

BEFORE THE ZONING HEARING BOARD
OF
SCHUYLKILL COUNTY

RE: Application of Cellco Partnership d/b/a Verizon Wireless for Special Exceptions.

BEFORE: Eric Seitzinger, David Ambrose, and Daniel Daub, Members of the Schuylkill County Zoning Hearing Board (the "Board").

MINUTES OF HEARING

Name of Applicant	Cellco Partnership d/b/a Verizon Wireless 4642 Jonestown Road Suite 200 Harrisburg, PA 17109
Location of Subject Property	313 Ridge Road Eldred Township Schuylkill County, Pa UPI No. 10-06-0033.000
Owner of Property	David & Lavina High
Zoning Classification	A (Agricultural)
Date of Hearing	September 5, 2013
Place of Hearing	Court #2 Schuylkill County Courthouse Pottsville, PA
Appearance (for Board)	Christopher W. Hobbs, Esq.
Appearance (for Applicant)	Richard M. Williams, Esq.
Protestants	Paul Mitchell 195 Tannenbaum Road Pittman, PA 17964

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FINDINGS OF FACT

After hearing all interested parties and consideration of the evidence presented, the Board finds as follows:

1. David High and Lavina High are the owners of the subject property ("Property") situate at 313 Ridge Road, Pitman, Schuylkill County, Pennsylvania and identified by UPI No.10-06-0033.000.
2. The Property is located in an A (Agricultural) District under the Schuylkill County Zoning Ordinance ("Ordinance").
3. The owners have entered into a written lease agreement for a 2,500 square feet portion of the property with Cellco Partnership d/b/a Verizon Wireless ("Applicant") which leased area is proposed to be used for a 195' wireless communications facility with accessory structure and equipment.
4. The Applicant filed a request for special exception to use the leased portion of the Property as a commercial communications tower consistent with §306.C.2.c and §402 of the Ordinance.
5. The Applicant also filed for special exception relief from §402.A.16.a(5) to construct the height of the proposed tower in excess of 150' in an A District.
6. A hearing was held on September 5, 2013.
7. Public notice of the hearing was given by advertisement in the Pottsville Republican Newspaper on August 19, 2013 and August 26, 2013.
8. Notice was given by mail to the parties; the Notice being sent on August 19, 2013.
9. Notice was also posted on the property on August 19, 2013.
10. The Applicant first presented the testimony of Eric Brinser, a professional engineer licensed in the Commonwealth of Pennsylvania, who testified that the Applicant is proposing to construct a new communications facility including a 190' self-supporting tower which will have an overall height of 195' with a 5' lightning rod. Associated improvements and equipment including a 11.5' x 16' prefabricated equipment shelter, 4' x 10' concrete pad, generator, cable ice

bridge, utility board, Mesa cabinet and 8' chain link fence will also be included on the 50' x 50' leased property.

11. Mr. Brinser added that no water or sewer is proposed for the facility which will be unmanned, unoccupied and serviced, on average, approximately once or twice a month and little, if any, additional traffic will be generated, and that access from the facility would be from Ridge Road.
12. According to Mr. Brinser, a commercial communications tower is a permitted special exception in an A District and the application and proposal complies with not only the Ordinance and Pennsylvania Municipalities Code, but all other County, State, Federal law and regulations.
13. The application will not have a negative effect upon traffic, will not create a significant hazard to the public health and safety of the district where located, will be suitable for the site, and shall not substantially change the character of any surrounding residential neighborhood.
14. Mr. Brinser confirmed that the proposed communication tower satisfies the specific criteria of §402.A.16 and that permitting the tower to be constructed in excess of 150' will not have a negative effect on the surrounding neighborhood where the property is located.
15. The Applicant next presented the testimony of Andrew M. Petersohn, a professional engineer licensed in Pennsylvania with a specialty in wireless communication, who testified that the Applicant is licensed by the Federal Communications Commission to provide wireless services which licenses are subject to the requirement that the Applicant supply sufficient wireless services within its licensed areas.
16. Mr. Petersohn added that the broadband signal strength in Eldred Township is weak and the proposed tower will significantly increase signal strength, wireless traffic and provide better service to its customers consistent with a Federal mandate.
17. Mr. Petersohn explained that it is absolutely necessary and unavoidable for the proposed tower to be in excess of 150' to provide consistent broadband services to the area and that such increased height will not have a negative impact on the area.
18. The signals that are produced by the communications tower will not cause any type of health concern or society hazard to the residents of the community.
19. The Applicant also produced testimony of Jim Rodgers, a consultant for Verizon, who testified to the importance and necessity for the construction of proposed

communications tower, its location, as well as the lack of any impact upon the district in question.

20. Mr. Paul Mitchell testified that he and his family including three young children reside in a home on an adjoining property and that he has concerns about the aesthetics of the proposed tower, the safety of the proposed tower, and the potential for hazardous signals from the proposed tower.
21. Mr. Mitchell also has concerns about the potential decrease in value of his property and believes that the application did not conform with the ordinance, the Pennsylvania Municipalities Planning Code, and other County, State, and Federal regulations.

CONCLUSIONS OF LAW

1. §111.D.4 of the Ordinance empowers the Board with exclusive jurisdiction to hear and decide requests for all special exceptions filed with the County.
2. §116 of the Ordinance sets forth the special exception use process and permits the Board to require such reasonable conditions and safeguards as it determines are necessary to implement the purposes of the Ordinance.
3. §402.16 sets forth additional requirements for commercial communications towers as a principle use and §402.16.a(5) sets forth the burden upon the Applicant to prove a special exception use for a tower in excess of 150'.
4. The Board finds all three of the Applicant's witnesses credible.
5. The Board concludes, based on the Applicant's witnesses' testimony and the exhibits presented that:
 - A. §306.C.2.c. of the Ordinance allows a commercial communications tower as a permitted special exception in an A District.
 - B. That the Applicant has established by credible evidence that the application complies with all applicable requirements of the Ordinance and that the Applicant has provided the Board with sufficient plans, studies or other data to demonstrate this compliance.
 - C. That the Applicant is in compliance with all applicable County, State and Federal laws, regulations and permits.
 - D. That the proposed use will not cause hazards or congestion to traffic in and around the property.

- E. That the Applicant has provided adequate site planning to the Board.
 - F. That the proposed use shall not substantially change the character of any surrounding residential neighborhood.
 - G. That the proposed use shall not create a significant hazard to the public health and safety.
 - H. That the proposed use shall be suitable for the site and surrounding district.
 - I. The proposed tower shall be set back from all lot lines and street rights-of-way a distance that is greater than the total height of the tower/antennae above the surrounding ground level. The Board notes the easement arrangement between the property owners and Applicant will ensure that the setback will continue to be met over time from the lot lines.
 - J. There are no existing dwellings that will come within 400' of the tower.
 - K. That the Applicant has investigated co-locating their facilities on existing towers and other tall structures which have been found to be unworkable and thus a new tower is needed.
 - L. That a height in excess of 150' is absolutely necessary and unavoidable.
 - M. That the Applicant has adequately described any proposed lighting.
 - N. That the tower is designed to protect property values, to minimize the visual impact, and to minimize the number and heights of tower in a manner that still provides for adequate telecommunication services and competition.
 - O. That adequate protections have been set in place so that the tower will be removed if no longer in use after a period of six (6) months.
 - P. That all accessory utility buildings or cabinets maximum height of 25' and meet principal building setbacks.
6. The Board finds the testimony of Paul Mitchell to be partially credible.
7. The Board finds that the Applicant has satisfied its burden to justify the award of both special exception requests consistent with the application.

DISCUSSION

In *Heck v. Zoning Hearing Board for Harvey's Lake Borough*, 397 A.2d 15 (Pa. Cmwlth. 1979), the Commonwealth Court stated that the term "special

exception” is a misnomer. The Court added that the use is neither “special”, nor an “exception”. To the contrary, the Court stated that a special exception use is specifically provided for in the zoning ordinance and is a use which the governing body of a municipality has, by adopting the zoning ordinance, determined is not adverse or incompatible in and of itself to other uses in the zoning district. In certain situations; it may generate adverse or otherwise unforeseen consequences, and hence is made subject to specific review by an administrative tribunal which may deny the use or make it subject to certain restrictions or requirements not generally applicable in the zoning district. *ID.*

In *Bray v Zoning Board of Adjustment*, 410 A.2d 909, 911 (Pa. Cmwlth. 1980), the Court held that once an Applicant establishes that the proposed use falls within a given category specified in an ordinance, the burden of showing injury to the public interest shifts to the objectors and that once the land owner meets his burden of proof that the proposed use satisfies the requirement of the zoning ordinance for the grant of a special exception, a presumption arises that the proposed use is consistent with the health, safety, and general welfare of the community. The burden then shifts to the objectors to present evidence establishing, with the high degree of probability, that the proposed use would adversely impact the health, safety, and welfare of the community. *Rural Area Concerned Citizens, Inc v Fayette County Zoning Hearing Board*, 646 A.2d 717 (Pa. Cmwlth. 1994), appeal denied, 658 A.2d 798 (Pa. 1995).

The Court added that objectors cannot meet their burden of showing that the proposed use would violate the health, safety and welfare of the community by merely speculating as to the possible harm; instead, objectors must show a high degree of probability that the proposed use will substantially affect the health, safety and welfare of the community. In *Re Appeal of Thompson*, 896 A.2d 659 (Pa. Cmwlth 2006).

Via its application packet, expert witnesses, and a fact witness, the Applicant covered each and every element required to justify the award of both special exceptions. Clearly, the framers of the Ordinance determined that commercial communications towers are reasonable uses in an Agricultural District. The Applicant’s witnesses confirmed the proposed use satisfies the requirement of the Ordinance and that the proposed use is consistent with the health, safety and welfare of the community. While the Board empathizes with Mr. Mitchell as clearly he does not want the proposed next door, the Board must follow the standards set forth by the higher courts in analyzing a protestant’s complaints. Unfortunately, Mr. Mitchell was not able to provide anything more than speculation and conjecture as to the possible harm and negative impact of the proposed use and the Board must find, as a matter of law, that his concerns are not supported by credible evidence. Mr. Mitchell has failed to show the required high degree of probability that the proposed use will substantially affect the health, safety, and welfare of the community. The Board also finds the Applicant’s site plan and application satisfy the requirements of the Ordinance.

8. In granting the Special Exception uses, the Board imposes the conditions that the tower be constructed in such a way that should a catastrophe occur and that the tower fall, that the tower be contained within the property and not cross over any property lines. The Board further imposes a condition that the tower be constructed so that it is no less than 400' from any existing dwelling on or off the property.

DECISION

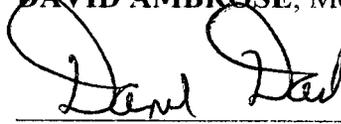
AND NOW, this 3rd day of October, 2013, after a consideration of all evidence presented, the Board **GRANTS** the Applicant's request for Special Exceptions consistent with the application subject to the aforesaid conditions. The Board directs the Zoning Officer to issue a permit consistent with this decision.



ERIC SEITZINGER, Chairman



DAVID AMBROSE, Member



DANIEL DAUB, Member