

BOARD OF APPEALS
October 14, 2020 6:00 p.m.

AGENDA

DOCKET NO. AP2020-029: An appeal was made by Diamond Communications LLC for special exception to construct a 199 ft. monopole commercial communication tower with equipment shelter, variance from minimum 199 ft. setback from the base of the tower to 57 foot 9 inches from northeast property line and 121 foot 9 inches from northwest property line and a variance from required 398 ft. setback from overhead transmission lines to 64 foot 1 inch on property owned by the Potomac Edison Company and located at 11676 Hopewell Road, Hagerstown, zoned Highway Interchange. 6:00 pm. - **GRANTED**

DOCKET NO. AP2020-030: An appeal was made by Denton & Daleen Weber for a special exception to establish a commercial dog breeding kennel, variance from the required 400 ft. setback to 180 ft. from north property line, and a variance from the required 50 ft. setback to 36 ft. from the west property line and 20 ft. from the south property line for existing structure on property owned by the appellant and located at 18815 Manor Church Road, Boonsboro, zoned Agricultural (Rural). 6:30 pm - **WITHDRAWN**

DOCKET NO. AP2020-031: An appeal was made by Craig & Theresa Tomsic for a variance from the required 15 ft. side yard setback to 8 ft. for the construction for proposed 28' X 30' detached garage on property owned by the appellant and located at 4902 General Anderson Court, Sharpsburg, zoned Preservation. 7:00 pm - **GRANTED**

Pursuant to the Maryland Open Meetings Law, notice is hereby given that the deliberations of the Board of Zoning Appeals are open to the public. Furthermore, the Board, at its discretion, may render a decision as to some or all of the cases at the hearing described above or at a subsequent hearing, the date and time of which will be announced prior to the conclusion of the public hearing. Individuals requiring special accommodations are requested to contact Kathryn Rathvon at 240-313-2464 Voice, 240-313-2130 Voice/TDD no later than October 5, 2020. Any person desiring a stenographic transcript shall be responsible for supplying a competent stenographer.

Due to government regulations during the COVID-19 restriction, all hearing will take place virtually. Only the board members and the appellant(s) can appear in-person for the hearing. The general public will not be allowed to attend hearings until further notice. The general public who wish to give testimony towards a case is **strongly encouraged to do so by writing a letter or by sending an email to the following:**

Ashley Holloway, Zoning Administrator
80 W Baltimore St
Hagerstown, MD 21740
aholloway@washco-md.net

All letters and emails will be read during the hearing and placed on file as an official record of the case. If you would rather give a voice testimony and/or listen to the hearing, you can do so by teleconferencing. Using a phone, you can dial in at the scheduled time of the hearing to (301) 715-8592. When prompted use meeting ID code **936-5340-6468** and meeting password **185254**. You also have the option to participate via live video or watch the hearing live. Using a computer or smart phone, go online to www.zoom.us and use the same meeting ID number and meeting password to access the hearing. Again, you are strongly encouraged to submit your testimony by letter or email.

The Board of Zoning Appeals reserves the right to vary the order in which the cases are called. Following the Applicant's case in chief, other individuals may receive three (3) minutes to testify, except in the circumstance where an individual is representing a group, in which case said individual shall be given eight (8) minutes to testify.

Paul Fulk, Chairman
Board of Zoning Appeals

**BEFORE THE BOARD OF APPEALS
FOR WASHINGTON COUNTY, MARYLAND**

DIAMOND COMMUNICATIONS, LLC

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Appeal No.: AP2020-029

Appellant

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OPINION

Diamond Communications, LLC (hereinafter “Appellant”) requests a special exception to construct a 199 foot monopole commercial communication tower with equipment shelter, a variance to reduce the minimum setback from 199 feet to 57 feet, 9 inches from the northeast property line, 121 feet, 9 inches from the northwest property line, and a variance to reduce the setback from overhead transmission lines from 398 feet to 64 feet, 1 inch at the subject property. The subject property is located at 11676 Hopewell Road, Hagerstown, Maryland; is owned by Potomac Edison Co.; and is zoned Highway Interchange, HI.

The Board held a public hearing on the matter on October 14, 2020.¹ Appellant was represented by Sean P. Hughes, Esq., Law Offices of Miller, Miller & Canby. All witnesses provided testimony, under oath and on the record.

¹ Due to the COVID-19 pandemic, in-person access and contact for public hearings has been limited, especially in County buildings. The members of the Board of Appeals, counsel, staff, and the Appellant were the only persons physically in attendance for the hearing. All other witnesses and the public at large were permitted to participate by telephone/video. All notices for the hearing provided the information necessary to call in and/or participate remotely and those who wished to participate were encouraged to make written submissions as well.

Findings of Fact

Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. Potomac Edison Co. owns the subject property located at 11676 Hopewell Road, Hagerstown, Maryland. The property is zoned Highway Interchange, HI.
2. Appellant is the anticipated lessee of the subject property.
3. The subject property consists of a Potomac Edison Co. substation and overhead transmission lines for electrical power.
4. Appellant proposes to construct a 195-foot monopole tower, with a 4-foot lightning rod, for a total of 199 feet. The site would contain an equipment shelter and 50-foot by 50-foot fenced area to secure access.
5. The proposed communications tower will provide coverage for service gaps and for FirstNet to operate emergency communication services. The anchor tenant will be AT&T, but capacity will be reserved for other communications providers and for Washington County Emergency Response. It will be designed to deliver 5G service.
6. The site would be serviced approximately one (1) time every other month, or about six (6) times per year.
7. Appellant has elected not to utilize the existing overhead transmission poles because they are only 120 feet tall. Communications service requires more height to be effective.
8. There was no opposition presented to this appeal.

Rationale

Special Exception

The Board has authority to grant a special exception pursuant to Section 25.2(b) of the Zoning Ordinance for Washington County, Maryland. A special exception is defined as “a grant of a specific use that would not be appropriate generally or without restriction; and shall be based upon a finding that the use conforms to the plan and is compatible with the existing neighborhood.” Article 28A. In the instant case, the subject property is ideal for the proposed project. It is located in an industrial area, isolated and already outfitted for the type of use proposed. There will be no gas, odor or light emissions, and no dust, noise, or significant traffic to and from the property. The Board finds that the proposed use at the subject property will have no greater “adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” *Schultz v. Pritts*, 291 Md. 1, 15 (1981). For all these reasons, we conclude that this appeal meets the criteria for a special exception and secures public safety and welfare and upholds the spirit of the Ordinance.

Accordingly, the request for a special exception to establish a 199-foot monopole commercial communication tower with equipment shelter at the subject property is hereby GRANTED, by a vote of 5–0.

Variances

The Board has authority to grant a variance upon a showing of practical difficulty or undue hardship. §§ 25.2(c) and 25.56.² “Practical Difficulty” may be found by the Board when: (1) strict compliance would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome; and (2) denying

² “When the terms unnecessary hardship (or one of its synonyms) and practical difficulties are framed in the disjunctive (“or”), Maryland courts generally have applied the more restrictive hardship standard to use variances, while applying the less restrictive practical difficulties standard to area variances because use variances are viewed as more drastic departures from zoning requirements.” *Belvoir Farms Homeowners Ass’n, Inc. v. North*, 355 Md. 259, 276 n.10 (1999) (citations omitted).

the variance would do substantial injustice to the applicant and a lesser relaxation than that applied for would not give substantial relief; and (3) granting the variance would observe the spirit of the Ordinance and secure public safety and welfare. § 25.56(A).

Practical difficulty and undue hardship are the result of a property being unique. "‘Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions." *North v. St. Mary’s Cnty.*, 99 Md. App. 502, 514 (1994.)

Appellant explained that the setback requirements for overhead transmission lines were likely intended to ensure that if a structure fell, it would clear said lines. In the instant case, Appellant testified that the monopole is designed to crumple rather than fall over. While there have been some instances of this happening in very extreme weather, the tower will be constructed at the subject property to withstand the typical elements encountered locally. There is little concern for the tower falling on the overhead transmission lines adjacent to the site. Moreover, the entity which should be most concerned with such a request is Potomac Edison Co., and they are in support of the requests made herein. Consequently, the imposition of the setback unreasonably prevents an otherwise reasonable use of the property and should be reduced.

Pursuant to the Ordinance requirements, the proposed tower must have a setback equal to its height, in this case, 199 feet. This is specifically intended to give clearance from nearby improvements should the structure fall. As has been stated, the risk of this is very minimal based both on construction and design of the monopole tower. Imposing this setback requirement without some relaxation would unreasonably prevent this

reasonable use of the property.

Appellant further testified, and the Board recognizes that the world of cellular phone and wireless data usage is growing exponentially. Appellant provided statistics that about sixty percent (60%) of all 911 emergency calls originate from a cellular phone. To meet the needs of this growing market and to ensure consistent coverage and capacity for users, Appellant is establishing towers like the one proposed in identified gap areas. The proposed project meets a need of the community and enhances communication services for the public; thus it is consistent with the spirit and intent of the Ordinance.

Accordingly, the request for a variances to reduce the minimum setback from 199 feet to 57 feet, 9 inches from the northeast property line, 121 feet, 9 inches from the northwest property line, and a variance to reduce the setback from overhead transmission lines from 398 feet to 64 feet, 1 inch at the subject property are hereby GRANTED, by a vote of 5-0. The application is granted upon the condition that the proposed use be consistent with the testimony and evidence presented herein.

BOARD OF APPEALS

By: Paul Fulk, Chair

Date Issued: November 12, 2020

Notice of Appeal Rights

Any party aggrieved by a final order of the Authority in a contested case, whether such decision is affirmative or negative in form, is entitled to file a petition for judicial review of that order to the Circuit Court for Washington County within thirty (30) days of the date of the order.

**BEFORE THE BOARD OF APPEALS
FOR WASHINGTON COUNTY, MARYLAND**

CRAIG & THERESA TOMSIC

Appellant

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Appeal No.: AP2020-031

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OPINION

Craig and Theresa Tomsic (hereinafter “Appellants”) request a variance to reduce the minimum required side yard setback from fifteen (15) to eight (8) feet for the construction of a detached garage at the subject property. The subject property is located at 4902 General Anderson Court, Sharpsburg, Maryland 21782; is owned by Appellants; and is zoned Preservation. The Board held a public hearing on the matter on October 14, 2020.¹

Findings of Fact

Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. Appellants own the subject property located at 4902 General Anderson Court, Sharpsburg, Maryland. The property is zoned Preservation.
2. The subject property consists of Appellants’ residence with an attached carport that sits at the end of a long driveway extending from General Anderson Court. The driveway contains a parking area approximately at the midway point. The subject

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property is bisected east to west by a twenty (20) foot storm drain easement and contains a septic field.

3. The subject property contains five (5) sides, all with varying distances.

4. Appellants propose to construct a 28 by 30-foot detached garage located at the parking area midway up the driveway. The ground in this area is level would permit construction without excavation.

5. Appellants purchase the subject property in 1990 and have not changed the boundary lines or the shape of the property. When they purchased, there was an existing septic field which required them to build the house in its current location.

6. Appellants contacted their neighbors and received no concerns for the proposed project.

7. There was no opposition presented to this appeal.

Rationale

The Board has authority to grant a variance upon a showing of practical difficulty or undue hardship. §§ 25.2(c) and 25.56.² “Practical Difficulty” may be found by the Board when: (1) strict compliance would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome; and (2) denying the variance would do substantial injustice to the applicant and a lesser relaxation than that applied for would not give substantial relief; and (3) granting the variance would observe the spirit of the Ordinance and secure public safety and welfare. § 25.56(A).

Practical difficulty and undue hardship are the result of a property being unique. “‘Uniqueness’ of a property for zoning purposes requires that the subject property have

² “When the terms unnecessary hardship (or one of its synonyms) and practical difficulties are framed in the disjunctive (“or”), Maryland courts generally have applied the more restrictive hardship standard to use variances, while applying the less restrictive practical difficulties standard to area variances because use variances are viewed as more drastic departures from zoning requirements.” *Belvoir Farms Homeowners Ass’n, Inc. v. North*, 355 Md. 259, 276 n.10 (1999) (citations omitted).

an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions." *North v. St. Mary's Cnty.*, 99 Md. App. 502, 514 (1994).)

In the instant case, Appellants bought and constructed their home on an irregular-shaped lot that was restricted by an existing septic field and a storm drain easement. Such conditions render the property unique and impose practical difficulties upon Appellants' use and improvement of the property. They cannot construct the garage on either side of the home without needing a variance or encroaching into these areas. The proposed detached garage would be located at the parking area near the midway point of the driveway. This would allow for ease of access, require far less excavation, and already provides a level and logical location for a garage. The requested variance relief is the minimum necessary to construct the detached garage and allows for a use that other surrounding properties already enjoy. In addition, it allows for a common and practical use of Appellants' property, consistent with the intent and spirit of the Ordinance.

Accordingly, the request for a variance to reduce the minimum required side yard setback from fifteen (15) to eight (8) feet for the construction of a detached garage at the subject property is hereby GRANTED, by a vote of 5-0. The application is granted upon the condition that the proposed use be consistent with the testimony and evidence presented herein.

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By: Paul Fulk, Chair

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Any party aggrieved by a final order of the Authority in a contested case, whether such decision is affirmative or negative in form, is entitled to file a petition for judicial review of that order to the Circuit Court for Washington County within thirty (30) days of the date of the order.