

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-2499

PETITION OF KMC TELECOM AND OAKMONT LLC

OPINION OF THE BOARD

(Hearing held April 3, 2002)

(Effective date of Opinion: August 7, 2002)

Case No. S-2499 is a petition for a special exception to permit a Public Utility Structure/Telecommunications Facility on 1.36 acres of land located at 16900 Oakmont Avenue, in the R-200 zone. The Petition is filed pursuant to Sections 59-C-1.31 and 59-G.2.43 of the Zoning Ordinance of Montgomery County, Maryland, *Montgomery County Code, 1994, as amended* (the Zoning Ordinance).

Decision of the Board: Special exception **GRANTED**, subject to the conditions enumerated below.

A public hearing was held on April 3, 2002 pursuant to Section 59-A-4.11(a) of the Zoning Ordinance.

Mark M. Viani of Linowes and Blocher LLP, appeared on behalf of KMC Telecom, Inc., ("**KMC**"). Mr. Viani called three witnesses in support of the application: Karlane Kosjer, KMC's City Director; Russell Reese, a landscape architect and site designer, and John F. Lichtig, an electrical and radio frequency engineer.

EVIDENCE PRESENTED¹

1. The subject property (the "Property"), also known as Parcel 817 in the 9th Election District, is comprised of 1.36 acres and is located at 16900 Oakmont Avenue. It is an irregularly shaped parcel with approximately 400 feet of frontage along Oakmont

2. Avenue. Improvements consist of several small workshops and equipment sheds used by Oakmont LLC ("Oakmont"), the property owner and Co-Applicant, in conjunction with the construction debris disposal service it operates on the Property.

3. The Property is split zoned, being partially zoned R-200 (Single Family Residential, 20,000 sq. ft. lot minimum) and partially zoned I-1 (Light Industrial).

4. KMC proposes to operate a public utility structure/telecommunications facility in the R-200 zoned portion of the Property, pursuant to Section 59-G-2.43 of the Zoning Ordinance (the "Special Exception"). KMC has already obtained all other necessary licenses and certificates required under applicable State and County law, and in good faith reliance thereon proceeded to construct the facility on the Property.

5. On March 28, 2001, the Montgomery County Department of Permitting Services issued a Notice of Violation to KMC alleging that it was operating a cable communication system equipment shelter without a special exception in violation of the Montgomery County Zoning Ordinance. The Notice of Violation directed KMC to remove the facility or obtain a special exception permitting its continued operation from the Board.

6. While located in a mixed residential, commercial, institutional and industrial neighborhood, the Property is primarily used for heavy equipment and truck storage, maintenance and repair. The property immediately to the north is also used to park semi/tractor-trailers. Further to the north of the Property, is a single-family residential community. To the west of the Property, are a 2.78-acre wooded lot and the Washington Grove Elementary School. To the east, across Oakmont Avenue, is carry-out restaurant. A CSX rail line is located across from, and runs parallel with Oakmont Avenue.

¹ Based upon, but not limited to, the following exhibits: the Applicant's Petition for the Special Exception (the Petition) (Exhibit 1), Statement of Operations (Exhibit 3), Summary of Proof (Exhibit 4), Boundary Survey (Exhibit 5), Elevation Drawings (Exhibit 6), Equipment Cabinet Brochure (Exhibit 7), Landscape Plan (Exhibit 8) Forest Conservation Plan Waiver (Exhibit 9), Lease Agreement (Exhibit 10), Franchise Agreement (Exhibit 11), Public Utility Certification from Maryland Public Service Commission (Exhibit 14), Air pressure/Noise Chart (Exhibit 15), Building Permit (Exhibit 16) Safety Report by John F Lichtig (Exhibit 17), Zoning vicinity Map (Exhibit 18), Notice of Mailing (Exhibit 20), Letter on lighting (Exhibit 21), M-NCPPC Staff Report (Exhibit 24), Rendered Boundary Survey and Topographic Survey (Exhibit 26), M-NCPPC Fax regarding Deer Park Bridge Rebuild (Exhibit 27), Oakmont LLC letter as Co-Applicant Exhibit 25).

7. The Property is subject to the 1982 Oakmont Special Study Plan (the "Oakmont Plan") and the 1985 Approved and Adopted Gaithersburg Vicinity Master Plan (the "Master Plan"). The Oakmont Plan, at page 16, recommends retaining the existing R-200 zoning for that portion of the Property upon which the Special Exception will be located. The Oakmont Plan, at page 16, also recognizes a need to provide a suitable buffer between the single-family residential areas and the industrial uses found on the Property and several adjacent properties.

8. The Special Exception consists of an equipment shelter, which measures 7-feet wide, 13-feet long and 9-feet high; however, as installed, the equipment shelter is partially buried; it stands no more than 5-feet above grade. The equipment shelter will be located in the northern portion of the Property. The shelter is a pre-cast concrete structure of modern design that protects telecommunications equipment supporting KMC's fiber optic telecommunications network. The Special Exception will also include limited landscaping to buffer the visual impact of the equipment shelter from Oakmont Avenue.

9. The Special Exception will be an unmanned use which requires only periodic (typically monthly) maintenance visits by a service supervisor with a small service truck or van. The Special Exception will provide for adequate and safe circulation and parking, internal traffic flow and access to and from Oakmont Avenue.

10. The telecommunications equipment housed in the equipment shelter supports KMC's fiber-optic communications system. This equipment complies with the National Electrical Safety Code and emits no harmful radiation, electromagnetic fields or EMF and will not adversely affect the health, safety, security, morals or general welfare or residents or workers in the area, irrespective of any adverse effects the Special Exception might have if established elsewhere in the R-200 zone.

11. The only noise derived from the Special Exception will be the occasional running of the air conditioning units used to cool the telecommunications equipment. The equipment shelter (and attached air conditioning unit) is set back 73.85 feet from the nearest residentially zoned property (the vacant parcel to the west), 88.85 feet from the property to the north, and 50.32 feet from Oakmont Avenue. The air conditioning unit will create no more than 42.50 DBAs of noise from a distance of 70 feet, no more than 40.81 DBAs at a distance of 85 feet and 45.42 DBAs at a distance of 50 feet. Thus, the air condition units, the only noise producing source of the Special Exception, satisfy the residential noise control standards of Article 31B of the Montgomery County Code and will produce no objectionable noise.

12. The Special Exception is in compliance with all of the applicable development standards for the R-200 zone.

13. Because the Special Exception involves less than 50 peak hour trips and will create no employment it satisfies both policy area and local area transportation review.

14. The Special Exception is exempt from the Forest Conservation Law (Waiver No. 4-01363E). The Property is less than 1.5 acres, there is no existing forest, and afforestation requirements will be less than 10,000 square feet.

15. The Special Exception will not use any lighting.

16. The operational characteristics of the Special Exception will be no different than what is typically associated with similar public utility structures/telecommunications facilities and will not create any significant noise, odor, glare, or other adverse effects.

17. KMC is a registered public utility in Maryland.

18. KMC has been granted a franchise to construct and operate a fiber optic telecommunications network by Montgomery County.

19. The Special Exception will not, when evaluated in conjunction with existing and approved special exceptions in neighboring one-family residential areas, adversely affect or alter the predominately residential nature of these areas.

20. The Special Exception will not include a broadcast tower.

21. The MNCPPC Staff reviewed plans for the Special Exception and recommended approval, subject to specific conditions in a report, dated March 26, 2002. [Exhibit No. 24].

22. The Board finds the testimony and evidence given in support of the Special Exception to be credible and persuasive.

FINDINGS OF THE BOARD

GENERAL CONDITIONS

Based upon the above-listed Findings of Fact and testimony and evidence of record,² the Board concludes that the Special Exception complies with the

² This includes, but is not limited to, the exhibits listed in Footnote 1.

General Conditions for granting special exceptions, as set forth in Section 59-G-1.2 of the Zoning Ordinance. Specifically, the Board concludes as follows:

Section 59-G-1.2.1 Standard for Evaluation.

A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.

The physical and operational characteristics of the Special Exception are reasonable and consistent with the inherent effects associated with similar public utility structures/telecommunications facilities and will cause no adverse effects on nearby properties and the surrounding neighborhoods. The design, scale and scope of the Special Exception are in harmony with the surrounding neighborhood and will be further mitigated by landscaping and the dominant use of the Property as a construction debris disposal service. Parking, on-site circulation, access and traffic impact are adequate and safe. There are no non-inherent adverse effects associated with the Special Exception.

Section 59-G-1.21 General Conditions.

(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

(1) Is a permissible special exception in the zone.

The Property is zoned R-200 and the special exception request complies with Section 59-G-1.21(a)(1) because it is a permissible special exception in the R-200 zone under Section 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a pre-

sumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

The Special Exception is in accordance with Section 59-G-1.21(a)(2) because it complies with the specific standards and requirements for public utility structures/telecommunications facilities set forth in Section 59-G-2.43. See Findings of Fact Nos. 6, 8 through 19, and Conclusions of Law 1 through 15.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

The Special Exception is consistent with the general plan for the development of the district, in accordance with Section 59-G-1.21(a)(3). The Special Exception is also consistent with the Oakmont Plan and the Master Plan in that it will help to provide a suitable buffer between the single-family residential areas and the industrial uses found on the Property and several adjacent properties. Further the development of a public utility structure/telecommunications facility is permitted by special exception in the R-200 zone and is consistent with the Oakmont Plan's recommendation that the Property be zoned R-200. See Findings of Fact Nos. 5 and 6.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

The Special Exception complies with Section 59-G-1.21(a)(4). The Special Exception will be in harmony with the general character of the neighborhood considering population density and design, scale and bulk of the equipment shelter, which satisfies the building height and development standards for the R-200. See Findings of Fact Nos. 5 through 8.

Further, the Special Exception will be in harmony with the general character of the neighborhood considering its intensity and character of activity and number of similar uses. The physical and operational characteristics of the Special Exception will be no different than what is typically associated with similar public utility structure/telecommunications facilities. See Findings of Fact Nos. 5, 6, 8, 9 and 10.

Finally, the Special Exception will be in harmony with the general character of the neighborhood considering traffic and parking conditions. There are no similar uses in the neighborhood. The Special Exception will provide adequate parking in accordance with Section 59-E-3.7. See Findings of Fact Nos. 5, 6 and 8.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

(6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

The Special Exception complies with Section 59-G-1.21(a)(5) and (6). The evidence demonstrates that the Special Exception will cause no adverse effects upon surrounding properties, nor will it cause any objectionable noise, vibrations, fumes, odors, dust, glare or physical activity. The equipment shelter is designed with noise insulation features and will utilize no lighting. Existing fencing and landscaping on the Property and in addition to the landscaping to be provided by KMC will provide adequate screening for surrounding properties and the general neighborhood. See Findings of Fact Nos. 5, 6, 7, 9, 10, 14 and 15.

(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of the area.

The Special Exception is in accord with Section 59-G-1.21(a)(7). When evaluated in conjunction with existing and approved special exceptions in the nearby one-family residential area, it will not increase the number, intensity, or scope of special exception uses sufficiently to affect that area adversely or alter the predominantly residential nature of that area. See Findings of Fact Nos. 5, 6 and 15.

(8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

The Special Exception is in accord with Section 59-G-1.21(a)(8). The evidence indicates that it will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area of the

Property, irrespective of any adverse effects the use might have if established elsewhere in the R-200 zone. See Findings of Fact Nos. 9 and 10.

(9) *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.*

(i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

(ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The Special Exception is in accord with Section 59-G-1.21(a)(9). The evidence indicates that it has no need for school, water, security, sewer or storm drainage. Police protection is provided by the Montgomery County Police Department's 6th District Headquarters, which is located at 18749 North Frederick Road. Fire protection is provided by the Gaithersburg-Washington Grove Volunteer Fire Company 28, which is located at 7272 Muncaster Mill Road.

FINDINGS OF THE BOARD

SPECIFIC CONDITIONS

Based upon the above-listed Findings of Fact, the testimony and evidence of record,³ and the above-listed Conclusions of Law regarding the General Conditions for granting special exceptions, the Board also concludes that the Special Exception complies with the specific standards and requirements set forth in Section 59-G-2.13.1 of the Zoning Ordinance, for granting special exceptions for public utility structures/telecommunications facilities. Specifically, the Board concludes as follows:

Sec. 59-G-2.43. PUBLIC UTILITY BUILDINGS, PUBLIC UTILITY STRUCTURES AND TELECOMMUNICATION FACILITIES.

(A) *A public utility building or public utility structure, not otherwise permitted, may be allowed by special exception. The findings of this subsection (a) do not apply to electric power transmission or distribution lines carrying in excess of 69,000 volts, which are regulated by subsection (f) below. For other buildings or*

³ This includes, but is not limited to, the exhibits listed in Footnote 1.

structures regulated by this section, the board must make the following findings:

(1) The proposed building or structure at the location selected is necessary for public convenience and service.

The Special Exception is in accord with Section 59-G-2.43(A)(1). The Special Exception is necessary at this location to regenerate signals in KMC's fiber optic telecommunications network and provide signal support to the network in the event of a line cut or similar network disruption. See Findings of Fact Nos. 7, 16 and 17.

(2) The proposed building or structure at the location selected will not endanger the health and safety of workers and residents in the community and will not substantially impair or prove detrimental to neighboring properties.

The Special Exception is in accord with Section 59-G-2.43(A)(2). See Findings of Fact Nos. 9 and 10 and Conclusion of Law 8.

(B) Public utility buildings in any permitted residential zone, shall, whenever practicable, have the exterior appearance of residential buildings and shall have suitable landscaping, screen planting and fencing, wherever deemed necessary by the Board.

The Special Exception is in accord with Section 59-G-2.43(A)(2). The evidence shows that given the small size of the equipment shelter and its location in the middle of a property used for heavy industrial purposes, providing a residential appearance is impractical. Nevertheless, KMC has proposed to provide landscaping suitable to screen the equipment shelter and permit access to the telecommunications equipment housed inside. See Findings of Fact Nos. 1, 5 and 7.

(C) Reserved.

(D) Any proposed broadcasting tower shall have a setback of one foot from all property lines for every foot of height of the tower; provided, that any broadcasting tower lawfully existing on September 1, 1970, shall be exempt from the setback limitations imposed by this subsection, and may be continued, structurally altered, reconstructed or enlarged; provided Further, that no structural change, repair, addition, alteration or reconstruction shall result in increasing the height of such tower above the then existing structurally designed height.

Section 59-G-2.43(d) is not applicable because the Special Exception will not include a broadcast tower. See Finding of Fact No. 7.

(E) Examples of public utility buildings and structures for which special exceptions are required under this section are buildings and structures for the

occupancy, use, support or housing of switching equipment, regulators, stationary transformers and other such devices for supplying electric service; telephone offices; railroad, bus, trolley, air and boat passengers stations; radio or television transmitter towers and stations; telecommunication facilities; above ground pipelines. Additional standards for telecommunication facilities are found in subsection (j).

(F) The provisions of section 59-G-1.21(a) shall not apply to this subsection. In any residential zone, overhead electrical power and energy transmission and distribution lines carrying in excess of 69,000 volts, where the board finds:

[OMITTED]

(G) In addition to the authority granted by section 59-G-1.22, the Board may attach to any grant of a special exception under this section other conditions that it may deem necessary to protect the public health, safety or general welfare.

(H) Petitions for special exception under this section may be filed on a project basis.

Section 59-G-2.43(h) is not applicable because the Special Exception will not involve a project plan.

(I) A petitioner under this section shall be considered an interested person for purposes of filing a request for a special exception if he states in writing under oath that he has made a bona fide effort to obtain a contractual interest in the subject property for a valid consideration without success, and that he intends to continue negotiations to obtain the required interest or in the alternative to file condemnation proceedings should the special exception be granted.

(J) Any telecommunications facility must satisfy the following standards:

(1) The minimum parcel or lot area must be sufficient to accommodate the location requirements for the support structure under paragraph (2), excluding the antenna(s), but not less than the lot area required in the zone. The location requirement is measured from the base of the support structure to the property line. The board of appeals may reduce the location requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually unobtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any and visibility from the street.

(2) A support structure must be located as follows:

A. In agricultural and residential zones, a distance of one foot from property line for every foot of height of the support structure.

B. In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.

C. These location requirements apply to perimeter lot lines and not to interior lot lines.

(3) A freestanding support structure must be constructed to hold no less than 3 telecommunication carriers. The board may approve a support structure holding less than 3 telecommunication carriers if: 1) requested by the applicant and a determination is made that collocation at the sit is not essential to the public interest; and 2) the board decides that construction of a lower support structure with fewer telecommunication carriers will promote community compatibility.

(4) No signs or illumination are permitted on the antennas or support structure unless required by the federal communications commission, the federal aviation administration, or the county.

(5) Every freestanding support structure must be removed at the cost of the applicant when the telecommunication facility is no longer in use by any telecommunication carrier.

The lot area is 1.36 acres, more than the minimum lot area required for the zone. The balance of Section 59-G-2.43 (J) is not applicable because the Special Exception will not include a broadcast tower, support structure or antennae. See Finding of Fact No. 6.

Therefore, based upon the foregoing, the Board **GRANTS** the Special Exception for a public utility structure/telecommunications facility, subject to the following condition:

The Applicant is bound by its testimony and exhibits of record, the testimony of its witnesses and representations of its attorneys, to the extent that such evidence and representations are identified in this opinion.

On a motion by, Angelo M. Caputo seconded by Donna L. Barron with Donald H. Spence, Jr., Chairman, and Louise L. Mayer in agreement, the Board adopted the following Resolution:

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

Donald H. Spence, Jr.
Chairman, Montgomery County Board of

Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 7th day of August, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

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

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the Zoning Ordinance). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.