BEFORE THE ZONING HEARING BOARD OF MAIDENCREEK TOWNSHIP BERKS COUNTY, PENNSYLVANIA

IN RE: APPLICATION OF CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS REGARDING A 50′ X 50′ LEASED AREA LOCATED ON THE PROPERTY AT 220 BUENA VISTA ROAD, MAIDENCREEK TOWNSHIP, BERKS COUNTY, PENNSYLVANIA

DECISION

I. FINDINGS OF FACT

1. Applicant is Cellco Partnership, d/b/a Verizon Wireless (hereinafter referred to as "Applicant"), with an address of 1120 Sanctuary Parkway, #150 GASA5REG, Alpharetta, GA 30009-7630, and an address in the Commonwealth of Pennsylvania, pursuant to the Application, of c/o Catherine E.N. Durso, Esquire, Fitzpatrick, Lentz & Bubba, P.C., 4001 Schoolhouse Lane, Center Valley, PA 18034.

2. The property which is the subject of the Application is a 50′ x 50′ space located on a property located at 220 Buena Vista Road, Maidencreek Township, Berks County, Pennsylvania 19510 ("Property").

3. The legal owner of the Property is C & D Zwicky, LLC. Applicant has authorization of the owner to apply to the Zoning Hearing Board for the requested relief. (Applicant Exhibit 1, Authorization of David Zwicky, dated February 27, 2015; Testimony of Sue Manchel, Site Acquisition Consultant, Verizon Wireless).

4. The Property is identified in Berks County Records as Parcel Identification Number 61-5412-04-72-1792. (See, Applicant Exhibit 3, Zoning Drawings).

5. The Property is a 113.43 acre tract, divided between three (3) zoning districts, which are the R-1 Low Density Residential District, the I-Industrial District, and the SIA-Special Intensified Agricultural District of Maidencreek Township, the limits of which Zoning Districts are shown in the Zoning Map accompanying the Maidencreek Township Zoning Ordinance of 1993, as amended, found at Chapter 220 of the Code of Ordinances of Maidencreek Township ("Zoning Ordinance").[1]

6. The current use of the Property is as a processing and recycling facility, which is an industrial use. (Maidencreek Township Zoning Hearing Board Notice of Appeal or Application, Board Exhibit 8).

7. Applicant, by its Zoning Hearing Board Notice of Appeal or Application, ("Application")[2] requested the following relief, in the alternative:

a) An appeal from the action of the Maidencreek Township Zoning Officer in refusing an application for Zoning Permit for a proposed wireless communication facility on March 31, 2015;

b) A request for interpretation of the Zoning Ordinance to the effect that Sections 220-48 and 220-88 permit wireless communication facilities as conditional uses in all Zoning Districts in Maidencreek Township; or,

c) A request for variance to allow the construction of the wireless communication facility.

[1] The Zoning Ordinance was marked as Board Exhibit 9 to the record of the hearing.

[2] A true and correct copy of the Application and Supplemental Statement was marked at the hearing and entered into the record as Board Exhibit 8.

8. The regulations governing the R-1 Zoning District are found in Article V of the Zoning Ordinance, Sections 220-18 to 220-20 of the Zoning Ordinance.

9. The regulations governing the I Zoning District are found in Article XIII of the Zoning Ordinance, Sections 220-45 to 220-48 of the Zoning Ordinance.

10. The regulations governing the SIA Zoning District are found in Article XIV of the Zoning Ordinance, Sections 220-49 to 220-52 of the Zoning Ordinance.

11. The area at issue in this Application is a 50' x 50' area on the east side of the Property, which will be leased by the Applicant.

12. The leased area which is the subject of this Application is located in the R-1 Zoning District. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A., and Zoning Drawings, Applicant Exhibit 3 (Site Plan, Drawing Number Z-2)).

13. Appropriate areas for the location of a wireless communications facility are determined by a Site Acquisition Consultant, in cooperation with a Radio Frequency Engineer. The Radio Frequency Engineer supplies the Site Acquisition Consultant with a "search ring" containing an area in which a site needs to be located and acquired for a facility, in order to close a capacity or coverage gap for the carrier. (Testimony of Sue Manchel, Site Acquisition Consultant, Verizon Wireless; Testimony of Andrew Petersohn, Radio Frequency Design Engineer, DBM Engineering).

14. Applicant has wireless communication coverage and capacity gaps in Maidencreek Township, which can result in poor quality and dropped cellular calls, and/or inability to connect to the Internet or maintain a connection for Verizon users. (Testimony of Andrew Petersohn, Radio Frequency Design Engineer, DBM

Engineering; Applicant Exhibits 7 and 8, showing existing coverage and coverage which would be provided by the proposed site).

15. Coverage and capacity gaps, in addition to depriving users of the service to which they are entitled, can create a hazard to public safety, as such gaps can interfere with emergency communications. (Testimony of Andrew Petersohn, Radio Frequency Design Engineer, DBM Engineering).

16. The site in question, to be known as the Reading/Evansville site, will fill the existing Verizon coverage and capacity gaps by offloading traffic from the existing Fleetwood and Shoemakersville sites. (Testimony of Andrew Petersohn, Radio Frequency Design Engineer, DBM Engineering; Applicant Exhibits 7 and 8, showing existing coverage and coverage which would be provided by the proposed site).

17. There is an increasing demand for wireless service, due to the many homes (two in five nationally) which have abandoned land lines for phone service, and rely solely on cell phones, as well as the proliferation of wireless devices. (Testimony of Andrew Petersohn, Radio Frequency Design Engineer, DBM Engineering).

18. The Property was necessary for the wireless communication facility because of:

a) its large size of approximately one hundred thirteen (113) acres, so that there would be no difficulty meeting required setbacks;

b) compatibility of the wireless communication facility with the existing industrial use of the Property; and,

c) the higher elevations on the Property than on other properties in industrial use within the search ring.

(Testimony of Sue Manchel, Site Acquisition Consultant, Verizon Wireless).

19. Other properties and areas in industrial use and zoning were considered, but they had a lower elevation, which would have required a higher tower in the 125' tower proposed. (Testimony of Sue Manchel, Site Acquisition Consultant, Verizon Wireless).

20. There is little leeway as to the placement of a wireless communications site. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

21. The cement manufacturing property, which is within the search ring and in the Industrial Zoning District, is one hundred feet (100') lower in elevation than the Property, and a much taller monopole antenna would be required on that site. (Testimony of Andrew Petersohn, P.E.).

22. Applicant's Site Acquisition Consultant looked for existing structures, such as water towers, silos, and high buildings, on which to locate its antennas, but found none suitable within the search ring. (Testimony of Sue Manchel, Site Acquisition Consultant, Verizon Wireless).

23. The proposed facility will consist of a freestanding wireless communication facility. The facility would be comprised of a one hundred twenty five foot (125') monopole antenna (one hundred thirty feet (130') to the top of a lightning rod) with twelve (12) panel antennas for cellular carriers at the 125' elevation, with an equipment shelter with a standby generator on concrete pads, within the above-

referenced 50′ x 50′ leased area. (See, Supplemental Statement to Application, Board Exhibit 8; Partial Site Plan, Drawing Number Z-3, Applicant Exhibit 3; Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

24. The compound will be fenced with a seven foot (7′) fence, with one foot (1′) of barbed wire at the top of the fence (which will have a locked gate, and landscaping around the compound. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A. and Partial Site Plan and Compound Layout and Elevation View, Applicant Exhibit 3, Drawing Numbers Z-3 and Z-4).

25. The compound will be accessed by a proposed twenty foot (20′) wide access easement of approximately thirty feet (30′) in length, with a twelve foot (12′) wide, dust-free, all-weather surface in the form of a gravel access drive and two off-street parking spaces. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A., and Zoning Drawings, Applicant Exhibit 3 (Site Plan and Partial Site Plan, Drawing Numbers Z-2 and Z-3)).

26. The compound will have a twenty foot (20′) wide utility easement, and will be served by underground lines from a proposed utility pole. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A., and Zoning Drawings, Applicant Exhibit 3 (Site Plan, Drawing Number Z-2)).

27. The tower will be grounded in accordance with National Electrical Code (NEC) requirements. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

28. The equipment shelter will be 12'9" v 11.5' in dimension, and will be placed on a concrete slab. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

29. All equipment will be in the equipment shelter. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

30. The tower will be connected to the equipment shelter by way of hyperflex cables. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

31. The site will be unmanned and will be remotely monitored, with the exception of periodic maintenance by a technician visiting every four (4) to six (6) weeks or in the event of the need for repairs,. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

32. On the site, there will be a standby diesel generator, which will be cycled every one to two weeks, which will only be placed in operation to prevent service interruption in the event of a power outage. The generator, when running, gives off approximately 65 decibels (65 dB) of audible sound. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

33. The visibility of the tower from four locations in the Township was represented by a weather balloon simulation shown in photographs in Applicant Exhibit 4. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A. and Photographs of Simulation, Applicant Exhibit 4).

34. The tower and building are located in excess of all setbacks from property lines and other structures. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

35. The facility will meet all industry standards for construction, contained in the Pennsylvania Uniform Construction Code, which incorporates the 2009 International Building Code and telecommunications industry standards. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

36. The facility will have a site-specific foundation, as required by telecommunications industry standards. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

37. The antenna will be constructed in accordance with the specification sheets marked as Applicant Exhibit 9 at the hearing. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.).

38. Up to three (3) other wireless carriers will be able to co-locate on the proposed tower, with ten foot (10') intervals between each carrier's antennas vertically on the monopole. (See, Testimony of Petros Tsoukalas of Maser Consulting, P.A.; Applicant Exhibit 5).

39. The facility will comply with FCC standards for human exposure to radio frequency (EMF) exposure, with or without co-located equipment. The cumulative exposure levels would be approximately two hundred (200) times less than permitted under FCC standards, with just one carrier, and even with four carriers would fall well

below FCC standards for EMF exposure. (See, Testimony of Andrew M. Petersohn, P.E.; EMF Compliance Report, Applicant Exhibit 10).

40. The tower will not require lighting or marking pursuant to the regulations of the Pennsylvania Bureau of Aviation or the Federal Aviation Administration, as it is not considered to be a hazard to aviation or within proximity to an airport so as to require such lighting or marking. (See, Testimony of Andrew M. Petersohn, P.E.; Determination from the Pennsylvania Bureau of Aviation, Applicant Exhibit 12; Federal Aviation Administration Screening Determination, Applicant Exhibit 13).

41. Applicant possesses licensure in the form of Radio Station Authorizations from the Federal Communications Commission – Wireless Telecommunications Bureau (FCC) to provide wireless service in Maidencreek Township. The licensure is for Cellular, AW-AWS (1710-1755 MHz and 2110-2155 MHz), CW-PCS Broadband, and WU-700 MHz Upper Band (Block C) radio service. (FCC Licenses, Applicant Exhibit 2; Testimony of Sue Manchel, Site Acquisition Consultant, Verizon Wireless).

42. Applicant applied to Maidencreek Township for a Zoning Permit.[3] The Permit Application was denied by the Zoning Officer for Maidencreek Township on March 31, 2015.

43. On April 6, 2015, Applicant made application to the Maidencreek Township Zoning Hearing Board ("Zoning Hearing Board") for the subject relief.

[3] The Zoning Permit Application was marked and entered into the record as Board Exhibit 8.

44. Notice of the hearing was duly advertised in the Reading Eagle on May 6, 2015 and May 13, 2015.[4]

45. On May 27, 2015, the Zoning Hearing Board held a public hearing to consider the Applicant's appeal, request for interpretation, and request for variance. A stenographic record was taken of the proceedings.

46. Notices of the hearing were posted on the Property, posted at the Maidencreek Township Building, and mailed to the Maidencreek Township Board of Supervisors, the Maidencreek Township Planning Commission, and owners of record of properties within one thousand feet (1,000 ft.) of the Property, as required by the Pennsylvania Municipalities Planning Code and the Zoning Ordinance.[5]

47. The Maidencreek Township Planning Commission, by letter dated May 8, 2015 to the Zoning Hearing Board, stated that it had discussed the Application at its meeting of May 6, 2015, and recommended that if the Zoning Hearing Board were to grant the variance, that the condition be imposed that the project satisfy Section 220-48 of the Zoning Ordinance, and that a land development plan be required. The Township did not enter an appearance at the hearing.[6]

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[4] Proof of Publication in the Reading Eagle was made a part of the record and marked as Board Exhibit 7.

[5] Affidavits of Posting of the Public Hearing Notice on April 13, 2015 at the Maidencreek Township Building and the Property on April 14, 2015 were made a part of the record and marked as Board Exhibits 2 and 3, respectively. Affidavit of Mailing of letters to potentially interested parties were made a part of the record, and marked as Board Exhibits 4 and 5, respectively.

[6] A copy of the letter from the Planning Commissoion to the members of the Zoning Hearing Board was made a part of the record and marked as Board Exhibit 6.

48. Other than the Applicant, no one entered an appearance at the hearing, although several property owners who received notice of the hearing were present and asked questions of the Applicant.

49. Applicant agreed to submit a land development plan for the facility to the Township, and agreed to remove the facility in the event of its abandonment, in accordance with Section 220-48 of the Zoning Ordinance. (See, Testimony of Sue Manchel, Site Acquisition Consultant).

II. CONCLUSIONS OF LAW

1. The Zoning Hearing Board of Maidencreek Township, under Section 910.2 of the Pennsylvania Municipalities Code, 53 P.S. Section 10910.2, and under Article XVIII, Section 220-96(F) of the Zoning Ordinance, has jurisdiction to hear and decide this Application for Variance.

2. The Zoning Ordinance was duly enacted according to law on March 11, 2010 and was in full force and effect during all time periods relevant to these proceedings.

3. Applicant, as a lessee, with the written authorization of the owner of record of the Property, has standing to bring this Application.

4. The Application for Variance/Appeal, dated April 6, 2015, after the denial of the Zoning Permit on or about March 31, 2015, was timely filed under Section 220-97(B)(3) of the Zoning Ordinance.

5. The hearing on the Application was advertised and notice given to interested parties in accordance with the terms of Section 908 of the Municipalities Planning Code, 53 P.S. Section 10908, and Section 220-97(C) of the Zoning Ordinance.

6. The hearing on the Application was held in conformity with Section 908 of the Municipalities Planning Code, 53 P.S. Section 10908, and Section 220-97 of the Zoning Ordinance.

7. The decision of the Zoning Hearing Board was deliberated and rendered in compliance with the Pennsylvania Sunshine Act, 65 Pa. Cons. Stat. §§ 701-716.

8. There are characteristics unique to the property creating a hardship; namely, that the Property is in industrial use and the leased area is not appropriate for the uses permitted in the R-1 Zoning District.

9. There is a significant coverage and capacity gap in Maidencreek Township, which is not being absorbed by Applicant's current Fleetwood and Shoemakersville sites.

10. The coverage and capacity gaps present hazards to public health, safety, and welfare, as such gaps may interfere with emergency communications.

11. A carrier is required to fill coverage and capacity gaps in service under the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), as amended.

12. The coverage and capacity gaps can only be filled by the placement of facilities on properties within the search ring as determined by Applicant's Radio Frequency Engineers.

13. Applicant's Site Selection Consultant made a diligent search for other sites within the search ring, including tower sites suitable for co-location, existing structures, and properties located in the Industrial Zoning District, where wireless communication towers are permitted as a conditional use.

14. The only site on which a wireless communication could have been located had a far lower elevation by approximately one hundred feet (100'), and would have required a higher tower, which would have had more detrimental visual impact than the current location.

15. The proposed use requested in the Application for Variance will not be detrimental to the health, safety, and welfare of the general public.

16. The variance, as authorized, will not alter the essential character of the neighborhood.

17. The proposed monopole tower and facilities will not have an overly intrusive or detrimental visual impact.

18. The proposed tower height is the minimum needed to fill the Verizon coverage and capacity gaps from the Fleetwood and Shoemakersville sites.

19. The variance, as authorized, will not alter substantially or permanently impair the appropriate use and development of adjacent properties.

20. The variance, if authorized, will have no negative impact on utilities.

21. The proposed facility does not have any nuisance characteristics such as odors, fumes, noise, glare, or dust, and EMF emissions are well below the FCC limits for safe human exposure.

22. The variance, as authorized, is the minimum variance which will afford relief and will represent the least possible modification of the applicable standards contained in the Zoning Ordinance.

III. ORDER

AND NOW, this 27th day of May, 2015, upon consideration of the Application of Cellco Partnership, d/b/a Verizon Wireless, for a variance from the terms of the Maidencreek Township Zoning Ordinance of 1993, as amended,[7] and the testimony and evidence entered into the record in support thereof, it is hereby ORDERED that the variance to allow the wireless communication facility on the 50' x 50' leased area of the property located at 220 Buena Vista Road, Maidencreek Township, is GRANTED, subject to the following terms and conditions:

1. Applicant shall comply with the standards and requirements set forth in Section 220-48 of the Zoning Ordinance, including but not limited to the submission and approval of a land development plan for the wireless communication facility, and the removal of the facility if abandoned.

2. Applicant shall comply with all applicable federal, state, and local laws, regulations, and ordinances with respect to the construction, maintenance, and operation of the wireless communication facility.

[7] The Request for Interpretation and appeal from the decision of the Zoning Officer, which sought an interpretation of the Zoning Ordinance that the wireless communication tower use was a conditional use in all Zoning Districts in the Township are rendered moot by this Decision, and the Zoning Hearing Board takes no position with respect to the interpretation of Section 220-48 of the Zoning Ordinance and its applicability in the I-Industrial District only, or Township wide.

3. Applicant shall procure all permits and approvals for the proposed addition as required by applicable laws, ordinances, and regulations.

4. The facility shall be constructed, maintained, and operated in accordance with industry standards, and in accordance with the testimony and evidence presented at the hearing of May 7, 2015.

MAIDENCREEK TOWNSHIP
ZONING HEARING BOARD

_____
William Riedel, Chair

_____
Joseph Pendleton

_____
Jan Williams

Vote of 3-0 to grant the variance.

YOU HAVE THIRTY (30) DAYS FROM THE DATE OF THIS DECISION OF THE MAIDENCREEK TOWNSHIP ZONING HEARING BOARD TO FILE AN APPEAL FROM THIS DECISION, OR ANY CONDITION THERETO, TO THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA.

BEFORE THE ZONING HEARING BOARD OF MAIDENCREEK TOWNSHIP
BERKS COUNTY, PENNSYLVANIA

IN RE: **APPLICATION OF CELLCO PARTNERSHIP, D/B/A VERIZON WIRELESS REGARDING A 50' X 50' LEASED AREA LOCATED ON THE PROPERTY AT 220 BUENA VISTA ROAD, MAIDENCREEK TOWNSHIP, BERKS COUNTY, PENNSYLVANIA**

CERTIFICATION OF SERVICE

I, Diane Hollenbach, Maidencreek Township Manager and Zoning Hearing Board Secretary, certify that I have forwarded a copy of the within Decision and Order of the Maidencreek Township Zoning Hearing Board to the following individuals via First Class U.S. Mail, postage prepaid, on the ___ day of _____, 2015:

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MAIDENCREEK TOWNSHIP
ZONING HEARING BOARD

_____
Diane Hollenbach,
Township Manager/ZHB Secretary