

BEFORE THE BOARD OF ADJUSTMENT OF SUSSEX COUNTY

IN RE: NANTICOKE CROSSING LIMITED PARTNERSHIP

(Case No. 11487)

A hearing was held after due notice on November 17, 2014. The Board members present were: Mr. Dale Callaway, Mr. Jeff Hudson, Mr. John Mills, Mr. Brent Workman and Mr. Norman Rickard.

Nature of the Proceedings

This is an application for a special use exception for a telecommunications tower and a variance from the minimum separation from a residentially zoned lot.

Findings of Fact

The Board found that the Applicant was seeking a special use exception to place a telecommunications tower and a variance of 354.33 feet from the 500 feet minimum separation requirement from a residentially zoned lot. This application pertains to certain real property located west of John J. Williams Highway (Route 24) and 492 feet north of Indian Mission Road (Route 5) (a.k.a. Route 23) (911 Address: 24832 John J. Williams Highway, Millsboro, DE); said property being identified as Sussex County Tax Map Parcel Number 2-34-23.00-269.12. After a hearing, the Board made the following findings of fact:

1. The Board was given copies of the Application, a portion of the tax map of the area, a statement from the Applicant, an addendum to the Application, an affidavit of collocation, aerial photographs, computer printouts of coverage with and without the proposed tower, a list of parcels within 200 feet, and a compound plan of the Property dated October 14, 2014.
2. The Board found that the Office of Planning & Zoning received no correspondence regarding this Application.
3. W. Jeffery Nagorny, John Herriott, Scott Van Rein, and Paul Dugan were sworn in to testify about the Application. Christopher Schubert, Esquire, and Jonathan Jordan, Esquire, presented the case to the Board on behalf of the Applicant and submitted exhibits for the Board to review which included correspondence, photographs, affidavits, reports, maps, and curriculum vitae.
4. The Board found that Mr. Schubert stated that the Property is currently used as a shopping center and that the tower will be placed to the rear of the shopping center.
5. The Board found that Mr. Schubert stated that the proposed steel monopole tower will be 150 feet in height with a six (6) foot lightning rod.
6. The Board found that Mr. Schubert stated that Verizon Wireless will be using the tower to cover a gap in coverage.
7. The Board found that Mr. Schubert stated that the tower will have space available for collocation by at least three (3) other collocators.
8. The Board found that Mr. Schubert stated that the lightning rod will be grounded so that the energy from a lightning strike will be safely dissipated.
9. The Board found that Mr. Schubert stated that the Property is surrounded by trees and wetlands which limit the options for placement of the tower.
10. The Board found that Mr. Schubert stated that there a dense woods is located to the west of the site.
11. The Board found that Mr. Schubert stated that the Property is commercially zoned but is located within 500 feet of properties which can be used for residential purposes.

12. The Board found that Mr. Schubert stated that the tower will be located as far away as possible from an actively used residential lot.
13. The Board found that Mr. Schubert stated that the Applicant considered six (6) other sites within two (2) miles of the site for collocation but those sites were not suitable for collocation.
14. The Board found that Mr. Schubert stated that one of the nearby structures could not structurally support the Applicant's systems.
15. The Board found that Mr. Schubert stated that another nearby structure already houses Verizon equipment.
16. The Board found that Mr. Schubert stated that a nearby American Tower site to the north and a Tidewater Utilities water tank to the south were too far away to alleviate Verizon's coverage gap.
17. The Board found that Mr. Schubert stated that the Applicant looked at a small lattice tower to the east on property owned by the Indian River Fire Company but the tower was not structurally sufficient to handle Verizon's equipment.
18. The Board found that Mr. Schubert stated that a tower owned by Sussex County was located too far to the west to alleviate this coverage gap.
19. The Board found that Mr. Schubert stated that the tower will not be close to traffic or existing residential areas.
20. The Board found that Mr. Schubert stated that Verizon Wireless is licensed by the Federal Communications Commission ("FCC").
21. The Board found that Mr. Schubert stated that the tower will meet all FCC regulations.
22. The Board found that Mr. Schubert stated that the tower will operate a level 100 times below the acceptable FCC level for radio frequency emissions.
23. The Board found that Mr. Schubert stated that the tower will be servicing the Millsboro area and is needed to fill its coverage gap
24. The Board found that Mr. Schubert stated that the tower will have lights every 50 feet but the Federal Aviation Administration ("FAA") does not require lighting on a tower at this height.
25. The Board found that Mr. Schubert stated that there is no concern with the effect of the tower on air traffic navigation.
26. The Board found that Mr. Schubert stated that the facility will be automated so there will be no office space on site and that the tower will be monitored from a central location.
27. The Board found that Mr. Schubert stated that the tower will be maintained through periodic visits by service technicians.
28. The Board found that Mr. Schubert stated that the tower site will have a six (6) feet high fence surrounding it.
29. The Board found that Mr. Schubert stated that there will be an equipment shelter with an eight (8) feet tall border fence surrounding it.
30. The Board found that Mr. Schubert stated that the Property is roughly six (6) acres in size.
31. The Board found that Mr. Schubert stated that the tower site will comply with all required setback requirements, and environmental and health requirements.
32. The Board found that Mr. Schubert stated that the tower will placed in the existing parking lot.
33. The Board found that Mr. Schubert stated that the use will not substantially adversely affect the uses of neighboring and adjacent properties.
34. The Board found that Mr. Schubert stated that there is no adverse visual impact from the tower on nearby properties and that there is no adverse impact on water, sewer, schools, natural resources, or traffic.
35. The Board found that Mr. Schubert stated that there is no hazard posed to health, safety, or welfare from the proposed use.

36. The Board found that Mr. Schubert stated that the tower will provide for enhanced communication services for Verizon users.
37. The Board found that Mr. Schubert stated that the Applicant looked to build the tower in the nearby wooded area but the area consists of wetlands and cannot be developed thereby limiting placement to the existing shopping center.
38. The Board found that Mr. Schubert stated that the location of the wetlands makes this unique.
39. The Board found that Mr. Schubert stated that the Applicant is constrained in placement of a tower due to the physics of radio wave propagation.
40. The Board found that Mr. Schubert stated that the Property cannot be developed for a telecommunications tower without a variance due to the limited area where the tower can be placed.
41. The Board found that Mr. Schubert stated that the difficulty was not created by the Applicant.
42. The Board found that Mr. Schubert stated that the use will not alter the essential character of the neighborhood.
43. The Board found that Mr. Schubert stated that there are significant wooded areas on three (3) sides of the Property and the tower will be located away from existing residential properties.
44. The Board found that Mr. Schubert stated that the Property is used commercially and has a great deal of traffic.
45. The Board found that Mr. Schubert stated that the variance represents the least modification possible of the regulation at issue.
46. The Board found that Mr. Van Rein, representing the developer, confirmed the statements made by Mr. Schubert as being true and correct.
47. The Board found that Mr. Herriott, site engineer, confirmed the statements made by Mr. Schubert as being true and correct.
48. The Board found that Mr. Dugan, radio frequency engineer, confirmed the statements made by Mr. Schubert as being true and correct.
49. The Board found that Mr. Nagorny, civil engineer, confirmed the statements made by Mr. Schubert as being true and correct.
50. The Board found that no parties appeared in support of or in opposition to the Application.
51. Based on the findings above, the testimony and evidence presented at the public hearing, and the public record, which the Board found credible, persuasive, and un rebutted, the Board determined that the application met the standards for granting a special use exception for a telecommunications tower. The findings below further support the Board's decision to approve the Application.
 - a. The use does not substantially affect adversely the uses of adjacent or neighboring properties.
 - b. The tower will be located on a property which is already developed as a busy shopping center.
 - c. The Applicant demonstrated that there will not be any adverse visual, traffic, health, or safety impact due to the tower. The tower will operate a level 100 times below the acceptable FCC level for radio frequency emissions.
 - d. The tower will also provide for improved cellular phone coverage in the area which should benefit neighboring and adjacent properties.
 - e. Furthermore, no evidence was presented that the tower would have a substantial adverse effect on neighboring and adjacent properties.
 - f. The Board also found that the proposed tower meets all of the other criteria required for approval of a telecommunications tower.
 - g. The Applicant identified the six (6) existing structures in the area which were investigated for collocation and convinced the Board that there are

no existing structures within a two (2) mile radius of the Property available for collocation.

- h. The Applicant demonstrated that there is a need for such tower at the proposed location. The computer models shown by the Applicant demonstrate that the cellular phone coverage in the area will greatly improve with the addition of the tower.
 - i. The tower will be designed to accommodate at least two (2) additional PCS / cellular platforms. The tower will be set back at least one-third (1/3) of its height from neighboring properties. The pad sites, ground equipment structures, and wires will be surrounded by a six (6) feet tall fence. The tower will have warning lights which comply with FAA regulations.
52. Based on the findings above, the testimony and evidence presented at the public hearing, and the public record, which the Board found credible, persuasive, and un rebutted, the Board determined that the application met the standards for granting a variance. The findings below further support the Board's decision to approve the Application.
- a. The size and shape of the Property make it unique. The Property is also unique because it is located adjacent to wetlands which limit the placement of the proposed tower.
 - b. The Applicant has demonstrated that a tower is needed in this location and that significant constraints limit its placement elsewhere. As such, the Property cannot be developed with the telecommunications tower in strict conformity with the Sussex County Zoning Code and the variance is necessary to enable reasonable use of the Property.
 - c. The exceptional practical difficulty and unnecessary hardship were not created by the Applicant. The Applicant has experienced a need for the tower in the area and has been unable to find other locations where it could collocate.
 - d. The variance will not alter the essential character of the neighborhood. The Property is already developed by a busy shopping center and the surrounding neighborhood will not be subjected to objectionable noise, lightning, glare, heat, ventilation, smoke, fumes, vapors, dust, dirt, gasses or radioactive or electrical disturbances by the proposed tower. The Property is also bordered on three (3) sides by woods which limit its visibility.
 - e. The variance sought is the minimum variance necessary to afford relief.

The Board granted the special use exception and variance application finding that it met the standards for granting a special use exception and a variance.

Decision of the Board

Upon motion duly made and seconded, the special use exception and variance application was approved. The Board Members in favor of the Motion to Approve the Application were Mr. Dale Callaway, Mr. Jeff Hudson, Mr. John Mills, Mr. Norman Rickard, and Mr. Brent Workman. No Board Members voted against the Motion to approve the special use exception and variance application.

BOARD OF ADJUSTMENT
OF SUSSEX COUNTY


Dale Callaway
Chairman

If the use is not established within one (1)
year from the date below the application
becomes void.

Date January 27, 2015.