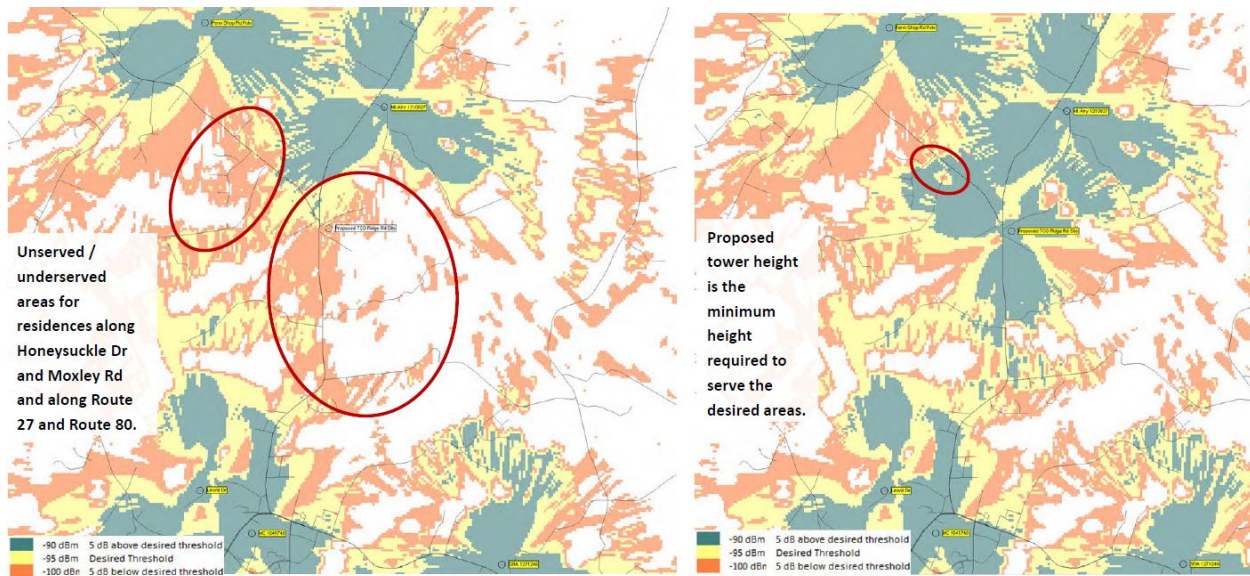


Mr. Mangra testified that the TFCG asked them to analyze the possibility of colocating on six existing towers (Exhibit 6, below). According to him, the terrain from the first tower to sixth tower falls by 40 feet, already reducing coverage. There's also a higher ridge that runs along Ridge Road. This acts as a natural boundary to coverage. The ground dips between the main roads, which also factors into problems with coverage. T. 20.

Mr. Mangra testified that they tested sites FE1, FE3, and FE6 at 200, 180, and 140 feet in height. None provided as much coverage than the proposed location at 140 feet. He opined that, even if they used all 6 existing towers, there are gaps in coverage in the targeted area, demonstrated by the propagation maps on the next page (Exhibit 6)



Location of Six Existing Towers and Area Topography (Ex. 6)



Service area from ALL existing facilities

Proposed TCG Site at 140 ft

**Comparison of Service Using All Existing Facilities and
Service from Proposed Facility at 140 feet
Exhibit 6**

Conclusion: The uncontroverted testimony and evidence from the Applicants, and the rationale of Staff, support a finding that the tower must be greater than 135 feet in height to reach the targeted service area. The propagation maps submitted show topography and other factors prevent collocation on an existing facility. Nor can the coverage be achieved by lessening the height of the tower at the existing location to 120 feet. As Staff notes, coverage in this area is needed to provide important emergency communications to customers. The tower will have the ability to house five carriers to reduce the need for additional towers. The TFCG recommended collocating another telecommunications application to justify need. This will be required as a condition of approval of this conditional use. With this condition, the Hearing Examiner finds that the Applicant has adequately shown that the 145-foot height is necessary to provide service, collocation, and emergency safety for users.

iv. The support structure must be located to minimize its visual impact. Screening under Division 6.5 is not required, however, the Hearing Examiner may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and nearby residential properties.

Conclusion: The issue of visual impact is always a major concern with large telecommunications facilities. Mr. Marzullo testified that it's "obvious" that the monopole will be a "visible structure."

T. 54. Nevertheless, the photo simulations shown in Part II.A of this Report demonstrate that the tower will be relatively screened from Mr. Durham's residence by a house and existing tree (Exhibit 15, Photo 1). The view from the north is somewhat mitigated by buildings and existing trees on the adjacent property (used for farm machinery sales and service business). *Id.*, Photo 3. The structure is set back from Ridge Road by 254 feet, lessening its impact on the roadway. The Applicant adjusted screening to adapt better to the agricultural nature of the area.

The Hearing Examiner questioned whether a stealth pole design would better screen the communications facility. The Applicants replied (Exhibit 19):

The two stealth design options available are a flagpole and treepole/monopine. A 145-foot monopine would be far more conspicuous here given the existing trees in the vicinity and the lack of trees on the subject property. For a flag pole, the antennas need to be located directly in a vertical line within the flag pole itself. To accommodate the six (6) proposed VZW antenna and GPS, space for the future collocating carriers' antennas and equipment, the flag pole would need to be significantly taller and would similarly be far more visually impactful than the proposed monopole design.

The Hearing Examiner finds the Applicants' have minimized the visual impact of the pole as much as possible. Although the 145-foot tower will be visible from some locations, she agrees with Staff that the large size of the property, setbacks from the road and other residential structures, and revised screening of the compound will significantly reduce these impacts.

v. The property owner must be an applicant for the conditional use for each support structure.

Conclusion: The property owner, Rhodes Brothers LLC, is a co-applicant, as required by this provision.

vi. A modification of a conditional use is only required for a change to any use within the conditional use area directly related to the conditional use approval.

Conclusion: Not applicable. The subject application is for a new use, not a modification.

vii. A support structure must be constructed to hold a minimum of 3 wireless communication carriers unless the Hearing Examiner finds:

(a) that collocation at the proposed location is not essential to the public interest; and

(b) that construction of a lower support structure with fewer wireless communication carriers will promote community compatibility.

Conclusion: This provision is more than satisfied, as the proposed support structure is designed to hold up to five providers (including the Verizon), and a condition of approval will require a this.

viii. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with all the carriers. Outdoor storage of equipment or other items is prohibited.

Conclusion: Staff found that the compound will have sufficient area to accommodate five total carriers, including the Applicants' antennas and the collocation recommended by the TFCG. Exhibit 32, p. 17. No outdoor storage of unrelated equipment or other items is reflected in the plans and such storage is prohibited by a condition in Part IV of this Report and Decision.

ix. The support structure must be removed at the cost of the owner of the Telecommunications Tower when the Telecommunications Tower is no longer in use by any wireless communication carrier for more than 12 months.

Conclusion: To ensure compliance with this provision, the Hearing Examiner has imposed a condition in Part IV of this Report requiring that the support structure be removed at the cost of the owner of the Telecommunications Tower when the Telecommunications Tower is no longer in use by any wireless communication carrier for more than 12 months.

x. The support structure must be identified by a sign 2 square feet or smaller, affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Hearing Examiner notified within 10 days of any change in ownership.

Conclusion: To ensure compliance with this provision, the Hearing Examiner has imposed a condition in Part IV of this Report and Decision, requiring that the support structure be identified by a sign two square feet or smaller, affixed to the support structure or any equipment building and requiring that the sign be updated, and the Hearing Examiner notified within 10 days of any change in ownership.

xi. Each owner of the Telecommunications Tower is responsible for maintaining the wireless communications tower in a safe condition.

Conclusion: To ensure compliance with this provision, the Hearing Examiner has imposed a condition in Part IV of this Report requiring that the Applicants and any owners of the telecommunications facility are responsible for maintaining the facility in a safe condition.

xii. The Hearing Examiner must make a separate, independent finding as to need and location of the facility. The applicant must submit evidence sufficient to demonstrate the need for the proposed facility.

Conclusion: The same evidence and testimony that justifies the 145-foot height of the tower demonstrates the need for the facility. That discussion is incorporated here by reference. Based on the record in this case, the Hearing Examiner finds that there is a need for a telecommunications facility of the proposed height, both for cell phone service needs and colocation requirements, at the location specified in the Applicants' plans.

D. Applicable General Development Standards (Article 59.6)

Conclusion: Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Section 59.3.5.2.C.2.c.iv. exempts telecommunications towers

from the screening requirements of Article 6.5 but the Hearing Examiner does have latitude to impose screening designed to minimize the tower's visual impact. As already noted, the two alternative methods of designing poles (the "stealth" pole and the monopine) would both require the tower to be taller and increase its visual impact. The Applicants have agreed, however, to screen the compound with a wooden fence and landscaping to screen the electrical equipment more compatibly with the surrounding area.

Other provisions of Article 6 of the Zoning Ordinance, such as parking, site access, and open space do not apply to this facility. The Applicants do not propose signage (except the mandatory sign outside the compound) or lighting. The practical fact is that traffic, access, parking, lighting, and signage are generally not issues in a cell tower case. The use has no significant need for parking; it creates virtually no vehicular traffic; the site is rarely accessed; it will not have lighting on the tower except as required by law or regulation; and it will have only the identification sign required by the Zoning Ordinance. Thus, there is no need to further address the general development standards in this case. The Hearing Examiner finds that the subject proposal satisfies the applicable general development standards "to the extent ... necessary to ensure compatibility," as required by *Zoning Ordinance*, §59.7.3.1.E.1.b.

IV. CONCLUSION AND DECISION

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Telecom Capital Group and Rhodes Brothers LLC (CU 23-07) for a conditional use under Section 59.3.5.2.C of the Zoning Ordinance to install and operate a telecommunications

tower and related equipment at 28025 Ridge Road, Damascus, Maryland 20872, is hereby **GRANTED**, subject to the following conditions:

1. All development on the site must conform to the Conditional Use Plans (Exhibits 38, 39, 41 through 48).
2. The Applicants must maintain the landscape plantings to ensure healthy growth. Any plant material planted in fulfillment of this condition that dies or becomes diseased shall be promptly replaced by the Applicants.
3. Tower Facility Coordinating Group Application No. 2021081545 must be colocated on the telecommunications facility.
4. The Applicants must schedule the required site inspections by M-NCPPC Forest Conservation Staff per Section 22A.00.01.10 of the Forest Conservation Regulations.
5. The Applicants must comply with all tree protection and tree save measures shown on the approved Tree Save Plan and Forest Conservation Exemption Plan. Tree save measures not specified on the Forest Conservation Exemption Plan may be required by the M-NCPPC Forest Conservation Inspection Staff.
6. The Limits of Disturbance (LOD) shown on the Final Sediment and Erosion Control Plan must be consistent with the LOD shown on the approved Forest Conservation Exemption Plan.
7. Any requirements of the Department of Permitting Services for stormwater management must be fulfilled prior to issuance of sediment and erosion control permits.
8. In accordance with Zoning Ordinance §59.3.5.2.C.2.c.iii., the Hearing Examiner has approved a telecommunications support structure not to exceed 145 feet in height. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the Applicants must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.
9. In accordance with Zoning Ordinance §59.3.5.2.C.2.c.vii., the support structure must provide space for the antennas of five providers, including the Applicants and TFCG Colocation Application No. 2021081545. No outdoor storage of equipment or other items unrelated to the conditional use is permitted.
10. In accordance with Zoning Ordinance §59.3.5.2.C.2.c.ix., the Telecommunications Tower support structure and equipment must be removed at the cost of the owner of the Telecommunications Tower when the Telecommunications Tower is no longer in use by any wireless communication carrier for more than 12 months.
11. In accordance with Zoning Ordinance §59.3.5.2.C.2.c.x., the telecommunication facility must display a contact information sign, two square feet or smaller, affixed to the outside of the

support structure or equipment building. This sign must identify the owner and the maintenance service provider of the support structure and any attached antenna, and it must provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Hearing Examiner notified within 10 days of any change in ownership.

12. In accordance with Zoning Ordinance §59.3.5.2.C.2.c.xi., the Applicants and all owners of the telecommunications facility are responsible for maintaining the facility in a safe condition.
13. The Applicants and any successors in interest must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicants and any successors in interest shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 27th day of January, 2023.



Lynn Robeson Hannan
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

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