

MCPB
 Item No. 12
 Date: 9-22-11

Whites Farm – Germantown, Subdivision Review Waiver, SRW-201202

RW Richard A. Weaver, Acting Supervisor, Area 3, (301) 495-4544

JAC John Carter, Chief, Area 3, (301) 495-4575

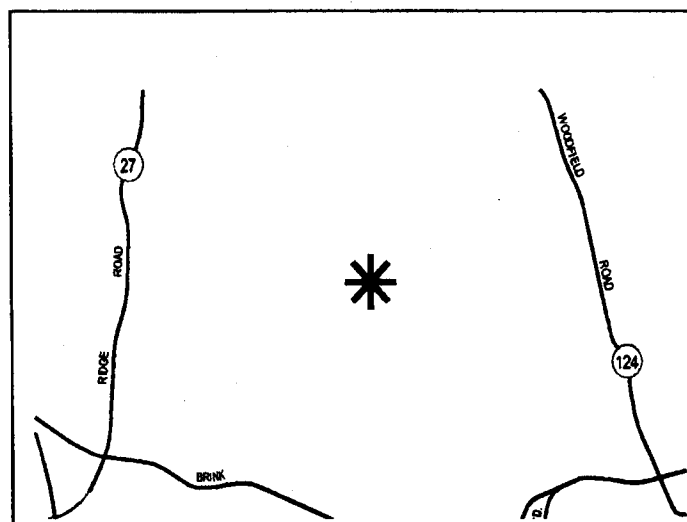
description

Whites Farm – Germantown, Subdivision Review Waiver, SRW-201202

Located at 22525 Wildcat Road in Germantown;
 RDT Zone; 42.72 acres; Agricultural and Rural
 Open Space Master Plan

Request to waive Section 50-20(b) of the
 Montgomery County Subdivision Regulations to
 allow issuance of a building permit for an
 approved cell pole and associated structures on
 an outlot

Staff Recommendation: *Approval*



summary

Staff recommends approval of a waiver of Section 50-20(b) of the Subdivision Regulations pursuant to Section 50-38(a)(1) of the Subdivision Regulations in order to allow release of a building permit for an approved cellular facility on an outlot. The Applicant, T-Mobile Northeast, L.L.C., received approval under Special Exception Case No. S-2770 to locate a 140 foot tall wireless cellular unipole, with associated structures, on an existing outlot. A building permit is required to construct the approved cellular facility. The Planning Board's transmittal to the Board of Appeals (BOA) recognized that building permits cannot be issued on outlots and recommended that the Applicant would need to secure a waiver from the Planning Board of the appropriate section of the Subdivision Regulations. The BOA included this requirement as a condition of its approval in the Opinion for the case. (Attachment A, See Condition #3)

The Applicant has submitted a Statement of Justification (Attachment B) that provides a rationale as to why the waiver request meets the requirements under Section 50-38(a) *Waivers*, of the Subdivision Regulations. Staff concurs with the arguments made in their statement. A significant point in this discussion is that the farm remainder for the White Property (120040450) was shown as an outlot so that it would remain unbuildable for additional *residential* units, not necessarily to restrict other uses that may be appropriate on the farm remainder. Other factors also contribute to Staff's support of this request are discussed in this report.

Location Map, S-2770, on 2008 Aerial Photo



2008 aerial photo of vicinity: The outlot is shown with a yellow outline, and the approximate location of the proposed tower site is shown in red.

discussion

The Applicant requests that the Planning Board waive Section 50-20(b) which states:

“(b) A building permit must not be approved for the construction of a dwelling or other structure, except a dwelling or structure strictly for agricultural use, which is located on more than one lot, which crosses a lot line, which is located on the unplatted remainder of a resubdivided lot, or which is located on an outlot,”

Again, the Application is required to secure this waiver as a condition of approval by the BOA in their review of the Special Exception S-2770 for the wireless communication facility. The Planning Board has the authority to grant waivers pursuant to Section 50-38(a)(1) of the Subdivision Regulations provided certain findings can be made. The section states:

“The Board may grant a waiver from the requirements of this Chapter upon a determination that practical difficulties or unusual circumstances exist that prevent full compliance with the requirements from being achieved, and that the waiver is: 1) the minimum necessary to provide relief from the requirements; 2) not inconsistent with the purposes and objectives of the General Plan; and 3) not adverse to the public interest.”

Because of the building permit restriction on outlots, Staff believes that practical difficulties do exist for the Applicant that will prevent full compliance with the requirements of Chapter 50. Further, staff believes that the waiver is the minimum required to provide relief from this requirement, it is not inconsistent with the purposes and objective of the General Plan and that it is not adverse to the public interest.

The White Farm was subdivided under Preliminary Plan 120040450 for 3 lots and 1 outlot on 88.79 acres in the Rural Density Transfer zone (RDT). The RDT zone provides for a maximum density of 1 lot for every 25 acres, hence, the White Farm achieved full density ($88.79/25 = 3.55$ lots max.). The plan was approved with a large farm remainder to allow continuing agricultural activities. For the White Property approval, the 3 residential lots were clustered and a 43 acre area was left as the farm remainder. Because it might not be apparent that no density remained on the 43 acre remainder, Staff recommended, and the Board accepted, to show the farm remainder as an outlot for two reasons: 1) The boundary of the outlot could be shown on the plat which allowed a note to be applied to the outlot stating that no density on the property remained and, 2) no additional residential units could be built on it. (Attachment C, Board Opinion)

Since 2004, and in response to complaints about the considerable expense of surveying and platting large farm remainder properties, the Board now accepts an alternative method to provide for farm remainders which is to leave them unplatted and not show them on a record plat. The Planning Board has accepted that there are other safety mechanisms in the Subdivision Regulations that restrict building permits on unplatted farm remainders that might exceed density.

However, under the Planning Board practice in 2004, the "outlot" designation was determined to be the most appropriate way to restrict additional residential units from being built on the farm remainder that would possibly exceed the allowable density for a property. In designating the remainder as an outlot, it also restricted building permits for "other structures" that might be found to be appropriate. Staff who presented this particular subdivision to the Planning Board does not recollect this as the intent of this particular outlot. on the outlot would not be in conflict with the Board's approval of the 2004 preliminary plan.

It is important to note that had the farm remainder been left unplatted, as it most likely would have been under current practices, there would be few obstacles to the issuance of a building permit for the approved cellular facility. Section 50-9 states:

"Sec. 50-9 Recording a subdivision plat under this Chapter is not required for:

(g) Telecommunications towers/antennas, including associated accessory structures unless or until other development of the land which requires a subdivision plan."

This exemption clause was added to the Subdivision Regulations in recognition that a full subdivision plan and record plat application to create a platted lots solely for telecommunication facilities, including cell towers and accessory building was often a hardship and sometimes impossible.

Given the circumstances cited above, Staff believes that a practical difficulty will be created for the Applicant if the waiver is not granted. The Subdivision Regulations will not allow staff to release a building permit for the approved structures on the outlot and in a location approved by the BOA. Granting the waiver is the minimum necessary to provide relief from Section 50-20(b). The waiver allows implementation of the approved use in a location that has been found by the Planning Board and the Board of Appeals to be in conformance with master plan purposes and objectives and not adverse to the public interest.

outreach

Staff has received no additional material to the file. The application has been processed in accordance with established procedures.

conclusion

Staff finds that the proper findings have been made pursuant to Section 50-38(a) and recommends that the Planning Board grant a waiver of Section 50-20(b) of the Montgomery County Subdivision Regulations which will allow the issuance of a building permit for the uses approved under Special Exception S-2770 on the subject outlot.

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
www.montgomerycountymd.gov/content/council/boa/index.asp

(240) 777-6600

Case No. S-2770

**PETITION OF KAY HARDING AND WILLIAM WHITE
AND T-MOBILE NORTHEAST, LLC**

OPINION OF THE BOARD
(Opinion Adopted January 19, 2011
(Effective Date of Opinion: February 2, 2011))

Case No. S-2770, Petition of T-Mobile Northeast, LLC and Kay Harding White, is an application, under Section 59-G-2.58 of the Zoning Ordinance, for a special exception for a telecommunications facility consisting of a 140-foot high "stealth" design unipole located in a 50-foot by 10-foot compound. The Hearing Examiner for Montgomery County held a hearing on the application on November 19, 2010, closed the record in the case on November 26, 2010, and on January 7, 2010, issued a Report and Recommendation for approval of the special exception subject to conditions.

The subject property is Parcel N300, Outlot A, White's Farm Subdivision, located at 22525 Wildcat Road, Germantown, Maryland 20876 in the RDT Zone.

Decision of the Board: Special Exception **Granted** Subject
To the Conditions Enumerated Below.

The Board of Appeals considered the Hearing Examiner's Report and the record in the case at its Worksession on January 12, 2010. After careful consideration and review, the Board adopts the Hearing Examiner's Report and grants the special exception subject to the following conditions:

1. The Petitioner shall be bound by all of the testimony and exhibits of record, and by the testimony of its witnesses and its representations as identified in the Hearing Examiner's Report and in this Opinion.
2. No signs or illumination shall be placed on the unipole.

3. The applicants must obtain Planning Board approval of a Subdivision Regulation Waiver to permit issuance of a building permit for the proposed telecommunications facility on existing Outlot A.
4. All RBS cabinets and batteries installed at the site must comply with all national and international safety and code requirements for those items and meet the same standard specifications and features set forth in Exhibit 52 (FACT SHEET, Ericsson Radio Base Station Cabinet Chemical Safety Information) and Exhibit 53 (Material Safety Data Sheet, Lead Acid Batteries).
5. The unipole shall be painted a neutral color.
6. All batteries installed must be registered with Montgomery County pursuant to Executive Regulation 1703.
7. The owner of Lot 1, White's Farm Subdivision, 22601 Wildcat Road, and the applicant must comply with all provisions of the existing forest conservation plan on their respective properties.
8. The applicants must remove all existing structures from the special exception area if the structures are not used for a period of twelve (12) months.
9. The sign required by Section 59-G-2.58(a)(8) must be installed on the compound fence prior to operation of the facility.
10. T-Mobile or any successor or assigns shall maintain the facility in a safe condition.
11. Outdoor storage of equipment or other items within the special exception area is prohibited.
12. Petitioner additionally must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

On a motion by David K. Perdue, Vice-Chair, seconded by Carolyn J. Shawaker, with Walter S. Booth, Stanley B. Boyd and Catherine G. Titus, Chair, 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 petition.

Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 2nd day of February, 2011.

Katherine Freeman
Executive Director

NOTE:

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 County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

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 a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

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.

BEFORE THE PLANNING BOARD OF MONTGOMERY COUNTY, MARYLAND

Petition of T-Mobile *
Northeast LLC and Washington White & Susan Butler
For Waiver of Section 50-20(a) Pursuant to
Section 50-38(a)(1) In Order to Allow Install of a Wireless * Case No.
Telecommunications Facility at 22525 Wildcat Road, *
Germantown, Maryland 20876 *

STATEMENT OF JUSTIFICATION

Overview of Request and History

In accordance with the requirements of the Zoning Ordinance of Montgomery County, T-Mobile Northeast LLC (“T-Mobile” or “Applicant”) and Kay Harding White (“White” or “Co-Applicant”) hereby furnishes the following Statement in support of the request that a waiver be granted from Section 50-20(a) pursuant to Section 50-38(a)(1) in order to allow the granting of building permits related to the install of a disguised 120 foot unipole wireless telecommunications facility at 22525 Wildcat Road, Germantown, MD 20876. Such a facility requires building permits for the telecommunications facility and ancillary equipment. However, the property, which consists of 43 acres of land located in the RDT zone and identified as Parcel N300, Outlot “A” of the Whites Farm division, does not permit building permits due to its classification as an “Outlot”.

The Applicants have recently received approval of a Special Exception application by the County’s Board of Appeals to allow a wireless telecommunications facility at 22525 Wildcat Road, Germantown, MD 20876 (case No.: S-2770). Prior to approval of the Special Exception the County’s Transmission Facility Coordinating Group (TFCG) (AKA The Tower Review Committee or Tower Committee) had recommended approval of the new facility from a technical perspective as had the County’s Planning Department.

The Whites Farm division was previously approved by the County and it included the Outlot “A”, noted above.

Facts and Legal Basis Supporting the Requested Waiver

Section 50-38 Waivers from this Chapter.

(a) Authority of the Board.

- (1) The Board may grant a waiver from the requirements of this Chapter upon a determination that practical difficulties or unusual circumstances exist that prevent full compliance with the requirements from being achieved, and that the waiver is: 1) the minimum necessary*

to provide relief from the requirements; 2) not inconsistent with the purposes and objectives of the General Plan; and 3) not adverse to the public interest.

The Waiver is absolutely appropriate in this case for the below noted reasons as well as additional that may be discussed at the public appearance on this request before the Planning Board:

First, if this parcel had not been re-classified as an Outlot then the potential to obtain a building permit, after receipt of a Special Exception approval for a wireless telecommunications facility, in order to provide enhanced wireless connectivity in this area of the County, would have been permitted. There is no evidence that this parcel is any different than any other farm remainder lot in the County. Such remainder lots do allow building permits to be requested and approved under the Code. This position has been confirmed with Planning Staff via meetings and discussions in which they noted that their research netted the same position. Consequently, there is no real reason to not treat this property in similar fashion to a typical farm remainder lot and thus allow a waiver to allow building permits for the telecommunications facility and ancillary equipment.

Further, section 50-9 (g) involves Exceptions to platting requirements and specifically notes that an exception applies to Telecommunications towers/antennas, including associated accessory structures, unless or until other development of the land which requires a subdivision plan. Thus, the theme is to allow exceptions to these very structures. They are unmanned facilities that involve a very passive use (they typically involve 1 vehicular trip to the facility a month for general maintenance, and do not promote any material smell, noise, emissions, vibrations, dust or require any material use of public facilities). And in this case no lighting is required on the unipole per FAA rules. It is the type of structure that is not atypical on a farm or in an agricultural setting (e.g. tall structures such as silos, grain elevators, barns and communication towers, which exist on farms in Montgomery County, Maryland and beyond) and help the landowners to continue to operate and maintain an agricultural type setting and use.

In addition we contend that the waiver requested does indeed involve the minimum necessary to provide relief from the requirements, as shown on the plan and design. The requested building permits would all be related to the wireless telecommunications facility equipment, which would all be housed on the inside of the unipole or inside the proposed 50 foot by 50 foot ground equipment compound, which would house the ancillary telecommunications ground equipment. Further this use is not inconsistent with the purposes and objectives of the General Plan. In fact the General Master Plan for this zone does allow wireless telecommunications facility by Special Exception. This is further noted in the Staff report in the Special Exception case S-2770 on page 7, where it noted, "The property is located within the planning area covered by the 1980 Functional Master Plan for the reservation of Agricultural and Rural Open Space and the 1996 Rustic Roads Functional Master Plan. Staff finds the amended proposal to be consistent

with both plans and, especially with the Rustic Road Functional Master Plan as detailed in the attached Vision Division Memo.”

The waiver requested would not be adverse to the public interest. There would be no material adverse impact on the health, safety, security, morals or general welfare of residents, visitors, or workers in the area and no material adverse impact to the use, peaceful enjoyment, economic value and/or development of surrounding properties or the general neighborhood. Instead, the general welfare of the citizens and the surrounding properties will benefit from the improved mobile telephone and wireless high-speed internet communications provided by T-Mobile and future co-locators.

Public health and safety will benefit in that a number of county agencies, including police, fire and rescue, utilize wireless telephone communications in performing their important public service missions. Presently that there are over 292 million wireless subscribers in the United States, including nearly 25% and growing of wireless only households. Additionally, availability of wireless communications benefits the public safety and welfare by facilitating communication with police, fire and rescue operations in times of emergency. To that end there are over 296,000 wireless 9-1-1 calls made each and every day in our Country, including thousands each year in Montgomery County. Furthermore, vehicular collisions, medical emergencies or crimes can be reported immediately after their occurrence when observed by a wireless telephone user, which results in faster emergency response times.

By locating its Facility on the subject Property, the Applicant has found an ideal location in this rural area of the County that does not possess many commercial/industrial zones or tall structures (buildings, tanks, existing towers) to co-locate upon like in Silver Spring, Rockville, Gaithersburg and others parts of the County. (See Montgomery County Tower Committee’s Coordinator Report, dated September 21, 2010 that wrote, “Based on our site visit and check of the TFCG database in June of 2009, there were no existing structures to which T-Mobile could attach their antennas and meet their coverage objective for these antennas. Since that time there have been no changes to the surrounding area. The database also shows no other application for any other structure in this vicinity that could be used in lieu of this monopole.” This location minimizes the structure’s visibility as it will be screened by very tall and thick existing trees in the area, as well as due to the large size of the subject parcel (42+ acres), proposed screening around the ground compound, significant setbacks, drop in elevation of the site from other locations in the area and that it would be set back nearly 1,000 feet from the nearest public road. And the structure is a disguised facility (unipole) that would have all of the equipment (cables, platforms and antennas) hidden inside of the pole and is proposed to be painted to further blend into the vicinity.

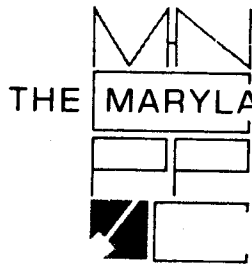
Consequently, the Applicant respectfully requests a granting of the requested Waiver for the above noted reasons and other relevant reasons provided up to and at the Planning Board review.

Respectfully submitted,

By: Sean P. Hughes
Sean P. Hughes

Attorney for T-Mobile Northeast
LLC
Law Office of Sean Hughes
6339 Ten Oaks Road
Suite 305
Clarksville, MD 21029

Attachment C
1 page



THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760

Date Mailed: July 23, 2004

Action: Approved Staff Recommendation

Motion of Comm. Bryant, seconded by
Comm. Robinson with a vote of 5-0;

Comms. Berlage, Bryant, Perdue,
Robinson and Wellington voting in favor

MONTGOMERY COUNTY PLANNING BOARD

OPINION

Preliminary Plan 1-04045
NAME OF PLAN: White Property

On 12/17/03, Kay White submitted an application for the approval of a preliminary plan of subdivision of property in the RDT zone. The application proposed to create 3 lots on 88.79 acres of land. The application was designated Preliminary Plan 1-04045. On 06/24/04, Preliminary Plan 1-04045 was brought before the Montgomery County Planning Board for a public hearing. At the public hearing, the Montgomery County Planning Board heard testimony and received evidence submitted in the record on the application. Based upon the testimony and evidence presented by staff and on the information on the Preliminary Subdivision Plan Application Form, attached hereto and made a part hereof, the Montgomery County Planning Board finds Preliminary Plan 1-04045 to be in accordance with the purposes and requirements of the Subdivision Regulations (Chapter 50, Montgomery County Code, as amended) and approves Preliminary Plan 1-04045.

Approval, subject to conditions:

- 1) Compliance with the conditions of approval for the preliminary forest conservation plan. The applicant must satisfy all conditions prior to recording of plat(s) or MCDPS issuance of sediment and erosion control permits.
- 2) Record plat to reflect common ingress/egress and utility easements over all shared driveways.
- 3) Compliance with the conditions of approval of the MCDPS stormwater management approval dated May 13, 2004.
- 4) Compliance with conditions of MCDPWT letter dated, June 4, 2004, unless otherwise amended.
- 5) Record plat to reflect a Category I easement over all areas of stream valley buffers and forest conservation.
- 6) Parcels A and B as shown on the approved preliminary plan to be conveyed to

M-NCPPC within eighteen (18) months from the date of issuance of the opinion in exchange for a value to be negotiated in good faith. Deed conveying Parcel A shall include a life estate to the Applicant or her designee.

- 7) Record plat should note limitation on future development of Outlot A as included in density calculation for preliminary plan No. 1-04045.
- 8) Compliance with conditions of MCDPS (Health Dept.) septic approval.
- 9) Access and improvements as required to be approved by MCDPWT prior to recordation of plat(s) (or MDSHA prior to issuance of access permits).
- 10) This preliminary plan will remain valid for thirty-seven (37) months from the date of mailing of the Planning Board opinion. Prior to this date, a final record plat must be recorded for all property delineated on the approved preliminary plan, or a request for an extension must be filed.
- 11) Other necessary easements.