MCPB
Item# 5
02/01/02

MEMORANDUM

DATE: February 1, 2002
TO: Montgomery County Planning Board
VIA: John Carter, Chief, Community-Based Planning JAC
FROM: Judy Daniel, AICP, Team Leader Rural Area JD

REVIEW TYPE: **Special Exception**
APPLYING FOR: **Telecommunications Facility**
CASE NUMBER: **S-2477**

APPLICANT: AT&T Wireless Services
ZONE: RDT
LOCATION: Hawkins Creamery Road at Laytonsville Road, Etchison Community
MASTER PLAN: Preservation of Agricultural and Rural Open Space
MCPB HEARING: February 7, 2002
PUBLIC HEARING: February 14, 2002 at Hearing Examiner

STAFF RECOMMENDATION: Approval with conditions –

1. The applicant is bound by all submitted statements and plans.

2. Move the equipment area to the location within the tree grove as recommended by the Tower Committee.

3. Submit a tree protection plan to the Environmental Planning staff for approval prior to the release of sediment and erosion control or building permit, as appropriate.

4. Comply with Department of Permitting Services requirements for sediment and erosion control and stormwater management.

5. Replace all trees cleared at a rate of 1:1 dbh (diameter at breast height). Reforestation should occur on site or within the same watershed.

6. Submit a reforestation plan to the Environmental Planning staff.

7. Monopole must be removed at the cost of the applicant when the telecommunication facility is no longer in use by any telecommunication carrier.

8. Coordinate with the Access Permits Section of the Maryland State Highway Administration on the location and specifications for the gravel driveway access from MD 108.

Background

In May of 2001 the Planning Board clarified its policy with respect to the "necessity" of telecommunications facilities, through the recommendation on the cellular monopole case on Brink Road (S-2447). These new interpretations of the standard for "necessity" required proof that alternate technology cannot work, fully substantiated by the Tower Committee; and proof that the level of service desired by the applicant is necessary. These standards were to be most firmly applied when there is citizen opposition to a monopole tower. This application did not meet the test of these standards and the staff recommended denial.

This petition was originally scheduled before the Board on October 11, but the applicant requested a deferral after the report was issued, and the hearings before the Planning Board and Hearing Examiner were rescheduled. No further materials were received from the applicant until November 8, when the applicant delivered a letter to the Planning Board in response to the May 2001 policy clarification and the October 5 staff report.

Essentially, this letter (attached) refuted the legal authority of the Planning Board's clarification of policy in their May 2001 letters to the Board of Appeals and the Tower Committee. However, the content of the letter did not impact or change the recommendations of the staff report for denial of the proposed use. At the November 15 Planning Board meeting the applicant, at the request of the Planning Board, requested a further postponement to allow time for the Planning Board to consider the applicant's November 8 letter.

On January 3, 2002, the Planning Board further clarified its position on monopoles and has now determined that proof that alternate technology cannot work, substantiated by the Tower Committee, is not required; and that standards are to be uniformly applied whether or not there is citizen opposition to a monopole tower. Further, the Board has determined that height is not to be considered an "inherent" characteristic of a cellular tower application, as height can vary considerably. [A copy the letter sent to the Board of Appeals and the Tower Committee on January 29, 2002 outlining these revised standards is attached to this report.]

On January 4, the staff revised the report in accordance with the clarification of standards, and the recommendation was changed to approval of the application. This case was to have been heard at the January 10 meeting of the Planning Board. However, because the revised standards had not been sent out in writing, allowing the residents in the area of the proposed use to review them before the hearing, the Planning Board requested that this case be deferred again. The case was rescheduled for February 7, 2002 before the Planning Board.

In addition to these revised standards, on January 25, 2002 the staff received a copy of a recent opinion of the Board of Appeals regarding a cell tower case that impacts this application. In the case of application S-2447 (the cell tower on Brink Road heard by the Planning Board in May 2001) the reason used to dismiss that application by the Board of Appeals (without a public hearing) was a change in existing policy regarding the size of land required for such a use. [A copy of that resolution is attached.] That opinion, in essence, requires a cell tower applicant to be in control of an area of land such as is required for the building of a single family home in the applicable zone. On advice from legal counsel, the staff has also used that new interpretation as a basis for review of this application.

PROJECT DESCRIPTION: Surrounding Neighborhood

The subject site is located in the Agricultural Reserve, and surrounding properties are in open field or forest and single-family homes in the RDT and R-200 Zones. To the west along Hawkins Creamery Road, and to the south along Laytonsville Road are scattered homes on large lots interspersed with fields and forest in the RDT zone. To the north along Laytonsville Road in the Etchison community there are a number of homes on smaller lots in the R-200 Zone, and two new homes along Hipsley Mill Road between Laytonsville Road and MD 650 (Damascus Road) in the RDT Zone. The location is also just to the north of the Davis General Aviation Airport. The proposed monopole would be located approximately 312 feet from Laytonsville Road, and approximately 400 feet from

the nearest residence. The monopole will be visible to the surrounding community although the equipment area would have limited visibility.

PROJECT DESCRIPTION: Site Description

The subject property is known as the "Barnhart" property. It is identified as Parcel 666 on Tax Map GW42 and located in the RDT Zone. The property contains 175 acres, divided by Hawkins Creamery Road and Laytonsville Road. The portion of the property that contains the site is at the northwest quadrant of Hawkins Creamery and Laytonsville (MD 108) Road and contains approximately 23 acres. The facility is proposed to be located within a forested area in the northern portion of the property in a clearing. There is no setback less than 214 feet from any property line, and the proposed site is approximately 400 feet from the nearest dwelling. The closest dwellings are approximately 400 feet to the north, 500 feet to the east, 600 feet to the southeast, 800 feet to the west, and 800 feet to the northeast.

PROJECT DESCRIPTION: Proposal

The applicant, AT&T Wireless Services, has requested a special exception to construct a telecommunications facility on this property within the RDT zone. The proposed facility consists of a 134-foot tall monopole with 12 panel antennas, and an equipment shelter measuring 12 by 28 feet. The monopole will taper from approximately 4 feet wide at its base to approximately 2 feet wide at the top. The antennas will be at the top of the pole. The panel type antennas measure 51 inches long, 6 inches wide, and 2 inches deep. There will be three groups of four antennas aligned in a triangular configuration. The monopole design will allow for co-location of two other carriers.

The equipment shed will be 11 feet tall and located near the base of the monopole. The monopole and equipment shed will be enclosed in a 60 by 60 foot compound area secured by an eight-foot high chain length fence. The base of the monopole and compound area will be screened from view by a surrounding grove of trees. Visual impact will be further mitigated by the setbacks and additional landscaping as indicated in the submitted site plan. Proposed setbacks from the property line are 376 feet to the north, 312 feet to the east, 1151 feet to the south, and 214 feet to the west, all exceeding the 134-foot minimum setback requirement.

The site will be accessed from Laytonsville Road via a proposed 8-foot wide gravel drive. In the ordinary operation of the facility there will be visits one to two times per month to check or repair the equipment. The only utilities required will be electricity and land telephone lines.

The stated purpose of the facility is to enable AT&T to provide more complete coverage for the customers of its cellular telephone network, as it is obligated by its FCC license. This tower is to provide coverage along Laytonsville Road, Hawkins Creamery Road, Route 650, and the surrounding area. This site was also selected to provide handoff of signals to adjacent sites to provide coverage in the upper Montgomery County area, in order to preclude dropped calls for AT&T customers traveling in those areas.

ANALYSIS

Tower Committee Recommendation

The applicant, AT&T has been working with the Tower Committee on this application since April, and the Tower Committee reviewed their request on September 19. At that meeting AT&T was requested to consider relocating the tower to a less visible location on the property and to report back to the Committee at a special meeting on October 3. The Tower Committee's report from the October 3 meeting (attached) recommends approval of the application with an adjustment to the height, and a location adjustment so that the equipment area is in a more visually sheltered location. That report states that they found no possibility of co-location with any existing monopole facility.

Further, at the request of the Planning Board, the Tower Committee also evaluated the potential for the applicant to use alternate technology. The Tower Committee determined that the use of such technology did not provide adequate signal handoff or continuous coverage along the main roads.

In lieu of the use of alternate technology, the Tower Committee recommended that the applicant consider working with the residents of the surrounding community to develop a mutually agreeable disguised tower design as has been used elsewhere. A Tower Committee representative has been asked to attend the Planning Board meeting.

Community Concerns

A number of area residents object to this application. Most of the objections relate to the visual nature of the proposed use – its height the utilitarian metal structure above the tree line. The letters that have been received are attached. Those contacting the staff have stated numerous reasons for their objection to the tower including proximity to the airport, visual incompatibility, and health concerns.

Regarding the proximity to the Davis Airport, as a part of this review, the Tower Coordinator visited the airport and interviewed a pilot who stated that the location was not on the direct approach to the runway, and there were no instrument or night landing at this airport, so

the monopole should not be too much of a problem for pilots using the airport. However, in June the Tower Committee received letters from the Aircraft Owners and Pilot Association (AOPA), an area pilot, and the Experimental Aircraft Association (EEA) expressing objection to the monopole, claiming it posed an obstruction to accessing the airport at the originally proposed 150 feet. Also, the Maryland Aviation Administration (MDAA) in a May 24, 2001 letter to the applicant stated that the monopole at the originally proposed 150-foot height would create an unsafe situation.

In response, AT&T revised their application to reflect a 16-foot shorter monopole (134 feet), as requested by the MDAA on the advice of the Federal Aviation Administration (FAA). The July 3 letter from the MDAA to the applicant (attached) states: *"By reducing the height of the proposed tower from 150 feet to 134 feet mean sea level, and no longer infringing on the Horizontal Imaginary Surface of Davis Airport, American Tower Corporation would not be in violation of The Code of Maryland Aviation Regulations (COMAR) Chapter 5, Section 11.03.05.4(A)(2). Therefore, the Maryland Aviation Administration (MDAA) has no objection to the construction of the proposed tower at that reduced height."* The applicant discussed with Tower Committee the impact of this reduction on the effectiveness of the monopole.

The Planning Board has stated previously that they do not allow consideration of health concerns, due to Federal Telecommunications Act statutes that preclude the consideration of health issues raised as a part of cellular monopole applications. In addition, the Planning Board has had a policy of deferring to the FAA on airport safety issues. Therefore, the staff did not consider the issues raised by the EEA and the AOPA in reviewing the application.

However, a recent letter from the EEA (attached) again requests that the Planning Board consider technical aeronautical factors beyond the FAA determination and find the proposed cell tower unsafe. Also, the applicant has submitted a subsequent letter affirming the FAA as the authority in such cases (attached). The staff does not have the expertise to evaluate the information submitted from the EEA. If the Board should wish to consider this testimony an expert in aviation may have to be retained to provide an informed evaluation of whether an FAA and MDAA determination of safety is insufficient.

The staff has also received a letter in general support of cellular towers in the RDT Zone from the Chairman of the Montgomery County Agricultural Advisory Committee. That attached letter states that cell tower uses are often very helpful for farmers, giving them supplemental income and thus enabling them to remain in the business of agriculture. It further states that cell towers in no way hinder agricultural operations or impede the purpose of the RDT Zone to support agriculture.

Master Plan

The Functional Master Plan for the Preservation of Agricultural and Rural Open Space is silent on special exceptions. The RDT Zone allows public utility structures by special exception. As a general use category, cellular monopoles do not cause negative impact on agricultural uses, which are the preferred use in the RDT zone; and in fact are generally supported by the agricultural community, which can derive important auxiliary income for farming operations.

Transportation

There are no significant transportation issues related to this type of special exception since there are no on-site personnel and require only periodic visits to check or repair the equipment. Access to the site will be via a gravel driveway from Laytonsville Road, which is classified as a major highway in the Preservation of Agriculture and Rural Open Space Master Plan. Because right-of-way width is not recommended in the Master Plan; the recommended width is 120 feet per Section 50-26 of the Montgomery County Code. Because subdivision is not required, no right-of-way dedication is required.

The proposed facility is expected to generate approximately two trips per month for routine maintenance or emergency repair. Under the LATR Guidelines such as use is considered de-minimis and no traffic impacts are anticipated. Therefore no traffic study is required. Also, because the facility is located in the Rural Policy area, no staging ceiling is established for this area.

Environmental

The Environmental Planning staff does not support the revised location for this monopole tower and compound because it will result in the clearing of 3,600 square feet of high quality, maturing, upland forest. Staff recommends that the monopole compound be placed 100 feet to the south, as originally requested, into the already cleared area. If the tower is built, the following conditions are recommended:

> Applicant to submit tree protection plan to the Environmental Planning staff for approval prior to the release of sediment and erosion control or building permit.
>
> Applicant to comply with Department of Permitting Services requirements for sediment and erosion control and for stormwater management.

Forest Conservation - The applicant proposes clearing of 3,600 square feet of high quality, maturing forest without the mitigation required under the forest conservation law. This application is exempt from the Forest Conservation Law (#4-01319E) under the Small

Property exemption criteria.

The dominant species of trees within this high quality forest are oak and hickory. Invasive species are absent from the interior of the forest but are found along the edges of the forest. Clearing any portion of this forest will disturb a portion of the interior of the forest resulting in what is termed the "edge effect." This occurs when forest is removed, converting the previous interior forest to an edge forest. These trees are then subject to significant die back. In addition, existing invasive species thriving on the edge now move in to the newly created edges of the forest and could possibly invade the interior forest.

Specifically, clearing will result in the removal of a specimen tree (30" red oak) and four moderately size trees between 12" and 14" dbh in addition to many seedlings. If the compound is approved within the forested area the following condition is recommended:

> Replacement of all trees cleared at a rate of 1:1 dbh (diameter at breast height). Reforestation should occur on site or within the same watershed. Applicant to submit a reforestation plan to the Environmental Planning staff.

If the compound is approved in the already cleared area staff recommends that the applicant be required to provide adequate fencing and vegetative screening around the equipment compound to shield it from the view of those driving on Route 108.

Stormwater Management - The site is located in the headwaters of the Upper Hawlings tributary of the Hawlings River watershed, part of the Patuxent River Primary Management Area (PMA). The *Countywide Stream Protection Strategy* (CSPS) assesses Upper Hawlings tributary, Use IV-P, as having good stream conditions and good habitat conditions, labeling it as an Agricultural Watershed Management Area. Preservation of forests within the PMA is especially important as forests play an essential role in filtering drinking water sources.

In addition, the applicant must submit a stormwater management concept plan to the Department of Permitting Services, as land disturbance will exceed 5,000 square feet (compound and driveway). Since construction of the monopole occurs within a Use IV watershed and the PMA, both water quality and quantity control are expected.

Required Findings for Special Exception

As outlined in the attached full review, the application meets all standards for a telecommunications public utility use in the zoning ordinance. Three standards are particularly difficult to evaluate, but the staff believes that in the absence of more

substantive evidence from those objecting to the monopole tower, the proposed use is in compliance. These standards and the staff evaluation include:

General Condition 59-G-1.2.1(a)(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 cellular monopole use is never in harmony with the general character of a surrounding area because of its tall visual character, which is a required, although not inherent (as determined by the Planning Board), element of the use necessary for it to perform its function. However, the Tower Committee has determined that the requested height is necessary for the monopole to function properly and thus the staff believes that it is no less harmonious at this location than at other locations in the vicinity that are available to the applicant.

59-G-2.43(a)(5) - Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood; and will cause no objectionable noise, vibrations, fumes, odors, dust, glare or physical activity.

This use will have a visual impact on the surrounding neighborhood but will not cause objectionable noise, vibrations or other detrimental physical activity. It will not be detrimental to the use of surrounding properties, but it may disturb peaceful enjoyment and economic value of neighboring properties due to its intrinsic nature of being tall and visible. However, no substantive evidence of detriment to economic value has been submitted, and no quantifiable evidence of loss of peaceful enjoyment has been submitted.

The staff believes that these elements are an intrinsic impact of the use that would be present wherever a tower is placed in proximity to residences; and that the Planning Board has previously required substantive and quantifiable evidence of diminution of economic value and loss of peaceful enjoyment to meet a regulatory test of such loss. No such substantive and quantifiable evidence has been submitted.

59-G-2.43(a)(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.

Because of its height, the use will have a visual impact, but it will not endanger the health and safety of area residents, although it may have the potential to impair or prove detrimental to neighboring properties in some aspects. However, the 134-foot height has been determined necessary for the use by the Tower Committee, and some detrimental impact is inevitable wherever a monopole is sited near residential uses (and often they must be sited near residential uses in order to provide the service they are required to provide to their customers). Therefore, the Planning Board has previously established that

quantifiable evidence of substantial impairment and detrimental effect is necessary to meet a regulatory test of such loss. As no such evidence has been submitted, the staff does not believe that such detrimental impact has been proved.

Lot Size Issue - In addition, as noted earlier, the staff evaluated this application for its compliance with the minimum lot size requirement set in the Board of Appeals resolution regarding case S-2447. This determination related to condition 59-G-2.43(j)(1) which states: *The minimum parcel or lot area must be sufficient to accommodate the location requirements for the support structure under Paragraph 2, excluding the antennas, but not less than the lot area required by the zone.* The Board now interprets this to mean that the minimum net lot area for a single family dwelling in the zone must be met; which would be 40,000 square feet for the RDT Zone.

The application for a 60x60 foot (3,600 sf) compound, as has been a standard size in most cell tower monopoles in the past, does not meet this new interpretation of required lot size. However, in a very recent case (S-2479) this lot size requirement issue was resolved via a suggestion from the Hearing Examiner that the property owner become a co-applicant in the case. Therefore, in order to comply with the lot size requirement, the applicant is submitting a letter from the property owner that will similarly make him a co-applicant. Because this methodology has been accepted by the Board of Appeals and the Hearing Examiner, the staff believes it is sufficient to meet the lot size requirement

Inherent and Non-Inherent Effects

Section 59-G-1.2.1 of the Zoning Ordinance (Standard for evaluation) provides that:

"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 the inherent effects, are a sufficient basis to deny a special exception."

The staff standard for previous cellular monopole applications has been that their only significant inherent effect is that the support towers for the antenna are very tall (because they must be substantially above the treeline to be technically effective) and thus very

visible. The mechanical equipment is located within small buildings in fenced compounds that can be easily screened by vegetation, they rarely require employee visits, and are accessed via a standard driveway. However, because of the necessity of the monopole, they have a negative visual impact - especially in areas of residential use. Given this unavoidably intrusive visual nature, the object in finding sites for these towers is to find a location which best balances the need to provide service with a location that offers the least visual intrusion upon the fewest area residents – and that the property owner is willing to lease.

However, the Planning Board has now classified tower height as a non-inherent characteristic for purposes of 59-G-1.2.1. This means that the Board believes that height is not a physical characteristic necessarily associated with the use. 59-G-1.2.1 states that non-inherent adverse effects, alone, are a sufficient basis to deny a special exception. Thus, if the tower height has a sufficiently adverse effect on the surrounding area, that characteristic alone is sufficient to deny the tower.

The staff does not believe there to be any significant non-inherent effects for this use other than height because the level of use anticipated will not impact the rural/residential character of this area other than the unavoidable visual impact. The size of the property and infrequency of maintenance access indicate a use with little potential for inherent or non-inherent effects or impacts – beyond height. Therefore, the only remaining issue is whether the tower height of 134 feet has a sufficiently adverse effect on the surrounding area to necessitate the denial of the tower.

CONCLUSION

This application meets the requirements for the use. There is not a conflict with the Master Plan, the Zone, or transportation issues. The Historic Preservation staff has stated there are no designated historic sites in the vicinity. The Federal Aviation Administration has ruled that the site meets their standards. The environmental concerns are valid, but in the interest of better visual protection of the neighborhood, the staff concurs with the Tower Committee that allowing the relocated site located in a small grove of trees is more important than a strict interpretation of forest conservation concerns.

However, as previously stated, the Planning Board has clarified its policy with respect to cellular monopoles and the legal staff concurs with the legal validity of the Planning Board's policy. Thus, in evaluating this application the staff honors the Planning Board clarification, which differs from previously accepted interpretations of the requirements for the use in the zoning ordinance and past standard practice.

The Planning Board stated in their May 21 letter to the Board of Appeals that because cellular towers are very visually intrusive in rural and residential communities, they pose substantial visual and economic burden and are detrimental to the visual environment - and therefore there must be a very compelling reason to allow them.

In their clarification of policy, the Planning Board determined that height is not to be considered an "inherent" characteristic of a cellular tower application, as height can vary considerably. As noted previously, if height is not to be considered an intrinsic (or inherent) characteristic of a monopole tower, then the negative or adverse impact of height becomes a far more important issue. The essence of all monopole objections is visual. They are tall, metal utilitarian structures, which is why people do not want to have to look at them.

As a non-inherent characteristic, the level of proof of detrimental impact is lower, but no firm standard of evaluation exists as a guide for determining detrimental impact. However, the Planning Board has made it clear that the protection of the visual integrity of a surrounding community is to be considered more important than the ability of cellular phone customers to have full use of their phones for business, personal, or emergency uses. The staff must weigh the visual impact on the surrounding area against the FCC mandated right of the cellular telephone companies to conduct their business and provide service to their customers.

In this instance the staff believes that the only substantive remaining issue surrounding this applications is the concerns of area residents who object vigorously to the tower because of its visibility.

- There are those who use the Davis Airport who still object for safety reasons despite the MDAA and FAA approval, but FAA and MDAA approval are the standard that is used.

- There are area residents who fear the health impacts of the tower, but FCC statutes have precluded the evaluation of this element.

- There are those who object because of potential visual threat to potential historic sites, but there are no currently designated historic sites.

- There are no transportation conflicts with the proposed use.

- The environmental concerns can be fully overcome by placing the monopole in the open field, but the staff believes the visual integrity of the surrounding area

will be better protected by placing the compound somewhat within the forested area on the site.

- There are those who object on the basis of what they perceive to be conflict with the master plan, but the preferred use in Agricultural and Rural Open Space Master Plan and the RDT Zone is agriculture, and agriculture is not harmed by monopoles; and in some instances is helped to continue through the supplemental income that monopoles provide to farmers. Therefore the staff believes that there is not a conflict with the intent of the master plan.

- There are those who object because they believe that the monopole will detract substantially from their property values and will result in loss of peaceful enjoyment of their property. However, in reviewing the general and specific special exception standards, the staff concluded, on the advice of legal counsel, that no substantive and quantifiable evidence of specific harm to economic value or loss of peaceful enjoyment has been submitted. There are the statements of area residents, but no expert reports or other evidence submitted, as was used as a basis for denying the Brink Road monopole case.

- And finally, the staff is left with the necessity of determining whether the "non-inherent" height of the tower is a sufficiently detrimental impact to necessitate a recommendation of denial. As with the loss of economic value or peaceful enjoyment stated above, the staff has received no substantive or quantifiable evidence of loss beyond statements of area residents. In the absence of such level of evidence, the staff does not believe the height in and of itself warrants a recommendation of denial since the Tower Committee has found that the submitted height is technically warranted.

Therefore, because there is no evidence of detrimental effect other than statements of objecting area residents, and because some elements of their objections to the tower are not admissible due to FAA authority and FCC statutes, and because the application fulfills all other standards for review - the staff, in accordance with the review standard set by the Planning Board – recommends **APPROVAL** of this application with the conditions stated at the beginning of this report.

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Attachments

General Conditions

Sec. 59-G-1.21 of the Zoning Ordinance (General Conditions) provides:

(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 use is so allowed in the RDT Zone.

(2) Complies with the standards and requirements set forth for the use in division 59-G-2.

The use complies with these standards as noted below.

(3) Will be consistent with the general plan for the physical development of the district, including any master plan or portion thereof adopted by the Commission.

The proposed use is not inconsistent with the Master Plan for the Preservation of Agricultural and Rural Open Space (AROS). Although visually intrusive (an intrinsic characteristic of the use) the proposed use is allowed by special exception in the zone, and the AROS Master Plan is silent in regard to special exceptions. In some ways this type of use furthers the purpose of the Rural Density Transfer Zone by providing auxiliary income for farmers, enabling them to remain in agricultural production. The towers do not in any way inhibit farming, which is the preferred and intended use for this zone.

(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 cellular monopole use is never in harmony with the general character of a surrounding area because of its tall visual character, which is a required, although not inherent (as determined by the Planning Board), element of the use necessary for it to perform its function. However, the Tower Committee has determined that the requested height is necessary for the monopole to function properly and thus the staff believes that it is no less harmonious at this location than at other locations in the vicinity that are available to the

applicant.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood; and will cause no objectionable noise, vibrations, fumes, odors, dust, glare or physical activity.

This use will have a visual impact on the surrounding neighborhood but will not cause objectionable noise, vibrations or other detrimental physical activity. It will not be detrimental to the use of surrounding properties, but it may disturb peaceful enjoyment and economic value of neighboring properties due to its intrinsic nature of being tall and visible. However, no substantive evidence of detriment to economic value has been submitted, and no quantifiable evidence of loss of peaceful enjoyment has been submitted.

The staff believes that these elements are an intrinsic impact of the use that would be present wherever a tower is placed in proximity to residences; and that the Planning Board has previously required substantive and quantifiable evidence of diminution of economic value and loss of peaceful enjoyment to meet a regulatory test of such loss. No such substantive and quantifiable evidence has been submitted.

(6) Will not, when evaluated in conjunction with existing and approved special exceptions in the neighboring one-family residential area, increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly residential nature.

The use will not create a surfeit of special exception uses in the area.

(7) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area.

The use will not have such adverse affect on the area or its residents.

(8) 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.

The existing public facilities are sufficient for the proposed use. Subdivision is not required.

Special Findings for a Telecommunications Facility

Section 59-G-2.43 of the Zoning Ordinance (Public utility buildings, public utility structures, and telecommunication facilities) provides:

(a) A public utility building or public utility structure, not otherwise permitted may be allowed by special exception. 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 Tower Committee has determined that additional telecommunication service is necessary for public convenience and service as evidenced in their attached report.

(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.

Because of its height, the use will have a visual impact, but it will not endanger the health and safety of area residents, although it may have the potential to impair or prove detrimental to neighboring properties in some aspects. However, the 134-foot height has been determined necessary for the use by the Tower Committee, and some detrimental impact is inevitable wherever a monopole is sited near residential uses (and often they must be sited near residential uses in order to provide the service they are required to provide to their customers). Therefore, the Planning Board has previously established that quantifiable evidence of substantial impairment and detrimental effect is necessary to meet a regulatory test of such loss. As no such evidence has been submitted, the staff does not believe that such detrimental impact has been proved.

(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 proposed use is not in a residential zone. However, the base of the proposed facility will be adequately screened by distance from the property lines, existing and proposed vegetation.

(c) Any proposed broadcasting tower shall have a setback of one foot from all property lines for every foot of height of the tower.

The proposed tower is 134-feet high and its setbacks are significantly greater than the required setback.

(d) 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,...or television transmitter towers and stations; telecommunication facilities.

The proposed use is a telecommunications facility.

(e) 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.

Not applicable for this use.

(f) 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 deem necessary to protect the public health, safety or general welfare.

Recommended conditions are given.

(g) Petitions for special exception may be filed on project basis.

Not Applicable.

(h) A petitioner 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.

Not Applicable.

(i) Any telecommunication 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 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, and visibility from the street.

The proposed tower is located within the RDT zone, which requires a 40,000 square foot minimum lot size. The subject property is 175 acres overall, with approximately 23 contiguous acres at the site location, and the applicant is leasing a 3,600 square foot compound area. However, the property owner is being added as a co-applicant for the proposal, which has been deemed sufficient to meet the lot area requirement by the Board of Appeals.

(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.

The proposed monopole is 134-feet high, and will be setback no less than 214 feet from all property lines. Thus the monopole will satisfy this requirement.

b. In commercial and industrial zones.

Not applicable for this use.

(3) A freestanding support structure must be constructed to hold not less than 3 telecommunication carriers.

The proposed tower is designed to hold three carriers.

(4) No signs or illumination are permitted in the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.

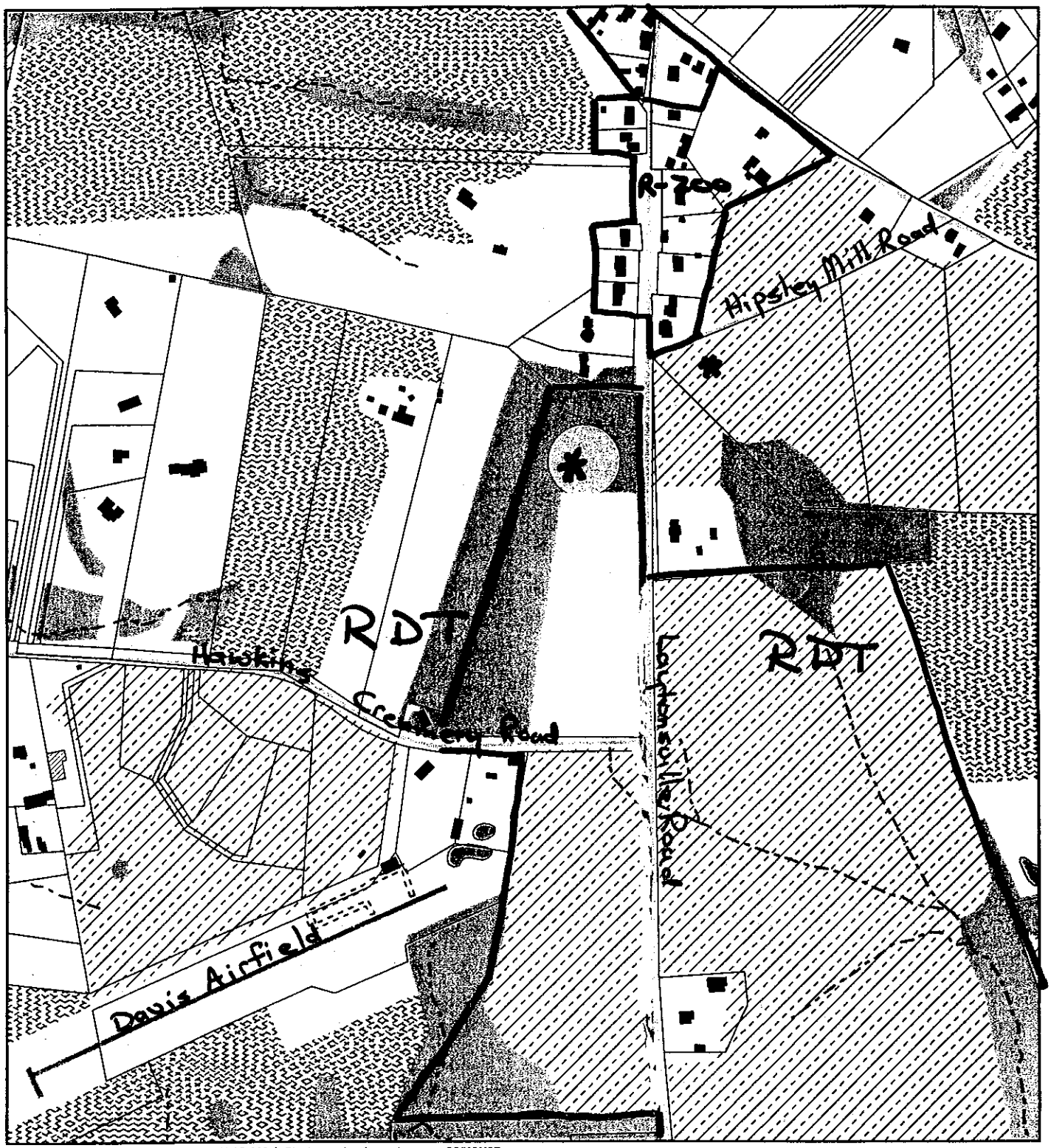
Generally, illumination is only required by the Federal Aviation Administration if the monopole tower is in close proximity to an airport which has night landings or is more than 200 feet in height. Neither is applicable here, as the proposed tower is 134 tall, and the Davis Airport does not have night landings.

(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.

This is a condition of approval.

VICINITY MAP FOR

S-2477 AT&T WIRELESS



Map compiled on September 26, 2001 at 11:02 AM | Site located on base sheet no - 233NW07

Key Map

N

Research & Technology Center

0 600

1 : 7200

M-NCPPC

MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

8787 Georgia Avenue - Silver Spring, Maryland 20910-3760

VICINITY MAP FOR

S-2477 AT&T WIRELESS

Map compiled on September 26, 2001 at 11:08 AM | Site located on base sheet no - 223NW07 | Date of Orthophotos - March 1998 | Orthophoto Images Licensed from VARGIS LLC.

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Property lines are compiled by adjusting the property lines to topography created from aerial photography and should not be interpreted as actual field surveys. Planimetric features were compiled from 1:14400 scale aerial photography using stereo photogrammetric methods.

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Key Map

N

Research & Technology Center

0 600

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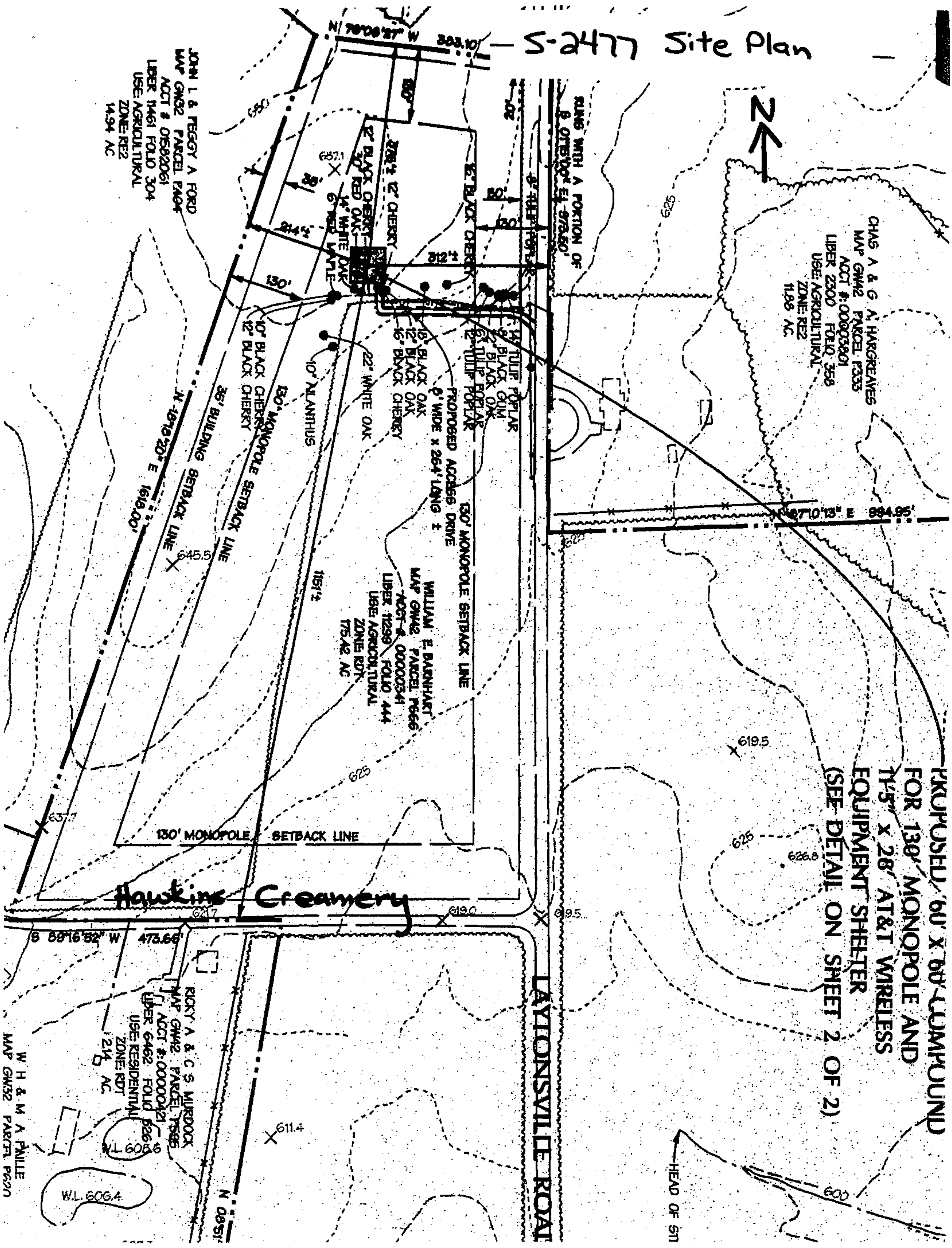
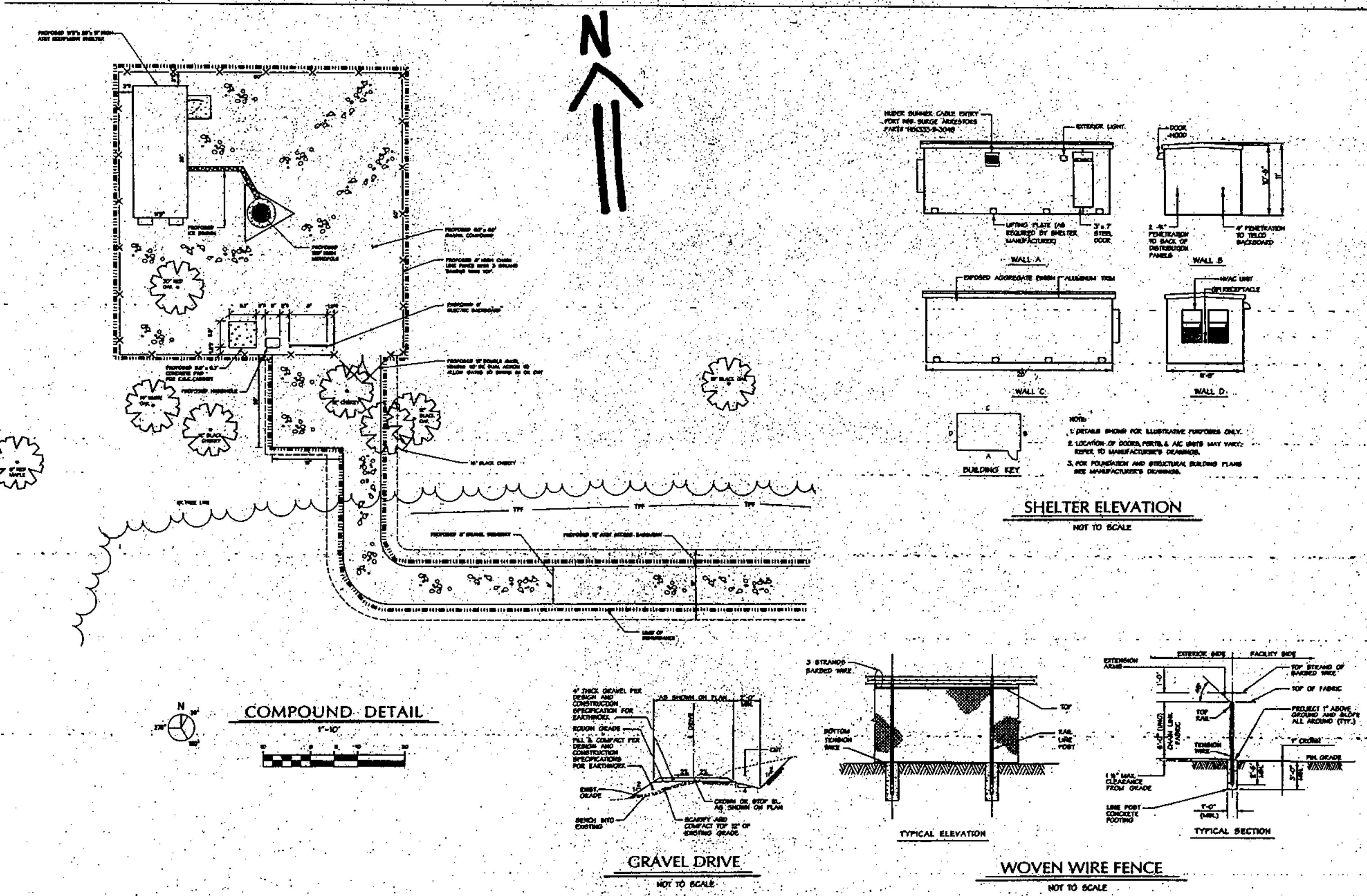
MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
8787 Georgia Avenue - Silver Spring, Maryland 20910-3760


S-2477 Site Plan
N
PROPOSED 60' x 60' COMPOUND FOR 130' MONOPOLE AND 11'5" x 28' AT&T WIRELESS EQUIPMENT SHELTER (SEE DETAIL ON SHEET 2 OF 2)
LAYTONSVILLE ROAD
Hawkins Creamery
HEAD OF ST
CHAS A & G A HARGREAVES
MAP GW42 PARCEL P333
ACCT #: 00003801
LIBER 2300 FOLIO 356
USE: AGRICULTURAL
ZONE: RE2
11.86 AC.
JOHN L & PEGGY A FORD
MAP GW32 PARCEL P404
ACCT # 01592061
LIBER 1461 FOLIO 304
USE: AGRICULTURAL
ZONE: RE2
14.94 AC
WILLIAM E. BARNHART
MAP GW42 PARCEL P666
ACCT # 00003341
LIBER 11299 FOLIO 444
USE: AGRICULTURAL
ZONE: RDT
175.42 AC
RICKY A & C S MURDOCK
MAP GW42 PARCEL P586
ACCT #: 00000421
LIBER 6462 FOLIO 626
USE: RESIDENTIAL
ZONE: RDT
2.14 AC.
W H & M A PAILLE
MAP GW32 PARCEL P620
RUNS WITH A PORTION OF S 07°15'00" E1 373.50'
PROPOSED ACCESS DRIVE 8' WIDE x 264' LONG ±
130' MONOPOLE SETBACK LINE
130' MONOPOLE SETBACK LINE
130' MONOPOLE SETBACK LINE
35' BUILDING SETBACK LINE
N 78°08'37" W 303.10'
N 18°18'20" E 1618.00'
N 87°10'13" E 984.95'
S 88°16'52" W 473.66'
12" BLACK CHERRY
30" RED OAK
14" WHITE OAK
6" RED MAPLE
12" CHERRY
12" BLACK CHERRY
8" TULIP POPLAR
14" TULIP POPLAR
12" BLACK GUM
12" BLACK OAK
16" TULIP POPLAR
12" TULIP POPLAR
18" BLACK OAK
12" BLACK OAK
16" BLACK CHERRY
22" WHITE OAK
10" AILANTHUS
10" BLACK CHERRY
12" BLACK CHERRY
378'±
312'±
214'±
1151'±
130'
130'
50'
35'
20'
180'
625
650
600
687.1
645.5
637.7
621.7
619.0
619.5
619.5
626.8
611.4
W.L. 608.6
W.L. 606.4

S-2477 Site Plan



DMW
A Team of Land Planners, Landscape Architects, Golf Course Architects, Engineers, Surveyors & Environmental Professionals

SITE PLAN TO ACCOMPANY APPLICATION FOR SPECIAL EXCEPTION

AT&T
AT&T WIRELESS SERVICES, INC.

AMERICAN TOWER

BARNHART PROPERTY
W237.3

01039.MB
2 OF 2

MONTGOMERY COUNTY, MARYLAND
TOWER COORDINATOR
RECOMMENDATION

NOV 20 20[illegible]

APPLICATION NUMBER: 200105-01 DATE: 26 April 2001
Revised October 1, 20001

Application Information:	
Applicant:	AT&T Wireless
Description:	Construct a new 134' monopole.
Site Location:	Barnhart Property Hawkins Creamery Road & Laytonsville Road, Gaithersburg
Property Owner:	William E. Barnhart

Classification in accordance with Zoning Ordinance: RDT

Private Property:	☒	By right:	☐	Special Exception:	☒
Public Property:	☐	By right:	☐	Special Exception:	☐
				Mandatory Referral:	☐

Impact on land-owning agency: N/A

Existing or future public safety telecommunications facilities and plans: None

Co-location options: We conducted a site visit of the Barnhart property and found that there were no existing structures in the immediate vicinity which could accommodate AT&T's antenna array. A review of the TTFCG database revealed that the nearest PEPCO transmission facility was 1.3 miles away. On May 9, we requested that AT&T provide RF propagation maps from that location (PEPCO Pole 57-R). In its reply of June 10, AT&T submitted an RF map which showed that Pole 57-R was too far to the east to provide adequate handoff of calls to the existing AT&T antennas to the south. We concur with that conclusion.

Once constructed, this monopole would provide an opportunity for other carriers to co-locate antennas on this structure, although a review of the carriers' annual plans do not show other carriers currently planning to deploy antennas in this area.

In reviewing this application in conjunction with the application for a monopole at the Stanley property to the north, we asked AT&T to consider a combination of attaching antennas to two PEPCO poles (Pole #40 or #49 and Pole #57) and an existing church steeple to the northwest of the Stanley property as an alternative to erecting two new monopoles at the Stanley and Barnhart properties. AT&T provided additional RF propagation information which demonstrated that the combination would not work to complete adequate signal handoff with the proposed site in Damascus, the existing site south of the Stanley property, and continuous coverage along the main roads not presently covered by AT&T service. We concur with that conclusion.

Implications to surrounding area:

Attachments: Application and request for information, AT&T replies, and Special Exception Request #SE-2477.

Comments: This application, submitted April 25, is to provide coverage along Laytonsville Road, Hawkins Creamery Road, Route 650, and the surrounding area. AT&T reports that this site was also selected to provide handoff of signals to adjacent sites to provide coverage in the upper Montgomery county area, in order to preclude dropped calls for AT&T customers traveling in those areas.

On May 4, AT&T provided RF propagation maps showing the gap in coverage, the expected coverage provided by the Barnhart site to fill in those gaps, and the expected links with existing sites to the south and west, and links to proposed sites to the north at the Stanley property, an additional application submitted by AT&T concurrently with the Barnhart site.

On May 9, we asked AT&T to provide the distance to the nearest residences at this location, and if FAA clearance was required at this site. AT&T responded that the nearest residence (Copeley) was over 500' from the proposed monopole location. AT&T also reported that an FAA clearance was being pursued for this location. On June 8, AT&T reported that American Tower Corporation had received a letter from the Maryland Aviation Administration declaring that the facility would violate the horizontal service of Davis Airport by 16'. AT&T provided a copy of that letter, which is attached to this recommendation.

At the time of the initial site visit, the Tower Coordinator also noted the proximity of the monopole to the Davis Airport. Upon visiting the airport, the tower coordinator interviewed a pilot who stated that since the monopole was not on the direct approach to the runway, and there were no instrument or nighttime landings, he did not believe the monopole would pose much of a problem for pilots using the Davis Airport. On July 9, we were also provided copies from the Aircraft Owners and Pilot Association, Bob Warner, Noel Mitchell, and Randy Hanson, all expressing objection to this monopole, claiming it poses an obstruction to accessing the airport.

On September 4, AT&T submitted a letter advising that the FAA determined that by reducing the monopole height to 134', the previous objections by Maryland Aviation would be mitigated. A copy of that letter is attached to this recommendation. AT&T requested that this application be amended to show a monopole height of 134'.

On July 12, we were also advised by Jane King, a resident of Etchison, that she and others in the community, were eager to know of activity on this application. Ms. King requested that we advise her of when the TTFCG would consider this application, which we have done.

At the September 19th meeting of the TTFCG, the application was reviewed and in response to questions, the meeting was closed so that the AT&T representatives could review their confidential RF maps with the members and the resident who raised questions about the coverage. The TTFCG requested that AT&T reconsider the placement of the tower on the property and report back to the group at a special meeting on October 3, in time for action by the TTFCG on this application prior to the scheduled date for the Planning Commissions review of the Special Exception.

Tower Coordinator Recommendation: Recommended: ☒
Not recommended: ☐

Signature 10/2/01
Date

Excerpts from September 19, 2001 TTFCG meeting minutes

Action Item: AT&T Wireless application to construct a new 134' monopole on the Barnhart property located at Hawkins Creamery Road and Laytonsville Road in Gaithersburg (Application #200105-01).

Bob Hunnicutt stated that the recommendation for this application was written to provide more information for the Park and Planning Commission, as requested. He asked the members to take a moment to review the extensive comments before Julie Modlin summarized the application.

Rey Junquera asked if the FAA issues had been resolved. Bob Hunnicutt explained that they had, despite the somewhat confusing way in which the recommendation text explained it. Mr. Hunnicutt apologized for the confusion, noting that the paragraph was out of order.

Ms. Modlin summarized the application, and noted that this site was linked to another AT&T site, the Stanley property, which will be coming before the TTFCG for review in the near future. She stated that in reviewing this application, the Tower Coordinator looked at a number of different RF propagation maps, including ones using existing PEPCO facilities, and RF analysis for the proposed monopole at the lower elevation. She noted that the alternatives did not provide the desired coverage in the service area and would complicate signal handoffs from the existing antennas to the south and to the proposed site at the Stanley property. Ed Donohue mentioned that the Stanley site application had been postponed for review by the Park and Planning Commission until November. He also noted that the Park and Planning Commission hearing on this application was scheduled for October 11, 2001.

Jane Lawton asked if drive tests had been conducted. Bob Hunnicutt replied they had not been done for this site.

Dave Niblock asked for clarification that the FAA did approve the monopole at the 134' height. Julie Modlin stated that it had and that RF maps for that lower elevation had been submitted and reviewed. In response to questions, Ms. Modlin stated that the Tower Coordinator does not generate the RF maps but requests that the carriers generate the RF models and provide the results to the Tower Coordinator for review.

Mark Nelligan, an Etchison community resident, stated that he had spoken with a number of pilots from the nearby airport that expressed a desire to have a light placed on this monopole. He asked if a light was presently proposed for this structure. Willem Van Aller stated it probably was not proposed, because if a structure is under 200' it is not required to have a light. Ed Donohue stated that the carrier would light the monopole if the County wanted it, but neither the FAA nor the Maryland AA require one. Rey Junquera stated he did not think we should endorse the lights because they are objectionable to residents.

Jane Lawton asked why the monopole could not be located nearer to the wooded area of the property to better conceal the structure from the community. Ed Donohue stated in order to do that, they would have to cut down trees in the area. Ms. Lawton stated she thought it would be

appropriate for the monopole to be farther into the woods and that it should also utilize a tree monopole design.

Mr. Nelligan asked why AT&T could not use the PEPCO facilities approximately one mile away. Julie Modlin replied that the PEPCO facilities were one of the alternate sites investigated by the Tower Coordinator, and one for which they had requested additional RF propagation maps.

Mr. Nelligan stated that area residents presently have satisfactory service with Verizon Wireless and Cingular, and although he did not know where their antennas were, he was sure there were other existing structures which could be used in lieu of this new monopole. He added that he was not comfortable with the fact that the TTFCG relies on the carrier's RF propagation maps and does not conduct an independent RF analysis as part of our review. He commented that he was not convinced that this site was necessary.

Bob Hunnicutt explained that Ed Donohue had offered to meet separately with Mr. Nelligan and other area residents to privately review AT&T system design and the RF propagation maps they had submitted to the County as confidential information. In response to a question of whether the Tower Coordinator considered the coverage by other carriers in the area, Mr. Hunnicutt replied that coverage by other carriers is not part of the application review process for an application. He noted that only the coverage needs of the applicant are considered.

Jim Michal commented that the carriers do not construct new towers if there are other existing structures nearby to which they can attach their antennas because of the excessive cost and burden on the carrier to go through the process of siting a new facility in the community. He added that each carrier has a different business plan and different coverage requirements.

Julie Modlin stated that the Tower Coordinator could review other information we may have regarding other carriers' service in the area. Jane Lawton stated she was not satisfied with the engineering review on this application.

Tom King asked the Tower Coordinator if they conducted a site visit to look for alternative existing structures. Bob Hunnicutt explained that they conduct a site visit, they drive the surrounding area, and, in addition to a database search, perform a visual survey of the general vicinity to look for alternate existing structures. He added that the survey includes looking for existing structures like silos, power company utility poles or transmission lines, church steeples, and other tall buildings that may be present. Julie Modlin added that, in this case, there were no other tall structures nearby except the PEPCO transmission lines, which we investigated and found them not to meet coverage requirements.

Mr. Nelligan stated he was still skeptical because the industry provides the RF maps. Ms. Lawton stated that while his belief that the monopole is unnecessary may be genuine, County law does not prohibit the Special Exception process for siting facilities in this zone.

The Tower Coordinators were asked if they could generate independent RF propagation maps.

Ms. Modlin explained that they could if they had the software and had all of the detailed information regarding the carriers' networks, such as the engineering details of the transmitters, antennas, phones, etc. She said that there were a number of different RF software packages on the market ranging in price from $3,000 to $20,000 and she noted that the carriers use a variety of software to generate their RF propagation maps.

Bob Hunnicutt added that in analyzing a carrier's RF maps, if there are aspects that seem out of the ordinary to the Tower Coordinators, they question the RF results, and in some cases, ask for additional information or additional RF maps. He stated that they look for consistency in the maps, and in some cases, they even compare them for accuracy to maps that have been provided for related sites that have been previously reviewed for other applications. He noted that if there are questions about the powering, the elevation, or other such factors used in the modeling process, the Tower Coordinator asks the carrier for clarification. He noted that if the group wanted the Tower Coordinator to generate RF maps, the additional cost to the County was not just related to the cost of the software but to the additional time it takes to load the programs, run the models, and perform the analysis. Michael Ma stated it might not be necessary to do that for each application, but only for applications to construct a new facility.

Mr. Nelligan asked if it mattered how high the structure was, because he knew there were some very tall structures in Damascus that could perhaps cover this area. Julie Modlin explained that height was an issue, and that generally, if antennas are at a higher elevation they can cover a larger area, but a limiting factor was the low power of the handset, which could not be too far away from the receiving antenna or the system would not work properly. The AT&T engineer agreed with Ms. Modlin.

In response to Mr. Nelligan's request, Jane Lawton suggested that the meeting be closed to the public, except for Mr. Nelligan, so that AT&T could provide a more detailed explanation of its network and service in this area.

The meeting was closed to discuss AT&T's confidential design materials for the Barnhart property application.

A special TTFCG meeting to only discuss the AT&T/Barnhart property application is scheduled for October 3, 2001 at 2:00 p.m. in the Consumer Affairs Conference Room #225 of the COB.

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MONTGOMERY COUNTY, MARYLAND TELECOMMUNICATIONS TRANSMISSION FACILITY COORDINATING GROUP RECORD OF ACTION

APPLICATION NUMBER: 200105-01 DATE: 19 September 2001

Application Review:	
Applicant:	AT&T Wireless
Description:	Construct a new 134' monopole.
Site Location:	Barnhart Property Hawkins Creamery Road & Laytonsville Road, Gaithersburg
Property Owner:	William E. Barnhart
Tower Coordinator Recommendation:	Recommended: ☒ Not recommended: ☐
Land-owning Agency input:	Attached: Yes ☐ No ☐
Group Comments: The TTFCG, at a special meeting held to conclude the review of this application voted to recommend the application as shown on the revised site plan placing the monopole 100 feet into a wooded area and with an understanding that AT&T would discuss with the interested residents, the opportunities for camouflaging the monopole.	

Vote on recommendation of approval: For: 4 Against: 0 Abstain: 0

Results: Recommended ☒ Not recommended ☐

Jane E. Lawton/awn 10/8/01

Chairman Signature Date

10/8/01

Tower Coordinator Signature Date

NOV 20 2001

EXHIBIT NO. 5(a)

CASE NO. S 24

MONTGOMERY COUNTY CONSUMER AFFAIRS

DEPARTMENT OF INFORMATION SYSTEMS AND TELECOMMUNICATIONS

Douglas M. Duncan
County Executive

Donald V. Evans
Director

MINUTES OF TTFCG MEETING

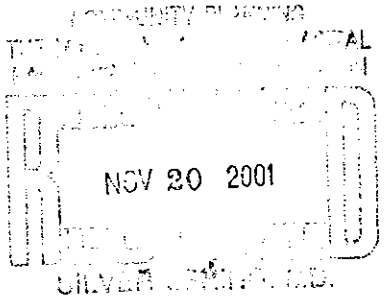
To: Distribution
From: Bob Hunnicutt, Tower Coordinator, Columbia Telecommunications

A meeting of the Telecommunications Transmission Facility Coordinating Group (TTFCG) was held on October 3, 2001. The following people were in attendance:

MEMBERS			
Jane Lawton	OCA	(240) 777-3724	(FAX) 777-3770
Michael Ma	M-NCPPC	(301) 495-4595	(FAX) 495-1306
Willem Van Aller	DIST	(240) 777-2994	
Eric Carzon	OMB	(240) 777-2763	
STAFF			
Robert Hunnicutt	CTC	(410) 964-5700	(FAX) 964-6478
Amy Rowan	OCA	(240) 777-3684	(FAX) 777-3770
OTHER ATTENDEES			
Lee Jarmon	Nextel	(410) 953-7440	(FAX) 953-7406
Tom King	Etchison resident		
Jane King	Etchison resident		
Mark Nelligan	Etchison resident	(301) 948-0020	
Jaymie Hanna	American Tower	(410) 729-5821	
Emily Nelms	Bechtel	(240) 447-9444	
Ed Donohue	Cole,Raywid/AT&T	(202) 659-9750	
Martin Klauber	OPC		
Patrick Welsh	American Tower	(410) 729-5821	
John Wilkes	Etchison resident		
Jane Wilkes	Etchison resident		
John Copley	Etchison resident		
Diane Copley	Etchison resident		
Terry Geldermann	Etchison resident		
Jane Waldron	Etchison resident		
Thomas Waldron	Etchison resident		

Action Item: AT&T Wireless application to construct a new 134' monopole on the Barnhart property located at Hawkins Creamery Road and Laytonsville Road in Gaithersburg (Application #200105-01).

Bob Hunnicutt reviewed the status of this application and the purpose for today's meeting. He explained that at the last meeting, the application had been reviewed with the TTFCG members. During the meeting, the group and an Etchison resident wanted to review AT&T's confidential RF



propagation maps in order to see the alternatives which had been identified by the Tower Coordinator, researched by AT&T and discussed during the meeting. He explained the room was cleared to allow only parties relevant to the particular application to review these materials with the AT&T engineer.

Mr. Hunnicutt explained that today's meeting was to specifically discuss two alternatives that the TTFCG had asked about at the prior meeting. Those alternatives were to place the monopole in a different location on the property and determine if there were any adverse effects from the move that would impact the service coverage. He noted that the TTFCG had requested that AT&T consider moving the monopole further into the wooded area to better conceal the structure.

Ms. Lawton recognized Ed Donohue and asked him to provide the members with an update on AT&T's progress in considering the TTFCG's request.

Mr. Donohue displayed a revised site plan and stated that the site acquisition and construction staff at AT&T had advised him that the monopole could be moved to a natural clearing in the wooded area, approximately 50' from its present location. He stated that a move of that short distance did not effect the RF or coverage aspects of the monopole, and that AT&T had agreed to locate the monopole at that new location on the property, as the TTFCG had requested. Mr. Donohue noted that these new plans had not yet been filed with the Board of Appeals, but the new location would still meet the setback requirements. He stated that AT&T conducted a balloon test at the site.

Mr. Nelligan asked if the monopole was still visible from any direction. Mr. Donohue stated that it was better concealed from some directions than others were, but the most improved view was the view of the site from Laytonsville Road driving north.

Jane Lawton asked if this relocation was still out of the airpark flight path. Mr. Donohue stated that it was, and noted that AT&T had reduced the monopole height to 134', the FAA approved limit. Ms. Lawton commented that she still believed this siting was a good candidate for a tree monopole.

John Copley, another Etchison resident, noted that the selection of photos did not best illustrate all of the views the community would have of the new monopole. He noted that there should be a photo of the balloon test from Hipsley Mill Road, which would have the most visible view of the structure.

Jane Lawton noted that she was pleased that so many residents of the community were in attendance at the meeting, but that the appropriate place for public comment would be at the Park and Planning Commission and Board of Appeals hearings. She explained that the TTFCG had completed its engineering review and that the remaining issues were related to the placement of the monopole on the property.

Mr. Copley asked what the Park and Planning Commission would review during its hearing. Ms. Lawton explained that under State law, the Park and Planning Commission reviews the land use

issues related to the monopole or tower siting. She stated they determine that the land use is compatible with the zoning and they look at the Special Exception requirements.

Michal Ma added that the difference between the Park and Planning Commission review and the Board of Appeals review is that the Planning Commission conducts its hearing and makes a recommendation to the Board of Appeals, and the Board of Appeals then has the final authority over granting a Special Exception.

Martin Klauber added that the TTFCG review is not based on the zoning ordinance. He stated that at the Park and Planning Commission there is a timed public hearing where individuals and other interested parties are given a specific amount of time to make comment on the application. He added that the Board of Appeals conducts a full hearing, where speakers are not limited by time, and there is an opportunity for a thorough discussion of each application. He stated that after the hearing, the Board of Appeals writes a written opinion for the case. Ms. Lawton commented that the TTFCG reviews some zoning issues such as the setback requirements and whether telecommunications facilities are permitted and, if so, under what conditions.

Michael Ma stated that at the last meeting, Bob Hunnicutt had explained what the Tower Coordinator had reviewed as alternative sites, and asked Mr. Hunnicutt to explain the process conducted for this application.

Mr. Hunnicutt stated that when the Tower Coordinator conducts a review, they perform a physical site visit where they survey the area to determine if there are any existing tall structures, such as a building, water tank, or electric transmission line towers which could accommodate the antennas in lieu of constructing a new monopole or tower. He stated that the Tower Coordinator also surveys the database which lists the locations of existing carrier antenna facilities. He stated from these surveys, they can determine if there are any alternatives which may be used by the carrier. When alternative sites are located, such as in this case, the carrier is asked to provide additional RF propagation maps showing the expected coverage if those existing structures were used to attach antennas.

He noted that when this application was submitted by AT&T, they had also submitted an application for a taller monopole at the Stanley property located on Long Corner Road to the north of the Barnhart property. In the review, the Tower Coordinator looked at both of these sites together for alternative configurations of antennas which could be deployed to use existing structures and still provide adequate coverage without the need for construction of new monopoles. For the Barnhart property, however, use of the nearby PEPCO transmission lines towers would not provide the coverage desired by AT&T, as it would leave gaps in coverage in certain portions of the service area.

Ed Donohue added that the request for a monopole at the Stanley property had been put on hold pending discussions with PEPCO to potentially site antennas on PEPCO facilities in lieu of a new monopole. He added that when PEPCO determines the height it can provide for the antennas and

addresses the structural issues, AT&T could decide whether they needed to pursue the Stanley monopole. He noted that if PEPCO facilities could be used, they would be, and a request for a second monopole at the Stanley property would be withdrawn.

Many of the residents in attendance examined the photo simulations, the photos of the balloon test, and the site plan. Jane Lawton noted that AT&T had a map which indicated which photos were taken from which property location, and that there was a color-coded reference map to indicate where the photos were taken from to see whether the monopole would be visible or not. Mr. Nelligan noted that during the winter there would not be as many leaves on the trees so the monopole might be more visible from some of these areas. He added that since he was the only community representative at the last TTFCG meeting, AT&T may wish to review the RF propagation maps for the residents at today's meeting.

Mr. Donohue stated that he had no objection to this request, and that Mr. Hunnicutt had the RF maps, but noted that since neither he nor the Tower Coordinator expected RF issues to be revisited today, neither of them had engineers to discuss the RF issues at the meeting today.

Mr. Hunnicutt displayed RF propagation maps for the attendees to review.

Ms. Lawton cautioned the group that they were viewing confidential information which could not be divulged to others.

Mr. Van Aller noted that the maps are a theoretical depiction of what the service coverage would be based on a computer generated model.

Mr. Copley noted that on Map #5, the Barnhart property is not depicted in the correct location, but is shown farther south on Laytonsville Road than where the actual site is.

Mr. Nelligan commented that it appeared from the RF maps that if the Stanley property and the Barnhart property sites were removed from the maps, the only place where there would be coverage would be near Damascus and Laytonsville. He added that at the last meeting, he was not aware that many of the Etchison residents have AT&T service, and that they report that the cellular service is fine and they do not experience dropped calls as they drive towards Damascus. Mr. Hunnicutt stated that he also has AT&T service, and when he was driving around the service area from a number of locations, he did experience difficulty and dropped calls when calling his office in Columbia. Mr. Van Aller commented that this anecdotal information is not especially valid, and that the carriers determine the level of coverage they need to adequately service their customers and that the RF maps are simply a statistical representation of what the expected coverage might attain.

Mr. Nelligan stated that from the RF maps, it appeared that use of a PEPCO transmission line tower and a shorter new monopole located between Etchison and Laytonsville, but farther to the south of the present location, would probably provide the coverage that AT&T needed. He added that he

believed the pilots at the Davis airport would be requesting that the monopole have lights, and if that was the case, the County would require AT&T to light the monopole. Mr. Van Aller explained the FAA requirements for lighting a structure. Mr. Donohue stated that neither the FAA nor the MAA required lights on this monopole. Jane Lawton noted that this is an issue to be resolved by the Park and Planning Commission and the Board of Appeals and should be addressed at that time.

Mr. Nelligan stated he believed there was more work to be done in investigating his suggestion for alternative locations for a new monopole. Mr. Copley noted that his examination of the revised site plan appears to show the new location of the monopole 100' from the original location, and not 50' as stated earlier by AT&T. Mr. Donohue replied that it may be the case on the plan, but his construction and site acquisition staff had informed him that the new location was 50' from the original site selected. Mr. Nelligan asked if the new plan had been filed with the Board of Appeals. Mr. Donohue stated that it had not been filed. Mr. Ma asked if the original and revised sites were still technically viable for AT&T. Mr. Donohue replied that they were viable.

Mr. Ma asked Mr. Hunnicutt to address the new alternatives suggested today. Mr. Hunnicutt explained that even if the Tower Coordinator engineer had been at the meeting, without new RF maps from AT&T, they could not comment on what coverage might be obtained by Mr. Nelligan's suggested alternative. He added that based on his review of the RF maps showing PEPCO Pole R-57, that site was too far to the north and east to provide coverage much farther south than to Etchison. He concluded that although it was conjecture on his part, he supposed that if a shorter monopole was located closer to Laytonsville, there would still be a gap in coverage south of Etchison, which would otherwise be covered by the Barnhart monopole. He also noted that there are problems with locating one cell too close to another. He stated that could be a problem because AT&T already had antennas at the airpark water tank located just south of Laytonsville.
Mr. Nelligan stated that perhaps two shorter monopoles could be used to cover the area south of Etchison.

Mr. Donohue replied that AT&T had worked hard to resolve the TTFCG's questions, and that today's meeting was scheduled just to answer the questions regarding relocating the monopole on the Barnhart property to better conceal the structure. He stated he had mentioned the Stanley property because it is AT&T's policy that if there are existing structures such as silos, water tanks, or transmission line facilities in a proposed area, they will use them. He stated that for the TTFCG to suggest that AT&T add more new monopoles goes beyond the TTFCG's authority. Mr. Nelligan stated he believed those additional options should be considered.

Ms. Lawton stated that the TTFCG's primary objective was to identify that there was a need for a new facility, and then they examine if there are co-location options available to the carriers. Jane King noted that the PEPCO transmission lines were fairly close to the Barnhart property, and asked what the minimum distance requirements were for finding an existing structure. Mr. Hunnicutt noted that one needed to look at where the transmission line towers were located, not the transmission lines. Ms. Lawton added that the TTFCG had met with the Tower Coordinator

engineer and AT&T's engineers in closed session at the last meeting and had reviewed all the RF issues and the TTFCG had resolved all of their questions; consequently, this meeting was only to review relocating the monopole on the property. She stated that the TTFCG now had to act on those remaining issues since the Park and Planning Commission hearing was scheduled for October 11, and the Commission required a recommendation from the TTFCG before proceeding with the hearing.

Eric Carzon stated he was in favor of recommending the application because, from a governmental perspective, there is a public interest in placing cellular service in the community, and if there are community objections to the aesthetics of the facility, those were issues that were more appropriately considered by the Park and Planning Commission and the Board of Appeals. He added that although one could consider other options for new monopoles or additional sites for antennas, there must be a limit to how many different options a carrier must consider. He noted that the role of the TTFCG was to review the carrier's application and the Tower Coordinator's evaluation and act on the information they have been provided to meet the role established for the TTFCG. He stated he did not believe it was appropriate to look at an endless array of options. He stated that the TTFCG encourages co-location and when it is demonstrated that there is a hole in service coverage, the TTFCG must act on the application, and the other issues must be taken up at the Park and Planning Commission. He stated that he believed that AT&T had fulfilled the requirement of looking at appropriate co-location options and he believed it was time for the group to take action on the application.

Mr. Van Aller agreed, stating that the County has also recently gone through an extensive review for siting new public safety radio system towers, and that all of the various design considerations have a cost implication; however, in the end the carrier must determine the option that best suits their needs. He agreed that he believed that the TTFCG had performed a complete review of this application, the carrier had done its part in responding to TTFCG questions. He stated that the residents certainly have the right to oppose this siting but that the Park and Planning Commission and the Board of Appeals are the appropriate place for their input.

Michael Ma stated that the Park and Planning Commission has been trying to establish a balance between meeting community interests as well as meeting the public need in reviewing telecommunications applications. He stated that the Park and Planning Commission wants to communicate to the carriers that they should try harder to come up with alternatives which minimize the adverse effect in the community but still enable them to deploy their facilities.

Ms. Lawton stated she would have liked to have had all of the residents at today's meeting in attendance at the last meeting when the RF issues were discussed in more detail. She stated that the TTFCG was satisfied with the RF issues and she believed it was appropriate for the group to take action on the application. She stated that any time there are existing structures in the vicinity of new siting requests, the TTCG should investigate them, and, in this case, it had done so. She stated that this application clearly shows a hole in coverage and the determination of whether that constitutes

a need for a new monopole is an issue for the Park and Planning Commission to address. She stated that she believed the TTFCG had done its job in its review of this application, and that the remaining issues were a matter for the Park and Planning Commission.

Jane Lawton agreed that the TTFCG should challenge the industry to do a more creative job in siting their facilities. She noted that many times the TTFCG's review of applications for new facilities had resulted in the application either being withdrawn or the antennas being placed on existing structures in lieu of construction of a new facility.

Bob Hunnicutt noted that the TTFCG had even expanded the realm of alternatives by negotiating with PEPCO to establish a master lease which would permit the carriers to attach antennas on existing PEPCO transmission line facilities.

Ms. Lawton explained that the County Council was in the process of reviewing the ordinance with particular regard for placement of new facilities in the up-county areas.

Michael Ma added that he believed that the suggestion of a tree monopole was a land use issue and more appropriate for the Park and Planning Commission. Ms. Lawton agreed that today that is true, but she noted that in the past, the Park and Planning Commission and the Board of Appeals were not as aware of the stealth siting options available.

Michael Ma stated that a community's perception of an acceptable siting differs from community to community. Mr. Nelligan stated that he believed that the citizens would feel more comfortable if the TTFCG recommended a camouflaged site in this case.

Mr. Van Aller asked if AT&T would discuss possible stealth applications for this monopole with the community. Mr. Donohue agreed to meet with them if they so desired.

Motion: Willem Van Aller moved that the revised plan for the siting of the monopole 100' from the original location be recommended, and that the carrier discuss possible opportunities for camouflage with the surrounding community representatives. Eric Carzon seconded the motion and it was unanimously approved.

The next meeting of the TTFCG is scheduled for Wednesday, October 10, 2001 at 2:00 p.m. in the 6th floor conference room of the COB.

AVIATION SYSTEMS INC.
Aviation Consultants

November 5, 2001

Patrick Welsh
American Tower
8258 Veterans Highway, Suite 8A
Millersville, MD 21108

Subject: Proposed "Barnhardt" Antenna Tower

Dear Mr. Welsh:

Aviation Systems Incorporated (ASI) has conducted a study of the operational impact of the subject American Tower antenna structure on Davis Airport in Laytonsville, MD.

It is proposed that this structure be erected to a height of 134 feet above ground level (AGL)/780 feet above mean sea level (AMSL) in Etchison, MD at latitude 39° 14' 57.05" and longitude 077° 08' 41.72" (NAD 83). The proposed structure would be 0.21 Nautical Miles (1321 feet) north of Davis Airports' Runway 26.

The structure was initially proposed to be 150 feet AGL/796 feet AMSL and notice was filed with the Federal Aviation Administration (FAA) Eastern Region. At that height it exceeded the FAA VFR Traffic Pattern criteria and was considered to be a "Hazard to Air Navigation." The structure was lowered to 134 feet AGL/780 feet AMSL and was subsequently issued a Determination of "No Hazard to Air Navigation" by FAA. (Study number 01-AEA-0354-OE). It is our opinion that this tower is now fully compliant with FAA criteria and should have no adverse impact on aircraft that are safely operated in accordance with the Federal Air Regulations.

Davis Airport Runway 8-26 is a Turf-Asphalt 2005 foot long general aviation facility. It has a standard left traffic pattern for both approaches. No night operations are allowed. The proposed antenna tower would be over 1000 feet north of the centerline approach to Runway 26. Aircraft in a standard left traffic pattern on final approach should be well to the south of the structure when they are that close in to the end of the runway.

Aircraft taking off from Runway 08 should be well above 134 feet AGL climbing to their pattern altitude of 1400 feet AMSL (754 feet AGL) when on the cross-wind/downwind leg for Runway 08. It should be noted that FAA considers these traffic pattern operations in issuing a Determination of "No Hazard" based on their criteria.

It is therefore our opinion, that the tower as proposed at 134 feet AGL should not pose a safety hazard to aircraft operating VFR in the Davis Field Traffic Pattern.

We would be pleased to discuss our opinions further if you have any questions.

Sincerely,

Jerry Clavkin
Vice President Airspace Operations

23430 Hawthorne Blvd. • Suite 200, Skypark Building 3 • Torrance, CA 90505
Tel: 310.378.3299 • Fax: 310.791.1546 • Email: asi@aviationsystems.com • www.aviationsystems.com

DEPARTMENT OF ECONOMIC DEVELOPMENT

Douglas M. Duncan
County Executive

David W. Edgerley
Director

October 3, 2001

Arthur Holmes, Chairman
MNCPPC
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Support for Additional Communication-Phone Towers in the Agricultural zones

Dear Chairman Holmes:

The purpose of this letter is to submit the Agricultural Advisory Committee's support for additional communication-phone towers in the Agricultural zones of Montgomery County.

In the past few years, the use of mobile phones have revolutionized every segment of our society. All businesses including agriculture have benefited greatly by this technology as economic decisions are made instantly in the field. Furthermore, in light of the national tragedy from September 11, 2001, it is evident that mobile phone usage represents a critical means of communication for government, emergency personnel, and all citizens.

It is the AAC's firm belief that additional communication-phone towers are needed in the rural and agricultural areas of our County. The signal strength from the existing towers is not sufficient to meet current demand as the signal fades out often or will not work altogether. Given the increasing demand and importance for this communication technology, it should not be surprising that farmers of this County expect an effective communication network that will work in both urban and rural areas.

The AAC further acknowledges that communication-phone towers located on farm properties does not represent a negative impact to agricultural operations as the towers are erected on small parcels of land usually taking up less than one acre. The rental income to the property owner also represents an economic incentive and opportunity that can be used to further support the farming operation.

In conclusion, the AAC encourages the Montgomery County Planning Board to support the construction of additional communication-phone towers in the Agricultural zones for the reasons outlined in this letter.

Thank you for your time and support on this vitally important issue impacting all citizens of our country.

Sincerely,

William Willard, JVC

William Willard, Chairman
Agricultural Advisory Committee

A:holmeswillard(mg2001)

(6)

AIRCRAFT OWNERS AND PILOTS ASSOCIATION
421 Aviation Way • Frederick, MD 21701-4798
Telephone (301) 695-2000 • FAX (301) 695-2375
www.aopa.org

June 7, 2001

Mr. William E. Merritt
Specialist, Airspace Branch
Federal Aviation Administration
Eastern Region, AEA-520
1 Aviation Plaza
Jamaica, NY 11434-4809

RE: Aeronautical Study 01-AEA-0354-OE

Dear Mr. Merritt:

The Aircraft Owners and Pilots Association (AOPA), representing the interests of over 370,000 aviation enthusiasts and professionals nationwide, respectfully submits its objection to the proposed construction .33 nautical miles north of Davis Airport (W50), Etchison, Maryland. If constructed, the tower's height coupled with its proximity to the active runway, would create a significant reduction in the safe and efficient use of airspace for pilots utilizing this facility.

For example, aircraft departing Davis Airport would be exposed to a considerable hazard while conducting operations within the established left-hand traffic pattern. The increased pilot workload inherent to the departure phase of flight, combined with the reduced visibility while in a climb attitude, makes the proposed location of this tower objectionable to the users of Davis Airport. Given that W50 is home to 27 based aircraft and the host of over 15,000 operations per year, the danger this construction poses to pilots is worthy of consideration. It is also important to note that during periods of reduced visibility or when meteorological conditions reduce aircraft climb performance, the aforementioned dangers will be compounded.

In short, if the proposed tower becomes a reality, it would have a substantial adverse impact to aircraft operations into W50. Airspace is a finite and diminishing natural resource, and we appreciate the demands being placed on all airspace users. However, for these interests to exist in harmony, each must understand the impact of its activities on the entire airspace system. For these reasons, AOPA respectfully requests that the FAA find the captioned proposal a hazard to air navigation.

Respectfully,

Michael W. Brown
Associate Director, Air Traffic Services
Aircraft Owners and Pilots Association

(9)

Robert T. Warner
8619 Edgewater Ridge
Omro, WI 54963
June 19, 2001

Mr. William E. Merritt
Specialist, Airspace Branch
Federal Aviation Administration
Eastern Region, AEA-520
1 Aviation Plaza
Jamaica, NY 11434-4809

RE: Aeronautical Study 01-AEA-0354-OE

Dear Mr. Merritt:

As an aircraft owner, pilot and frequent user of the Davis Airport (W50), I must register my aviation safety objection to the proposed construction .33 nautical miles north of Davis Airport (W50), Etchison, Maryland. If constructed, the proposed tower's height coupled with its proximity to an active runway would create a significant reduction in the safe and efficient use of airspace for pilots utilizing this public-use facility.

Davis Airport is critical to airport capacity in the Washington metropolitan area. While it is not listed as eligible for federal funding, it is an essential public-use airport included in the Maryland state system plan. The runway was recently resurfaced with matching public funds from the Maryland aviation grant program. While the airport currently has approximately 30 aircraft and about 15,000 operations per year, this number is projected to increase under new ownership (as the current owner suffers Alzheimer's disease and lives in a nursing home) and with facility and service investments by both the private and public sectors.

As to specific airspace issues affecting air operations in the immediate Davis vicinity that would be effected by this tower, there are numerous factors. The airspace in the vicinity of the airport is already highly congested as a result of an overlying Class B airspace floor of 2,870 feet AGL. Within this airspace is the Davis Airport traffic pattern and continuous overflights (below the Class B floor) enroute to Montgomery County Airport (GAI). It has been acknowledged that the proposed structure will exceed both federal and Maryland airport imaginary surfaces.

The above circumstances would create a highly unsafe condition and excessive pilot workload for those arriving and departing Davis Airport. In this case, the pilot is also required to avoid GAI overflights, Class B airspace restrictions, and comply with appropriate traffic pattern procedures. This is an unacceptable

(10)

degradation of safety during this critical phase of flight when cockpit workload is at its highest.

I have reviewed the letters filed in this case by AOPA, EAA and the Maryland Aviation Administration. I would like to go on record as reinforcing all aviation and safety issues brought forward in these letters.

For the above reasons, I request that the FAA find the above captioned proposal as a hazard to air navigation. Further, I request that you file an objection on the basis of aviation safety with Montgomery County, Maryland Board of Appeals Case No. S-2477 / OZAH Referral No. 01-14.

Respectfully,

Robert T. Warner
Commercial Pilot #1898682
Owner: N627WM, N1075H
Member: AOPA, EAA

Cc: AOPA, EAA, MAA

Parris N. Glendening
Governor

John D. Porcari
Secretary

Maryland Aviation Administration

David L. Blackshear Executive Director

July 3, 2001

Mr. Christopher W. Hembree
Cole, Raywid and Braverman, L.L.P.
1919 Pensylvania Avenue, NW.
Suite 200
Washington DC 20006-3458

Dear Mr. Hembree:

Thank you for providing our office with the site plans for the "Barnhart property" and the opportunity to comment on the location and height of the planned monopole tower on that site, *FAA Aeronautical Study Number AEA 01-0354-OE.*

By reducing the height of the proposed tower from 150 feet to 134 feet mean sea level, and no longer infringing on the Horizontal Imaginary Surface of Davis Airport, American Tower Corporation would not be in violation of The Code of Maryland Aviation Regulations (COMAR) Chapter 5, Section 11.03.05.4 (A) (2). Therefore, the Maryland Aviation Administration (MAA), has no objection to the construction of the proposed tower at that reduced height.

It is imperative however, that any and all revisions or alterations to the original FAA Airspace Study be forwarded to the FAA Eastern Region, for approval. If I can be of any further assistance to you in this matter, please do not hesitate to contact me at (410) 859-7689.

Sincerely,

Jaime A. Giandomenico
Aviation Systems Planning Officer

24111 Hipsley Mill Road
Gaithersburg, MD 20882
September 25, 2001

Montgomery County Dept. of Park and Planning
Planning Board Chair
8787 Georgia Ave.
Silver Spring, MD 20910

RE: Case No. S-2477 – Petition of American Tower Corporation and AT&T Wireless Services for monopole tower in Etchison, MD (Hawkins Creamery Road and Route 108)

We strongly oppose the construction of this tower for several reasons:

1) The proximity to Davis Airport is of great concern for safety of flight operations.
2) Montgomery County purchased over 25 acres on the west side of Davis Airport presumably to protect and ensure the safety of local residents. It doesn't make sense to provide protection of the Airport on the west side and then build a tower to endanger it on the northeast side.
3) The Federal Aviation Administration (FAA) has conducted an aeronautical study concerning this tower. FAA indicates that the proponent has agreed to erect a shorter tower. However, we plead with you to consider the safety of the aircraft and the homes in the area. We know that when collision occurs with a structure, much damage occurs. We hadn't thought about the possibility of fire if an accident occurred, but it is upmost on our minds now. Please, please, deny this structure.
4) Several aviation associations and private pilots have written to the Hearing Examiner to oppose this structure: The Aircraft Owners and Pilots Association (AOPA), Experimental Aircraft Association (EAA), and the Maryland Aviation Administration. If these organizations are concerned, we believe that there is reasonable concern about the erection of this tower.
5) There are other sites that are more practical than this one. And there are sites for co-location.
6) The proposed site is zoned RDT and should remain "rural".
7) The petitioner states that the "proposed use will not be detrimental to the use, peaceful enjoyment, economic value or development of the surrounding properties or the general neighborhood." We strongly disagree with this statement. As members of this community, we feel that the tall tower represents visual pollution and detracts from our enjoyment of our rural setting, and would devalue our property.
8) Several properties in Etchison (including Mt. Tabor United Methodist Church which is directly across the street from the proposed site) have been named (per Susan Soderburg, Historic Preservation Education & Outreach Planner of Montgomery County Department of Park & Planning) as being eligible for "historic designation" and the erection of this tall tower would not be compatible.
9) We are concerned also about the health aspects. Once the cell phone tower is operational, residents will be exposed to pulsating and continuous doses of radiated frequency. Studies are now showing its dangers. These frequencies can disrupt and decrease the body's production of melatonin, a controlling hormone that is released from the pineal gland in the center of the brain. The disruption of this gland impairs

normal hormone system release, suppresses the immune systems, influences cell behavior, and can produce serious systemic problems throughout the body, including cancer.

Please consider all these points carefully (especially the proximity to Davis Airport and the danger that poses) and we feel confident that you will agree with us in determining that this tower should not be erected on this site. We recommend that if more coverage is necessary for wireless service, that the petitioners look for co-location on existing towers or power lines.

Sincerely,

Tom & Jane King

Tom and Jane King

Montgomery County Dept. of Park and Planning
Planning Board Chair
8787 Georgia Ave.
Silver Spring, MD 20910

RE: Case No. S-2477 – Petition of American Tower Corporation and AT&T Wireless Services for monopole tower in Etchison, MD (Hawkins Creamery Road and Route 108)

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normal hormone system release, suppresses the immune systems, influences cell behavior, and can produce serious systemic problems throughout the body, including cancer.

Please consider all these points carefully (especially the proximity to Davis Airport and the danger that poses) and we feel confident that you will agree with us in determining that this tower should not be erected on this site. We recommend that if more coverage is necessary for wireless service, that the petitioners look for co-location on existing towers or power lines.

Wayne Miller
Name

23534 Pocahontas Dr
Address

Laytonsville MD 20882
City, State, Zip

9/30/01
Date

P.S.
Where does it end? Look around at the blight on the landscape all across the country as these towers pop up everywhere. I saw one tower near Columbus, Ohio, that had been "disguised" as a tree. It was laughable — it looked like what it was – a metal skeleton with greenery added here and there! Please use the Pepco utility towers which are just north of the [illegible]/Laytonsville area. Thank you.

Wayne Miller

October 11, 2001

To: Park and Planning

From: Peter and Donna Currall
7425 Hawkins Creamery Road
Gaithersburg, MD 20882

Re: Barnhart Property

Although we are unable to attend the meeting, we want to express our objection to the request for a communication tower exception for the corner of Route 108 and Hawkins Creamery Road. We live approximately one-half mile from the site, and have done so for over twenty years. Our objections to erection of the tower follow:

1. At a height of 120-130 feet the tower will be visible from all points on our property. A recent suggestion to disguise the tower as a tree seems a less than an adequate solution. Few trees are that high, and the necessity of a light due to Davis Airport has yet to be determined.

2. Our area was zoned a twenty-five (25) acre agricultural buffer area years ago. However, it was never really enforced in our area. All the open land was sold off, deeded as children's and grandchildren's five (5) acre lots, and developed. The amount of open acreage has steadily decreased and the two lane country road is incapable of handling the new volume.

3. We have the oil pipeline running within 1/8th of a mile from our property.

4. The tower will be an eyesore and reduce our property values.

5. The tower may be a danger to planes taking off and landing at Davis Airport.

6. It has yet to be determined how much maintenance and traffic will result on that corner, due to servicing of the tower. It is already a dangerous corner, with restricted view when turning left onto 108.

I am aware of several communications providers who have added their towers to existing structures, e.g. farmer's silos, barns, water towers, etc. and wonder why that can't be a resolution for our area.

In short, it seems as if upper Montgomery County gets a raw deal because our numbers are too small to have any clout in protesting the erection of structures, buildings, pipelines, etc. Just this once, we ask you **not to grant the special exception**. We do not want this tower in our pastoral, rural neighborhood, which is fast becoming overdeveloped.

Peter and Donna Currall

Donna Currall

November 12, 2001

Montgomery County Dept. of Park and Planning
Planning Board Chair
8787 Georgia Ave.
Silver Spring, MD 20910

RE: Case No. S-2477 - Petition of American Tower Corporation and AT&T Wireless Services: for monopole tower in Etchison, MD (Hawkins Creamery Road and Route 108)

I am writing to let you know I am opposed to the construction of this tower for the following reasons:

1) I am concerned about the proximity to Davis Airport and for safety offlight operations.
2) The Federal Aviation Administration (FAA) has conducted an aeronautical study concerning this tower. Although the FAA indicates that the proponent has agreed to erect a shorter tower I believe you still MUST consider the safety of the aircraft and the homes in the area, especially in light of the September 11th tragedy. When collision occurs with a structure, much damage occurs. In this area with the proximity to homes and the airport, the potential damage from fire is much greater because there is no city water and, to my knowledge, there are no fire hydrants.
3) Montgomery County purchased over 25acres to the west of Davis Airport presumably to protect and ensure the safety of local residents. It does not make sense to provide protection of the Airport to the west and then build a tower to endanger it on the northeast side.
4) Several aviation associations and private pilots have written to the Hearing Examiner to oppose this structure: The Aircraft Owners and Pilots Association (AOPA), Experimental Aircraft Association (EAA), and the Maryland Aviation Administration. If these organizations are concerned, I believe that there is reasonable concern about the erection of this tower.
5) Personnel from Davis Airport have already indicated that they will request a light for the tower if it is approved in this location. The proposed location for the tower is in the flight path of the state Medivac helicopter, and it is my understanding that a light would also be requested for that reason. Alternate locations away from the airport and out of the Medivac helicopter path would not require a light.
6) There are other sites that are more practical than this one that would not be in as close proximity to homes or the airport, and that would not require a light.
7) The proposed site is zoned RDT and should remain "rural".
8) The petitioner states that the "proposed use will not be detrimental to the use, peaceful enjoyment, economic value or development of the surrounding properties or the general neighborhood." I utterly disagree with this statement. I believe that a tower standing approximately twice as high as the existing trees represents visual pollution, detracts from our enjoyment of a rural setting, and would devalue our property.
9) According to Susan Soderburg, Historic Preservation Education & Outreach Planner of Montgomery County Department of Park & Planning, several properties in Etchison, including Mt. Tabor United Methodist Church which is directly across the street from the proposed site, have been named as eligible for "historic designation" and the erection of this tall tower would be incompatible with such a designation.
10) I am also concerned about the health aspects. If the monopole tower is operational, residents will be exposed to pulsating and continuous doses of radiated frequency. Studies are now showing its dangers to the body, including cancer.

Please consider these points carefully (especially the proximity to Davis Airport and the danger that poses) and I am confident that you will decide that this tower should not be erected on this site. If more coverage is truly necessary for wireless service, alternative approaches should be considered, such as smaller towers located elsewhere, perhaps in conjunction with co-location on existing towers or power lines.

Sincerely,

Kathy B. Nelligan
7505 Hawkins Creamery Road; Laytonsville, MD 20882-3209

November 13, 2001

Montgomery County Dept. of Park and Planning
Planning Board Chair
8787 Georgia Ave.
Silver Spring, MD 20910

RE: **Case No. S-2477** - Petition of American Tower Corporation and AT&T Wireless Services: for monopole tower in Etchison, MD (Hawkins Creamery Road and Route 108)

I am writing to voice my opposition to the 134 foot monopole tower proposed for Etchison, MD. It is critical that Montgomery County require AT&T to consider other options to improve wireless phone coverage in this area. Even though these other options may require additional engineering and may involve a higher construction cost, there are other methods that would minimize the impact on this rural area.

The following aspects of the proposed tower location could and should be avoided by selecting a different site nearby for a 134 foot pole, or a combination of co-locating on a nearby power transmission line, and one or more lower poles further south.

1) The proposed tower is adjacent to Davis airport, introducing an unnecessary safety hazard for small airplanes.
2) Airport personnel have indicated that they and the state Medivac helicopter, which flies directly over the proposed tower location, will request that the tower be lit at night if the tower is approved at that location. It seems certain that theses requests would be approved for safety reasons. The introduction of a red flashing light to the night sky in a rural area has a tremendous impact and could be easily avoided by consideration of a different site.
3) The proposed location is quite close to many existing homes which will have a negative impact on all those homes.
4) Several homes and public buildings in the immediate vicinity of the proposed tower location are candidates for historic landmark classification.

The above issues could all be avoided by locating on a different piece of property or by choosing a combination of co-location and smaller poles. AT&T and the Tower committee refused to consider these options when asked.

It is difficult to accept that the proposed tower location and height, along with the unique problems associated with it, is the only location capable of providing cell phone service.

I am glad to see that your staff raised the question of required level of service. Most of the homeowners in the area adjacent to the tower have wireless telephone service, some with AT&T. We all get acceptable coverage at home and on the roads in this area. I often use my phone at home, on the roads between Laytonsville and Etchison, and Etchison and Damascus. I do not ever remember having a dropped call on those roads. The service level may not be perfect, but it is adequate, and certainly comparable to more populated areas of the county such as Gaithersburg, Rockville, Bethesda, etc. Please note in the Tower Committee meeting minutes, that no drive tests were performed to confirm AT&T's assertion that additional service is required

For the reasons stated above, I ask that you recommend a denial of the application for this tower. The beauty of rural Montgomery County is too valuable to be destroyed when <u>all</u> other options have not been considered.

Sincerely,

Mark D. Nelligan
7505 Hawkins Creamery Road
Laytonsville, MD 20882-3209

24020 Laytonsville Road
Laytonsville, MD 20882

November 6, 2001

Mr. Art Holmes, Chairman,
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910-3760

Re: Board of Appeals Petition No. S-2477 (Special Exception)

Dear Mr. Chairman

My wife and I live at 24020 Laytonsville Road in Etchison. Our property lies immediately north of, and borders, the so-called "Barnhart" property (parcel 666 on Tax Map GW42, located in the RDT zone). AT&T Wireless Services originally proposed to locate a monopole tower in the NW corner of Mr. Barnhart's field to the north of Hawkins Creamery Road, west of Laytonsville Road. Our property line is 476 feet from that location. Following a meeting of the Tower Committee a second site was proposed, 100 feet north of the original site. The more northerly site, which is in some woods, is 376 feet from our property line, approximately 400 feet from our house.

The woods to the south of our house, on Mr. Barnhart's property, are sparsely populated with trees. Thus the proposed tower, whether erected in the field or in the woods, will be highly visible from our house at all times of the year. It will be particularly visible in wintertime, especially the upper parts of the structure. My wife and I will be daily confronted by the structure, every time we look out the windows of our living room, bedroom or bathroom, every time we walk the dog, shovel snow, rake leaves or mow the lawn. Depending how well they are camouflaged by a "grove of trees", the 8-foot high fence and the 11-foot tall equipment shed will also be visible.

Notwithstanding the July 3 letter from the Maryland Aviation Administration, the tower will be a hazard to low-flying aviation, not to mention Medevac helicopters and experimental aircraft such as ultralight vehicles, whether it is placed in the field or in the woods. As stated in Ms. Daniel's memorandum to the Planning Board, "area pilots ... may still object to the tower despite the MDAA and FAA approval". I believe that the more successfully the tower is disguised as a tree, in order to make it less unsightly from the ground, the more likely it is that it will be a hazard to flying. If the tower is located in the woods and is struck by a plane there will almost certainly be a fire, in which case it is very possible that our house, which is constructed of wood, and surrounded on more than two sides by the woods, will also burn.

The view from our house to the south, and the threat of a fire, are matters that we will have to live with daily if the tower is erected as proposed. We will have even more to

Montgomery County Dept. of Park and Planning
Planning Board Chair
8787 Georgia Ave.
Silver Spring, MD 20910

RE: Case No. S-2477 – Petition of American Tower Corporation and AT&T Wireless Services for monopole tower in Etchison, MD (Hawkins Creamery Road and Route 108)

We strongly oppose the construction of this tower for several reasons:

1) The proximity to Davis Airport is of great concern for safety of flight operations.
2) Montgomery County purchased over 25 acres on the west side of Davis Airport presumably to protect and ensure the safety of local residents. It doesn't make sense to provide protection of the Airport on the west side and then build a tower to endanger it on the northeast side.
3) The Federal Aviation Administration (FAA) has conducted an aeronautical study concerning this tower. FAA indicates that the proponent has agreed to erect a shorter tower. However, we plead with you to consider the safety of the aircraft and the homes in the area. We know that when collision occurs with a structure, much damage occurs. We hadn't thought about the possibility of fire if an accident occurred, but it is upmost on our minds now. Please, please, deny this structure.
4) Several aviation associations and private pilots have written to the Hearing Examiner to oppose this structure: The Aircraft Owners and Pilots Association (AOPA), Experimental Aircraft Association (EAA), and the Maryland Aviation Administration. If these organizations are concerned, we believe that there is reasonable concern about the erection of this tower.
5) There are other sites that are more practical than this one. And there are sites for co-location.
6) The proposed site is zoned RDT and should remain "rural".
7) The petitioner states that the "proposed use will not be detrimental to the use, peaceful enjoyment, economic value or development of the surrounding properties or the general neighborhood." We strongly disagree with this statement. As members of this community, we feel that the tall tower represents visual pollution and detracts from our enjoyment of our rural setting, and would devalue our property.
8) Several properties in Etchison (including Mt. Tabor United Methodist Church which is directly across the street from the proposed site) have been named (per Susan Soderburg, Historic Preservation Education & Outreach Planner of Montgomery County Department of Park & Planning) as being eligible for "historic designation" and the erection of this tall tower would not be compatible.
9) We are concerned also about the health aspects. Once the cell phone tower is operational, residents will be exposed to pulsating and continuous doses of radiated frequency. Studies are now showing its dangers. These frequencies can disrupt and decrease the body's production of melatonin, a controlling hormone that is released from the pineal gland in the center of the brain. The disruption of this gland impairs

worry about when it comes time to sell the house. It is very difficult to gauge the effect of a tower, in either of the proposed locations, on the value of our property, but because the tower will be clearly visible from our house we anticipate that the value of our property will be considerably reduced.

My wife and I used to live in a planned community which we never particularly liked. We were delighted when we discovered a house for sale in an almost untouched section of Montgomery County. Before our decision to make an offer on the house I spent more than an hour at the Park and Planning Commission, receiving helpful advice about such mundane matters as wells and septic systems, as well as thoughts about possible future plans for the area. The general opinion was that this part of the county would probably be the last to be adversely affected by changes in zoning and the march of "progress". I was told about the great importance that MNCPPC attaches to protecting and promoting the integrity of Montgomery County's rural areas. Little did I suspect that a scant four years later we would be threatened with the very real possibility that a grotesque tower would be built within sight of our house.

It seems to me most unfair that, should a tower be built as proposed, our neighbor to the south (an absentee owner, who lives many miles from Etchison) will be compensated handsomely whereas my wife and I stand to suffer daily, all the more so when we attempt to sell our property.

I believe that a tower on the Barnhart property will create considerable visual intrusion for many area residents, whether it is placed in the woods or in the field. In fact area residents will not be the only ones to suffer. People driving north on route 108, west on route 650 or south on Hipsley Mill Road between 650 and 108, will also be negatively affected. Photographs taken during balloon tests conducted by the applicant appear to suggest little visual impact, but the overall conclusion from such tests critically depends on the choice of locations from which pictures are taken. I have taken some pictures from the east, looking toward the proposed tower location, and I have superimposed a standard tower or a "stealth" tower, such that the tower (at 134 feet tall) is roughly twice as high as the trees (whose average height is 60-70 feet). These pictures, attached, show very clearly that the visual impact looking from the east and from the south is considerable. Indeed the visual impact will if anything be worse than is suggested by these pictures because the triangular antenna structure at the top of the proposed tower is 20 feet on a side whereas the structure depicted in the picture, scaled to the height of the trees, is 12-15 feet in width.

My wife and I vehemently oppose the proposed construction of a monopole tower on the "Barnhart" property. We respectfully ask that you and your colleagues deny this proposal.

Yours sincerely

John R.D Copley

COLE, RAYWID & BRAVERMAN, L.L.P.

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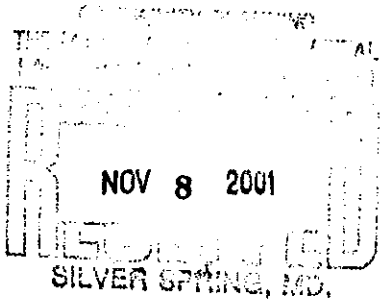
November 7, 2001



BY FEDERAL EXPRESS

Arthur Holmes, Jr., USA (Ret.), Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, Maryland 20910-3760

Re: Application for Special Exception Approval S-2477 ("Application")
Proposed AT&T Wireless Facility at Hawkins Creamery Road, Laytonsville
(Barnhart Property/AT&T Wireless Site No. W-237)

Dear Chairman Holmes:

The Montgomery County Planning Board ("Planning Board" or "Board") is scheduled to hear the referenced matter on November 15, 2001. The purpose of this letter is to call to the Board's attention certain local, state and federal issues regarding the Planning Board Staff's recommendation to deny the Application. As explained below, the Board should reject the Staff Report and recommend approval of this Application.

After months of working with the Applicant in this case, the Tower Committee recommended approval of the Application with only minor adjustments to the height and location of the facilities. Notwithstanding the Tower Committee's Report, the Planning Board Staff Report dated October 5, 2001 recommends that the Application be denied. This recommendation is based on the Staff's application of an improper and illogical interpretation of the zoning requirements set forth by the Board in a separate proceeding involving a similar application for special exception approval. The Staff Report specifically acknowledges that the Application satisfies the requirements of the Zoning Ordinance in *all* other respects.

The Staff Report is based upon a flawed interpretation of the Zoning Ordinance contained in a letter from the Planning Board to the Board of Appeals dated May 21, 2001 in case S-2447 ("Hussman Letter"). Staff states that this correspondence "clarifies" the policies of the Board with respect to this type of facility. To the contrary, the policy stands the regulatory framework on its head, improperly sets up a tiered analysis of equivalent facilities and is otherwise contrary to state and federal law. Moreover, because the Application satisfies the requisite burden of proof under the applicable sections of the Zoning Ordinance, to recommend to the Board of Appeals that the Application be denied would be contrary to well-settled caselaw in Maryland

In support of our position, the Applicant submits the following:

I. There Is No Requirement That An Applicant Disprove The Existence Of Any And All Alternate Technologies, Nor Refute Assertions That It Has "Adequate Coverage"

In 1996, the County Council adopted Executive Regulation #14-96, which established the Tower Coordinator, Tower Committee (also referred to as the "TTFCG") and its review process. The Hussman Letter requests that the TTFCG "require applicants . . . to fully prove or disprove the technical viability of methods for achieving their desired coverage other than the use of a tower when a proposal may have significant adverse impacts. Further, we want you to require the applicant to demonstrate precisely what level of coverage is necessary to meet their service requirements." There is no legal basis for this request.

A. The Tower Committee's Authority Derives from a County Council Mandate.

The mandate for the Tower Committee derives from the Executive Regulation, and until that Executive Regulation is revised or expanded pursuant to applicable procedure (County Council approval), the Planning Board has no authority to place additional review responsibilities upon the Tower Committee. The "alternative technologies" and "level of service" issues that the Planning Board requested the Tower Committee review may be ultimately within the scope and mission of the TTFCG but currently there is no legislative basis for the Tower Committee to comply with these requests or for an applicant to be held accountable to them. Therefore, the Planning Board's request is *ultra vires*. To require the Tower Committee to perform the analysis is also *ultra vires*. There is simply no authority by which the Planning Board can require or demand that the Tower Coordinator expand the technical review of applications for telecommunications facilities. It is up to the County Council-the creator of the TTFCG to consider and make legislative changes to the tower review process.

B. The Planning Board's New Standard Is Flawed In Its Construction And Applied In A Discriminatory Manner.

Even if the Planning Board had the legal authority to demand such analysis of the Tower Committee, which it does not, the Committee Chair has indicated in her letter dated October 2, 2001 ("Lawton Letter") that it would be "very difficult, if not impossible, for the [Committee] to prospectively identify and review the viability of all alternative technical methods to provide the desired services. We do not believe that there is a way to prove or disprove all technical alternatives." (Emphasis in original). Furthermore, the Chairperson indicates in the letter that requiring applicants to demonstrate the necessary level of coverage is equally challenging to identify and review. Therefore, even if the Committee were legally required to perform these two tasks, there is no indication from the Committee that it could (or would) successfully complete its analysis for the benefit of the Planning Board.

According to the Staff Report, the new standards regarding "level of service" and "alternative technologies" are to be "most firmly applied when there is citizen opposition to a monopole tower." This sliding standard based upon the level of citizen opposition may

effectively preclude a favorable recommendation by staff (and ultimately special exception approval) even when exhaustive, time-consuming and costly "level of service" and "alternative technologies" evidence is provided to the Planning Board. As a result, the application of this varying review standard effectively denies applications for personal wireless facilities in any case where citizen opposition arises, in violation of section 332(c)(7)(B)(i)(II) of the Telecommunications Act. The Planning Board is encouraged to disregard this discriminatory review standard.

C. The New Standard was Not Agreed to by the Board of Appeals As Required.

Section 59-A-4.48 of the Zoning Ordinance states that the Planning Board must generate its report on an application "in accordance with the format and other requirements established by agreement of the planning board and the board of appeals." Other than the Hussman Letter outlining the desired "level of service" and "alternative technologies" analysis, there is no indication that the Board of Appeals agreed to or otherwise requires this additional analysis requested by the Planning Board. Therefore, in accordance with Section 59-A-4.48, the Planning Board cannot recommend denial of this Application to the Board of Appeals on the basis of the additional analysis requested **because the Board of Appeals has not formally agreed to such analysis.**

A report including such additional analysis and forming the basis for a recommended denial is *ultra vires* in the face of Section 59-A-4.48. Additionally, nothing in Section 59-A-4.48 is to affect "the applicant's burden of proof and persuasion as provided in section 59-G-1.21". But the Planning Board's additional analysis does just that by requiring an applicant to go beyond the burden of proof outlined in the Zoning Ordinance to prove two additional matters that the Planning Board and Board of Appeals never agreed upon.

Therefore, the Planning Board Staff was mistaken in recommending denial of the Application based only upon a "level of service" or "alternative technologies" analysis. The Staff's analysis exceeds the proper interpretation and Application of the Zoning Ordinance requirements. Furthermore, the Planning Board would violate its report-making authority by recommending denial to the Board of Appeals on the basis of this additional analysis.

D. Maryland Caselaw Supports Approval of Special Exceptions with Only Inherent Adverse Effects.

The Maryland Court of Appeals, in the seminal case of *Schultz v. Pritts*, 291 Md. 1 (1981), states that special exception uses are presumptively "in the interest of the general welfare" and "absent any fact or circumstance negating that presumption" may be approved. In a case with some similarities to the present one, the Court of Special Appeals refined the statements in *Shultz* as follows:

> Adverse effects are implied in all special exceptions. The standard to be considered by the Board is whether the adverse effects of the use at the particular

location proposed would be greater than the adverse effects ordinarily associated with that use elsewhere within the R-1 zone.[1]

In describing the standard for evaluation, Section 59-G-1.2.1 speaks of inherent and non-inherent adverse effects of the proposed use on nearby properties and the general neighborhood. For telecommunications facilities such as the one proposed, its height is an inherent effect. The mobility of a wireless PCS user is dependant upon a wireless network's coverage and the ability to have signal coverage is dependant upon the relative height of these facilities. The Staff recognizes on page 8 of its Report that the application cannot be denied solely on the basis of its inherent adverse effect. Therefore, the concerns of residents and the County regarding the visual incompatibility of the site are offset by Section 59-G-1.2.1. Non-inherent adverse affects could be the basis for denying a special exception application, but the Planning Board staff report found **no significant non-inherent effects for the proposed use.**

Even if the Planning Board's request for additional analysis from the Tower Committee is permitted, there is still action that may be taken at the hearing to remove Staff's sole concern in this case. The Planning Board Staff's recommendation of denial was based upon the opinion that Tower Committee's analysis of alternative technology was "not definitive" and that the Tower Committee "did not sufficiently demonstrate the necessity for the proposed tower." The Planning Board or its staff has the opportunity to request a more definitive statement from the Tower Committee representative and thus remove the one issue that prevents staff from recommending approval. We encourage the Planning Board to request that a representative of the TTFCG be present to address whatever deficiencies the Planning Board believes exist.

II. The Applicant Has Met the Requisite Burden of Proof Under the Special Exception Requirements and the Application Should Therefore be Approved

As stated in the Application's Statement of Justification, the proposed facility is needed in order for AT&T Wireless to provide seamless coverage of its Personal Communications Services (PCS) network within upper Montgomery County. AT&T Wireless is under an obligation by the terms of its FCC license to build its regional networks within time frames specified by the FCC. The proposed Barnhart facility is necessary to AT&T Wireless in meeting the obligations of its FCC license and achieving its coverage objectives.

In March, 1996 the County Council adopted Zoning Text Amendment 95028 [effective April 1, 1996] to regulate the installation of telecommunications facilities. Sections 59-G-1.2.1 and 59-G-2.43 describe the general and specific requirements that an applicant must demonstrate in order to satisfy the burden of proof for special exception approval. If an application meets the requirements of the Zoning Ordinance the Board is obligated to recommend approval to the Board of Appeals. There is no requirement within the Zoning Ordinance that alternate technologies be disproved or that a level of service be articulated to obtain special exception

[1] *AT&T Wireless Services v. Mayor and City of Baltimore*, 123 Md. App. 681 (1998), citing *Mossburg v. Montgomery County*, 107 Md. App. 1, 8-9 (1995), *cert. denied*, 341 Md. 649 (1996).

approval. If the only fault that can be found in the Application is based upon a discretionary "alternate technology/level of coverage" criteria not found in the Zoning Ordinance, the Planning Board cannot deny that the Application on that new and unsubstantiated criteria.

A. Tower Committee Meeting Minutes Reflect That a Level of Service Analysis was Performed and Defended

The Tower Committee properly recommended approval of the Application. Specifically, the Tower Committee found as follows:

- **The TTFCG Chair stated that the Tower Committee was satisfied with the RF issues and the Application clearly showed "a hole in coverage".**

- At the October 3, 2001 Tower Committee meeting, the Committee stated that it compared this Application to the application submitted for the Stanley Property (S-2478) to determine if alternative configurations could be used on existing structures to meet the desired coverage area. Again, the Committee found that even when comparing the Barnhart application in conjunction with the Stanley property or the existing AT&T Wireless network, **no suitable alternative configuration could be utilized for Barnhart without leaving gaps in service in certain portions of the coverage area.**

- In reviewing the Application, the radio frequency ("RF") engineer employed by the Tower Committee stated that a number of different RF propagation maps were required of the Applicant and reviewed, including ones for existing PEPCO facilities in the area. She specifically noted that the PEPCO facilities **did not** provide the desired coverage in the service area.

- The Tower Coordinator was asked what review was performed to ascertain viable alternative structures. Mr. Hunnicutt responded that a site visit was performed, as well as an area drive, a database search and a visual survey of the surrounding area in order to identify any existing structures (silos, power poles, church steeples, tall buildings, etc.). **Mr. Hunnicutt concluded that with the exception of the PEPCO poles (that would not meet the coverage objective) no suitable alternative facilities were found.**

- As for the level of analysis, at the same Tower Committee meeting, Mr. Hunnicutt went on to detail that if there are aspects of an applicant's RF propagation maps that seem out of the ordinary, additional data is requested. Thus, Mr. Hunnicutt, on behalf of the Committee, looks for consistency in each set of submitted maps and even compares them for accuracy to maps for related sites that have been previously reviewed. The Tower Committee, if it has questions about the power level, elevation or other factors used in the RF modeling process, requests clarification from the applicant.

Based upon the TTFCG meetings on both September 19, 2001 and October 3, 2001, we believe the statements at these meetings conclusively prove that the Tower Committee performed the appropriate "level of service" analysis and, therefore, the Staff should have recommended approval of the Application.

B. The Applicant Modified the Proposed Facility and Others to Satisfy County.

A viable alternative site on an existing facility is not possible for the Barnhart Application. The Tower Committee noted at its October 3, 2001 meeting that AT&T had fulfilled the requirement of looking at appropriate co-location options and it was time for the Committee to take positive action on the Application. The Tower Committee unanimously (4-0) recommended approval of the Barnhart Application.

Indeed, issues raised in the letters from the Aircraft Owners and Pilot Association and the Experimental Aircraft Association were met by concessions from the Applicant, such as reducing the height of the monopole from 150' to 132' as well as moving the facility further out of the takeoff/landing approach path for Davis Airport. Further, the Tower Committee asked for the proposed facility to be moved to a less visible site and the Applicant agreed.

With these concessions made, and the approval of the FAA and the Maryland Aviation Administration ("MDAA"), the Applicant has proven that they are in compliance with all applicable safety requirements for aerial navigation. Furthermore, as no instrument or night landings are conducted at Davis Airport, there is no need for lighting beyond that required by the FAA (which, incidentally, requires no lighting). All regulatory authorities over aerial navigation are in agreement that the facility as proposed is safe for the continued operation of Davis Airport.

III. The Staff Recommendation is Contrary to Federal Law Embodied in the 1996 Telecommunications Act and the Equal Protection Clause of the U.S. Constitution

In the face of rapidly developing wireless technology and the need to ensure its timely deployment, Congress amended the Communications Act of 1934 by enacting the Telecommunications Act of 1996, signed into law by the President on February 8, 1996. An important purpose of the of the Telecommunications Act, as described by the Conference Report to the Senate bill, is to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ."[2]

In enacting the Telecommunications Act, Congress gave due consideration to the potential conflict between State and local government regulation of the placement and aesthetic impacts of wireless telecommunications facilities, and the national need for rapid deployment of economical and effective wireless services. Accordingly, Section 704 of the Act, codified at 47

[2] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 1 (1996).

U.S.C. § 332(c)(7), preserves local authority "over decisions regarding the placement, construction and modification" of wireless facilities, but imposes significant restraints on such decisions. Local governments cannot "unreasonably discriminate among providers of functionally equivalent services"[3] or "prohibit or have the effect of prohibiting the provision of personal wireless services".[4]

More generally, Section 253 of the Telecommunications Act prohibits the erection of state and local barriers to entry in the interstate or intrastate telecommunications services industry.[5]

A. The Recommended Denial Violates Section 332 of the Telecommunications Act.

The Planning Board's new standard constitutes unreasonable discrimination in violation of Section 332(c)(7)(B)(i)(I) of the Telecommunications Act, in that other telecommunications facilities have been approved in the County that provide functionally equivalent wireless telecommunications services, under the same special exception requirements, but the Staff has effectively denied similar treatment to AT&T Wireless, based on the above referenced discretionary application of those standards.[6]

The facility proposed by the Applicant is essential to provide connectivity and coverage in certain identified areas of Montgomery County. As noted above, the Tower Committee specifically considered and rejected alternative sites as unsuitable or unavailable. Without this facility, AT&T Wireless is denied adequate service and coverage of this area. Thus, the Planning Board Staff's recommended denial of AT&T Wireless's Application also prohibits or has the effect of prohibiting the provision of personal wireless services in violation of section 332(c)(7)(B)(i)(II) of the Telecommunications Act in that AT&T Wireless is unable to provide adequate service and coverage for the provision of personal wireless services to its customers without the proposed wireless telecommunications facility.[7]

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[3] 47 U.S.C. § 332(c)(7)(B)(i)(I).

[4] 47 U.S.C. § 332(c)(7)(B)(i)(II).

[5] *See* 47 U.S.C. § 253.

[6] 47 U.S.C. § 332(c)(7)(B)(i)(I), provides that: "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof -- (I) shall not unreasonably discriminate among providers of functionally equivalent services."

[7] 47 U.S.C. § 332(c)(7)(B)(i)(II) provides that: "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof – (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

AT&T Wireless has fully addressed and resolved all reasonable concerns of the Tower Committee and community residents as to the environment, aesthetics, and land use compatibility, yet the Planning Board's Staff has been forced to recommend denial of the Application. The untenable policy upon which the recommendation is based and the resulting recommendation itself is tantamount to a general prohibition of telecommunications facilities in instances, such as this, where there is opposition to such a proposed facility. It effectively precludes a favorable recommendation and ultimately special exception approval. The lack of evidence supporting the recommended denial in this case shows that the Planning Board has adopted a general policy to deny applications for personal wireless facilities in any case where opposition is interposed in violation of section 332(c)(7)(B)(i)(II) of the Telecommunications Act.

B. The Recommended Denial Violates Section 253 of the Telecommunications Act.

The Planning Board Staff's recommended denial of the Application also violates 47 U.S.C. § 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Local regulations do not have to explicitly prohibit a particular entity from providing telecommunications services in order to violate Section 253(a). Indeed, the majority of challenged provisions have not been explicit prohibitions on local market entry. The FCC and the courts have held numerous provisions to be barriers to entry, even in the absence of explicit prohibitory language, where the provisions were found to have the *actual or potential* effect of prohibiting telecommunications entry.[8]

By requiring consideration of discretionary factors that have nothing to do with the preserved authority to manage or use of the right-of-way, in general, or the special exception requirements in particular, the Planning Board has created a barrier to entry that prohibits or has the effect of prohibiting the provision of interstate or intrastate telecommunications services in violation of section 253(a) of the Telecommunications Act in that AT&T Wireless is unable to provide adequate service and coverage for the provision of personal wireless services to its customers without the proposed wireless telecommunications facility.[9]

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[8] *See, e.g., RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000); *Bell Atlantic—Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805 (D. MD. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000). On remand, the district court struck down the County's ordinance based solely on Maryland state law. *Bell Atlantic-Maryland, Inc. v. Prince George's County*, 2001 U.S. Dist. LEXIS 10645 (D. Md. July 23, 2001). While the court's initial decision addressing Section 253 was vacated by the Fourth Circuit because the Circuit Court believed the District Court should have analyzed the case first under state law, subsequent cases have still cited the initial decision because of its thorough and thoughtful analysis of Section 253. *See e.g. Auburn*, 260 F.3d at 1175-76 (9th Cir. 2001); *New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 2001 U.S. Dist. LEXIS 2478 at *21 (D. N.J. Mar. 7, 2001).

[9] *See, e.g., City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1178 (9th Cir. 2001); *TCG New York v. City of White Plains*, 125 F. Supp. 2d 81, 92-93 (striking down the City's discretion to approve the franchise only if the City found

The County has effectively created other barriers to entry for telecommunications facilities and thus has the effect of prohibiting personal communications services. For example, there is the super-majority requirement for approval of a telecommunications facility under Subsection 59-A-4.123 of the Zoning Ordinance. Furthermore, Section 59-G-1.2.1 imposes an additional level of review to determine the inherent and non-inherent adverse effects of a proposed telecommunications facility. Additionally, with a special exception application having to proceed through a public hearing before the TTFCG, the Planning Board ***and*** the Board of Appeals,[10] the County burdens an applicant with unnecessary delays and transaction costs that effectively create a barrier to entry in violation of federal law. While Maryland courts have limited a zoning body's review authority to a degree through case law[11], the pattern and effect of the above-mentioned special exception requirements, utilized in conjunction with the new "level of service" and "alternative technologies" review, create an impermissible barrier to entry for telecommunications facilities in Montgomery County.

C. Planning Board's Review Standard is Violative of Equal Protection

A major concern of the Applicant is the violation of its equal protection under the U.S. and Maryland Constitution. The Staff Report unequivocally states that the Planning Board's "standards are to be most firmly applied when there is citizen opposition to a monopole tower." The Staff goes on to recognize that the Planning Board's additional analysis request "substantially exceeds previously accepted interpretations of the requirements for the [special exception] use in the zoning ordinance and past standard practice."

Finally, Staff acknowledges that "this standard is not to be applied uniformly, but primarily when there is opposition to a monopole tower." This standard as applied by the Planning Board and its Staff is patently discriminatory, creating a review standard that is higher for an application that has citizen opposition than one that does not. This sliding standard runs afoul of not only equal protection under the U.S. Constitution, but also discrimination under 47

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the franchise was in the public interest); *Qwest Communications Corp. v. City of Berkeley*, No. C 01-0663 SI (N.D. Cal. May 23, 2001)(prohibiting the consideration of "such other factors" and information as the City wished).

[10] A survey of the jurisdictions of the District of Columbia, Arlington, Fairfax, and Loudoun Counties in Virginia, the City of Alexandria, and Carroll County, Maryland reveals that special exceptions in those jurisdictions go through one, or at most two, public hearings.

[11] *See Schultz v. Pritts*, 291 Md. 1 (1981)("The special exception use is a valid zoning mechanism that delegates to an administrative board **a limited authority** to allow enumerated uses which the legislature has determined to be permissible . . . .")(Bold added), *American Tower vs. Frederick County and AT&T Wireless Services vs. Mayor and City Council of Baltimore*, 123 Md. App. 681 (1998)(Board failed to show how adverse affects of the facility would be greater at one location than another in the same zoning district).

U.S.C. Section 332(c)(7)(B)(i)(I)[12] and prohibition of service under 47 U.S.C. Section 253(a).[13] This discriminatory standard potentially allows another functionally equivalent wireless telecommunications service provider to gain special exception approval under one set of standards, while effectively denying the instant Application under a stricter standard, based upon the fact that there is opposition to the Application. Such an inequitable standard based on the amount or level of citizen opposition is not competitively neutral as required by the Telecommunications Act. Therefore, the Planning Board should disregard this subjective standard and review this application against the criteria presently existing in the Zoning Ordinance.

CONCLUSION:

The lack of evidence supporting the recommended denial in this case shows that the Planning Board Staff is forced to recommend denial by this new standard even when the Applicant has satisfied the requirements of the Zoning Ordinance. For the reasons stated above, the Board should reject Staff's recommended denial, and recommend that the Board of Appeals approve the Application.

Sincerely,

Edward L. Donohue

Edward L. Donohue

Copies to: All parties of record
Mark Burrell, AT&T Wireless
Tasha Pablo, American Tower

[12] "The regulation of the placement . . . of personal wireless service facilities by any . . . local government or instrumentality thereof shall not unreasonably discriminate among providers of functionally equivalent services."

[13] "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION
8787 Georgia Avenue • Silver Spring, Maryland 20910-3760
(301) 495-4605

Montgomery County Planning Board
Office of the Chairman

January 29, 2002

Mr. Donald Spence, Chairman
Montgomery County Board of Appeals
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

Jane E. Lawton, Chairperson
Telecommunications Transmission Facility Coordinating Group ("Tower Committee")
c/o Department of Housing and Community Affairs
Stella B. Werner Council Office Building, 4th Floor
100 Maryland Avenue
Rockville, Maryland 20850

JAN 30 2002

RE: Standard of Review for Telecommunication Facility Applications

Dear Chairman Spence and Chairperson Lawton:

The Montgomery County Planning Board ("Planning Board"), through this letter, clarifies for your benefit the Board's review process for telecommunication facilities. This letter is in follow-up to previous letters to yourselves dated May 21, 2001, and May 22, 2001, from former Planning Board Chairman Hussmann on this subject.

In its consideration of applications for telecommunications facilities, the Planning Board does not expect applicants to prove or disprove to the Tower Committee the viability of technologies other than the one proposed. (Certainly, however, co-location opportunities are to be explored.) However, the Planning Board asks the Tower Committee to require an applicant to demonstrate the level of coverage necessary to achieve its service requirements in keeping with the Tower Committee's role in advising "any land use agency . . . on the technical rationale at that location for any telecommunications transmission facility . . . ." Montgomery County Code Sec. 2-58E. The Board also asks the Tower Committee to transmit to the Planning Board all of the specific findings of the Tower Coordinator under Section 5 of Executive Regulation 14-96, specifically including any "potential impacts on [the] surrounding area" identified by the Tower

Coordinator under Section 5(a)(2)(e) of the Executive Regulation.[1] (Copy enclosed.)

I also want to elaborate on the Planning Board's position with respect to the inherent/non-inherent special exception characteristics of these facilities. Under Montgomery County Code § 59-G-1.2.1, inherent adverse effects, including those "physical and operational characteristics necessarily associated with [a telecommunications facility], regardless of its physical size or scale of operations . . . are not [by themselves] a sufficient basis for denial of a special exception." The Planning Board is of the opinion that the height of a telecommunications facility is not an inherent adverse effect. This analysis is based on the fact that height varies among facilities. Similarly, the Planning Board considers the type of telecommunications structure— (e.g., monopole, lattice tower, guyed tower, stealth tower flagpole or simulated tree)—to be a non-inherent characteristic.

Consequently, the height of a facility can be a reasonable basis for the denial of an application if supported by substantial evidence of record that the height would have an adverse impact on the surrounding properties or general surrounding neighborhood. The Planning Board has determined that the enormous range of heights of telecommunications facilities—from less than fifty feet tall to heights in excess of four hundred feet—and, furthermore, the fact that an applicant can provide comparable levels of service by mounting of its antennae mounted on one tall structure or on several considerably shorter structures, necessitate such a finding. Therefore, from this point forward, the Planning Board considers the height of a telecommunications facility to be a non-inherent characteristic for the purposes of County Code § 59-G-1.2.1.

I hope this clarification will assist the Board of Appeals and the Tower Committee as we jointly administer the County's regulations governing these uses. Please call me at (301) 495-4605 if you wish to discuss these matters further.

Sincerely,

Arthur Holmes, Jr.
Chairman

Enclosure

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[1] Also to clarify, the Planning Board will not impose any form of heightened standard of review simply because of community opposition to a proposed facility siting. Opposition testimony will of course be considered as evidence of record, to be weighed on its merits along with all of the other evidence of record.

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

(240) 777-6600

Case No. S-2447

PETITION OF AT&T WIRELESS SERVICES

Resolution Reaffirming Dismissal of Petition
Oral Argument Held December 5, 2001
(Effective Date of Resolution: January 23, 2002)

Case S-2447 is an application for a special exception pursuant to § 59-G-2.43 (Public Utility Building, Public Utility Structures and Telecommunications Facilities) of the Montgomery County Zoning Ordinance to permit a telecommunications facility which would include a 130 foot monopole, 9 panel antennas and a 12 by 28 foot equipment building.

The subject property is Parcel 111, located at 8630 Brink Road, Gaithersburg, Maryland, in the RE-2 zone.

On October 3, 2001, a public hearing was convened on the above captioned special exception. At the hearing, Norman Knopf, Esquire, on behalf of David and Cathy Hubbard, adjoining property owners in opposition to the petition, moved to dismiss the petition. That motion was granted and a resolution dismissing the petition was issued with an effective date of November 26, 2001.

On October 23, 2001, Edward L. Donohue, Esquire, on behalf of the petitioner, filed a motion for reconsideration of the Board's action dismissing the petition. Mr. Knopf filed a response on November 8, 2001.

On December 5, 2001, a hearing was held on the motion for reconsideration, pursuant to the Board's authority under Paragraph 10 of the Board's Rules of Procedure. Edward L. Donohue, Esquire, appeared on behalf of petitioner AT&T Wireless and Norman Knopf, Esquire, appeared on behalf of David and Cathy Hubbard, adjoining property owners in opposition. Martin Klauber, Esquire, Office of the People's Counsel, also appeared.

EVIDENCE PRESENTED TO THE BOARD

1. Patricia and J. F. Burrows (the "Burrows") are the owners of Parcel 111 at 8630 Brink Road. The parcel is 25.04 acres in size. The Burrows and the petitioner have entered into a Lease Agreement for a 50 by 50 foot area on which petitioner proposes to construct the 130 foot monopole and equipment building. (See Exhibit Nos. 5, 9, and 27(b)).

2. The Burrows are not co-petitioners with AT&T Wireless Services.

3. The 50 by 50 foot leased area is less than the two acre minimum lot size required for a residential structure in an RE-2 zone. See, Montgomery County Zoning Ordinance, Section 59-C-1.322(a).

4. At the hearing held December 5, 2001, petitioner offered into evidence a letter from the Burrows to Mr. Donohue, petitioner's counsel, stating that they authorized the prosecution of the petition for a special exception "on behalf of your clients" and "agreed to the filing of a Special Exception Application" by AT&T Wireless. (Exhibit 54(b)).

FINDINGS OF THE BOARD

MINIMUM LOT SIZE

The petitioner first argues that the Montgomery County Zoning Ordinance does not contain any lot size requirements that relate to the proposed use of the property. The Board disagrees with this assertion. Section 59-G-2.43(j)(1) provides:

> The minimum parcel or lot area must be sufficient to accommodate the location requirements for the support structure under Paragraph 2, excluding the antennas, but not less than the lot area required by the zone . . . . (emphasis added).

The Board interprets this section to mean that petitioner's proposal must be on a lot or parcel large enough to meet the applicable minimum parcel or lot area required in that zone. Section 59-C-1.322(a) of the Zoning Ordinance provides that the minimum net lot area for a one family detached dwelling is 87,120 feet or two acres in an RE-2 zone. The Zoning Ordinance does not provide for an alternate minimum lot area for any other type of building or structure in the RE-2 zone. Further, no specific minimum lot area is identified for a telecommunications tower in that section.

Petitioner supports its argument citing the case of *Christopher O'Flinn v. Bell Atlantic Nynex Mobile*, an unreported decision in the Court of Special Appeals, Case No. 31, September Term, 1999, filed January 20, 2000. The *O'Flinn* case involved a special exception for a telecommunications facility in Montgomery County. Petitioner directs the Board to a statement by the Court of Special Appeals at Page 12 of the *O'Flinn* opinion that "no minimum lot area is required for a telecommunications facility."

In the *O'Flinn* case, the issue presented was whether two special exceptions could exist on the same property. The property was located in an RE-2 zone and exceeded two acres. On the property, at the time of the filing of the special exception for the telecommunications facility, was a previously granted special exception existing for a private club. The Court of Special Appeals held that the minimum lot size requirements did not require a minimum of two acres for each proposed special exception and that the lot size requirements were not cumulative. (See pages 12-13 of *O'Flinn* slip opinion).

The Board finds that *O'Flinn* is not dispositive of the present action. The specific issue of whether a minimum of two acres in an RE-2 zone is required for a telecommunications facility was not before the Court in *O'Flinn*.

The issue presented to this Board is one of statutory interpretation. It is proper for the Board to consider such issues. *Montgomery County v. Broadcast Equities, Inc.*, 360 Md. 438, 451, 758 A.2d 995, 1002 (2000). The rules relating to statutory interpretation are restated in *County Council v. Dutcher*, 365 Md. 399, 780 A.2d 1137, 1147 (2001) citing *Chesapeake & Potomac Telephone Co. of Md. v. Director of Finance*, 343 Md. 567, 578-79, 683 A.2d 512, 517-18 (1996) (citations omitted):

> Of course the cardinal rule is to ascertain and effectuate legislative intent. To this end we begin our inquiry with the words of the statute and, ordinarily, when the words of the statute are clear and unambiguous, according to their commonly understood meaning, we end our inquiry there also. Where the statutory language is plain and unambiguous, a court may neither add nor delete language so as to "reflect an intent not evidenced in that language," *Condon v. State,* 332 Md. 481, 491, 632 A.2d 753, 755 (1993), nor may it construe the statute with "forced or subtle interpretations" that limit or extend its application. *Id* (citation omitted) Moreover, whenever possible, a statute should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory. (emphasis added)

The Board finds that Section 59-A02.43(j)(1) is "clear and unambiguous." The Board further finds that to give meaning to the language in Section 59-G-2.43(j)(1), requiring "not less than the lot area required in the zone," and so as to not render that

clause "superfluous or nugatory," that section must be read to require a minimum lot area of two acres.

BURROWS' LETTER

Petitioner also argues that a letter provided by the Burrows and entered into the record on December 5, 2001, (Exhibit 54(b)) is sufficient to allow the Burrows' entire 25.04 acre tract to be considered as the property "subject to" the special exception. The Board finds, however, that the letter does not provide the petitioner with sufficient rights to prosecute the action before the Board relative to the entire 25.04 acre parcel.

Section 59-A-4.22 directs those filing a petition for a special exception that certain data must accompany the petition. That section states, in pertinent part, as follows:

> (a) Each petition for special exception must be accompanied at the time of its filing by 4 copies of a statement that includes:
>
> • • • •
>
> (6) If the petitioner is not the owner of the property involved, the lease, rental agreement, or contract to purchase by which petitioner's legal right to prosecute the petition is established.

In this action, the petitioner is not the owner of the entire 25.04 acres of the "property involved." (The 50 foot by 50 foot leased portion of the property itself would not meet the setback requirements identified in the Code, however, it is relied on by the petitioner to meet the relevant setbacks.) Therefore, it is incumbent upon petitioner to submit the required documentation establishing its legal right to prosecute the action. The Code specifies the nature of the documentation that is required. That documentation must be either (1) a lease, (2) a rental agreement, or (3) a contract to purchase. There are no other documents specified, nor is there a general clause which permits other or similar documents that might satisfy this requirement. Each of these three types of the agreements involve the transfer of certain rights. In a lease or rental agreement, the petitioner is transferred the right to use a particular property for a specific terms of years. These rights are enforceable by the courts of this state so long as the petitioner meets requirements of the lease or rental agreement. In a contract to purchase, equitable title has passed to the petitioner and the passage of legal title is pending. See, *Himminghoefer v. Medallion Industries, Inc.*, 302 Md. 270, 487 A.2d 282 (1985).

The letter placed into evidence by petitioner from the Burrows does not rise to the level of the transfer of rights that Code Section A-4.22(a)(6) contemplates. It

appears to do no more than acknowledge the Burrows' support for the special exception by Mr. Donohue "on behalf of his client." As such, it does not meet the requirements of the Zoning Ordinance and is insufficient to allow the petitioner to proceed in this action.

PREVIOUSLY GRANTED SPECIAL EXCEPTIONS

Finally, petitioner argues that this Board has granted as many as 25 other special exceptions for telecommunications facilities on similar facts, 16 of which have followed the 1996 adoption of the last major zoning text amendment relating to telecommunications facilities. Assuming, for purposes of argument, that this is true, the Board observes that it has never squarely addressed the issue. The People's Counsel argues that since this issue has never been raised the Board is not prohibited from fully considering this issue now that it has been presented. The Board agrees with People's Counsel.

The law is clear that an agency must either follow its own precedents or explain why it departs from them. *Atchison, T. & S. F. R. Co. v. Wichita Board of Trade,* 412 U.S. 800, 808 (1973). In *Greater Boston Television Corp. v. F.C.C.,* 444 F.2d 841, 852 (D.C. Cir.) *cert. denied*, 403 U.S. 923 (1971) the court observed that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. . . ."

As stated previously, this is a case of first impression. However, assuming, arguendo, that the Board is changing a prior policy, it now finds, in this and future cases, that under Section 59-G-2.43(j)(1), a telecommunications facility may only be built on a lot or parcel that meets the minimum requirements of the zone. The Board concludes that, given the size and height of the structures involved, that basic compatibility analysis, as a required finding in Section 59-G-1.21, mandates a larger lot size than petitioner's proposed 2,500 square foot area. Given the relative height of this type of structure (130 feet in this case), the Board believes that in order to be harmonious with the residential character of a neighborhood, a finding is required under Section 59-G-1.21(a)(4) that such a facility must, at a minimum, meet the lot size required for a single family residence in the neighborhood.

The Board also observes that, even if prior panels of the Board had failed to require that the minimum lot size apply to this facility, that such a finding is contrary to the plain meaning of Section 59-G-2.43(j)(1). As stated in *County Council v. Dutcher, supra*, quoting *Smith v. Higinbothom*, 187 Md. 115, 132-133, 48 A.2d 54, 763 (1946): "Indeed, we have long held that '[n]o custom, however long and generally it has been followed by officials of the State, can nullify the plain meaning and purpose of a statute.'" 780 A.2d at 1154. This holding is in accord with our finding above that the language of the Zoning Ordinance is "clear and unambiguous."

The Board observes that it is not unusual for the Zoning Ordinance to specify a minimum lot area for a special exception. Examples include Section 59-G-2.31 Hospitals (minimum area five acres); Section 59-G-2.25.1 Grain elevator (5 acres); Section 59-G-2.23 Funeral Parlors or Undertaking Establishments (1 ½ acres); Section 59-G-2.21.3 Farm Supply (2 acres); and Section 59-G-2.14 Clinic (40,000 square feet). The only difference between these special exceptions and the one at issue is that the allowable minimum lot area changes to meet that of the underlying zone.

Based upon the foregoing, the Board finds that petitioner's proposal fails to meet the requirement that it must be on a lot or parcel large enough to meet the applicable minimum parcel or lot area of two acres required in the RE-2 Zone.

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

BE IT RESOLVED, by the Board of Appeals for Montgomery County, Maryland, that upon Reconsideration, the Resolution dismissing the Petition of AT&T Wireless Services in Case No. S-2447, is reaffirmed and Case No. S-2447 is **dismissed**, as legally deficient.

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 23rd day of January, 2002.

Katherine Freeman
Executive Secretary to the Board

COLE, RAYWID & BRAVERMAN, L.L.P.

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EDWARD L. DONOHUE
ADMITTED IN DC AND MD
202-659-9750
EDONOHUE@CRBLAW.COM

January 31, 2002

BY FACSIMILE & 1ST CLASS MAIL
Arthur Holmes, Jr., USA (Ret.), Chairman
Montgomery County Planning Board
Maryland-National Capital Park & Planning Commission
8787 Georgia Avenue, Room 300
Silver Spring, MD 20810

Re: Special Exception Case No. S-2477; OZAH Referral No. 01-14
Barnhardt Property, Laytonsville Road, Gaithersburg, MD

Dear Chairman:

This is to inform you that the issue regarding the property owner as co-applicant was previously resolved in S-2479 (Mullinix) to the satisfaction of the Hearing Examiner and the Board of Appeals by having the property owner agree to be a co-applicant to the special exception application in that case.

In this case, S-2477, the property owner agreed by letter to the Board dated January 9, 2002 (see attached), to become a co-applicant to the special exception application. We reiterate here, as we did in Mr. Barnhardt's letter, that we submit this letter and attachment without prejudice to, and reserving the right to seek administrative and judicial review of the decision made by the Board of Appeals in Case No. S-2447.

Respectfully submitted,

Edward L. Donohue

Edward L. Donohue

Attachment

cc: Judith Daniel, Community-Based Planning Department, M-NCP&PC
Michele Rosenfeld, M-NCP&PC Legal Department

:147515-1

COLE, RAYWID & BRAVERMAN, L.L.P.

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January 9, 2002

BY HAND DELIVERY

Mr. Donald Spence, Jr.
Chairman, Montgomery county Board of Appeals
100 Maryland Avenue, Suite 217
Rockville, Maryland 20850

RE: Special Exception Case No. S-2477, OZAH Referral No. 01-14
Barnhardt Property, Laytonsville Road & Hawkins Creamery Road,
Gaithersburg, MD

Dear Mr. Spence:

Attached please find a letter from Mr. Barnhardt, owner of the Barnhardt property. Mr. Barnhardt has authorized Cole, Raywid and Braverman, LLP to prosecute the above referenced special exception application. In accordance with the recent decision by the Board of Appeals in Case No. S-2447, Mr. Barnhardt requests that the Board consider him as a co-applicant in Case No. S-2477. We submit this letter and attachments without prejudice to, and reserving the right to seek administrative and judicial review of the decision made by the Board of Appeals in Case No. S-2447.

If you have any questions regarding this submission do not hesitate to contact me.

Very truly yours,

Edward L. Donohue

Edward L. Donohue

cc: Francoise Carrier, Director of Office of Zoning and Hearing
Mr. Martin Klauber, People's Counsel
Tim Brenner, AT&T Wireless Services
Tasha Pablo, American Tower Corporation

4509_1.DOC

William E. Barnhardt
2602 Bennies Hill Road
Middletown, MD 21769

Mr. Donald Spence, Jr.
Chairman, Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, Maryland 20850

Re: Case No. S-2477, Special Exception application for a telecommunications facility at Laytonsville Road & Hawkins Creamery Road, Gaithersburg ("Barnhart Property")

Dear Mr. Spence:

I am the owner of the above-referenced property that is the subject of special exception application S-2477. The purpose of this letter is to advise the Board of Appeals that I have authorized Edward Donohue, an attorney at Cole, Raywid and Braverman, to pursue this special exception application on behalf of his clients, AT&T Wireless Services and American Tower Corporation.

In addition, to comply with Montgomery County's zoning procedures I would like the Board to consider me, as owner of the subject property, to be a co-applicant on the above-referenced application. This revision will not alter my status as landlord for the proposed telecommunications facility and will not make me a co-owner of the facility.

Thank you for your attention to this matter.

Sincerely,

William E. Barnhardt

The Leader In Recreational Aviation

January 9, 2002

14 2002

Mr. Arthur Holmes, Chairman
M-NC Park and Planning Commission
Room 300
8787 Georgia Avenue
Silver Spring, MD 20810

Mr. David Podolsky, Hearing Examiner
Office of Zoning and Administrative Hearings
Room 200
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, MD 20850

Mr. Martin Klauber
People's Counsel for Montgomery County
Room 226
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, MD 20850

RE: Special Exemption No. S-2477 / OZAH Referral No. 01-14
Proposal by American Tower Corporation and AT&T Wireless

Dear Mr. Holmes, Mr. Podolsky and Mr. Klauber:

It is our understanding that the Maryland / Nation's Capital Park and Planning Commission will consider staff recommendations at a public hearing on January 10, 2002 to accept the request of the petitioner to erect a tower in the immediate vicinity of the Davis (Maryland) Airport. Further, we understand that the Board of Appeals will consider a Special Exemption at a hearing on January 18. The Experimental Aircraft Association recommends that the Commission and the Appeals Board deny this petition on the basis of the information provided below.

As to standing in this case, EAA (Experimental Aircraft Association) is the world leader in recreational aviation. With an international membership of 171,000 EAA brings together aviation enthusiasts, pilots and aircraft owners who are dedicated to the continued growth of aviation, the preservation of its history and

a commitment to aviation's future. EAA programs, activities and events are known throughout the world for supporting aviation safety and promoting personal enjoyment and responsibility within an aviation lifestyle. These efforts are made possible through massive volunteer involvement in support of the organization, as well as EAA's special interest Divisions, and a global network of nearly 1,000 local Chapters and the affiliated National Association of Flight Instructors (NAFI).

Therefore, EAA represents tens of thousands of American citizens that have legal access to the public-use Davis Airport. Our sole concern is the safety of the individuals operating aircraft to and from the Airport and those on the ground in the flight path areas.

EAA, the local EAA Chapter, the Aircraft Owners and Pilots Association (AOPA) and individual pilots have all filed significant comments to both Federal and State aviation authorities objecting to the construction of this tower on the basis of aviation safety degradation. (Copies of these objections are attached for your convenience.) These safety concerns remain.

We are aware the proponent has amended the original proposal lowering the height of the tower to assure the height is (just) below the airspace surfaces that would constitute "an aeronautical hazard" according to FAA and Maryland aviation regulations. While we acknowledge this fact, we, on behalf of those actually flying the aircraft, realize that just because the FAA and State standards are met, does not assure safety in all cases. In this regard, we respectfully submit the following reinforcing and new information to support our request for your denial of the proposed Special Exemption.

As key leaders in the community it is very important to understand the role of the FAA in the tower "approval" process. Federal Aviation Regulation (FAR) 77 requires builders of towers to notify the FAA by means of a request for an aeronautical study when these structures exceed certain heights. Upon receipt, the FAA will, in turn, process the study to determine (issue a finding) if the tower location and height will be a "hazard" or a "no hazard" to the public flying within the National Airspace System (NAS). That determination is the FAA's only role in this action, as their finding is simply that - a finding of hazard or no hazard. Their finding is not a building permit, an authority of which is maintained by local governmental agencies like yours, nor does the FAA finding indicate any other type of construction approval authority. Only the local zoning and planning commission/board can address local land use issues, local flight and ground safety issues, local citizen feedback, local environmental issues, etc. and apply all that information to the building permit approval/disapproval process.

EAA has reviewed the public record for S-2477. This includes a November 5, 2001 letter from Aviation Systems, Inc. of Torrance, California. While a consulting firm in California can articulate the facts of public record concerning such matters as the current facility dimensions and the fact that no night landings and instrument approaches are currently permitted, they are not familiar with other salient facts concerning this public-use facility. We, therefore, provide the following information:

- All points made in the attached letters from AOPA, EAA and EAA Chapter 524 that relate to aviation and safety concerns remain valid at the reduced height of 134 feet above ground level (AGL).
- Davis Airport is critical to airport capacity in the Washington metropolitan area. It is an essential public-use airport included in the Maryland state system plan.
- The runway was recently resurfaced with matching public funds from the Maryland aviation grant program.
- In recent years, the same Montgomery County that is now considering reducing the safety and capacity of this public-use facility, spent considerable tax dollars to acquire land at the west end of the Airport to assure compatible land-use and to enhance the safety of operations.
- Under anticipated new ownership (the current owner suffers Alzheimer's disease and lives in a nursing home) additional private and public sector facility/service investments will be made. While night and instrument procedures are not currently available, future improvements could include these activities, thereby enhancing aviation safety and the community service value of the Airport.
- The airspace in the vicinity of the airport is already highly congested as a result of an overlying Class B airspace floor of 2,870 feet AGL. There are already occasional airspace conflicts from continuous overflights (below the Class B floor) enroute to Montgomery County Airport (GAI) at Gaithersburg. The construction of the tower will exaggerate this situation, since the tower will become a "informal" VFR checkpoint for those operating to GAI.
- Student pilot training operations are one of the major activities at the Airport. This learning environment includes many pilot workload issues; therefore, the added element of tower avoidance should not be added.
- Finally, the attached EAA June 20 letter references a "soon to be released" set of Federal regulations that will create an entire new structure of Federal pilots licenses and Federal certification standards for light sport aircraft. These light aircraft may operate at traffic pattern altitudes typical of current ultralight aircraft procedures (stipulated in FAA Advisory Circular 90-66) – lower than conventional aircraft traffic patterns. An airport with

Davis Airport's limited capabilities (due to runway length) and major metropolitan location will be very attractive to these types of operations. The tower, even at the lowered height, will directly conflict with these operations. The Federal proposed regulations will be released within the next two weeks and could result in final Federal regulations as early as mid-2002.

Based on the above comments, and those attached, EAA recommends denial of the subject proposals to erect the subject tower.

Sincerely,

EXPERIMENTAL AIRCRAFT ASSOCIATION

Randy Hansen
Government and Industry Relations

Attachments: Experimental Aircraft Association letter dated June 20, 2001
Aircraft Owners and Pilots Association letter dated June 7, 2001
EAA Chapter 524 letter dated June 24, 2001

cc: Ms. Judy Daniel Community-Based Planning Department / M-NCPPC
AOPA
Maryland Aviation Administration
Doug Kelly, Past President, EAA Chapter 524
Gust Mitchell, President, EAA Chapter 524

EAA
The Leader in Recreational Aviation

June 20, 2001

Mr. William E. Merritt
Specialist, Airspace Branch AEA-520
FAA Eastern Region Headquarters
1 Aviation Plaza
Jamaica, NY 11434-4809

Dear Mr. Merritt:

Re: FAA Aeronautical Study No. 01-AEA-0354-OE, Proposed Antenna Tower in Etchison, MD

EAA (Experimental Aircraft Association) is the world leader in recreational aviation. With an international membership of 170,000 EAA brings together aviation enthusiasts, pilots and aircraft owners who are dedicated to the continued growth of aviation, the preservation of its history and a commitment to aviation's future. EAA programs, activities and events are known throughout the world for supporting aviation safety.

After contacting local pilots and EAA Chapter members, EAA feels this tower proposal should be classified as a "Determination of Hazard to Air Navigation."

Within the very congested Washington Dulles, Regan National, Andrews AFB and Baltimore Washington airport areas, Davis Airport (W50) is considered to be a vital VFR reliever airport. With over 15,000 operations a year, any restrictions within their airspace would have a negative impact on the entire region. This tower proposal would have an adverse impact on the total airport operations. The key considerations used to make this hazard determination are:

1. Due to the overhead Class B airspace, Davis Airport has a non-standard downwind traffic pattern altitude of 1,400' MSL (AOPA Airport Directory page 3-250 and FAA AC 90-66 paragraph 8c);
2. Published traffic pattern procedures state pilots should complete their turn from crosswind to final within ¼ mile from the runway. When landing to runway 26, this proposed tower would become a critical flight hazard. (AIM figure 4-3-3 and FAA AC 90-66 airport operations appendix)
3. Ultralight Vehicles (FAR 103) use this airport. Per AC 90-66 these vehicles utilize a traffic pattern that is inside and 500' lower than the standard traffic pattern – or 900' MSL in this case. This directly means that turns to base and to final will be closer to the airport and much lower than standard. The location of this tower means that Ultralight Vehicles turning base to final for

runway 26 or turning crosswind on runway 08 departures will over fly this tower by less than 100'.

FAR 77.71 states the national FAA policy is to encourage the use of antenna farms and the single structure – multiple antenna concept whenever possible. With towers located within 2-3 miles, both east and west, of Davis Airport, EAA feels the FAA should attempt to get this proposed tower co-located with either of the existing towers. Both existing towers are taller then the proposed tower, and by co-locating this tower with them the builder could easily raise the height of this tower to offset any reduced performance created by moving the tower 2 miles either east or west.

And finally, like all aeronautical studies this one states "consideration will be given to all facts relevant to the effect of the structure on existing and planned airspace use, air navigation facilities, airports, aircraft operations, procedures and minimum altitudes, and the air traffic control system." In June 2001 FAA Administrator Garvey signed the proposed Sport Pilot and Sport "Light Plane" rule and forwarded it to the Secretary Mineta, Department of Transportation, for final DOT approval The new rule will have a relevant effect on "planned" use of airports and aircraft operations by allowing for significant new growth in general aviation aircraft operations at this and all airports. In a area as congested as Washington and Baltimore the new class of pilots and aircraft will be forced to use reliever airports like Davis to conduct their flight operations. Based on the airspeed and weight limitations established by under the Sport "light aircraft" rules, these new category of aircraft will be utilizing the same airport traffic patterns published for ultralight vehicles in AC 90-66. FAA Administrator Garvey expects the public will be able to operate under these new rules within one year. So, this new rule will have a definite impact on planned operations at the Davis Airport (W50) and must be considered during this study. The tower, in it's proposed location and height, will be a "Hazard to Air Navigation" for the new Sport Pilots and their "light" aircraft.

Sincerely,

Randy Hansen
EAA
Government & Industry Relations

920-426-6522
rhansen@eaa.org

AIRCRAFT OWNERS AND PILOTS ASSOCIATION
421 Aviation Way • Frederick, MD 21701-4798
Telephone (301) 695-2000 • FAX (301) 695-2375
www.aopa.org

June 7, 2001

Mr. William E. Merritt
Specialist, Airspace Branch
Federal Aviation Administration
Eastern Region, AEA-520
1 Aviation Plaza
Jamaica, NY 11434-4809

RE: Aeronautical Study 01-AEA-0354-OE

Dear Mr. Merritt:

The Aircraft Owners and Pilots Association (AOPA), representing the interests of over 370,000 aviation enthusiasts and professionals nationwide, respectfully submits its objection to the proposed construction .33 nautical miles north of Davis Airport (W50), Etchison, Maryland. If constructed, the tower's height coupled with its proximity to the active runway, would create a significant reduction in the safe and efficient use of airspace for pilots utilizing this facility.

For example, aircraft departing Davis Airport would be exposed to a considerable hazard while conducting operations within the established left-hand traffic pattern. The increased pilot workload inherent to the departure phase of flight, combined with the reduced visibility while in a climb attitude, makes the proposed location of this tower objectionable to the users of Davis Airport. Given that W50 is home to 27 based aircraft and the host of over 15,000 operations per year, the danger this construction poses to pilots is worthy of consideration. It is also important to note that during periods of reduced visibility or when meteorological conditions reduce aircraft climb performance, the aforementioned dangers will be compounded.

In short, if the proposed tower becomes a reality, it would have a substantial adverse impact to aircraft operations into W50. Airspace is a finite and diminishing natural resource, and we appreciate the demands being placed on all airspace users. However, for these interests to exist in harmony, each must understand the impact of its activities on the entire airspace system. For these reasons, AOPA respectfully requests that the FAA find the captioned proposal a hazard to air navigation.

Respectfully,

Michael W. Brown
Associate Director, Air Traffic Services
Aircraft Owners and Pilots Association

18313 Muncaster Road
Derwood, MD 20855
24 June 2001

William E. Merritt
Specialist, Airspace Branch
Federal Aviation Administration
Eastern Region, AEA-520
1 Aviation Plaza
Jamaica, NY 11434-4809

RE: Aeronautical Study 01-AFA-0354-OE

Dear Mr. Merritt:

On behalf of the 100 members of Chapter 524 of the Experimental Aircraft Association (EAA), I am writing to express concern regarding the proposed erection of a communications tower within the traffic pattern of Davis Airport (W50) near Etchison, Maryland. Chapter 524 is based in Frederick, Maryland, but many of its members reside in nearby Montgomery County, and some are based at Davis.

Davis Airport lies beneath the BWI/DCA/IAD Class B airspace and along approaches to and from Montgomery County Airpark (GAI) from Frederick (FDK), Clearview, and Carroll County airports. As such, it experiences considerable compressed overhead crossing traffic immediately above (or often within) its traffic pattern. The proposed tower will present an intrusion and hazard about 1/3 mile from the runway at Davis.

Our chapter strongly encourages the preservation of small public use recreational airports such as Davis that absorb light aircraft activity that would otherwise overburden airports in nearby congested areas. The proposed tower will, in our view, be hazardous to operations at Davis – especially considering its strategic location relative to other commercial and recreational operations directly overhead or nearby. On the basis of aviation safety, we join others in requesting that you file an objection with the Montgomery County, MD Board of Appeals, Case No. S-2477/OZAH, Referral No. 01-14.

Thank you for your consideration of our request.

Sincerely,

Douglas E. Kelly
President, EAA Chapter 524
Private Pilot: 524367260
Owner: N213Y

COLE, RAYWID & BRAVERMAN, L.L.P.

ATTORNEYS AT LAW
1919 PENNSYLVANIA AVENUE, N.W., SUITE 200
WASHINGTON, D.C. 20006-3458
TELEPHONE (202) 659-9750
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2381 ROSECRANS AVENUE, SUITE 110
EL SEGUNDO, CALIFORNIA 90245-4290
TELEPHONE (310) 643-7999
FAX (310) 643-7997

EDWARD L. DONOHUE
ADMITTED IN DC AND MD
DIRECT DIAL
202-659-9750
EDONOHUE@CRBLAW.COM

January 29, 2002

VIA FEDERAL EXPRESS
Mr. Donald Spence, Jr.
Chairman, Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, Maryland 20850

Re: Special Exception No. S-2477/OZAH Referral No. 01-14; Telecommunications Facility proposed by American Tower Corporation and AT&T Wireless

Dear Chairman,

We are in receipt of the January 9, 2002 letter from the Experimental Aircraft Association in which they express their opposition to the proposed telecommunications facility. In light of this fact, we are providing information to you regarding the preemptive authority of the FAA over matters of aviation safety.

First, we wish to remind the Board that the Federal Aviation Administration ("FAA") and the Maryland Aviation Administration ("MAA") have made determinations that the proposed facility **would not** be a hazard to aerial navigation. Under its exclusive authority granted by Congress[1] and enunciated in the Code of Federal Regulations[2], the FAA took the physical characteristics of Davis Airport and the comments by several parties into account prior to issuing its determination. The MAA made recommendations to American Tower Corporation and AT&T Wireless (the "Applicants") regarding a height reduction to the facility. The Applicants agreed to the reduction and amended the application. Based on all the facts before it, the FAA determined that the proposed facility was not a hazard to aerial navigation.[3]

[1] The Federal Aviation Administration (FAA) is an agency of the U.S. government with primary responsibility for the safety of civil aviation. The FAA's authority was established by the Federal Aviation Act of 1958, 49 U.S.C. 1301 et. seq., which affirmatively states that the "United States Government has exclusive sovereignty of [the] airspace of the United States." 49 U.S.C. 40103(a)(1).
[2] 14 C.F.R. 77, "Objects Affecting Navigable Airspace".
[3] Aeronautical Study No. 01-AEA-0354-OE issued September 7, 2001.

The federal law and regulations under which the FAA exercises its authority to regulate aviation safety render inconsistent any state or local action in the area of aviation safety and such action is preempted in accordance with the Supremacy Clause of the United States Constitution.[4] As Congress stated when it passed the Federal Aviation Act:

> Aviation is unique among transportation industries in its relation to the federal government - - it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities. Thus, **the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.**[5]

Additionally, the House Report accompanying the Federal Aviation Act stated that the purpose of the Act was to grant "the Administrator of the new [FAA] . . .full responsibility and authority for the advancement and promulgation of civil aeronautics generally, including promulgation and enforcement of safety regulations."[6] Courts, for example the Third Circuit Court of Appeals, have determined that the "legislative history reveals that Congress intended the Administrator, on behalf of the Federal Aviation Administration, **to exercise sole discretion in regulating air safety**."[7]

The Experimental Aircraft Association ("EAA") has failed to recognize that once the FAA has spoken to the matter of aviation safety, particularly in the case of the proposed telecommunications facility, the issue is resolved. The doctrine of preemption forecloses any opportunity to second-guess the determination of the FAA in this matter. For example, the Supreme Court, in City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 93 S. Ct. 1854 (1973), enforced federal preemption of airspace management by finding that the City of Burbank's attempt to regulate noise was preempted by the Federal Aviation Act. Therefore, any attempt by Montgomery County to regulate the issuance of a special exception based upon airspace management or aviation safety (particularly after the FAA has spoken to the matter) runs afoul of federal law and the Constitution.

The EAA wanted its concerns about the proposed telecommunications facility to be heard and the FAA affords them that right. Under 14 C.F.R. 77.35 the FAA solicits comments from all interested persons when it conducts an aeronautical study and explores any objections. In the case of S-2477, the objections of the EAA and others were heard and presumably considered by

---

[4] The Supremacy Clause states that "the Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2.

[5] S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1958)(emphasis added).

[6] H.R. Rep. No. 2360, reprinted in 1958 U.S.C.C.A.N. 3741.

[7] Abdullah v. American Airlines, Inc., 181 F. 3d 363, 369 (3rd Cir. 1999) (emphasis added). See, e.g., Pirolo v. City of Clearwater, 711 F.2d 1006 (11th Cir. 1983)(City ordinances regulating night operations and dictating air traffic patters are preempted), Price v. Charter Township of Fenton, 909 F. Supp. 498 (E.D. Mich. 1995)(town ordinance limiting number of flights is preempted by the FAA) and Big Stone Broadcasting, Inc. v. Dr. Buron Lindbloom, et al., 2001 U.S. Dist. LEXIS 14984 (D. SD 2001)(the South Dakota Aeronautics Commission is preempted from regulating the height and location of a radio broadcast tower).

the FAA.[8] As a result, the FAA issued a Determination of No Hazard to Aerial Navigation regarding S-2477, a copy of which is attached.

Special Exception application S-2477 is an inappropriate forum for the EAA or others to request that Montgomery County ignore the determination of the Federal Aviation Administration. Therefore, the FAA's Determination of No Hazard to Aerial Navigation should be acknowledged by Montgomery County and the special exception application be decided on its merits.

If there are any questions in this regard, please contact the undersigned.

Respectfully submitted,

Edward L. Donohue

Edward L. Donohue

cc: Office of Zoning and Administrative Hearings
Montgomery County Planning Board
Judith Daniel, Community-Based Planning Department, M-NCP&PC

[8] Comment Letters to the proposed facility were filed with the FAA by the Aircraft Owners and Pilots Association (June 7, 2001), Robert T. Wagner, an individual pilot (June 19, 2001), and Douglas E. Kelly, President of EAA Chapter 524 (June 24, 2001). These letters were filed prior to the height reduction that the Applicants made on September 6, 2001. Since the height reduction by the Applicants, no further comments regarding the facility have been made by the above-mentioned parties.

1-0-0103.MD.09
Barnhardt

Federal Aviation Administration
Eastern Region, AEA-520
1 Aviation Plaza
Jamaica, NY 11434-4809

AERONAUTICAL STUDY
No: 01-AEA-0354-OE
PRIOR STUDY
No: 00-AEA-4963-OE

PROCESSED
SEP 17 2001
BY

RECEIVED
SEP 15 2001

ISSUED DATE: 09/07/01

AVAITION SYSTEMS ASSOCIATES, INC.
AMERICAN TOWER CORPORATION
23430 HAWTHORNE BLVD., STE 200, BDG
TORRANCE, CA 90505-4720

** DETERMINATION OF NO HAZARD TO AIR NAVIGATION **

The Federal Aviation Administration has completed an aeronautical study under the provisions of 49 U.S.C., Section 44718 and, if applicable, Title 14 of the Code of Federal Regulations, part 77, concerning:

Description:	ANTENNA TOWER 800-900 MHZ .1 KW 1850-1910/1930-1990 MHZ .2 KW
Location:	ETCHISON MD
Latitude:	39-14-57.05 NAD 83
Longitude:	077-08-41.72
Heights:	134 feet above ground level (AGL) 780 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

Based on this evaluation, marking and lighting are not necessary for aviation safety. However, if marking and/or lighting are accomplished on a voluntary basis, we recommend it be installed and maintained in accordance with FAA Advisory Circular 70/7460-1K Change 1.

While the structure does not consitute a hazard to air navigation, it would be located within or near a military training area and/or route.

This determination expires on 03/07/03 unless:

(a) extended, revised or terminated by the issuing office or
(b) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case the determination expires on the date prescribed by the FCC for completion of construction or on the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE POSTMARKED OR DELIVERED TO THIS OFFICE AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE.

This determination is based, in part, on the foregoing description which

includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, frequency(ies) or use of greater power will void this determination. Any future construction or alteration, including increase in heights, power, or the addition of other transmitters, requires separate notice to the FAA.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission if the structure is subject to their licensing authority.

If we can be of further assistance, please contact our office at 718-553-4530. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 01-AEA-0354-OE.

William E. Merritt
Specialist, Airspace Branch

(DNE)

Kathy B. Nelligan
7505 Hawkins Creamery Road
Laytonsville, MD 20882-3209
(301) 253-3121

January 24, 2002
Arthur Holmes, Jr., Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

Dear Chairman Holmes:

Subject: Case No. S-2477 (OZAH no. 01-14), Monopole Communications Tower

This is to inform you that I am greatly opposed to the proposed location of the 134 foot telecommunications tower near the intersection of Hawkins Creamery Road and Route 108 in Etchison, MD for the following reasons:

1. The location is very close to Davis Airport, and I am very concerned about collision with flights and the potential damage. We live in an area without water hydrants, and only tanker trucks to fight fire.

2. AOPA, the Experimental Aircraft Association and Maryland Aviation Administration have all expressed concern, which I find alarming. The FAA even opposed this structure until it was shortened by a mere 16 feet.

3. This location is within the path taken by medical helicopters, day and night, increasing the hazard of collision.

4. Although the company requesting the tower construction say they have investigated alternate sites, the property owner of a much less intrusive site in the area was not approached for consideration. A letter stating such was sent to your Planning Board.

5. Several properties in view of the proposed tower are being considered for Historic designation, which would be in direct conflict with a wireless communications tower.

6. This area is zoned RDT and should remain rural.

Please carefully consider the above items in your review. I hope you will agree that a less hazardous, more suitable location should be found, or that other methods of coverage should be considered.

Sincerely,

Kathy B. Nelligan

Kathy B. Nelligan

January 25, 2002

Arthur Holmes Jr., Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, Md 20910

RECEIVED
JAN 29 2002
OFFICE OF THE CHAIRMAN
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Dear Sir,

I am writing to you with regards to the construction of the 134 foot Monopole tower at the intersection of Hawkins Creamery Rd + Rt 108. I want to go on record opposing the construction for a number of reasons:

1) Safety issue because of airport nearby (within 300 yards)

2) Obvious eyesore and consequently depreciates home values and impacts number of possible home-owners who may purchase property near it

3) Can't ATT come up with a better way of improving their equipment... than ruining the aesthetics of the countryside

Please give this request of the homeowners around the site area serious consideration. Would you want this in your backyard ???

Sincerely,
JoAnne + Richard Priday
24356 Hilton Place
Laytonsville Md 20882

cc: Mr. Donald A. Spence Jr., Chairman
Board of Appeals, Montgomery County
Council Office Building
100 Maryland Ave.
Rockville, Md 20850

January 28, 2002

Mr. Arthur Holmes, Jr., USA (Ret.), Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD. 20910-3760

Re: Application for Special Exception – Case # S-2477

Dear Mr. Holmes:

I am writing to request a postponement of the hearing on this case that is currently scheduled for Feb. 07th.

Along with a number of citizens of the Etchison community, I have followed the application for this proposed tower very closely. As you may know there are at least one hundred letters of opposition to this tower.

The reasons for my request of postponement are as follows:

1. I understand that the Planning Board has recently clarified its policy with respect to cellular monopoles. The specifics of this clarification are obviously important to our preparation for the hearing. We have asked for a copy of this clarification from Judy Daniel in Community Based Planning, and Michele Rosenfeld in your legal office. At the time of this letter, we have not yet received this clarification and have been told it has not been completed.

2. I understand that the property on which the tower is proposed has been broken up, and most of it sold. Closing on this sale is supposedly scheduled prior to the Feb. 07th hearing date. The resulting size and layout of the remaining property is unknown and may raise questions in the application process.

With these issues outstanding it is difficult for us to prepare for the hearing. Please postpone the hearing to allow us an opportunity to review the clarification of policy when it is issued. Thank you for your consideration of this matter.

Very truly yours,

Mark D. Nelligan
7505 Hawkins Creamery Road
Laytonsville, MD 20882

Cc: Judy Daniel - MNCPPC
Michele Rosenfeld - MNCPPC

24020 Laytonsville Road
Laytonsville, MD 20882

January 31, 2002

Mr. Arthur Holmes, Jr., USA (Ret.), Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910-3760

Re: Board of Appeals Petition No. S-2477 (Special Exception)

Dear Mr. Holmes

I write to request that you postpone the February 7 hearing on the above-captioned case.

1. Until very recently we had not seen written documentation of the clarifications described by Ms. Judy Daniel in her January 4 staff report to the Planning Board. Your letter to Chairman Spence and Chairperson Lawton was faxed to my attention late in the day on Tuesday, January 29. This gives us little time to develop a response.

2. The "Barnhart" property is apparently sold, or in the process of being sold, but we have yet to determine whether the property is sold in its entirety or subdivided. This in turn will have implications vis-à-vis the "option and lease agreement" between Mr. Barnhart and AT&T.

3. According to Mr. Randy Hansen of the Experimental Aircraft Association, in his letter dated January 9, 2002, the Federal Aviation Administration is presently developing revised regulations that will govern the operations of light sport aircraft such as those that use the Davis airport. These new regulations will have a direct and intimate bearing on this case. They will apparently be published very soon.

I urge you to delay the hearing until such time as these matters are fully resolved.

Thank you for your consideration of this important matter.

Sincerely

John R.D. Copley

7401 Hawkins Creamery Road
Laytonsville, MD. 20882
January 31, 2002

Dear Mr. Holmes,

Enclosed is a copy of the letter and enclosures we have sent to Nancy Dacek regarding the petition of American Tower Corporation and AT&T Wireless Services for a special exception to build a Cell tower in Etchison, MD. Case No. S-2477 OZAH Referral No. 01-14

Very truly yours,
Edward C. Waldron
Edward C. Waldron
Jane B. Waldron
Jane B. Waldron
High TAX paying Residents of Etchison

7401 Hawkins Creamery Rd.
Laytonsville, MD. 20882
January 31, 2002

Council Woman Nancy Dacek
County Office Building
100 Maryland Avenue
Rockville, MD 20850

Re: The proposed AT&T Cell Tower in Etchison, MD. SR 2477

Dear Mrs. Dacek,

My husband and I are lifelong residents of Montgomery County. After saving our entire lives we built a home in Etchison on a plat of land called "Etchison View". Other than paying the extremely high property taxes, we have been very happy here. Now in light of this proposed wireless cell tower we are going to be faced with this eyesore and diminished property values. Appraisers estimate between 10 to 40% lowering of value to our home if this cell tower is allowed to be built.

In AT&T's application for special exception they stated that the properties bordering the proposed site were mainly agricultural with scattered single family homes. FALSE!! The proposed site is directly across the street from the old historic Methodist church, and it will be virtually in the back yards of the homes on that side of the street! There are well over 200 homes in less than a mile around this site. Further, photographs taken from the Catholic Church on Damascus Road, 4.5 miles away show that it will be clearly seen from that distance!

AT&T's contention that there is a "gap" in service around the proposed site is also FALSE!!!! Neighbors' whose property borders this site have AT&T wireless service and have perfect reception.

The bottom line is that AT&T is pushing to get this Tower approved so that they can financially benefit from charging other companies to hang equipment on their tower. Mrs. Dacek, a Cell tower now exists on Damascus Road 2 miles from Etchison, and there is also one located at the firehouse in Laytonsville, 3 miles away. **There is no justifiable NEED for another tower in this area!** Why don't they hang their equipment on existing structures? Greed! At our expense!

AT&T has no sense of community. They are a profit oriented company. They don't live here. They are merely renting the land for the tower site. They don't care that their tower would be an endangerment to the small aircraft that use Davis Airport on the other side of the street, not to mention the Med-evac helicopters that fly directly over head. They don't care that Etchison can have historical designation, and they certainly don't care that this eyesore will reduce our property values while providing us with something we don't need and service that we already have!

We are appealing to you to help us! The "need" for this cell tower is simply FALSE.

Sincerely, Edward C Waldron
Jane B. Waldron

Residents of Etchison

enclosures: case of Sprint vrs. West Bloomfield township. Sprint denied approval because the tower would cause a loss of property value. AT&T's map of coverage for this area

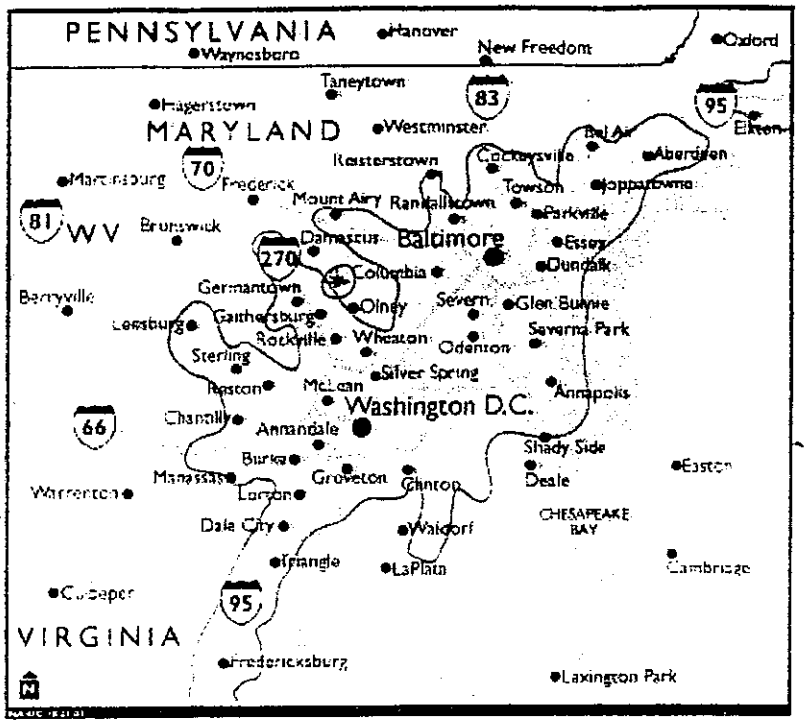
cc: Council Woman, Marilyn Praisner
Park and Planning, Arthur Holmes, Chairman
Office of Zoning and Administrative Hearings, Francois Carrier
Historic Preservation Commission, attn: Robin Zeik

Sprint Spectrum v. Charter Township of West Bloomfield, 141 F. Supp.2d 795 (E.D. Mich. 4/30/2001). Affirms Township decision to deny a special use permit application to construct a 130 - foot high wireless telecommunications tower at the rear of a shopping center. Opponents of the tower submitted a petition signed by 150 residents declaring that the tower would "create a visual eyesore immediately to the west of the subdivision and would have the effect of lowering property values." A resident testified that the tower would "be visible six months of the year as well as disrupt the pristine wooded area.." After Sprint conducted a balloon test at the elevation of the top of the proposed tower, a resident testified that the tower would block the view of a meadow from a neighboring highway. The court held that there was sufficient objective evidence of an adverse aesthetic effect to support the denial of the tower application. The court also held there was sufficient objective evidence of a potential lowering of property values to justify turning down the application. Said the Court, "Indeed, the Kimberly North Improvement Association filed a formal opposition paper, opposing Sprint's application due to diminution of property value, aesthetic concerns and concerns regarding health risks (Item number 10). As to concerns over property values, the paper stated `in other communities where cell phone towers have been erected, expert appraisers have gauged diminution of property values from 10% to 40%.' (Id.). The paper cited and attached various articles from the Microwave News Reprint Service as authority for their position (Item Number 10, sections A,B, & C)."

Coverage Maps

Below is a map of the coverage area for the region you've selected. ZIP 20852 ETCHISON MD

Close Window



This map is a general representation of coverage. Coverage areas shown are approximate. Actual coverage depends on system availability and capacity, system repairs and modifications, customer's equipment, terrain, signal strength, weather conditions and other conditions.