BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF: *
*
T-MOBILE NORTHEAST, L.L.C. (T-Mobile) *
AND WEST HILLANDALE SWIM CLUB (Hillandale) *
PETITIONERS *
Matthew Chaney *
James Clayton Hankinson *
Dr. Judith Harrison *
Brian C. Morgan *
Randy Gene Ogg *
*
In Support of the Petition *
*
Edward Donohue, Esquire *
Attorney for the Petitioners *
* *

Board of Appeals Case No. 2709

(OZAH No. 08-06)

GOVERNMENT WITNESSES *
Thomas Carlin, Montgomery County Gov't. *
Department of Permitting Services (DPS), *
Site Enforcement Section (SES) *
Ehsan Motazedi, DPS, SES Manager *
*
Neither in Support nor in Opposition *
* *
Gretchen Gervase *
Susan Present *
Richard Present *
Ida Rubin *
Doris Stelle *
Emma Stelle *
*
In Opposition to the Petition *
* *
Before: Philip J. Tierney, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION ON REMAND

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I. SUMMARY

This case is on review after remand from the Board of Appeals. The Petitioners have had over two years to pull together a coherent presentation of their case. Yet the latest effort is well short of the mark.

Several of the Petitioners' witnesses were unfamiliar or uninformed about the details of the project. This information gap was due to the absence of the initial project manager, Marianna Crampton, who was on maternity leave and could not testify at the scheduled hearing dates. Instead of delaying the hearing until Ms. Crampton could return, the Petitioners called as witnesses people who were inexperienced in County land use hearings or uniformed about the project detail. All too often their response to questions was "I don't know". The evidence was in conflict, inconsistent or incomplete on several important points.

One particular problem related to conflicts and inconsistency with the Petitioners' own documents over the 300 foot setback requirement. An aerial photo depicted two homes within the prohibited setback area and this evidence was in conflict with the site plan which reflected conformity with the 300 foot setback requirement. The Petitioners failed to withdraw erroneous documents and compounded the problem with stubborn insistence that incorrect measurements were correct. One of the Petitioners' witnesses withheld information that was eventually disclosed by the interrogation of Hearing Examiner Carrier and Susan Present. The conflict and inconsistency in the Petitioners' evidence caused a continuing problem of credibility for the Petitioners.

The Petitioners did revise the site plan to add more vegetation and trees and filed a revised landscape plan to improve compatibility with the community. However, the Petitioners never cleared up the conflict over the 300 foot setback. Another major

omission was the lack of information about the contractor proposed to monitor and eliminate the risks of lead acid batteries as backup for the cell phone system.

On Balance, the Petitioners presented a case that was fraught with lack of information, misinformation, lack of preparation and misunderstanding about the need to supply the decision maker with sufficient evidence to resolve conflicts in the record.

Since the Petitioners failed to provide a record that satisfies the burdens of proof and persuasion, they must deal with the consequences of the failed presentation. The recommendation to the Board of Appeals is to deny the petition. The Petitioners had ample time and opportunity to clear the record but did not do so. That they failed to do so is grounds for denial and denial is my primary recommendation.

If the Board is reluctant to deny the application because of the need for expanded service, another remand is an option. While a remand would seem unfair to the community at this juncture and is not my recommendation, it will allow the Petitioners another opportunity to fill the evidentiary gaps present in the current case. It will certainly give them more time to study and supplement its' evidence on lead acid battery safety and correct the mistakes in Petitioners' documents and present a clear presentation that meets the zoning requirements.

II. STATEMENT OF THE CASE

An application for a special exception for a freestanding telecommunications tower to be located at 915 Schindler Drive in Silver Spring was filed by the Petitioners and included a request that the property line setback adjacent to the Cresthaven School be reduced from 120 feet to 41 feet. The matter was referred to the Maryland National Park and Planning Commission (MNCPPC). Following Technical Staff review and Planning Board hearing, the application was recommended for approval with conditions.

The Board of Appeals authorized the Hearing Examiner to conduct two days of hearings in January and February, 2008.

Hearing Examiner Carrier submitted her Report and Recommendation, dated June 2, 2008, which was transmitted to the Board of Appeals and the parties of record on the same date. The administrative record was returned to the Board for further action. In her 141 page report, Hearing Examiner Carrier made extensive findings and conclusions and recommended denial of petition based on the failure of the Petitioners to present sufficient evidence on several critical issues.

The Board of Appeals heard oral argument on the petition on September 17, 2008. On January 8, 2009 the Board concluded as did Hearing Examiner Carrier that the record does not contain sufficient evidence to grant the petition. The Board remanded the matter to the Hearing Examiner Carrier to receive additional testimony and evidence on nine enumerated topics and six subtopics:

1. Petitioners must submit sufficient evidence to show that the support structure as proposed on the site will minimize its visual impact to the greatest degree reasonably possible;

2. Petitioners must submit written information sufficient to show that the proposed array of back up batteries will not pose a safety risk to the community that justifies denial of the petition;

3. Petitioners must submit a persuasive explanation of why the equipment compound cannot be further reduced in size to lessen its visual impact;

4. Petitioners must submit a revised Landscape Plan that includes the following features:

    a. The gate is located on the Ruppert Road side of the compound;
    b. Plantings are adequate to fully screen the compound on all sides except for the gate and the side facing exiting forest (unless it is demonstrated that additional planting along the Ruppert Road side would be damaging to the large tree currently growing within a few feet of the proposed compound location;
    c. A specified minimum height at planting and expected maximum height and spread after two, five and ten years;

d. T-Mobile's commitment to provide for the maintenance of these trees, and replacements for any that die, for as long as the tower or the equipment compound is located on the site;
e. T-Mobile's commitment to ensure that all tree-related work is performed by a certified arborist or licensed tree professional; and
f. T-Mobil's commitment to adjust the location of the compound fence and landscaping as needed to preserve community access to the path currently used by children walking to the adjacent elementary school.

5. Petitioners must submit written information sufficient to allow the Board to assess whether the proposed floodlights would cause any objectionable illumination or glare, or result in lighting levels exceeding 0.1 foot-candles along the side and rear lot lines.

6. Petitioners must submit written information sufficient to explain the inconsistency between the site plan, Ex. 155(a), and the aerial photograph, Ex. 155 (d), and to demonstrate that the 300-setback requirement would be satisfied.

7. Petitioners must submit written evidence that T-Mobile intends to comply with Montgomery County's Hazardous Material Storage registration requirement as they relate to the subject property, or has received approval from the County for an exemption from such compliance.

8. The Board also asks the Hearing Examiner to inquire into the conditions under which batteries such as proposed for this special exception would degrade; and

9. The Board asks the Hearing Examiner to address specific standards in the Code for community swimming pools, or explain her position, that she and the Board are not required to consider them. Ex. 170, January 8, 2009.

The Board made its remand order effective on January 8, 2009. Hearing Examiner Carrier scheduled remand hearings for March 12 and 15, 2010. For administrative reasons, the hearings were rescheduled to March 9, and March 16, 2010. The March 9, 2010 hearing was convened as scheduled. The March 16, 2010 was rescheduled and conducted on April 8, 2010. Evidence was presented at the hearing both for and against the application.

The hearing record was initially closed on April 30, 2010. However, Hearing Examiner Carrier was appointed to a new position, Chair of the Montgomery County Planning Board, which made it impossible for her to complete the report and

recommendation. There were several orders issued extending the time for the Hearing Examiner's report and recommendation. During this time a new Hearing Examiner was appointed with instructions to review the entire record and prepare a supplemental report and recommendation for the Board of Appeals. An extension of time was granted for the supplemental report and recommendation to be filed by October 31, 2010.

The Board's remand order specifies issues to be resolved but evidently accepts Hearing Examiner's Carrier's findings and conclusions on other issues that are not specified for review. After review of record this Hearing Examiner concludes that it is not necessary to repeat all the material of the original hearings or the original Hearing Examiner's report and recommendation. Instead, Hearing Examiner Carrier's June 2, 2008 report and recommendation is hereby incorporated by reference into this supplemental report and recommendation and made a part of it.

Unless otherwise stated, the findings and conclusions of Hearing Examiner Carrier will be adopted here. The focus of this report will be confined to the testimony and evidence submitted after the remand and the Board's instructions for evaluation of enumerated issues contained in the remand order.

One issue was raised by the Opposition that was not specified for remand evaluation by the Board of Appeals. The Opposition presented evidence to show that the Federal Housing Administration (FHA) adopted a policy relating to mortgage lending that views the presence of a cell tower in the neighborhood as a hazard and nuisance and a negative factor in obtaining a government backed mortgage.[1] The Petitioners objected to consideration if this issue on the grounds that the Board did not specify property values as an issue to be considered during remand.

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[1] U. S. Department of Housing and Urban Development, Ex. 172 (b).

The FHA policy may apply to this neighborhood and raises questions about the relevancy of the federal policy in a local use matter. These questions involve legal matters that are better handled with an opinion from the County Attorney or the Attorney General. Given the importance of telecommunications and preservation of property values as competing policy factors, it seems prudent to refer this matter for a legal opinion if the matter is remanded again. Because the Board did not specify this issue to be considered, it is not included in this report.

III. SUMMARY OF TESTIMONY

All testimony was presented under oath. In order to accommodate witnesses' schedules, Hearing Examiner Carrier permitted some testimony out of turn. For the convenience of the reader, the witness testimony is grouped as testimony in support of the Petitioners, testimony from Montgomery County Government DPS representatives, the testimony of the Opposition, and Petitioners' Rebuttal.

A. PETITIONERS' CASE IN CHIEF

Matthew Chaney is the Zoning Manager for T-Mobile coverage and is the responsible official for finding a solution to the coverage problem that has gone on since 2007. He testified that the Tower Committee determined that this deficiency can only be rectified with additional coverage. The level of dropped and blocked calls has increased to a point that threatens the 911 emergency communications system.

Mr. Chaney acknowledged that one of the requirements of the Zoning Ordinance, §59-G-2.58, specifies that support structures for the tower must be sited to minimize its visual impact and the Board may require that the structure, to be less visibly intrusive, include mitigation such as screening, coloration, stealth design and other options. He

proceeded to evaluate the issues raised by the Board of Appeals and concluded that the Petitioners have satisfied each and every requirement raised by the Board and the application in its current form is responsive to the Board's direction.

Mr. Chaney concluded that the facility will be screened from the surrounding area on multiple sides. For example, existing tall trees and vegetation are located on the north and will be retained. All antennas and cable lines will be concealed inside the tower, which is designed to look like a flag pole. The height of the tower is proposed at 120 feet. An 8 foot tall board on board fence will surround the compound that will include the tower and facility equipment.

Mr. Chaney indicated that the facility will be situated so that it is at least 300 feet from nearby residences. The area outside the fence will be landscaped with additional trees and vegetation that will make it difficult to see the fence. Located immediately south of the site is the existing Oakview[2] swimming pool and community area. The existing pool is enclosed with a chain link fence and it will be more visible to the surrounding residents than the proposed facility. He explained that a propagation map shows the gaps in coverage. He indicated that there are no other sites available that would provide a solution to the coverage gap.

Mr. Chaney testified that Barbara Moore, the Director of the County's Office of Emergency Management, has reviewed the proposed application and concluded that it conforms to the requirements of Executive Regulation 17-03. T-Mobile had initially challenged the applicability of the regulation. However, the Petitioner has since reached a settlement agreement and registered all existing facilities within the County including the proposed facility.

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[2] The witness appears to have confused the Oakview pool with the Hillandale pool which is contiguous to the site of the proposed facility.

Mr. Chaney addressed the proposal to relocate the facility to the rear of the site. The relocation of the tower northeast of the pool would require considerable ground disturbance and removal of trees. Grading alone would level out the area and remove natural screening of topography and vegetation. He noted that the equipment compound was reduced in size from 35 by 45 feet to 30 by 30 feet. Some compounds are larger than the Petitioners' proposal. Some are 75 feet by 75 feet and are designed for 5 or 6 carriers.

Mr. Chaney explained that the revision of the site plan does not propose to relocate the gate access to Ruppert Road because large trees would be lost if gate is moved there. He indicated that the gate will be constructed of the same materials as the fence, that is, an 8 foot high board on board. A 12 foot wide and 20 to 25 feet long gravel path will extend from the paved parking lot to the gate to permit vehicular access to the tower and compound. The Petitioner also proposes to plant 8 trees instead of the original proposal of 5 trees. He indicated that T-Mobile will commit to adjust the location of the compound fence and landscaping needed to preserve community access to the path adjacent to the site and the Cresthaven Elementary School. However, he does not believe it is appropriate to encourage people to go through the site. Nevertheless, the Petitioner will abide by the Hearing Examiner's determination on this issue.[3] The proposed compound does not block access to the school or pool. The school was designed so there will be no cut-through access to the school.

Mr. Chaney was subjected to extensive cross examination by several members of the opposition. The reduction in the size in the compound was intended to be

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[3] Hearing Examiner Carrier made clear to the Petitioners that her responsibility did not include proposing any adjustments to the site plan as that is the responsibility of the Petitioners who carry the burdens of proof and persuasion for a special exception request.

responsive to the Board's remand order. However, he did not know what would be the smallest compound that would work on the site and did not know the details of T-Mobile's instructions to its contractor, KCI. There were many questions he could not answer. His lack of knowledge about the details of the proposal, decrease the weight given to his general conclusions about compliance with the zoning requirements.

Mr. Chaney was questioned about the proposed tower or pole which will resemble a flag pole although it will not contain a flag. Co-locaters at the site could fit into the flag pole but he did not know its' width. He defended the flag pole as preferable to a pole disguised as a tree because it will look good at the site. He conceded that the pole at 120 feet in height will tower over existing trees and will be visible to neighbors. When the gate is open, there will be no screening of the compound, its on-site equipment or the tower. All will be visible to homes along Schindler Road.

Mr. Chaney indicated that contractor or T-Mobile operational personnel would visit the compound on a monthly basis and the gate would be opened for an unknown periods of time. He indicated that the equipment compound will contain batteries stored in three cabinets. There would be four batteries per cabinet. However, he conceded that a fourth cabinet may be installed for capacity reasons although there are no current plans for more battery backup units. Other testimony from Petitioners' witnesses indicates that there will be at least 16 batteries or more.

Mr. Chaney testified that T-Mobile will provide for monitoring and safety of the facility. The monitoring and maintenance will be performed on a 30 to 45 day cycle. T-Mobile's operational personnel or its contractor will visit and inspect the site, its equipment and its operations. Whenever there is a malfunction or an emergency, T-

Mobile will respond and correct the problem. If there are co-locators on site, they will be responsible for their own equipment and operations.

The Opposition cross examination of Mr. Chaney brought out the following points: ENCELL Technologies, LLC (ENCELL) is the manufacturer of the Sentinel system, which the Petitioners claim will eliminate any safety concerns about the batteries. ENCELL does not have a contract with T-Mobile and it is only under consideration as a contractor; ENCELL only installed its product at one location in the region, Richmond, Virginia. ENCELL does not have a web site or written evaluations of the product, including its Richmond facility. ENCELL's product has only been in production for one year.

Randy Gene Ogg qualified as an expert witness in the field of batteries as applied to cellular facilities. He is Chief Technical Officer at ENCELL. He is familiar with batteries to be used at the Hillandale facility. He concluded that the proposed array of batteries will not pose a safety risk to the community. The proposed facility is a standard setup similar to many around the country.

Mr. Ogg testified that a safety risk relates to the lead acid sealed batteries proposed for use at the site. When batteries proposed here develop resistance while they are on constant float, the condition will generate internal heat and pressure buildup. He concluded that the proposed internal safety system developed by his employer, ENCELL, will maintain the safety of the system and extend the life of the batteries because they will be removed from constant charge and heat will be reduced. The battery state of health will be kept at constant level and remove risk situations.

Mr. Ogg indicated that the ENCELL safety system is called "Sentinel". Sentinel will monitor the batteries, determine their state of health, and extend the life of the

batteries because it will protect the system from constant charge and reduces heat within the system. Sentinel is the only product to evaluate the battery state of health. Sentinel is automatic but can be monitored at remote locations.

Mr. Ogg addressed the Board's concern about the degradation of the batteries. One of main benefits of Sentinel is the reduction of degradation. Normally, batteries degrade in 2 to 3 years. However, under Sentinel battery life span can be extended up to two or three times normal. Sentinel itself has a life span of 12 years.

Mr. Ogg explained that batteries are in a static state when in constant float and sulfate buildup will occur on surface of electrodes and create resistance points. Swelling occurs. By taking batteries off float charge, it is no longer in a static state and is allowed to adjust down for 23 hours and a post charge clean up will return the batteries to a low resistance state. He concluded that Sentinel should eliminate all the currently known factors that cause safety issues. The system is shown on Ex. 171 (o).

Dr. Judith Harrison is a scientist who lives in the neighborhood and supports the proposed use. She is a member of the Board of Directors for the West Hillandale Swim Club. She explained that a "float charge" means that batteries are held in a constant state of charge, usually 100% and can be held at any point. The most common time for lead acid battery failure is during a float charge.

Dr. Harrison explained that lead acid batteries are extensively used in telecommunications facilities as backup in case the main power source is not available. They are used in many applications worldwide. She provided a review of the use of these batteries in her report, Ex. 181. These batteries are safe and they are used in 1,500 T-Mobile telecommunications facilities located in the Washington D.C. Metropolitan area. These batteries are also used in 155 T-Mobile facilities in

Montgomery County. The batteries are heavily used in automobiles and the failure rate is exceptionally low.

Dr. Harrison indicated that the use of Sentinel removes the battery from constant float. Sentinel monitors the health of the battery by monitoring internal resistance. Sentinel removes even the small risk of failure. Based on her 17 years of experience, she concluded that the lead acid battery does not pose an unacceptable safety risk and Sentinel provides further assurance that the batteries are safe.

Dr. Harrison explained that there is a need for the facility in this area of the county. All T-Mobile facilities are compliant with Executive Regulation 1703. The Tower Committee and the MNCPPC both indicated the need for the facility. Dropped calls have increased and 911 calls are at risk. The monopole is designed to withstand 90 m.p.h. winds. If the pole should break during a storm, only the top 39.25 feet will drop within a designated fall area. The Cresthaven School is 135 feet from the Tower.

Dr. Harrison concluded that the proposed use of Foster's Holly trees will be ideal screening for the compound. The Petitioners' evidence meets the Board's concerns as the compound area will be significantly reduced in size and additional screening will provide a satisfactory buffer, see, photos Exs. 240, 241 and 244. She also agreed with the Petitioners' evidence that there is no better site for the facility. The selected site will cause less ground disturbance to the environment. For example the location of an alternative access road next to the pool is a bad idea as it will render the pool useless. Moreover, construction vehicles driving over the patio will break its' foundation stones.

James Clayton Hankinson is an engineer and program manager for KCI Technologies, Inc. (KCI), which is T-Mobile's contractor. He was qualified as an expert witness. He explained the differences between the two site plans prepared for the

hearings of March 9, 2008, Ex. 171 (p), and April 8, 2009, Ex. 217 (c). The model numbers have changed as the previous models are no longer manufactured. He stated that ground access will only be 25 feet from the parking lot and it is necessary to allow access for maintenance vehicles and transport of equipment.

Mr. Hankinson explained that the project documents, Ex. 217 (a-s), show that light at the property line will not exceed 0.1 foot candles. Lights will be located facing down and at cabinets mounted six feet in air. The lights will only be turned on in the event of a nighttime emergency. The lights will not cause glare and will not extend beyond the property line. He also concluded that the proposed tower location is 300 feet from off-site dwellings. He agrees with the DPS witnesses that sealed drawings are the most probative evidence of setbacks.

Mr. Hankinson, on cross examination, stated that it is inaccurate to claim that further tower survey work was done to verify the 300 foot setback, tr. of April 8, 2010, p. 83. He conceded that to meet the 300 foot setback, the tower was shifted “slightly” or moved in a northeast direction “couple of feet”. The tower has the same GPS location for both site plans. Property lines were also changed between the April 8, 2010 and the March 9, 2010 hearings. He conceded that he has only been involved in the project for the past 3 weeks, tr. of April 8, 2010, p. 27, as he replaced a woman who is on maternity leave.

Mr. Hankinson testified that the diameter of the tower at its base is 40.66 inches[4] and 30 inches at the top. He indicated that the cabinets where the batteries and

[4] Tr. March 9, 2010 pp. 257-258; He later testified that the outside diameter of the pole is 20.33 inches or exactly half of the stated diameter, tr. April 8, 2010, p. 118, lines 10-17.

equipment will be stored will be 8 inches wide, 23 inches long and space between cabinets will be 2 feet, 2 inches. There will be no change in the natural grade. The new site plan and landscape plan reflect a reduction in the size of the compound. The compound forms a rough rectangle.

Mr. Hankinson was questioned extensively by the opposition. He conceded that he does not know the GPS location of the tower. An aerial photo was used to estimate the tower location and the 300 foot setback. He also conceded that several homes have rectangular shapes on the site plan, but in reality more homes than reflected on the site plan are irregular in shape. Ex. 231, photo of Lev-Tov home. The Rossen home at 4 Schindler Court is also irregular in shape, Ex. 233, tr. of April 9, 2010, pp. 99-105. The site plan is inconsistent with the shapes of homes on the ground. The Opposition contends that the incorrect shapes of the homes and incorrect measurements on the site plan undermine the reliability of the Petitioners' claimed 300 foot setback measurements.

Mr. Hankinson disputed the Opposition' contention as a revised measurement shows that the setback is maintained. The Lev-To house is setback 304 to 310 feet. The Rossen house is setback 308 to 310 feet[5]. Mr. Hankinson concedes that KCI failed to include the diameter of the pole in the measurements and this omission was a mistake, tr. April 8, 2010, p. 99-105, lines 15-17. He testified that the tower 300 foot setback moved away from the Gervase house, tr. April 8, 2010, p. 91, lines 13-23. However, the site plan does not bear this out, Ex. 217 (c).

Mr. Hankinson stated that in his opinion, the new landscape plan, Ex. 207, is fully adequate to screen the compound from the surrounding community. There is no

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5. This testimony does not foreclose the possibility that incorrect depiction of house foot prints could mean that homes are within the prohibited setback area. Also the witness failed to disclose the incorrect measurements on his direct examination.

alternative location on the site less visible. The only other place is the northeast corner and topography and trees make it difficult to construct in this area.

Brian Morgan works in field of landscape architecture and is project manager for KCI. He described changes in the site plan. The gate was shifted north and some screening materials were added. Eight foster holly trees were added along with a honey locust along the east side of the access road to offer additional screening between the public road and tower. The height of the plantings will be 12 to 14 feet with 2 1/2 to 3 inch calipers. The face of the compound will be screened with a spread of plant heights and intervals.

Mr. Morgan indicated that the landscape plan, Ex. 217 (i) shows that screening will be closer to Schindler Dr. The landscape contractor who plants the trees will be responsible for a one year commitment for watering and maintenance, see, plan note, Ex. 217 (i), which requires plant material to be guaranteed for one field growing season. After that the contract requires maintenance. Mulch is used for watering and weed control. The fence is 30 feet long. The height of Foster holly trees at installation will be 6 to 8 feet with 18 to 24 inches in spread. After 5 years, the height will be 12 to 20 feet and 4 to 6 feet in spread. After 10 years, the height will be 15 to 25 feet with 6 to 8 feet in spread. He indicated that two trees near the street would be deciduous as well as four trees on the west side of the compound. No trees will be removed. Indeed, eight new trees will be added to the project.

Mr. Morgan indicated that the lighting plan reflects no glare past property lines. Photo-metrics include perimeter fencing. The lights will be set at 6 feet, Ex. 171(m). Illumination on the ground will recede substantially before it gets to perimeter fencing.

Mr. Morgan conceded that there is a six foot difference between the old site plan and the new one. Compare, Ex. 171(p), and Ex. 1 71 (c). The northwest property line was at 495 and is now 490. The west property line was 269 and is now 267. The southeast property line was 31 feet and is now 45 feet. The Northeast property line was 249 and is now 243, tr. April 8, 2010, pp. 86-87.

B. MONTGOMERY COUNTY DPS

Hearing Examiner Carrier requested that DPS assist in the measurement of the 300 foot setback of the tower from nearby homes

Ehsan Motazedi is the manager of the site plan enforcement section. He testified that the site plan provides the most accurate measurement and more so than field measurements since site plan measurements are validated by an engineer and are the preferred approach. The site plan is a legal document and it is accepted as such. DPS on occasion performs measurements and has field equipment for this purpose. A land survey is considered the most accurate form of measurement.

Thomas Carlin works in the section and was involved in the measurement efforts. The field measurements were conducted on a cloudy day in January 2010 and the foliage was low. He and another DPS staffer measured from the proposed location of the tower to each house. He used a hand held laser device and measured from the dead center of the tower pole to each house. He determined that some houses were at the edge of the 300 foot setback area.

Mr. Carlin was questioned by the parties. He used the site plan to determine the location of the tower. He did not measure the perimeter of the cell tower or determine its diameter. He conceded that consideration of the diameter would have changed his measurements. See, transcript of March 9, 2010 hearing, p. 182. Indeed,

he conceded that using the dead center point can result in the pole being actually less than 300 feet from 911 Schindler Dr.

C. COMMUNITY OPPOSITION CASE IN CHIEF

Emma Stelle is a resident of 912 Schindler Drive. She opposes the proposed use with the tower on the north side. The tower will have a significant and adverse visual impact on the community. For example her home lies in a direct line of sight to the proposed facility. Her home rests at an elevation of 348.5 feet above sea level (a.s.l). Elevation of the area means that 6 rooms in her home will experience visual intrusion from the facility including her bedroom.

Mr. Hankinson challenged the correctness of this testimony by pointing out that the 8 foot fence would block any view to her bedroom. However, Ms. Stelle contended that she would be able to see beyond the fence. The fence is 8 feet tall and the elevation of her home is 348.5 at ground level. Her bedroom is higher than the fence. The Opposition submitted an analysis that supports the view that the fence will not visually screen equipment in the compound. Ex. 172 (o), paragraph 1. Ms. Stelle's testimony is credible. Indeed. Mr. Hankinson conceded that he did not study elevations outside the public right of way.

Ms. Stelle pointed out that the Petitioners initially proposed a compound 50 feet by 50 feet but now contends that it has made the project smaller with 30 feet by 30 feet size. However, this supposed reduction is illusory as the project will likely revert to its original size to accommodate two more carriers co-located at the site.

Ms. Stelle indicated that the FHA considers cell phone towers to be hazards and nuisances. This is a real detriment to the neighborhood as it means that mortgages for

property next to cell phone towers are impacted. She considers the Petitioners evidence confusing, and unresponsive.

Ms. Stelle witnessed an event that occurred on Friday March 12, 2010. She was looking out the front window of her home on Schindler Dr. and saw a man in the parking lot. It was a cloudy, windy and rainy day. At 4:18 p.m. She heard a noise and saw a man pounding a stake into a grass strip between the sidewalk and street. He was driving a KCI van. She asked what he was doing. He responded that he was taking measurements of the West Hillandale Swim Club. He said that he took measurements two years ago for all towers. Because the new school was built, he was asked to take measurements in light of the recent school construction. She went back home and observed his activities. He drove the van over the parking lot and eventually parked in the middle of the lot about 4:39 p.m. He parked and sat in the van for a time. At 4:41 p.m. he set up a tri-pod and a large umbrella. He then set up another tri-pod. At 4:56 p.m. the umbrella was caught by the wind and knocked over the tri-pods. The man got out of the van and reset the tripods and umbrella. At 5:10 p.m. he was adjusting the tripod and umbrella when two people approached him. At 5:53 p.m. it was getting dark and the man left. She believes the man did not treat the equipment to the high standards of KCI and she questioned the reliability of the survey.

Gretchen Gervase is a resident of 911 Schindler Dr. Her family uses the nearby swimming pool almost daily. She is concerned about the financial status of the swimming pool club but the tower is not the answer. As a direct neighbor of the pool, she is concerned about safety, visual impact and economic impact of the proposed tower.

Ms. Gervace pointed out that ENCELL installs the system, monitors it, and can go to the site. The Sentinel facility will indicate whether there are defects or the system

is over extended. She is concerned about radio frequency radiation and the fall zone, which is only 39 feet and can impact the baby pool, people who walk the existing path and children sledding on pool hill. A fall of the tower could reach these areas.

Ms. Gervase indicated that the tower will be unsightly for anyone travelling along Schindler Dr. She will have a direct view of the proposed facility. It will be visible through the school yard and higher elevations in the area.

Ms. Gervase contended that potential family members will not be interested in joining a swim club with a cell tower especially if they have young children. She believes the tower will lower property values and cited expert testimony submitted at a January 4th 2008 hearing in the same case.

Ms. Gervase concluded that the tower should be relocated in back of the trees. The Petitioners failed to show cost estimates and terrain data to support their claim that relocation would be impractical. A tower that ranges in diameter from 3 ½ to 2 ½ feet from base to top is not a flag pole. The Petitioners failed to stake out the center of the tower.

Ms. Gervase criticized Mr. Hankinson's testimony about the Oakview Pool site. The pool had ground access point but it does not have that access today. The site is less wooded with no clearing and more level. An old photograph shows the character of the Oakview pool, Ex. 181.

Doris Stelle is a resident of 1008 Devere Dr. There have been changes in the character of the neighborhood since the Petitioners' efforts began that make denial of the special exception request more compelling. According to MNCPPC data, the school site has 9.8 acres, 4.4 acres of which were forested. Only 0.82 wooded acres were preserved. The school is larger than the old school with 640 students compared to 340. It has parking for 85 cars and 8 bus bays.

Ms. Stelle testified that the neighborhood is becoming more denuded of trees. Eighty trees have been removed by Montgomery County but only 13 replacement trees have been planted. There has been a 20% loss of trees along Schindler Dr. Replacement trees tend to be lower in height so as not to conflict with utility lines. Significant trees have been removed from the neighborhood with the construction of the Crestview School. Two White Oaks trees of large caliper were lost. Forty large specimen trees were removed at 50% loss of this type of tree. The loss of these trees will make the proposed cell phone tower more visible and intrusive for the neighborhood.

Ms. Stelle contended that against this background, the Petitioners' proposal to screen adjacent equipment compound is clearly inadequate. The Petitioners' should revise its landscape plan to provide more trees[6]. A commitment to maintain and replace dead trees by a certified arborist or licensed tree professional should be included as a condition. There is a need for clear conditions.

Susan Present lives at 1000 LaGrande Ave., Silver Spring and close to Schindler Drive. She is concerned with battery safety as battery failure could produce an explosion. The reduction of batteries and the use of ENCELL Sentinel are hazard mitigation measures that should be condition of the use of lead acid batteries because of their hazards. Robert Taylor's report, Ex. 159 (f), is supported by expert evidence, see, Ex. 248 (a) and (b), Ex. 249 and 249 (a). She noted that Montgomery County has no operational enforcement. Consequently, the petition needs to be deferred.

Ms. Present concluded that the Petitioners' evidence is unclear as to whether 4 or 8 batteries will be used on the site. Claims of need for more power supply are not

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[6] Aside from the small number of trees to be planted, the Opposition also raised concerns about the foster's holly trees having poisonous berries to which the Petitioners did not respond. Several publications describe the characteristics of the tree but none include any mention of poisonous berries. The Opposition needs better evidence to establish its point.

supported by the evidence.

Ms. Present addressed the Settlement Agreement between the County and T-Mobil, Ex. 254. There is an exposure of consequence to accommodate Verizon or Sprint. The Petitioners have not sought waivers on co-location. If they got a waiver it would reduce the need for height based on Petitioners intention to host two co-locators. If not in the rear yard compound, it would be an accessory structure. An eight foot tall fence is prohibited in rear and side yards where the height limit is 6.5 feet, Ex. 256 (DPS interpretation). If the fence is reduced in height, it is not accessory. Petitioner has presented unreliable evidence on the issue of maintenance. She believes that the burden of maintenance enforcement will fall on the community.

Ms. Present contended that the evidence is misleading about visual impact given the pyramidal shape of the tower and holly trees. Petitioners were expected to provide written information about visual impact behind the pool. Petitioners' reason for locating the tower has more to do with financial considerations and inconvenience to T-Mobil rather than adverse impact on the surrounding community. She also testified about the elevation of the area. The elevation behind the pool is 360 feet. The elevation of the proposed location of the tower is a 351 feet.

Ms. Present addressed the fall area. A wider monopole will cause greater impact. The Planning Board usually requires 12 feet side and rear yard space for elementary school. Cresthaven occupies 9.88 acres. She also testified that the zoning ordinance is to protect inhabitants of the County and Petitioner is not an inhabitant.

Richard Present is the husband of Ms. Present and resides at the same address. He wrote a letter on the blockage of the path from school, Ex. 158. Path is widely used by adult community as well as school children. He indicated that the path

from Schindler Court is not maintained and school does not want students to use it because it is steep and winding and is sometimes covered with leaves and other debris. Using the path would be risky.

D. PETITIONERS' REBUTTAL

Attorney Edward Donohue delivered some rebuttal comments[7]. The loss of property values is not an issue raised by the Board of Appeals in its remand order. Moreover, the Petitioners presented evidence on January 4 before the remand order through the testimony of real estate expert Oakleigh Thornton who provided an analysis, Ex. 38 (b), which demonstrates that property values will not be reduced by a cell tower in this area.

IV. FINDINGS OF FACT AND CONCLUSIONS

The report and recommendation of June 2, 2008 contains detailed findings of fact and conclusions. This supplemental report is only intended to update the record and provide findings and conclusions pertaining to the remand order. In a few cases, this report will provide findings of fact and conclusions that differ from those provided by Hearing Examiner Carrier. The later hearings presented evidence that the Hearing Examiner Carrier did not have available when she issued her June 2nd report and recommendation. Our ultimate conclusions are identical, that is, the Petitioners have not satisfied its burdens of proof and persuasion.

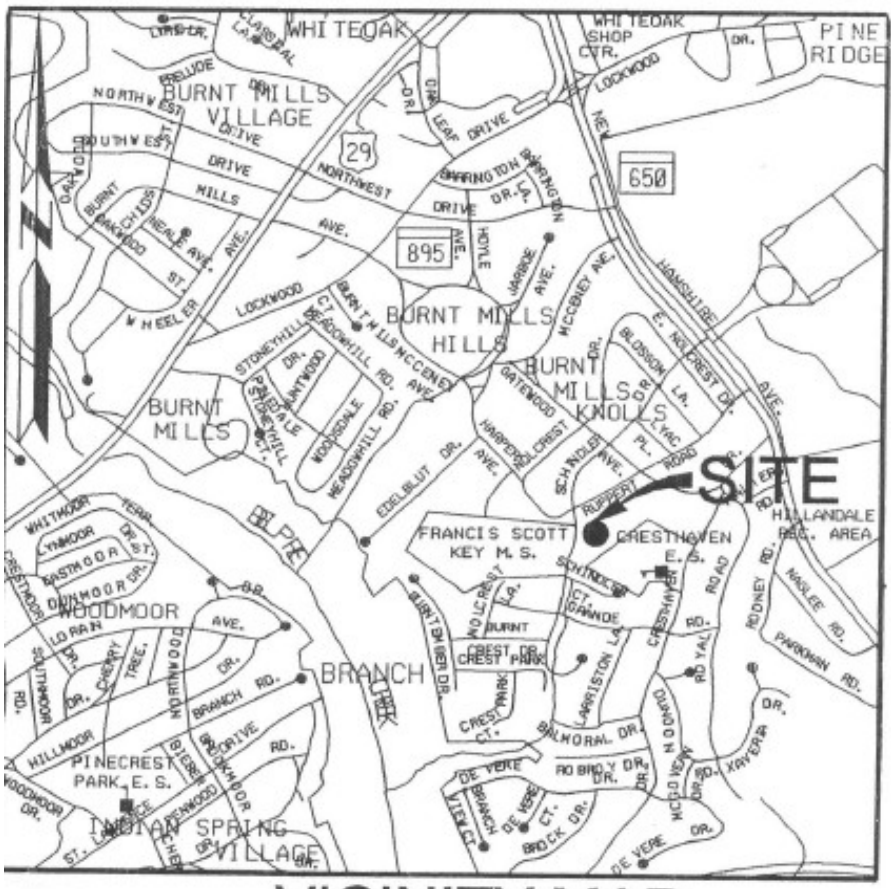
A. BACKGROUND

Hearing Examiner Carrier defined the relevant neighborhood in her June 2 report, page 12, and it is bounded by Northwest Branch Park on the west, Edelbut Drive

[7] Maryland Courts have approved Attorney testimony in administrative hearings.

and McCeney Avenue on the north, New Hampshire Avenue and the east and Devere Drive and a line extending from it on the south. This neighborhood will be adopted for this analysis.

The neighborhood is developed with well maintained single family detached homes and several institutional uses including the Cresthaven Elementary School, which borders the site to the east, and the Francis Scott Key Middle School, located west of the site beyond homes that front on Schindler Drive and face the site. The neighborhood contains a substantial tree cover but this cover has been eroded by a significant drop in replacement trees by the County and the school system. In addition, many of the trees are deciduous and only provide a tree cover for part of the year. A vicinity map that depicts the area is reproduced below.



VICINITY MAP

The site, which is home to a community swimming club, was proposed to be initially redeveloped with a single 120 feet tall monopole and a 50 x 50 foot storage compound surrounded by an 8 foot board on board fence. The north side of the site is covered by a heavy growth of trees. Following the hearing, the Petitioners revised the site plan to reduce the size of the compound to 30 x 30 feet and add eight new trees to better screen the south and west sides of the compound. However, T-Mobile's lease with the West Hillandale Swim Club allows for a compound of 50 x 50 feet for future co-location of two other carriers if needed. Both the swim club and the T-Mobile will occupy parts of the site for their different uses. The Petitioners also seek a 79 foot waiver of the setback adjacent to the elementary school.

B. NEED FOR CELL TOWER

A propagation map shows the gaps in cell phone coverage in the area. The Tower Committee determined that this deficiency could only be rectified with additional coverage. The Planning Board and the Board of Appeals did not consider need an issue at this juncture since other organizations have found any need factor to be satisfied.

There is a need for the facility in this area of the county. The Tower Committee and the MNCPPC both indicated the need for the facility. Dropped calls have increased and 911 calls are at risk. The monopole is designed to withstand 90 m.p.h. winds. If the pole should break during a storm, only the top 39.25 feet will drop within a designated fall area. The Cresthaven School is 135 feet from the Tower. Although the Opposition raised need as a pre-remand issue, the evidence about need is largely uncontested at this point in the process.

Matthew Chaney is the Zoning Manager for T-Mobile coverage and is the responsible official for finding a solution to the coverage problem that has gone on since

2007. He testified that the Tower Committee determined that this deficiency can only be rectified with additional coverage. The level of dropped and blocked calls has increased to a point that threatens the 911 emergency communications system. Mr. Chaney's testimony on this issue was credible and the record supports an affirmative finding on this issue. Hearing Examiner Carrier found in favor of the need issue and her rationale is persuasive.

C. PETITIONER'S CREDIBILITY PROBLEM

All witnesses testified under oath which included a promise "to tell the truth, the whole truth and nothing but the truth". Perjury includes false or incomplete testimony that conceals damaging facts.

Between the March 9 and April 8 hearings, TCI discovered its measurements were incorrect. KCI developed a new site plan that moved the tower at least 2 feet in a northeast direction so that all residential houses were presumably outside the 300 feet setback requirement. In addition, the property lines were revised in the new site plan and some were changed as much as six feet.

At the April 8, 2010 Hearing, the Petitioners' key witness, James Clayton Hankinson, withheld important information. Mr. Hankinson failed to disclose changes in measurements and movement of the tower during his direct examination when he addressed changes between the two site plans. This action was not disclosed to the Opposition, the Hearing Examiner or T-Mobile's Attorney. Instead he remained silent on the issue until he was questioned by the Opposition representative, Susan Present, and Hearing Examiner Carrier. This examination is set out in detail on the following pages from the transcript of the hearing.

* * *

Ms. Carrier: I'm a little bit confused because in your testimony this morning, what I jotted down was that you said further survey work had been performed and had verified the minimum 300-foot distance from outside of the…pole to all offsite dwellings, but then just a moment ago, you said that the only building that was actually measured in March of this year was the school. So which of those – am I missing something? It sounds inconsistent

Mr. Hankinson: All offsite dwellings had been actually field surveyed.
Ms. Carrier: At some other time in another year. Is that what you mean?
Mr. Hankinson: Yes, ma'am.

* * *

Ms. Carrier: Go ahead. So what was done- you're earlier statement that the recent survey work verified the minimum 300 distance, was that inaccurate or was it intended to refer to earlier survey work and I misunderstood?
Mr. Hankinson: It was intended to refer to earlier survey work that was actual field survey of the, of the building corners.
Ms. Carrier: Okay. So you're telling me that at some other point in time, there was an actual survey done.
Mr. Hankinson: Yes, ma'am.
Ms. Carrier: Where someone measured physical distance from the building to where the outside of the pole would be.
Mr. Hankinson: Yes, ma'am.
Ms. Carrier: Okay. And did they do that in a way that was similar to what was described by the gentlemen from our Department of Permitting Services with a laser beam kind of thing, do you know?
Mr. Hankinson: I can't – I don't know.

[Recess taken and cross examination resumed]

Ms. Present: What happens to the field measurements that KCI takes after they're taken?
Mr. Hankinson: They are downloaded into an electronic file.
Ms. Present: And are they maintained?
Mr. Hankinson: Yes, Ma'am.
Ms. Present: And would you explain the process by which aerial photos are taken and measurements are produced?
Mr. Hankinson: We use the aerial photo as a, to show them, we gather the photo off of, we got it off line. The measurements to the closest houses were not used from the aerial photos. They were actual survey data.
Ms. Present: I'm sorry. That wasn't clear. Could you explain that further? The aerial photo that you just included as part of Exhibit 217 that was not a photo that KCI took itself? That was something you purchased?
Mr. Hankinson: Yes, ma'am.

* * *

Ms. Carrier: That was for illustrative purposes, then?

* * *

Ms. Carrier: Or for measurement purposes?
Mr. Hankinson: It was scaled as best possible to show the alternate site location exhibit.
Ms. Present: Okay. And when was it purchased? Do you know?
Mr. Hankinson: File created 3/10/2010.

Ms. Present: You said that the site was not re-measured, the property lines were not re-measured, is that correct?
Mr. Hankinson: Correct.
Ms. Present: So if the property lines were not re-measured, how come you have different measurements on your most recent site plan for property line measurement?
Ms. Carrier: Do you mean compared to the previous site plan?
Ms. Present: Compared to the one that was submitted in October. There's a difference of about six feet.
Ms. Carrier: Would you like to see that, Mr. Hankinson?
Mr. Hankinson: Yes, ma'am
Ms. Carrier: Do you know the exhibit number?
Ms. Present: Yes. It's 271 (c) verses Exhibit 171 (p).

* * *

Ms. Present: So the former northeast property line was 495 and now it's 490. The west property line was 269, and now it's 267. Southeast property line, 31 feet, now it's 45 feet. And the northwest property line, 249, now it's 243.
Mr. Hankinson: To meet the 300 foot setback from the survey building corners, the pole was shifted slightly.
Ms. Present: But the pole is consistent at its GPS location in both, both site plans.
Ms. Carrier: Where is the GPS location number?
Ms. Present: It's in the site notes.
Ms. Carrier: Oh.
Mr. Hankinson: The reason the – then that needs to be updated. To meet all 300-foot setbacks from surveyed building corner, the pole moved slightly which would account for the different measurements for the property lines.
Ms. Carrier: When did you move the pole slightly?
Mr. Hankinson: In between – prior to this submission.
Ms. Carrier: Do you mean between the last hearing and today?
Mr. Hankinson: Yes, ma'am.
Ms. Carrier: How come you didn't say that in your direct testimony? You explained all the changes. You did not say the pole moved slightly. Is there a reason?
Mr. Hankinson: It just moved a little bit.
Ms. Carrier: It just means that, you know, I sent DPS out to measure from a pole now you've moved the pole so I'm not sure quite what to do with that. And you already told me that you did not re-measure the distances from the pole to the houses, so how did you know that you needed to move the pole to get the 300 feet if you didn't premeasured the distance from the pole to the houses.
Mr. Hankinson: Because based off of the surveyed building corners from field survey.
Ms. Carrier: From some previous survey.
Mr. Hankinson: Yes, ma'am. That certified surveyor the 300 is maintained for all buildings or for --.
Ms. Carrier: So it sounds like you discovered between last hearing and this one that your previous that the pole was at least 300 feet from all the houses was wrong and therefore, you, because you checked the survey data and so you moved the pole to make it work.
Mr. Hankinson: Yes, ma'am. Yes, ma'am.

> Ms. Carrier: Okay. You know, Mr. Donohue, are you aware that all this transpired.
> Mr. Donohue: No, ma'am.
> Ms. Carrier: You've got to tell your lawyer when something like that happens because it effects your credibility that this is only coming out because Ms. Present saw it. I couldn't see it because I was given tiny little plans.
>
> * * *
>
> [Tr. of April 8, 2010 hearing, pp. 82-88]

The DPS testimony first raised the possibility that the Petitioners' site plan may be in error and the record does not clearly reflect whether or not nearby homes fall inside or outside the 300 foot setback restriction. DPS used the location of the tower as a point of measurement. However, DPS did not factor in the diameter of the tower, which is essential to a correct measurement. Mr. Hankinson conceded that this failure to consider the diameter was also a mistake on the part of KCI.

The Petitioners' also concede that the tower was moved two feet in a northeast direction to make the setback evaluation turn out correct. Before the tower move, Petitioners' site plan reflected the Gervase home at the edge of the setback area or 300 feet, Ex. 155 (a). After the move, a newer site plan still showed the Gervase home at 300 feet, Ex. 217 (c). He testified that the 300 foot setback moved away from the Gervase house bringing it further away from the 300 foot setback, tr. April 8, 2020, p. 91, lines 13-23. The site plan does not bear this testimony out, Ex. 217 (c), which shows the Gervase house remaining at the edge of the 300 foot setback mark and not moved at all.

Mr. Hankinson provided conflicting testimony about the diameter of the tower. His first diameter was over 3 feet, and later he testified that it was less than 2 feet. The record shows that the diameter is over 3 feet. How this diameter relates to the movement of the tower and the setback of the homes is unclear. He did not know the GPS coordinates of the tower. However, the inclusion of the diameter does not change the measured distance of the Gervase home. Why not?

Mr. Hankinson's testimony was flawed because he did not disclose on direct examination errors made in the KCI measurements and covered it up until he was questioned by Ms. Pleasant and the Hearing Examiner Carrier. The truth finally came out but at a cost to the Petitioners' credibility.

Other testimony by the same witness claims that an inconsistency in the all important 300 foot setback requirement was simply a mistake. If it was a mistake the Petitioner did not correct it with a new version of the aerial photo. See, Tr. of March 9, 2010 hearing, pp. 246-249. Moreover, Mr. Hankinson passed off as a mistake the clear inconsistency between the aerial photo, which clearly shows two homes within the setback area, Ex. 155 (d), and the site plan which shows the same homes outside the setback area. Mr. Hankinson blamed the discrepancy on the use of two different scales.

These two incidents leave the reader befuddled as to the reliability of the Petitioners' evidence and the weight it should receive, if any. Mistakes were clearly made in the Petitioners' presentation regardless of motive. Looking at the mistakes in their best light, that they were simply mistakes and not motivated by any attempt to deceive, they still pose a credibility problem for the Petitioners.

How can the Board make an affirmative determination on the project's impact on the community with the conflict over whether the Petitioners measurements are correct? Mistakes can be forgiven, but their consequences remain and involve loss of credibility and reliability. The Petitioners seek approval based on a sloppy presentation by inexperienced or uninformed witnesses.

D. BOARD'S REQUIREMENTS

The Board set out nine topics and six subtopics to be addressed by the evidence.

1. Visual Impact on Neighborhood

The Board's order of Remand makes the impact on the neighborhood an issue of first priority that"…the support structure as proposed on the site will minimize its visual impact to the greatest degree reasonably possible."

The project's impact on the neighborhood is one of the most disputed issues of this case. The Petitioners' evidence on the issue of the 300 foot setback is shaky given that key witnesses were not prepared to testify about the details of the project. The project manager, Marianna Crampton, was unable to testify because she was on maternity leave. The replacement witnesses only worked on the project for brief times and were unresponsive to many of the questions about the project.

In support of the Petitioners, existing tall trees and vegetation are located on the north and will be retained. All antennas and cable lines will be concealed inside a 120 foot high pole designed to look like a flag pole although it will fly no flag. An 8 foot tall board on board fence will surround the compound that will include the tower and facility equipment. Moreover, the Hearing Examiner Carrier found in favor of the Petitioners. She found that the visual impact was an inherent factor that did not justify denial of the Petition. However, her support was qualified and she did not have the current state of the record to review. I find that the proposed location constitutes a non-inherent factor given the unique topography, proximity to dense residential and educational uses, the potentially hazardous materials on site, and the unique factors at this location which are described below.

The Opposition presented a well coordinated case for non-compliance with the visual impact requirement. The most contested part of the case involves the 300 foot setback requirements, which has a direct impact on the visual intrusion into neighboring properties.

The Opposition contends that the incorrect shapes of the homes and incorrect measurements on the site plan undermine the reliability of the Petitioners' 300 foot setback measurements. Mr. Hankinson was only involved with the project for 3 weeks. According to Hearing Examiner Carrier, he is an earnest but inexperienced witness before a County land use proceeding. He conceded that he did not know the diameter of the tower or its' GPS location and the diameter is critical to proper measurement of setbacks. He also conceded that several homes have rectangular shape on the site plan but are really irregular in shape, Ex. 231, photo of Lev-Tov home, tr., April 9, 2020, p. 97; and the Rossen home at 4 Schindler Court is also irregular in shape, Ex. 233, tr. of April 9, 2010, pp. 99-105.

His testimony raises some unanswered questions. The one constant in most of the measurements shows the Gervase home located at exactly 300 feet from the tower. This measurement is constant in the early site plan, Ex. 155 (a) and the later site plan, Ex. 217 (c), which occurred after the movement of the tower two feet to the northeast. Yet the later site plan should reflect the two foot movement of the tower on the Gervase house and it does not. There is a mistake here and not just the absence of diameter measurements.

Another unique factor deals with the variable elevation of the area. Emma Stelle is a resident of 912 Schindler Drive. Her home lies in a direct line of sight with the proposed facility and has a higher elevation that exposes six rooms in her home to adverse visual intrusion. The visual intrusion into her home is clear because her home is higher than the fence and she will be able to see tower and the equipment compound. Her testimony is credible.

There are also gaps in the Petitioners landscaping and screening which make

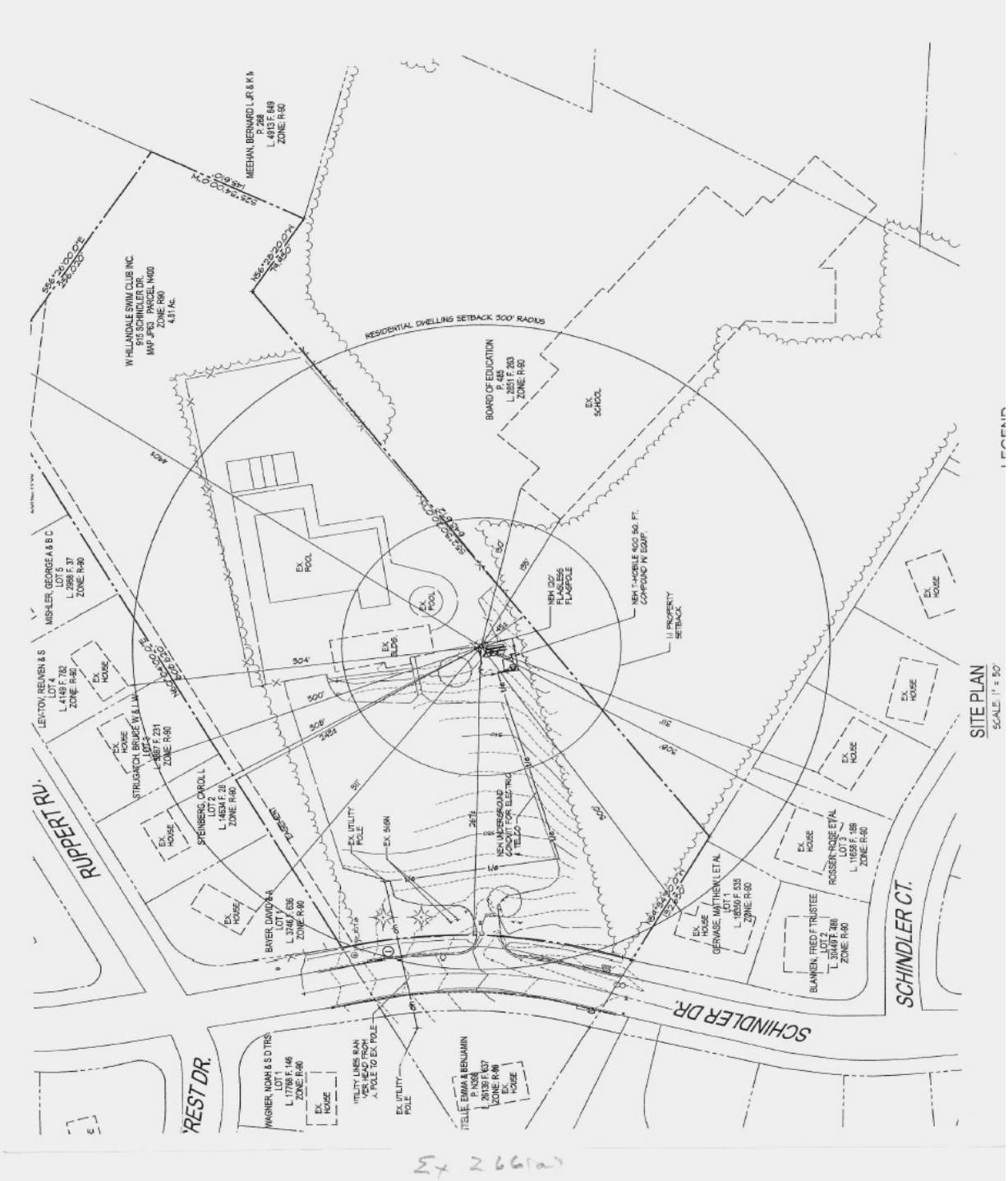
the proposed facility visible. The tower will be visible for people passing through the school yard and at higher elevations in the area. One particular gap is the unregulated gate which can be open at any time throughout work at the compound. When the gate is open, there will be no screening of the compound, on site equipment and the tower. All will be visible to homes along Schindler Road. This gap could be closed by a condition that limits to opening to the gate to certain times or situations. However, despite this gap in the project, the Petitioners have not proposed any regulation.

Another unique factor deals with the reduced size of the compound. While the Petitioners have made the project smaller with a 30 by 30 foot compound, this supposed reduction is illusory. It is clear that the Petitioners plan to add two more carriers to the tower, which will expand the use of the compound and make it necessary to expand it. The evidence shows that the 120 feet tower and the equipment compound will not be adequately screened from adjacent homes.

Another unique factor is the change in the character of the neighborhood since the project was first proposed. This change makes denial of the special exception more compelling. The neighborhood has become denuded of trees. Eighty trees have been removed but only thirteen replacement trees have been planted. Replacement trees are lower in height so as not to conflict with utility lines. Significant trees have been removed from the neighborhood with the construction of Crestview School. Two White Oak trees of large caliper were lost at the school site. Forty large specimen trees were removed at 50% loss of this type of tree. The loss of these trees will make the proposed cell phone tower more visible and intrusive for the neighborhood.

The Opposition presented a much stronger case for a determination that the project will have an adverse visual impact on the neighborhood. The Opposition's case

is assisted in part by the confusing testimony of the Petitioners case on this issue. On balance, the Petitioners simply failed to meet its burden of proof and persuasion on this issue. The most recent site plan is reproduced below. Another document reproduced on the following page illustrates the shape of the homes in the area to compare with the site plan.



Ex 266(a)

N497000
N496000
LILAC PL
AVENUE
SCHNEIDER
RUPPERT
TREES
PARKING
PKG
POOL
ATHLETIC FIELD
B/B
DRIVE
COURT
GRANITE
350
EXHIBIT NO. 246(a)
REFERRAL NO. S-2709

2. Battery Safety

Petitioners must submit written information sufficient to show that the proposed array of back up batteries will not pose a safety risk to the community that justifies denial of the petition.

The safety risk relates to the lead acid sealed batteries proposed for use at the site. The proposal currently includes 16 batteries but could increase to up to 48 if additional carriers are permitted to use the site. These batteries include hazardous materials and present a risk of fire, explosion, dangerous vapors and other hazards if not carefully monitored. When these batteries develop resistance while they are on constant float, the condition will generate internal heat and pressure buildup.

An internal control system known as “Sentinel”, which is manufactured by ENCELL, is presented as T-Mobile’s “silver bullet”. Sentinel is claimed to maintain the safety of the system and extend the life of the batteries. The Sentinel system monitors the batteries, determines their state of health, and extends the life of the battery because it protects it from constant charge and reduces heat within the system. It is claimed that the Sentinel system should eliminate all the current known factors that cause safety issues. The system has only been used in Richmond, Virginia.

The Opposition cross examination brought out the following points: ENCELL does not have a contract with T-Mobile and it is only under consideration as a contractor. ENCELL has only installed its product at one location in the region, Richmond, Virginia. ENCELL does not have a web site or written evaluations of the product, including its Richmond facility. Sentinel has only been in production for one year.

The entire case for the safety of battery storage rests on the Sentinel system. The Opposition established that T-Mobile, the operator of the project, does not have a

contract with ENCELL, the provider of the Sentinel systems. Moreover, the facts also show that Sentinel has only been installed at one location in Richmond, Virginia and there are unanswered questions about its reliability and endurance. One of Petitioners' two expert witnesses about Sentinel's virtues is an employee of the organization and his testimony is hardly an unbiased viewpoint. The other expert is a swim club board member who is hardly a disinterested party as the swim club will benefit financially from approval of the special exception. Their testimony is informative but cannot be given full weight.

The knowledge of the potential contractor is thin. The only one facility is cited as a customer and Sentinel does not have much of a track record. ENCELL is in its infancy and this in itself presents another risk to the community. In this situation, it seems better to err on the side of caution when dealing with a apparatus that can explode if improperly operated or monitored. At the very least, more information is needed about ENCELL and its operation.

Battery failure could produce serious hazards. People at risk include adults and children who use a nearby path as well as those who use the adjacent children's pool and elementary school. The reduction of batteries and the use of ENCELL Sentinel are hazard mitigation measures that must be a condition of the use of lead acid battery because of their hazards. Hearing Examiner Carrier found this issue to be grounds for denial. She found battery stand-by use to be non-inherent and a basis for denial. Her basis for this conclusion is still valid. Consequently, the petition needs to be deferred until all safety concerns are satisfied.

3. Smaller Equipment Compound

Petitioners must submit a persuasive explanation of why the equipment compound cannot be further reduced in size to lessen its visual impact.

The Petitioners' revised the application in a manner that reduces the size of the compound and provides for additional screening. The equipment storage compound was reduced in size form from 35 by 45 feet to 30 by 30 feet, as shown on the revised site plan, Ex. 204.

This reduction may be illusory given the likelihood that two additional carriers will require the compound to be expanded. The impact of an enlarged facility on the community could be severe considering the uneven presentation of the Petitioners proposal. This expanded use will cause a serious intrusion into a stable community. If the use is expanded to include more communications facilities, it will add greater impact than the current proposal.

4. Landscape Plan.

Petitioners must submit a revised Landscape Plan that includes the following features:

a. The gate is located on the Ruppert Road side of the compound:

Mr. Chaney addressed the suggestion to relocate the facility to the rear of the site. He responded that the location of the tower northeast of the pool would require considerable ground disturbance and removal of trees. Grading alone would level out the area and remove natural screening of topography and vegetation. He noted that the equipment compound was reduced in size form from 35 by 45 feet to 30 by 30 feet as shown on a recent version of the site plan, Ex. 204. For these reasons, he concluded

that relocation is not a viable option because it would increase visual impact of the proposed facility.

Mr. Chaney explained the revision of the site plan does not propose to relocate the gate to transition to the Ruppert Road side of the compound as suggested by the Board because large trees would be lost if gate is moved there. He indicated that the gate will be constructed of the same materials as the fence, that is, an 8 foot high board on board. A 12 foot wide and 20 to 25 feet long gravel path will extend from the paved parking lot to the gate to permit vehicular access to the tower and compound.

Mr. Chaney indicated that T-Mobile will commit to adjust the location of the compound fence and landscaping needed to preserve community access to the path adjacent to the site and the Cresthaven Elementary School. However, he does not believe it is appropriate to encourage people to go through the site. The proposed compound does not block access to the school or pool. School was designed so there is no cut-through access to the school. He indicated that T-Mobile will commit to adjust the location of the compound fence and landscaping needed to preserve community access to the path adjacent to the site and the Cresthaven Elementary School.

The proposed alternative location within this site would cause significant ground disturbance and removal of trees. Grading alone would level out the area and remove natural screening of topography and vegetation. For these reasons, use of alternative site seems not a viable option because it would result in loss of trees and increase visual impact of the community. On balance, the Petitioners' proposal appears to be the best option.

b. Additional plantings

The additional planting must be adequate to improve the visual impact on the neighborhood. The petitioner also proposes to plant 8 trees instead of the original proposal of 5 trees. The use of Foster's Hollies was praised by several witnesses as appropriate.

The Opposition raised some concern about the berries on the tree as poisonous. However, literature submitted about the tree does not mention poisonous berries and the claim is unsubstantiated as a threat, see, Ex.238 and 258. If it is a problem, the type of tree can be changed.

c. Specification of plantings

The Board required specified minimum height at planting and expected maximum height and spread after two, five and ten years. The Petitioners provided the specific information required.

Eight foster hollies were added along with a honey locust along the east side of the access road to offer additional screening between the public road and tower. The height of Foster Hollies will be 6 to 8 feet at installation with 18 to 24 inch spread. After five years, the height will be 12 to 20 feet and 4 to 6 feet in spread. After ten years, the height will be 15 to 25 feet with 6 to 8 feet in spread. Two trees near the street are deciduous as well as four trees on the west side of the compound. No trees will be removed.

d. Commitment on tree maintenance.

T-Mobile's made a commitment to provide for the maintenance of these trees, and replacements for any that die, for as long as the tower or the equipment compound is located on the site.

The Petitioners commit to the required maintenance

e. Commitment of professional tree work

T-Mobile is required to provide a commitment to ensure that all tree-related work is performed by a certified arborist or licensed tree professional.

The Petitioners have committed to provide the required personnel.

f. T-Mobile's commitment to adjust the location of the compound

Fence and landscaping as needed to preserve community access to the path currently used by children walking to the adjacent school.

T-Mobile made a commitment to adjust the location and compound fence and landscaping to preserve community access to the path currently used by children walking to the adjacent school

However, T-Mobile does not believe it is appropriate to encourage people to go through the site. Nevertheless, the Petitioner will abide by the Board's decision. The proposed compound does not block access to the school or pool. School was designed to so there is no cut-through access to the school.

5. Floodlights, illumination and glare

Petitioners must submit evidence to show that any illumination or glare would not exceed lighting levels of 0.1 foot-candles along the side and rear lot lines.

The Petitioners indicated that the lighting will comply with all requirements. The lights will be located facing down and at cabinets mounted six feet in air. The lights will only be turned on in the event of a nighttime emergency. The lights will not cause glare and will not go off the property. The light will measure .071 foot candle at the property line. The lighting plan reflects no glare past property lines. Flood lights would be

monitored at 7 feet. Lighting will be set at 6 feet, Ex. 171(m). Illumination on ground will recede substantially before it gets to perimeter fencing.

6. Inconsistent Setback[8]

Petitioners must submit written information sufficient to explain the inconsistency between the site plan, Ex. 155(a), and the aerial photograph, Ex. 155 (d), and to demonstrate that the 300-setback requirement would be satisfied.

The Petitioners' submission was insufficient to comply with this requirement. The exhibits are in clear conflict. The site plan, Ex. 155 (a) (dated January 15, 2008) depicts a site plan where the adjacent homes are shown to be outside of a 300 foot radius of the tower. On the other hand, the aerial photo, Ex. 155 (d) (dated January 15, 2008) depicts the setback area as going through parts of two homes, the Gervase home and the Rossen home. The Petitioners prepared both exhibits and submitted them as exhibits in support of their case.

The Petitioners now claim that the site plan is correct but the aerial photo is incorrect because it reflects a different scale than used for the site plan. If the aerial contained a mistake, the Petitioners did not file a corrected copy and allowed the allegedly incorrect version to remain in the record. If the site plan was correct, why move the tower? This is another example of the inconsistent manner this contested case was handled by the Petitioners. Petitioners have not shown with credible evidence that the 300-setback requirement is satisfied in its entirety, see, Section IV C of this report for a discussion of Petitioners' credibility problems.

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[8] For this paragraph 6, paragraph 9 and the demeanor of Mr. Hankinson, I consulted with Françoise M. Carrier, former Hearing Examiner. However, the finding of facts and conclusions are my own and if errors or omissions are present, I bear sole responsibility for them.

7. County's Hazardous Material Storage

The Petitioners are on the record that they have complied with Montgomery County's Hazardous Material Storage. All T-Mobile facilities are compliant with Executive Regulation 1703.

8. Battery Degradation

The Sentinel system appears to remove the batteries from constant float. So far Petitioners' claims that Sentinel would reduce degradation, internal resistance and remove risk of failure is not substantiated and appears to be premature pending further evidence of the contractor's experience.

Normally, batteries degrade in 2 to 3 years. However, under the Sentinel system battery life span is predicted to be two or three times normal. Sentinel itself has a life span of 12 years.

Like battery safety, this issue is dependent upon the reliability of the contractor, ENCELL, and its products. There is a need for more information about this product.

9. Applicability of County Swimming pool standards

The Board asks the Hearing Examiner to address specific standards in Code for community swimming pools, or explain her position, that she and the Board are not required to consider them. Ex. 170, January 8, 2009.

The co-location of a swimming pool and a cell phone tower is dependent on the manner both operate. Co-location seems permissible where two or more special exceptions are authorized for the same property so long as they do not conflict with each other, both are jointly compatible with the community, and each one can satisfy the separate requirements of the code. This does not mean that the cell tower must satisfy

the standards for a swimming pool so long as the communications tower does not interfere with the other use or impact in a negative way on the public health, safety and general welfare.

IV. RECOMMENDATIONS

While the Petitioners have met some the standards of the Board, they have not satisfied others including visual impact, battery safety, the smaller equipment compound, battery degradation and the 300 foot setback requirement. Consequently, the Petition does not merit approval.

The Petitioners have presented testimony and evidence that is either not credible or so inconsistent to be unpersuasive. Do they deserve another chance to obtain approval? The current record is muddled with inconsistent evidence. It must be noted that the Petitioners have had two bites at the apple forcing the Opposition to expend time and money opposing the Petitioners. There comes a time in the process when it is necessary to advise the Petitioners that a deficient application cannot be granted. Despite the extended time and opportunity to correct the deficiencies in the application, the Petitioners have not met their burdens of proof and persuasion and the petition must be denied on the basis of the current state of the record.

The Hearing Examiner's June 2, 2008 report and recommendation contain sufficient basis to deny the Petition notwithstanding the changes to the site plan. This supplemental report simply adds to the justification for denial.

The Opposition has presented more evidence that the neighborhood's property values will be adversely impacted by the presence of a cell tower in the neighborhood. The FHA has determined as a matter of policy that the presence of cell tower in a neighborhood can in certain circumstances have a negative impact on the sale of

housing. If the case is remanded again, this new evidence should be considered given the need review the impact of this federal policy on local land use decisions. Moreover, the footprint of the new school is not in the record and it should be added so the request to reduce the setback can be properly evaluated. Lastly, the Petitioners should add conditions to safeguard the community that includes adding regulations about how long the gate may be opened, and make clear that the compound will not be expanded.

Based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2709, which requests a special exception under the R-90 Zone for a telecommunications facility to be constructed on property located at 915 Schindler Drive, Silver Spring, Maryland, be denied, and that the related request to modify the special exception for the Hillandale Swim Club also be denied.

Dated: October 28, 2010

Respectfully Submitted,

Philip J. Tierney

Hearing Examiner