

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER**

**SPECIAL EXCEPTION
4482**

VARIANCE (VSE-4482)

DECISION

Application:	Tower, Pole, Monopole or Antenna
Applicant:	SwampDawg Development LLC
Opposition:	None
Hearing Date:	January 26, 2005 and February 22, 2005
Hearing Examiner:	Joyce B. Nichols
Disposition:	Approval of S.E.-4482 with Conditions, Approval of VSE-4482

NATURE OF PROCEEDINGS

- (1) Special Exception 4482 is a request for permission to use approximately 9.82 acres of land in the R-E (Residential Estate) Zone located on the west side of Old Largo Road, approximately 100 feet west of MD Rt. 202 (Largo Road) and approximately 900 feet north of Bock Drive, Upper Marlboro, Maryland for a telecommunication Monopole and related equipment and cabinet.
- (2) The Technical Staff recommend approval with conditions and the record does not contain the Planning Board's action. (Exhibit 10)
- (3) No one appeared in opposition to the Application.
- (4) At the conclusion of the evidentiary hearing, this Application was taken under advisement and the record was held open for the receipt of a variety of documents by the Applicant and, upon receipt of these documents, the record was closed on March 14, 2005.

FINDINGS

Subject Property

- (1) The subject property is an irregularly shaped parcel which includes an upper and a lower plateau as well as areas of steep slopes. The entire property has operated as a Private Club (Fraternal Order of Police) (S.E. 2602) since 1973. Modifications to the Private Club were approved by S.E. 2686 and S.E. 3607.

(2) The upper plateau area is developed with the main lodge and parking area for the Private Club as well as a two story single family dwelling which has been converted into a law office for the FOP. The lower plateau, which includes the larger portion of the subject property, is developed with a baseball field, a basketball court, a picnic pavilion and a gravel parking lot.

Neighborhood

(3) The neighborhood is bounded on the north by the University of Maryland tobacco farm, on the east by MD Rt. 202 (Largo Road), on the south by Kent Drive, and on the west by the Western Branch.

(4) The neighborhood remains somewhat open in character, with agricultural uses and large lot subdivisions predominating.

Surrounding Property

(5) The subject property is surrounded by the following uses:

- to the north, south and west are large undeveloped parcels of land in the R-E Zone owned by Prince George's County, MD
- to the east across MD Rt. 202 (Largo Road) is a large lot subdivision in the R-E Zone (Brock Hall Subdivision)
- to the southeast and west is a small condemned building and a single family detached dwelling unit in the R-E Zone.

Master Plan/Sectional Map Amendment

(6) The subject property was placed within the 2002 General Plan Development Pattern policies for the Developing Tier. The Subregion VI Study Area Master Plan recommends a public or quasi-public use for the subject property. The Master Plan does not specifically address Monopoles, however the instant Application is located in an area identified as a conditional reserve area (scenic vista) along MD Rt. 202 (Largo Road).

Applicant Proposal

(7) The Applicant requests approval of a telecommunications facility consisting of a 190 foot Monopole with related equipment pads and a cabinet that will be less than 560 square feet and less than 12 feet in height. The Applicant intends to make the Monopole available for multiple tenants such as Sprint and T-Mobile. The Monopole is proposed to be located within a .36 acre area which includes the existing basketball court, which will be relocated on the subject property.

LAW APPLICABLE

(1) A Tower, Pole, Monopole or Antenna is permitted by Special Exception in the R-E Zone provided that all criteria of §27-317 and 27-416 are met.

(2) Section 27-317 provides as follows:

- (a) A Special Exception may be approved if:
 - (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;
 - (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
 - (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
 - (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;
 - (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and
 - (6) The proposed site plan is in conformance with an approved Tree Conservation Plan.

(3) Section 27-416 states:

- (a) A tower, pole, or Monopole for the support of an antenna (electronic, radio, television, transmitting, or receiving) may be permitted, subject to the following:
 - (1) In the Commercial and Industrial Zones, and for land in a Residential Zone owned by a public entity, the structure shall generally be set back from all property lines and dwelling units a distance equal to the height of the structure (measured from its base). The District Council may reduce the setback to no less than one-half (1/2) the height of the structure based on certification from a registered engineer that the structure will meet the applicable design standards for wind loads of the Electronic Industries Association (EIA) for Prince George's County. In the Residential Zones, on privately owned land, the structure shall be set back from all property lines and dwelling units a distance equal to the height of the structure (measured from its base);
 - (2) On privately owned land, the structure shall not be used to support lights or signs other than those required for aircraft warning or other safety purposes;
 - (3) Any tower or Monopole which was originally used, but is no longer used, for telecommunications purposes for a continuous period of one (1) year shall be removed by the tower or Monopole owner at the owner's expense; and
 - (4) Any related telecommunication equipment building shall be screened by means of landscaping or berming to one hundred percent (100%) opacity.

(4) A variance may only be granted if the following findings are made:

- (a) A variance may only be granted when the Board of Appeals finds that:
 - (1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;

(2) The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and

(3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.

(5) T[he] Court ...(of Appeals of Maryland)... has frequently expressed the applicable standards for judicial review of the grant or denial of a special exception use. The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. 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 absent any fact or circumstance negating this presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal. Turner v. Hammond, 270

Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Rockville Fuel & Feed Co. v. Board of Appeals of Gaithersburg, 257 Md. 183, 187-88, 262 A.2d 499, 502 (1970); Montgomery County v. Merlands Club, Inc., 202 Md. 279, 287, 96 A.2d 261, 264 (1953); Anderson v. Sawyer, 23 Md. App. 612, 617, 329 A.2d 716, 720 (1974). These standards dictate that if a requested special exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied. Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1325 (1981).

See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

(6) ...[T]he appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed and the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Deen v. Baltimore Gas & Electric Co., 240 Md. 317, 330-31; 214 A.2d 146, 153 (1965); Anderson v. Sawyer, 23 Md. App. 612, 617-18, 329 A.2d 716, 720, 724 (1974). Schultz v.

Pritts, 291 Md. 1, 432 A.2d 1319, 1331 (1981).

See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

CONCLUSIONS

(1) The proposed Use and Site Plans are in harmony with the general purposes of the Zoning Ordinance, §27-102(a), as follows:

(1) To protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County;

This is a Special Exception request for the approval of a 190-foot Monopole and related equipment compound and to validate various improvements to an existing Private Club for the Fraternal Order of Police. The subject property has been the subject of several previously approved Special Exceptions all pertaining to its use as a Private Club.

The Private Club, as it exists today, has evolved over many years and is not in conformance with the latest revised Special Exception Site Plan, approved in 1985. Further, a picnic pavilion was constructed with a rear yard setback of 21 feet when a 25 foot setback is required in the R-E Zone. This Application also requests a variance to validate the 21 foot rear yard.

This proposal will contribute toward improving mobile and land based cellular telecommunications in the general area, thereby significantly increasing the mobility and personal safety of County residents, workers and visitors. The Applicant, by voluntarily making the Monopole available for co-location, is helping to reduce the demand for new Monopole sites in the immediate vicinity, which has the effect of preserving the County's scenic beauty.

(2) To implement the General Plan, Area Master Plans, and Functional Master Plans;

The M-NCPPC Technical Staff have indicated that the Private Club has existed at this location for many years and was previously found to be consistent with the public-quasi-public land use element for the subject property as designated by the Subregion VI Study Area Master Plan. The M-NCPPC Technical Staff have also indicated that the proposed tower is not inconsistent with the 2002 General Plan Development Pattern policies for the Developing Tier. The Staff have noted that while the Master Plan does not specifically address the location of Monopoles, the proposed telecommunications site, which is similar to a public utility, is consistent with the Master Plans designation of the subject property.

The Master Plan identifies the area containing the Private Club and proposed Monopole site as a conditional reserve area containing scenic views into the site from MD Rt. 202 (Largo Road). However, the M-NCPPC Technical Staff has identified several mitigating factors in its Staff Report that reduce the visual impact of the proposed Monopole. First, Staff has indicated that the Monopole

is set back 245 feet from Old Largo Road and 340 feet from MD Rt. 202 (Largo Road). Secondly, the Monopole has been located in an area that is approximately 40 feet below the elevation of Old Largo Road. The visual effect of this elevation difference would be that a motorist on MD Rt. 202 would see the upper sections of the Monopole, which are more narrow and less obtrusive than the wider Monopole base. Finally, Staff has indicated that the wooded areas on- and off-site will screen another 50-60 feet of the structure from view along MD Rt. 202 (Largo Road).

(3) *To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;*

The proposed site will become an essential part of the County's telecommunication infrastructure system, which will be enhanced by the development and operation of this site. Adequate wireless infrastructure is an important service to the community and to the County, especially as additional broadband services are developed and provided to the public. (Exhibit 58 & 60)

(4) *To guide orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;*

This proposal will contribute toward the orderly growth and development of the County by providing a necessary public service in a public-quasi-public location, so that it will have a negligible effect on the surrounding area. By promoting co-location of other carriers on the Monopole, the Applicant is helping reduce the need for new telecommunication sites. Approval of this request will also validate various improvements to an existing Private Club, in conjunction with the approval of the telecommunications facility, to bring the Private Club into conformance with the Zoning Ordinance.

(5) *To provide adequate light, air, privacy;*

Although the Monopole will be 190 feet tall, its visual profile will be substantially less than that of a building of the same height. The tall and narrow profile of the Monopole structure will not obstruct light and air in the surrounding area. Although a variance is requested as part of this Application, it is for an existing picnic pavilion which encroaches approximately four (4) feet into the rear yard area; a variance is not required for the Monopole setback. The proposed Monopole structure complies with the Zoning Ordinance requirement that it be set back a distance equal to its height. The proposed Monopole will be somewhat visually screened and will not interfere with the privacy of residents in the surrounding areas.

(6) *To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;*

The Monopole site is ideally located in an area of sparse development. It will be constructed on ground with an elevation that will allow most of it to be visually screened from the road by existing vegetation. The proposed telecommunications site will be constructed in a cleared area of the existing Fraternal Order of Police property; it will not be constructed on undeveloped land. The considerable distance from the proposed Monopole to the nearest residence should protect

landowners from adverse impacts from the Monopole. The telecommunications use will generate negligible additional traffic by the operation of the facility. There will be no additional traffic generated by this use.

(7) *To protect the County from fire, flood, panic and other dangers;*

This proposal will not result in the creation of a dangerous situation at the subject property as it will be constructed in conformance with all applicable County, State and Federal regulations.

(8) *To provide sound, sanitary housing in a suitable and healthy living environment within the economic reach of all County residents;*

This proposal is for the approval of a telecommunications facility and for the validation of the various improvements to an existing Private Club and as such, this purpose does not apply.

(9) *To encourage economic development activities that provide desirable employment and a broad, protected tax base;*

This proposal encourages economic growth, will expand the tax base and will provide desirable employment in the operation and maintenance of the proposed facility.

(10) *To prevent overcrowding of land;*

This Application will not overcrowd the land as the footprint of the proposed telecommunication structure and compound are relatively small. The variance for the picnic pavilion will not overcrowd the land as the Special Exception area is 9.82 acres in size and the proposed pavilion is well buffered from adjacent property by existing woodland.

(11) *To lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions;*

This Application is for the approval of a 190-foot Monopole and related equipment compound and to validate various improvements to an existing Private Club. There will be a negligible increase in the traffic generated by the site due to maintenance visits to the telecommunication facility. The existing traffic from the Private Club should not adversely affect the safety or capacity of the adjacent roadways because this traffic already exists. No additional access points are proposed by this Application and the existing parking facilities at the site are sufficient to meet the needs of the proposed use.

(12) *To insure the social and economic stability of all parts of the County;*

This proposal will contribute toward the economic stability of the County through the establishment of a new facility, which will improve the County's telecommunications infrastructure.

- (13) *To protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features;*

This Application does not propose the development of new land, but rather proposes to make use of an existing site. The proposed telecommunications site is located on relatively level land, which is devoid of trees. The footprint of the facility is relatively small compared to the 9.82 acre size of the property. The view of the proposed telecommunications structure from adjacent property will be somewhat mitigated by its set backs, woodland screening and its lower elevation relative to MD Rt. 202 (Largo Road). According to the M-NCPPC Environmental Planning Technical Staff, the Site Plan for the proposed facility was found to address the environmental constraints of the site and is in compliance with the requirements of the Prince George's County Woodland Conservation Ordinance.

- (14) *To provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space, and;*

This proposal is in conformance with all environmental regulations of the County and does not propose the development of new land, but rather proposes to make use of an existing site. The Private Club grounds are improved with a baseball field, a volleyball (sand) court and a basketball court, providing recreation space.

- (15) *To protect and conserve the agricultural industry and natural resources.*

This purpose is not applicable to the instant Application. §27-317(a)(1)

(2) The proposed Use and Site Plans are in harmony with the purposes of the R-E Zone, §27-427(a)(1), as follows:

- (A) *To provide for and encourage variation in the size, shape, and width of one-family detached residential subdivision lots, in order to better utilize natural terrain;*

As the subject Application is for the approval of a 190-foot Monopole and related equipment compound and to validate various improvements to an existing Private Club for the Fraternal Order of Police, this purpose is not applicable to the instant Application. The proposed use is a permitted use in the R-E Zone, by Special Exception and, therefore would not contravene other uses in the area. Further, the proposed use will not interfere with the use and enjoyment of natural resources in the area.

- (B) *To facilitate the planning of one-family residential developments with large lots and dwellings of various sizes and styles;*

This Application is for the approval of a 190-foot Monopole and related equipment compound and to validate various improvements to an existing Private Club and therefore this purpose is not applicable to the instant Application.

(C) *To encourage the preservation of trees and open spaces in order to create an estate-like atmosphere; and*

The Site Plan does not propose the removal of any woodlands from the subject property. The subject property is heavily wooded and the Applicant seeks to install its facility amidst the existing vegetation in a cleared area, near the existing athletic fields. Therefore, the intent and spirit of the proposed development in the R-E Zone are preserved.

(D) *To prevent soil erosion and stream valley flooding.*

The Site Plan is in conformance with this purpose as it is in conformance with all applicable regulations. §27-317(a)(1)

(3) With the approval of the four (4) foot variance from the western property boundary setback requirements, the proposed use is in compliance with all of the applicable requirements and regulations of the Zoning Ordinance. §27-317(a)(2)

(4) The proposed use will not substantially impair the 2002 General Plan or the Subregion VI Master Plan. The Technical Staff found as follows:

The Private Club has existed at this location for many years and was previously found to be consistent with the Subregion VI Master Plan. The Community Planning Division staff notes that the proposed Monopole is not inconsistent with the 2002 General Plan Development Pattern policies for the Developing Tier. The Subregion VI Study Area Master Plan does not specifically address Monopoles. However, this Application is located in an area identified as a conditional reserve area (scenic vista) along Largo Road (MD 202). It is further noted that the Master Plan (page 19) encourages careful site planning and the use of construction techniques to minimize the adverse impact of visual intrusion, etc., on the human environment. There are two living area guidelines relevant to this Application (page 94):

11. Where feasible, building setbacks and/or berms...should be utilized to...screen visual impacts, especially at major road intersections and interchanges, or where conflicts may develop between land uses.
19. Residential and related uses fronting on major highways and scenic roads should conform to a particularly high standard of design both as individual structures and as they blend in among other building.

Comment:

The proliferation of communication towers across the landscape is a national phenomenon that pits the visual environment, both natural and constructed, against the need for modern communication systems. This issue takes on greater significance in an area identified as having a scenic vista. However, there are several factors that mitigate the otherwise negative impacts of a tower of this height at this location. First of all, the site of the proposed tower is depressed almost 40 feet below the elevation of Old Largo Road. Secondly, wooded area both on and offsite will effectively screen another 50 to 60 feet of the tower from views along Largo Road. Finally, those portions of the tower that will be visible are relatively narrow and less obtrusive than the sections near the base of the tower. §27-317(a)(3)

(5) There is no probative evidence in the record to support a finding that the proposed use will either adversely affect the health, safety or welfare of residents or workers in the area or will be detrimental to the use or development of adjacent properties or the general neighborhood. The topography of the subject property, the generous setbacks from the proposed Monopole site and the existing screening located on the subject property of the Monopole from MD Rt. 202 (Largo Road) will ensure that the instant proposed revisions to the Private Club will have no negative impact on the current relationship between the Private Club and the surrounding neighborhood. §27-317(a)(4)&(5)

(6) The Application includes a Letter of Exemption from the Prince George's County Woodland Conservation and Tree Preservation Ordinance. (Exhibit 46) §27-317(a)(6)

(7) The proposed Monopole is 190 feet in height and its location meets the setback requirements of residentially zoned, privately owned land. The Monopole is proposed to be setback 203 and 245 feet from the nearest property lines to the north and to the east. §27-416(a)(1)

(8) Telecommunications Facility Note 4 on the Amended Site Plan states: "No additional lights or signs will be permitted unless required for aircraft warning or other safety reasons." (Exhibit 49(a)) §27-416(a)(2)

(9) Telecommunications Facility Note 5 on the Amended Site Plan states: "All equipment will be removed within one year if the use is terminated." (Exhibit 49(a)) §27-416(a)(3)

(10) The Amended Site and Landscape Plans, Exhibit 49(a) & (b), indicate that an eight (8) foot high, opaque board on board fence will screen the equipment from views by the Private Club. Views into the equipment area from surrounding properties are screened by trees and topographical features. §27-416(a)(4)

Variance

(11) Exhibit 42 is an aerial photograph dated 1968 which indicates that a structure existed at the current location of the picnic pavilion, probably the barn that was referenced in the 1973 approval of Special Exception 2602 for a Private Club. (Exhibit 43) T. Jan. 26, p. 66-69

(12) Prior to 1977 the subject property was in the R-R (Rural Residential) Zone which required only a 20 foot setback from the western property line. When the subject property was placed in the R-E Zone by the adoption of the Subregion VI Sectional Map Amendment, the setback for the barn was increased from 20 to 25 feet. Thus it is arguable that the barn, legal when built, became nonconforming as to location by the zoning change which occurred in 1977.

(13) Mr. Thomas Kieffer, an expert Land Planner for the Applicant, opined that after inspecting the picnic pavilion that it is likely that the preexisting barn was modified and reconfigured to create the current picnic pavilion. T. Jan. 26 p. 66-71 §27-230(a)(1)

(14) The strict application of the Zoning Ordinance would require the Applicant to remove and rebuild the existing picnic pavilion four (4) feet from its current location, which would create financial difficulties on the Applicant. T. Jan. 26 p. 72-73 §27-230(a)(2)

(15) The extent of the variance, four (4) of the required 25 feet, is insignificant when taken in the context of the sizes of the subject property and its adjacent County owned parcels (which may include an abandoned gravel pit). The parameter of the subject property is indistinguishable from the adjacent property at this location and the requested variance will have no impact on the intent, purpose or integrity of the General Plan or the Subregion VI Master Plan. (Exhibit 10) T. Jan 26 p. 73-74 §27-230(a)(3)

Parking Regulations

(16) The Amended Site Plan, Exhibit 49(a), is in accordance with all Parking Regulations.

(17) With the approval of the four (4) foot variance request, the proposed use meets the standards of the Zoning Ordinance for the R-E Zone.

Signage

(18) The Amended Site Plan shows an eight (8) foot wide by 7 ½ foot tall sign on the subject property. The Sign Ordinance permits a sign advertising the Private Club to have an area of 48 square feet and be eight (8) feet in height. The signage shown on Exhibit 49(a) is in accordance with the Sign Ordinance so long as the sign addresses the Private Club only and not any legal services available in the accessory structure.

DISPOSITION

Special Exception 4482 and Variance (VSE-4482) are Approved, subject to the following Conditions:

- (1) The structure constructed as a single family detached dwelling unit and which has been altered to accommodate an office providing legal services for members of the Fraternal Order of Police shall not be used as a dwelling and its office use shall be limited solely to providing legal services to FOP members.
- (2) The law office shall cease to be an accessory use to the Private Club if legal services are provided to non-FOP members.
- (3) Freestanding signage shall be limited to identifying the Private Club. Freestanding signage shall not identify the legal services or law firm providing such services to be provided on the subject property.