

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

CUAP NUMBER CUAP # 24-0001

DRIFT INN COMMUNICATIONS TOWER

FIFTH ELECTION DISTRICT

DATE HEARD: March 14, 2024

ORDERED BY:

**Mr. Hayden, Mr. Bradley, Mr. Payne,
Mr. Richardson, and Ms. Weaver**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: April 11, 2024

Pleadings

Telecom Capital Group (“TCG,” and hereinafter “Applicant”) seeks conditional use approval for Use Type 91 – Communications Tower and a variance from Section 51.3.91.b.(10) requiring a setback distance of 100 percent of the height of the tower.

Public Notification

The hearing notice was advertised in *The Southern Maryland News*, a newspaper of general circulation in St. Mary’s County, on February 23, 2024 and March 1, 2024. The hearing notice was physically posted on the Property by February 28, 2024. The file contains the certification of mailings to all adjoining landowners, including those located across a street, by February 28, 2024. The agenda was also posted on the County’s website on March 8, 2024. Therefore, the St. Mary’s County Board of Appeals (“Board”) finds and concludes that Applicant has complied with the notice requirements.

Public Hearing

A public hearing was conducted at 6:30 p.m. on March 14, 2024 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were heard after being duly sworn, the proceedings were recorded electronically, and the following was presented about the Applicant’s request.

The Property

The proposed location of the cell tower is an unaddressed parcel on Rustin Family Way in Mechanicsville, Maryland (“the Property”). The Property consists of 41,957 square feet, more or less, is zoned Rural Preservation District (“RPD”) and may be found at Tax Map 10, Grid 13, Parcel 42.

The Conditional Use & Variance Requested

The Applicant requests conditional use approval pursuant to Chapter 25 of the St. Mary's County Comprehensive Zoning Ordinance for use type 91, Communications Tower, Commercial within the Rural Preservation District ("RPD") zoning district and a variance from conditional Standard 51.3.91.b(10) requiring a setback distance of 100 percent of the height of the tower from any residence, historic site, building or other structure not associated with the tower site.

The St. Mary's County Comprehensive Zoning Ordinance

Pursuant to Schedule 50.4 of the CZO, Use Type 91, "Communication tower, Commercial" is defined as:

Communication tower that supports commercial uses or non-commercial uses when the structure exceeds 100 feet in height.

Chapter 25 provides general standards and guidance for conditional uses in St. Mary's County, and standards the Board must find before approving an conditional use are listed in CZO § 25.6. Additional conditional use standards unique to Use Type 91 are found in CZO § 51.3.91.b.

The Evidence Submitted at the Hearing by LUGM

Stacy Clements, Environmental Planner of the St. Mary's County Department of Land Use and Growth Management ("LUGM") presented a staff report and slideshow that, among other things, included the Applicant's site plan, maps and pictures of the Property, and the Applicant's standards letter. Included was the following evidence:

- The Property is 41,957 s.f. in size and is an agricultural parcel with a pre-existing barn.
- Applicant proposes to develop a site by locating a 195' tall (with 4' lightning rod) Commercial Communications Tower. The Tower will be located on a 30' x 82' equipment compound with access by way of a gravel drive from Rustin Family Way. Applicant is leasing the space. The equipment compound will be surrounded by an 8' chain-link fence

with 1' of barbed wire.

- The Maryland State Highway Administration and the Department of Natural Resources Wildlife and Heritage Service do not object to the site plan. Reviews from the St. Mary's County Health Department, the Department of Public Works & Transportation, the St. Mary's County Metropolitan Commission, the St. Mary's County Soil Conservation District, and the Federal Aviation Administration reviews are pending. The Department of Land Use & Growth Management's review approval is pending only on approval of the conditional use and variance request.
- The project is exempt from stormwater management review because it proposes cumulative soil disturbance of less than 5,000 s.f..
- A variance will be required because the cell tower is proposed within the required setback distance of 100 percent of the height of the tower from any residence, historic site, building or other structure not associated with the tower site. The existing barn on the Property triggers this requirement.
- Upon inquiry by a Board member of whether CZO § 51.3.91.b(10) required a 300% height distance setback from Maryland Route 6, staff replied they did not believe so as the state had not, to staff's knowledge, designated Route 6 a state scenic road.
- The following Attachments to the Staff Report were introduced:
 - Attachment 1: Conditional Use Standards Letter
 - Attachment 2: General Standards Letter
 - Attachment 3: Location Map
 - Attachment 4: Zoning Map
 - Attachment 5: Site Plan

Attachment 6: CZO § 51.9.3.91.b(10), Use Type 91 Conditional Standards

Attachment 7: Review Comments

- In addition to the Staff Report and its attachments, the following were provided as part of the materials provided to the Board and made part of the public record:
 - Q24-10248 Fall Radius Letter
 - 2024-02-07 TCG Drift Inn Site – FAA Application
 - 2024 -02-07 TCG Drift Inn Site – 1A
 - Radio Frequency Study by St. Mary’s County Drift Inn Site
 - 2024-03-11 TCG Drift Inn FCC Application

Applicant’s Testimony and Exhibits

Applicant was represented before the Board by Mark Fisher and Edward Donohue, duly authorized agents and representatives of Applicant. Mr. Fisher and Mr. Donohue provided testimony that included a PowerPoint presentation and answered questions posed to them by the Board. The following was included in Applicant’s testimony:

- Mr. Fisher noted that as generations of wireless technology have evolved, coverage afforded by cell towers has dropped. He noted that today’s 4G and 5G coverage area is approximately 1.5 miles.
- A coverage map shown by Mr. Fisher showed the area around the proposed tower site to have relatively poor coverage and in need of a cell tower.
- Also shared were maps and slides sharing Applicant’s site selection process, including a slide depicting what Mr. Fisher called the “site specific search ring” which showed the Property to be within what Applicant felt was an ideal location. These materials, among other things, highlighted the challenging topography in this area.

- Mr. Fisher also detailed the outreach Applicant conducted the outreach conducted to property owners in this vicinity, which included mailings to property owners to determine who, if anyone, was interested in leasing. Mr. Fisher testified that Applicant received only two such replies, the Property and one other parcel. Mr. Fisher's testimony was that the other parcel was disregarded because of site constraints, including the location of septic systems.
 - Mr. Fisher also testified that certain additional, larger properties in the area could not be considered because these properties were encumbered by conservation easements, and development of the cell tower would violate the provisions of those easements.
- Mr. Fisher concluded his presentation by drawing attention to the updated fall letter that was provided to the Board and testified that in thirty years the Applicant has never had a cell tower fall.
- On questioning following his presentation, Mr. Fisher explained that Verizon had identified the site as an area where calls and coverage were dropped. Mr. Fisher and Mr. Donohue explained that Verizon is required to provide "ubiquitous coverage" and that the site had been identified by engineering personnel at Verizon as an area in need of greater cell coverage.
- Mr. Fisher said that following construction the site would be seldom-visited, approximately once a month, and that most maintenance would be done in the equipment box, and that any maintenance requiring climbing would not be "typical." Mr. Fisher also stated the Applicant would be responsible for repairing any damage done to the cell tower during construction.

- Mr. Fisher said “boosters” would not be a viable alternative to the 195’ tall monopole tower.
- With respect to Commissioner Alderson’s letter, Mr. Fisher said the letter would not reach Snow Hill Park but would reach the boating traffic on the Patuxent River, as well as Drift Inn.
- The monopole is designed to collapse, if it collapses at all, to cave in on itself. Mr. Fisher explained the structure was designed with a weak point specifically so that the pole would bend inwards at this weak point in the event of a collapse. Mr. Fisher said the only circumstance he could imagine causing a collapse would be a direct hit by a tornado.
- Given the chance to respond to public comments, Applicant restated that the Board is pre-empted from giving any consideration to environmental health concerns by virtual of federal law. Applicant also confirmed that there was another property in close proximity that was considered as a candidate, but that it was partially impacted by DNR wetlands, among other concerns.
- The Applicant did not believe that the smaller cell towers would be a viable alternative to a monopole. Applicant said they would need to build more, and that building more towers would be particularly challenging considering the topography of the area. Applicant did not believe these smaller towers would be feasible, and, additionally, said Verizon’s engineers would not allow it.
- Regarding property values, Mr. Donohue stated that reports he has seen, over the years, contradict what members of the public said about the possibility of diminished property values. He said these reports have found “no discernible difference between the house that can see the pole versus the one that can’t see the pole.” Mr. Donohue did not submit any

such reports to the Board.

Public Testimony

The following members of the public appeared to offer testimony related to the request:

- Donna Meador, 41055 New Market Turner Road
 - Mrs. Meador lives in close proximity to the Property and opposes the requested variance and conditional use approval. Ms. Meador, quoting from the Comprehensive Zoning Ordinance, stated the purpose of the Rural Preservation District is to preserve the County's rural character. She feels this proposed cell tower would diminish the rural character of the area. She shared a picture, taken from her upstairs, of the proposed cell tower site and said there would not be adequate tree cover to materially limit the visual impact the tower would have on her property. She stated that there is an existing stormwater management problem with surface water runoff from that property flowing on to her property. Finally, Ms. Meador questioned whether there would be adverse health effects from the cell tower.

- Robert Meador, 41055 New Market Turner Road
 - Mr. Meador is Donna Meador's husband. He was familiar with studies that say property values drop by as much as 20% when a cell tower is placed near a property and that it becomes less desirable as a property to rent. Mr, Meador did not provide any of these studies to the Board. He said that the field nearby the proposed cell tower site has been used as a MedEvac landing site in the past and said this would not be possible if the tower is built. He also provided pictures to the Board showing the property and said the trees pictured were overhanging his

property and, because of the erosion his wife mentioned, these trees would need to come down.

- Marie Rustin, 28130 Rustin Family Way
 - Ms. Rustin owns property adjacent to the Property. She claimed she was in the process of building a house that was “scheduled to go between the side of the barn and where the tree area is half-way.” She said she was planning on building “soon,” and guessed she would begin in approximately a year or two. She described that she had been working on building a home on that property for many years. She approximated that her house would be located 140-150 feet from the proposed cell tower location, and said that housing sites had been, at one point, staked. She also said she has heard that cell communication towers can cause a variety of health effects.
- Celia Franklin, 6620 Stone Crest Lane, Fairfax Station, Virginia
 - Mrs. Franklin owns property adjacent to the Property. Mrs. Franklin said this property had been owned by her grandfather and been in her family for many years. She opposes the request because of “medical issues I have read.” She said she also has approved percs on her property and could build a home on this property or sell it as a buildable parcel. She said she has visited the property for years and has never had a call drop.
- Harold Franklin, 6620 Stone Crest Lane, Fairfax Station, Virginia
 - Mr. Franklin is Mrs. Franklin’s husband. He claims there were percs done on the Property in the past that passed, but those records were never recorded at the Health Department. He said the Property was only an acre in size because it had

been “grandfathered” by the County.

- John Dickens, 41065 New Market Turner Road
 - Mr. Dickens bought his property four years from Washington, DC. He explained he purchased his property for approximately \$400,00 and said his investment would “go down the drain” if the proposed tower is built. He did not provide any estimate for how much property values would decrease and did not present any expert testimony to that effect.
- Tim Pounsberry, 41000 New Market Turner Road
 - Mr. Pounsberry lives in “straight view” of the tower, and said he would live right across the street from it. He also expressed concerns about the “RF factor.” He also expressed doubt the local power grid could handle the cell tower. He did acknowledge that the “only good thing” about the tower would be that it would act as a lightning rod. Mr. Pounsberry stated he did not need better cell coverage.
- Brandon Bowman, 40901 New Market Turner Road
 - Mr. Bowman lives near the Property and explained his family history. He expressed concern over the “rads” the cell tower would emit. He also questioned whether there was truly a need for better cell cover in the area.

In addition to the in-person testimony noted above, written comments were received from Tim Pounsberry, Keith and Jessica Gagnon, Mike Alderson, Jr., Donna Meador, and Robert Meador prior to the public hearing. All were provided to the Board and are part of the record of it.

Decision

County Requirements for Granting Conditional Uses

The St. Mary's County Comprehensive Zoning Ordinance § 25.6 sets forth eight separate standards that must be met for a conditional use to be granted:

1. The conditional use complies with the standards of the district in which it is to be located and standards applicable to that use;
2. The establishment, maintenance, and operation of the conditional use will not be detrimental to or endanger the public health, safety, convenience, morals, order, or general welfare;
3. The conditional use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, and will not substantially diminish or impair property values within the neighborhood;
4. The proposed use at the proposed location will not have adverse effects above and beyond those inherently associated with the proposed use irrespective of its location within the zoning district;
5. Adequate utilities, access roads, drainage, and/or necessary facilities have been or are being provided;
6. Adequate measures have been or will be taken to provide ingress and egress following a design that minimizes traffic congestion in the public streets;
7. The proposed conditional use is not contrary to the goals, objectives, and policies of the St. Mary's County, Maryland Comprehensive Plan ("Comprehensive Plan"); and
8. The conditional use, in all other respects, conforms to the applicable regulations of the district in which it is located or to the special requirements established for the specific

conditional use in the Ordinance.

Id. Upon review of the facts and circumstances, the Board concludes that the Applicants have not met each of these standards for granting a conditional use. Specifically, members of the Board in deliberation raised concerns that the proposed cell tower would be injurious to the use and enjoyment of other properties in the immediate vicinity, would have adverse effects above and beyond those inherently associated with the proposed use within the zoning district. Several factors support this decision.

First, the Board acknowledges that many members of the public expressed concerns about potential environmental health effects of the proposed cell tower. The Board acknowledges that, under 47 U.S.C. 332(c)(7)(B)(iv), it has no authority to base its decision on those concerns. Accordingly, it is not. Other concerns which are rightfully within the Board's jurisdiction remain, however.

Central to this matter is whether the proposed cell tower will or will not have impacts above and beyond those inherently associated with the proposed use irrespective of its location within the zoning district. Maryland's courts have long held that denials of conditional uses/special exceptions may be upheld in those instances where a Board finds, with substantial evidence behind it, that a proposed use would have such adverse impacts above and beyond the norm for that use. *Schultz v. Pritts*, 291 Md. 1 (1981).

The Applicant adduced voluminous evidence identifying an apparent need for expanded cell coverage in the vicinity of the proposed cell tower site. Applicant also produced evidence of measures taken in design of the structure to mitigate the risk of harm and damage to adjacent properties, and produced a letter claiming an effective fall radius of zero feet. At length, Applicant spoke of the difficulty of finding a suitable location to place a cell tower in the area; at times its

difficulties were driven by terrain and topography, and at other times by the reluctance of neighbors to engage with the project.

Doubtless there would be some benefit to allowing the cell tower. However, the County's Comprehensive Zoning Ordinance requires the Board to search for more than some public benefit. By classifying the cell tower as a conditional use the ordinance charges this Board with inquiring as to whether the proposed use, at this particular location, would have negative impacts above and beyond the adverse effects normally associated with such uses. *Id.*, at 36-37. We find that it does.

Applicant began its presentation in this matter by noting its proposed use would, from the outset, be exceptional. In opening remarks Applicant referred to the Property as an "under-sized site" and a "unique situation." Barely an acre in size, the proposed cell tower would be located within close proximity of several houses. One property, that of Ms. Rustin, would see a large swath of its land within the 100% tower height setback, a conditional standard fashioned to protect residents and property owners. Other neighbors would doubtless, as they testified, see major impacts to their properties' viewscape and quality of life. The 195' monopole would rise over any existing trees and vegetative cover and, located so close to other properties, would likely dominate the immediate neighborhood.

Those members of the public who attended the public hearing opposed the requested variance. All members of the public lived or owned property either directly adjacent to the proposed tower or, at most, lived within several hundred feet of it, and would constitute any definition of a "neighborhood." *Attar v. DMS Tollgate, LLC*, 451 Md. 272 (2017). Though their reasons were varied and many concerns were raised that are unactionable by this Board, common to most was a belief that this cell tower would disrupt the character of their neighborhood and negatively, and severely, impact their enjoyment of their own properties. Though Applicant

disputes the effect the proposed tower would have on property values – and neither side produced expert testimony in support of their contentions – many neighbors spoke to the concern that they would see property values lower greatly if the proposed tower is constructed so close to their homes and properties.

Applicant also acknowledged that, in a setting like the Rural Preservation District, the Property would not be its first choice to develop a site. Applicant stated, at times, it would prefer to develop a use such as the proposed tower on a farm. Such a location would, presumably, allow Applicant to locate the tower further away from residences and from New Market Turner Road, and would abate the adverse effects noted by this Board and feared by Applicant’s neighbors. On a property as small and constrained as the instant one, however, the Board believes it is impossible.

On the whole, the record contains evidence that there would be adverse impacts above and beyond those normally associated with a proposed commercial cell tower. On the Property, even the copious number of conditional standards – not all of which the Applicant can meet without a variance – can serve to sufficiently abate these impacts. Accordingly, the Board finds that the Applicant cannot meet, at the least, CZO § 25.6.4. Because CZO § 25.6 requires that all standards must be met, the Board will cease its inquiry at that.

County Requirements for Granting General Variances

The St. Mary’s County Comprehensive Zoning Ordinance § 24.3 sets forth seven separate requirements that must be met for a variance to be issued:

- (1) Because of particular physical surroundings such as exceptional narrowness, shallowness, size, shape, or topographical conditions of the property involved, strict enforcement of this Ordinance will result in practical difficulty;
- (2) The conditions creating the difficulty are not applicable, generally, to other properties within the same zoning classification;

- (3) The purpose of the variance is not based exclusively upon reasons of convenience, profit, or caprice. It is understood that any development necessarily increases property value, and that alone shall not constitute an exclusive finding;
- (4) The alleged difficulty has not been created by the property owner or the owner's predecessors in title;
- (5) The granting of the variance will not be detrimental to the public welfare or injurious to other property or improvements in the neighborhood and the character of the district will not be changed by the variance;
- (6) The proposed variance will not substantially increase the congestion of the public streets, or increase the danger of fire, or endanger the public safety, or substantially diminish or impair property values within the neighborhood; and
- (7) The variance complies, as nearly as possible, with the spirit, intent, and purpose of the Comprehensive Plan.

Id.

Because consideration of the variance request is moot by virtue of the Board's finding with respect to the conditional use approval, the Board shall not proceed any further. It will note, however, the following language in CZO § 51.3.91.b(10): "If the communications tower is proposed along a state or County scenic roadway, then a setback from the road of 300 percent of the height of the tower and additional landscaping, or additional screening, may be required by the Board of Appeals." Staff did not determine a variance from this section of the standard was necessary when it conducted its initial review. While not before the Board tonight, we encourage County staff to reexamine this section if this project, or a similar one, should return to us in the future.

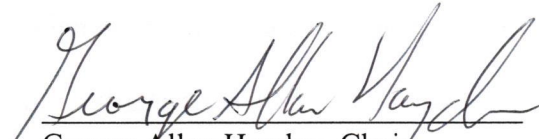
ORDER

PURSUANT to the application of Telecom Capital Group, requesting conditional use approval pursuant to Chapter 25 of the St. Mary’s County Comprehensive Zoning Ordinance for Use Type 91, Communications Tower, Commercial within the Rural Preservation District (“RPD”) zoning district and for a variance from Section 51.3.91.b(10) requiring a setback distance of 100 percent of the height of the tower; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

ORDERED, by the St. Mary’s County Board of Appeals, that the Applicants are **DENIED** the requested conditional use approval and variance.

Date: April 11, 2024


George Allen Hayden, Chair

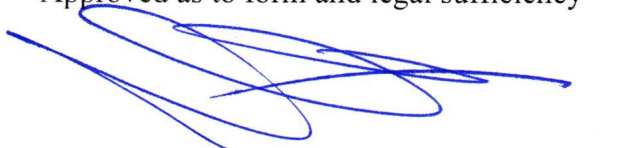
Those voting to grant the conditional use:

Mr. Richardson

Those voting to deny the conditional use:

Mr. Hayden, Mr. Bradley, Mr. Payne,
Ms. Weaver

Approved as to form and legal sufficiency



Steve Scott, Attorney to the Board

NOTICE TO APPLICANT

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals. St. Mary's County may not issue a permit for the requested activity until the 30-day appeal period has elapsed.

Further, St. Mary's County Comprehensive Zoning Ordinance § 25.9 provides, "Subject to an extension of time granted by the Board of Appeals for cause, no conditional use permit shall be valid for a period longer than one year unless a site plan is approved, a building permit is issued, construction is actually begun within that period and is thereafter diligently pursued to completion, or a certificate of occupancy is issued and use commenced within that period."

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order; otherwise, they will be discarded.